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Progress of the Law in Washington Community Property

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PROGRESS OF THE LAW IN WASHINGTON
COMMUNITY PROPERTY

"Law grows, and though the principles of law remain unchanged, yet their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progression of human opinion." —LORD COLERIDGE.

In the ten year period of 1922-32 over one hundred cases involving the law of community property were decided by the Supreme Court of Washington. Many of the cases merely reaffirm well established principles of the law and constructions of the statutes, and the importance of these cases is largely negative. Other cases in which established principles are either extended in application, modified, or rejected, are of positive significance as landmarks in the development and growth of the law It is the purpose of this article (1) to picture that development, and (2) to append to the decisions such comment as is believed desirable.[1]

I
OWNERSHIP OF COMMUNITY PROPERTY

Prior to the case of *Bortle v. Osborne*[2] the Supreme Court had frequently asserted that the ownership of community property resided in an entity distinct and part from the husband and wife or the estates of either and this entity was designated as "the community" The theory seemed to be that upon the marriage of H and W a third legal person was thereby created, in which vested the ownership of all community property, and which functioned

[1] No attempt has been made to deal exhaustively with the subject of community property and several cases in which the community property law is involved only incidentally, have been omitted from consideration entirely.

For convenience in the organization of this article the following classification of cases has been adopted:

I Ownership of Community Property
II Acquisition of Community Property
  (1) Presumptions
  (2) Time of Acquisition
  (3) Manner of Acquisition
  (4) Source of Acquisition
III Powers of Disposition
  (1) Real Property
  (2) Personal Property
IV Liability for Debts
  (1) Community Liability
  (2) Personal Liability

[2] 155 Wash. 585, 285 Pac. 425 (1930).

[3] *Mattinson v. Mattinson*, 128 Wash. 328, 222 Pac. 620 (1922)

through the medium of the husband as statutory agent of the entity [3] Although this principle had not been universally applied in the Washington cases and was at variance with the views of other community property jurisdictions, it had received sufficient judicial sanction to establish it as one of the well-settled doctrines of the law [4]

There is quite a bit in the opinion in *Bortle v Osborne* that would lead one to believe that the court is not entirely satisfied with this doctrine. Without formally abandoning the position taken by the court in previous decisions, it was pointed out by Millard, J., that the community property statutes of Washington "did not create an entity or a juristic person separate and apart from the spouses composing the marital community" and that the legislature "did nothing more than classify as community property—designate the character of certain property as community and other property as separate—the property acquired after marriage by the spouses." The court then continued

> "We have for convenience of expression, employed the term 'entity' and 'legal entity' in referring to a partnership and to a marital community However we have never held that a partnership or a marital community is a legal person separate and apart from the members composing the partnership or community, or that either the partnership or the marital community has the status of a corporation.

In the following particulars the cases prior to *Bortle v. Osborne* were at variance with the entity theory of community ownership:

(1) In actions on behalf of or against the community interest there is no suggestion of entity ownership. The entity cannot sue or be sued, but the spouses, or one of them, are the necessary parties plaintiff or defendant. Any theory of entity ownership of property in which the entity can neither sue or be sued is self-contradictory for ownership is merely an aggregate of rights, liabilities etc., with reference to a given thing.

(2) The courts, in several cases, regarded the ownership of community property as vested equally in the spouses.

"A deed of lands under the conditions specified in the statute vested the ownership in the community, no matter which spouse was named as grantee in the deed, and the title of one spouse therein was a legal title, as well as that of the other." *Mabie v. Whittaker* 10 Wash. 656, 39 Pac. 172 (1895).

"Now a wife's rights in family personality are not of the contingent sort, like dower or survivorship, but a present estate. The personal property is just as much hers as his." *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916).

Also see *Poe v. Seaborn*, (1930) 282 U. S. 101. This case held, in effect, that the spouses are equal owners of the community income.

(3) The husband's separate property is liable for community obligations. *McLean v. Burginger* 100 Wash. 570, 171 Pac. 518 (1918) This is not consistent with the doctrine that community is a separate juristic person with independent property, rights, and liabilities.

> "A marital community is in no sense a corporation, neither is it a partnership, though the community of property between the spouses is, in a restricted sense, a partnership between the husband and wife. The legislature did not change the relationship of husband and wife to the status of a corporation or declare that the property acquired during marriage was owned by a legal personality distinct from the spouse composing the community In the community property each of the spouses has an undivided one-half interest."

Reduced to its lowest terms, this is, in effect, a declaration that "the community" is after all nothing more than the legal relationship existing between husband and wife with reference to the property acquired in certain ways by them during coverture. It is simply a kind of property ownership unknown to the common law and here specially created by statute.[5]

To the objection that the doctrine of this case is revolutionary it may be answered that (1) it brings the Washington law into line with that of other community property jurisdictions, (2) it is the only reasonable construction of the community property statutes, (3) it is not likely to result in any very far-reaching changes in the disposition of specific cases—in fact it is not doing much more than declaring the law to be what it actually has been for many years.

That the doctrine is entirely sound can easily be demonstrated. Suppose that H and W are married in church at noon on a legal holiday and that by reason of an explosion both are killed as they are leaving the church after the performance of the ceremony Was there a community? If so, of what did it consist? Did it affect the legal position of the parties? Was there any community property? rights? duties? liabilities? The answer to these questions is obvious. There was no community, no community property, or rights, or duties, or liabilities—there was only the newly acquired capacity in H and W to own property by a peculiar form of tenancy called "community" Now assuming that H and W live and acquire community property during coverture—in whom or what is the ownership vested? Clearly in H and W as tenants in community This relationship is the community, to suppose that the

[5] See an excellent article by Francis W Jacob, The Law of Community Property in Idaho, 1 Idaho Law Jornal, 1. Professor Jacob, speaking of the Idaho community property statutes, says: "In other words, the legislature created a new type of co-tenancy or concurrent estate (in personal as well as in real property), comparable to, though quite different from, the familiar joint tenancy, tenancy by the entirety tenancy coparceny, and tenancy in common. It did not undertake to create, and it did not create, a new legal entity. That is to say 'the community' is simply a form of property ownership—it is not a corporation or a partnership consisting of husband and wife."

This language is equally appropriate to the Washington statutes.

legislature intended anything more is to read into the statutes something which is not even remotely suggested by them.

Discarding an established formula merely for the sake of bringing the local law into line with that of other community jurisdictions is not necessarily a commendable move, but when the adoption of a view universally adhered to elsewhere makes possible coherence and unification in the local law, it is believed to be desirable. Three particulars in which the Washington cases have been at variance with the entity theory of community property owner ship have already been enumerated.[6] Possibly there are others. In the remaining situations the decisions are as consistent with the theory of joint ownership by H and W as they are with the theory of entity ownership. This is so even in those decisions by which the principle has been established that community property is liable to be taken only in satisfaction of community obligations. Liability and ownership are not one. The court may rationally declare that the legislature intended community property to be taken only for community obligations without denying that the ownership of such property is vested in H and W

II

ACQUISITION OF COMMUNITY PROPERTY

(1) Presumptions

The Washington statutes provide that all property and pecuniary rights acquired by husband and wife during coverture other wise than by gift, bequest, devise or descent, or the rents, issues, and profits of property acquired before marriage, shall be community property Whether property is community or the separate property of the spouses within the meaning of this legislation is a problem constantly before the courts. To assist in its solution there has been judicially created a *prima facie* presumption that all property acquired during coverture is community property Professor Jacob has offered a convincing explanation of the presumption in this manner· (1) There are a great many cases in which the evidence of each party is of equal probative value on the issue of community or separate property To leave the question to a jury would be to leave it to mere chance. Therefore some rule allocating the burden of proof is desirable, and this is accomplished by means of the presumption. (2) The burden should be put upon the party alleging the property to be separate, (a) because as a matter of common experience it has been found that in the average case property acquired by H or W during coverture is community property, and (b) because it is fairer to require proof of one affirmative fact (that it is the separate property of one of the

In *Bortle v. Osborne* the result would have been the same on either theory of ownership.

spouses) than to require proof of two negative facts (that it is neither the separate property of H or W)[7]

The Supreme Court has uniformly recognized and applied this principle. Several recent cases have reaffirmed it.[8] One of these cases, however, has advocated an extension of the presumption to an entirely different situation. In *State ex rel. Marshall v. Superior Court for Snohomish County,*[9] it was in effect held that all property in the possession of either spouse during coverture or at the dissolution thereof was presumed to be community property in the absence of evidence to the contrary The court said.

> "In the text of 5 R. C. L. 844, the learned editors state the presumption of the nature of property arising from marriage, as follows 'As a general rule, all property in the possession of either spouse during marriage, and all property in their possession at the dissolution of the community, is presumed to be community property until the contrary is shown.' This statement of the law seems to find support in the decisions, particularly in *Fennell v. Drinkhouse,* 131 Cal. 447, 451, 63 Pac. 734, 82 Am. St. Rep. 361, and our own decisions in *Stewart v. Bank of Endicott,* 82 Wash. 106, 143 Pac. 458, and *Plath v. Mullins,* 87 Wash. 403, 151 Pac. 811, contain observations which lend support to the view that all property in the control and possession of either spouse is in the absence of all evidence to the contrary presumed to be community property "[10]

Applying this presumption it was held that the defendant was insolvent as to his separate estate where the only evidence before the court was an affidavit that defendant was a married man. Thus the presumption that property acquired during coverture is community property has been expanded into a presumption that property possessed or controlled by either spouse is, in the absence of other evidence, community property The result which the case reaches is sound if the presumption as formulated is sound, for if the defendant had no property he was necessarily insolvent as to his separate estate, and if he was married any property which

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[7] Law of Community Property in Idaho, note 5, *supra.*

[8] *In re Sanderson's Estate,* 118 Wash. 25- 203 Pac. 75 (1922) *De la Pole v. Broughton,* 118 Wash. 395, 204 Pac. 15 (1923) *In re Brown's Estate,* 124 Wash. 273, 214 Pac. 10 (1923) *Jones v. Duke,* 151 Wash. 108, 275 Pac. 72 (1929)

[9] 119 Wash. 631, 206 Pac. 362 (1922).

[10] Of the three cases cited by the court in support of this proposition only one seems at all in point. In *Fennell v. Drinkhouse* the property in question was acquired during coverture and the court properly held that it was presumed to be community property in the absence of evidence to the contrary. *Plath v. Mullins* is a similar case. In *Stewart v. Bank of Endicott* H conveyed property to trustees upon certain trusts, declaring it to be his separate property. During this time W was insane. H died and it was held that since there was no evidence before the court showing how or where the trust res was acquired it would be presumed to be community property.

he might have was presumptively community and again his separate estate must be insolvent.

Can the presumption be supported? It seems apparent that the answer to this question depends upon whether or not the reasons which support the presumption that property acquired during coverture is community property, likewise support this presumption. Reason (1) has no application for in this situation there is no contradictory and equally convincing evidence before the court on the issue of separate or community property—there is no evidence of any property at all. Reason 2 (a) might support the presumption if it could satisfactorily be established by statistical data that in the average case all property in the possession or control of either spouse during coverture is actually community property That the court is warranted in assuming this to be true seems doubtful. Reason 2 (b) has no more relevancy than reason (1), since in this case plaintiff was not attempting to prove that any specific property was community property, but merely that defendant had no separate property It will be observed that this leaves the presumption with a rather meagre and infirm foundation, this was tacitly admitted in *State v. Superior Court* in the court's statement that "it is not a very strong presumption and is one that may be easily overcome." The presumption that all property acquired during coverture is community property is, on the contrary, not easy to overcome, being rebutted only by clear and convincing evidence of the separate character of the property involved.[11]

(2) Time of Acquisition

Since only that property *acquired* by the spouses during coverture is regarded as community property, it follows that in determining the status of property as separate or community the exact date of acquisition is of prime importance. This proposition has been expressed in the rule that the status of property, as separate or community, is to be ascertained as of the time of acquisition and to this rule the language of the Washington cases including those reported during the last decade, apparently gives unqualified approval.[12] In those instances where property is acquired outright no difficulty is encountered in the application of the rule. If the time of acquisition, thus definitely determined, falls within the period of coverture the presumption arises that it is community

[11] *Denny v. Schwabacher* 54 Wash. 689, 104 Pac. 137 (1909) *In re Slocum's Estate*, 83 Wash. 158, 145 Pac. 204 (1915).

[12] *Rawlings v. Heal*, 111 Wash. 218, 190 Pac. 237 (1920) *In re Parker's Estate*, 115 Wash. 57, 196 Pac. 632 (1920) *In re Sanderson's Estate*, 118 Wash. 250, 203 Pac. 75 (1923) *Rogers v. Joughin*, 152 Wash. 448, 277 Pac. 988 (1929) *In re Neisz's Estate*, 152 Wash. 336, 277 Pac. 849 (1929).

property, if it does not, the property is conclusively proved to be separate. But there is a large number of instances in which the acquisition of property is not instantaneous, making it necessary to fix some point of time when, as a matter of law, the property is deemed to have been acquired, if the rule is to be applied to those instances. Typical cases are the acquisition of real or personal property through the medium of conditional sales contracts, where the acquisitive process consists of a series of legally connected steps requiring more or less time for their consummation. At what point of time during this process shall the status of the property be determined? In McKay on Community Property it is stated as the general rule that it is that time when the initial rights are acquired.

> "As between husband wife, when a right, legal or equitable, is acquired whether before or during marriage, all things of value into which the initial right develops by the performance of conditions, the running of time or the like, or into which it is converted by an assignment, or, if the initial right rests in obligation, all that which is obtained through the performance, discharge, satisfaction, enforcement or assignment of the obligation, are deemed in law to have been acquired as of the date of the acquisition of the initial right, and take the character, as separate or common, of that right."
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> "The performance of conditions, or the payment of charges against a thing or its increase or improvement, does not convert it from separate into common property or *vice versa,* though it may in some cases create a charge against it. In brief a thing is deemed to be acquired as of the time of the acquisition of the initial right of which it is the development. Thus if either spouse before marriage acquires an unconditional obligation for the future payment of money or the delivery of a thing, it is clear that the money when paid, or the thing when delivered or conveyed is not an acquet of a marriage solemnized after acquiring the obligation and the same rule applies to an obligation acquired during marriage, but not performed by payment, conveyance or delivery till after the marriage is dissolved. This simple case presents no difficulties, but the case is not so clear when the contract contains conditions which must be performed to preserve the contract right. In some of the cases it seems at first blush as though the final fruits of the contract are acquired by the performance of the conditions, and some cases have been decided on this theory, but clearly this is not in accord with legal principle and is against the great weight of authority "[13]

[13] McKay, Community Property (2nd Ed.), secs. 517, 533.

The recent case of *In re Kuhn's Estate*,[14] while purporting to follow the general rule that the status of property is to be determined as of the time of acquisition, flatly rejects the collateral rule that the time of acquisition is that time when the initial rights are acquired. The facts of the case were that in 1902 H and W became purchasers of real estate under an executory installment contract containing a forfeiture clause, and lived together on the land until March, 1906, when W died leaving heirs surviving. The contract provided for payment aggregating $1,200 of which $300 had been paid at the death of W No substantial improvements had been made upon the property at that time. Five months after the death of W, H paid the remaining sum of $900, due under the contract, and took a deed to the land. After the death of H the probate court ruled that this land was community property of H and W Upon appeal the ruling was reversed with directions to find that the land was the separate property of H. The court said, in part

> "There is no doubt that the court erred in holding that the real estate was the community property of the deceased and the children of his first wife. We have so held in a long line of decisions announcing the principle that such a contract, while it remains executory and forfeitable, creates no interest in the land in the vendee, and that he has no legal or equitable title to, or interest in, the land until the contract has been fully performed. *Churchill v. Ackerman*, 22 Wash. 227, 60 P 406, *Younkman v. Hillman*, 53 Wash. 661, 102 P 773, *Tieton Hotel Co. v. Manheim*, 75 Wash. 641, 135 P 658, *Converse v. La Barge*, 92 Wash. 282, 158 P 958, *Schaefer v Gregory Co.*, 112 Wash. 414, 192 P 968.
>
> "Respondent relies largely upon the decision of this court in *Ahern v. Ahern*, 31 Wash. 334, 71 P 1023, 96 Am. St. Rep. 912, where this court held that the title was acquired by the community But in that case everything had been done to earn the title. As was stated in the case, the community had done all the law required it to do, and equitable title had vested, which is not true in the case at bar. The community had paid only $300 of the consideration of $1,200 to be paid for the land. At the most the community had an interest only in the $300, which would be represented by the sum of $150. Of the remaining $900 which was paid for the land, decedent paid it, and, therefore, he acquired the property as separate estate. Decedent and the children of his first wife were not tenants in common in anything. No equitable title had been acquired by decedent and the heirs of his first wife to the real estate. There was no title of any kind either legal or equitable to the real estate when the first wife died. Hence the remaining portion of the purchase price paid by decedent and the

[14] 132 Wash. 678, 233 Pac. 293 (1925), opinion corrected on rehearing 135 Wash. 693, 236 Pac. 568 (1925)

amount paid for improvements were part and parcel of his separate estate."

The real significance of this decision is not readily apparent. Obviously it cannot be reconciled with the principle, elsewhere applied in similar cases, that the time of acquisition is that time when the initial rights are acquired and the reason for *this* is not the peculiar Washington doctrine which was crystallized in the notorious case of *Ashford v. Reese*,[15] for the utmost limit to which the theory of that case might conceivably be extended is this—that the vendee under a forfeitable executory contract for the sale of land acquires no property interest of any kind in the land until he has performed his obligations imposed by the contract. Now the very statement of this proposition is a recognition of the existence of prior contractual rights in the vendee, which rights are the initial ones out of which the ownership of the property develops. These rights, *In re Kuhn's Estate*, were created in 1902, more than four years before the dissolution of the community Therefore, if the court had wished to apply the general rule, by which the property would be denominated as community property, there was nothing in the theory of *Ashford v. Reese* to interfere with it.

It is believed that the true explanation of the decision is to be found in this more fundamental proposition—that the court is sometimes reluctant to determine the status of the property as of the time of its acquisition, preferring, in certain cases, to determine its status by a consideration of the substantial or practical equities of the situation. In support of this conclusion the reasoning of a number of cases might be invoked. Some of these are discussed in a note and they show pretty clearly that the court has not always determined the status of the property as of the time of acquisition.[16] Theoretically it seems more desirable to deter-

[15] 132 Wash. 649, 233 Pac. 29 (1925).

[16] *In re Finn's Estate*, 106 Wash. 137, 179 Pac. 103 (1919). W purchased a tract of land for a consideration of $2,000. She paid $1,000 of this out of her separate estate and took a deed to the land in her own name; there was a mortgage on the land for $1,000 and she took subject to it in lieu of the remainder of the purchase price. Subsequently H voluntarily satisfied the mortgage from community funds. *Held*, that one-half of the tract was the separate property of W the other half community property.

The court did not determine the status of the property as of the time of acquisition, for as of that time the entire tract was the separate property of W She paid one-half of the consideration out of her separate estate and the other half, while paid from community funds, was never an obligation of H, W or the community—it was merely a lien against the separate property of W Payment of the debt from community funds merely operated to release the property from a lien.

Merritt v. Newkirk, 155 Wash. 517, 285 Pac. 442 (1930). "The title to property, whether separate or community, is determined as of the date of its acquisition, and the general rule is that when community funds are expended in improvements on the separate property of one of the spouses, the title to the improvements follows the title to the land. Unless, therefore, there is a specific agreement to the contrary, or the equities of the case require a different conclusion, the ownership of the property is not

mine the status of the property by the practical equities of the situation since the chief objective of the community property system is to preserve to "the community" the fruits of community enterprise. If, for example, the facts of *In re Kuhn's Estate* had been that prior to the death of W all payments provided for by the contract were made except one, amounting to say $100, the property should be classified as community property, although in view of the decision in that case such a classification could not be made unless founded upon the practical equities of the situation. The only practical objection to this procedure is that in many cases it is likely to result in a serious encroachment upon the element of certainty which is emphasized by the rule determining status at the time of acquisition.

This objection might be overcome, while at the same time preserving the substantial equities in these cases by utilizing a suggestion made in the course of the opinion *In re Carmack's Estate*[17] and re-affirmed in *W T Rawleigh Co. v. McLeod.*[18] In the former case W owned a vacant lot as her separate property Improvements of proportionately great value were put upon the property with community funds. It was held that the property continued to be the separate property of W, but it was also held that the community estate had an interest in it in proportion to the community contributions for its improvement. By applying this method to the cases where both separate and community funds are contributed in the acquisition of property it would be possible to classify the property as separate or community according to the character of the initial right and at the same time secure to the community estate the value of its contribution to the purchase price.[19]*

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changed. Here, there was nothing of this latter sort; there was no specific agreement, and the equities of the situation favor the wife rather than the community" Therefore the court held that the status of the property should be determined as of the time of acquisition, *since the equities would not be violated* in this case by such a determination.

Prior to the decision in *Teyner v. Heible*, 74 Wash. 222, 133 Pac. 1 (1913), there was quite a bit in the homestead cases to indicate that the status of homestead land was determined upon the practical equities rather than the time of acquisition. See: *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229 (1895) *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023 (1903) *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005 (1905). While these cases were overruled by *Teynor v. Heible*, in so far as homestead acquisitions are concerned they nevertheless show that the practical equities have at times been an important factor in the court's consideration of the problem.

It should be observed that in a great many cases the same result would be reached by a determination of the status of the property either upon the equities of the situation or the time of acquisition.

[17] 133 Wash. 374, 233 Pac. 94 (1925).

[18] 151 Wash. 221, 275 Pac. 700 (1929)

[19] *In re Kuhn's Estate* the court observed that the community estate had, at most, an interest in the land to the extent of $300, which was the sum paid on the purchase price prior to the death of W

*To be continued.

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JOINT ADVENTURE IN WASHINGTON AUTOMOBILE LAW

The relationship of Joint Adventure has long been a concept of the commercial world, and has served to unite, under one label any union, as parties of the same part, in any contract or transaction, of two or more persons not otherwise joined in interest.[1] The relatively recent application of the doctrine to automobile damage cases likewise appears to have been prompted by the desire to classify, by name, certain unions of parties who could not easily be classified in any other legal category.[2] Such classification has been deemed desirable for the purpose of attaching certain legal incidents to such relationship, when once established. In this paper an examination of the necessary elements of the relationship, and of the legal incidents flowing therefrom, will be made, with particular reference to the Washington cases.[3]

I. What Constitutes a Joint Adventure.

The General Rule

In Washington, as in the United States generally, the driver of a vehicle and an occupant thereof will be deemed to be engaged in a joint adventure in all cases where the two have entered into a *contract,* express or implied, by the terms of which the vehicle is being operated to effect a *common purpose,* and as an incident of which each has the *control or right of control* over the vehicle. Thus, in *Rosenstrom v. North Bend Stage Line,*[4] the driver and the occupant were both members of the Renton High School football team. The two boys were dismissed early, so that they might engage in football practice. Each discovered that he had left his locker key at home. The driver offered to drive the occupant to his home to obtain the latter's key, at the same time getting his own key at his own home. While so riding the occupant was injured in an accident. In holding the occupant to be an invited guest rather than a joint adventurer, the court said

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[1] *Peterson v. Nichols,* 90 Wash. 398, 156 Pac. 406 (1916) Scope Note, Amer. Dig. "Joint Adventure"· A commercial joint adventure has been likened to a partnership, *Harm v. Boatman,* 128 Wash. 202, 222 Pac. 478 (1924), and each party is personally liable for the contracts of the others made in pursuance of the joint adventure, *Leake v. City of Venice,* 50 Cal. App. 462, 195 Pac. 440 (1920), as well as for the torts committed in connection therewith, *Bonfils v. Hayes,* 70 Colo. 336, 201 Pac. 677 (1921), the principle being that each member of a joint adventure acts for himself as principal and as agent for the other member, within the general scope of the enterprise, *O. K. Boiler and Welding Co. v. Minetonka Lumber Co.,* 103 Okla. 226, 229 Pac. 1045 (1924).

[2] The following jurisdictions appear to have adopted this legal concept: Ala., Cal., Conn., Ill., Iowa, Kan., Maine, Mass., Mich., Minn., Mo., Neb., New Hamp., New Jersey New York, No. Car.,·Ohio, Ore., Penn., So. Car., Tex., Utah, Vt., Virginia, Wash., and the 3rd, 4th, 8th and 9th circuits of the federal courts of appeals.

[3] An effort has been made to collect all of the Washington cases bearing upon the subject.

[4] 154 Wash. 57, 280 Pac. 932 (1929).

> " The relation, as a legal concept cognizable by the courts, must have its origin in contract. There must be an agreement to enter into an undertaking in the objects or purposes of which the parties to the agreement have a community of interest and a common purpose in its performance. Necessarily, the agreement presupposes that each of the parties has an equal right to a voice in the manner of its performance, and an equal right of control over the agencies used in its performance. One or more of the parties may, of course, intrust performance to another or others, but this involves only the law of agency, his rights in the ultimate result and liability for negligent or wrongful performance remain the same."

The Contract

The nature of the contract by which the relationship of joint adventure is established has been the subject of voluminous comment which has failed, nevertheless, to crystalize legal opinion into any generally accepted view The contract is most commonly likened to the contract between master and servant, principal and agent, or partners.[5] While there can be no denying the fact that a joint adventure is analogous, in certain features, to each of these relationships, it appears to be generally agreed that the analogy is not complete with respect to any particular one.[6] It would seem that courts should not feel driven to justify the joint adventure doctrine on the ground of analogy to these other well settled relationships, but that candor would require a recognition of the fact that the very concept of joint adventure originated in the necessity of inventing a label for an otherwise anomalous relationship.[7] Such analogy may be invaluable, however, in defining the legal incidents which should flow from the relationship. Even in this respect, there is probably little utility in attempting any fine distinctions between the agency or partnership aspects of joint adventure, since apparently the same legal incidents would logically follow under either analogy.[8] In Washington, while no

[5] 77 Univ Penn. L. Rev 676.
38 Yale L. Jour. 810.

[7] Note 6, *supra.*

[8] That vicarious liability is an incident alike, of agencies, and of partnerships, needs no citation of authority. In regard to the duty of care owing by one member of the relationship to the other, it is well settled that a servant owes a duty of care to his master, Mechem, Agency (2d ed., 1914) Sec. 1275, and almost equally well settled that a member of a partnership is liable to other members of the firm for his negligence and misconduct, *Newly v. Hamell*, 99 N. C. 149, 5 S. E. 284 (1888) Story Partnerships (Whart. 7th ed. 1881, Sec. 169) With respect to imputed negligence, it is clear that the contributory negligence of the servant will prevent the principal from recovering from a negligent third person, *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391 (1886) *Moom v. St. Louis Transit Co.*, 237 Mo. 425, 436, 141 S. W 870, 872 (1911). No cases were found in which this effect of imputing negligence was applied to partnerships, but, as stated in 77 Pa. L. Rev at page 681, " it is obvious that, just as a partner is held liable for the negligence of his copartner (see Burdick (3rd ed. 1917)

particular emphasis has been placed upon analogy, the court seems to have adopted the view that the joint adventure contract most nearly approaches the contract between principal and agent, or master and servant. This is made clear by the court in *Allen v. Walla Walla R. R. Co.*,[9] where it is said.

> "The basic thought upon which the doctrine or principle of imputed negligence rests is that the relationship of master and servant or principal and agent must exist between the driver and the occupant at the time of the injury In the absence of such a relationship, the negligence of the one will not be attributed to the other. "

Likewise, the same view is announced in *Sanderson v. Hartford Eastern Ry. Co.*,[10] in which the following language is used

> "In order to hold that the negligence of the driver is to be imputed to the passenger, it must appear that the relation of principal and agent existed between the persons, which relation must, of course, be founded upon contract, either express or implied."

When it is once understood that the contract involved in joint adventures is analogous to an agency or partnership relationship, the task of discovering the existence or non-existence of a contract in any particular case becomes less burdensome. This is because it is then possible to apply some of the familiar tests of agency and partnership to these cases. An examination of some of these tests will be made in connection with the discussion of "control" and "common purpose," *infra*. It is readily seen, however, that the proof of a contract or agreement in these joint adventure cases is likely to be much more difficult than in making the same kind of proof in ordinary business transactions. The reason for this is that persons contemplating such a venture seldom realize that such a relationship is being formed, or anticipate the legal consequences which may flow therefrom. This being so, they rarely reach any express agreement as to the enterprise they are about to embark upon, and hence such agreement must usually be implied from the circumstances.[11]

209), so the negligence of the one would prevent a recovery by the other from a third party."

[9] 96 Wash. 397, 165 Pac. 99 (1917).

[10] 159 Wash. 472, 294 Pac. 241 (1930). Strangely enough, however, when the Washington Court has had before it a question involving a commercial joint adventure, such have been consistently likened to partnerships, *State ex rel. Ratliffe v. Sup. Ct.*, 108 Wash. 443, 184 Pac. 348 (1919) *Donahue v. Haskamp*, 109 Wash. 562, 187 Pac. 346 (1920) *Harm v. Boatman*, note 1, *supra*. The only automobile joint adventure case in which the relationship was compared to partnership rather than agency appears to be *O'Brien v. Woldson*, 149 Wash. 192, 270 Pac. 304 (1928) and this comparison seems to be no more than a passing remark.

[11] Such agreements may be either express or implied, *Rosenstrom v. North Bend Stage Line*, note 4, *supra*. No case was found in which the

In determining whether or not such a contract should be said to exist under the facts of each individual case, the courts have reached some fairly uniform conclusions. For example, it has been held that the mere fact that the host has gone a long way to invite him to ride, and that the ride may be a very great convenience to the guest, will not be sufficient to establish a contract of joint adventure.[12] Likewise, the fact that the passenger is in the habit of making certain trips at regular intervals with the same driver is not conclusive evidence of such a contract.[13] Probably the most important factor in determining the existence or non-existence of a joint adventure contract, outside of the items of "control" and "common purpose" to be considered *infra*, is the presence or lack of financial contribution. Financial contribution, in the sense here used, is not limited to a specific cash payment by the passenger to the driver, but includes any contribution of a valuable nature, to the expenses of the trip or the promotion of its objects.[14] The cases indicate that a showing of financial contribution will be accepted as some evidence of a previous agreement between the parties, but they likewise indicate that the proof of such fact does not conclusively establish a joint adventure relationship, nor does the absence of such fact render the establishment of such relationship impossible.[15] Where it is already shown or admitted that there had been no prior agreement, the fact that the passenger took it upon himself to pay some of the expenses of the trip will not be regarded as an indication that the parties were engaged in a joint adventure. This is true because the only relevancy of such evidence is to show or tend to show that there

agreement had been reduced to writing. Likewise, no case was found in which one of the parties sought to enforce the contract or agreement.

[12] *Sanderson v. Hartford Eastern R. R. Co.*, note 10 *supra*.

[13] *Colvin v. Simonson*, 70 Wash. Dec. 313, 16 Pac. (2d) 839 (1932).

[14] *Cases holding a joint adventure to exist, and in which there was an element of financial contribution*: *O'Brien v. Woldson*, note 10 *supra*— previous agreement that each was to pay own expenses, and passenger to pay for gasoline; *Lloyd v. Mowery*, 158 Wash. 341, 290 Pac. 710 (1930), —all contributed to expenses of trip; *Jensen v. Chicago, Mil. & St. P R. R. Co.*, 133 Wash. 208, 233 Pac. 635 (1925),—passengers agreed among selves to pay expenses, but didn't tell driver,—one passenger gave driver a ticket to prize fight, which was object of trip. *Cases holding joint adventure to exist, and in which there was no element of financial contribution*. *Hurley v. Spokane*, 126 Wash. 213, 217 Pac. 1004 (1923) *Shirley v. American Automobile Insurance Co.*, 163 Wash. 136, 300 Pac. 155 (1931) *Martin v. Puget Sound Elec. Ry.*, 136 Wash. 663, 241 Pac. 360 (1925) *Masterson v. Leonard*, 116 Wash. 551, 200 Pac. 320 (1921). *Cases holding no joint adventure to exist, although there was an element of financial contribution*: *White v. Stanley*, 69 Wash. Dec. 270, 13 Pac. (2d) 457 (1932) —the passenger paid for one of the lunches, and purchased gasoline for return trip, *McAllister v. Saginaw Timber Co.*, 71 Wash. Dec. 301, — Pac. — (1933),—passenger helped driver with milk route in return for privilege to ride home; *Eubanks v. Kielsmeier* 71 Wash. Dec. 332, — Pac. — (1933) —passenger suggested paying for gasoline and oil, but car was already serviced.

[15] As to the last statement, see *White v. Stanley*, note 14, *supra*.

once that fact has been disproven, there is no further utility in producing evidence of such contribution. The correctness of this view is well brought out in the very recent case of *Eubanks v. Kielsmeier,*[16] where the court, speaking through Mr. Justice Steinert, said.

> "But even if the gasoline and oil had been purchased by the lady companions, that of itself would not have established a joint adventure. Standing alone, it would have been simply an expression of courtesy and appreciation that a guest often evinces and manifests. The purchase by a companion of a trifling amount of gasoline, in the absence of any agreement by the parties to share the expenses of a trip, does not *ipso facto* convert the amenities of a friendly host into the obligations of a joint adventurer. To hold otherwise would compel every host to dilute his hospitality and season it with the flavor of a bargain. A guest may not accept a gratuity under a mental reservation and, by a trifling reciprocity, convert it into a binding agreement having legal consequences, at least not without the consent, acquiescence or knowledge of his, or her, host. Of course, such a purchase may be an element to be considered as evidence of an agreement made, but it does not, of itself, constitute a binding contract where there has been no meeting of minds upon the subject."

Control or Right of Control

The Washington court appears to have followed, with one prominent exception, the general rule throughout the United States, that in no case will a driver and an occupant be deemed to be engaged in a joint adventure, unless the occupant has the control or right of control over the car.[17] The rule is well expressed in *Bauer v. Tougaw,*[18] where it is said.

> "It is well established that negligence cannot be imputed to a passenger in an automobile, unless his relation to the driver was such that he was in a position to have exercised some authority or control over the driver with reference to the matter wherein the latter was negligent,

[16] Note 14, *supra.*

[17] For a discussion of the "control" test elsewhere in the United States, see 38 Yale L. Journ. at page 811. It must be remembered, in this connection, that right of control and not actual control at the moment of the accident, is the determining factor, *Crescent Motor Co. v. Stone,* 211 Ala. 516, 517, 101 So. 49, 51 (1924) *Bradshaw v. Payne,* 111 Kan. 475, 207 Pac. 802 (1922). The right of control must consist of more than the mere privilege of selecting the route. *Kelley v. Hodge Transp. System,* 197 Cal. 598, 242 Pac. 76 (1926). While ownership of the vehicle by the passenger has been said to be conclusive evidence of control, and was apparently the test in *Masterson v. Leonard,* note 14, *supra,* a joint adventure and therefore control were conceded to exist in the case of *Lloyd v. Mowery,* note 14, *supra,* although the driver owned the vehicle.

[18] 128 Wash. 654, 224 Pac. 20 (1924).

> and in this case there was no attempt to impute the negligence of Oberts to the appellant."

The same rule is announced in *Allen v Walla Walla Valley R. R. Co.*,[19] as follows

> " So that the doctrine of imputed negligence is based upon the single question of whether the occupant of the vehicle was in a position to exercise authority or control over the driver in a respect to the matter in which the driver was negligent. "

In *Jensen v. Chicago, Mil. & St. P R. R. Co.*,[20] however, in finding that a joint adventure relationship existed between the driver and the occupants of a car in a trip from Hoquiam to Seattle and return, for the purpose of attending a prizefight, the court expressly held that "control" was not a necessary element of a joint enterprise. It will be noted that this case was decided subsequent to both of the last quoted cases. Since the *Jensen* case, however, the Washington court appears to have reverted to its former position that "control" is a necessary element in establishing the relationship.[21] It is not without significance that those cases which most strongly advocate the "control" test are those which utilize it for the purpose of demonstrating that no joint adventure existed in the particular case being considered.[22] On the other hand, the one Washington case which openly discards this test ends up by finding a joint adventure to exist in the particular case.[23] When it is observed, in addition, that there are few cases in which any actual control, or even right of control, can be clearly demonstrated, and that control has never been a necessary element in imputing negligence in other relationships such as agencies and partnerships, the concept falls into its true place in the analysis of these situations, as an important fact to be considered, but not a necessary element of the relationship.[24] From

[19] Note 9, *supra*. See, also, *Neagle v. Tacoma*, 127 Wash. 528, 221 Pac. 588 (1923) *Masterson v. Leonard*, note 14, *supra*.

[20] 133 Wash. 208, 233 Pac. 635 (1925)

[21] *Nagel v. McDermott*, 138 Wash. 536, 244 Pac. 977 (1926) *Rosenstrom v. North Bend Stage Line*, note 4, *supra*; *Eubanks v. Kielsmeier* note 14, *supra*.

[22] *Allen v. Walla Walla Valley R. R. Co.*, note 9, *supra*, *Neagle v. Tacoma*, note 19, *supra*, *Bauer v. Tougaw*, note 18, *supra*, *Nagel v. Mc Dermott*, note 21, *supra*, *Rosenstrom v. North Bend Stage Line*, note 4, *supra*, *Eubanks v. Kielsmeier* note 14, *supra*. The only case which applies the "control" test, and at the same time finds a joint adventure to exist, appears to be *Masterson v. Leonard*, note 14, *supra*.

[23] *Jensen v. Chicago, Mil. & St. P R. R. Co.*, note 14, *supra*.

[24] An instructive discussion of the historical basis of the "control" test, as applied to joint adventures, is to be found in 16 Cornell L. Quart., beginning at page 334. The writer of the article indicates that in rejecting the doctrine of imputed negligence as layed down in the early leading case of *Thorogood v. Bryan*, 8 C. B. 115 (Eng. 1849), the courts uniformly pointed out that the passenger had no control over the driver.

evidence of control a contract may properly be implied, and the nature of the contract as well, where such evidence is lacking, the establishment of a joint adventure becomes more difficult, but not insurmountable.[25] This appears to be the practical effect of the application of the "control" test, although we may expect the courts to continue announcing the rule in the same unequivocal language as formerly

The Common Purpose

The common purpose of the driver and the passenger, in engaging in an automobile trip apears to be an invariable element of joint adventure relationships.[26] The mere consent or even a contract between the parties, by which they agree to travel together in one vehicle, will not be sufficient to establish a common enterprise, where it is not shown that they had the same object in mind.[27] The nicety with which the courts will examine the circumstances with regard to this matter is indicated by the decision in *Rosenstrom v. North Bend Stage Line*.[28] It will be remembered that in this case each boy was going for his own locker key, which each had left at his own home. The court held that they were not engaged in a joint adventure, and the following language indicates that the decision turned on the question of whether or not there was a common purpose.

> "While each found himself in the same situation when he sought to open his locker, the situation did not present a community of interest. The one had no interest, as that term is understood in the law of joint adventure, in

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That this is exactly what occurred in Washington, see *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365 (1902) *Shearer v. Town of Buckley*, 31 Wash. 370, 72 Pac. 76 (1903) and *Wilson v. Puget Sound Elec. R.*, 52 Wash. 522 101 Pac. 50 (1909). In making this uniform statement, however, the writer points out, the courts were merely applying the test of the existence of the master-servant relationship, and that since there was no control, no master and servant relationship existed. From this manner of stating the case, an inference was unconsciously and incorrectly drawn, which crystalized into a concept of law, that if a right of control did exist, then, even in the absence of the master-servant relation, the negligence of the driver would be imputable to his passenger. See also, 77 Pa. L. Rev., at page 677.

[25] A joint adventure was either conceded or held to exist in the following cases, although the "control" test was not discussed or applied: *Hurley v. Spokane*, note 14, *supra*; *Shirley v. Amer Automobile Ins. Co.*, note 14, *supra*, *Lloyd v. Mowery*, note 14, *supra*.

[26] The only suggestion of a departure from this view in this state, is to be found in the dissenting opinion of Mr. Justice Beals, in the case of *Dahl v. Moore*, 161 Wash. 503, 297 Pac. 218 (1931), in which he intimates that there might be a joint adventure or a relationship analogous to joint adventure, where there was no common purpose, so long as a common means of effecting their distinct purposes was employed.

[27] For example, a passenger both consents and contracts to ride with the driver of a common carrier, yet, there being no common purpose, no joint adventure can be said to exist.

[28] Note 4, *supra*. See also, *Reamer v. Griffiths*, 158 Wash. 665, 291 Pac. 714 (1930) *Dahl v. Moore*, note 26, *supra*.

> procuring the key of the other, and in going for them, their purpose was in no sense common or joint, but rather separate and independent."

Where the occupant and the driver are engaged only in making a pleasure trip, or their presence together is solely for the purpose of mutual companionship, the Washington court has regarded this an insufficient "commmon purpose" to render the joint adventure doctrine applicable. In *Nagel v. McDermott*,[29] Myron Hampton, fourteen years of age, was at the house of Michael Nagel with his bicycle. Nagel's daughter asked Myron to go to a store and purchase some walnuts for her, giving him the money Myron invited John Nagel, ten years of age, to accompany him. John Nagel rode on the cross-bar of the bicycle. In holding that the boys were not engaged in a joint enterprise, the court said

> "In this case there is no such common purpose shown. The Hampton boy was going on an errand, using his own bicycle and operating it himself, for the sister of the respondent boy He merely took respondent with him for company They had no common purpose."

Yet, where an element of financial contribution is involved, as in paying for the expenses of the trip, the court has usually held the relationship of joint adventure to exist, even though the purpose of the trip was for the mutual pleasure of the travelers.[30] It would seem that where the trip is for pleasure, there is no more "common purpose" in the case of financial contribution, than in any other case, but the fact of such contribution is evidence of a contract between the parties. Hence it would appear that in cases where the parties are making the trip for mutual pleasure, but there is no financial contribution, the courts should deny the joint adventure relationship, not on the ground that there is no common purpose, but because there is no contract.

It should be borne in mind that the fact that either the driver of the vehicle or the occupant, had a separate and distinct purpose of his own in making the trip will not prevent the trip from being a joint enterprise, if, in fact, the driver and the occupant had an additional common purpose.[31] However, the mere purpose of reaching the same destination, even if it be the like purpose of both parties, where there is no other object of the enterprise, such

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[29] Note 21, *supra*. See also, *Thompson v. Collins*, 139 Wash. 401, 247 Pac. 458 (1926) *Contra*: *Masterson v. Leonard*, note 14, *supra*.

[30] See note 14, *supra*.

[31] *Sanderson v. Hartford Eastern Ry. Co.*, note 10, *supra*,—occupant had additional purpose of being relieved from driving his own car back home; *O'Brien v. Woldson*, note 10, *supra*,—driver had additional purpose of meeting her husband and driving him back home. But see *Nagel v. McDermott*, where the driver's additional purpose was an errand for the passenger's sister.

as companionship or business, has usually been held to be insufficient.[32] In any event, it is uniformly held that proof alone of a common purpose, in the absence of a showing of an agreement between the parties, will not be sufficient basis for the existence of a joint adventure relationship. This view is aptly expressed in the case of *Eubanks v. Kielsmeier*,[33] in the following words

> "The parties may have made the trip to Yakima each having a like purpose in mind, but that fact alone does not constitute a joint adventure. A host and guest may and often do, have a common objective, in point of time or place, yet their relationship as such is not thereby necessarily changed. There may still be lacking a community of interest or an engagement to effect a common purpose as that term is understood in the law of joint adventure. "

Other Relationships Distinguished

It has generally been held in Washington,[34] as elsewhere,[35] that a family relationship between driver and occupant, or a family purpose in driving the car would not of itself create the relationship of joint adventurers. A recent Washington case illustrates the point, however, that family relationship, although it does not establish, *per se*, a joint adventure, may be evidence of such an enterprise. In this case, *Shirley v. American Automobile Ins. Co.*,[36] the automobile was owned by H. A. Shirley, and was driven by his son. Five persons were in the automobile, the driver's two parents, his fiancee, and another member of his family The court, after finding the fiancee to be an invited guest, said.

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[32] *Klopfenstein v. Eads*, 143 Wash. 104, 254 Pac. 854, 256 Pac. 333 (1927). But see *Hurley v. Spokane*, note 14, *supra*, where the only purpose of the two was to reach and attend church.

[33] Note 14, *supra*.

[34] *Denny v. Power* 159 Wash. 465 293 Pac. 451 (1930), mother and son,—distinguishing *Hurley v. Spokane*, note 14, *supra*, on the ground that in the latter case it appeared that the brother and sister were using their father's car for the purpose of driving to church, which car "may well have been held had been intrusted to them jointly, neither being the guest of the other"; *Sanderson v. Hartford Eastern Ry. Co.*, note 10, *supra*, father and son; *Cable v. Spokane & Inland R. R. Co.*, 50 Wash. 619, 97 Pac. 744 (1908), father and daughter· *Gregg v. King County*, 80 Wash. 196, 141 Pac. 340, Ann. Cas. 1916C 135 (1914) parent and six year old child; *Reamer v. Griffiths*, note 28, *supra; Ostheller v. Spokane & I. E. Ry. Co.*, 107 Wash. 678, 182 Pac. 630 (1919), husband and wife. In the last case the decision really turned on a point of community property law, but the court intimated that, were it not for this, the mere fact of the relationship would not require the application of the principle of imputed negligence.

[35] *Bryant v. Pac. Elec. Ry.*, 174 Cal. 737, 164 Pac. 385 (1917), father and son; *Bowley c. Duca*, 80 N. H. 548, 120 Atl. 74 (1923), husband and wife; *Turney v. United Ry.*, 155 Mo. App. 513, 135 S. W 93 (1911), cousins; 77 U. Penn. L. Rev. 676.

[36] Note 14, *supra*.

> "The negligence of the driver bars any recovery on his part, and bars any recovery in favor of his parents, who were the owners of the automobile, because of the fact that the driver was their agent and servant. The other member of the Shirley family who was awarded a judgment is barred from a recovery because the excursion of the family during which the accident occurred was the joint enterprise of the family in which all participated, and in which each one must bear the fault and blame of the others."

Where the facts clearly indicate a principal and agent, or master and servant relationship, there is, of course, no room for the application of the doctrine of joint adventure, since the rights and liabilities of the parties are determined by the establishment of that relationship.[37] Such situations should not be confused with the case where the master is driving and the servant is the passenger, however, since in such case the relationship is not in refer ence to the particular automobile adventure, and it must be fur ther inquired whether the two are engaged upon a joint adventure. The question is settled in this state, however, since it has been held that the servant, having no control or right of control over the operation of the vehicle, is not engaged in a joint adventure with the master who is driving.[38]

An apparent inconsistency in the Washington decisions has developed in the case of common employees of the same master. In *Cathey v. Seattle Elec. Co.*,[39] the plaintiff and the driver were both employed by an Ice Company, and were engaged in their duties of delivering ice. The plaintiff had no control or authority over the driver, but accompanied him in the wagon. The court did not impute the negligence of the driver to the plaintiff. This case was decided in 1910. In *Martin v Puget Sound Elec. Ry.*,[40] decided in 1925, the appellant was not the driver of the truck, but both he and the driver were the common employees of the same master and engaged in hauling timber. The court found the two to be engaged in a joint enterprise, such that the negligence of the driver was imputed to the appellant. It appears, however, that an instruction given by the trial court, to the effect that the two were engaged upon a joint adventure, was not excepted to.

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[37] *Cole v. Wash. Water Power Co.*, 119 Wash 29, 204 Pac. 1060 (1922), and cases cited on page 38 therein.

[38] *Neagle v. Tacoma*, note 19, *supra*.

[39] 58 Wash. 176, 108 Pac. 443 (1910). Of course where co-employees are not on duty at the time of the accident, their usual status as fellow-servants has no bearing on the question of whether they were engaged upon a joint adventure, *Haaga v. Saginaw Logging Co.*, 165 Wash. 367, 5 Pac. (2d) 505 (1931).

[40] Note 14, *supra*. See also, *Leland v. Chehalis Lumber Co.*, 68 Wash. 632, 123 Pac. 1086 (1912).

Hence, on appeal, that ruling became the law of the case, and was not argued in the briefs nor discussed by the higher court. An examination of the cases elsewhere reveals that it is the general rule that the relationship of joint adventure will not be predicated upon the single fact that the driver and the passenger are fellow servants.[41]

A prospective buyer of real estate, who accompanies the real estate agent on a trip to view the land, has been held, in Washington, to be neither an invited guest nor a joint adventurer,[42] although the cases elsewhere in the United States appear to be split upon this question.[43] This rule would doubtless apply with equal effect, where the trip was one to demonstrate the car to the passenger, for the purpose of inducing him to purchase it. With respect to common carriers, although financial contribution is involved, as in the case of some joint adventures, there is no common purpose, often no control or right of control, and usually the driver cannot be regarded as the agent of the passenger.[44] Hence these two relationships can be readily distinguished.

II. Legal Consequences of Joint Adventure Relationship

Between Passenger and Third Person

Having established the fact that the driver and his passenger are engaged upon a joint adventure, the problem becomes one of determining what effect this relationship will have upon the rights and liabilities of the driver, the passenger, and third persons who may be involved. The problem arises most frequently in connection with automobile accidents in which the passenger is injured by reason of the combined negligence of the driver and a third person, and the passenger attempts to recover damages from the third person. Cases must be excluded in which the passenger is himself contributorily negligent, since he is then precluded from recovery without ever adverting to the doctrine of joint adventure. Where he is not actually negligent, the only ground for denying recovery to him, is to "impute" to him the negligence of the driver, exactly as if the driver was the agent or servant or partner of the passenger.

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[41] *McCormack v. Nassau Elec. R. R. Co.*, 18 App. Div. 333, 46 N. Y. Supp. 356 (1897) *Denver Tramway Co. v. Orback*, 64 Colo. 511, 172 Pac. 1063 (1918) *Grand Rapids v. Cooker* 219 Mich. 178, 189 N. W 221 (1922) *McBride v. Des Moines Ry.*, 134 Iowa 398, 109 N. W 618 (1906) *Sevier v. Pittsburgh Ry.*, 252 Pa. 1, 97 Atl. 116 (1916)

[42] *Dahl v. Moore*, note 26, *supra.*

[43] See 38 Yale L. Jour. at page 814, for cases there cited.

[44] *Field v. Spokane, Portland, etc. R. Co.*, 64 Wash. 445, 117 Pac. 228 (1911) *Klopfenstein v. Eads*, note 32, *supra; Little v. Hackett*, note 8, *supra.*

The doctrine of "imputed" negligence had its origin in dicta in the classic English case of *Thorogood v. Bryan*,[45] in which, without needing to so hold, the court stated that the negligence of a public cab driver is to be imputed to the passenger. The doctrine was later extended to include all cases of gratuitous passengers, whether engaged in a joint adventure or not. The doctrine was grounded on the fiction that the driver was the servant or agent of the passenger, and that the passenger was therefore responsible for the negligence of the driver. The case is now repudiated both in England and America, insofar as ordinary occupants are concerned.[46] In repudiating the doctrine, however, courts recognized a certain type of situation wherein the analogy to master and servant was not entirely artificial, and in which it was thought that the concept of imputed negligence could be justly applied. This type of case was labeled "Joint Adventure," and as to it, the doctrine of imputed negligence has survived.[47]

The rule is well stated in the Washington case of *O'Brien v. Woldson*,[48]a leading case on this phase of the problem, where it is said

> "Where the action is brought against a third party the rule is that the negligence of one member of a joint enterprise within the scope of that enterprise will be imputed to the other."

The legal effect of the rule is twofold. In all cases where the passenger is injured, while engaged in a joint adventure, by reason of the combined negligence of the driver and the third person, the passenger is precluded from recovering damages from the third person.[49] This defense is as complete and absolute as the defense of contributory negligence itself. On the other hand, in all cases in which an innocent third person is injured by reason of the sole negligence of the driver, with whom the passenger was engaged

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[45] Note 24, *supra*.

[46] *Little v. Hackett*, note 8, *supra*, *Shearer v. Town of Buckley*, 31 Wash. 370, 72 Pac. 76 (1903) 77 Univ Penn. L. Rev. 676, *Cable v. Spokane & I. E. R. R. Co.*, note 34, *supra*; *Field v. Spokane P etc. R. Co.*, note 44, *supra*. But the doctrine remains, in a limited form, in Michigan, —see *Skang v. Knappins*, 241 Mich. 57, 216 N. W 403 (1927) 16 Corn. L. Quar. 322, footnote. 5.

[47] Mr. Joseph Weintraub, writing in 16 Corn. L. Quarterly denies that the concept of imputed negligence should be applied in these cases, saying, on page 337 " The joint enterprise doctrine, the mischievous limits of which are as yet undefined, may well go the way of its predecessor, the doctrine of *Thorogood v. Bryan*."

[48] Note 10, *supra*.

[49] *Masterson v. Leonard*, note 14, *supra*, *Hurley v. Spokane*, note 14, *supra*, *Jensen v. Chicago, Mil. & St. P R. Co.*, note 14, *supra*, *Rosenstrom v. North Bend Stage Line*, note 4, *supra*, *Haaga v. Saginaw Logging Co.*, note 39, *supra*, *Allen v. Walla Walla Valley R. Co.*, note 9, *supra*, *Sanderson v. Hartford Eastern R. Co.*, note 10, *supra*, *Nagel v. McDermott*, note 21, *supra*.

upon a joint enterprise, such third person could recover damages from the passenger.[50] The negligence of the driver is a necessasry element in the application of either one of these aspects of the rule.

Between Passenger and Driver

As between passenger and driver, the establishment of a joint adventure relationship has one legal effect of general application throughout the country, and another legal effect of particular application to Washington. With respect, first, to the legal consequence of general application, the rule appears now well settled, that the doctrine of imputed negligence does not apply in an action by the passenger against the driver, so as to deprive the passenger from recovering damages from the negligent driver.[51] The problem is exhaustively analyzed in *O'Brien v. Woldson,*[52] where it is said

> "It does not necessarily follow, however, that that rule should be applied when the action is by one member of the joint enterprise as against the other. When the action is against a third person, each member of the joint enterprise is a representative of the other and the acts of one are the acts of all if they be within the scope of the enterprise. When the action is brought by one member of the enterprise against another, there is no place to apply the doctrine of imputed negligence. To do so would be to permit one guilty of negligence to take refuge behind his own wrong. The situation when the action is brought by one member of the enterprise against the other is entirely different from that where the recovery is sought against third persons."

The joint adventure doctrine also has a particular effect in Washington, with regard to the rights and liabilities of the passenger and driver toward each other, which is shared in the other American jurisdictions which follow the "gross negligence" rule. It is well settled in this state that the driver of a vehicle is liable

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[50] *Judge v. Wallen,* 98 Neb. 154, 152 N. W 318, L. R. A. 1915E 436 (1915) *Lucey v. John Hope & Sons Engraving & Mfg. Co.,* 45 R. I. 103, 120 Atl. 62 (1923) *Van Horn v. Simpson,* 35 S. Dak. 640, 153 N. W 883 (1915) *Boyd v. Close,* 82 Colo. 150, 257 Pac. 320 (1921) *Howard v. Zimmerman,* 120 Kan. 77, 242 Pac. 131 (1926) *Adams v. Swift,* 172 Mass. 521, 52 N. E. 1068 (1899) 38 Yale L. Jour. 810; dicta in *McCanna v. Silke,* 75 Wash. 383, 134 Pac. 1063 (1913).

[51] *Wilmes v. Fournier,* 111 Misc. Rep. 9, 180 N. Y. Supp. 860 (1920) *Ryan v. Snyder,* 29 Wyo. 146, 211 Pac. 482; *Collins v. Anderson,* 37 Wyo. 275, 260 Pac. 1089 (1927) *Harbor v. Graham,* 105 N. J. Law, 13, 143 Atl. 340, 61 A. L. R. 1232 (1928) *Lloyd v. Mowery,* note 14, *supra, Vacek v. State,* 55 Md. 400, 142 Atl. 491 (1928). But see Blashfield: Cyclopedia of Automobile Law, Vol. I, page 969, citing *Coleman v. Bent,* 100 Conn. 527, 124 Atl. 224 (1924), and I Wash. Law Rev. 113.

[52] Note 10, *supra.*

to his invited guest, only in case the driver is guilty of "gross" negligence.[53] It will be seen at once, then, that in every case where a joint adventure can be shown to exist, the gross negligence rule has no application, and the passenger can recover from the driver by merely showing the driver's lack of ordinary care. This negative effect of the joint adventure doctrine is well illustrated by the decision in *O'Brien v. Woldson*,[54] where the rules of liability with regard to the care of gratuitous bailments and bailments for hire are applied, by analogy, to the case of invited guests, and joint adventurers, respectively In respect to a joint adventurer, the court summarizes as follows.

> "A bailment for hire is for the mutual benefit of the parties. A joint enterprise is an undertaking for the mutual benefit or pleasure of the parties. The same rule should be applied in the one case as in the other. In the case of a joint enterprise, the rule of ordinary negligence should be applied."

Conclusion

It is thus seen that the courts have taken note that in the type of situation which is termed "joint adventure" the parties have so identified themselves in control and interest, that a redistribution of rights and liabilities is called for. It is, in short, a convenient formula for situations which cannot be otherwise readily classified, but in which the courts find reason for applying the rule of imputed negligence, as if the relationship were a clear cut agency or partnership. Since a contract is said to be necessary, an intention to contract must be discovered. As an expression of intent is seldom to be found, the same must ordinarily be implied from the situation in which the parties have placed themselves. Evidence of control, and of a common purpose then become important, not only in defining the nature of the contract, but in proof of its very existence. With these considerations in mind, it will be seen that each case is dependent, in large measure, upon its particular facts,[55] that generalizations cannot be safely indulged in,

[53] The Washington cases involving the Gross Negligence Rule are collected in an Article by Frank L. Mechem and Lowell P. Mickelwait, in 5 Wash. L. Rev. 91. See also, *Saxe v. Terry*, 140 Wash. 503, 250 Pac. 27 (1926), a leading case on this question.

[54] Note 10, *supra*.

[55] Of the twenty-three Washington cases which have passed on the question of the existence of a joint adventure relationship in these automobile cases, four have held that there was a joint adventure, as a matter of law, one was so held by a jury, and two were conceeded to be joint adventure cases; eleven cases held, as a matter of law, that there was no joint adventure, three reached the same conclusion by decision of the jury, one was held to be a question for the jury, and in one case the question was referred to a jury, but its decision can not be ascertained from the printed case.

and that apparent inconsistencies in the cases can usually be accounted for by a distinction in the facts. On the other hand, the chief characteristics of a joint adventure cannot be lost sight of, but must be applied to the particular facts for the purpose of determining the existence of the relationship. Having found the relationship to exist, the chief difficulty has been surmounted, for the legal incidents of such relationship are now well settled.

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The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions*

Chapter 3

FORMATION OF INFORMAL CONTRACTS**

Topic C. Consideration and Its Sufficiency

Section 75. DEFINITION OF CONSIDERATION.

(1) Consideration for a promise is

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification or destruction of a legal relation, or

(d) a return promise,

bargained for and given in exchange for the promise.

(2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Comment.

a. The law generally imposes no duty on one who makes an informal promise unless the promise is supported by sufficient consideration (see Section 19)

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*The absence of annotations to particular sections of the Restatement indicates that no Washington decisions have been found on the principle therein stated.

**Continued from last issue.