plained, will generally weigh heavily against the party in the minds of the jury. But it does not seem that a party's adverse testimony should be automatically considered conclusive. The many qualifications recognized by courts applying the rule-of-conclusiveness are adequate indications of the weakness of the rule itself. The continued use of a rule that is encompassed by so many qualifications can only produce protracted litigation, as losing parties seek appellate rulings on whether a particular admission was or was not within a recognized exception to the rule. The earlier approach, treating a party's adverse statements the same as those of any other witness, seems to provide a more flexible and desirable method of dealing with a party's adverse testimony. It is to be hoped that more courts will pursue the course indicated by the court in the principal case and reject the rule-of-conclusiveness, for "The truth of the case depends on a comparison of what *all* the witnesses say and *all* the circumstances indicate."[27]

TORTS—GUEST STATUTE—STATUS OF RIDER LEGALLY OBLIGATED TO PAY FOR TRANSPORTATION

In re Dikeman's Estate, 178 Kan. 188, 284 P.2d 622 (1955)

Plaintiff and defendant's decedent agreed that plaintiff would ride in decedent's car and pay a reasonable sum for transportation to and from a fraternal meeting. The amount to be paid was to be determined after the return home. On the return trip decedent's car collided with a train, causing decedent's death and injury to the plaintiff. Plaintiff sued decedent's estate, alleging ordinary negligence, and the trial court sustained the defendant's demurrer. The Kansas Supreme Court, three justices dissenting, affirmed the judgment of the trial court, holding that plaintiff was within the Kansas "guest" statute and, therefore, was precluded from recovery on the basis of ordinary negligence.[1]

At common law the driver of an automobile has a duty to exercise ordinary and reasonable care for the protection of a guest.[2] Since

27. 9 WIGMORE, EVIDENCE § 2594a n.16 (3d ed. 1940). For an extensive review of the cases on the subject, see Annot., 169 A.L.R. 798 (1947).

The courts in Missouri have followed the rule-of-conclusiveness in dealing with a party's own adverse testimony. Smith v. Siercks, 277 S.W.2d 521 (Mo. 1955); Steele v. Kansas City So. Ry., 265 Mo. 97, 175 S.W. 177 (1915). See also Mollman v. Pub. Serv. Co., 192 S.W.2d 618 (Mo. App. 1946) (refusing to recognize exception to rule because testimony related to evidence in party's own special knowledge). 9 WIGMORE, EVIDENCE § 2594a (Supp. 1955) lists the many exceptions to the rule recognized by Missouri courts.

1. *In re* Dikeman's Estate, 178 Kan. 188, 284 P.2d 622 (1955).

2. PROSSER, TORTS 451 (2d ed. 1955). Missouri by statute requires the operator of a motor vehicle to "exercise the highest degree of care." MO. REV. STAT. § 304.010 (1949). This standard of care represents the driver's duty to his guest. Kaley v. Huntley, 333 Mo. 771, 63 S.W.2d 21 (1933).

1927 a majority of the states have abrogated this common law duty by the enactment of "guest" statutes.[4] While these statutes vary in terminology, in general they relieve the driver of any liability to a guest except when the driver is guilty of gross negligence.[5] The Kansas statute provides:

> That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury . . . unless such injury . . . resulted from the gross and wanton negligence of the operator. . . .[6]

The usual reasons advanced for the enactment of a guest statute are twofold: (1) the common law rule is contrary to the layman's concept of justice, *i.e.*, a rider who receives the benefit of transportation from the driver and confers no benefit in return should not be permitted to recover damages for the driver's ordinary negligence; and (2) such a statute will deter collusion between driver and guest in suits against the driver's insurer.[7] However valid these reasons may be,[8] and whatever weight is to be accorded them in applying a particular statute to a specific factual situation,[9] the language of the

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3. Connecticut was the first state to enact a guest statute. CONN. REV. GEN. STAT. § 1628 (1930) (later repealed). The constitutionality of the Connecticut statute was upheld in Silver v. Silver, 108 Conn. 371, 143 Atl. 240 (1928), *aff'd*, 280 U.S. 117 (1929).

4. Missouri does not have a guest statute. See note 2 *supra*. For a compilation of the statutes of the twenty-six states which do have guest statutes, see Note, 1 WYO. L.J. 225 n.2 (1949).

5. The statutory descriptions of the negligence required vary, *e.g.*, "gross and wanton negligence," "willful and wanton misconduct," "intentional act, gross negligence, reckless disregard of right," "intoxication or reckless operation." See Hodges, *The Automobile Guest Statutes*, 12 TEXAS L. REV. 303 nn.1-22 (1934). Statutes which deprive a guest of any remedy have been held unconstitutional. See Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24, 29 (1937).

6. KAN. GEN. STAT. § 8-122(b) (Supp. 1955).

7. Hodges, *The Automobile Guest Statutes*, 12 TEXAS L. REV. 303 (1934); Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24, 34-35 (1937).

8. In the situation where the driver is insured it is quite likely that the layman's concept of justice would permit the rider, especially if he were a friend or member of the driver's family, to recover against the driver's insurer. It is also questionable whether the guest statute prevents collaboration by the driver and guest or merely requires collaboration on additional elements of proof, *i.e.*, the relationship of the parties and the presence or absence of payment for the transportation. As the insurance lobby was largely responsible for the passage of these statutes it might be contended that this justifies interpretations of the statutes favorable to insurers, thus requiring more plaintiffs to prove a degree of misconduct higher than that of ordinary negligence. However, this reasoning would appear to be inconsistent with legislation designed to compel car owners to carry insurance. All of the states have enacted some form of financial responsibility legislation. Netherton, *Highway Safety Under Differing Types of Liability Legislation*, 15 OHIO ST. L.J. 110, 118 n.18 (1954). All but four of the states have passed security-type safety responsibility laws which have been quite effective in raising the percentage of those insured. *Id.* at 121; Vorys, *A Short Survey of Laws Designed to Exclude the Financially Irresponsible Driver from the Highway*, 15 OHIO ST. L.J. 101, 102 & n.3 (1954). See also 1954 WASH. U.L.Q. 244.

9. Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24, 35 (1937):

> The defects in the common law are associated with the gratuitous guest. The guest whose presence in the vehicle is beneficial to the host is in a dif-

Kansas statute clearly contemplates[10] three classes[11] of riders: (1) nonguests; (2) guests who have given "payment" for the transportation; (3) guests who have not given "payment" for the transportation.[12] If the rider is within the last class he must allege and prove *gross* negligence; if he is within the first two classes, the common law rules of liability for ordinary negligence are applicable.

Certain relationships between rider and driver negative a guest-host status,[13] e.g., prospective vendor and vendee,[14] employer and employee,[15] or teacher and student.[16] Of course, the transportation in question must have been furnished in furtherance of this relationship.[17]

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ferent category. It does not seem to be unfair to require the operator to exercise due care for his safety. The chances of collusion are definitely lessened when the guest pays for his transportation or is a business associate of the host.

10. The rules of statutory interpretation are of little value in this area. Although the guest statutes are in derogation of the common law and thus apparently subject to the principle of strict construction, legislation should not be so construed as to render it ineffective. Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24, 33 (1937). The search for legislative intent in this area is also fruitless. See note 8 *supra*.

11. See the text supported by note 6 *supra*. In construing the Iowa statutory language of "as a guest or by invitation and not for hire" the Iowa Supreme Court said:

> It is evident that the intent of the legislature . . . was to recognize nongratuitous riders in an automobile, as well as a guest and a mere invitee . . . . to distinguish between "passenger for hire," as that term is used in law, and other nongratuitous riders in an automobile.

Knutson v. Lurie, 217 Iowa 192, 195-96, 251 N.W. 147, 149 (1933).

12. In the majority of the statutes the language used is "guests without payment." See note 4 *supra*. "Guest without giving compensation" is the language used in the California and North Dakota acts. CAL. VEHICLE CODE § 403 (1948); N.D. REV. CODE § 39-1501 (1943). For the suggestion that this language might call for a different result in a particular case, see Phillips, *When the Guest Buys the Gas*, 1949 INS. L.J. 407, 408 n.6. The language of the Nebraska and Montana statutes is "guest or by invitation and not for hire." MONT. REV. CODES ANN. § 32-1113 (1947); NEB. REV. STAT. § 39-740 (1952).

Another possible method of classification would be to distinguish only between "guests" and "nonguests." However, this would overlook the presence of the "without payment" language and would be too indefinite for a useful guide.

13. Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455 (1938); Phillips, *When the Guest Buys the Gas*, 1949 INS. L.J. 407, 409; Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24, 35-39 (1937). Some courts treat these "nonguest" cases as "guests who have made payment" situations since the driver usually receives some benefit in furnishing transportation to the rider. See, *e.g.*, Duncan v. Hutchinson, 139 Ohio St. 185, 39 N.E.2d 140 (1942).

14. Crawford v. Foster, 110 Cal. App. 81, 293 Pac. 841 (1930); Bookhart v. Greenlease-Lied Motor Co., 215 Iowa 8, 244 N.W. 721 (1932). In several states the prospective purchaser of an automobile is expressly excluded from the operation of the guest statute. See, *e.g.*, IND. ANN. STAT. § 47-1022 (Burns 1952).

15. State Compensation Ins. Fund v. Dalton, 13 Cal. App. 2d 284, 56 P.2d 962 (Cal. App. 1936); Kruy v. Smith, 108 Conn. 628, 144 Atl. 304 (1929); Garrett v. Hammack, 162 Va. 42, 173 S.E. 535 (1934).

16. Whittecar v. Cheatham, 287 S.W.2d 578 (Ark. 1956). See also Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455 (1938) (passenger for hire and chauffeur).

17. Kruy v. Smith, 108 Conn. 628, 144 Atl. 304 (1929); Labatte v. Lavallee, 258 Mass. 527, 155 N.E. 433 (1927).

While not considered by the court in the principal case,[18] another relationship which might, if found to exist,[19] result in a nonguest classification is that of joint enterprise. A joint enterprise exists when the parties have a common purpose and a mutual right of control over the instrumentality used in effectuating that common purpose.[20] Joint enterprisers, on a rider-driver agency theory, may be liable to third persons because of the negligence of any one of them, or may be barred from recovery against a third person by reason of such imputation of negligence.[21]

It is arguable that because of the substantial legal consequences attaching to the finding of joint enterprise, it is unrealistic, in that situation, to classify the rider in the vehicle as a "guest" within the meaning of the guest-host statutes. But in the overwhelming majority of jurisdictions which have recognized the joint enterprise doctrine, no negligence is imputed in suits between joint enterprisers.[22] Consequently, it may be said that the finding of joint enterprise affects the legal status of the parties only insofar as the rights and liabilities of third persons are involved; *inter se* the joint enterprisers are still guest and host. The bare finding, therefore, of a joint enterprise should not place one of the parties in the nonguest classification.[23] Certainly it seems unnecessary to encumber guest-host statutes with a judicial doctrine which, at least in its modern extensions, is based on a compounding of the fiction of a mutual right of control with the fiction of a rider-driver agency.[24]

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18. In Bedenbender v. Walls, 177 Kan. 531, 539, 280 P.2d 630, 636 (1955), however, the Kansas court that the joint enterprise doctrine had no bearing on the application of the guest statute.

19. An agreement to share expenses of a trip is some evidence of the mutual right of control that is necessary to establish a joint enterprise. PROSSER, TORTS 366 (2d ed. 1955).

20. In a minority of jurisdictions the existence of a common purpose in which the driver and rider have a mutual interest is sufficient to establish a joint enterprise. *Id.* at 364.

21. *Id.* at 363-64.

22. The joint enterprise doctrine of vicarious liability is for the protection of third persons against the hazards of the enterprise and is not applicable in actions between the parties to the undertaking. Thus, in the majority of states the driver's negligence will not be imputed to the rider to bar an action by the rider against the driver. *Id.* at 366-67.

23. In discussing the relation of the doctrine of joint adventure to the Washington guest statute, Richards, *Another Decade Under the Guest Statute*, 24 WASH. L. REV. 101, 121 (1949), said:

> [S]o long as it is on the books it [the guest statute] should not be stultified by first bringing in as an escape from it a concept totally foreign in field and purpose and then watering that concept down in its application to social expeditions until the statute had ceased . . . to have much of any meaning at all.

24. PROSSER, TORTS 367 (2d ed. 1955). The Supreme Court of Idaho in French v. Tebben, 53 Idaho 701, 713, 27 P.2d 474, 479 (1933), stated that if the rider and driver were engaged in a joint enterprise or adventure the gross negligence requirement of the guest statute would not be applicable. The case is cited with apparent approval in Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24, 39 & n.35 (1937). In Washington, parties engaged in a joint adventure are not within

The distinguishing factor in the second and third classifications is the presence or absence of "payment"; it is only the non-paying guest who must allege and prove gross negligence.[25] The payment requirement is satisfied if the rider confers a "benefit,"[26] even though prospectively,[27] upon the driver.[28] This may consist of assisting with the driving,[29] acting as a guide for the driver,[30] or accompanying the driver to make peace with the driver's wife.[31] Nor is it necessary that the benefit be conferred by the rider rather than by some third person.[32] Neither is it essential that prior to the actual trip the driver or the rider be legally bound in a contractual sense *to undertake the trip*.[33] If, however, the trip is taken pursuant to a promise to make payment, the rider is a paying guest. Although courts seek to explain this by asking whether the benefit conferred, *i.e.*, the payment, was the "motivating cause" of the furnishing of the transportation,[34] it seems that the real question in such cases is whether the payment has been "bargained for."[35] Stated succinctly, a gift is not payment—but a

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the guest statute. See, *e.g.*, Pence v. Berry, 13 Wash. 2d 564, 125 P.2d 645 (1942). For a discussion of the early practice in that state of permitting the joint adventure to be utilized as an easy escape from the guest statute and the later practice of limiting this doctrine to the business partnership, see Richards, *Another Decade Under the Guest Statute*, 24 WASH. L. REV. 101, 110-21 (1949).

25. Notwithstanding the fact that the same factors that would create a joint enterprise may be present in the paying guest classification, the proof of a joint enterprise would be an unnecessary step in attempting to avoid the guest statute.

26. Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87 (1949).

27. Kempin v. Mardis, 123 Ind. App. 546, 111 N.E.2d 77 (1953).

28. This, of course, does not mean that the rider must be a passenger for hire in the legal sense. Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455 (1938).

29. Druzanich v. Griley, 19 Cal. 2d 439, 122 P.2d 53 (1942).

30. Arkansas Valley Co-op. Rural Electric Co. v. Elkins, 200 Ark. 883, 141 S.W.2d 538 (1940); Lerma v. Flores, 16 Cal. App. 2d 128, 60 P.2d 546 (1936); Hansen v. Lawrence, 149 Neb. 26, 30 N.W.2d 63 (1947); Dorn v. Village of North Olmsted, 133 Ohio St. 375, 14 N.E.2d 11 (1938).

31. Zaso v. De Cola, 72 Ohio App. 297, 51 N.E.2d 654 (1943).

32. Sprenger v. Braker, 71 Ohio App. 349, 49 N.E.2d 958 (1942).

33. Albrecht v. Safeway Stores, 159 Ore. 331, 340, 80 P.2d 62, 66 (1938). It has been stated that in the "purchase of gasoline" cases there must be a binding obligation to pay certain expenses to constitute "payment" for the transportation and that the consideration must be adequate. Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24, 39-40 (1937). However, it seems that if the transportation has been bargained for this satisfies the payment requirement even though the contract to pay expenses would not for some reason be binding upon the parties prior to the trip. The adequate consideration requirement is urged because of the fear that the statute would be circumvented by an agreement to pay a nominal amount. It would seem, however, that if the transportation were in fact bargained for, the amount to be paid would be more than nominal.

34. Ward v. Dwyer, 177 Kan. 212, 277 P.2d 644 (1954); Srajer v. Schwartsman, 164 Kan. 241, 188 P.2d 971 (1948); Vogrin v. Bigger, 159 Kan. 271, 154 P.2d 111 (1944); Bushouse v. Brom, 297 Mich. 616, 298 N.W. 303 (1941).

35. See Lerma v. Flores, 16 Cal. App. 2d 128, 60 P.2d 546 (1936); Phillips, *When the Guest Buys the Gas*, 1949 INS. L.J. 407. Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24, 39 & n.37 (1937), suggests that the bargaining element is not necessary except in the gasoline purchase cases. Of the cases cited to support this, only Russell v. Parlee, 115 Conn. 687, 163 Atl. 404 (1932), really discusses the question and there the court was faced with a nonguest situation. Defendant's employee had hired the plaintiff to help him with work for the de-

bargained for consideration is. Thus, mere gratuities of the road, e.g., voluntary contributions to the expenses,[36] are not payment within the statutory sense.

In the principal case the transportation must have been bargained for since the court assumed[37] that there was a legally enforceable contract to pay for it.[38] Thus, under the principles set out above, the rider would be a guest who had made "payment" and thus would not be within the guest statute. However, the Kansas Supreme Court held that the plaintiff was within the guest statute because the trip was of a social nature. This reasoning is in accord with an earlier Kansas case[39] and several other decisions[40] which have ascertained whether the rider was within the guest statute by determining whether the trip was of a social or business nature, regardless of the fact that the rider had conferred a benefit upon the driver. This seems to have resulted from equating the words "social" and "guest" and overlooking the presence of the word "payment" in the statute. Of course, the social nature of the trip should be given appropriate weight in determining whether the transportation has been bargained for. But when the parties have, as in the principal case, entered into a legally enforceable contract, the fact of a bargain is definitely established, and the social aspects of the trip become immaterial. Thus, it would seem that the result in the principal case cannot be logically supported.

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fendant. On the day the accident occurred the defendant driver requested his employee to ride in the car to defendant's farm. Plaintiff was present at the time and also entered the car. The defendant knew that the plaintiff was going to his farm to perform the work for which he had been hired by defendant's employee.

36. See, *e.g.*, Riggs v. Roberts, 74 Idaho 473, 264 P.2d 698 (1953); Shumaker v. Kline, 333 Mich. 346, 53 N.W.2d 295 (1952).

37. *In re* Dikeman's Estate, 178 Kan. 188, 195, 284 P.2d 622, 628 (1955).

38. RESTATEMENT, CONTRACTS § 75 (1932). This is not the type of situation in which the promissory estoppel principle of § 90 is applicable.

39. In Bedenbender v. Walls, 177 Kan. 531, 280 P.2d 630 (1955), the parties had gone on many hunting trips together, some in plaintiff's automobile and some in defendant's, under the agreement that the party who did not take his car would pay for the gasoline and meals consumed. Such was the arrangement in question and the Kansas Supreme Court held that the rider was within the guest statute. However, the court did point out that upon the facts of the case the payment of these expenses only amounted to an "exchange of social amenities."

40. See Vogrin v. Hedstrom, 220 F.2d 863 (8th Cir. 1955) (applying California guest statute); Duncan v. Hutchinson, 139 Ohio St. 185, 39 N.E.2d 140 (1942). The principal case, however, is apparently the first case to hold that a rider who has entered into a legally enforceable contract is nevertheless within the guest statute.