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PARTNERSHIP OR JOINT VENTURE?

Walter H. E. Jaeger*

INTRODUCTION

Attempts to answer this question have been fraught with difficulty ever since the modern version of the joint venture emerged as a frequently used type of business association. That it has caused endless perplexity in judicial circles is amply demonstrated by the cases which will be considered. Originally, no attempt was made to differentiate these closely related associations. But with the re-emergence of the joint venture in its modern form at the close of the last century, and its ever-increasing employment for the joint participation of large agglomerations of capital in gigantic business operations, the courts have shown a greater and greater awareness of its individual character.

The object of this discussion is to determine under what circumstances and by what norms certain business associations will be considered partnerships and when they will be deemed joint ventures. Making this determination has given rise to a certain amount of confusion; it is hoped that some of this may be resolved in the following pages.

The subject has been divided into four parts: First, the origin, meaning and nature of the respective terms, partnership and joint venture; second, points of similarity; third, points of difference; and in conclusion, an appraisal of the current trend of case law.

I. ORIGIN AND NATURE

Partnership

Some form of partnership is probably as old as the first exhibition of the gregarious instinct of man. It has been known to every system of law although its legal implications may have varied from system to system. Certainly, it was prevalent at common law and was largely derived from the Roman law and the law merchant. Neither of these required any particular form of contract for its creation; however, the Roman law was more restrictive as to the authority of the partner for he could not alienate more than his share of partnership property, while in a common law partnership, it is generally held that each partner may be considered by third parties as having the requisite authority to administer partnership affairs in their entirety. In both systems, death of a partner dissolved the partnership as did the assignment of a partner’s interests to a third party, and in either case, the winding up of the partnership was accompanied by an accounting as is the case today.1

The concept of partnership continued through the Middle Ages during which a common form was the “commenda” wherein one party provided the capital, either in money or goods, while the other furnished the knowledge, skill

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1 Scrutton, Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 208, 220 (1907).
and the active management of the partnership business. But coexisting with this form of partnership was another described as the "societas" closely resembling the modern partnership wherein each partner was individually responsible for the debts of the firm. However, in contrast to common law partnerships, the partner was not always recognized as having the necessary authority to bind his copartners, even within the scope of the partnership business.  

A marked development in the law of partnership has occurred since a number of jurisdictions have enacted statutes governing the relations of partners and other incidents of partnership law. In addition to these individual statutes, a Uniform Partnership Act has been formulated and adopted by a number of jurisdictions. After extended deliberation, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Statute embodying the aggregate or "plurality" common law theory of partnership and rejected the so-called "entity theory," which would have given the partnership a juridical personality separate and distinct from that of its individual members.  

In order to understand the nature of the partnership and its similarity to the joint venture, it may be well to cite some of the definitions which have been used in the past. Although the courts have been loathe to essay a definition, quite early in the past century, Chancellor Kent defined a partnership as a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions. While this definition has been relied on and quoted repeatedly, it has also been criticized.  

Attesting to the difficulty which the courts experience in attempting to define partnership is Petty v. First National Bank of Quitman; the court said:

There is no fixed definition of a partnership; therefore, there can be no fixed form of pleading to allege same. But, a petition should allege the existence of some of the facts essentially necessary to constitute a partnership in order to put the alleged partner on notice of the proof to be offered against him. . . .

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2 Mitchell, Early Forms of Partnership in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909).
3 Williston, The Uniform Partnership Act, 63 U. Pa. L. Rev. 196 (1914) cited and relied on in United States v. A & P Trucking Co., 358 U.S. 121 (1958); in that case the Supreme Court of the United States recognized that the entity theory had been rejected in the majority of jurisdictions, but held that under certain federal statutes, a partnership might nevertheless be given a juridical personality.
4 Goldsmith v. Eichold Bros., 16 S.W.2d. 1100 (Tex. Civ. App. 1929); Blackerby v. Oder, 201 Ky. 403, 257 S.W. 43 (1923); Willis v. Crawford, 38 Or. 522, 63 Pac. 985 (1901); Haggett v. Hurley, 91 Me. 542, 40 Atl. 561 (1898); 94 Ala. 116, 10 So. 80 (1891); Howell v. Harvey, 5 Ark. 270 (1843); Brown v. Higginbotham, 5 Leigh 583 (Va. 1834).
5 The requirement of a contribution of something of value to the stock in trade of the business has been criticized because at times, there may be a "dormant partner," such as the widow or other surviving relative of a deceased partner who, while contributing nothing, nevertheless is paid a percentage of the profits by the partnership, as in Pooley v. Driver, (1876) 5 CT. Div. 458, criticizing the definition formulated by Chancellor Kent supra. This may, however, be considered an exception to the general rule because contribution to the partnership or joint venture has been held by many courts to be a prerequisite for the existence of such an association. But, as will be seen, there are decisions to the contrary which have held that joint participation in an enterprise for recreation or pleasure may be a joint venture, especially in the case of automobile journeys.
That elements usually appearing in partnerships are present in facts disclosed here, that is,

(1) A common undertaking;
(2) A venture for profit;
(3) Common control and direction including stopping and starting work on job contracted for, hiring and terminating employees doing such work, financing payrolls and equipment, etc.;
(4) Each party participating in profit and losses.\(^8\)

The Supreme Court of the United States has held that persons are partners who contribute property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions.\(^9\) More recently, this court has also defined the partnership as an organization for the production of income to which each partner contributes one or both of the ingredients of income—capital or services.\(^10\) The Uniform Partnership Act defines a partnership as "An association of two or more persons to carry on as co-owners a business for profit."\(^11\) Similar definitions are to be found in the Code provisions of various jurisdictions.\(^12\)

Typical of the application of such code provisions is *Donroy, Ltd. v. United States*,\(^13\) where the plaintiffs sought to recover an alleged overpayment of federal income tax. The basis for the claim was that these plaintiffs did not have "a permanent establishment in the United States," being Canadian corporations, and that, therefore, the proper tax rate should have been fifteen per cent according to Article XI of the Tax Convention between the United States and Canada.\(^14\) Consequently, the taxes which they had paid in excess of fifteen per cent should be refunded. Decision in the case hinged upon the definition of partnership in light of the term "permanent establishment" as used in the above mentioned Tax Convention.

After an extensive discussion of the meaning of "partnership" under the pertinent California Code,\(^15\) and a discussion of the authorities, the court rejected the contention of the plaintiffs that they were acting through a broker or an independent contractor and held that they were engaged in business in California through the medium of a partnership and as defined in the Tax Convention, they had a "permanent establishment" in that State. In the course of its opinion, the court also engaged in a comprehensive discussion of the agency powers of the members of a partnership, whether general or limited.\(^16\)

In summary, it may be said that in general, a partnership requires two

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11 *Uniform Partnership Act* § 6.
14 Tax Convention, United States-Canada, 56 Stat. 1399, 1402 (1942).
16 See *Crain v. First National Bank*, 114 Ill. 516, 2 N.E. 486 (1885); *W.G. Johnston*, 24 T.C. 920 (1955); *De Amodio*, 34 T.C. 894; *Mecham on Agency*, § 60 (2d ed. 1914).
or more competent persons who have entered into a contract to carry on a business for profit as co-owners.\textsuperscript{17}

\textit{Joint Ventures}

Over the years, the joint venture originated as a commercial or maritime enterprise used for trading purposes. Shrouded in antiquity, the joint venture was used as a commercial device by the merchants and businessmen of ancient Egypt, Babylonia, Phoenicia and Syria to conduct sizeable commercial and trading operations, often overseas. Subsequently, joint "adventures" (as they were known in England) were used by the merchants of Great Britain some four or five centuries ago. Thus, it is generally known that companies of "gentlemen adventurers" were organized to carry on trade and to exploit the resources of various corners of the globe as, for example, America and India. On the continent, the Hanseatic League employed such ventures to good advantage. The Dutch were not slow in proceeding along the same mercantile lines by associating themselves in similar joint companies likewise for overseas trade and colonization.\textsuperscript{18}

It was not, however, until the second half of the nineteenth century that the courts began to attribute to the joint venture certain characteristics which might eventually give this association a legal character of its own: "The concept of joint adventure as a legal relationship or association sui generis is purely of American origin dating from about 1890."\textsuperscript{19} Originally, the joint venture was assimilated to the partnership and, in many cases, they are treated as more or less synonymous.\textsuperscript{20} Indeed, in any number of cases, no attempt is made to

\textsuperscript{17} 2 \textsc{Williston, Contracts, § 307A, p. 441 (3d. ed. Jaeger 1959)}.

\textsuperscript{18} \textsc{Ashley, Introduction to English Economic History; Loth, Public Plunder; Sandborn, Origins of the Early English Maritime and Commercial Law; and especially Barnes, Economic History of the Modern World; Beard, History of the Businessmen; Breasted, Ancient Times}.

\textsuperscript{19} \text{State ex rel. Crane Co. v. Stokke, 60 S.D. 207, 272 N.W. 811, 817 (1937).}\n
distinguish between the two.\textsuperscript{21} It has even been suggested in the sparse literature on the subject that there is no logical reason for distinguishing or differentiating the two; in fact, cogent reasons are adduced why the same principles of law should be applied to both.\textsuperscript{22} But in spite of these arguments, contentions, and asseverations, the courts have unconcernedly forged ahead and blazed a trail for the recognition of the joint venture as a distinct legal concept. However, it must be admitted that if the partnership was difficult of definition, the joint venture has proved even more so.\textsuperscript{23} A few of these attempts by the judiciary will be reviewed.

Illustrative of the difficulties which perplex the courts in their endeavor to define joint venture is the following excerpt from a leading and representative case:\textsuperscript{24}

"Precise definition of a joint venture is difficult. The cases are of little help since they are generally restricted to their own peculiar facts. "Each case in which a coadventure is claimed \ldots depends of course for its results on its own facts, and owing to the multifariousness of facts, no case of coadventure rises higher than a persuasive precedent for another.\"\textsuperscript{25}

Although it took some time for the courts to realize that the joint venture was evolving and developing to a point where it was no longer identical with partnership, the weight of authority among current decisions recognizes that there is no necessity in the organization of a joint venture to have any "partner-
ship or corporate designation." The Supreme Court of Michigan has defined joint venture in a similar vein:

It can be said that a joint adventure contemplates an enterprise jointly undertaken; that it is an association of such joint undertakers to carry out a single project for profit; that the profits are to be shared, as well as the losses, though the liability of a joint adventurer for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the contract. There must be a contribution by the parties to a common undertaking to constitute a joint adventure... and a community of interest as well as some control over the subject matter or property right of the contract...

Whether the parties to a particular contract have thereby created, as between themselves, the relation of joint adventurers or some other relation depends upon their actual intention, and such relationship arises only when they intend to associate themselves as such. This intention is to be determined in accordance with the ordinary rules governing the interpretation and construction of the contracts.

A more succinct definition has been formulated by Williston who devotes more than a hundred pages of the new edition of his treatise to the joint venture:

The joint venture is an association of two or more persons based on contract who combine their money, property, knowledge, skills, experience, time or other resources in the furtherance of a particular project or undertaking, usually agreeing to share the profits and the losses and each having some degree of control over the venture.

II. POINTS OF SIMILARITY

From the foregoing definitions of partnership and joint venture, it may readily be discerned that there are some significant similarities. These will be analyzed and discussed after having been identified under the following headings:

1. Unincorporated association of two or more competent parties;
2. Created by the agreement of the parties;
3. Ordinarily involving contribution by the partners of money, property, credit, knowledge, skill, labor, or something else of value, to constitute the stock in trade of the venture;
4. Transaction of some lawful business, trade, profession, or other occupation which is carried on by the parties as principals;
5. For purpose of pecuniary profit or economic gain of the members, whose relations are fiduciary.
6. Their relationship to third parties is identical.

Contract Essential

At the outset, it must be emphasized that both partnership and joint ven-

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30 Id. at p. 535 § 918.
ture require a contract for their existence; articles of partnership as well as joint venture agreements must have all the usual requisites of other enforceable contracts, as for example, consideration, capacity of parties, and lawful object. Like other contracts, they need not be express but may be implied from the demeanor and conduct of the participants. This contractual relationship, based on offer and acceptance, means that the voluntary character of the relationship is most important. So vital is the element of free choice, the *delectus personarum*, as it is called, that it has been frequently described as one of the most significant characteristics of the partnership. The courts in a variety of cases have held that without a contract there can be neither partnership nor joint venture. An examination of a few of these may prove profitable.

In *Seaboard Surety Co. v. H & R Construction Corp.*, the court had occasion to examine the relationship of a construction company and an investment firm when plaintiff brought action for damages under certain surety bonds which it had issued. Although the defendants were in complete agreement that they did not intend to establish a partnership relation between them, the court disregarded this allegation and stated in effect that it would have to make this determination based on the facts, especially the contract, as these were developed. Showing little or no inclination to differentiate between these two types of business organization, the court remarked:

A partnership agreement or a joint adventure having in general the legal incidents of a partnership may very well arise out of agreements between parties to combine their money, skill and efforts towards the accomplishment of a mutually profitable enterprise. It is, of course, essential that the parties jointly contribute thereto in the sense of putting into it something in the nature of property, services, conduct or investment tending to constitute a community of interest.

In deciding that the facts established a partnership relation or joint venture between the defendants, the court added:

It is the substance and not the name or form of the relationship

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31 *Id.* at Ch. 6 "Consideration."
32 *Id.* at Chs. 9-11, discussing capacity of the parties to a contract.
34 Carbonneau v. Peterson, 1 Wash. 2d 347, 95 P.2d 1043 (1939).
37 People v. Herbert, 162 Misc. 817, 295 N.Y. Supp. 251 (1937); also reported in JAEGGER CASES AND STATUTES ON LABOR LAW 73 (1939). *Delectus Personarum* — the right of a partner to decide what new partners, if any, shall be admitted to the firm, 1 *BOUVIER, LAW DICTIONARY* 499 (15th ed. 1883).
41 *Id.* at 646.
that constitutes the legal relationship of the contracting parties.42
What transpired, as reflected in the record of the instant case, was
the creation between H & R and the Nelsons of a partnership or
joint adventure in praesenti.43
On appeal, Nelson v. Seaboard Surety Co.44 was reversed and remanded
on the ground that the facts did not sufficiently establish that a partnership
existed “between the appellants and the H & R Construction Corporation.”45
In the course of this appellate opinion it was also observed:
A corporation is an entity authorized by statutory law. It is
governed by a board of directors elected by its stockholders, and by
officers in turn elected by its directors. Its officers and directors
alone control and have the sole authority of controlling the action of
the corporation. If the corporation could become a partner with
individuals or with another corporation, its actions would be subject
to control by the vote of such partnership, and this, manifestly,
would be contrary to public policy.46
When the case had been retried and again appealed, Seaboard Surety Co.
v. H. C. Nelson Investment Co.,47 the Eighth Circuit now concluded that
the newly developed facts supported the lower court’s finding that a part-
nership existed between the Nelsons ("a father and son combination")
and the H & R Corporation. However, the case was decided against Seaboard
Surety on the ground that the latter, by continuing to issue surety bonds to
the contractor, H & R Construction Corporation, even after the Nelson part-
nership had refused to sign these bonds, had waived any rights it might have had
vis-a-vis the Nelsons and had elected to hold H & R exclusively. It is submitted
that the court had a much simpler solution, and one conformable to the weight
of authority48 and its previous decision wherein it had said: “A corporation

42 See Teas v. Kimball, 257 F.2d 817 (5th Cir. 1958); Rizzo v. Rizzo, 3 Ill. 2d 291,
120 N.E.2d 546 (1954); Cyrus v. Cyrus, 242 Minn. 180, 64 N.W.2d 538 (1954), citing
Blumberg v. Blumberg, 233 Minn. 249, 47 N.W.2d 412 (1955); Sample v. Romine, 193 Miss.
706, 8 So. 2d 643, 10 So. 2d 346 (1942); Goacher v. Bates, 280 Ill. 372, 117 N.E. 427 (1917).
43 Seaboard Surety Co. v. H & R Construction Corp., supra note 40, at 646.
44 262 F.2d 189 (8th Cir.). The opinion was withdrawn by order of the court and
does not, at present, appear at 262 F.2d 189.
47 269 F.2d 882 (8th Cir. 1959).
48 Independently incorporated railroads were not authorized to consoli-
date by agreement and, under a common name and common board of
management, conduct the business of both lines, subjecting the capital of
each to answer for the common liabilities. Pearce v. Madison & I.R.Ry., 62
U.S. (21 How.) 441 (1858).
A corporation is an entity authorized by statutory law. It is governed
by a board of directors elected by its stockholders, and by officers in turn
elected by its directors. Its officers and directors alone control and have
the sole authority of controlling the action of the corporation. If the cor-
poration could become a partner with individuals or with another cor-
poration, its actions would be subject to control by the vote of such
partnership, and this, manifestly, would be contrary to public policy. The
controlling law on this question is succinctly stated in 13 AM. JUR.,
CORPORATIONS, § 823, p. 830.
Partnership — According to the prevailing view, a corporation has
no implied power to become a partner with an individual or another cor-
poration. This limitation is based on public policy, since in a partnership
the method would be entirely inconsistent with the policy of the law
that the corporation shall manage its own affairs separately and exclusively.
has no implied capacity to become a partner with another corporation or an individual by merely holding that the “partnership” between a corporation and a partnership could have no legal existence and therefore, H & R could not bind Nelson. This result could have been obviated had the association of H & R and the Nelson partnership been regarded as a joint venture.

Any number of cases involving partnerships or joint ventures dealing with the exploitation of mineral resources, especially oil and gas, have stated that the contract establishes the rights and duties of the participants. Thus, in *Rae v. Cameron,* the rule was stated: “[W]hether the parties have created a corporation exists require its powers to be exercised by a board of directors and preclude the partnership, to bind the others by his individual acts, whereas the statutes under which a corporation has suffered losses while engaged in a “partnership” with other corporations, especially since the 1950s).

Kasashke v. Baker, 146 F.2d 115 (10th Cir. 1944), cert. denied, 325 U.S. 856 (1945); Central Lumber Co. v. Schilleci, 227 Ala. 29, 148 So. 614 (1933); Lewis Werner Sawmill Co. v. Vinson & Bolton, 220 Ala. 210, 124 So. 420 (1929).

The ground upon which the power of a corporation to enter into a partnership implies the power of each partner, under his authority as a general agent for all the purposes of the partnership, to bind the others by his individual acts, whereas the statutes under which a corporation exists require its powers to be exercised by a board of directors and preclude the formation from becoming bound by the act of one who might be only its partner.


54 112 Mont. 159, 114 P.2d 1060 (1941).
the relation of joint adventure... depends upon their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts. In short, whether partnership or joint venture, "The true relationship must be determined by the conduct of the parties, together with all the other material facts and circumstances."

In another case, Tucker Corporation v. Yorke, which involved the ill-fated Tucker Corporation's agreement with one of its "dealers" the question presented for review was the liability of the latter who had signed a "Tucker Dealer Franchise." The appellate court concluded that this agreement was "somewhat in the nature of a joint venture" and affirmed judgment for plaintiff against defendant for the payment of the balance due on a promissory note given in part payment for the franchise.

Probably the most frequently recurring similarities between the partnership and joint venture are found in the cases dealing with the relationship of the parties to each other, and their relations with third parties.

Fiduciary Relationship of the Parties

Undoubtedly one of the most celebrated and consistently quoted classics of all joint venture-partnership cases is Meinhard v. Salmon. There, the court in assessing the duties of the members of such associations to each other, said:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncom-

55 "A joint venture is a joint adventure." Myers v. Lillard, 215 Ark. 355, 220 S.W.2d 608 (1948). (Emphasis added). The courts have shown a preference for the term "venture" in more recent times.

56 Supra note 54 at 1064. 4 WILLISTON, CONTRACTS, Ch. 22 "Interpretation and Construction of Contracts" (3d ed. Jaeger 1961).

57 St. Paul-Mercury Indemnity Co. v. United States, 238 F.2d 917, 921 (10th Cir. 1956).

58 256 F.2d 808 (7th Cir. 1958).


60 249 N.Y. 458, 164 N.E. 545 (1928).
promising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘dis-integrating erosion’ of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.61

Stated somewhat more succinctly: "The relation of joint adventurers is fiduciary in character and requires good faith between them."62 And in similar vein:

If title to partnership property is placed in the name of one of the partners, a fiduciary relation is thereby created, as to which he owes the highest degree of honor and good faith. . . .63 The partnership property is regarded as personal property for the purposes of adjusting the equities of the parties, . . . or equity may impress a trust upon the property for the benefit of the joint adventurer. Or, equity may impress a constructive trust upon the real property for the benefit of the joint adventurers to prevent unjust enrichment and to enforce restitution. . . .64 Or, estoppel may be utilized to prevent the imposition of the statute of frauds as a shield for fraud. . . .65 Whatever procedural devices may be employed, courts of equity are not impotent to effect complete justice between parties to a joint adventure.66

Indicating that no distinction would be made between partners or joint venturers in cases wherein their relations to each other are involved, the court, in Van Stee v. Ransford,67 said:

What we have in all of the above is the charge, variously put, that one of the parties who participated in the described venture enriched himself at the expense of his fellows. The name given the enterprise, whether that of partnership or joint adventure, is, with respect to the duty of the trust reposed, unimportant. The fiduciary duties are parallel. With respect to defendant Ransford they were particularly demanding. He was more than a mere joint participant for he was, as well, the manager of the enterprise. In the words of . . . [the court in the] classic opinion in Meinhard v. Salmon [supra] referring to one Salmon, likewise the manager of a joint enterprise, “The two were coadventurers, subject to fiduciary duties akin to those of partners. . . . As to this we are all agreed. The heavier weight of duty rested, however, upon Salmon. He was a coadventurer with Meinhard, but he was manager as well.” Not only, however, was Ransford under the “heavier weight of duty as manager,” but, in addition, he was under peculiar ob-

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61 Id. at 546.  
62 Hey v. Duncan, 13 F.2d 794 (7th Cir. 1926), citing Jackson v. Hooper, 76 N.J. Eq. 185, 74 Atl. 130 (1909).  
63 Blackner v. McDermott, 176 F.2d 498 (10th Cir. 1949); Citing Mattikow v. Sudarsky, 248 N.Y. 404, 162 N.E. 296 (1928); Wyoming-Indiana Oil & Gas Co. v. Weston, 43 Wyo. 526, 7 P.2d 206 (1932); Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).  
ligations because he was the president and general manager of the company for which James Van Stee and Edward Bloom worked. They were not completely free, as to him, to inquire, to demand, or to take to task. He was the boss. So it is that plaintiff Van Stee, in speaking of his delay in asking the return of $5,000, says that "it was an embarrassing thing to bring up for a subordinate to the head of the company." Under such circumstances the obligation of the trustee is the more acute. It is compelling evidence of the complete trust and confidence reposed in him, that his associates permitted to stand in his name, and his alone, the legal title to their only asset. It was within his power to sell, encumber, or mortgage, subject only to those considerations of conscience so jealously guarded by a court of equity. We do not condemn the plenitude of power vested in the trustee by his coadventurers and subordinates. We insist only that his performance match in scruple and sensitivity the confidence reposed in him.

And in *Horne v. Holley*, the court said:

The obligations *inter se* of persons engaged in a joint adventure are similar to those existing between partners. The relation is one of mutual trust and confidence. The utmost good faith, the most scrupulous honesty, is exacted of each party toward the other. Each must guard the interest of his coadventurer equally with his own, and must make a frank and full disclosure of all material facts. Each is regarded by a court of equity as a trustee or agent of the other with respect to the enterprise to be undertaken.

Within the scope of the enterprise they stand in a fiduciary relation each to the other, and are bound by the same standards of good conduct and square dealing as are required between partners. This obligation begins with the opening of the negotiations for the formation of the syndicate, applies to every phase of the business which is undertaken, and continues until the enterprise has been completely wound up and terminated!

But in an even more instructive case, *J. Leo Johnson, Inc. v. Carmer*,

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68 Id. at 348-49.
69 167 Va. 234, 188 S.E. 169 (1936).

The relationship between those in a joint venture is fiduciary in nature; upon each co-adventurer are imposed obligations of loyalty, fairness, good faith and full disclosure toward his fellow co-adventurers. Particularly is this true in the case of that co-adventurer to whom is intrusted the conduct of the enterprise; toward his associates he occupies the position of a trustee.


In the transaction out of which this litigation arose, Goldstein and Greenberg were partners in a joint venture, and as such, they owed to each other fidelity. See Bell v. Johnston, 281 Pa. 57, 39, 126 A. 187. In Jackson v. Clemson, 103 Pa. Super. 39, 45, 156 A. 540, 542, the Superior Court said: "Joint adventurers in such a transaction must act with each other in the utmost good faith."

The court continues by quoting the celebrated and oft-quoted passage from Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. * * * Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

71 156 A.2d 499 (Del. 1959).
the Court of Chancery of Delaware concluded that an accounting was essential under the following facts: An agreement had been made between a railroad company and a joint venture whereby the joint venture was to buy ballast and ties from the railroad for the purpose of reselling these and realizing a profit which they were to split. When the work on the first section of the railroad had been completed, one of the venturers (the defendant) obtained from the railroad a contract for the purchase of ballast and ties on the second section without notifying his co-venturer, the plaintiff. Chancellor Seitz, following an able opinion in which he reviewed the authorities, ordered defendant to account to the plaintiff for the profits resulting from operations dealing with the second section. Affirming the Chancellor's decree, the high court of Delaware said:

The relationship of joint adventurers is fiduciary in character and imposes upon all of the participants the utmost good faith, fairness and honesty in dealing with each other with respect to the enterprise. It forbids one joint adventurer from acquiring solely for himself any profit or secret advantage in connection with the common enterprise. This is particularly true in the case of one to whom is entrusted the conduct of the enterprise.²²

The court held that the deceitful joint venturer would be regarded as a trustee and his duty as such would be as great as in any fiduciary relationship and would preclude him "from dealing with property relating to the enterprise, either for himself or another, in the absence of full disclosure to his associates."²³ And as to the objects of the association, the courts do not seem to make any distinction between the partnership and the joint venture. The purposes for which organized must be lawful, and the means employed conformable to law. Here, however, some interesting questions have presented themselves more particularly as to the effect and application of the Federal Anti-Trust Laws.²⁴

III. PARTNERSHIP AND JOINT VENTURE DISTINGUISHED

Having examined the points of similarity between the two types of associations, it seems appropriate to ascertain and point out the differences the courts have relied on in distinguishing joint ventures from partnerships. Based on the case law, the following differences have been noted:

1. The single or _ad hoc_ nature of the undertaking;
2. Eligibility for membership;
3. Limitation of agency relationship;

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²² _Id._ at 502.
²³ _Ibid._
PARTNERSHIP OR JOINT VENTURE

4. Profit-or-loss-sharing not essential;
5. *Delectus personarum* not vital;
6. Action on the contract permissible;
7. No distinct status.

The *Ad Hoc* Nature of the Undertaking

The first of these, namely, the unique or *ad hoc* nature of the joint venture is the characteristic the courts have emphasized most often as, for example, in the statement, "usually, there is a single business transaction rather than a general and continuous transaction."

This aspect of the joint venture was stressed in *Shafer v. Southwestern Bell Telephone Co.*, where the court compared it to a partnership:

A "joint adventure," as a legal concept, is of comparative recent origin, ... and is founded entirely on contract, either express or implied. It can exist only by voluntary agreement of the parties to it .... It is in the nature of a partnership, generally governed by the same rules of law, the principal difference being that a joint adventure is usually limited to a single transaction. As a general rule, in order to constitute a joint adventure, there must be a community of interest in the accomplishment of a common purpose, a mutual right of control, a right to share in the profits and a duty to share in the losses as may be sustained.

And also in *Hathaway v. Porter Royalty Pool*:

It can be said that a joint adventure contemplates an enterprise jointly undertaken, that it is an association of such joint undertakers to carry out a single project for profit; that the profits are to be shared, as well as the losses, though the liability of a joint adventurer for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the contract .... There must be a contribution by the parties to a common undertaking to constitute a joint adventure ... and a community of interest as well as some control over the subject matter or property right of the contract ... 

Although from the foregoing cases it appears that the courts have achieved some degree of uniformity in holding that the transaction or undertaking should
be a single one in a joint venture undertaking,\textsuperscript{81} they have reached no such concurrence as to the meaning to be attached to the word "single" when used in this connection. Basically, it is a question of degree.\textsuperscript{82}

**Eligibility for Membership**

A distinction is also made between the partnership and the joint venture based on membership restrictions; while it is generally held that corporations may not engage in partnerships, this restriction is not applied to joint ventures.\textsuperscript{83} This also applies to municipal corporations.\textsuperscript{84}

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The reason why partnerships are generally held precluded from admitting corporations is that there is present the danger that the officers and directors of the corporation may not be able to carry out their responsibilities, thus jeopardizing the corporate assets by ultra vires actions. This danger is apparently not so threatening in the case of joint ventures, and the courts have quite frequently found it compatible with public policy to hold such joint ventures lawful.

Agency Relationship

The purported agency which characterizes the partnership and which extends to all partners at common law has been greatly restricted where a joint venture is involved. This leads to the question, to what extent is the joint venturer the agent of the venture? In seeking the answer to this question, a lack of harmony among the jurisdictions will soon be discovered. The majority rule does hold that some form of mutual agency exists, but that it is more limited than in the case of partnerships. Thus, it has been said: "A joint venture is a sort of mutual agency, akin to a limited partnership." Conversely, the minority holds there is no such agency.

In this connection, it has been said that in a joint adventure, no one of the parties thereto can bind the joint adventure. But further analysis of the cases indicates that it is the growing trend to consider the authority of the joint venturer as lying somewhere between that of a partner and total inhibition.

When two or more persons enter upon a specific venture, wherein a joint profit is sought, without any actual partnership or thereof, in such enterprises as erecting and maintaining city halls, sewage disposal systems, airports, and schools is generally upheld, except where it is prevented by constitutional or statutory prohibition, such as a provision that municipal corporations shall not give money or property, or loan money or credit, to or in aid of any individual, association, or corporation, or where the particular enterprise would require the taxation of property within the municipal corporation for an improvement outside the municipal limits in violation of a constitutional provision.

85 Shell Oil Co. v. Prestidge, 249 F.2d 413 (9th Cir. 1957); Dunclick, Inc. v. Utah-Idaho Concrete Pipe Co., 7 Idaho 459, 295 P.2d 700 (1956); Nolan v. J. & M. Doyle, 338 Pa. 398, 13 A.2d 59 (1940).
91 Taylor v. Brindley, 164 F.2d 235 (9th Cir. 1947); Mason v. Rose, 176 F.2d 486 (2d Cir. 1949) and cases supra note 90.
92 164 F.2d 235 (10th Cir. 1947).
designation, they become co-adventurers in the enterprise... A profit jointly sought in a single transaction by parties thereto is the chief characteristic of a joint venture....

Unlike co-tenants, there is a confidential and fiduciary relationship between co-adventurers. Each member acts individually and as agent for other members within the general scope of the enterprise. Being closely akin to a partnership, the law of partnership and principal and agent underlies the conduct of the venture, and governs the rights and liabilities of co-adventurers, and of third parties as well.

Profit-or-Loss Sharing

As to the commercial character of joint ventures and the requirement that they be organized for purposes of profit or gain, the decisions have not been uniform, although many hold that the "venture" element, or the endeavor to make a profit while incurring the risk of suffering a loss is essential to the joint venture. However there are contrary decisions, but not so with respect to partnerships. In fact, the dominant reason for the organization of the partnership, and usually of the joint venture, is the desire of the individual members to improve their economic lot by their association with the other members. However, where the venture element is lacking, some of the courts have not hesitated to hold a joint undertaking to be a joint venture as, for example, in cases of automotive transportation or other recreational endeavor.

A prime example is furnished by the facts in West v. Soto, where the court found that a joint venture could be organized for social purposes and required no profit factor. In the West case the facts indicated that two insurance agents and the Arizona state manager for the Service Life Insurance Company, their common employer, were driving to Nogales in an automobile belonging to one of the agents and collided with another car.

At the trial of the case, all of the occupants of the colliding car owned by the insurance agent were joined as co-defendants. Plaintiff was the occupant...
of the damaged car and had been injured in the collision. It was proved that the three insurance men had been drinking together and were found guilty by a justice of the peace following the arrest of the driver of the automobile. It was considered that the negligence of the driver had been established but the question of the responsibility of the co-defendants remained for determination on appeal. There, the Supreme Court of Arizona said:

Were defendants engaged in a joint venture at the time here involved? If they were this judgment must be affirmed, otherwise, it must be reversed. The elements of a joint venture are (1) a contract, (2) a common purpose, (3) a community of interest, and (4) an equal right of control. We have necessarily discussed some of these elements in considering the preceding question. Joint adventures are applicable to both business and social purposes. They are in the nature of a partnership. Each of the parties thereto is the agent of the others. It follows that each of the others is likewise a principal so that the act of one is the act of all.

A joint adventure whether it be for business or social purposes must rest upon an agreement, either express or implied between the parties thereto. Whatever the common purpose or community of interest may be, it must appear as a part of the agreement either expressly or by necessary implication, that each of the parties to such joint adventure has authority to act for all in respect to the control of the means or agencies employed to execute such common purpose.\(^\text{100}\)

And in a similar case, which arose in Kentucky, \textit{Wright v. Kinslow},\(^\text{101}\) the court said:

When all the occupants of an automobile are engaged in a “joint adventure” or “joint enterprise,” this Court has held that the negligence of one is the negligence of all, but in order to constitute a joint enterprise there must be an equal right, express or implied, among all occupants of the car, to direct and control its operation.\(^\text{102}\)

This use of the term “joint venture” has been criticized by jurisdictions wherein the profit factor is held to be an essential; and it has been suggested that it would be better to use the broader term “joint enterprise” for these social and recreational activities of a joint character.\(^\text{103}\)

However, where the profit element is involved in a joint venture, and in the absence of a contrary agreement, it is usual to hold that the parties to either form of association, partnership or joint venture, are entitled to share equally in the profits\(^\text{104}\) or to be equally liable for any losses that may be sustained.\(^\text{105}\)

\textit{Delectus Personarum}

It has previously been emphasized that the \textit{delectus personarum} is perhaps

\(^{100}\text{Id. at 157.}\)
\(^{101}\text{264 S.W.2d 673 (Ky. 1954).}\)
\(^{102}\text{Id. at 676.}\)
\(^{104}\text{National Surety Co. v. Winslow, 143 Minn. 66, 173 N.W. 181 (1919).}\)
\(^{105}\text{Stattauer Bros. v. Carney & Stevens, 20 Kan. 474 (1878); Note, 33 HARV. L. REV. 852 (1920).}\)
the most significant single element in the partnership relation. This element in the case of a joint venture is generally not as significant, especially as the average life of the venture is measured by the time consumed in the accomplishment of a single undertaking. Even so, as between themselves, the relationship of the joint venturers hardly differs from that of partners: It is fiduciary, as was strongly held in *Meinhard v. Salmon,* repeatedly cited and quoted, and discussed above. Referring to *Meinhard,* a lower New York court said: "The ringing words of Cardozo, J., in Meinhard v. Salmon... stand as a memorial and a warning and it seems that they cannot too often be repeated," and cited the paragraph from *Meinhard* which is set out above at page 147. Later in the *Meinhard* opinion Cardozo also said, "For him and for those like him the rule of undivided loyalty is relentless and supreme."

Also relying on *Meinhard v. Salmon,* the Maryland Court of Appeals enunciated the same general principle:

The case involves no major dispute as to the applicable legal principles. It is considered that joint venturers owe each other the duty of loyalty and fair dealing. A leading case on the subject is Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1. Cf. Hambleton v. Rhind, 84 Md. 456, 487, 36 A. 597, 40 L.R.A. 216, and Nagel v. Todd, 185 Md. 512, 45 A.2d 326. See also note 62 A.L.R. 13, 24. The case turns largely upon questions of fact. In 1955, Cushing was and had been for many years the owner and operator of an active cemetery company, known as Belair Memorial Gardens, Inc. He was a man of considerable financial standing and substantial credit rating. He hired Chubb as a sales manager. Chubb introduced him to Walrath, with whom Chubb had previously been associated in Pennsylvania. Walrath convinced Cushing of the possibilities of large profits in the promotion of cemetery business, and particularly mentioned nearby Kenwood Memorial Park Cemetery, a long inactive cemetery in Baltimore County, for which Walrath had been dickering. Cushing was interested in seeing that this cemetery, at least, did not get into the hands of a competitor. He seems also to have been impressed with Walrath’s claims of promotional abilities and connections. On August 15, 1955, Walrath, Chubb and Cushing signed an agreement of joint venture, “for the establishment, development and operation of cemeteries in Maryland,” subject to restrictive provisions, “that none of the three parties may enter into any contract covering any phase of the cemetery business * * * (exempting Bel Air Memorial Gardens, Inc., * * *) without inviting the other parties on a share and share alike basis; and further, if any sum of money is involved each of the parties shall be given at least thirty (30) days to raise his equal share of the fund after written notice has been given,” with a further proviso that no party should “sell, transfer or pledge his interest (exempting Bel Air Memorial Gardens, Inc.) in the joint venture or any part thereof without first having offered [it] to the other parties hereto at a price equal to any bona fide offer, and having given thirty (30) days notice in writing.” It was further provided

106 Supra notes 37-38.
107 249 N.Y. 458, 164 N.E. 545 (1928).
109 Id. at 20.
that the agreement should remain in force until terminated by written agreement of all the parties.\textsuperscript{111}

The court found that the defendant Cushing had given his co-venturers an opportunity to participate pursuant to their original contract and that they had failed to do so and in consequence, abandoned the joint venture agreement. The court observed that neither of the plaintiffs "was in a financial position to contribute any funds whatever to the purchase." Consequently, there was no occasion for ordering an accounting since defendant had completely fulfilled his fiduciary and other obligations to the plaintiffs.

\textit{Action on the Contract}

A further distinction that the courts have made is the right of action on the contract of joint venture against a fellow joint venturer. Such an action between partners is generally not permitted, they being limited to an accounting in equity.\textsuperscript{112} It has been observed, emphasizing this distinction: "A distinctive characteristic of the joint adventurer is his right of suing at law for his share; he is not obliged to resort to an accounting as is a partner."\textsuperscript{113} A few illustrative cases may serve to emphasize the distinction.\textsuperscript{114}

In \textit{Barnes v. Alexander},\textsuperscript{115} a law firm and an independent practitioner entered into a contingent fee-sharing arrangement with another firm of attorneys whereby each of the three parties was to receive a one-third share in the fee. The attorneys were to cooperate in perfecting and prosecuting certain mining claims in Arizona. Upon recovery of judgment in the amount of $75,000, the successful claimants, who were the original clients, paid the contingent fee of one-fourth of this amount, namely $18,750, to the individual attorney whom they had originally retained. The latter retained his one-third as agreed, and paid the balance to his associates, the first law firm, who, however, failed to pay their fellow venturers, the other law firm. Thereupon, this action was brought for $6,250, or one-third of the contingent fee. After judgment for plaintiffs in the courts below, the defendant appealed to the Supreme Court of the United States. In affirming judgment, the Court, after discussing \textit{Trist v. Child}\textsuperscript{116} upon which appellants had placed considerable reliance, remarked:

\begin{quote}
We start, however, with the principle that an informal business transaction should be construed as adopting whatever form consistent with the facts is most fitted to reach the result seemingly desired.... it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing.\textsuperscript{117}
\end{quote}

In a similar case, \textit{Ellis v. Frawley},\textsuperscript{118} a firm of lawyers requested another

\begin{footnotesize}
\item \textsuperscript{111} Id. at 240.
\item \textsuperscript{112} 2 WILLISTON, CONTRACTS § 318C (3d ed. Jaeger 1959).
\item \textsuperscript{113} Joring v. Harriss, 292 Fed. 974, 978 (2d Cir. 1922), cert. denied, 263 U.S. 710 (1923).
\item \textsuperscript{115} 232 U.S. 117 (1914).
\item \textsuperscript{116} 88 U.S. (21 Wall) 441 (1874); JAEGGER, LAW OF CONTRACTS, 512 (1953) also discussed in 4 WILLISTON, CONTRACTS § 615A (3d ed. Jaeger 1961).
\item \textsuperscript{117} Supra note 115 at 120.
\item \textsuperscript{118} 165 Wis. 381, 161 N.W. 364 (1917).
\end{footnotesize}
attorney to circulate among certain flood sufferers and persuade them to employ
the firm to prosecute their damage claims. The attorney agreed and was success-
ful in persuading a number of litigants to retain the firm. From these suits, the
firm received upwards of $20,000 (on a 60%-40% contingent fee arrangement),
of which half should have been paid to the lawyer for bringing in the clients
according to the terms of the joint venture agreement. When the firm refused
the request of Ellis (the lawyer) for his share of the fee, the latter brought this
action and recovered judgment. However, on appeal, the court reversed on the
ground that “the arrangement between the parties was against public policy”;
it amounted to an officious stirring up of litigation. This reversal, based as it is
on public policy, is comparable to the outcome in Trist v. Child.

In Schnackenberg v. Towle, 119 much more recently decided, a lawyer,
about to be elected to the judgeship of a circuit court, made an agreement with
another attorney to divide certain fees to be received in connection with handling
a case by the latter in the court in which the first mentioned lawyer was to sit
as judge. When the fees were received by the attorney handling the case, he
refused to split them with the judge; the latter brought suit for an accounting.
He was successful in the lower court, but the Supreme Court of Illinois reversed
on the ground of illegality, very much as in the case of Ellis v. Frawley.

Status

Finally, the matter of status appears to differentiate the partnership and
joint venture. The courts have repeatedly placed the greater emphasis upon
status or relationship in the partnership, 120 an element which seems to be un-
important in the joint venture. But this status is not that of a distinct legal
entity or juridical personality separate and distinct from that of its members
as, for example, in a corporation. 121 This is true, of course, only in the absence
of statutes to the contrary, although a number of jurisdictions will, when
occasion demands, vest the partnership with an entity status for certain
purposes. 122

If these various differences are critically examined, some may seem more
apparent than real. What does seem quite clear to the objective observer is
that fundamentally most of them involve a question of degree. Nonetheless,
a gradual but definite evolution of the joint venture as a distinct business
association is discernible and of this, the courts are taking judicial cognizance. 123

IV. THE MODERN TREND:
RECOGNITION OF THE INDIVIDUAL CHARACTER OF JOINT VENTURES

The outstanding conclusion to be drawn from what has been said before
is that the modern trend of the cases is to recognize the individual character of
the joint venture as sui generis at least, and probably as sui juris. The best

120 Supra notes 37-38, 106.
121 Shell Oil Co. v. Prestidge, 249 F.2d 413 (9th Cir. 1957).
Partnership Act, 63 U. PA. L. REV. 196 (1914).
123 2 WILLISTON, CONTRACTS §§ 318 et seq. (3d ed. Jaeger 1959); Jaeger, Joint
evidence of this lies in the most recent judicial pronouncements, although there are some few courts which still fail to note the distinction.224

But with the constant growth of business operations, commercial enterprises, and similar undertakings, the joint venture, standing on its own footing, has become an economic and legal necessity. It is a convenient means for providing great concentration of financial resources, knowledge and skill, found essential to the accomplishment of large-scale construction projects characteristic of the twentieth century. In keeping with the modern tempo, the discovery and development of fissionable materials and the construction and operation of power reactors and atomic furnaces have been accomplished by joint ventures. Other examples include the development of major housing projects and other real estate ventures, farming and livestock raising, bridges, toll roads, super highways, dams, shipping and overseas trading ventures, commercial fishing operations, and the exploitation of oil and other mineral resources both here and abroad. Promoters have also organized such ventures for the presentation of theatrical and similar productions, the exploitation of patents, trademarks and copyrights, and the public offering of stocks, bonds, and similar securities.

Somewhat comparable to the attempts of the courts to assimilate labor unions to partnerships225 is the endeavor to confine the joint venture to similar norms. Like pouring old wine into new bottles, the attempt did not succeed and in consequence, a new labor law had to be fashioned under the aegis of the federal labor legislation.226

Among the basic reasons why the joint venture may be deemed to have achieved a niche of its own is that it affords advantages and is free from certain inhibitions which restrict partnerships, as, for example, the exclusion of wives and corporations. Certainly the latter have not been slow to appreciate these advantages and to take advantage of them.

No longer can it be successfully argued that this legal concept is merely a form of partnership, for as the Supreme Court of Delaware has recently said: “The widely recognized legal relationship of joint adventure is of modern origin.”227 In short, the joint venture has become (or in some jurisdictions, is becoming) a distinct form of business organization, a legal relationship.


125 This evolution is somewhat reminiscent of the development of labor relations following the establishment of labor organizations, but prior to the enactment of state and federal statutes governing them. During the nineteenth and twentieth centuries, unions developed as a distinctive type of association, rather different than the customary forms, such as the partnership, with which the courts usually dealt. Here, too, the courts were confronted with the application of inelastic common law rules to a new form of association which these rules simply did not cover and which did not fit into the framework of the preconceived legal system. Thus, it was like “pouring old wine into new bottles.” JAEGER, LABOR LAW Ch.1, “Introduction,” Ch.2, “The Union” (1939). 1 WELLISTON, CONTRACTS Preface to third edition, p. vii (3d ed. Jaeger 1957).
