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Comment

THE JOINT VENTURE: PROBLEM CHILD OF PARTNERSHIP

Classification may serve a very useful purpose by helping to find the law, or by segregating legal matter into easily understandable categories to facilitate study, but perhaps its greatest effect on our legal system is in the realm of law making. The growing prominence of the joint venture, with the tendency of many courts to recognize it as a distinct species of organization divorced from the supposed complications of partnership law, provides an interesting illustration of judicial legislation by classification.

1 "Joint venture" as used here does not include the "joint enterprise" of tort law where the issue is imputation of negligence. Joint ventures are sometimes known by that name, as well as by "joint adventure" or "syndicate."

2 "At the present time this newcomer [joint venture] is clamoring, and not without success, for recognition as a legal relation sui generis." Mechem, The Law of Joint Adventures, 15 MINN. L. REV. 644 (1931).

3 "It is asserted that the courts regard the law of partnership as too complex for joint adventures. But when it is recalled that practically all the courts applied substantially the same rules of law to them that they have applied to partnerships, that theory is exploded. The courts have not found the partnership code too complex—they have adopted it at practically every point for the determination of joint adventure problems." Mechem, supra note 2, at 658.
The joint venture as a business association has ancient recognition in the commercial world, but as a legal concept is of modern origin. A large body of judicial discussion has centered on this latter aspect of the joint venture, but the necessity in some cases of attempting a legal definition and ascertaining appropriate incidents has led to nothing precise or illuminating. There has been a resultant welter of confusion and complexity, the exact opposite of the effect sought in providing separate classification.

If there is justification for the joint venture as a distinct legal genus, there must be cogent reasons for its cleavage from partnerships. An investigation must be made to determine what factors constitute a particular association a joint venture rather than a partnership. If a factual situation may clearly be characterized as one or the other, it will then be possible to consider in detail the problem of what differences, legally, follow from the distinction. If the legal consequences are exactly those which would flow from a partnership, judicial segregation of the joint venture is wasteful and nonsensical.

The emphasis of inquiry should not be placed upon admitted identities of the two categories, but there should be a careful examination of those divergencies supposed by various courts and writers to be significant.

**FACTUAL DISTINCTIONS**

"A partnership is an association of two or more persons to carry on as co-owners a business for profit." Although there is no satisfactory definition of a joint venture, it is at least included within the comprehensive terms of this standard definition of a partnership. The partnership definition is so broad that it is not always easy to isolate those factors which will serve as tests for a particular organization.

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5 The joint venture as an independent relation is not recognized in England. Mechem, supra note 2, at 644; Nichols, supra note 4, at 443.

6 "No sharply defined meaning emerges from the cases." Nichols, supra note 4, at 432.

An able federal judge characterizes the joint venture as a "case law hybrid of recent origin and undetermined connotation." Hutcheson, C. J., in Porter v. Cooke, 127 F. 2d 853, 857 (5th Cir. 1942).

7 Uniform Partnership Act § 6(1); Cal. Corp. Code 15006(1). The Uniform Partnership Act is Title 2, Chapter 1, of California Corporations Code (1949). The UPA section numbers are the last digits of the California code sections.

8 See note 6 supra.

"A joint adventure may be defined as an association of two or more persons to carry out a single business enterprise for profit." 2 Rowley, Modern Law of Partnership 1339 (1916).

"It is an undertaking by two or more persons jointly to carry out a single business enterprise for profit." Nelson v. Abraham, 29 Cal. 2d 745, 749, 177 P. 2d 931, 933 (1947).

"A joint adventure is a limited partnership, not limited in the statutory sense as to liability, but as to its scope and duration . . . ." Ross v. Willett, 76 Hun. 211, 213, 27 N.Y. Supp. 785, 786 (Sup. Ct. 1894).
Professor Mechem arrived at certain characteristic features which are not only excellent criteria of the existence of a partnership, but which also can serve as bases for comparison in an attempt to analyze the joint venture.\(^9\)

With one possible exception, there should be universal agreement that the characteristics outlined by Professor Mechem are applicable to both partnerships and joint ventures. Both are unincorporated associations; both are created by agreement and not by operation of law; both require two or more competent parties; both ordinarily involve contribution by all members; and both are carried on for profit. But if it is said that a joint venture, like a partnership, "contemplates the transaction of some lawful business, trade or occupation, in which the parties are to be co-owners and which they are to carry on as principals," some objections may be anticipated.

**Joint Control**

A partnership may contemplate the carrying on of the business by the members as co-owners or principals,\(^10\) and each partner ordinarily has a right to participate in the management,\(^11\) but this does not mean that every partner must be active in the conduct of the business or that the management may not by agreement be vested in less than all of the members.\(^12\) Ultimate control is with the partners, and only in the sense of ultimate control is it necessary that they carry on the business as owners. Ownership is indicative of proprietary interest, not managerial functions.

It was contended in *Sime v. Malouf* that on the facts no joint venture could exist since there was no joint control of the enterprise.\(^13\) The court dismissed the argument and pointed out that while joint control might be essential to the so-called joint enterprise which is the basis for imputation of negligence in tort, it is not necessary to a commercial joint venture where, as in the particular case, control may be placed in the hands of only one of the venturers. In this there is nothing to distinguish a joint venture from a partnership.

**Continuing Business—Single Transaction**

The most emphasized factor\(^14\) differentiating partnerships and joint ventures is that the former contemplate the carrying on of gen-

\(^9\) Mechem, *Elements of Partnership* 3 (2d ed. 1920).
\(^10\) Nelson v. Abraham, *supra* note 8, at 749, 177 P. 2d at 933; UPA § 6(1).
\(^11\) As to distinction between partnership and employment, see Note, 137 A.L.R. 6 (1942).
\(^12\) UPA § 24(3).
\(^14\) *Harmon v. Martin*, 395 Ill. 595, 612, 71 N.E. 2d 74, 83 (1947); *Comment, 18 Ford L. Rev. 114, 118 (1949).*
eral business with some degree of continuity while the latter come into being for the execution of a single transaction.\textsuperscript{15} However, "business" is defined by the Uniform Partnership Act to include "every trade, occupation, or profession."\textsuperscript{16} If a particular project is carried on and dealings conducted for profit, there is a doing of "business" within this meaning, even if the parties have joined to execute but a single business transaction, operation or enterprise.\textsuperscript{17}

Joint ventures are not so limited in scope or duration, nor partnerships so general and continuous as is indicated by the general business-single transaction distinction. In \textit{Harmon v. Martin} it was held that an agreement for a speculative purchase of real estate, to be subdivided, improved, sold, and the profits divided among the parties, created a joint venture.\textsuperscript{18} Although there was involved the making of many contracts and the carrying on of business over a period of several years, the court characterized it as "but a single specific enterprise for profit."\textsuperscript{19} In \textit{Pfingstl v. Solomon}, plants and shrubs were to be raised for retail sale.\textsuperscript{20} The relationship was held to constitute a joint venture even though numerous operations were necessary and no time limit was provided or contemplated. Thus a joint venture may embrace complex commercial transactions over a long period of time.\textsuperscript{21}

On the other hand, it is recognized that a partnership may exist to carry out a single operation.\textsuperscript{22} It is evident that the scope or number of transactions is not decisive as to the character of an association, but merely one factor, though an important one, which leads some courts to find a joint venture.

Factually a joint venture seems to be nothing more than a species of partnership with a limited scope or duration,\textsuperscript{23} while a general partnership is usually concerned with a more continuing line of business.\textsuperscript{24}

\textsuperscript{15} Tufts v. Mann, 116 Cal. App. 170, 177, 2 P. 2d 500, 503 (1931); 1 Rowe\textit{y, op. cit. supra} note 8, at 164; 2 id., at 1340; Mechem, \textit{supra} note 2, at 659; Comment, 18 Ford. L. Rev. 114, 118 (1949).
\textsuperscript{16} Section 2.\textsuperscript{17} "Much language is expended in the cases in emphasizing a distinction between 'business' and 'adventure' or 'enterprise' but there seems to be no very certain test for determining whether a given course of conduct comprises the one or the other." Mechem, \textit{supra} note 2, at 659, n. 48.
\textsuperscript{18} \textit{Supra} note 14.
\textsuperscript{19} \textit{Supra} note 14, at 612, 71 N. E. 2d at 83.
\textsuperscript{20} 240 Ala. 58, 197 So. 12 (1940).
\textsuperscript{21} Aside "from the element of contemplated continuity it is too plain for argument that joint adventures often require a much more extensive course of commercial dealings than partnerships." Mechem, \textit{supra} note 2, at 659.
\textsuperscript{22} Kaufman-Brown Potato Co. v. Long, 182 F. 2d 594, 599 (9th Cir. 1950); Westcott v. Gilman, 170 Cal. 562, 569, 150 Pac. 777, 780 (1915); Thompson v. O. W. Childs Estate Co., \textit{supra} note 12, at 554, 266 Pac. at 294; Tiedeck v. Pedrick, 122 N. J. Eq. 20, 22, 191 Atl. 751, 752 (1937); Note, 138 A. L. R. 968 (1942); 1 Rowe\textit{y, op. cit. supra} note 8, at 169.
\textsuperscript{23} Ross v. Willett, \textit{supra} note 8, at 213, 27 N. Y. Supp. at 786.
\textsuperscript{24} Tufts v. Mann, \textit{supra} note 15, at 177, 2 P. 2d at 503.
Ultimately the only distinction is one of fact and the usual factor conclusive of a finding of the existence of a joint venture is that the organization relates to a single venture or specific enterprise—somewhat vague terms.

SUPPOSED LEGAL DISTINCTIONS

That there is great legal similarity between joint ventures and partnerships cannot be denied. Courts often refrain from determining whether the relationship of the parties is one or the other, finding that such determination is not necessary to the solution of their specific problem. This fact, however, is of little value in proving that no legal differences exist, for no final conclusion is possible until all supposed legal distinctions have been examined.

Actions Between Associates: Equity or Law?

One of the imagined legal consequences of a particular association being a joint venture rather than a partnership is that a member may bring an action against his associate at law or in equity, while a partner is limited to an action in equity for an accounting. Such is not the law.

It is not correct to say that partners can only seek relief in equity, although many courts have declared that absent statute, fraud, or express provision, partners may not sue colleagues at law. To support such a proposition these courts have advanced various reasons: that until an accounting it is impossible to determine whether a partner is a creditor or a debtor, or whether there are outstanding debts which have priority; that a partner does not become the debtor of another partner, but of the firm; that the action in—


26 "But there is a considerable amount of law upon this subject [joint ventures], discussion of which here may well be regarded as academic, since it is a matter of absolutely no consequence, so far as the decision of this case is concerned, whether the relation created between the parties to this action is that of a partnership or a joint adventure...." Keyes v. Nims, supra note 25, at 9, 184 Pac. at 698.


29 Laughlin v. Haberfelde, 72 Cal. App. 2d 780, 165 P. 2d 544 (1946); Mayhew v. Craig, 253 Ill. App. 238 (1929); O'Toole v. O'Toole, 10 N. J. Misc. 159, 158 Atl. 337 (1932); see Cunningham v. de Mordaigle, supra note 25, at 622, 186 P. 2d at 424.

30 Mayhew v. Craig, supra note 29.

31 O'Toole v. O'Toole, supra note 29.
volves investigation which courts of law are not equipped to make.\textsuperscript{32} The rule is not of statute, but of convenience, and the reasons limit the rule. This is evidenced by the fact that courts recognize many situations where legal actions lie. Thus, the partner's action may be at law where the facts are such that no complex account concerning a variety of partnership transactions is involved,\textsuperscript{33} or where the action concerns a particular item of business which has been segregated by express agreement,\textsuperscript{35} or where there remains but one item to adjust and no accounting is necessary,\textsuperscript{36} or where there has been a breach of the copartnership by wrongful dissolution while the plaintiff has kept his covenant.\textsuperscript{37}

Nor is it to be concluded that a joint venturer may in all circumstances have an action at law against his colleague.\textsuperscript{38} It is true that a joint venture is frequently a very limited enterprise and its affairs may be of sufficient simplicity to make an accounting unnecessary to determine the rights of the parties. While it is thus clear that there \textit{may} be actions between joint venturers at law,\textsuperscript{39} this will not preclude an accounting in equity if such is required,\textsuperscript{40} and it may even be that an action \textit{must} be brought in equity.\textsuperscript{41}

The equity-law distinction between joint ventures and partnerships is without merit.\textsuperscript{42} Actions between associates of these organizations are governed by the same rules as are all other actions.

\textbf{Corporate Membership}

Some decisions lend support to the proposition that a corporation may not be a member of a partnership but may associate in a joint

\textsuperscript{32}McComas v. Turman, 116 W. Va. 91, 178 S. E. 630 (1935).
\textsuperscript{34}Elsback and Sons v. Mulligan, 58 Cal. App. 2d 354, 136 P. 2d 651 (1943).
\textsuperscript{36}Shuken v. Cohen, \textit{supra} note 33.
\textsuperscript{37}Triplet v. Trippett, 117 Cal. App. 466, 4 P. 2d 238 (1931).
\textsuperscript{38}Brudwick v. Frosaker Blaisdell Co., 56 N. D. 215, 216 N. W. 891 (1927).
\textsuperscript{42}This point is ably discussed in Berwin v. Cable, \textit{supra} note 41, at 434, 47 N. E. 2d at 953.
venture. This is not, however, a proper distinction. The important thing is to differentiate between those situations where membership of a corporation in a business association results in undue delegation of the authority of its directors, and those where it does not. A corporation is not forbidden from entering a partnership where the entire management and control is in the hands of the corporation, for in such case the dominion of the directors over corporate matters is undisturbed and the ultimate authority of the stockholders is unimpaired.

Whether a corporation may be a member of a joint venture should be decided by the same considerations as those determinative of the propriety of its membership in a partnership. While the simple, single operation of some joint ventures may be an important factor in deciding whether there is an undue delegation or the authority of the directors or managers of the corporation, the problem cannot be resolved by mere choice between the partnership and the joint venture.

The Uniform Partnership Act would in terms permit a corporation to become a partner, for a partnership is an association of two or more "persons," and the word "persons" is defined to include corporations. This not only has judicial support, but also leaves the question of corporate membership to be settled on the real issue: have the directors abandoned control to an extent that cannot be sanctioned?

Mutual Agency

Another supposed difference in legal consequence between partnerships and joint ventures relates to implication of mutual agency. It is commonly said that absent an agreement to the contrary the acts of a partner in carrying out partnership business bind the firm, while the acts of a joint venturer in similar circumstances do not.

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45 Section 6(1).

46 Id., § 2.

47 Memphis Natural Gas Co. v. Pope, 178 Tenn. 580, 161 S.W. 2d 211 (1941), aff'd, 315 U.S. 649 (1942).


49 Sime v. Malouf, supra note 12, at 96, 212 P. 2d at 953; Keyes v. Nims, supra note 25, at 9, 184 Pac. at 698.
Even in a partnership the extent of mutual agency is not infinite. The authority of each partner is limited, first by the scope of the partnership business, and again by the articles of copartnership or any other express or implied agreements.

There is no difference between partnerships and joint ventures as to the operation of express agreement to establish agency and define its limits. It would also seem that there should be no distinction as to implied authority of partners or joint venturers to act within the scope of their business. In the case of a general partnership the very process of forming the association, unless otherwise provided, clothes each party with the power to act, raising the inference that acts in apparently carrying on the firm's business are binding on it. A joint venture may also exist under circumstances which imply mutual agency, in which event there should be no hesitation in giving effect to such agency. The fact that there are many joint ventures where the scope of commercial operation is so restricted that authority of one venturer to represent the others should not be implied gives no support to an arbitrary rule that there is no mutual agency without express agreement.

As to implication of agency there is a marked difference between trading and non-trading business associations. From the mere formation of a non-trading venture, without other agreement, it can hardly be implied that the parties contemplate a mutual principal-agent relationship, for there is in no sense a manifestation of consent that any of the parties may act on behalf of the organization. The purposes of the business in such a case do not include commitments with third parties, and acts of a venturer so obligating the enterprise could not, by the very nature of the arrangement, be "apparently for carrying on of the business." Even if partnership law is directly applied, any implication of agency will be negatived by the character of the venture.

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51 People v. Van Skander, supra note 48.
52 An agent's authority may be actual or apparent, and either may be express or implied. RESTATEMENT, AGENCY §§ 7, 8, 26, 27 (1933).
53 Mechem, supra note 2, at 654; Nichols, supra note 4, at 447; Comment, 18 Ford L. Rev. 114, 127 (1949).
54 "The implied authority of the [joint venturers] to bind each other by contracts is usually very limited. Persons so situated who have acquired property which they are to hold until they unite in disposing of it do not usually contemplate or require any acts of agency by one; there are ordinarily no incidental contracts to be made; the parties intend to act unitedly when they act at all; and consequently there is no ground for implying any general authority in one to act for all. Only the consent of all, or the rare case of overpowering necessity, would create an authority." MECHEN, op. cit. supra note 9, at 20.
55 UPA § 9(2).
It is not uncommon for a joint venture to be formed which, though involving a degree of trading activity, specifies non-trading duties for one or more parties. Such an agreement may make no mention of agency, but it is implicit in its terms that the non-trading member is without authority to act for the association, while one or more other venturers may be agents. Thus, where one joint venturer is to furnish services as a furrier and the other is to furnish capital and sell the goods, it cannot be supposed that the agreement contemplates the former as an agent to market the finished product. Likewise, an agreement to remove ore from a mine does not imply authority to enter into trading arrangements.

One can but conclude that the principles of agency which apply to partnerships apply equally to joint ventures.

Dissolution

While the existence of a general partnership is precarious, being subject to dissolution by the express will or by the death of any partner, it has been supposed that this is not true of a joint venture, which must be continued until the realization of its object or the ascertainment that such realization is impossible.

The court in *San Francisco Iron Co. v. American Milling Co.*, held that a joint venture is not terminable at the pleasure of one of the parties. Since many joint ventures are created for the execution of a particular scheme or project, or are expressly limited in duration, it may well be concluded that by implication the agreement in these cases forbids dissolution until the venture has been completed. What is denied to a party under such circumstances, however, is his right to dissolve the business at will, while nothing abridges his power to withdraw without the consent of the other parties and subject himself to liability.

In this there is nothing to distinguish a partnership from a joint venture. A partner may dissolve a partnership without consent of the

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55 See the arrangement between the parties in Butler v. Union Trust Co., supra note 25.
56 Mechem, supra note 2, at 654; Nichols, supra note 4, at 447; Comment, 35 Mich. L. Rev. 297, 303 (1936).
57 UPA § 31(1)(b).
58 Id. § 31(4).
60 *San Francisco Iron Co. v. American Milling Co.*, supra note 39; Pöngstl v. Solomon, supra note 20, at 62, 197 So. at 15; Braddock v. Hinchman, 78 N. J. Eq. 270, 273, 79 Atl. 419, 421 (1911) (reaching the result by analogy with a partnership which is continued after death by express agreement); Pownall v. Cearfoss, 129 W. Va. 487, 502, 40 S. E. 2d 886, 896 (1946); Comment, 18 Ford. L. Rev. 114, 131 (1949).
other parties and without liability if the partnership is one where "no definite term or particular undertaking is specified." The fact that there is a definite term or particular undertaking will not disable a partner from withdrawing, but his election to do so will expose him to the risk of litigation.

The facts of Pfingstl v. Solomon did not involve a dissolution at will. Instead, one of two joint venturers had died and one question was whether this of itself dissolved the venture. Where a partner dies, the Uniform Partnership Act makes the apparently unqualified declaration that the partnership is dissolved. There is no suggestion of any exception. If this be so, and if there is any merit to the conclusion of the Solomon case that the death of a joint venturer does not necessarily dissolve the association, it may be that a real difference exists as to the legal incidents of a partnership and joint venture.

In fact, the rule of the Uniform Partnership Act as to dissolution on death is in no sense rigid, but has the same flexibility which is common to the entire act and which permits departures from its provisions, by agreement, in almost every particular. There is no doubt that the parties may by prior agreement continue a partnership irrespective of the death of a partner. As to joint venturers, such continuance by mutual agreement has been recognized, but there also is authority for the contention that it may be continued without prior agreement. The language of Pownall v. Cearfoss is indicative of the treatment to be expected:

The death of a co-adventurer does not necessarily terminate the enterprise .... The agreement, however, may expressly provide that on the death of one of the parties the survivor shall complete the enterprise, but even in the absence of such a provision, if capital is embarked in a joint adventure for a prescribed term, and the parties have clearly evinced an intent that it should remain in the business until the expiration of the term, it may not be withdrawn merely because of the death of one of the joint adventurers.

Two things of interest are to be noted of joint ventures which are not dissolved by the death of one party even though there is no pro-

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63 UPA § 31(1) (b).
64 Zeibak v. Nasser, supra note 25; UPA 38(2) (a) II.
65 Supra note 20.
66 Section 31(4).
67 Supra note 20, at 62, 197 So. at 15.
69 Pownall v. Cearfoss, supra note 60, at 502, 40 S. E. 2d at 896.
70 Supra note 60, at 502, 40 S. E. 2d at 896.
vision for continuation. First, dissolution requires winding up, and where a venture is limited in scope or duration a winding up may well be commensurate with completion of the venture. Second, an agreement to continue the relation after the death of one party may be implied as well as express. The *Pownall* case would allow a project to be continued after the death of one party without agreement if the "parties have clearly evinced an intent" that it should. This is a desirable result.

It may readily be recognized that where a partnership is limited in duration, or where its agreed purposes are near completion, the winding up of its affairs may, as with many joint ventures, be equivalent to execution of the entire undertaking. Is it also possible to apply to partnerships the doctrine that there may be implied agreements not to dissolve on the death of a partner? The Supreme Court of California held in *Zeibak v. Nasser* that the rights and liabilities of joint venturers as between themselves are governed by the same principles which apply to partnerships. Also, the death of a partner, who had a twenty per cent interest in the business and who had assumed the status of an investor, taking no active part in partnership affairs, did not work a dissolution, even though there was no express agreement that it should not. From the terms of the partnership agreement and the status of the deceased partner, the court inferred that the intent of the parties was to continue the business.

The *Zeibak* case clearly indicates that the provision of the Uniform Partnership Act which decrees dissolution on the death of a partner may be circumvented by implied as well as express agreements. There is therefore no reason why the death of a joint venturer should not have the same consequences as the death of a partner. The disparity between partnerships and joint ventures which some assert may thus be reconciled.

**Tenancy in Partnership**

A doubt has been raised as to the applicability to joint ventures of the property provisions of the Uniform Partnership Act. The uni-

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71 "Dissolution of a joint venture takes place when either party to the joint venture ceases to be associated in carrying on the common business as distinguished from the winding up of the business." Shearer v. Davis, 67 Cal. App. 2d 878, 879, 155 P.2d 708 (1945).

"The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." UPA § 29.

"On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Id. § 30.


72 Supra note 25.

73 Comment, 18 Ford. L. Rev. 114, 126 (1949).
form act specifies three types of property rights enjoyed by partners.\textsuperscript{74} One of these is the novel concept of tenancy in partnership, which was created by the act and is one of its constructive features.\textsuperscript{75} The other two are the partner's interest in the business, characterized as personalty,\textsuperscript{76} and his right to participate in the management.\textsuperscript{77}

The tenancy in partnership concerns the rights of partners in specific partnership property. The five incidents of this tenancy are:\textsuperscript{78}

(1) Equal rights of members to possess the property for purposes of the business, subject to agreement.

(2) Exclusion of charges on the property for dower, curtesy, and allowances to widows, heirs and next of kin.\textsuperscript{79}

(3) Non-assignability except in connection with an assignment by all.

(4) Exemption from attachment or execution except on a claim against the partnership.

(5) Vesting of a partner's right on his death in the survivors.

It would seem that the incidents of a tenancy in partnership are equally applicable to specific joint venture property, but one writer concluded that they "cannot be presumed to have [been] contemplated or desired" by joint venturers.\textsuperscript{80} He specifically questioned the last three incidents listed above, but failed to mention the others. He apparently assumed, and there is little doubt, that the first two apply to both joint ventures and partnerships. It is believed that application of the other three incidents to joint venture property would not only be unobjectionable, but also desirable and practical. This can be shown by an examination of these three incidents.

The purpose of providing that the right in specific property is not assignable except in connection with an assignment by all is to preserve the element of personal choice and the fiduciary relationship. If one member were free to assign his interest in specific property, an assignment by him would take property from the control of all the members of the association and place it under the management of non-assigning members and the grantee. The grantee would become a partner \textit{pro tanto}. This is emphasized by recognition of the principle that the right assigned could be no greater than that of the assignor, which is the right to possess the property for purposes of partnership.

\textsuperscript{74} UPA § 24.

\textsuperscript{75} Id. §§ 24(1), 25.

\textsuperscript{76} Id. §§ 24(2), 26.

\textsuperscript{77} Id. § 24(3).

\textsuperscript{78} Id. § 25(2) (a), (c), (b), (c) and (d).

\textsuperscript{79} In California the words "and is not community property" have been added. Cal. Corp. Code § 15025 (2) (e).

\textsuperscript{80} Comment, 18 Ford. L. Rev. 114, 126 (1949).
business. The assignee’s right would therefore be directly coupled to the partnership. The voluntary nature and fiduciary character of a joint venture compels the restriction of assignment to prevent such an incompatible result.

The provision that the right in specific property is not subject to attachment or execution except on a claim against the partnership follows from non-assignability. There would be little strength to a rule forbidding alienation by one member if personal creditors could nullify it by forcing involuntary assignment. The provision does not entirely defeat the creditors of an individual member, for there is also a provision in the Uniform Partnership Act making a partner’s interest, which is his share of the profits and surplus, personal property and specifically subject to being charged by a court in satisfaction of a judgment debt. There is nothing about a joint venture which indicates the need of a different result. Any sympathy for a venturer’s creditors should vanish when it is realized that the usual joint venture is of relatively short duration and that the surplus divided among the venturers on completion of the enterprise is part of a member’s “interest” which may in the meantime be made subject to receivership.

The final incident of tenancy in partnership is that on the death of a partner his right in specific property vests in the surviving partner or partners, but without right to possess except for partnership purposes. This carries over into the uniform act the right of survivorship necessary to partnerships. This necessity led early courts to hold that partners were joint tenants of partnership property. Absent express or implied agreement to the contrary, death of a partner or joint venturer dissolves the association and the only partnership or joint venture purposes which remain are those relevant to winding up the affairs and distributing the profits and surplus. To deprive the surviving members of control of the legitimate business of the organization, which becomes very restricted on dissolution, is to interfere unduly with expeditious winding up. Substitution of an executor, administrator, or personal representative of the deceased without agreement, express or implied, would defeat the right to personal choice of associates. The incident of survivorship is the solution for both partnerships and joint ventures.

Until reasons appear on which to predicate a distinction between

81 7 U.L.A. § 25 (2) (b), annotation at 145 (1949).
82 Id. § 25 (2) (c), annotation at 150 (1949).
83 UPA § 26.
84 Id. § 28.
85 7 U.L.A. § 25(1), annotation at 144 (1949).
86 UPA § 31(4); see text at notes 65 et seq. supra.
87 Id. §§ 29, 30; see text at note 71 supra.
specific partnership property and specific joint venture property, it is logical to conclude that the incidents of both should be coincident.

Legal Entity

A partnership is treated as a legal entity for certain purposes, but it has been contended that a joint venture can have no legal existence distinct from its members. However, California Code of Civil Procedure, Section 388, provides that when two or more persons associate in transacting business under a common name, the associates may be sued jointly by such common name. This statute is applicable to both the partnership and joint venture and clearly illustrates that a joint venture may be recognized as a separate legal entity just as a partnership may be so recognized upon occasion. The fact that in many instances a joint venture is so limited in scope or duration that a common or firm name is unnecessary and impractical is no reason to deny its recognition as an entity when otherwise proper under the uniform act and local statutes. Partnerships for limited operations, as well as for general business, are treated as entities for appropriate purposes, indicating that the mere difference in scope of business activity is of no importance in a determination of separate existence.

BUSINESS TRUSTS AND JOINT STOCK COMPANIES

It is not to be supposed that every type of business organization which might possibly be fitted into the broad partnership definition of the Uniform Partnership Act will be as indiscernible from a partnership as is a joint venture. The business trust is illustrative. It may involve the kind of proprietary co-ownership which differentiates a partnership from the association of principal and agent or master and servant, and even though by agreement it has centralized management, there may be nothing requiring the courts to distinguish it from a partnership, in which authority to manage may be delegated to one or more members.

Yet the Massachusetts court in State Street Trust Co. v. Hall felt it could not ignore the differences between an ordinary partnership

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88 Id. § 8(2); Cal. Code Civ. Proc. § 388; Ballantine, op. cit. supra note 43, at 6; Gleason v. White, 34 Cal. 258, 263 (1867).
89 Comment, 18 Ford. L. Rev. 114, 124 (1949).
90 DeMartini v. Industrial Accident Commission, supra note 35, at 149, 202 P. 2d at 835.
92 Mechem, supra note 2, at 660.
93 Ibid.
94 See Note, 156 A.L.R. 22 (1945).
95 See note 12 supra.
and a business trust, with transferable shares, which had most of the attributes of a corporation, even though the shareholders had control and were subject to unlimited personal liability. Transferable shares are incongruous with the normal right of partners to choose their associates. It was accordingly held that business trusts are not dissolved by notice or by death of a shareholder as they would be if governed by the Uniform Partnership Act.

Many courts use the "control test" in holding that when the power of control is reserved in the shareholders they become like partners with reference to personal liability. Unlimited liability in such situations has led some courts to speak of the shareholders as "partners," but this is merely descriptive of the nature of their liability and does not mean the association is a partnership subject to the uniform act.

This same doctrine should apply to unincorporated joint stock companies which are given most incidents of a corporation by contract. Absent statutes, the shareholders are subject to the partnership type of liability. As with business trusts, the transferable shares and the rules as to dissolution, as well as the usual absence of mutual agency, distinguish this form from partnerships. The joint liability of shareholders should not be sufficient to convert an intermediate, quasi-corporate form of organization into a partnership for all purposes.

CONCLUSION

A joint venture is a variety of partnership, distinguishable only by vague considerations of scope, duration or continuity of business, all of which relate to matters of degree rather than to essential differences in kind. It is impossible to formulate a definition or test which will satisfactorily segregate a joint venture from a partnership. Even if such a definition or test can be found, there are no differences in legal policy or rules which indicate that special consequences would follow.

As a species of partnership, the joint venture is in general governed by partnership law. This law is very elastic. Throughout the

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96 311 Mass. 290, 41 N.E. 2d 30 (1942).
97 Id., at 312, 41 N.E. 2d at 38.
98 Goldwater v. Oltman, 210 Cal. 408, 417, 292 Pac. 624, 672 (1930); Bernesen v. Fish, 135 Cal. App. 588, 598, 28 P. 2d 67, 72 (1933); Note, 156 A.L.R. 22, 42 (1945).
99 The court in State Street Trust Co. v. Hall, supra note 96, at 308, 41 N.E. 2d at 36, pointed out that the statements in Horgan v. Morgan, 233 Mass. 381, 124 N.E. 32 (1919) and First National Bank v. Chartier, 305 Mass. 316, 25 N.E. 2d 733 (1940) that the rules of partnership applied to business trusts where stockholders were subject to unlimited liability must be read in context and could not mean that the business trust under such circumstances was a partnership for all purposes.
100 BALLANTINE, op. cit. supra note 43, at 17; In re Agriculturist Cattle Insurance Co. (Baird's Case), 5 Ch. App. Cas. 725 (1870).
102 In re Agriculturist Cattle Insurance Co. (Baird's Case), supra note 100.