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WHAT CONSTITUTES A JOINT VENTURE†

Joseph Taubman*

IDENTIFYING THE JOINT VENTURE

The first problem in the classification of a set of facts such as the jural relationship of joint venture is that of identification. How does one know what constitutes a joint venture?¹

Unlike the corporation, it cannot be identified by reason of its form. The corporation, at least in this country, is a creation of statute. Unless the certificate of incorporation is in accord with the formalities required by law, incorporation will be denied. This is so regardless of theory or definition of a corporation.

The trust is also generally readily identifiable by its form. Classification of it may vary, however.² In different states, the business trust may be held to be a pure trust, corporation, or partnership.³ But in form, at least, there is a trust res, trustee, beneficiary, and many of the familiar incidents of a trust.

Even the partnership is, in the main, readily identifiable. The agreement in many instances is reduced to writing. This instrument is generally designated on its face as “Articles of Partnership.”

Contrast the joint venture. A written agreement of joint venture usually does not state explicitly that it is just that.⁴ Since this relationship is a conclusion of law, even pleadings need not refer to the term in so many words. Oral agreements of joint venture are even more troublesome. Oral corporations there may not be; oral trusts as a form of business organization there seldom will be. While there are oral partnerships, proof of a partnership in a trade or business is less difficult. Intent and purpose are paramount evidence of association to carry on a business as co-owners for profit. General and particular partnerships usually contemplate a span of time for the continuation of this relation-

† This article is based upon a section of a thesis written in partial fulfillment of the requirements for the Degree of Doctor of Juridical Science at the New York University School of Law.

* See Contributors’ Section, Masthead, p. 656, for biographical data.

¹ What constitutes a joint adventure is a question of law, but whether a joint venture existed has been held a question of fact. 48 C.J.S. § 16, at 875 (1947).


³ Note, 8 Tax L. Rev. 103, 105-06 (1952).

⁴ 1 Rabkin & Johnson, Current Legal Forms with Tax Analysis, 182-270 (1953). Like others agreements it may be implied. Hyman v. Regenstein, 222 F.2d 545 (5th Cir. 1955).
ship in a number of lines or a single trade or industry. The term "partnership" is well known to laymen, as are the concomitant risks of unlimited liability. Men do not enter into partnership lightly. Teleology is a great aid in identification even of the oral partnership.

But the joint venture does not enjoy ease of identification at all. Laymen scarcely know the term. The bar is aware of it mainly as a device to impose legal liability as an additional cause of action in a complaint. The bench has used the relationship to impose certain legal consequences of the relationship as a measure of justice.⁵

**DEFINING THE JOINT VENTURE**

Paradoxically, the term is easier to define than to identify. Joint venture is an association of two or more natural or juridical persons to carry on as co-owners an enterprise, venture, or operation for the duration of that particular transaction or series of transactions or for a limited time.

There are, indeed, a variety of definitions. Crane writes:

What is known as joint adventure is commonly a single undertaking, or a series of undertakings, not requiring the entire attention of the participants.⁶

A New York judge states:

A joint venture is an association of two or more persons in the nature of a partnership, to carry on a business enterprise for profit.⁷

Still another says:

A joint adventure is a limited partnership; not limited in a statutory sense as to liability, but as to scope and duration; and under our law, joint adventures and partnerships are governed by the same rules.⁸

In England, joint adventure is known as a special partnership and is governed by the same rules as ordinary partnership.⁹ Support for this view is found in Roman law, which speaks of a *societas rei unius* and *societas negotiationis aliquid*.¹⁰ The partnership for a particular thing or transaction was known to Roman law.

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⁶ Crane, Handbook of the Law of Partnership and other Unincorporated Associations 120 (1938).
¹⁰ Justinian's Digest XVII, 2.5; Buckland, A Manual of Private Roman Law 294 (2d ed. 1939).
A Joint Venture Classification

Why, then, a separate classification known as joint venture? The writers are virtually unanimous in this respect. According to them, the joint venture is a branch of partnership law which can best be so handled and which does not merit a separate classification.1

Nevertheless, the writers have not been able to undo the work of the American courts. One of these critics writes: "... the legal concept of the joint venture is of modern origin and is a creation of the American courts."2 An American court explains it as follows: "Its vogue arises from a desire to find words descriptive of joint enterprise yet not amounting to a partnership."3 Even in New York, the court writes: "... nor is it imperatively requisite that a legal partnership relation exist; there can be a joint venture without it."4

Moreover, the courts have sometimes referred to the joint venture as a quasi-partnership.5 Yet Sugarman writes: "A quasi-partnership is really no partnership at all."6 The confusion of terminology is rendered greater by the use of certain terms by the courts and writers as apparent synonyms such as joint enterprise, deal, and syndicate.7

Finally, the law of imputed negligence has been extended in certain states, under the name of joint venture or joint enterprise, to cover situations unrelated to business or profit. In Pence v. Berry the court said:

The joint venture, as a useful legal device, is therefore not limited to strictly business transactions, but may also find application in connection with enterprises having the attainment of pleasure as their sole objective, so long as the association of the parties is not motivated merely by a desire for social companionship.8

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6 Sugarman, Partnership 44 (2d ed. 1947).
One need not be dismayed at the extension of the notion of joint venture to the sharing of the expenses of an automobile trip to a college football game as in the Pence case. After all, the notion of partnership in Roman law was not limited to business or profit. Sohm writes that two socii could associate for the care of a dog.\textsuperscript{19}

Classification is a matter of selection.\textsuperscript{20} For the most part, the joint venture has been limited to business or financial operations. Since the vast majority of joint ventures are of this type, such limitation is proper. However, there should be nothing startling about a broader use as in the Pence case.

**Joint Venture Criteria**

Despite the variety of terms used, joint venture, joint adventure, quasi-partnership, joint enterprise, joint undertaking—the term in greatest vogue today is joint venture. Judicial decisions have enunciated a set of principles as the \emph{sine qua non} for the creation and existence of this relationship:

1. an agreement.
2. joint interest.
3. sharing of profits and losses.
4. control.
5. fiduciary relationship.
6. right to an accounting, unless the account is stated or simple.

1. **Agreement**

The joint venture is a contract and more. The societas of Roman law was a consensual agreement. The modern partnership is likewise an agreement, but it is more than that. It is a form and method of business organization and of doing business.

Joint venture, too, is born \emph{ex contractu}.\textsuperscript{21} Arising out of agreement, it is a form of business organization that is extremely varied and rich in content. Quite often, business men have a joint venture in mind when they make a “deal.” The civil law term, \emph{société momentanée}, seems to express its economic significance very well.\textsuperscript{22}

Ours is a society of mobility of titles.\textsuperscript{23} What is more, the very

\textsuperscript{19} Sohm, Institutes of Roman Law 406 (Ledlie translation 1907).
\textsuperscript{20} Pound, “Classification in Law,” 37 Harv. L. Rev. 933 (1924), taken from Hall, Readings in Jurisprudence 608 (1938).
\textsuperscript{21} Cf. tenancy in common and joint tenancy. See Freeman, Co-tenancy and Partition 177-78 (2d ed. 1886).
\textsuperscript{22} Ripert, Traité Élémentaire de Droit Commercial 321 (2d ed. 1951).
\textsuperscript{23} Cahn, The Sense of Injustice 55-92 (1949).
methods of doing business are accelerated as men engage in a variety of transactions either in the same or in related fields. As a most informal method of association, the joint venture is admirably suited for this purpose. It can be formed and dissolved quickly, and at a minimum of expense. It can be formed between corporations as well as individuals. All this can be done by way of contract, oral or written.

2. Joint Interest

The courts have stated as a caveat that the word "joint" means just that, i.e., together. Some res of the enterprise must be established. The adventurers must have a joint interest in the money, skill, or services contributed, and not a several one.

Thus, a pooling of funds for purchase for separate accounts is not a joint venture. There is no joint account or stock. In Hasday v. Barocas the court wrote:

It is not enough that two parties have agreed together to act in concert to achieve some stated economic objective. Such agreement, by itself, creates no more than a contractual obligation, otherwise every stockholder agreement would give rise to a joint venture. The fiduciary obligation arises upon the coagulation of property, profits, or other interests which the parties can then be said to hold jointly and which are made accessible to each other in terms of the confidential relationship which exists between joint associates.

Therein intention is paramount. There must be more than the mere unity of possession of tenants in common.

3. Sharing of Profits and Losses

There must be the sharing of adventure by the associates, i.e., the seeking of profits together with its correlative obligation of sharing of losses.

In testing for the existence of the relationship itself some sharing of profits or other gain in the achievement of the venture and some apportionment of the risks involved must be found.

Adventure denotes two things: (a) affectio societatis—the intention to


26 Freeman, Co-tenancy and Partition 150 (2d ed. 1886); 62 C.J., Tenancy in Common 401, 419 (1933).

associate as venturers; and (b) the purpose of sharing in the results, good or bad, of the venture.

In order to constitute a joint venture, it is not sufficient that the parties share in the profits and losses; but there must be, in addition, an intention of the parties to be associated together as partners, either as general partners, or for the more limited duration of a joint adventure.28

Other legal relationships may provide a community of interest in real or personal property.29 Thus, the common ownership as tenants in common, joint tenants, or tenants by the entirety provides some measure of community of interest. There may even be community of interest in ownership in severalty of separate floors of a house.30 Even a joint stock or joint account may provide a community of interest and still lack the element of association for a common venture. In the latter, the associates must agree to share profits and assume the risk of losses.31

In Usdan v. Rosenblatt, the court states: "It is not necessary to the existence of a joint venture that the parties share losses as well as profits."32 As authority for this proposition, Justice Rabin cites Mariani v. Summers.33 But in the Mariani case, the court wrote:

In net result, therefore, only a joint venture has been proved; and in determining the sum which plaintiffs may be entitled to receive the rule with respect to sharing of profits and losses as applied in the case of a partnership is to govern, that is, plaintiffs will share in the net profits only.

Justice Eder then cites Marston v. Gould,34 which reads in part: "A share in the net profits is an interest in the profits and implies a participation in the profits and losses."

Thus, even though there is no express provision for sharing losses, one may be implied.35 Whether expressly stated or implied, an essential ingredient in association in a joint venture is sharing of both profits and losses.

29 Porter v. McClure & Tourtellot, 15 Wend. 187 (N.Y. 1836).
30 Freeman, Co-tenancy and Partition 150-51 (2d ed. 1886).
32 93 N.Y.S.2d 862, 863 (Sup. Ct. N.Y. County 1949).
34 69 N.Y. 220, 223 (1877).
4. Control

In a recent unanimous decision, the Court of Appeals of New York reversed the appellate division's finding of a joint venture as a matter of law, between a broker and a seller, stating:

One finds nothing in the agreement about the parties pooling their efforts, about a mutual right to control the carrying out of the transaction, that plaintiffs were to share in the losses, or that they joined their interests, risks, and skills. (Emphasis added.)

Yet, of the four cases cited in support of this proposition, none contained any rule as to control. Three of them were partnership cases and only one pertained to a joint venture.

It is suggested that there are two components to this concept of control: (a) intuitus personae and (b) agency. Intuitus personae is the conception of personal characteristics of a partnership, arising from the fact that a partnership arises from choice of associates. From this principle follows that of delectus personae, which is one of the props underlying federal income tax classification. "Choose your partner" has as much significance here as in a square dance. Indeed, it has more. Its corollary in a partnership follows logically. Freedom of choice imports freedom to dissolve the relationship. Damages may result from such a breach, but the decision to end the relationship remains effective.

In the joint venture, laissez choisir is subject to the limitation that where the success of the venture will be jeopardized by the withdrawal, the court will permit the venture to continue to completion. This modification is also true of the special partnership of England where there is no separate classification of joint adventure.

Given freedom of withdrawal, such personal association can only be effective when each venturer is in a position to control as a matter of

39 This is the rule of Roman law, Buckland, A Manual of Private Roman Law 296 (2d ed. 1939), and of the French civil law, Code Civil art. 1865(5) (52d ed., Dalloz 1953).
41 Buckland and McNair, Roman Law and the Common Law 305 (2d ed. 1952).
WHAT CONSTITUTES A JOINT VENTURE? 647

law. Indeed, absent this mutual right of control, the entire theory of imputing negligence to a joint venture would collapse. Since, however, each associate presumably has the right of direction over the persons or instrumentality causing the injury, he can be held responsible in damages. Vicarious liability in this respect is an extension of the law of principal and agent. Each associate in a venture is principal and agent for the other. Mutual agency is fully operative in a joint venture, even though the scope of the agency may be restricted by the terms of the agreement. Within the scope of authority, each venturer, as principal, may control the action of his associates, and vice versa.

Such a conception of control must be distinguished from the test used by a number of states for classifying business trusts, syndicates, and a variety of unincorporated associations as partnerships. In those, the courts are referring to an objective test based upon the language of the instrument creating the entity. There the test is the degree of delegation of authority to the representative. If the transfer of management is great, then there is no effective control by the inactive associates. If a measure of power is vested in the latter, then in those jurisdictions, the entity is held to be a partnership.

Logic must be supported by history to sustain such a view. The classic partnership was modified in time. Unincorporated associations were held to be partnerships even though the personal characteristics of such associations were all but gone, as in the joint-stock company and the business trust, and with them, the notion of mutual agency. It is clear, then, that the Court of Appeals had the classic partnership in mind when it referred to control.

5. Fiduciary Relationship

Actually, control is less important in a joint venture than delegation of authority to the associate. The entire fortune of the grantor of such powers may be at stake in unlimited liability. In most instances, control cannot match the risks of reliance. To protect the associate as

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44 Brown v. Bedell, 263 N.Y. 177, 188 N.E. 641 (1934). "... The subscribers ('of the syndicate') created a pooling agreement or agency and did not create a quasi legal entity. ..." Id. at 189, 188 N.E. at 644. "The agreement is one of joint venture when the subscribers retain some degree of ownership and control over the property which they put into the pool." Id. at 187, 188 N.E. at 643.
principal, the law has developed the notion that the joint venture is a fiduciary relationship.\(^{45}\) One may not profit at the expense of the others by knowledge gained as their agent.

In *Endries v. Paddock* the court said:

Kuykendall owed to Kingsbury more than ordinary honesty. His possession and interest in the mortgage was that of a trustee. The quality of his conduct was measured by the standard required of an executor, administrator, or trustee of an express trust.\(^{46}\)

Compare this rule with that of a tenancy in common:

In the absence of statute or agreement to the contrary, where one co-owner of property collects the rents and profits of the whole, he does it not in the capacity of agent, but in that of owner, although he may be regarded as a representative of his cotenants, and he holds the money received in excess of his share not as a trustee, but as a debtor.\(^{47}\)

6. Accounting

As a fiduciary, each associate is held accountable to the other.\(^{48}\) Such an accounting is generally in equity.\(^{49}\) As Pomeroy wrote:

The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief.\(^{50}\)

But there are exceptions. If a share of the profits of a joint venture can easily be ascertained by a simple computation, no accounting is necessary.\(^{51}\) An action at law is good where there are no debts or mutual accounts to be adjusted and nothing to be done except to divide profits or contribute to losses.\(^{52}\) Indeed,

... if damages result from the breach of a covenant sounding in joint venture but which exclusively belong to the one whose damages can be

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\(^{47}\) 62 C.J., Tenancy in Common 401, 405 (1933).


\(^{50}\) 4 Pomeroy, Equity Jurisprudence § 1421 at 2801 (3d ed. 1905).

\(^{51}\) Felbel v. Kahn, 29 App. Div. 270, 51 N.Y. Supp. 435 (1st Dep't 1898). However, where plaintiff pleaded joint venture, defendant's motion to vacate a warrant of attachment was granted since the warrant must be for an account stated in the original papers and the defect may not be cured by amendment. Montenegro v. Roxas, 141 N.Y.S.2d 681 (Sup. Ct. N.Y. County 1955).

recovered without the taking of an accounting or other resort to equity machinery, the jurisdiction of equity over such matters as quasi partnership is not exclusive nor necessary.\textsuperscript{53}

**Norms**

In a sense, the foregoing principles are deceptive. The legal incidents of a joint venture spelled out above are basically rules of partnership law. The similarity of the partnership and the joint venture has prompted writers to the view that the joint venture is just a branch of partnership law and should be abandoned at a separate classification.\textsuperscript{54}

Unfortunately for them, even legal classification must depend upon the facts of life if it is to have any validity. For example, writers today use the term "classic partnership"\textsuperscript{55} for the norms defined and described in the Uniform Partnership Act. The incidents of this relationship, \textit{i.e.}, the classic form, comprise the core of the law of partnership. The Uniform Partnership Act serves this purpose in two ways: (a) by codifying, to a great extent, the law of partnership,\textsuperscript{56} and (b) by establishing rights and duties among partners \textit{inter sese} and between them and third parties in the absence of other agreement on those matters.

Nevertheless, such a legal framework cannot be inflexible. Deviations from the norm will occur qualitatively since a norm is but a distillation or idealization of the concrete experiences of life. In short, a norm imports assembly of a congeries of similar facts and experiences into categories of relationships. The sanctions imposed by the state give such norms the force of law.\textsuperscript{57} Thus, legal norms are the sum and substance of classification. As such, however, they are not independent of life itself, but on the contrary, are modified by experience.

**Joint Venture Characteristics**

The joint venture has been separately classified by the American courts because its factual patterns and legal incidents began to deviate considerably from the classic partnership. The joint venture has been characterized by the following incidents:

1. mobility
2. frequency

\textsuperscript{54} See articles cited note 11 supra.
\textsuperscript{56} N.Y. Partnership Law §§ 4, 5; the same in Uniform Partnership Act §§ 4, 5.
3. diversity of factual patterns
4. confusion with other relationships
5. use of this resulting confusion for hindsight legal maneuvering
6. incomplete formulation of its principles of law
7. lack of planning for the joint venture.

1. **Mobility of Association**

The essence of joint venture is intent to associate for the time being, either by way of a single or determinable series of transactions or for a limited time. Modern commercial society increases the possibilities and opportunities for short-term association for profit. Concomitantly, speculation, the taking of risks for gain, increases. Rapid technological change forces certain branches of industry to seek a spreading of risk of loss. Interdependence, acceleration of transportation, and easier communication contribute to making short-term joint economic activity desirable, if not necessary. Thus, persons, legal and natural, perforce enter into joint enterprise. Much of it arises in the course of the major economic activity of such persons. As much, perhaps, arises from "deals" which are incidental, yet often substantial activities of such persons.

2. **Frequency**

Consequently, the number of joint ventures entered into annually is tremendous. No statistics have probably ever been collected on the subject. The reasons for this are (a) it is doubtful whether most joint ventures ever file the certificate of doing business required of partnerships, or are even required to do so, and (b) most informal joint ventures never file a Federal Income Tax Partnership Return.

3. **Diversity of Factual Patterns**

The number and scope of joint ventures are so difficult to estimate because of the variable fact patterns which can scarcely be grouped in any coherent fashion. Attorneys, for example, enter into partnership in a formal manner, but the variety of other associations entered into by them is legion. Many of these take the form of joint ventures rather than employer-employee relationships and are informal, oral agreements.

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61 Rogers v. Aronstein, 185 Misc. 999, 57 N.Y.S.2d 858 (Sup. Ct. N.Y. County 1945). Agreement between two attorneys with third, all to render legal services in pending federal court action, was in the nature of a joint venture.
Other informal types that abound are co-brokerage and promotional undertakings at their inception. More formal types are investments, usually in stocks or real estate or in oil and gas leases, and intercorporate undertakings. These are usually elaborate, carefully drawn documents which are seldom denominated as joint ventures. Quite often an industrial pattern will be criss-crossed with a variety of both formal and informal agreements as in motion pictures.

Still another facet of this mosaic is the large number of "deals" entered into where one or more of the principals is a silent joint venturer, undisclosed to third parties.

Therefore efforts at classification solely by collection of specific factual patterns of the decisions cannot be considered too helpful in determining what constitutes a joint venture. It may be useful to the practitioner looking for a case in point, but it does not bring the usual beneficial results of formulation of doctrines by use of the method of inductive reasoning of the common law. This is so because parties enter into such agreements giving little or no thought to the fact that they might thereby become joint venturers. They know when they are partners, or shareholders in a corporation, but they generally do not know when they are joint venturers.

4. Confusion with Other Relationships

With respect to the informal types of agreement, the parties often do not consider or even contemplate that the occasion will ever arise making necessary the inclusion of many points in their agreement. For example, A and B agree to share their profits and commission from a given venture equally. They do not contemplate losses, and so fail to provide for any, or else never even raise the matter because the possibility of losses seems so remote. There may be similar omissions with respect to the method of handling expenses incurred or to be incurred by A and B.

The net result of such informality is the erosion of many of the familiar landmarks of partnership law and accounting. The terms of the relationship, other than the fact of profit sharing, may be so shadowy that it might easily be considered something else, e.g., a debtor-creditor transaction, a brokerage agreement, an employment contract, an agreement to finance an operation does not constitute the lender a joint adventurer with the borrower; and this is true even where the profits resulting from
independent contractor agreement, an agency, or a lease.

5. Hindsight Legal Maneuvering

This confusion with other legal relationships has had a deleterious effect on the development of the law of joint venture. Attorneys have paid greater attention to the label of joint venture by way of hindsight than to any other phase of this body of law. The legal consequences flowing from the tag have been the preoccupation of attorneys in this field. If counsel wants equitable relief, an accounting, and the law of fiduciaries to apply, he will allege that A entered into a joint venture with B. Or, if A sues for his share of the profits on some other theory, B will set up a defense of joint venture in order to offset A’s share by losses suffered.

Perhaps the reason for this has been the penchant of the courts for applying the concept of joint venture as a device for doing justice.

the venture were to be divided between the operator and the person advancing the money.


Hutchinson v. Birdsong, 211 App. Div. 316, 207 N.Y.Supp. 273 (1st Dep’t 1925) (plaintiff was manager of defendant’s department store for salary plus percentage of profits and losses); La Dreire v Martin, 56 N.Y.S.2d 436 (Sup. Ct. N.Y. County 1945) (plaintiff to get $15,000 plus 50% of profits).

Cooper v. Henkind, 56 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1945) (subcontractor owning sewing machine plant aided contractor in getting work and then performed same for latter at agreed price plus percentage of profits).


Peslin v. Haxton Canning Co., 274 App. Div. 144, 80 N.Y.S.2d 869 (3d Dep’t 1948), aff’d, 299 N.Y. 477, 87 N.E.2d 522 (1949) (plaintiff working defendant’s land under lease for 50% of profits held to be landlord-tenant relationship). Note that in footnotes 63-68 supra, “the profits referred to were simply a measure of compensation which plaintiff was to receive in the event of success.”

See, for example, Leitner v. Wass, 63 N.Y.S.2d 350 (Sup. Ct. N.Y. County 1946), in which an effort was made to spell out a joint venture from an antenuptial agreement.

Medaris v. Rubinstein, 199 N.Y. Supp. 1 (Sup. Ct. N.Y. County 1923). Plaintiff entrusted money to defendant to buy and resell cameras, profits to be divided equally. Through no fault of plaintiff, the money was used for other purposes. The court imposed a fiduciary relationship of joint venturer on defendant. Brown v. Leach, 189 App. Div. 158, 178 N.Y. Supp. 319 (1st Dep’t 1919) (defendant attempted to freeze out plaintiff in order to secure profits for itself); Hollister v. Simonson, 18 App. Div. 73, 45 N.Y. Supp. 426 (2d Dep’t 1897) (sale of real estate purchased jointly by plaintiff and defendant.
WHAT CONSTITUTES A JOINT VENTURE?

Consequently, counsel have used the joint venture in a great variety of pleas. The courts, however, have not hesitated to defeat such pleas where the notion of joint venture might work injustice.\textsuperscript{71}

6. **Incomplete Formulation**

Such confusion is bound to arise when the law of joint venture has not been fully elaborated. For example, does the equitable doctrine of marshalling assets apply to a joint venture? If the venture has most of the characteristics of a classic partnership as to scope, duration, and intent, then the doctrine would probably be applied.\textsuperscript{72}

On the other hand, what is the relationship of joint venturers in the ownership of property? *Corpus Juris Secundum* considers them tenants in common,\textsuperscript{73} citing a Supreme Court decision as authority—but *Clark v. Sidway*\textsuperscript{74} predates the Uniform Partnership Act. In those states that have adopted the Uniform Partnership Act does the joint venture thereafter hold title to land as a tenancy in partnership? Consider this statement from *American Jurisprudence*:

> While a contract of joint adventure is not personally binding on the heirs of the parties thereto, still where real estate which is the subject of a joint adventure descends to the heirs of the parties, it is subject to the trust imposed for the benefit of all the parties, and other parties to the adventure can enforce the trusts to the extent necessary to secure their share of the profit of the joint adventure.\textsuperscript{75}

If joint venturers are to be considered as holding land as tenants in common, then they too are subject to the same problems of the uncertain nature of partnership holding of land prior to, or in the absence of

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\textsuperscript{72} Olmsted Hotel, P-H. 1952 T.C. Mem. Dec. ¶ 52,209, stipulation dismissing appeal, P-H. 1953 T.C. Mem. Dec. ¶ 71,110. Tax court in holding there was no association found as a fact that the petitioners had entered into an "Agreement of Joint Adventure" for operation of a hotel upon acquisition of a lease running from the year 1945 to the year 2011. See Cain's Adm'r v. Hubble, 184 Ky. 38, 211 S.W. 413 (1919).

\textsuperscript{73} 48 C.J.S. § 7 at 834 (1947).

\textsuperscript{74} 142 U.S. 682 (1892).

\textsuperscript{75} 30 Am. Jur., Joint Adventures § 42 at 700 (1940).
the Uniform Partnership Act. On the death of a co-tenant, his heirs will succeed to ownership of a fractional share. To offset such rigidity, the courts have resorted to theories like equitable conversion to achieve a more just result.76

7. Lack of Planning for the Joint Venture

With such major aspects of the joint venture uncertain or unsettled, it is in many ways a rudimentary form of business organization. To the writer's knowledge, there is not a single treatise on the subject to formulate and elaborate its incidents on a systematic basis.

Yet the problems of the practitioner demand solution. If natural or juristic persons, A and B, enter into joint enterprise, counsel ought to be in a position to consider the joint venture as one method of organizing and carrying out the project. Sometimes, it may be the best way. The hindsight of litigation is of small assistance to a practitioner at the inception of a deal. He must foresee possibilities and probabilities arising out of this as well as other relationships. This implies planning for the joint venture, planning in all its ramifications—organization, operation, and termination.

In the more formal types of joint enterprise, counsel has the opportunity of draftsmanship to spell out the details of the relationship. Contrariwise, in informal ventures, where a written instrument, if any, covers only the barest elements, the practitioner's problems are legion. Can he properly plan a joint venture where the parties or the nature of the transaction preclude detailed elaboration?

Only by the process of "just imagine," i.e., thinking through the ramifications of his given fact situation, based upon the decision and authorities and his own reasoning, will he overcome the handicap of mere oral agreements or short written ones. Perhaps he ought to prepare a joint venture check list as a guide in organizing joint ventures; next, he should carefully weigh each facet of the joint venture relationship as it impinges upon his fact situation. At times, he may have to resort to logic and improvisation where the factual pattern is uncharted by the authorities. Where the parties desire or the circumstances call for informal agreement, he should consider writing a memorandum setting forth an explanation of the advice given. Its chief value will be to shed light on the intent of the parties at the inception of the relationship.

76 1 Powell, Real Property 481-516 (Natural Persons as Unincorporated Groups—Capacity to Hold Land), at 507-12 (Partnerships—Apart from Uniform Partnership Act) (1949).
Consequently, shifting ground at a later date by affirming or denying the relationship will be less likely to succeed.

In an age of planning—estate planning, tax planning, etc., the prospect of bringing order to this basic form of associational life of business organizations is not more of a dream than the mastery of the atom in physical science proved to be. It is a challenge that can and will be met.