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Agency –Joint Ventures –Nebraska Supreme Court Refuses to Disturb Jury Determination of a Sharecropping Arrangement as Constituting a Joint Venture –*Fangmeyer v. Reinwald,* 200 Neb. 120, 263 N.W.2d 428, 1978

by

Gerald B. Buechler, Jr.

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AGENCY—JOINT VENTURES—NEBRASKA SUPREME COURT REFUSES TO DISTURB JURY DETERMINATION OF A SHARECROPPING ARRANGEMENT AS CONSTITUTING A JOINT VENTURE—*Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978).

INTRODUCTION

When two or more persons associate together in a business context and combine their respective resources toward the accomplishment of a shared objective, an event of legal significance may have occurred. If certain elements are present, the law may denominate the association a joint venture or joint adventure.[1] Once the requisite elements of this relationship are established, one result is the joint and several liability of each associate for the negligent conduct of any associate acting within the scope of the venture.[2]

Because the joint venture relation requires no formalities in formation or dissolution and may have its entire basis in an informal agreement that need not even be expressed,[3] this device may offer attractive advantages for those in search of a convenient mode of doing business.[4] At the same time, however, because the joint venture is created and its contours defined with such ease and subtlety,[5] it may also be a snare for those who are unaware of the legal consequences that may result from such an association.[6]

In the case of *Fangmeyer v. Reinwald*,[7] the Nebraska Supreme Court was presented with a unique factual setting for the application of joint venture principles. In addition, because this case arose in the context of a sharecropping arrangement between two farmers, the decision is of particular importance in view of the prominent role played by agriculture in Nebraska.[8]

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1. A joint venture is a joint adventure. Meyers v. Lilliard, 215 Ark. 355, —, 220 S.W.2d 608, 610 (1949); *accord*, Bradbury v. Nagelhus, 132 Mont. 417, —, 319 P.2d 503, 509 (1957). The term "joint venture" is more commonly found in modern decisions, Nichols, *Joint Ventures*, 36 VA. L. REV. 425, 430 (1950), and will be used herein to denote that association.

2. *See* notes 75-81 and accompanying text *infra*.

3. *See* note 50 and accompanying text *infra*.

4. Taubman, *What Constitutes A Joint Venture*, 41 CORNELL L.Q., 640, 650 (1956).

5. *Id.* at 640-41.

6. A. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP § 35, at 194 (1968). "It is a great mistake to think (as some businessmen do) that a joint venture offers significant protection from liability." *Id.*

7. 200 Neb. 120, 263 N.W.2d 428 (1978).

8. 200 Neb. at 136, 263 N.W.2d at 437 (McCown, J., concurring in part and dissenting in part). In his dissenting opinion in *Fangmeyer*, Judge McCown noted:

The purpose of this casenote is to examine the concept of the joint venture in American law and to evaluate the court's application of joint venture principles in *Fangmeyer*. Particular emphasis will be placed upon the element of profit sharing and the jury instruction given in the case at trial.[9]

FACTS AND HOLDING

This case arose out of a collision between a pickup truck driven by the plaintiff and one driven by the co-defendant, Mark Reinwald. The plaintiff commenced his action in the district court of Thayer County, alleging that the collision was proximately caused by the negligence of Reinwald. The plaintiff further alleged that Reinwald and Henry Virus, the other co-defendant in the case, were engaged in a joint farming venture,[10] and that at the time of the collision Reinwald was conducting the business of the joint venture.[11]

At trial before a jury, there appeared to be no dispute as to the essential facts concerning the relationship between Virus and Reinwald.[12] The evidence indicated that Mark Reinwald and his wife and children lived on the Virus farm.[13] Although not related to the Viruses, Reinwald had lived with them since he was thirteen years old and regarded Henry Virus as a father.[14]

For some ten years, Virus and Reinwald operated the farm together according to an informal oral agreement.[15] Under the terms of this agreement, Virus furnished all the land, almost all the farm equipment,[16] and bore all the operating expenses of the farm.[17]

"Hundreds of farm families in Nebraska have similar informal arrangements of various kinds based on crop shares." *Id.*

9. Although the *Fangmeyer* case presented the additional issues of contributory negligence, and, in the joint venture context, the issue of control exercised over the farm operation, 200 Neb. at 121-22, 263 N.W.2d at 429-30, the analysis here is restricted to the profit sharing aspect of the case and the jury instruction given at trial.

10. 200 Neb. at 121, 263 N.W.2d at 430.

11. *Id.* Reinwald was en route to a nearby town to check on repairs being made on a tractor of Virus at the time of the collision. Although the facts are not explicit on this point, Reinwald seems to have been alone in the truck. *See id.* at 122-24, 263 N.W.2d at 430-31; Brief for Respondent at 7-8, Fangmeyer v. Reinwald, 200 Neb. 120, 263 N.W.2d 428 (1978).

12. 200 Neb. at 135, 263 N.W.2d at 436 (McCown, J., concurring in part and dissenting in part).

13. *Id.* at 130, 263 N.W.2d at 433-34.

14. *Id.* at 130, 263 N.W.2d at 434.

15. *Id.*

16. *Id.* Virus' equipment consisted of a pick-up truck, a one-and-one-half ton truck, four tractors, two plows, a cornpicker and a combine. Brief for Respondent at 18.

17. *Id.* The court noted that Virus bore "all expenses such as fertilizer and

Reinwald, on the other hand, provided three farm implements,[18] and he and Virus both worked full time on the farm.[19] According to their agreement, Virus received two-thirds of all the grain produced on the farm, and Reinwald received one-third.[20]

Apart from this agreement, each party individually owned some livestock which was kept on the farm premises,[21] and each party maintained a separate store of grain to feed their animals.[22] No formal partnership was ever established between Virus and Reinwald, and each filed separate individual income tax returns.[23] In addition, it was stipulated that there were no assets jointly owned by the two farmers,[24] and, although the truck involved in the collision had been previously owned by Reinwald, Virus purchased it from him several months before the accident.[25]

Although some testimony indicated that Virus exercised the ultimate decision-making authority over the farm operation, there was also testimony indicating that the two conferred with one another on farm matters and that Reinwald made some independent decisions.[26]

At the close of the evidence, the court found as a matter of law that the plaintiff was not contributorily negligent.[27] Virus then moved for a directed verdict in his favor on the issue of joint venture.[28] This motion was denied,[29] and the jury, after receiving instruction from the court on the joint venture issue,[30] returned a

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seed." *Id.* Reinwald did apparently provide some fuel and repairs for his implements. Brief for Appellant at 7. However, the plaintiff conceded that Virus paid for the fertilizer, seed, and "*all* other expenses." Brief for Respondent at 18 (emphasis added).

18. *Id.* Reinwald's equipment consisted of a pick-up truck, a lister, a hay conditioner, a sprayer, and "some other minor pieces of equipment." *Id.*

19. *Id.*

20. *Id.* The grain consisted of corn, milo, and wheat. *Id.*

21. *Id.*

22. *Id.* However, this grain was apparently stored in a common bin. *See* Brief for Appellant at 6; Brief for Respondent at 18.

23. Brief for Respondent at 18. The defendants also stated that they maintained separate business records. Brief for Appellant at 7.

24. Brief for Appellant at 7.

25. 200 Neb. at 130-31, 263 N.W.2d at 434. The court noted that

> Reinwald usually used his own truck when farming, but the Virus truck was available for his use whenever he needed it for farming purposes. He did not need Virus' permission to use the truck, but usually told Virus if he was going to use it. Reinwald's own truck was available on the day of the accident, but he used the Virus truck because it got better gas mileage.

Id.

26. *Id.* at 132, 263 N.W.2d at 435.

27. *Id.* at 121, 263 N.W.2d at 430.

28. *Id.* at 122, 263 N.W.2d at 430.

29. *Id.*

30. *See* note 153 and accompanying text *infra*.

verdict for the plaintiff and against both defendants.[31] Subsequently, the defendants moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial on the joint venture issue, both of which were denied.[32]

The defendants took this appeal, contending that the issue of contributory negligence should have been submitted to the jury, and that the joint venture issue should have been removed from the jury because, as a matter of law, their relationship did not constitute a joint venture.[33]

On appeal, the surpeme court ruled that the trial court had erred in removing the issue of contributory negligence from the jury,[34] but held that the court's submission of the joint venture question to the jury was not error since it could not be said as a matter of law that the Virus-Reinwald relationship did not constitute a joint venture.[35] The majority admitted that the relationship between the defendants was difficult to characterize, but found the evidence sufficient to permit the jury to find that Virus and Reinwald had entered into an agreement to operate the farm together, that each had a common purpose and community of interest in the object of the undertaking, and that each had an equal voice in controlling the manner in which the undertaking was performed.[36] Thus, the majority concluded that the trial court had not erred in submitting the joint venture issue to the jury.[37]

Judge McCown concurred with the majority's opinion regarding the question of contributory negligence, but dissented as to the joint venture issue, positing that, as a matter of law, the relationship did not constitute a joint venture.[38] It was his position that the evidence in the case indicated that Virus and Reinwald did not intend to create a joint venture relationship, but only a crop-sharing lease arrangement.[39] Further, he asserted that the defendants did not share an equal voice in the performance and control of the farm operation, and that there was no true sharing of the profits from the undertaking, but only a sharing of crops produced on the

31. 200 Neb. at 122, 263 N.W.2d at 430. The jury awarded the plaintiff $47,958 in damages.
32. *See id.*; Brief for Appellant at 2.
33. *See* 200 Neb. at 122, 263 N.W.2d at 430; Brief for Appellant at 2.
34. 200 Neb. at 129-30, 263 N.W.2d at 433.
35. *Id.* at 133, 263 N.W.2d at 435.
36. *Id.* at 132-33, 263 N.W.2d at 435.
37. *Id.* at 133, 263 N.W.2d at 435.
38. *Id.* at 134-36, 263 N.W.2d at 436 (McCown, J., concurring in part and dissenting in part).
39. *Id.* at 135, 263 N.W.2d at 436 (McCown, J., concurring in part and dissenting in part).

farm.[40]

In order to gain a proper perspective of the joint venture question presented in *Fangmeyer*, it will be useful initially to arrive at a general understanding of the joint venture concept in American law and the nature of the liability that inheres in the joint venture.

BACKGROUND

The joint venture, as a commerical device, has a long history, with roots dating back to the mercantile practices of ancient times.[41] In the modern setting, the joint venture method of doing business possesses qualities of convenience and versatility that make it particularly well adapted to the demands of a highly technological and rapidly changing economy.[42]

Despite its long history and frequent use, however, the courts have not succeeded in developing any uniform definition of the joint venture.[43] In the most general of terms, the joint venture is defined as

> an association of two or more persons to carry out a single business for profit which is usually, but not necessarily, limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years. Another definition is that it is a limited partnership—not limited in a statutory sense as to the liabilities of the partners, but as to its scope and duration.[44]

Although there is a similar lack of unanimity as to the characteristics of the joint venture,[45] judicial decisions state the following elements as the sine qua non of the 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."[46]

The relationship is said to arise wholly ex contractu and cannot be imposed by law[47] and, therefore, the intention of the parties

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40. *Id.*

41. Jaeger, *Joint Ventures: Origin, Nature and Development*, 9 AM. U.L. REV. 1, 2 (1960).

42. *See* note 4 and accompanying text *supra*.

43. Jaeger, *supra* note 41, at 5.

44. 1 CAVITCH, BUSINESS ORGANIZATIONS § 13.05, at 677 (1978). For a similar general definition, see 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 318, at 555 (3d ed. 1959).

45. *See* A. BROMBERG, *supra* note 6, § 35 at 170.

46. Taubman, *supra* note 4, at 643. *See generally* Beck v. Cagle, 46 Cal. App. 2d 152, —, 115 P.2d 613, 618 (1941); Ford v. McCue, 163 Ohio St. 498, —, 127 N.E.2d 209, 213 (1955).

47. Nichols, *supra* note 1, at 434-35. "Underlying every joint venture, and constituting its very warp and woof, is the contract between the parties, express or

is given particular weight in this formulation.[48] Accordingly, the existence of the joint venture is regarded as a question of fact to be determined by the jury upon proper instruction from the court.[49] As noted above, no particular form of expression is necessary to create this agreement, as an agreement to enter into a joint venture may be inferred from the mere conduct of the parties.[50]

In addition, the parties should have a joint and not merely several interest in the property, money, assets, skill or knowledge contributed by each co-venturer to the undertaking.[51] Thus, a mere pooling of these items for the benefit of each member severally is not sufficient.[52] Stated another way, the co-venturers must have a

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implied. . . . It arises wholly *ex contractu*." *Id.* This statement requires some qualification. First, while the joint venture will ordinarily be created by mutual agreement, the familiar principles of estoppel may be invoked to preclude the parties from denying the existence of such a relationship where they have held themselves out as joint venturers. *See, e.g.*, Bryce v. Bull, 106 Fla. 336, 143 S. 400 (1932); John's Inc. v. Long Island Garden Center, Inc., 49 Misc. 2d 1086, 269 N.Y.S.2d 231 (Dist. Ct. 1966); Garrison v. Place, 92 Ohio App. 239, 109 N.E.2d 569 (1952); Babcock Co. v. Katz, 121 Ore. 64, 253 P. 373 (1927). However, an estoppel to deny the existence of a joint venture or partnership relation will not ordinarily support an action in tort alleging vicarious liability of the associates. Painter, *Partnership by Estoppel*, 16 VAND. L. REV. 327, 335 (1963). *But see* Rhone v. Try Me Cab Co., 65 F.2d 834 (D.C. Cir. 1933); Manning v. Leavitt Co., 90 N.H. 167, 5 A.2d 667 (1939); Hannon v. Siegel-Cooper Co., 167 N.Y. 244, 60 N.E. 597 (1901). *See also* RESTATEMENT (SECOND) OF AGENCY § 267 (1958). Second, in the law of corporations, the relationship may be imposed upon the incorporators of a defectively organized corporation, so that "[i]f the incorporators, before the corporation has been legally completed, proceed to manage a business in the name of the corporation, they are deemed to be doing it as individuals engaged in a joint enterprise or partnership." Beck v. Stimmel, 39 Ohio App. —, —, 177 N.E. 920, 922 (1931). *See generally* Crane, *Unintended Partnership*, 31 W. VA. L.Q. 1 (1924). In a sense, therefore, the relation of joint venture or partnership may be imposed by law. As to the applicability of the terms partnership and joint enterprise to the concept of joint venture, *see* notes 71 & 86 and accompanying text *infra*.

48. Hathaway v. Porter Royalty Pool, Inc., 296 Mich. 90, —, 295 N.W. 571, 576 (1941); Nichols, *supra* note 1, at 436.

> The joint venture arises only where the parties to an undertaking intend to enter into such an arrangement. The first question in resolving cases of joint adventures is to determine the intention of the parties *inter sese*. In adjudicating the intention of the parties, the courts are governed by the ordinary rules relating to the interpretation and construction of contracts.

Id.

49. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72, at 475 (4th ed. 1971).

50. Nichols, *supra* note 1, at 434. Similarly, the Nebraska Supreme Court notes: "The contract need not be express, but may be implied in whole or in part from the apparent purposes, the acts and conduct of the parties." Soulek v. City of Omaha, 140 Neb. 151, 154, 299 N.W. 368, 371 (1941) (citing O.K. Boiler & Welding Co. v. Minnetonka Lumber Co., 103 Okla. 226, 229 P. 1045 (1924)).

51. Taubman *supra* note 4, at 644: "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 service contributed, and not a several one." *Id.*

52. Soulek v. City of Omaha, 140 Neb. 151, 154, 299 N.W. 368, 371 (1941) (citing

community of interest in the undertaking itself as distinguished from a mere individual interest that is severable from the undertaking.[53]

Furthermore, the members of a joint venture must share in the profits[54] and often are required to share in the losses of their joint undertaking.[55] In fact, the term venture or adventure itself is said to denote "two things: (a) *affectio societatis*—the intention to associate as venturers; and (b) the purpose of sharing in the results, good or bad, of the venture."[56] Thus, as between co-venturers, there must exist a mutuality or community of interest in the profits of the undertaking, as distinguished from an individual interest in deriving a profit that is not necessarily related to the profitability of the venture itself.[57] As will be developed below,[58] the distinction between a true joint interest in the profits of the undertaking and an interest that is merely several or independent of the undertaking itself is an important one, "otherwise every person, firm, or individual who furnished material or supplies or performed work or labor in connection with the enterprise might be termed joint adventurers therein whether they had any such intention or not."[59]

Another important feature of the joint venture relation is found in the concept of control.[60] This term carries a rather narrow and specialized meaning in the joint venture context, for it refers not to any sort of physical control, but, rather, to the sort of managerial or decision-making authority that co-venturers exercise over the business affairs of their joint undertaking.[61] Such

Bank of Cedar Bluffs v. LeGrand, 127 Neb. 183, 254 N.W. 892 (1934)). "The mere pooling of property, money, assets, skill or knowledge does not create the relationship." *Id.*

53. 2 S. WILLISTON, *supra* note 44, at 579. "An agreement to share joint profits is essential to the creation of a joint venture. The profit accruing must be joint and not several; each must have an equitable interest in the profits themselves." *Id.*

54. *Id.*

55. Comment, *The Sharing of Losses Dilemma*, 18 U. MIAMI L. REV. 429, 430 (1963). While there appears to be considerable confusion over the loss sharing requirement, many jurisdictions have required co-venturers to share in the losses of their undertaking, though some have been willing to infer loss sharing from a sharing of profits; a few courts have required an express agreement to share losses, and fewer still have even permitted joint venturers to expressly agree not to share losses. *See id.* at 434-42.

56. Taubman, *supra* note 4, at 644-45.

57. *See* 2 S. WILLISTON, *supra* note 44, § 318B at 610-11.

58. *See* notes 105 and accompanying text *infra*.

59. Commercial Lumber Co. v. Nelson, 181 Okla. 122, 124, 72 P.2d 829, 830 (1937). *See also* Jarvis v. Sun Chemical Corp., 7 F.R.D. 50, 50 (S.D.N.Y. 1947); Brabazon v. Joannes Bros. Co., 231 Wis. 426, —, 286 N.W. 21, 26-27 (1939).

60. 2 S. WILLISTON, *supra* note 44, § 318A at 564.

61. Nichols, *supra* note 1, at 439.

A most important criterion of a joint venture is joint control or management of the property used in accomplishing its aims. In determining

control, however, need not be actually exercised by the members of a joint venture but may be delegated by the venturers to another.[62] Thus, the control requirement is often phrased in terms of a right to control rather than the actual exercise of it.[63]

Highlighting all of the foregoing elements is the close fiduciary relationship that is intrinsic to the joint venture.[64] In the words of Chief Justice Cardozo:

> 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 moral of the market place. Not honesty alone, but the punctilio of an honor the most senstive, is then the standard of behavior.[65]

Finally, as a corollary to these fiduciary duties, co-venturers may avail themselves of the traditional equitable remedies for breaches of these duties, including an action for accounting, restitution, constructive trust, and the like.[66]

Upon a closer examination of the joint venture concept, one is confronted by what appears to be a virtual identity between the joint venture and the partnership, and, for this reason, a further understanding of the joint venture is perhaps best achieved when placed against the backdrop of partnership principles. The joint venture is, in fact, a product of partnership principles, growing as it did out of the general law of partnership in America in the early

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> whether a joint venture exists in a particular transaction most jurisdictions insist that some element of joint participation in the management or conduct of the enterprise, or right to mutual control be present. Joint venturers generally have equal voice and control in the operations of the enterprise. The parties thereto usually possess an equal right in the management and conduct of the undertaking, such right manifesting itself in the power of each member to determine precisely how, when and where the details of the enterprise are to be performed.

Id.

62. Hayes v. Killinger, 235 Ore. 465, —, 385 P.2d 747, 753 (1963).

63. *Id.* at —, 385 P.2d at 753.

64. *See* 2 S. WILLISTON, *supra* note 44, § 318C at 625.

65. Meinhard v. Salmon, 249 N.Y. 458, 463-64, 164 N.E. 545, 546 (1928); *accord*, Nelson v. Lindsey, 179 Iowa 862, —, 162 N.W. 3, 5 (1917); Van Stee v. Ransford, 346 Mich. 116, —, 77 N.W.2d 346, 352 (1956); Carey v. Humphries, 171 Neb. 578, 607-08, 107 N.W.2d 20, 36 (1961); Alexander v. Turner, 139 Neb. 364, 368-69, 297 N.W. 589, 592 (1941).

66. Dayvault v. Baruch Oil Corp., 211 F.2d 335, 340 (10th Cir. 1954). "Whatever procedural devices may be employed, courts of equity are not impotent to effect complete justice between parties to a joint adventure." *Id.*; *see* A. BROMBERG, *supra* note 6, § 35 at 194; Jaeger, *Joint Ventures: Membership, Types and Termination*, 9 AM. U.L. REV. 111 (1960).

part of the nineteenth century.[67] On the surface, the only discernible difference between the joint venture and partnership is that the former is usually more limited in scope and duration.[68] Indeed, the notion of the joint venture as a jural concept distinct from partnership appears to be a peculiarly American view.[69] Furthermore, once the requisite elements of the joint venture have been established, it is widely held that the general law of partnership is to be applied to determine the rights, duties, and liabilities of the co-venturers, both *inter sese* and as to third parties.[70]

All of this has led to some controversy over whether there is any legally significant difference at all between the concepts of joint venture and partnership.[71] Thus, it is not unusual to find the authorities speaking of the two concepts as if they were virtually identical.[72] Nevertheless, the courts continue to recognize addi-

67. Meechem, *The Law of Joint Adventures*, 26 MINN. L. REV. 644, 660-62 (1931).

68. A. BROMBERG, *supra* note 6, § 35 at 189; *see* Kislak v. Kreedian, 95 So. 2d 510, 514 (Fla. 1957); Johanik v. Des Moines Drug Co., 235 Iowa 679, 17 N.W.2d 385 (1945); Bard v. Hanson, 159 Neb. 563, 68 N.W.2d 134 (1955). *But see* Meechem, *supra* note 67, at 659.

69. State v. Stokke, 65 S.D. 207, 220, 272 N.W. 811, 817 (1937). "The concept of joint adventure as a legal relationship or association sui generis is purely of American origin dating from about 1890. Just how or why it originated no one seems precisely to know." *Id.*; *see* Meechem *supra* note 67, wherein the author states: "Historically, there appears to be no explanation of the joint adventure concept." *Id.* at 660. Such a concept was never recognized as distinct from partnership in English law, the English counterpart being referred to simply as a special partnership. *Id.* at 644.

70. Taylor v. Brindley, 164 F.2d 235, 241 (10th Cir. 1947). "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." *Id.*; Kislak v. Kreedian, 95 So. 2d 510, 514 (Fla. 1957); A. BROMBERG, *supra* note 6, § 35 at 189.

71. Meechem, *supra* note 67, at 644. Professor Meechem forcefully argues that, whatever difference does exist between the concepts of joint venture and partnership, it is not significant enough to justify the joint venture as a concept distinct from partnership. *Id.* "The differences appear to be more concerned with commercial form than legal substance." Nichols, *supra* note 1, at 459. Nevertheless, Jaeger insists that the distinctions between the joint venture and partnership have been so often recognized in the decisions that the joint venture can not be regarded simply as a form of partnership. "Cogent reasons are adduced why the same principles of law should be applied to both. 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." Jaeger, *Partnership or Joint Venture?*, 37 NOTRE DAME LAW. 138, 142 (1961).

72. *See* Dayvault v. Baruch Oil Corp., 211 F.2d 335, 339 (10th Cir. 1954) (partnership property as joint venture property); Seaboard Surety Co. v. H & R Const. Corp., 153 F. Supp. 641, 646 (D. Minn. 1957) (partnership agreement as joint venture); Carey v. Humphries, 171 Neb. 578, 596, 107 N.W.2d 20, 30 (1961) (partnership as joint adventure). *But see* McRoberts v. Phelps, 391 Pa. 591, —, 138 A.2d 439, 443-44 (1958) (joint venture not a partnership, tenancy in common or mining partnership); Jaeger, *supra* note 66, at 115-16. *See also*, A. BROMBERG, *supra* note 6, § 35 at 189

tional differences between the joint venture and partnership,[73] and these differences have been important enough to preserve for the joint venture a unique place in American law.[74]

One of the consequences of applying the principles of partnership law to the joint venture is the joint and several liability that attaches to co-venturers for the negligent conduct of any one of them who acts within the scope of the venture.[75] The resulting liability is a species of vicarious liability, and the mechanism used to achieve this result is found in the familiar notion of imputed negligence.[76]

The underlying justification for imposing vicarious liability in any case rests in a deliberate rule of policy which was born out of the need to ensure the adequate compensation of tort victims.[77] The central features of vicarious liability are found in the broad concepts of loss distribution and risk allocation,[78] whose aim is to compensate the victims of torts in the most equitable and economically efficient manner; Justice Douglas has stated that the rules of vicarious liability

> were rationalized on the ground that the losses which were being allocated to the enterpriser were cost items which the business should bear. They were hazards which the business incurred. If they were treated as cost items, the consumer of the product would ultimately pay them as they would normally be passed on to him. It was reasoned that these were costs which the consumer should pay: that it was difficult to differentiate between these items

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wherein the author states: "In all important respects, the joint venture is treated as a partnership." *Id.*

73. Jaeger, *supra* note 41, at 15. In cataloguing the differences that have been recognized in the courts between the joint venture and the partnership, Jaeger finds the joint venture to be distinguished from the partnership by: (1) the ad hoc or more limited nature of the undertaking; (2) the corporate eligibility for membership in the joint venture; (3) the somewhat more limited agency powers of joint venturers, due to the normally more limited scope of the undertaking; (4) the absence or infrequency of status as an entity; (5) the infrequency of a loss sharing requirement; (6) the access of joint venturers to legal as well as equitable remedies against their associates; (7) the importance of the contract in the joint venture, as distinguished from the emphasis upon status or the element of *delectus personarum*, as in partnership; and (8) the survival of the joint venture beyond the death of one of its members. *Id.* at 17-23.

74. *See* Jaeger, *supra* note 71, at 159.

75. *See* W. PROSSER, *supra* note 49, § 72 at 476; Meechem, *supra* note 67, at 644.

76. W. PROSSER, *supra* note 49, § 69 at 458-59, § 72 at 476. Similar examples of such liability are found in the context of the employer-employee relationship and, to a limited extent, in the cases involving the independent contractor. *See id.* §§ 70, 71 at 460-75; 2 F. HARPER & F. JAMES, LAW OF TORTS §§ 26.6-26.10, at 1374-1392 (1956).

77. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 533 (1968); *see* P. ATIYAH, VICARIOUS LIABILITY 22 (1967).

78. W. PROSSER, *supra* note 49, § 69 at 459.

> and any other cost items. It was concluded that no one enterprise was discriminated against; that all members of a competitive group were treated alike; that a premium was put on efficiency.[79]

Thus, when the venture is shown to possess the capacity to distribute the losses and allocate the risks attributable to it, the policy objectives of vicarious liability are fully satisfied, and the imposition of such liability is, therefore, justified.[80] In fact, the requisite elements of the joint venture have been looked upon as tests used in determining whether the putative venture possesses the characteristics necessary to fulfill the policy objectives sought by vicarious liability.[81]

Of course, the dispute in the joint venture cases ultimately revolves around the question of whether or not these elements are in fact present in the relationship, without much regard for the more theoretical question of whether the policy of vicarious liability will be served by imposing such liability upon the association.[82] Still, an appreciation of these policy objectives is important, inasmuch as the liability that attaches to the joint venture can be justified only on the basis of the policy that supports the notion of vicarious liability itself.

In examining the joint venture, it is important to recognize the distinction that exists between the concept of the joint venture and the ostensibly related concept of the joint enterprise. The so-called joint enterprise doctine originated not out of partnership principles but, rather, out of the principle of imputed contributory negligence in the law of torts.[83] The chief application of this doc-

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79. Douglas, *Vicarious Liability and Administration of Risk II*, 38 YALE L.J. 720, 722 (1929). There have been several theories advanced that have enlarged upon this concept of enterprise liability. *See*, Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 583-84 (1961), which posits the theory of "specific deterrence" against risk of loss; and Calabresi, *Fault, Accidents, and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216, 230 (1965), which advances the theory of "general deterrence" against such risks.

80. *See* Douglas, *supra* note 79, at 722-23.

81. Douglas, *supra* note 79, at 722.

82. W. PROSSER, *supra* note 49, § 69 at 459:

> Most courts have made little or no effort to explain the result, and have taken refuge in rather empty phrases, such as "he who does a thing through another does it himself," or the endlessly repeated formula of "respondeat superior," which means nothing more than "look to the man higher up."

Id.

83. Weintraub, *The Joint Enterprise Doctrine In Automobile Law*, 16 CORN. L.Q. 320 (1931). The joint enterprise doctrine is said to have originated from the famous case of Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (1849), where the negligence of an omnibus driver was imputed to his passenger, thus barring the passenger's recovery against a negligent third party. Weintraub, *supra*, at 321-22; Rollison,

trine today is in the field of automobile negligence as a defendant's device for imputing the contributory negligence of a vehicle driver to his passenger in order to bar the passenger's recovery.[84] Nevertheless, the joint enterprise concept is seen as encompassing both the notions of the joint venture and partnership:

> A 'joint enterprise' is in the nature of a partnership, but it is a broader and more inclusive term. In a partnership, there is a more or less permanent business relationship, creating a mutual agency between the partners for the purpose of carrying on some general business dealings, so that the acts of one are to be charged against the others. A joint enterprise includes a partnership, but it also includes less formal arrangements for cooperation, for a more limited period of time and a more limited purpose. . . . While it is by no means impossible that the principle may be applied to other activities, the very great majority of the decisions applying it have involved the use of motor vehicles.[85]

A common formulation of the essential elements of the joint enterprise are "(1) a contract, (2) a common purpose, (3) a community of interest, (4) equal right to a voice, accompanied by an equal right of control."[86] The most apparent distinction, then, between

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The "Joint Enterprise" In The Law of Imputed Negligence, 6 NOTRE DAME LAW. 172, 173-74 (1931). Some forty years later, the *Thorogood* case was overruled in Mills v. Armstrong, 13 L.R. 7 (1888) as a "fictitious extension of the principle of respondeat superior." Weintraub, *supra*, at 322. In the interim, however,

> [a] few American jurisdictions blindly followed Thorogood v. Bryan, but in the majority it was never recognized as law; and of the former, all except Michigan finally abandoned the insidious doctrine, although in Iowa, Montana, Nebraska, Wisconsin, and Vermont it was so well founded in precedent that some serious difficulties were encountered in disposing of it.

Meechem, *The Contributory Negligence of Automobile Passengers*, 78 U. PA. L. REV. 736, 748 (1930). Michigan abandoned the *Thorogood* principle in 1946. Bricker v. Green, 313 Mich. 218, —, 21 N.W.2d 105, 111 (1946).

84. W. PROSSER, *supra* note 49, § 72 at 476.

85. RESTATEMENT (SECOND) OF TORTS § 491, Comment b (1965). *But see id.* at § 485, Comment a (1965), which states in part that "[d]uring the latter part of the nineteenth century a good many courts 'imputed' the negligence of the third person to the plaintiff in a number of situations, because of theories of a fictitious agency relation, which are now generally recognized as pure fiction, and no longer valid." *Id.* Comment b to section 485 goes on to state that:

> [i]t is now generally recognized that such theories of agency are entirely fictitious, and the doctrine of imputed negligence has been largely discredited. It is now applied only in the limited number of respects. These are as follows: . . . 3. The negligence of one member of a joint enterprise is imputed to bar recovery by the others.

Id.

86. Carboneau v. Peterson, 1 Wash. 2d 347, —, 95 P.2d 1043, 1054 (1939). Professor Hynes notes:

> With respect to terminology, you will notice that the *Carboneau* court referred to the relationship as a "joint adventure." . . . Although, as you know, the terms are sometimes used indiscriminantly, "joint enterprise" usually refers to a nonbusiness relationship. And the term "joint venture"

the concepts of joint venture and joint enterprise is that the former is limited to a business or profit-seeking association, while the latter extends to a non-business or merely social relationship; thus, while the element of profit sharing is deemed to be an essential element of the joint venture, this element is entirely irrelevant to the joint enterprise.[87]

In addition, the joint enterprise doctrine, as distinguished from the joint venture, has been roundly criticized as being particularly at odds with the underlying policy of vicarious liability.[88] The critics have observed that the doctrine's emphasis upon control over another's physical conduct is not only fictitious in application,[89] but also does violence to the notion of vicarious or true fault-free liability.[90] Further, the doctrine is criticized for its ineffi-

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or "adventure" usually is used to describe business relationships, where the parties have a joint interest in a business undertaking, an understanding as to the sharing of its profits and losses, and a right of joint control.

J. HYNES, AGENCY AND PARTNERSHIP, CASES, MATERIALS AND PROBLEMS 19 (1974); *see* Rosenstrom v. North Bend Stage Line, 154 Wash. 57, —, 280 P. 932, 934 (1929).

87. 2 S. WILLISTON, *supra* note 44, § 318B at 581. While modern decisions sometimes add the requirement that joint enterprisers must share a "community of pecuniary interest" in the enterprise, this requirement is not analogous to profit sharing in the joint venture context. A pecuniary interest in the joint enterprise goes toward determining the existence of a right to physically control the manner in which an instrumentality, usually a motor vehicle, is operated. *See* W. PROSSER, *supra* note 49, § 72 at 479-80; RESTATEMENT (SECOND) OF TORTS, § 491, Comments g & i (1965). *See also* Stam v. Cannon, 176 N.W.2d 794, 798 (Iowa 1970).

88. 2 F. HARPER & F. JAMES, *supra* note 76, § 26.14 at 1418-19; W. PROSSER, *supra* note 49, § 72, at 481; James, *Vicarious Liability*, 28 TUL. L. REV. 161, 214-15 (1954); Weintraub, *supra* note 84, at 334-38.

89. W. PROSSER, *supra* note 49, § 72 at 481, wherein the author states:

> The contractual arrangement by which he is said to enter into such an arrangement is all too obviously a fiction in situations where the parties have merely got together for the ride; and upon this there is erected a second fiction, that the passenger shares a "right of control" of the operation of the vehicle; and on this there is erected in turn a third fiction, that the driver is his agent or servant. This topheavy structure tends to fall of its own weight. In the usual case the passenger has no physical ability to control the operation of the car, and no opportunity to interfere with it; and any attempt on his part to do so in fact would be a dangerously distracting piece of backseat driving which might very well amount to negligence in itself.

Id. For an intriguing discussion as to how this concept of control originated in the joint enterprise context, see Weintraub, *supra* note 83, at 334-38, wherein the author states: "It would seem to be an obvious fallacy to carry what is simply the test of the existence of the master-servant relation into a field where that relationship admittedly does not exist and there use it as a test of liability. Yet this is precisely what has happened." *Id.* at 335.

90. James, *supra* note 88, at 215. Professor James states flatly that the imposition of genuine vicarious liability cannot

> be justified on the principle of personal fault. It demands justification from policy. Right of control is not better justification here than in any other case of vicarious liability. Indeed it is weaker in this situation than in most, for the kind of control typically found in the joint enterprise is not the kind

cacy in carrying out the policy objectives of vicarious liability;[91] indeed, in the usual application of the joint enterprise doctrine, an innocent automobile passenger is denied recovery against a negligent third party,[92]thereby producing one of the results that vicarious liability was designed to prevent.[93]

The purpose here, however, is not to determine the merits of the joint enterprise doctrine but, rather, to point out that the joint venture and the joint enterprise are not interchangeable jural concepts.[94]

In sum, while the joint venture is often indistinguishable from the partnership, and although it is ostensibly similar to the joint enterprise, the joint venture phenomenon cannot be satisfactorily explained by reference to either the partnership or joint enterprise. For this reason, the joint venture remains a concept sui generis in American law.

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of control that can be implemented by testing and selection based on it . . . .

Id.

91. 2 F. HARPER & F. JAMES, *supra* note 76, § 26.14 at 1419.

92. W. PROSSER, *supra* note 49, § 72 at 476.

93. *See* note 77 *supra*.

94. Jaeger, *supra* note 41, at 15-16.

> [T]he terms "joint venture" and "joint enterprise" have sometimes been used interchangeably. This has been severely criticized since "venture" connotes profit-seeking, while the joint enterprise merely requires "A community of interest in the object and purposes of the undertaking . . . and an equal right to direct and govern the movements and conduct of each other in respect thereto. If either of both these elements is absent, there is no joint enterprise." Actually, recent instances of this confusion are infrequent, and may be considered as essentially isolated instances. Certainly, the modern decisions recognize that the "joint enterprise" is far broader than "joint venture" including as it does clubs of all kinds, religious societies, athletic and other recreational endeavors, and business and labor organizations. Here, as suggested, the basis for distinguishing between the two forms of association is the concept of "venture," which connotes a business or profit motive, although there are decisions to the contrary.

Id. (footnotes omitted); *accord*, 2 S. WILLISTON, *supra* note 44, § 318B at 580-84. For examples of decisions that distinguish the joint venture from the joint enterprise, see State v. Bland, 355 Mo. 706, —, 197 S.W.2d 669, 672-73 (1946); Greer v. McCrory, 192 S.W.2d 431, 439 (Mo. App. 1946); Bradbury v. Nagelhus, 132 Mont. 417, —, 319 P.2d 503, 509 (1957). *See also* Shook v. Beals, 96 Cal. App. 2d 963, —, 217 P.2d 56, 60 (1950); Connellee v. Nees, 266 S.W. 502, 503 (Tex. 1924). For examples of decisions that considerably obfuscate this distinction, see Connor v. Great Western Sav. & Loan Ass'n, 73 Cal. Rptr. 369, 375-76, 447 P.2d 609, 615-16 (1969); Vonderheide v. Comerford, 113 Ohio App. 284, —, 177 N.E.2d 793, 795-96, (1961); Pence v. Berry, 13 Wash. 2d 564, —, 125 P.2d 645, 648 (1942).

Although the joint venture and joint enterprise are clearly distinguishable, they are not necessarily mutually exclusive. *See generally* Zajic v. Johnson, 126 Neb. 191, 253 N.W. 77 (1934); Judge v. Wallen, 98 Neb. 154, 152 N.W. 318 (1915), where the court found the existence of a joint enterprise but might just as easily have found a joint venture.

ANALYSIS

In analyzing the joint venture question presented in *Fangmeyer*, it is important initially to identify the basic issue that was before the court on appeal. The basis of the defendant's appeal on the joint venture issue consisted of the assertion that the trial court had erred in refusing to grant the defendant's motion for a directed verdict.[95] Thus, on the basis of the standards for directed verdicts in Nebraska,[96] the issue presented in the case was whether the evidence introduced at trial was sufficient to sustain a jury determination of the issue or, alternatively, whether the Virus-Reinwald relationship did not, as a matter of law, constitute a joint venture.[97] The court held that the facts presented at trial were sufficient to allow a jury determination of the joint venture issue.[98] In deciding whether, as a matter of law, the relationship did not constitute a joint venture, the court turned to elements necessary in Nebraska to form a joint venture:

> "to constitute the relationship there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other." The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill or knowledge does not create the relationship; there must be something more than mere sharing of profits, some active participation in the enterprise, and some control of the subject matter thereof or property engaged therein.[99]

The court noted that, from the facts in *Fangmeyer*, the jury could have properly determined that the Virus-Reinwald relationship was that of employer-employee or simply one of landowner-sharecropper.[100] However, in applying the above standard to the facts in the case, the court held that it could not be said as a matter of law that the relationship did not constitute a joint venture.[101]

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95. 200 Neb. at 122, 263 N.W.2d at 430.
96. *See id.* at 124-25, 132 263 N.W.2d at 431, 435.
97. *Id.* at 132, 263 N.W.2d at 434-35.
98. *Id.* at 132, 263 N.W.2d at 435.
99. *Id.* at 131, 263 N.W.2d at 434 (citing Soulek v. City of Omaha, 140 Neb. 151, 155-56, 299 N.W. 368, 372 (1941)). *But see* the additional language in *Soulek* regarding profit sharing at note 110 and accompanying text *infra*.
100. 200 Neb. at 133, 263 N.W.2d at 435.
101. *Id.*

There was, however, a crucial issue present in the case that was not addressed by the court. That issue concerns the question of whether the arrangement between Virus and Reinwald satisfied the joint venture requirement of profit sharing. Although this issue formed no part of the majority's consideration of the case,[102] Judge McCown, in dissenting from the majority's opinion on the joint venture issue, did raise the profit sharing question:

> The undisputed evidence in this case was that Reinwald was a sharecropper tenant who lived on the farm and received one-third of the crops. Virus owned virtually all the equipment and bore all the expenses and both parties contributed labor. Each also had a separate individual livestock operation on the farm. There was clearly no true sharing of profits or losses, but only a sharing of the crops.[103]

The question thus presented, and to be examined below, is whether the Virus-Reinwald arrangement satisfied the joint venture requirement of profit sharing.

In the law of partnership, the element of profit sharing was once regarded as not only necessary to the existence of the relationship, but as conclusive evidence of it.[104] Today, while the element of profit sharing is essential to both the joint venture and partnership, the presence of this element is merely presumptive of the existence of these relationships.[105]

In Nebraska, the first clear recognition of the profit sharing requirement in the joint venture context appears to have been in the 1934 case of *Bank of Cedar Bluffs v. LeGrand*.[106] In that case, the defendant's husband, a farmer who had been adjudged bankrupt, transferred to his wife a certain fund representing a portion of the farm revenues. The plaintiff, as trustee in bankruptcy for the husband's estate, claimed the transfer to be a fraud upon the husband's creditors and sued to recover the fund from the wife. The defendant resisted the claim on the theory that the fund was the product of a joint farming venture between herself and her husband and that she was therefore entitled to it.[107] In rejecting this

102. *See id.* at 130, 263 N.W.2d at 430-35. Although the defendants asserted specifically that they had not shared profits, *see* Brief for Appellant at 40, nowhere in the majority's opinion is there any discussion of this issue. Indeed, aside from acknowledging the existence of the profit sharing requirement, *see* note 99 and accompanying text *supra*, the issue seems not to have been considered at all.

103. 200 Neb. at 135, 263 N.W.2d at 436 (McCown, J., concurring in part and dissenting in part).

104. A. BROMBERG, *supra* note 6, § 14 at 66-68.

105. *Id.*, § 35 at 191.

106. 127 Neb. 183, 254 N.W. 892 (1934).

107. *Id.* at 184-89, 254 N.W. at 893-95.

argument, the court stated: "There is no evidence in this case of any agreement that the profits of the farming and stock-raising business should be divided between the husband and wife. . . . 'To constitute a partnership or joint adventure at common law, there must be an agreement to share in the profits and losses.' "[108] This requirement of profit sharing was reiterated in more resolute terms in the case of *Soulek v. City of Omaha*,[109] wherein the court stated: "the absence of mutual interest in the profits or benefits is *conclusive* that a partnership or joint adventure does not exist."[110] Although this firm language is found in subsequent Nebraska cases, the court has generally been willing to assume that the evidence either confirmed or dispelled the existence of profit sharing without resorting to the more penetrating question of what is meant by the term profits and what it means to share in them.[111]

The case of *Gardner v. Kothe*[112] should be of particular interest in this connection. There, the defendant, a building contractor, entered into an agreement with a siding contractor, Noble, for the installation of some residential siding. Under this agreement, the defendant was to furnish Noble with the necessary siding material and was to pay Noble at a fixed rate of twelve dollars per one hundred square feet of siding applied by him, which was the same rate as the defendant was to receive for the job. Noble hired the plaintiff to assist him in installing this siding and agreed to pay him at the same rate he, Noble, was paid.[113] When the plaintiff was injured on the job, he brought an action against the defendant under the Nebraska Workmen's Compensation Act on the theory that, since the defendant had failed to require Noble to carry compensation insurance, the defendant should be liable as a statutory em-

108. *Id.* at 191, 254 N.W. at 896 (citing Columbian Laundry v. Hencken, 203 App. Div. 140, 196 N.Y.S. 523 (1922)).

109. 140 Neb. 151, 299 N.W. 368 (1941) (no joint venture between the Works Progress Administration and the City of Omaha where the former supplied the labor and building material in the construction of city buildings while the latter was to supply only that portion of needed funds which were not supplied by the federal government).

110. *Id.* at 155, 299 N.W. at 371 (emphasis added).

111. *See* Frisch v. Svoboda, 182 Neb. 825, 157 N.W.2d 774 (1968) (no joint venture where two parties entered into an agreement for the application of fertilizer whereby one would supply the fertilizer and the necessary equipment, while the other was to supply a tractor and the necessary labor and receive fifty cents per acre of fertilizer applied by him); Carey v. Humphries, 171 Neb. 578, 107 N.W.2d 20 (1961) (no joint venture, and hence no breach of fiduciary duty, in a complex oil lease transaction where the assignor of an oil lease acquired a second lease in which the plaintiff, assignee of the initial lease, was interested). *See also* notes 112-17 and accompanying text *infra*.

112. 172 Neb. 364, 109 N.W.2d 405 (1961).

113. *Id.* at 365, 109 N.W.2d at 407.

ployer under the Act.[114] The defendant countered that the plaintiff was not an employee of Noble but was, rather, either an independent contractor or engaged in a joint venture with Noble.[115] The compensation court dismissed the action and, on appeal, the district court affirmed the dismissal.[116] The Nebraska Supreme Court, however, reversed the district court's ruling and held that the plaintiff was an employee of Noble at the time of the plaintiff's injury, and, further, that the absence of profit sharing between the plaintiff and Noble negated any possibility of a joint venture.[117]

The *Gardner* case is important here for the reason that the absence of profit sharing seems to have been determinative of the joint venture issue in the case.

Crop Sharing As Profit Sharing

In the context of the share crop arrangement, then, what does constitute profit sharing? An appropriate point of departure is the distinction between a mere division of gross proceeds and a true sharing of the profits. It will be recalled that the very term joint venture denotes a sharing in the results, whether good or bad, of the venture.[118] Thus, before any profit at all can be determined, some element of the expenses of conducting the undertaking must be accounted for. So, where the owner of a tobacco plantation agreed with another to provide him with the land and to furnish the necessary teams and feed, while the other was to supply the labor in raising a crop to be shared equally between the two, there was no profit shared: "[t]he prominent feature in such an association is a common liability for losses and a common participation in the results or profits, as profits, ascertained after payment of the expenses incurred in prosecuting the joint business."[119] Another example may be taken from the case of *Tyson v. Bryan*,[120] which involved the question of profit sharing in the partnership context. In that case, Tyson let to Bryan a tract of land to be farmed by him on shares, and also provided him with forty head of cows, also to be milked on shares.[121] The court found the element of profit sharing lacking in this arrangement:

While there may be a sharing of profits and yet no partner-

114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 368, 109 N.W.2d at 408.
118. *See* note 56 and accompanying text *supra*.
119. Day v. Stevens, 88 N.C. 83, 87 (1883).
120. 84 Neb. 202, 120 N.W. 940 (1909).
121. *Id.* at 202, 120 N.W. at 941.

> ship, there can be no partnership without a sharing of profits. The sharing of gross returns, with or without a common interest in the property from which the returns come, does not amount to a sharing of profits, and does not of itself create a partnership. In this case, the defendant was to render a share of the gross returns, which might be more or less than the profits of the business, and which were to be paid even in the case the business was conducted at a loss. It hardly seems necessary to cite authorities to this proposition. . . .[122]

The notion that a mere division of gross proceeds is insufficient to constitute a true sharing in the profits is codified in the Uniform Partnership Act which, while singling out the sharing of net profits as presumptive of partnership,[123] specifically excludes mere gross sharing from this favored treatment.[124]

Although differentiating the mere division of gross proceeds from a sharing in the profits is an important first step in analyzing the profit sharing problem, a further distinction is necessary in understanding what it means to share profits as co-venturers. This distinction is found in the concept of mutuality. It is a common theme in the Nebraska cases that co-venturers must share a mutual or community of interest in the profits of their joint undertaking.[125] As demonstrated above, it should be apparent that no such mutuality can exist if only gross proceeds are divided. Indeed, to arrive at a profit at all, some element of expense must be accounted for. It should follow, therefore, that in order to achieve a mutual or community of interest in the profits of the undertaking, the expenses borne by the co-venturers must possess the quality of mutuality. Thus, it should not be sufficient for each party to simply bear his own expenses, rather it is the expenses of the undertaking itself that must be mutually shared by the co-venturers in order for each to possess a mutual interest in the profits of their joint undertaking.

The requirement that joint venturers must have a mutual, and not merely several, interest in the success of their undertaking makes eminently good sense. For to allow joint venturers to be only severally or individually interested in the undertaking would,

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122. *Id.* at 205, 120 N.W. at 942; *accord*, Schleiker v. Krier, 218 Wis. 376, 261 N.W. 413 (1935).

123. UNIFORM PARTNERSHIP ACT § 7(4).

124. *Id.*, § 7(3).

125. *See* notes 109-17 and accompanying text *supra*. Virtually identical statements requiring a community of interest in profits are found in the partnership cases. *See* Gillispie v. Bohling, 107 Neb. 357, 360, 186 N.W. 85, 86 (1921); Gates v. Johnson, 56 Neb. 808, 809, 77 N.W. 407, 407-08 (1898); Waggoner v. First Nat'l Bank, 43 Neb. 84, 94, 61 N.W. 112, 116 (1894).

paradoxically, be to condone the possibility of conflict between their respective interests while still binding them together with the "duty of finest loyalty."[126] The case of *Moore v. Smith*[127] may put the matter into perspective. In that case, two parties agreed to provide their labor and their own hired hands, horses, and mules, which were to be supported by each party respectively, in raising a crop to be shared by each according to an agreed formula.[128] In finding no community of interest in the expenses or profits, the court stated:

> There was no mutuality in the loss, *but they were severally bound each to bear the loss and expense* incident to the property used in the cultivation of the farm. It is but the common case of giving the overseer a portion of the crop raised as his compensation, thus making his compensation depend upon the quantity of produce raised, doubtless to excite him to greater diligence in the discharge of his duties.[129]

Similarly, in the case of *Gillispie v. Bohling*,[130] the defendant, who owned a threshing machine, entered into an informal oral agreement with one Whitlow whereby the defendant agreed to supply Whitlow with the thresher, to furnish the coal and oil needed to operate the machine, and to bear any risk of breakage to

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126. *See* note 65 and accompanying text *supra*. Thus, it should be apparent that where the parties share a mutual interest in the profits of their joint undertaking, that which is beneficial to one will be beneficial for all; all are mutually interested in and dependent upon the success of the venture and each other's success. Conversely, where the parties are only severally or individually interested in the profits, the parties need not be concerned with the success of the venture or each other's success, but only their own success. Such an arrangement would invite conflicts of interest, and there would be no true joint venture.

To illustrate this point, consider the hypothetical case of A and B who have entered into a business venture for the manufacture and sale of widgets. A and B purport to agree to "share profits" in the proportion of two-thirds and one-third, respectively. They agree also that, since they expect the cost of raw materials needed to produce widgets to amount to one-third of all expenses, B is required to furnish only these raw materials while A is to furnish the remaining expenses.

In such a case, there would be no joint venture because A and B are not sharing together in each other's expenses or in the expenses of the venture itself. Moreover, even this much holds true only so long as the expenses borne by each continue to represent their intended proportion to all expenses. If, for example, the cost of raw materials rises so that it represents one-half of all expenses, A would profit at B's expense. The result, of course, would be a serious conflict of interest.

On the other hand, if A and B together had borne all expenses in the proportion of two-thirds and one-third, respectively, both would share mutually in each other's success and in the success of the venture itself, and neither could profit at the other's expense.

127. 19 Ala. 774 (1851).

128. *Id.*

129. *Id.* at 780-81 (emphasis added).

130. 107 Neb. 357, 186 N.W. 85 (1921).

the machine.[131] Whitlow, in turn, was to supply the labor needed to operate the machine and was to obtain whatever threshing jobs might be available.[132] The defendant was to receive sixty-five percent of whatever the "machine made," while Whitlow was to receive thirty-five percent.[133] When the plaintiff, a hired assistant of Whitlow, was injured during the operation of the machine, he sought to hold liable both Whitlow and the defendant on the theory that the two were engaged in a partnership.[134] In rejecting the plaintiff's argument, the court found no community of interest between the defendants in the profits of their undertaking:

> [w]hether the earnings or profits or what the thresher 'made' were to be gross or net, the division thereof in the proportion of 65 and 35 was to be a compensation or payment to the respective parties for what each did; to Bohling, for the use of the machine; to Whitlow, for doing the actual work; that there was no community of profits as such, but that the compensation of each was defined and measured by the certain specified portion of the earnings or of the profits of the venture.[135]

The case of *Hayes v. Killinger*[136] will also be illustrative in this connection. In that case, the defendant, Killinger, engaged one Wallace to assist in the hauling of harvested corn from the field to the cannery. It was agreed orally between the parties that Wallace would use his own truck in hauling the corn and bear all the expenses incidental to the operation of his truck.[137] Killinger would bear all other expenses of the cornpicking operation and would pay Wallace a fixed sum per ton of corn hauled by him.[138] The plaintiff was injured during the operation of the cornpicker and sought to hold Wallace and Killinger jointly liable as joint venturers.[139] In holding that no joint venture existed between Killinger and Wallace, the court noted the absence of a mutual sharing in the profits of the undertaking:

> [I]n order to establish a prima facie evidence that a party is a co-partner, it must appear his right to share in the profits results from the fact that he is a part owner of them. . . . Defendant Wallace was paid a portion of the receipts of the cornpicking operation on the basis of the

131. *Id.* at 358-59, 61 N.W. at 85.
132. *Id.*
133. *Id.*
134. *Id.* at 358, 61 N.W. at 85.
135. *Id.* at 359, 61 N.W. at 85.
136. 235 Or. 465, 385 P.2d 747 (1963).
137. *Id.* at —, 385 P.2d at 749.
138. *Id.*
139. *Id.* at —, 385 P.2d at 748-49.

> number of tons of corn he actually hauled. He was paid only for the exact services he performed and no more. He realized a profit from the operation of his truck only if this amount thus received exceeded his expenses.[140]

This subtle but crucial distinction between a mere several or individual interest and a truly mutual or community of interest is brought out in the following passage:

> The parties may have a common objective or purpose, and still a community of interest may be lacking. For instance, two parties may be engaged in the performance of a purpose or object, which may be for the sole interest or advantage of one, and from which the other is to derive no benefit whatever, or the interest of the one may be different and distinct from that of the other; in either of such cases there would not be a joint adventure. The term 'community of interest,' as applied to the relation of joint adventure, means an interest common to both parties, that is, a mixture or identity of interest in a venture in which each and all are reciprocally concerned and from which each and all derive a material benefit and sustain a mutual responsibility.[141]

Although the parties must share mutually in the profits of their joint undertaking, this does not mean that they must share equally in these profits. Indeed, the parties may agree to share profits in any proportion.[142] Consequently, the parties must be permitted to share the expenses of the undertaking in a like manner. Thus, it should follow that, in determining the existence of profit sharing, the quantity or proportion of expenses borne by each party is of no particular importance. Rather, the important question should be whether the expenses borne by the parties are the expenses of the undertaking itself so that the parties have a mutual interest in them or, conversely, whether these expenses are those of the parties' indvidually and are severable from the undertaking. Stated succinctly,

> [t]he ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure *their respective contributions have become as one* and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement

140. *Id.* at —, 385 P.2d at 751.
141. Carboneau v. Peterson, 1 Wash. 2d 347, —, 95 P.2d 1043, 1055 (1939).
142. A. BROMBERG, *supra* note 6, § 14 at 68; 2 S. WILLISTON, *supra* note 44, § 318A at 575.

that each would act for their joint benefit.[143]

Applying these principles to the facts in *Fangmeyer*, it should be apparent that there was no mutuality or community of interest between Virus and Reinwald in the profits of the farm operation, and the reason for this lies in the fact that there was no mutual sharing or community of interest in the expenses borne by them. It cannot be reasonably argued that the labor contributed by Reinwald represented an expense to the farm operation so that he was, in effect, receiving not merely a share of the gross proceeds but was actually participating in the profits of the undertaking as a joint venturer. Such conceptual legerdemain would obscure the fact that Reinwald shared no community of interest with Virus in the profits that Reinwald received. Reinwald could realize a profit only to the extent that the value of his crop share exceeded his expenses, quite irrespective of the ultimate profitability of the undertaking itself. This is made obvious by the fact that Reinwald himself might well continue to profit from his fixed share of the crops even when the farm operation itself suffered substantial net losses. This result obtains not necessarily from the fact that Virus bore more of the expenses than Reinwald but from the fact that the two did not share jointly in the expenses of the farm business.[144]

It is true, of course, that Reinwald contributed more in the way of expenses to the undertaking than mere labor. He contributed several pieces of farm equipment and provided some fuel and repairs for his implements.[145] But these expenses were severable from the undertaking itself and were not mutually shared between Virus and Reinwald, and, by the same token, there was no mutual sharing or community of interest in the expenses borne by Virus; these too were severable from the undertaking itself. It is not suggested that the expenses borne by each of the parties cannot be fairly regarded as expenses necessary to the operation of the farm but, rather, that there was no mutual sharing or community of interest in these expenses.

It is also true that, since the value received by Reinwald in return for his crontributions was in the form of a commodity having a fluctuating value, he was, along with Virus, subjected to an element of the general economic risks of farming. But, since Reinwald played little or no part in the expense items necessary to the

143. Hasday v. Borocas, 10 Misc. 2d 22, —, 115 N.Y.S.2d 209, 215 (1952) (emphasis added).

144. *See* note 126 and accompanying text *supra*.

145. *See* notes 17 & 18 and accompanying text *supra*.

production of these commodities, this fact alone should not transform Reinwald into a profit sharing co-venturer.

> All cropping contracts have, to a certain extent, the elements of a division of profits, but such contracts are rarely held to be partnership contracts. They lack two of the essential elements of a partnership, namely, that the parties are mutually principals of and agents for each other, and that the business is carried on on joint account.[146]

It is for the reasons set forth above, among others, that sharecropping arrangements are generally regarded as lacking the attributes of a joint venture or partnership:

> The courts hold quite generally that there are obvious reasons for holding that farm contracts or agricultural agreements, by which the owner of land contracts with another that such land shall be occupied and cultivated by the latter, each party furnishing a certain portion of the seed, implements, and stock, and that the products shall be divided at the end of a given term, or sold and the proceeds divided, shall not be construed as creating a partnership between the parties. Such agreements are common in this country, and are usually informal in their character, often resting in parol. In the absence of stipulations or evidence clearly manifesting a contrary purpose, it will not be presumed that the parties to such an agreement intended to assume the improtant and intricate responsibility of partners, or to incur the inconveniences and dangers frequently incident to that relation.[147]

Finally, it is conceded that the existence of profit sharing, like

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146. Cedarberg v. Guernsey, 12 S.D. 77, 81, 80 N.W. 159, 160 (1889); *accord*, Schleiker v. Krier, 218 Wis. 376, —, 261 N.W. 413, 414 (1935).

147. Florence v. Fox, 193 Iowa 1174, —, 188 N.W. 966, 968 (1922). Similarly, in Parker v. Fergus, 43 Ill. 437 (1867) the court stated:

> Over this entire country, we see that farmers lease their lands for agricultural purposes, and agree to receive a third or other portion of the products of the soil, and the labor of the tenant, as payment of the rent. Again, it not unfrequently occurs, that the owner of the soil furnishes the land, the teams, implements and the seed; while another performs the labor, and they divide the product, according to the terms of their agreement, and no one ever imagined that in either class of such cases, the parties became in any sense copartners.

Id. at 441; *accord*, R. STEFFEN, AGENCY-PARTNERSHIP, CASES AND MATERIALS 545-46 (1969). Cases are collected at Annot., 48 A.L.R. 1055, 1068 (1926); 63 A.L.R. 909, 917 (1928); 138 A.L.R. 968, 985 (1941). In addition, because wages and rent often resemble profits in the sharecropping context, the arrangement is often found to constitute the relationship of employer-employee or landlord-tenant. Cases distinguishing the joint venture or partnership relation from that of employer-employee in the sharecropping context are collected at Annot., 137 A.L.R. 7, 112 (1942). Cases distinguishing the joint venture or partnership relation from that of landlord-tenant in the sharecropping context are collected at Annot., 131 A.L.R. 508, 525 (1941).

the additional joint venture elements, is largely a question of the parties' intent, as manifested by their conduct and in the context of the facts of the case.[148] But assuming, arguendo, that Virus and Reinwald had intended to share mutually in the farm profits, it would seem illogical to expect them to accomplish this by going to such apparent lengths to segregate their respective interests. Each party maintained separate business records, filed separate individual income tax returns, and there were no assets jointly owned between the two.[149] In addition, each had carried on separate livestock operations which each maintained from a separate store of grain.[150] Finally, while Reinwald provided fuel and repairs for his own truck and implements, he did not do so for any of Virus' vehicles or implements.[151] Such conduct hardly seems to evince any intention to share mutually in the farm profits. In fact, such conduct would seem to be strong evidence of an intention not to share profits mutually.

In view of the absence of a mutual or community of interest in the profits of the undertaking, the court would have been fully justified in concluding as a matter of law that the relationship did not constitute a joint venture. The fact that the court did not do so, however, is not as puzzling as the fact that it did not not even address the issue. For this reason, the *Fangmeyer* decision represents a radical departure from prior decisons which in the most resolute language have insisted that the parties to a joint business venture must share jointly in the profits of their undertaking.[152]

One might well ask at this juncture, what *was* the basis for the court's holding in this case? This question will be addressed below.

JOINT VENTURE OR JOINT ENTERPRISE?

As the court stated in *Fangmeyer*, the jury instruction given in the case at trial, Nebraska Jury Instruction 6.40,[153] does not reflect

148. See notes 48 & 99 and accompanying text *supra*.
149. See notes 23-25 and accompanying text *supra*.
150. See notes 21-22 and accompanying text *supra*.
151. See note 17 *supra*.
152. See notes 109-17 and accompanying text *supra*.
153. NJI 6.40 (1969). The instruction, in pertinent part, reads as follows:

Two or more persons are said to be engaged in a joint enterprise when the following elements are found to exist:

1. An agreement, expressed or implied, between such persons to enter into an undertaking;
2. A common purpose to be carried out by such undertaking;
3. A community of interest in that purpose among such persons; and
4. An equal right in each of such persons to control the manner of perform-

the distinction between the concepts of joint venture and joint enterprise.[154] Although the appellants did not challenge the propriety of this instruction,[155] the court suggested that the instruction "could, and perhaps should, be more precise in cases such as the present one where an alleged joint business venture is involved."[156] This suggestion is well taken. The instruction, on its face, seems applicable only to cases involving the joint enterprise.[157] It mirrors the classic formulation of the joint enterprise elements[158] and, in the tradition of the joint enterprise, there is no mention of the profit sharing element which is essential to the joint venture.[159]

Inasmuch as the instruction is completely silent as to the element of profit sharing, it is difficult to perceive how this instruction could be said to represent the law in Nebraska regarding joint ventures.[160] Nevertheless, the court, in effect, held that evidence of these four elements alone *was* sufficient to constitute a joint business venture relationship:

> There can be no doubt the evidence was sufficient to permit the jury to find that the two had entered into an agreement with respect to farming, and that they had a common

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ance and the agencies used therein, although such performance may be entrusted to one or fewer than all of such persons.

Id.

154. 200 Neb. at 132, 263 N.W.2d at 435.

155. *Id.* at 132, 263 N.W.2d at 435.

156. *Id.* at 132, 263 N.W.2d at 434-35.

157. While the instruction is titled "JOINT VENTURE," the subheading thereunder reads "JOINT ENTERPRISE—DEFINITION." N.J.I. 6.40 (1969). Moreover, of the eighteen cases cited as authorities for this instruction, seventeen involve only the joint enterprise. *See generally* Hoffman v. Jorgensen Awnings, Inc., 178 Neb. 261, 132 N.W.2d 867 (1965); McCarty v. Morrow, 173 Neb. 643, 114 N.W.2d 512 (1962); Hopwood v. Voss, 172 Neb. 204, 109 N.W.2d 170 (1961); Kleinknecht v. McNulty, 169 Neb. 470, 100 N.W.2d 77 (1959); Bartek v. Glasers Provisions Co., 160 Neb. 794, 71 N.W.2d 466 (1955); Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N.W.2d 219 (1954); Petersen v. Schneider, 154 Neb. 303, 47 N.W.2d 863 (1951); Remmenga v. Selk, 150 Neb. 401, 34 N.W.2d 757 (1948); Hofrichter v. Kiewit-Condon-Cunningham, 147 Neb. 224, 22 N.W.2d 703 (1946); Ahlstedt v. Smith, 130 Neb. 372, 264 N.W. 889 (1936); Zajic v. Johnson, 126 Neb. 191, 253 N.W. 77 (1934); Mick v. Oberle, 124 Neb. 433, 246 N.W. 869 (1933); Yost v. Nelson, 124 Neb. 33, 245 N.W. 9 (1932); Toliver v. Rostin, 120 Neb. 363, 232 N.W. 616 (1930); Jessup v. Davis, 115 Neb. 1, 211 N.W. 190 (1926); Kepler v. Chicago, St. P., M. & O. Ry. Co., 111 Neb. 273, 196 N.W. 161 (1924); Judge v. Wallen, 98 Neb. 154, 152 N.W. 318 (1915). Only one, Soulek v. City of Omaha, 140 Neb. 151, 299 N.W. 368 (1941), concerns a joint venture. *See also* NJI 6.40 (1969).

158. *See* notes 86 & 153 and accompanying text *supra.*

159. *See* notes 87 & 153 and accompanying text *supra. Compare* the Nebraska Jury Instruction relating to partnership: "A partnership is an association of two or more persons who agree to contribute their money, property, or services, or some of them, in order to carry on a business *and who agree to share the profits* of that business." NJI 6.20 (1969) (emphasis added).

160. *See* notes 106-117 & 153 and accompanying text *supra.*

> purpose and a community of interest. . . . Under the circumstances of this case, where the informal relationship between two persons involved in a business operation makes it difficult to characterize the relationship, we believe that a question of fact was raised in regard to the right of each person to control the manner of performance of the undertaking.[161]

Certainly, the court could not have intended to imply that the Virus-Reinwald relationship was one of joint enterprise. It will be recalled that one of the necessary elements of the joint enterprise is the right to control the physical operation of the vehicle.[162] Indeed, this element is of cardinal importance to the joint enterprise.[163] As stated by the Nebraska Supreme Court: "The rule is: To be engaged in a joint enterprise in order to impute negligence there must be a community of interest in the object and purpose of the undertaking in which the vehicle is being driven and *an equal right to direct and control its movement with respect thereto.*"[164] The practical effect of this requirement has been that where the court has found such a right of control to exist, at a minimum, the party to whom negligence is to be imputed has been present in the vehicle at the time of the mishap.[165] However, the mere presence of this party in the vehicle has provided only the opportunity for such a right to exist, since the court on numerous occasions has determined that no such right to control existed even where all the alleged joint enterprisers were present in the vehicle.[166] In this case, of course, Virus had no right to control the actual operation of the pick-up truck driven by Reinwald; there was not even the op-

161. 200 Neb. at 132-33, 263 N.W.2d at 435.

162. *See* notes 89-90 and accompanying text *supra*.

163. Weintraub, *supra* note 83, at 334.

164. McCarty v. Morrow, 173 Neb. 643, 649-50, 114 N.W.2d 512, 517 (1965) (emphasis added).

165. *See* Alstedt v. Smith, 130 Neb. 372, 373-74, 264 N.W. 889, 896 (1936); Zajic v. Johnson, 126 Neb. 191, 198-99, 253 N.W. 77, 80 (1934); Judge v. Wallen, 98 Neb. 154, 156-57, 152 N.W. 318, 318-19 (1915). *See also* Toliver v. Rostin, 120 Neb. 363, 366-67, 232 N.W. 616, 618-19 (1930).

166. *See* Hoffman v. Jorgensen Awnings, Inc., 178 Neb. 261, 266, 132 N.W.2d 867, 870 (1965); McCarty v. Morrow, 173 Neb. 643, 649-50, 114 N.W.2d 512, 517 (1962); Hopwood v. Voss, 172 Neb. 204, 208, 109 N.W.2d 170, 173 (1961); Kleinknecht v. McNulty, 169 Neb. 470, 480-82, 100 N.W.2d 77, 83 (1959); Bartek v. Glassers Provisions Co., 160 Neb. 794, 804-05, 71 N.W.2d 466, 473 (1955); Scott v. Service Pipeline Co., 159 Neb. 36, 38-39, 65 N.W.2d 219, 222 (1954); Petersen v. Schneider, 154 Neb. 303, 304-05, 47 N.W.2d 863, 864 (1951); Remmenga v. Selk, 150 Neb. 401, 406-07, 34 N.W.2d 757, 762 (1948); Hofrichter v. Kiewit-Condon-Cunningham, 147 Neb. 224, 230-31, 22 N.W.2d 703, 707 (1946); Mick v. Oberle, 124 Neb. 433, 434-35, 264 N.W. 869, 871 (1933); Yost v. Nelson, 124 Neb. 33, 36-37, 245 N.W. 9, 11 (1932); Jessup v. Davis, 115 Neb. 1, 6-7, 211 N.W. 190, 192 (1926); Kepler v. Chicago, St. P., M. & O. Ry. Co. 111 Neb. 273, 278-79, 196 N.W. 161, 163 (1923).

portunity for the existence of such a right to control, since Virus was not present in the truck at the time of the collision.[167] Finally, that the court understood that it was dealing with a joint venture and not a joint enterprise is evidenced by the fact that the court specifically distinguished the joint enterprise from the relationship involved in this case[168] and is further evidenced by the fact that the sort of control discussed in the court's opinion related not to any right of physical control over the operation of the truck at the time of the collision but, rather, to the managerial or decision-making authority that was exercised over the farm business.[169]

In applying to a joint business venture a test that does not reflect the law in Nebraska relating thereto, the court's rationale in deciding the joint venture issue seems to be flawed. It is difficult to sustain the conclusion that it could not be said as a matter of law that the Virus-Reinwald relationship did not constitute a joint venture when the premise for this conclusion rests upon a jury instruction appropriate only in cases involving the joint enterprise. Additionally, in its willingness to apply such a joint enterprise test to a joint venture, the *Fangmeyer* decision may be viewed as an example of the few and severely criticized decisions that have confused the concepts of joint venture and joint enterprise.[170]

CONCLUSION

In *Fangmeyer* the Nebraska Supreme Court was presented with the question of whether, on the basis of the evidence presented at trial, it could be said as a matter of law that the relationship between the co-defendants did not constitute a joint venture.

The court held that the evidence presented at trial was sufficient to allow the jury to find that the elements required for the existence of a joint venture had been satisfied, and that it could not be said as a matter of law that a joint venture did not exist. In so holding, the court did not address the question that was placed before it regarding whether the co-defendants had shared jointly in the profits of the farming business. In addition, in reaching this result, the court permitted the application of a test seemingly appropriate only in cases involving the joint enterprise.

The court's rationale in resolving the joint venture issue in

167. *See* note 11 *supra*.
168. 200 Neb. at 132, 263 N.W.2d at 434-35. *See* note 156 and accompanying text *supra*.
169. *See* 200 Neb. at 132, 263 N.W.2d at 435.
170. *See* note 94 *supra*.

Fangmeyer is unsettling. The court's failure to insist upon a community of interest in the profits of this business venture is contrary to established precedent in Nebraska. But what is more troubling is the court's failure to even address the profit sharing question. Still more confusion is created by the court's willingness to permit the application of the joint enterprise test to a joint business venture, while at the same time acknowledging the distinction between the two.

In the presence of this confusion, it is difficult to assess the impact that *Fangmeyer* may have upon future joint venture cases. At this time, it may only be hoped that subsequent decisions will eliminate this confusion by insisting upon a mutual sharing of profits and by recognizing the important distinctions that exist between the joint venture and joint enterprise.

Gerald B. Buechler, Jr.—'80