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Joint Adventure

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JOINT ADVENTURES.—The A Company made a contract with the West Virginia state road commission to build a road in Pleasants county. The A Company then entered into a contract with the B Company whereby the B Company was to do the concrete and excavating work at prices specifically set forth in the agreement. This agreement was entered into pursuant to an arrangement that had been made between the A Company and the B Company prior to the time that the A Company had submitted its proposal to the state road commission. In this preliminary arrangement the B Company set forth prices at which it would do the concrete and excavating work, and these figures were carried by the A Company into the contract with the state road commission. The B Company was not a party to the contract with the road commission. The B Company did not do its part of the work properly. The A Company, therefore, completed the B Company's work, using the machinery and equipment the latter had placed on the job, and received the agreed consideration in the A Company's contract with the road commission. The B Company thereupon sued the A Company praying judgment for: (1) the total cost of all work done and all materials furnished by the B Company and, (2) rent for the use of the machinery placed on the job by the B Company.

Held: (1) that on contract principles the B Company was only entitled to the value of the contract at the time of the breach, and that therefore the B Company could only have the agreed amount for its work minus the cost to the A Company of completing it; (2) that the A Company and the B Company were joint adventures and, therefore, the B Company could collect no rent for the use of its equipment.

The result achieved by the above theories is entirely correct, but it is a little difficult to see how the A Company and the B Company were joint adventurers or why it was necessary to so call them in order to achieve this result. The joint adventure is a very indefinite sort of thing and in particular cases it is very hard to tell when it exists. For instance, where two or more parties jointly put in bids for construction work with the understanding that each is to do a certain part it is very hard to tell whether the relation of joint adventurers or contractor and sub-contractor exists. The joint adventure is simply a piece of machinery used by the courts to get the following results:

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1 Ohio Valley Builders' Sup. Co. *v.* Wetzel Construction Co., 151 S. E. 1 (W. Va. 1929).

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1. To allow the parties to share the profits or losses of the transaction. [2]

2. To impose a fiduciary relationship upon the parties so that neither may work to the detriment of the partnership nor retain any secret advantage or profit growing out of the relation. [3]

3. To give one of the parties the right to bind the other and make him liable for debts incurred within the scope of the joint enterprise. [4]

The holding that the A Company and the B Company were joint adventurers is inconsistent with the holding that the B Company could not recover its entire outlay, i. e., the value of the materials it had furnished and of the work it had performed, before there was a division of profits, or rather what is equivalent in this case, before the A Company could receive any profit for its share of the work, for: "On the termination of an adventure and a settlement of accounts, the amounts expended because of it by the various parties thereto must be repaid and the expenses met before there can be a division of the profits". [5] The theory of the joint adventure is that the adventurers shall divide the whole profit or loss, not necessarily equally, but proportionately at least;[6] and not that the joint adventure shall be split into two separate adventures, leaving A to make a profit on his part and B to go bankrupt on his. When the joint adventure is thus split, the fiduciary relation between the parties as well as the right to a share of all the profits is destroyed. In 15 R. C. L. at 502 we have this principle laid down: "The fiduciary relationship existing between the parties to a joint adventure demands the utmost good faith in all the dealings of the parties with each other. This requirement of good faith alone would make improper the acquisition of secret advantages, but in addition to this, it is also recognized that the contract contemplates a division of all the profits growing out of the transaction among all the adventurers." The joint adventure is a partnership for a single transaction. [7] The

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[2] Lantz *v.* Tumlin, 74 W. Va. 196, 81 S. E. 820 (1914); Annon *v.* Brown, 65 W. Va. 34, 63 S. E. 691 (1909); Newbrau *v.* Snider, 1 W. Va. 153 (1865).

[3] Berry *v.* Colborn, 65 W. Va. 493, 65 S. E. 636 (1909); Bond *v.* Taylor, 68 W. Va. 317, 69 S. E. 1000 (1910); Lantz *v.* Tumlin, *supra*, n. 2; Kersey *v.* Kersey, 76 W. Va. 70, 85 S. E. 22 (1915).

[4] 15 R. C. L. 505; Leake *v.* City of Venice, 43 Cal. App. 568, 195 Pac. 440 (1920).

[5] 15 R. C. L. 506; Kaufman *v.* Catzen, 90 W. Va. 719, 111 S. E. 755 (1922); as to division of losses, see 33 C. J. 865; Newbrau *v.* Snider, *supra*, n. 2.

[6] 15 R. C. L. 502.

[7] 15 R. C. L. 500.

test of whether such a partnership is in fact formed is the intention of the parties.[8] Certainly it is not the intention to be partners when the work is split up and the parties work entirely separate from each other. 33 C. J. 844 says: "The reported cases are of scant benefit in determining whether the parties to a contract sustain the relation of joint adventurers or of employer and employee in our case, contractor and sub-contractor since in the final analysis the facts of each case must determine the question." An examination of the cases cited under this proposition[9] and of the West Virginia cases cited below[10] reveals the fact that in every instance where it was held that a joint adventure existed, the joint adventurers were by their agreement entitled to share the profits. No case was found where the parties were held to be co-adventurers where they were not entitled to a percentage of all the profits. Of necessity each would be entitled to his outlay before there would be any profits. Yet, in the case under discussion, the parties were not entitled to share the profits, but were each to make what it could out of its share of the contract, and were still held to be joint adventurers.

In *Dutcher* v. *Buck*,[11] we find the following language: "The authorities upon that question are not harmonious, even in our own state. All, however, agree that profit sharing is evidence tending to show partnership. . . . I said that the recognized test had been announced in various forms as 'a community of interest in the profits;' 'a participation in the net profits;' 'a participation in the profits as profits;' 'a specific interest in the profits with the right to an account;' that to constitute a communion of profits the interest in the profits must be mutual, . . . there must be a common interest in them as principal trade and as distinguished from the right of a creditor to receive a sum of money out of

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[8] Fewell *v.* American Surety Co., 80 Miss. 782, 28 So. 755, 757, 92 Am. St. Rep. 625 (1900).

[9] Franken-Karch Corp. *v.* Castriotis *et al.*, 186 N. Y. S. 344, 195 App. Div. 529 (1921); Hipwell *et al. v.* Pioneer Inv. & Trust Co., 150 Cal. 723, 89 Pac. 1085 (1907); Rau *v.* Boyle, 5 Bush. (Ky.) 253 (1868); Zuby *v.* Height, 188 N. Y. S. 88 (1921); Winemiller *v.* Page, 75 Okla. 278, 183 Pac. 501 (1919); Burns *v.* Niagara, Lockport, etc. Power Co., 145 App. Div. 280, 130, N. Y. S. 54 (1911) (construction contract); Ross *v.* Burrage, 233 Mass. 439, 124 N. E. 267 (1919); Kent *v.* Universal Film Corp., 118 Misc. 779, 193 N. Y. S. 838 (1922); Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 556 (1887); Dutcher *v.* Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776 (1893); American Security Co. *v.* Barker Co., 102 Nebr. 515, 167 N. W. 780, 169 N. W. 257 (1918).

[10] Newbrau *v.* Snider, *supra*, n. 2; Kaufman *v.* Catzen, *supra* n. 5; Berry *v.* Colburn, *supra*, n. 3; Barbee *v.* Lynch, 82 W. Va. 384, 96 S. E. 593 (1918); Annon *v.* Brown, *supra*, n. 2.

[11] *Supra*, n. 9.

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the profits, . . ." The note to the L. R. A. report of this case says: "The opinion of the judges in the above case very fully presents the principles of the law as to the existence of a partnership. Without attempting any annotation of the question we call attention to the earlier cases", etc.

It is therefore submitted that the parties A and B in the West Virginia case were not joint adventurers. They were not partners.

It is also contended that the same result could have been reached on the contract theory alone, i. e., the B Company at the most is entitled to no more than the worth of its contract at the time of the breach. Even if the A Company had breached the contract this would be so. Therefore, the B Company can receive the amount the A Company was to pay it by its contract with that company less the cost of completing that contract. This would be what the A Company spent in completing the contract, and if the B Company charged rent on the machinery, that would be part of the A Company's costs and would be deducted from the amount to be paid to the B Company and would be in effect not allowing the B Company rent on the machinery. The A Company and the B Company were simply contractor and sub-contractor, and the decision reached could have been obtained solely on the basis of the contract between them.

We are, therefore, a little puzzled as to why the court used the joint-adventure theory. Did the court intend to impose a fiduciary relationship upon such a relationship as contractor and subcontractor?

—HENRY K. HIGGINBOTHAM.

BANKS AND BANKING—PREFERRED CLAIMS AGAINST INSOLVENT BANK ON THE THEORY OF TRUSTS.—BANK DRAFTS AS ASSIGNMENTS OF FUNDS.—The Bank of Mullens, a state bank in West Virginia, and the Federal Reserve Bank of Richmond made an arrangement whereby the Federal Reserve Bank agreed to cash checks drawn on the Mullens Bank by its depositors. The Bank of Mullens agreed to remit immediately to the Federal Reserve Bank by draft on certain designated banks, one of which was the First National Exchange Bank of Roanoke, Virginia.

In accordance with this arrangement about $20,000 worth of checks were cashed by the Federal Reserve Bank and sent to Mullens. The Mullens Bank drew two drafts on the bank in Roanoke aggregating some $12,000, and returned the remaining checks with said drafts to Federal. The amount of the deposit in the Roanoke bank was sufficient to cover the drafts. When they were presented for payment, Mullens had been closed by the banking commissioner and payment was refused.