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UNINTENDED PARTNERSHIP

By Judson A. Crane*

Infinite variety is possible in the agreements by which persons unite property or services in the hope of gain. As legal problems arise between associates, or between one or all of them and outsiders, the method of solution is to classify the associates as constituting some standard relation, such as partnership, co-owners, or principal and agent, and then to apply the rules of law appropriate to the relation found to exist. As there is a *prima facie* presumption that persons sharing profits are partners it is often necessary to decide whether or no that relation exists, and in so deciding the solution of the problem is generally apparent. This method is used in such problems as whether one is liable for the contract\(^1\) or torts\(^2\) of another; whether a creditor may levy on property held in co-ownership by the debtor and another\(^3\) whether property held in co-ownership is taxable to the group or to the members severally\(^4\); whether the interest of an associate in real property held by the group is personal or real property\(^5\); whether income is taxable to the group or to members severally\(^6\); whether co-

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debtors are subject to bankruptcy proceedings as a group; and what are the obligations between associates and the remedies for breach of such obligations.

Where the entire terms of association are embodied in a writing the nature of the relation thereby created is a judicial question. If the writing is uncertain in its meaning, or if the agreement is not in writing there is a jury question as to the facts of the agreement, but a judicial question of the legal effects of the agreement.

The relation of partnership is not like a corporation or a limited partnership, a relation existing de jure only after compliance with certain formalities of organization prescribed by legislation, but a common law consentual relation requiring only a voluntary agreement between the parties. Intent is controlling, i. e. intent to enter into a relation embodying the essential elements of what the law classifies as partnership. If the existence of the essential elements is doubtful the specific intent of the parties to be partners or not is of almost decisive weight. But it sometimes happens that persons are legally partners because they have agreed to a relation in terms that of partnership, although they believe their relation to be devoid of some of the obligations of partnership. The many definitions of partnership do not in themselves furnish infallible guides for discrimination and classification, but indicate the indicia of the relation to be looked for and examined in each particular state of facts. The definition of the Uniform Partnership Act

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8 Runo v. Rothchild, 219 Mich. 560, 189 N. W. 183 (1922); Ceci v. Montgomery, 218 Pac. 311 (Okla. 1923).
9 Rider v. Ramey, 63 Kan. 733, 66 Pac. 1026 (1901); Florence v. Fox, 193 Ind. 1174, 185 N. W. 926 (1922); De Rees v. Costagula, 275 Fed. 172 (1921); Mackie-Clemens Fuel Co. v. Brady, 202 Mo. App. 551, 208 S. W. 151 (1919).
11 "It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; . . . . ." Conley J. in Beecher v. Bush, 45 Mich. 188, 7 N. W. 785 (1881).

"Up to this time we have not alluded to the declaration in the indenture of trust here in question that it was the intention of the parties to it to create a trust and not a partnership. It is what the parties did in making the trust indenure that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did." Loring J., in Williams v. Milton, 218 Mass. 1, 102 N. E. 355 (1915).

"A decision of the question requires first, the ascertainment of their actual relation, and then the determination of whether a partnership was thereby constituted, giving effect to their intention if possible, but having regard for the rule that parties may intend no partnership and yet form one." Phillips J. in Freeman v. Hutttig Sash & Door Co., 105 Texas 560, 153 S. W. 122 (1913).

12 U. P. A. Sec. 6.
UNINTENDED PARTNERSHIP

is "An association of two or more persons to carry on as co-owners a business for profit." In applying this definition we have to decide in each case whether the associates have associated themselves to carry on a business, and whether they intend to carry it on as co-owners. We shall discuss separately the nature of these two elements, as they appear in a few typical recent cases.

A. To Carry on Business.

Business for profit is a series of acts of a commercial character. For constituting a partnership the series must be of a substantial degree of number and duration. A difficult question is how extensive must be the business of co-owners of property put to a profitable use in order to create partnership. This is illustrated by cases involving the acquisition, development and operation of mining property.

In Walker v. Tupper A and B owning an oil lease assigned a three-fourths share to C and D who agreed to develop and operate, sharing expenses and production, if any, in certain agreed shares. A creditor, who had drilled a well under contract with C and D sued all four parties as partners. The court held C and D were partners, but not A and B, relying on absence of expressed intent to form a partnership, and refusing to infer it from the sharing of gross returns as distinguished from profits as such. The decision seems correct, as A and B were not entitled to participate in active operation of the business carried on by C and D, but were rather landlords receiving a share in the product in lieu of rent for their interest in the premises. In Neal v. Shamburg one co-tenant of an undeveloped oil lease purchased the share of another without disclosure of the production on an adjoining tract owned by him, which fact affected his judgment of value. The vendor subsequently sought to rescind the sale, claiming a breach of the fiduciary relation of partners. The court properly held there was no partnership; there was no business carried on or agreed to by the parties.

In other Pennsylvania cases a joint carrying on of business is more nearly apparent. In Dunham v. Loverock, three co-owners

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See Joseph v. Mangos, 192 Pa. 729, 185 N. W. 464 (1921), holding there is a duty of disclosure of material facts in a sale of partner's interests to his co-partner.
In jurisdictions where mining partnerships are recognized agreement to operate is necessary to constitute the relation. Doyle v. Burns, 123 Pa. 488, 99 N. W. 195 (1904); Anaconda Copper Min. Co. v. Butte & B. Min. Co., 17 Mont. 541, 43 Pac. 923 (1896); Harter v. Gealing, 10 Wyo. 346, 68 Pac. 1138 (1902); Cf. Cogdall v. Cottrill, 188 Pa. 58, 38 Atl. 50 (Okla. 1902), holding purchase of mining leases for resale at a profit constituted partnership.
of an oil lease shared expenses and receipts in proportion to their interests. One co-owner sold his share to a stranger at a time when he was owing his associates a considerable sum for expenses of operation. The court held that there was no partnership and therefore the debt was not a charge on the share in the leasehold as against the assignee. The court would not, without expressed intent, create the relation of partnership "as the consequence of a course of conduct and dealing naturally referable to a relation already existing between them." The result might have been the same even if a partnership was created, as real estate used by a partnership of co-owners does not necessarily become partnership property." In Butler Savings Bank v. Osborne two persons, who happened each to be partnerships, acquired each a half interest in an oil lease, which they agreed to develop and operate sharing equally, and sharing equally the proceeds of the oil which was run into pipe lines and credited to each by the pipe line company. Two creditors of one of the associates levied on its share in the property, one on the theory of partnership, the other on that of co-ownership. The latter was held entitled to the proceeds of execution sale. The existence of partnership was denied by the court for the same reason as in Dunham v. Loverock. As in that case the precise question was not one of partnership, but whether the property was partnership property.

The doctrine that the relation of co-owners is presumed to continue was again applied in Laughner v. Wally. A, B and C became co-owners of an oil lease which they developed and operated under the name of "Laughner, Wally & Co." A acted as treasurer, all payments being made through him, and the associates divided not the gross product as in the preceding cases, but the net profits. B took away an unused casing, for which in accordance with the usage of the associates he should have paid A. An action in assumpsit was brought against B by all the associates, including B, "doing business as Laughner, Wally & Co." It was held that assumpsit could be maintained and the relation was not one of partnership. Here it was necessary to decide the issue of partnership, as assumpsit could not be brought by partners to recover from a co-partner the price of partnership property sold to him, and if there was a partnership the casing appears to have been partnership property. The adoption of a name, and the doing

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of business through a treasurer, and the sharing of net profits, and particularly the admission by plaintiffs in the form of process are very strong evidence of an association to carry on business sufficient to overcome to presumption of mere co-ownership. The court said, "Considering their method of business and all the circumstances, the conclusion is irresistible that the defendant took the property in question as a purchaser from the association, and is liable as such." The result of the decision does not seem unjust in view of the usage in the particular association of paying for machinery taken over by a member, and not letting the debt become an item in accounts to be charged against profits. Partners may sever partnership property and make an isolated transaction of its sale to a partner, distinct from partnership accounts. The case however was decided on the partnership issue and is an extreme instance of the reluctance of courts to find partnership without expressed intent as between the parties where no public interest is involved. Incidentally the misjoinder of defendant as a co-plaintiff was held to have been waived, if it were a defect, by going to trial on the merits.

In many other jurisdictions an intermediate relation has been devised, that of "mining partnership." While mine owners may form an ordinary partnership, the business is such that some of the incidents of the conventional relation would be inconvenient, particularly those of non-transferability of interests and power of such representation as in the usual trading partnership. These incidents are not present in the mining partnership but there is a remedy in equity for dissolution and account and the partnership property is subject to a charge for partnership obligations of an associate as against his assignee. The institution of mining partnership is a commendable instance of the realization with judicial sanction of the intention of parties to form a relation sui generis with peculiar incidents suited to their purposes and distinct from the ordinary partnership and from co-tenancy.

There are many other instances of co-ownership for limited busi-

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21 Simpson v. Richie, 110 Me. 299, 56 Atl. 124 (1913).
22 See on transferability of shares in so-called mining partnerships Skillman v. Lachman, 23 Cal. 198 (1893); Blackmar v. Williamson, 57 W. Va. 249, 50 S. E. 264 (1905); Duryea v. Burt, 23 Cal. 569 (1885); Bissell v. Foss, 114 U. S. 252, 29 L. Ed. 126 (1884).
23 A mining partnership is not a "trading partnership," in which partners can borrow money and issue negotiable instruments, but there is implied authority to do what is necessary for the operation of the enterprise, such as purchase of materials, Mansville v. Parks, 7 Colo. 323, 2 Pac. 212 (1883); repair of equipment, Childers v. Neely, 47 W. Va. 70, 34 S. E. 828 (1899); employment of labor, Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735 (1899). See also Hartley v. Gesling, 10 Wyo. 546, 68 Pac. 1118 (1902); Kahn v. Smelting Co., 102 U. S. 641, 26 L. Ed. 266 (1886).
24 Childers v. Neely, supra note 22.
ness purposes, in which without expressed intent to become partners the courts have refused to find the partnership relation to exist, such as ownership of stallions, race horses, ships, goods, and real estate for investment or resale. The rule that co-ownership and division of proceeds does not in itself amount to partnership is incorporated in the Uniform Partnership Act.

B. To Carry on a Business as Co-Owners.

Not only must there be a business but a person is participating in it as a partner only if he is a co-owner of the business. Co-ownership for this purpose means something more than co-ownership of property or capital employed in the business. "The salient features of an ordinary partnership are (1) a community of interest in profits and losses; (2) a community of interest in the capital employed; and (3) a community of power in administration." In addition to property ownership and profit sharing there is necessary actual or potential participation in ultimate control. The emphasis in the past was on profit-sharing. Today, particularly in dealing with associations many members of which are relatively inactive, the emphasis is based on the element of control, as a criterion of the nature of the relation of a person to a business.

At the outset, or while a business is that of a going concern, persons may desire to invest money taking the risks of the business as to profit and loss. Formerly, following a dictum in Grace v. Smith, first applied in Waugh v. Carver, it was held that who-

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25 Rocky Mountain Stud Farm Co. v. Lunt, 46 Utah 299, 161 Pac. 521 (1915); Cf. Smith v. Braman, 51 S. W. 178 (Ky. 1899).
28 Hoare v. Dawes, 1 Doug. 371 (1780); Baldwin v. Burrows, 47 N. Y. 109 (1872); Goell v. Morse, 126 Mass. 430 (1879 purchase of horse for resale); Williams v. Knibs, 213 Mass. 534, 100 N. E. 666 (1913 ownership of patent, apparently to be made productive by granting of licenses); Rutzen v. Merchants' Loan & Trust Co., 41 So. Dak. 216, 170 N. W. 128 (1918).

In Morrison v. Meister, ubi supra, absence of indicia of partnership was pointed out in the following language, "This was the only property they had a common interest in; there was no firm name, no firm funds, no firm accounts, no firm letter head, no firm bank account. No commingling of funds or property, no certificate of partnership filed, no agreement as to losses, no time fixed when it would expire."
30 U. P. A. Sec. 7. (2) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not of itself establish a partnership, where such co-owners do or do not share any profits made by the use of the property.
31 The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
33 2 Wm. Bl. 998 (1775).
34 2 H. Bl. 255 (1793).
ever shared the profits of a business, thereby diminished the fund for the subsequent payment of debts and should therefore be liable to creditors as a partner. It is now the law that excepting cases of estoppel, one is not a partner as to third persons unless a partner as between the associates.\(^{34}\) Accordingly a lender who has no risk of loss as between the associates beyond that of his investment, and no power of control beyond a right to information and inspection of accounts is not a partner.\(^{35}\) An apparent exception to this statement is found in the law of statutory Limited Partnerships.

The Limited Partnership Statutes were adopted at a time when the profit sharing basis of partnership as to third persons was prevalent in many states. The investor who enjoyed the fortunes of the business was thought of as inherently a partner as regards his liabilities. The purpose of the statutes was to provide a scheme of participation which would relieve the investor of a natural burden of his status. He was called a “special partner,” and it was specifically provided that if all formalities of organization were not complied with the associates were all general partners as to their liabilities for debts.\(^{36}\) That he would be a special partner and was not in reality a general partner was recognized by decisions that defective organization did not make him liable for torts,\(^{37}\) and that neglect to give notice of dissolution did not extend his liability to contracts made after termination of the defective partnership.\(^{38}\)

The true nature of the association appears from the recent decision of the United States Supreme Court in the

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\(^{34}\) U. P. A. Sec. 7 (1) Except as provided by Section 16 persons who are not partners as to each other are not partners as to third persons.

\(^{35}\) Rosenblom v. Springfield Produce Co., 243 Mass. 111, 137 N. E. 357 (1922); Cudahy Packing Co. v. Hibou, 52 Misc. 234, 46 So. 73 (1903) noted in 18 L. R. A. N. S. 976; Harvey v. Childs, 28 Oh. St. 319 (1876); Boston Smelting Co., v. Smith, 13 R. I. 27, (1850) ; Goucher v. Bates, 280 Ill. 372, 117 N. E. 427 (1917); Mechan v. Valentine, 145 U. S. 611 (1892); Mollwo March & Co., v. Court of Wards, 4 P. C. App. 419 (1872); see also Kilhaw v. Jukes, 3 Best & Sm. 847 (1863); Bailey Co., v. Darling, 115 Me. 326, 111 Atl. 410 (1920) where the principal of the investment was at the risk of the business.


Continuance of an insolvent business by trustees for creditors in the hope of paying off debts out of profits of operation does not constitute the creditors partners. Wells-Stone Mercantile Co., v. Grover, 7 No. Dak. 460, 75 N. W. 311 (1898); In re Hoyne, 277 Fed. 668 (1922); Cox v. Hickman, 8 H. L. Cas. 268 (1860).

The special liability "sub-partnership," whereby a stranger is sharing profits and losses of one or more but less than all the partners is not partnership; Burnett v. Snyder, 76 N. Y. 344 (1879); Lovejoy v. Bailey, 214 Mass. 134, 101 N. E. 63 (1913); Kings Estate N. Y., v. All. 237 (1886); 32 Atl. 237 (1886); 35 Atl. 530 (1883); Myers v. Electric Co., 59 N. J. L. 153, 35 Atl. 1059 (1896); Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397 (1889); Oglesby v. Lindsay, 112 Va. 767, 12 S. E. 672 (1811); Strang v. Thomas, 114 Wls. 599, 91 N. W. 237 (1896).


case of Giles v. Vette. Marcus and Morris as general partners, and six others as special partners undertook to form a limited partnership under the Illinois Act of 1874, for the conduct of a brokerage business. The act under which they supposed they were entitled to organize was repealed and supplanted by the Uniform Limited Partnership Act effective in Illinois before they filed their certificate. They could not organize a brokerage partnership under the latter Act. The question presented was whether the ostensible special partners were subject to bankruptcy proceedings against the insolvent firm along with the general partners. It was held that they were not general partners or liable as such, both under the Uniform Limited Partnership Act and under the Uniform Partnership Act. The reasons were that the intended special partners did not intend to become general partners, did not carry on the business as co-owners or otherwise having no authority, actual or apparent, to act for or bind the partnership. This decision clearly expresses and applies the modern view that investment and profit sharing is not partnership if there is complete absence of power of conduct or control of the business.

Difficult and doubtful questions with conflicting solutions by the courts are presented in cases where the associates do not intend what they understand as partnership but some other form of association such as corporation or trust. In corporation law there is the generally accepted institution of de facto corporation, immunity from personal liability resulting from bona fide color of compliance with a law of organization and action in the corporate form. If the requisites above stated are lacking the de facto doctrine is inapplicable. Are the associates who so engage in group action partners? There are present the essentials of partnership, a business entered into for profit by a group of persons who actively participate as officers or directors or possess and exercise a power of control as stockholders. Many decisions holding the associates liable on contracts speak of them as being liable "as partners," and might be regarded as going no farther than treating the active participants in unauthorized corporate action as co-principals with liabilities similar to those of partners. One case at least holds:


81 U. L. P. A. Sec. 11, providing that one erroneously believing himself a limited partner is not liable as a general partner is on discovering his mistake he promptly renounces his interest in profits or other compensation by way of income. The supposed limited partners in Giles v. Vette had complied with this section.

them partners, in that they can be adjudicated bankrupt under the partnership section of the Bankruptcy Act.\textsuperscript{42}

Supposing a \textit{de jure} corporation to be formed in one state what is the status of its members with respect to acts in a foreign state committed without compliance with requirements for the licensing of foreign corporations? After a period of doubt as to whether the corporate franchise could be recognized outside the state which conferred it,\textsuperscript{43} it was agreed that on principles of comity the corporate existence created in the state of organization, with its accompanying rights and immunities should be recognized in a foreign state, unless inconsistent with its policy as to corporate action laid down by legislative enactment. "It was not necessary that the corporation should have an existence in this state as a corporation, but with the consent of this state it could do business here on the principles of comity. With the exception of corporations in the service of the United States or engaged in interstate or foreign commerce, the permission of a state to exercise corporate functions therein is necessary, and any state may exclude a foreign corporation entirely or fix the conditions under which it may do business in the state."

The states have forbidden foreign corporations to engage in doing business unless certain formalities are complied with, and affixed penalties for noncompliance. In some states officers, agents and stockholders are by statutory provision expressly made jointly and severally liable personally on contracts purporting to be made by unauthorized foreign corporations.\textsuperscript{45}

In some states members have been held to be partners. An important recent case to this effect at common law is \textit{Equitable Trust Co. v. Central Trust Co.}\textsuperscript{46} The Dayton Coal & Iron Company, Ltd., was organized in 1883 under the laws of Great Britain as a corporation, to operate mining properties in Tennessee. It was reorganized in 1895 and again in 1897, and neither of the latter two corporations complied with the laws in Tennessee as to foreign corporations. The Commercial Bank of Scotland and the Bank of Scotland became shareholders. The company became bankrupt and a bill in equity was filed by certain general creditors alleging that the


\textsuperscript{43} See \textit{Henderson, Foreign Corporations in American Constitutional Law.}

\textsuperscript{44} Cartwright J. in Joseph Ryerson \& Son \textit{v.} Shaw, 277 Ill. 524, 115 N. E. 650 (1917).

\textsuperscript{45} Chesley \textit{v.} Soo Lignite Coal Co., 19 No. Dak. 18, 121 N. W. 73 (1909); Lerner Engineering Works \textit{v.} Kempner, 163 Fed. 605 (1908).

\textsuperscript{46} 145 Tenn. 143, 239 S. W. 171 (1922).
company was a partnership, of which the Scottish banks were partners, the purpose being to reach funds payable to the banks as the proceeds of foreclosing a mortgage on company property, of which the banks and others were mortgagees. It was held that the Commercial Bank was a stockholder that had actively exercised its rights as such, participating in direction of the company and was a partner, "since the corporation was without power to contract, and as the stockholders could not bind it, they necessarily bound themselves." The liability was so created only as to acts of the associates in Tennessee, and not as to acts beyond its jurisdiction, as in Ohio and New York. As the Bank of Scotland held stock only as collateral and did not participate in management by voting it was not held a partner. Allegations that neither bank had authority under charter or corporations laws of Great Britain to enter into partnership were not noticed by the court. It was held to be immaterial that the banks and the petitioning creditors of the Dayton Company were ignorant of the non-compliance with the Tennessee laws and supposed that there was de jure corporate action. While this is a disregard of specific intent, and is a hardship on bona fide non-resident and relatively inactive stockholders, it is a logical result of the power of a state to designate the legal status of a group engaging in group action within its jurisdiction.

A corporation is essentially an association to carry on business for profit with community of interest and control. It differs from a partnership as a legal institution in that the state has conferred certain privileges on the group, including legal personality as a unit, with consequent immunity from personal liability of the individual associates. The state creating the corporation by undertaking to vest privileges in the group cannot ensure their recognition by the courts of another state as regards group action in that state. The foreign state may prohibit corporate action unless certain conditions are fulfilled. If the group violates the prohibition the foreign state may regard the acts done as corporate action, though disobedient, or it may regard them simply as the action of a group of persons who do not deserve and cannot be held to possess any corporate privileges whatever. Which view is taken depends on the relative weight of considerations of comity favoring recognition of

47 A corporation is acting ultra vires in becoming a partner, Whittenton Mille v. Upton, 10 Gray 582 (1858); Hocher-Platt Co. v. Miller, 238 Mass. 518, 131 N. E. 310 (1921); Merchants Nat'l Bank v. Wehrman, 202 U. S. 295, 50 L. Ed. 1036 (1906).

In one case the facts were found to constitute partnership but for the fact that one party to the agreement was a corporation. A partnership being ultra vires the relation was held to be that of joint adventure, with the same consequence, a right to an accounting, as if a partnership had been formed. Luhrig Colleries Co., v. Interstate Coal & Dock Co., 261 Fed. 265 (1922).
foreign institutions, and considerations supporting the legislative policy against unauthorized corporate action. There is some authority in support of the inhospitable view taken in *Equitable Trust Co. v. Central Trust Company,* but the weight of authority is to the contrary.

The trust form of business organization has been frequently employed by large associations for the purpose of gaining transferability of shares and permanency and concentration of management without submission to the restrictions and burdens imposed by legislative regulations of corporations. The trust is clearly an association to carry on business the beneficiaries or shareholders being the equitable owners of the property and sharing the profits, if any, and subjecting their investment to the risks of the business. Legislatures have to some extent classified it as an association *sui generis,* or at least distinct from the partnership and the conventional trust created by others than the beneficiaries, such as a testamentary trust. The courts have been reluctant to extend recognition to a new form of association and have tried to squeeze it into the partnership category along with joint stock companies whenever it can be found that the terms of organization vest in the associates the control feature of co-ownership. *Nina v. Cravens & Cage Co.* illustrates the length to which courts have gone in finding the existence of sufficient measure of control. The association there involved was formed to engage in the automobile business. The trustees were to "have and exercise exclusive management, disposition and control of same (the property), subject to the terms and provisions of the declaration of trust." It was provided that trustees could not bind *cestuis,* and further, "To eliminate any question which might be raised as to the intention of the parties

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43 *Mandeville v. Courtright,* 142 Fed. 97 (1905); *Taylor v. Branham,* 35 Fla. 297, 17 So. 352 (1895); *Cunningham v. Shelby,* 136 Tenn. 176, 136 S. W. 1147 (1913); *Booth v. Scott,* 276 Mo. 1, 205 S. W. 693 (1918); see 26 Yale L. Jour. 481; L. R. A. 1917 B 574.

Officers and agents actively engaging in transactions in behalf of unlicensed foreign corporations have been held liable as partners, *Joseph T. Ryerson & Son v. Shaw,* 277 Ill. 524, 115 N. E. 650 (1917); see also *Lasher v. Stimson,* 145 Pa. St. 30, 23 Atl. 562 (1892); *Raff v. Isman,* 235 Pa. St. 347, 84 Atl. 352 (1912); 27 Yale L. Jour. 248.

44 Natl. Bank of Wichita *v. Spot Cash Coal Co.,* 98 Ark. 597, 136 S. W. 953 (1911); *Beal v. Childress,* 82 Kans. 109, 139 Pac. 1108 (1914); *Shawmut Commercial Paper Co. v. Auerbach,* 214 Mass. 368, 101 N. E. 1000 (1913); *Pierce v. Yeaton,* 108 N. H. 675, 100 Atl. 584 (1917); *Merrick v. Van Santwood,* 34 N. Y. 308 (1860); *Stephenson v. Dodson,* 36 Pa. Super. 343 (1906).

45 *Chicago Title & Trust Co. v. Smietanke,* 275 Fed. 60 (1921) holds an association in the trust form who associates had limited powers of control over the trustees to be a "corporation," "joint-stock company or association" and not a partnership or trust within the meaning of the Federal Revenue Act of 1913. So also a similar association was held to be an "association" and not a trust under the Act of 1916 in *Malley v. Howard,* 251 Fed. 363 (1922); certiorari granted 260 U. S. 715.

A business trust has been adjudicated bankrupt as an association, *In re Associated Trust,* 222 Fed. 1012 (1914).

Trusts are expressly included in the "Blue Sky Law" of Pennsylvania, 1923- P. L. 779.

to this instrument, as well as to the *cestuis que trustents* it is hereby 
stipulated and declared that the purpose is to create a trust and not 
a partnership." No powers were expressed as vested in *cestuis*, 
but the court inferred from the absence of provisions for election 
of trustees, save in case of unexpired terms, and presence of pro-
visions for meetings of *cestuis*, that *cestuis* had the power to elect 
trustees and at their annual and special meetings to supervise the 
business. Therefore the trustees were "subject to the control of the 
certificate holders," and the latter were properly held liable as 
partners. The court cited a line of Massachusetts cases, apparently 
as sustaining the proposition that if the terms of association pro-
vide for meetings of beneficiaries for the purpose of taking any 
action whatever the association is a partnership. It also cited 
*Wells v. Mackey Telegraph & Cable Co.*, in the opinion of which 
case it is stated that the trust form of organization "cannot be sub-
stituted for statutory methods of limiting the liability of persons 
associating themselves together for the purpose of conducting a 
business for profit." This sentence expresses the crucial point. 
Are beneficiaries conducting a business by reason of power to 
periodically elect trustees who do directly conduct it, or to fill 
vacancies in unexpired terms, or alter, amend or terminate the 
terms of association? Unless it can be fairly said that they are 
conducting a business the holding them, contrary to their expressed 
intent, to the liabilities of partners is a reversion to the discarded 
rule of profit sharing as a sufficient basis of liability to third 
persons. It is agreed that the beneficiaries are not liable to one 
contracting with the trustees with knowledge of inhibitions con-
tained in the terms of association as to personal liability. 
Formation of corporation and limited partnership are not then the 
only ways in which may be obtained immunity from personal liabil-
ity by those who would enjoy the earnings of capital they have 
invested in business. Why cannot the law charge persons doing 
business with an association which holds itself out as a trust with 
knowledge of existing limitations on the power of trustees which 
are customary and usual in such associations? The law should 
as in the case of mining partnerships, recognize the existence of 
a new form of association with incidents intended by the parties 
which are not contrary to public policy and can be legally effective

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53 McCarthy v. Parker, 138 N. E. 8 (Mass. 1923); Hardie v. Adams Oil Co., 254 
S. W. 602 (Tex. Civ. App. 1923); see also Hibbs v. Brown, 190 N. Y. 167 (1907).
as to third persons who have notice of the character of the association. 54

To sum up, definitions merely indicate the indicia of partnership, the factors of the situation to be examined and evaluated. The more important indicia are the presence of a common business, and the co-ownership of that business in the sense of community of interest and control. Specific intent of parties to be or not to be partners is important but not conclusive. Some courts have appeared to be very keen to uphold a supposed legislative policy against the assumption of forms and methods of business of a corporate character by imposing on unincorporated associates the unwelcome status of partners.
