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THE LEGAL STATUS OF JOINT VENTURE CORPORATIONS

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INTRODUCTION

American industry employs many forms of business organizations. The sole proprietorship, the partnership, general and limited, the joint venture, the joint stock company, the corporation, public issue and close, and many others are all familiar and well established in their use. This article deals with the use by American industry of the close corporation to carry on a joint venture. With due deference to purists in legal terminology we have elected to refer to this particular type of corporate entity as the joint venture corporation. In this article we not only look at the use made of the joint venture corporation in America but also we examine its treatment at the hands of American courts.

ABERCROMBIE V. DAVIES

The recent case of *Abercrombie v. Davies*,[1] was not an encouraging one for those who value the joint venture corporation as a useful form of business organization available to American businessmen. In that case, the Supreme Court of Delaware had before it a joint venture corporation formed in 1947 to carry on foreign oil operations. A few years after operations commenced some of the participants joined together in a stock pooling agreement. Some time later, other participants in the joint venture who were not parties to the stock pooling agreement challenged its validity. In the instant case, the Supreme Court of Delaware struck the agreement down on the grounds that it failed to meet certain formal requirements of the Delaware General Corporation Law. While the result of the case may not be particularly disturbing, the opinion of the court is somewhat disquieting because of its total lack of recognition that the case involved a special kind of corporation. In addition, unfortunately, there was no acknowledgment by the court that, for certain purposes, joint venture corporations of the kind before the court have been treated by the law differently than other corporations.

The joint venture corporation in the case, American Independent Oil Company (American), was formed to obtain and develop an oil concession in the Kuwait-Saudia Arabian neutral zones. It was under-

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1. 130 A.2d 338 (Del. 1957), 11 VAND. L. REV. 215 (1957).

stood that the ruler of Kuwait, the British Foreign Office, and the United States Department of State preferred that the concession go to an independent organization rather than to a major oil company. To secure the necessary approval of these governmental bodies, it was agreed that no single interest would dominate American. Accordingly, each of the participants had a voice in its operation and was represented by at least one director on the board of the joint venture corporation. The major investor-participant, Phillips Petroleum Company, was represented by four directors, three other investors by two directors, and the remaining participants were represented by one director each. Oil was discovered and the company prospered.

Three years after American began operations enough of the smaller participants to constitute a majority on the board of directors entered into the agreement in question. The alleged purpose was to prevent Phillips from obtaining control of American. In substance, the agreement bound the parties for ten years to vote on corporation matters as seven of the eight directors representing them desired. If concurrence of seven on any matter was not attained a system of arbitration was set up to determine how all should vote. In form the agreement provided a transfer of voting control of the stock of the parties to eight agents for a period of ten years. The agents were to be identical as far as possible with the directors.

The court held the agreement to be a voting trust and since applicable statutory requirements as to filing and exchange of stock certificates had not been met, it was held to be invalid. We are not here concerned with the result of the case. It may be that the voting trust provisions of the Delaware General Corporation Law were intended to cover agreements involving participants in a joint venture corporation if such agreements otherwise fall within the registration requirement of Delaware law. However, it is unfortunate that the court reached its conclusion on this issue without so much as alluding to the fact that American Independent was a close corporation of a special type. To the extent that Delaware precedents in the law of corporations have a wider impact on the use of the corporate form than those of any other American jurisdiction, its omission is doubly regrettable.

THE JOINT VENTURE CORPORATION IS A UNIQUE ENTITY

The distinction between close and public issue corporations has long been recognized. The close corporation is an enterprise in corporate form "in which management and ownership are substantially identical. As a result of that identity the participants consider themselves 'partners' and seek to conduct the corporate affairs to a greater or lesser extent in the manner of a partnership."[2] The usual characteristics of a close corporation are that: (a) the stockholders are few in number; (b) they know one another reasonably well; (c) most of them take an active part in the enterprise; (d) each assumes some definite obligation with respect to the conduct of the enterprise; and (e) the identity of the other stockholders is important to them.[3]

The joint venture corporation is merely the traditional joint venture arrangement cast in corporate form. The orthodox joint venture is a legal relation of comparatively recent origin but one which has been recognized by the American courts.[4] It is usually described "as an association of persons to carry out a single business enterprise for profit."[5] The joint venture has all the attributes of a partnership.[6] While the usual joint venture generally is limited to a single transaction,[7] nevertheless, the business of conducting the joint venture may, if the character of enterprise is a continuing one, carry on for a number of years.[8] A corporation, of course, is a legal entity distinct from its stockholders and does not in itself constitute a joint venture relation.[9] However, in the absence of some prohibiting provision, either in the statute or the corporate charter, a corporation may enter into a binding agreement to carry on a joint venture with another if the purposes of the venture are within the corporate powers bestowed.[10] There is no doubt, according to a leading commentator on corporate law, that a corporation has the capacity "to enter into a commercial venture within the general scope of its corporate powers, whereby the profits or losses of the enterprise are to be divided between the corporation and another person or corporation."[11]

Therefore, at least from an analytical point of view, there would appear to be no legal barriers prohibiting a corporation from entering into an agreement with others, including other corporations, to create a joint venture to carry on an enterprise within the corporate powers bestowed on the corporation. Oklahoma, for example, has consistently

2. Israels, *The Close Corporation and the Law*, 33 CORNELL L.Q. 488 (1948).
3. Winer, *Proposing A New York "Close Corporation Law,"* 28 CORNELL L.Q. 313, 314 (1943).
4. Porter v. Cooke, 127 F.2d 853, 857-58 (5th Cir. 1942).
5. 48 C.J.S., *Joint Adventures* § 1 (1947); Pan American Trade & Invest. Corp. v. Commercial Metals Co., 33 Del. Ch. 425, 94 A.2d 700, 702 (Ch. 1953).
6. Southwestern Lumber Co. v. Kerr, 11 F. Supp. 253, 263 (S.D. Tex. 1934), *aff'd*, 78 F.2d 348 (5th Cir.), *cert. denied*, 296 U.S. 611 (1935).
7. 48 C.J.S., *Joint Adventures* § 1 (1947).
8. Morris v. Lessel, 185 Ark. 18, 45 S.W.2d 524 (1932); Upper Penns Neck Township v. Lower Penns Neck Township, 20 N.J. Super. 280, 89 A.2d 727, 732 (L. 1952).
9. Buck v. G. W. L. Constr. Co., 114 F. Supp. 448 (W.D. Mo. 1953).
10. Kasishke v. Baker, 146 F.2d 113 (10th Cir.), *cert. denied*, 325 U.S. 856 (1945).
11. 6 FLETCHER, PRIVATE CORPORATIONS § 2520 (perm. ed. rev. repl. 1950); Red Robin Stores v. Rose, 274 App. Div. 462, 84 N.Y.S.2d 685, 690 (1st Dep't 1948).

held that a corporation may be a party to the joint venture.[12] The same is true in California.[13] *Manacher v. Central Coal Co.,*[14] however, is a troublesome New York decision holding that individuals may not organize a corporation for the sole purpose of carrying on a joint venture. The New York court did draw a distinction in that case, however, between the situation where there is a true joint venture agreement separate and apart from the corporate entity. Therefore, the *Manacher* case seems distinguishable and not contrary to the general rule allowing the formation of joint venture corporations. Just as a corporation may invest in another close corporation, so too is it permitted to become a joint venturer with other corporations forming a corporation to carry on a particular transaction or a series of related transactions.

In joint venture corporations, as with other closely held corporations, the participants are torn between choosing the safety of the corporate form on the one hand and electing the flexibility of the partnership or joint venture form on the other. In operations of a highly speculative nature involving immense financial risk, such as the exploration and production of oil and gas in foreign areas, the limitation of liability and stability of organization make the corporate form particularly attractive. At the same time, the participants seek the advantages of the partnership form, to wit, personal voice in management policy, opportunity to maintain a pro rata share in the enterprise, and the ability to choose fellow participants and preclude unwanted outsiders from joining the undertaking.

Participants in close corporations have employed various devices to strike the desired balance.[15] Cumulative voting and provisions requiring greater than a majority vote for action by shareholders or the board of directors have been employed to give to each participant personal power in policy determination. Limitations on the transferability of stock and preferential stock purchase arrangements have been used to prevent unwanted outsiders from coming into the enterprise. Agreements among stockholder-participants as to appointment and removal of officers, dividend policy and other corporate policy have also been used. These provisions and agreements have been recorded either in the articles of incorporation, in the bylaws, or in independent agreements.

Joint Venture Agreements Sustained

Joint venture corporations have been used in a number of industries

12. Sand Springs Home v. Dail, 187 Okla. 431, 103 P.2d 524 (1940).
13. California Consolidated Furniture Manufacturers v. Goldstein, 140 Cal. App. 563, 35 P.2d 627 (1934).
14. 284 App. Div. 380, 131 N.Y.S.2d 671 (1st Dep't 1954).
15. Hornstein, *Judicial Tolerance of the Incorporated Partnership,* 18 Law & Contemp. Prob. 435 (1953).

in the United States. In the post-Civil War railroad building era, joint ventures were employed to build railroads, to construct and operate terminals and to provide a pool of special kinds of equipment such as refrigerator cars. In the construction industry, joint venture corporations have been used for gigantic tasks such as the Grand Coulee Dam and the Boulder Dam Project. At present, joint venture corporations are being used more frequently and on a larger scale in the petroleum industry than in any other area of American industry. We shall subsequently discuss in more detail some examples of the current use of the joint venture corporation in American industry.

Some courts have taken a realistic approach to these agreements and have not rigidly applied principles of corporation law designed primarily for public issue corporations. Illustrative of these cases is *Wabash Ry. v. American Refrigerator Transit Co.*[16] That case involved an agreement among a number of railroads for the organization of a separate corporation to manage the refrigerator cars operating on their lines. The contract defined the respective interests of the railroads in the refrigerator company and provided in detail for the distribution of its earnings. In an action to compel distribution of earnings in accordance with the contract, the court rejected the argument that declaration of dividends was a matter left to the discretion of the directors. While recognizing this to be a requirement of orthodox corporate law, the court stated that:

> [T]here is no particular divinity surrounding the term "corporation." The courts will look through the form to get at the real intent of the association of individuals or corporations forming the organization, and, if rights of third parties have not intervened, will give effect to the real purpose of the organization in order to promote square dealing and effectuate justice.
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> The stockholders' contract . . . provides that the surplus accruing from all sources shall be distributed (after payment of expenses and rentals of cars) by the refrigerator company to the three railroad companies, signers of the same, in certain proportions therein specified. There was no discretion in the refrigerator company as to how the fund should be distributed. It was under the compulsion of a contract obligation to make distribution of all "surplus accruing from all sources" according to the terms of the contract.[17]

The court made no mention of the fact that section 12 of the New Jersey General Corporation Act of April 21, 1896,[18] under which the corporation was organized, provided that: "the business of every corporation shall be managed by its directors."

16. 7 F.2d 335 (8th Cir. 1925).
17. *Id.* at 343-44, 346.
18. N.J. Sess. Laws 1896, c. 185 § 12 p. 281. (Now NEW JERSEY REV. STAT. § 14:7-1 (1937).

Similarly in *Chicago, M. & St. P. Ry. v. Des Moines Union Ry.*,[19] the Supreme Court held that the interest in a joint venture terminal corporation should be determined according to the terms of the agreement of the joint venture rather than according to later inconsistent corporate action taken by scheming stockholders. The Court took the position that the joint venture transactions established a trust for the benefit of the joint venturers. It struck down the formal corporate machinations such as amendment of articles of incorporation and acquisition of stock certificates, etc., upon which the various corporation officials based their authority. Likewise in *Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n*,[20] a joint venture terminal company was treated as the agency of these who established it, since the law deals with "the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."[21]

In the cases discussed above, the courts have indicated that *express* arrangements between corporate joint venturers should be construed with less emphasis on the corporate form of the joint venture and the ordinary rules of law usually applied to corporate entities and with more consideration given to the nature of the agreement between joint venturers. However, in *Seaboard Airline Ry. v. Atlantic Coast Line Ry.*,[22] a North Carolina court went further and, despite the absence of an express agreement, gave effect to an *implied* joint venture arrangement. The court implied from the acts of the railroads establishing a bridge company that each had equal rights to the use of the rail facilities of the joint venture bridge company. The implied agreement as to these rights was held controlling, notwithstanding contrary formal action by the corporation. The court said:

> The Bridge Company has no independent status or interest. Whatever the outcome of this controversy between its co-owners, the Bridge Company stands neither to gain nor to lose. It receives no revenues, pays no bills. Again, we advert to the fact that the co-owners pay no charge to the Bridge Company for the use of its facilities. As to operational and maintenance costs they pay *its* bills in the *proportion* determined on the wheelage or user basis and each pays 50% of its capital outlay costs. It holds legal title to properties. But in essence it is simply used by Seaboard and Coast Line, its co-owners, as a device to work out details of the usage of the jointly owned facilities. It is an instrumentality of its co-owners. Their rights, *inter se*, in respect of the use of the Bridge Company facilities, do not depend upon action of stockholders and directors within the corporate form. As heretofore observed, they spring from the nature of the original incorporation, confirmed by usage and course of dealings

19. 254 U.S. 196 (1920).
20. 247 U.S. 490 (1918).
21. *Id.* at 501.
22. 240 N.C. 495, 82 S.E.2d 771 (1954).

> across the years. Seaboard's position is predicated upon legal rights vested in it as successor to an incorporator. Its position is quite different from a stockholder whose rights spring solely from stock ownership.[23]

These cases present situations similar to that involved in the *Abercrombie* case, in that in general they deal with joint ventures in which the participants themselves are corporations rather than individuals. However, whether the joint venture corporation is composed of individuals rather than corporations apparently seems to make no difference to the courts that demonstrate an understanding of, or at least, a realistic approach to joint venture corporation agreements. In *DeBoy v. Harris*,[24] plaintiff and defendants had entered into a joint venture for the construction and leasing of buildings, which they agreed to carry out through the formation of a Maryland corporation. They also fixed the participation by the parties in the venture through the issuance of stock, and agreed that the parties were to devote their full time to the venture and serve as officers of the corporation at a specified salary. Plaintiff brought this action alleging that the defendants had breached the agreement between them by removing plaintiff as an officer and director of the corporation and by issuing additional shares of stock. The action of the trial court in sustaining a demurrer to the complaint was reversed by the Maryland Court of Appeals in a decision reviewing many of the authorities in the field.

The court of appeals noted the decisions in the early New Jersey case of *Jackson v. Hooper*,[25] and similar cases holding that joint venture agreements entered into prior to incorporation are contrary to public policy and invalid because they deprive the directors of discretion in managing the business of the corporation. The court refused to follow this conservative line of decisions, however, relying instead on the cases holding that incorporation of a joint venture does not change the essential nature of the relationship and that the courts will look through the corporate form and give effect to the intentions of the parties when the rights of third parties are not in issue.

In *Hathaway v. Porter Royalty Pool, Inc.*,[26] the Michigan Blue Sky Law was held not to apply to the issuance of certificates of stock to a number of private persons. Even though the transfer of the stock was within the literal meaning of the statute, the court held that the law does not apply where a corporation is used merely as a convenient method of carrying into effect a joint venture.

The Supreme Court of the United States adopted this same approach in *Beardsley v. Beardsley*.[27] That case involved two brothers who were

23. 82 S.E.2d at 785.
24. 207 Md. 212, 113 A.2d 903 (1955).
25. 76 N.J. Eq. 592, 75 Atl. 568 (Ct. Err. & App. 1910).
26. 296 Mich. 90, 295 N.W. 571, *amended*, 296 Mich. 773, 299 N.W. 451 (1941).
27. 138 U.S. 262 (1891).

engaged in building a small railroad in Arkansas in the last quarter of the nineteenth century. The Court construed their relationship as primarily a joint venture rather than as one of mere stockholders in the corporation that had been formed to carry on the construction work.

The same approach was used by a California court in *Hunt v. Davis.*[28] The litigants there were joint venturers in a newspaper that failed. According to the court, the rights of the parties could be more justly determined by considering the corporation which they had formed as a mere agency to more conveniently carry out their agreement. The court looked to the agreement as the basis for determining their rights. The corporation was considered the trustee of their respective interests.

In these, as in all other cases presenting close legal questions as to the extent to which corporate form should control, the effort to achieve an equitable result has much to do with the approach of the court. Usually this unarticulated major premise will not be expressed but is nevertheless present and is of controlling importance. In the cases discussed immediately above, the courts undoubtedly thought that substantial justice lay with those litigants who relied on the joint venture agreement rather than with the litigants who relied on the orthodox principles of corporation law. A California court has expressed this position in the form of a general proposition of law: "If a corporation or a formal partnership is a mere agency for the purpose of convenience in carrying out a joint venture agreement, and independent and innocent third parties, such as creditors or stockholders, are not injured . . . justice would seem to demand that in determining the rights of the parties they be placed in the position each occupied under the original agreement."[29]

JOINT VENTURE AGREEMENTS HELD INVALID

On the other hand, if these same courts had concluded that substantial justice lay on the other side of the question, the opinions easily could have been written with reliance on the general principles of corporation law. For instance, in *West v. Camden,*[30] the Supreme Court of the United States held an independent contract of employment between the president of the corporation and the general manager to be violative of public policy. According to the Court, the agreement might bind the president who held 5/6 of the stock of the corporation to act contrary to the interests of the other stockholders. It is worthy of note that the general manager held half of

28. 135 Cal. 31, 66 Pac. 957 (1901).
29. Elsbach v. Mulligan, 58 Cal. App. 2d 354, 136 P.2d 651, 659 (1943).
30. 135 U.S. 507 (1890).

the remaining outstanding shares which meant that only nine per cent of the shares were distributed among other stockholders. Again, in *Jackson v. Hooper*,[31] the New Jersey Court of Errors and Appeals refused to enforce a joint venture agreement which was inconsistent with subsequent corporate action. The case involved publishers of the Encyclopedia Brittanica who used the corporate form but operated as partners. They each held half the total stock in the corporation. The court expressed the orthodox corporate approach to the matter as follows:

> It is fundamental that, no matter how the shares of stock are held, the corporation itself is an entity wholly separate and distinct from the individuals who compose and control it. The complainant and the defendant, though owning the entire capital stock of the two corporations, are not, as expressed by Chief Justice Waite in the leading case of Pullman's Palace Car Co. v. Missouri Pacific Ry. Co., 115 U.S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, "the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property." The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form, and then, Proteuslike, become at will a copartnership or a corporation, as the exigencies or purposes of their joint enterprise may from time to time require. The policy of the law is to the contrary. If the parties have the rights of partners, they have the duties and liabilities imposed by law, and are responsible in solido to all creditors. If they adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners, and have only the rights, duties, and obligations of stockholders. They cannot be partners inter sese and a corporation as to the rest of the world. Furthermore, upon grounds of public policy, the doctrine contended for cannot be tolerated, as it renders nugatory and void the authority of the Legislature—a co-ordinate branch of the government—established by the Constitution, in respect to the creation, supervision, and winding up of corporations.[32]

The court supported its decision with the citation of ample authority including an early English decision, *Salomon v. Salomon & Co.*[33]

The trend of the law, in the writers' view, should be away from the corporate conceptualism dominating judicial opinions, as in *Jackson v. Hooper*,[34] and in the direction of cases like *Wabash Ry. v. American Refrigerator Transit Co.*,[35] and *DeBoy v. Harris*.[36] Where a joint venture agreement works no injustice on independent third parties it should be given effect. The human and social value in honoring one's agreement and all the factors that give integrity to contracts

31. 76 N.J. Eq. 592, 75 Atl. 568 (Ct. Err. & App. 1910).
32. 75 Atl. at 571.
33. [1897] A.C. 22.
34. See note 25 *supra*.
35. 7 F.2d 335 (8th Cir. 1925).
36. See note 24 *supra*.

freely entered into far outweigh any advantage derived from adherence to the letter but not the spirit of a general corporation statute.

Emphasis on the letter but not the spirit of the statute in addition to falling short of higher standards of judicial equity creates many practical problems. It increases the number of situations in which a lawyer will find it difficult to predict whether specific agreements desired by businessmen involving no harm to third parties would, if challenged, be upheld or stricken down by courts. Witness the hair splitting distinction of the New York courts between what is and what is not permissible slight deviation from the corporate norm. In *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*,[37] the court struck down an agreement whereby certain stockholders were given authority to manage theaters belonging to the corporation. The court said the agreement "sterilized" the powers of the directors over the management of the corporation theatres in violation of the General Corporation Law of the state.

However, an earlier New York case, *Clark v. Dodge*,[38] had upheld an agreement which resided full managerial control of the corporation in one of the two stockholders. The court in that case said: "If the enforcement of a particular contract damages nobody—not even, in any perceptible degree, the public—one sees no reason for holding it illegal, even though it impinges slightly upon the broad provisions of section 27."[39] *Clark v. Dodge* was decided after two earlier New York decisions[40] in which the court had stricken down similar agreements to control the discretion of the board of directors.

As in other jurisdictions, the recent tendency in New York is to accommodate as much as possible the reasonable expectations of businessmen in utilizing the corporate form for the operation of a joint venture. The New York courts have frequently upheld agreements providing for arbitration of management policies in the event of disagreement.[41] *Ripley v. Storer*,[42] approved by-laws requiring stockholder approval of all contracts made by the directors for more than one year and of all directors' resolutions providing for bonuses

37. 297 N.Y. 174, 77 N.E.2d 633 (1948).
38. 269 N.Y. 410, 199 N.E. 641 (1936).
39. *Id.* at 642, referring to N.Y. GEN. CORP. LAW § 27. "The business of a corporation shall be managed by its board of directors."
40. McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234 (1934); Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918).
41. Application of Landersman, 280 App. Div. 963, 116 N.Y.S.2d 495 (1st Dep't 1952); Application of Carl, 263 App. Div. 887, 32 N.Y.S.2d 410 (1st Dep't 1942); Application of De Caro, 261 App. Div. 975, 25 N.Y.S.2d 849 (2d Dep't 1941); Martocci v. Martocci, 42 N.Y.S.2d 222 (Sup. Ct), *aff'd*, 266 App. Div. 840, 43 N.Y.S.2d 561 (1st Dep't 1943); O'Neal, *Resolving Disputes in Closely Held Corporations: Intra Institutional Arbitration*, 67 HARV. L. REV. 786 (1954).
42. 1 Misc. 2d 281, 139 N.Y.S.2d 786 (Sup. Ct.), *aff'd*, 286 App. Div. 844, 142 N.Y.S.2d 269 (1st Dep't 1955), *modified in other respects*, 309 N.Y. 506, 132 N.E.2d 87 (1956).

over a specified amount to corporate officials. *Simonson v. Helburn*,[43] sustained a sweeping agreement among stockholders of a theatre guild which, among other things, provided for changes in the capital structure of the company, instructed the directors as to who were to be employed as officers of the corporation, gave those officers as such and not as directors the exclusive power to select plays and engage actors, and gave others the power to dissolve the corporation and required that they be hired as an advisory board at fixed salaries. Other decisions have upheld agreements among shareholders to vote for themselves as directors and as directors to vote for themselves as officers.[44]

In the light of the conflicting line of decisions dealing with the proper relation between the joint venture and the corporate entity, it is of interest to examine in detail provisions and agreements which have been employed by various joint venture corporations in American industry. A principle of law which is either evaded or ignored in business practice, absent other compelling considerations of public policy, should not long survive.

USE BY AMERICAN INDUSTRY OF THE JOINT VENTURE CORPORATION

The Construction Industry

While the corporate joint venture may not now be as popular in the construction business as it once was, it is, however, known to that industry. Especially is this true in the heavy construction field. For instance, construction work on the Boulder Canyon Project was done by a joint venture corporation formed by six large construction companies and known as the "Six Companies, Inc."[45]

According to counsel for the Six Companies, Inc. there was no pre-incorporation agreement signed by the stockholders of that company. Similiarly, the attorney for the Morrison-Knudsen Co., Inc., one of the six corporate venturers who formed Six Companies, Inc., has advised the writers that he was

> informed that the several corporate shareholders of this corporation occupied the same position with respect to control over the actions of the directors as to individual stockholders of corporations generally. Insofar as we know, the organizers of Six Companies, Inc., did not enter into a stockholders' voting agreement, and each stockholder participated in the management of the corporation only in that degree accorded to each by the laws of the state of incorporation and the charter and the by-laws.

43. 198 Misc. 430, 97 N.Y.S.2d 406 (Sup. Ct. 1950).
44. Lockley v. Robie, 301 N.Y. 371, 93 N.E.2d 895 (1950); Cohen v. Wacht, 124 N.Y.S.2d 207 (Sup. Ct.), *aff'd*, 282 App. Div. 1054, 126 N.Y.S.2d 910 (2d Dep't 1953); Tremsky v. Green, 106 N.Y.S.2d 572 (Sup. Ct. 1951); Blum v. Oxman, 190 Misc. 647, 75 N.Y.S.2d 177 (Sup. Ct. 1947); *In re* Block's Will, 186 Misc. 945, 60 N.Y.S.2d 639 (Surr. Ct. 1946).
45. Six Companies, Inc. v. Di Vinney, 2 F. Supp. 693 (D. Nev. 1933).

> Of course, in the case of the Six Companies, Inc., and that of the Transbay Construction Company which was organized a year or so afterward, *each stoekholder was represented by a director, presumably by informal agreement of the group and consequently there was no divergence of interest by the stockholders and directors.* (Emphasis added.)

Despite counsel's disclaimer, the underscored portion of his remarks indicates that through informal agreement of the stockholders there *was* a significant departure from ordinary corporate arrangements in that directors were, in effect, named by the stockholders they represented, rather than being elected by all.

In addition to the Six Companies, Inc., as already noted, construction on the Grand Coulee Dam was performed by a joint venture corporation formed by four construction companies. This was the Mason-Walsh-Atkinson-Kyer Company. The company served as agent of the four corporate stockholders in connection with all the work done on the dam. The amended complaint filed by the plaintiff in *Silas Mason Co. v. Tax Comm'r*,[46] states that the Mason-Walsh-Atkinson-Kyer Company was the *"alter ego"* of the stockholder principals and was an "entity brought into being by them for the more convenient and economic doing of the work under the contract" with the United States. In the *Silas Mason* case the Supreme Court of the United States adopted this characterization of the joint venture corporation.

It is evident that the joint venture corporation has been used in the construction industry but that its present use is not widespread. Generally, the larger construction companies who are faced with the problem of organizing a joint venture prefer to maintain a definite distinction between corporate organization and joint venture organization. In those situations where the corporate form of organization would best suit their purposes they organize a corporation, but exercise control as a stockholder thereof in the same manner and to the same extent as is common with corporations generally. It appears that while joint venture *arrangements* are fairly common and well known in the heavy construction industry, the joint venture *corporation* as such is not in wide use at present.

The Railroad Industry

Attention has already been called to the use to which railroad companies at times have put the joint venture corporation in operating terminals, refrigerator companies, and switching lines. The case materials to which we have previously referred supply examples of favorable judicial reaction to such use of the corporate mechanism by the railroad industry. In addition to this, there are other railroad companies presently making use of the joint venture corporation. For

46. 302 U.S. 186 (1937).

instance, the Railway Express Company is a joint venture corporation. The entire stock of the company is held in varying proportions by most of the railroad companies of the country. The agreement between the Railway Express Company and the railroads which make up its stockholders imposes significant limitations on the authority ordinarily exercised by the board of directors in the case of the conventional corporation. Weight restrictions, tariff charges, and restrictions on the use by Railway Express Company of non-railroad transportation media are all subject to the control and direction of the stockholders of Railway Express. The earnings of Railway Express are distributed on the basis of the volume of Railway Express business done on the lines of the respective carrier stockholders. In addition, the railroad stockholders can complain of actions or decisions by the board of directors of Railway Express and in case they disagree with them, the matter is submitted to arbitration or, in the alternative, determination by the Interstate Commerce Commission. The agreement between he railroad stockholders who own Railway Express imposes other important and unusual restrictions on the powers ordinarily vested in the board of directors. Thus, under their agreement with Railway Express, an individual railroad has the right to have any employee of Railway Express who may be objectionable to it removed or discharged. The agreement also requires that the business of Railway Express Company is to be conducted by the board of directors in a manner that is "satisfactory" to the railroads.

In addition to the case of the Railway Express Company, agreements pertaining to a number of other joint venture corporations which have been established by groups of railroads are of interest. These are: an agreement between four railroads establishing the Chicago Union Station Company, an Illinois corporation which is a jointly operated company for handling the passenger, mail and express traffic of the proprietary companies;[47] an agreement relating to the Houston Belt & Terminal Railroad Co., a Texas corporation, which serves as a terminal railroad established by a number of southeastern roads;[48] an agreement concerning the Chicago & Western Indiana Railroad Company, a terminal company established by five railroads and organized under the laws of Illinois;[49] an agreement relating to the Joplin Union Depot Company, a Missouri corporation, which is a station company owned by three railroad stockholders;[50] an agreement involving Pueblo Union Depot & Railroad Company, a Colorado corporation which serves as a terminal company owned in equal shares by four western roads;[51]

47. Exhibit No. 29, Matter of Chicago Union Station Co., 70 I.C.C. 191 (1921).
48. Exhibit No. 7, Houston Belt & Terminal Ry., 275 I.C.C. 289 (1950).
49. Exhibit No. 7, Chicago & Western Indiana Ry., 271 I.C.C. 815 (1948).
50. Exhibit No. 1, Joplin Union Depot Co. Bonds, 239 I.C.C. 491 (1940).
51. Exhibit No. 7, I.C.C. Finance Docket No. 14518.

Salt Lake City Union Depot and Railroad Company, a Utah corporation, operating as a station and terminal company owned equally by two western roads;[52] Joliet Union Depot Company, an Illinois corporation, serving as a depot company the stock of which is held in equal parts by three railroads;[53] and Northern Pacific Terminal company, a terminal company owned, though not in equal proportion, by three roads and organized under the laws of Oregon.[54]

The agreements relating to these terminal companies illustrate typical restrictions imposed by the railroad stockholders on the board of directors of such jointly owned companies. These restrictions include: (1) the vesting of control over the selection and retention of employees in the stockholders; (2) the distribution of profits or surplus on the basis of use and not in proportion to stock ownership; and (3) providing for the arbitration of disputes arising either between stockholders themselves or between one of themselves or between one of them and the joint venture company. At the same time each of the states in which these corporations are incorporated has the typical statutory provision to the effect that the business and affairs of the corporation shall be managed by a board of directors.[55]

Maritime Industry

An example of an agreement employed in the maritime industry is the agreement dated April 23, 1947, between Lykes Bros. Steamship Company, Inc. and Grace Line, Inc., providing for the formation of Gulf & South American Steamship Company, Inc.[56] This jointly held company is a Louisiana corporation established to provide steamship service in the foreign trade. The agreement between the two corporate joint venturers, approved by the Federal Maritime Board, provides that general control and management of the business is to be vested in a board of directors of four, "upon which there shall at all times be two directors representing Grace and two directors representing Lykes." The first board of directors of the new company was named in the agreement between the two joint venturers. The agreement between them further provides that the parties may at any time change their representatives on the board of directors. The chairmanship of the board of directors is required to be alternated between representatives of the two stockholders on an annual basis. In the case of a deadlock on the board of directors of four or between the two

52. Exhibit No. 7, I.C.C. Finance Docket No. 14695.
53. Exhibit No. 7, I.C.C. Finance Docket No. 14563.
54. Exhibit No. (b)-7, Northern Pac. Terminal Co., 282 I.C.C. 807 (1951).
55. Illinois: Ill. Ann. Stat. c. 32, § 157.33 (Smith-Hurd 1954); Missouri: Mo. Rev. Stat. § 351.310 (1949); Oregon: Ore. Rev. Stat. c. 70, § 47.180 (1953); Texas: Tex. Civ. Stat. Ann. art. 1327 (Supp. 1957); Utah: Utah Code Ann. § 16-2-21 (1953).
56. Federal Maritime Board Contract No. 7612.

stockholders, with respect to any matter pertaining to the business of the company, the issue is to be settled by arbitration. Under the agreement between Lykes and Grace the new corporation is required to appoint Lykes as its sole traffic agent at United States Gulf ports, with the exception of New Orleans, and is required to appoint Grace as its sole traffic agent on the west coast. Moreover, the new company must establish its principal operating headquarters at New Orleans, Louisiana.

The Mining Industry

The joint venture corporation has been employed also in the mining industry. An example of this is TAMAS, a Turkish corporation, but a joint venture owned by the Newmont Mining Corporation of New York and Etibank, an operating agency of the Turkish government. There is an agreement between Newmont and Etibank concerning the operations of TAMAS. Under the agreement, the joint venture corporation is required to report and account periodically to Etibank. The joint venture corporation is required to give Etibank an opportunity of participating in the development of production in any areas which have been under exploration by TAMAS. Etibank must be given an opportunity to approve and participate in any production program contemplated by TAMAS with respect to any such area. Disputes which arise between the joint venture corporation, TAMAS, and Etibank are to be settled by arbitration.

While one of the co-owners of TAMAS is the corporate instrumentality of a foreign government, the agreement between the Newmont Mining Company and Etibank furnishes an example that, as in the case of overseas oil exploration, so, too, with respect to overseas mining opportunities the joint venture corporation is a device of which important use sometimes is made. It is not possible to determine the exact extent to which the joint venture corporation has been employed in United States mining operations. However a number of American mining corporations are owned jointly by other mining companies and it reasonably can be assumed that some are joint ventures.

Communications

In the communication field there are at least two examples of the use of the joint venture corporation of which the authors have knowledge. One of these is Press Wireless, Inc., a Delaware corporation, an international communications common carrier. It is jointly owned by, and provides radio services for, newspapers and press associations. The articles of incorporation of this company provide that the corporation may in its bylaws fix the number (not less than the number required by law, however) of the shares of stock the holders of which must approve specific acts by the board of directors of Press Wireless, Inc. The articles of incorporation also impose a limitation on the amount of stock which one press interest may own directly or indirectly at any one time.

The second example is Aeronautical Radio, Inc., a Delaware corporation. It is a joint venture corporation formed to provide a system of radio communications serving aircraft operators. It is jointly owned by a number of airlines, large and small. The bylaws of AIRINC provide for the refunding of profits in proportion to the use of the companies' services by the individual airlines and not on the basis of stock ownership. Also, as in the case of Press Wireless, Inc., the bylaws of AIRINC prohibit any airline, or group of airlines under a common ownership, from obtaining "control of the policies or actions of AIRINC." To that end, no airline nor group of affiliated airlines may own "directly or indirectly or control the vote of, more than twenty per cent of the total authorized capital stock of AIRINC, or more than 33 1/3 per cent of its total capital stock actually issued and outstanding at ony one time."

Electric Power

Examination of the registration statements of several electric utility corporations which are on file with the Securities and Exchange Commission reveals that the joint venture corporation is also known in this industry. The rather well publicized "Dixon-Yates" electric power matter exemplifies the use of the joint venture corporation in the electric power field. "Dixon-Yates" sought to supply electric power to the Tennessee Valley Authority and the Atomic Energy Commission in replacement of power which TVA provided for certain facilities of AEC. The two electric utility companies involved were Middle Southern Utilities, Inc. (MSU) and the Southern Company (Southern). These two utilities agreed with each other to establish an operating company which would supply the power which they had agreed to sell to AEC. The joint venture company established by MSU and Southern was the Mississippi Valley Generating Company (MVG).

The agreement between MSU and Southern pertaining to the organization and operation of MVG affords each the right to designate representatives on the board of directors of MVG.[57] The two companies pledge that MVG will not enter into contracts or commitments concerning the sale of power to AEC by MVG without the approval of both MSU and Southern. In addition, there are provisions regarding rights of MSU and Southern to any surplus of electric power over that which MVG is required to make available for sale and disposal to facilities of the AEC. Although, as we know, the "Dixon-Yates"

57. S.E.C. File No. 70-3319, Exhibit L.

proposals were finally rejected by the Government, if those proposals had been accepted and the enterprise allowed to proceed, MVG would have provided an interesting illustration of recent resort to the joint venture corporation in a novel situation arising in the electric power industry.

Air Transportation

An example of a joint venture corporation operating in the air transportation industry is Air Cargo, Inc., a Delaware corporation, organized and operated to perform certain traffic services and facilities in connection with the handling of air cargo for air carriers. The stockholders of Air Cargo, Inc., are all airlines holding varying proportions of its stock. The agreement between the participating stockholders in this joint venture provides for significant departures from the usual method of electing the directors of a corporation.[58] For instance, one nominee must be designated by at least five airline members of the board of directors and that nominee may not be an officer, director or employee of any party to the joint venture agreement. Again, the parties pledge themselves to vote their stock for the election of one nominee who must be the incumbent of the office or president of the Air Transportation Association of America. The stockholders further commit themselves to vote for four nominees designated (one each) of the four largest stockholders of record. Finally, one nominee must be designated by each of the stockholders, apart from the four largest shareholders. In the case of any vacancy arising on the board, the parties agree to cast their votes for the election of a nominee who has been designated in the same manner as the member whose death, resignation or disqualification caused the vacancy.

The Petroleum Industry

A. *Domestic:* Perhaps in no other American industry is there so much use being made at present of the joint venture corporation as in the oil and gas industry. This holds true both as to the domestic phases of that industry and in connection with the exploration and development of foreign oil and gas properties. There is a reasonable explanation for this. The considerations which convince businessmen to make use of joint venture corporations probably apply with special force in the petroleum industry. Speculative investments involving a high degree of risk of failure, requiring large and continued expenditures and, very often, a considerable personnel force are frequently the prospects which face those who are engaged in the exploration, development and production of oil and gas in the United States and abroad. Moreover, the depletion allowance provided under the Internal

58. C.A.B. File 1041.

Revenue Code minimizes any tax disadvantage in the use of the corporate form in the oil and gas industry. Under these circumstances, distribution of the expenses, the effort, and the risk involved among a number of interested oil and gas companies is often mandatory. The device frequently used in such situations to achieve these purposes has been the joint venture and often in its corporate form.

An example of the joint venture corporation in this field is Amurex Oil Development Company which is composed of three companies: Ashland Oil and Refining Co.; The Murphy Corporation of Eldorado, Arkansas; and A. G. Becker & Co., a Chicago corporation. Extracts from the registration statement which Amurex filed with the Securities and Exchange Commission on January 11, 1953, indicate that Amurex is a Delaware corporation.[59] It was organized to engage in the business of prospecting for and acquiring oil and natural gas properties in the western provinces of Canada and the western states of this country. The prospectus filed by Amurex as part of its registration statement explains the reasons for the registrant's use of a joint venture corporation. It applies in other situations as well:

> This procedure of carrying on oil exploration and development activities through joint operations is common in the petroleum industry and is practiced by many of the largest as well as the medium-sized and small companies. Such a course is expected to result in a greater distribution of risk and makes it possible, with given funds, to prospect much larger areas than would otherwise be feasible. As indicated above, Ashland and Murphy are now participating in a number of joint undertakings and each participates frequently with others.

The joint venture corporation has also been quite extensively used in connection with the construction and operation of both oil and natural gas transmission or pipelines. These involve, of course, heavy costs, both of construction and of operation and maintenance. The Federal Trade Commission records the following pipeline companies as corporations which are owned jointly by other oil or natural gas companies:[60] Great Lakes Pipeline Company (owned jointly by Continental Oil, Midcontinent Petroleum, Skelly Oil, Texas Company, Pure Oil, Cities Service, Sinclair Oil, and Phillips Petroleum Company); Detroit Southern Pipeline Company (owned jointly by Pure Oil, Gulf Oil and Sun Oil); Natural Gas Pipe (owned jointly by Cities Service, Texas Company, Standard of New Jersey, People Gas Light & Coke Company, South Western Development Company and Columbian Carbon Company); Ajax Pipe Line Company (owned jointly by Standard of Ohio, Pure Oil, and Standard of New Jersey); Plantation Pipeline Company (owned jointly by Standard of New Jersey, Standard

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59. Registration Statement S - 9375.
60. FTC, REPORT ON INTERLOCKING DIRECTORATES 365 (1951).

of Kentucky, and Shell Union Company); Wyco Pipeline Company (owned jointly by the Texas Company, Sacony Vacuum, and Standard of Indiana). Processing companies, too, are often the joint venture of several oil companies. For instance, Neches Butane Products Company is jointly owned by the Texas Company, Gulf Oil, Sacony Vacuum, Pure Oil and Atlantic Refining Company.[61]

B. *Foreign Exploration and Development:* It is in this area that joint venture corporations, such as American Independent Oil Company involved in the *Abercrombie* case, abound. Many of these, but by no means all, are owned in whole or in part by groups of American oil companies. Perhaps the most extensive listing of examples of the use of jointly used companies in overseas oil exploration and development may be found in a report of the staff of the Federal Trade Commission entitled "International Petroleum Cartel."[62] Throughout this report may be found a number of references to the extensive use of the corporate joint venture by oil companies engaged in exploring or developing oil and gas reserves abroad.

While the tenor of the report of the staff of the Federal Trade Commission, understandably, is hostile to the overseas operations of major American oil companies because of alleged antitrust implications, nevertheless, the report attests to the fact that joint venture corporations are almost the rule, rather than the exception, in this very important industry. For instance, the report observes that:

> Joint ownership of affiliated companies is probably more widespread in the international petroleum industry than in any other field of enterprise. The major international oil companies use the joint-ownership technique not only in conducting foreign operations but also in their operations in the United States and Canada. This is particularly true with respect to control of pipe lines and companies holding patents on technological processes. Thus, the international companies, operating in the United States and Canada, are joined with the large domestic oil companies in the two operations where control is likely to exert the maximum of influence on the industry.
>
> Also, the boards of directors that manage the myriad of jointly owned corporations may, in effect, be private planning boards where differences are resolved and where an oil policy for the world can be established.

In subsequent sections of the report, the Commission's staff discusses particular overseas oil companies of this type. We note here only those which pertain to corporations in which American oil companies participated as shareholders or joint venturers. They include: Basrah Petroleum Company, Ltd. (23.75% of this jointly owned company is held by Standard Oil Company of New Jersey and Socony-Vacuum Company, the rest of its stock being held by British, Dutch and French

61. *Id.* at 368.
62. *Hearings Before Subcommittee on Monopoly, Senate Select Committee on Small Business,* 82d Cong., 2d Sess., Comm. Print, No. 6 (1952).

interests); Kuwait Oil Company, Ltd. (holding a 75% concession granted in 1934 and covering all of the Sheikdom of Kuwait and owned 50% by the American Gulf Oil Company); Bahrein Petroleum Company (owned in equal parts by the Standard Oil Company of California and the Texas Company); Arabian American Oil Company (holding a concession in Saudi Arabia and owned jointly by Standard Oil Company of California, Texas Company, Standard Oil of New York and Socony-Vacuum); Turkish Petroleum Company (jointly owned by a group of American oil companies along with British, Dutch and Persian interests);[63] Aramco (jointly owned corporation in which four American companies, Jersey Standard, Socony-Vacuum, Standard of California and Texas Company participate along with European interests); and the Mene Grande Oil Company (a joint enterprise of the Gulf, Standard of New Jersey and Shell Oil Companies).

C. *Typical Provisions:* A few agreements pertaining to joint venture oil corporations organized and operated for the purpose of exploring and developing foreign oil resources are of interest. The agreements relate to the following: Trans-Arabian Pipe Line Co. (Trans-Arabian); Middle East Pipelines, Ltd. (Middle East); Turkish Petroleum Company, Ltd. (Turkish Petroleum); Arabian American Oil Co. (Arabian American); Iranian Oil Co., Ltd. (Iranian); and Irican Agency, Ltd. (Irican). Three of these, Trans-Arabian, Arabian American and Irican, are Delaware corporations. The corporate organizers of the six oil companies have laid significant restrictions upon powers which, in the case of public issue corporations, ordinarily are exercised by a board of directors. We summarize herein a number of these restrictions.

The provisions by means of which the stockholders of these six overseas joint venture oil companies restrict or control the managerial powers given their boards of directors are of several types. For instance, nearly all vest sole power in the stockholders to make by-laws. Most of these six companies also operate pursuant to requirements imposed that more than a majority of the stockholders must approve changes in the by-laws, or in the articles of incorporation. In some cases, more than a majority of the stockholders is required to approve any disposition of the assets of the corporation and there are also pro-

63. "Close cooperation was required of the groups in the administration and management of TPC. Each group holding a 23.75 percent share was termed a major group and was entitled to appoint two directors. Participations and investments (Gulbenkian) was termed a minor group and entitled to one director. (Any appointed director could select an alternate director.) In addition to the directors appointed by the groups, one director could be appointed by the Government of Iraq; the TPC Board could elect a chairman and a managing director, but the number of directors could never exceed 12, and resolutions could be passed at a board meeting only if 3 major groups voted favorably." FTC, REPORT ON INTERLOCKING DIRECTORATES 65 (1951).

visions which require greater than a majority vote with respect to all stockholder action.

The agreement among the participants in the Iranian Oil Co., Ltd., contains a number of interesting provisions affording stockholder control over the authority of the board of directors to manage the company. For instance, the agreement provides that:

> N. Notwithstanding anything contained in the Articles of Association for the time being of the Company any Director may request at a meeting of the Board that any resolution submitted to the Board for its consideration (whether the Board takes a decision thereon or not at that meeting) shall be submitted instead to the Company in General Meeting, and upon any such request the Directors shall forthwith convene a General Meeting for the purpose of considering the said resolution. The Directors shall thereafter give full effect to the decision of the Company thereon and failing such decision no action on the resolution may be taken by the Board.

The agreement also gives any stockholder the right to call a special meeting for the election of directors, which right cannot be abridged save by the unanimous consent of all the other stockholders.

There are also provisions found among the documents pertaining to the organization and operation of these six oil companies which require that director action, as well as stockholder action, must obtain approval of greater than a majority of the holders of capital stock in order to be effective. For example, the articles of incorporation of Middle East provide that the "lowest majority for the passing of a resolution at a meeting of the Directors of the Pipe Line Company shall be more than 66 2/3 per cent of the total number of votes capable of being cast by all the directors . . . ." Likewise, the agreement between the stockholders of Turkish Petroleum requires that the articles of incorporation of that company must be altered so as to provide:

> that Resolutions at Board Meetings can only be carried if the Directors or one of the Directors appointed by at least three of the Major Groups vote in favour thereof and that no Resolution at a General Meeting of Shareholders shall be carried unless the votes attaching to the Shares then held by at least three of the Major Groups be cast in favour of it.

Again, in the selection, election, or removal of directors of these six joint venture oil companies operating abroad, the stockholders thereof have exhibited considerable caution to preserve their control. They have attempted to insure that the directors designated or elected to serve on the board of directors of these joint venture companies are responsible to and represent the stockholders who designate or elect them. For example, the agreement among the participating stockholders in Middle East provides that the stockholders shall have the right to appoint directors in a number based on the percentage of the company stock held by the dominating stockholders. The stockholders' agreement relative to participation in Turkish Petroleum provides that each of the majority group of stockholders may appoint two directors to the board and that the minor group may appoint one. Affiliates, or "Operating Companies," established by Turkish Petroleum, must also have a board of directors to which directors are appointed in the same manner and based on the same proportion of stock holdings as are required with respect to the appointing of a director to the board of the parent company. The participants' agreement relative to the Iranian Oil Company provides that each member of the participating groups "shall be entitled to appoint to and maintain on the Board a number of directors which shall vary according to the number of shares of which such member is the registered holder . . ." thereof. The actual number of directors a stockholder may appoint is computed with reference to a formula which permits a member company owning more than five per cent but less than forty per cent of the stock to appoint one director, and member companies holding more than forty per cent to appoint two directors. A quorum for any meeting of the board of directors requires the presence of the director appointed by each member of the group entitled to appoint a director to the board.

There are other provisions which represent deviations from those which usually govern the relations between a corporation and its stockholders. Illustrative are provisions which guarantee that: the participating company have a preferential right to a pro rata share in the product of the joint venture oil company; that the stockholder's preferential rights to purchase additional shares issued by the company may not be abridged; and that disputes arising between stockholders are to be settled by arbitration.

CONCLUSION

In an effort to distribute the risk, maximize the use of investment capital and divide heavy costs of construction and operation, we have seen that American industry has often turned to the joint venture corporation. The provisions of the agreements noted herein exemplify the fact that the ordinary relations which prevail between the stockholders of the public issue corporation and the corporation do not apply, in important respects, in the case of these joint venture corporations. The objectives which usually lie behind the business decision to utilize the joint venture corporation cannot be realized unless some deviation from the ordinary legal relations which obtain between stockholders and corporate management is allowed. This means that the courts should continue to move away from the philosophy of *Jackson v. Hooper,* dominated as it is by some supposed duty to give effect to the literal terms of general corporation statutes even though this involves the violation of freely made contractual agreements and deters effective business use of a very necessary form of organization. Instead, the courts should renounce such formalism and recognize not only that justice among the participants in a joint venture corporation will often be best achieved if the participants are required to abide their freely negotiated agreements, but also that American industry will be the beneficiary of a more liberal judicial reception of such agreements.

Most of the provisions and agreements employed by joint venture corporations in American industry, although at variance somewhat with the usual corporate forms, would be upheld as valid in many jurisdictions even if a public issue rather than a close corporation were involved. This is true for example of provisions vesting control in stockholders over election and retention of certain officers and employees.[64] However, the provisions and agreements for arbitration of unsettled policy matters and other modifications of control by the board of directors are more doubtful. In this category is the "Dixon-Yates" provision for stockholders' approval of all contracts for sale of power and the Iranian Oil Co. provision that any resolution submitted to the board of directors may instead be submitted to a general meeting of the stockholders. Such limitations on directorate control of ordinary corporate affairs would be of doubtful validity in a public issue corporation.[65] Similarly, provisions for greater than majority vote for stockholder action unless authorized by statute, have been held invalid.[66]

Generally, these joint venture agreements are entered into by all participants in the joint venture corporation. Various theories have been employed to sustain these agreements. Some courts base their decision on the theory that the corporation is the agency for carrying out the agreement in question.[67] Other courts have employed the theory that the corporation is a trustee of the respective interest of the parties.[68] On the other hand, some courts have not leaned on the crutches of the agency or trust theories in writing their opinion but have stated flatly that the agreement is a binding, valid contract

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64. 5 FLETCHER, PRIVATE CORPORATIONS § 2064 (perm. ed. rev. repl. 1952); Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N.W.2d 288 (1954).
65. 5 FLETCHER, *op. cit. supra* note 64, § 2097. It should be noted that some statutes expressly authorize consent of stockholders to directors' action in extraordinary corporate affairs, such as the sale or mortgage of the property of a corporation. *Id.* § 2105.
66. Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829 (1945); Hornstein, *supra* note 15, at 443, 445.
67. Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n, 247 U.S. 490 (1918); Wabash Ry. v. American Refrigerator Transit Co., 7 F.2d 335 (8th Cir. 1925).
68. Chicago, M. & St. P. Ry. v. Des Moines Union Ry., 254 U.S. 196 (1920); Hunt v. Davis, 135 Cal. 31, 66 Pac. 957 (1901).

which is not superseded or attenuated by the formal requirements of corporate statutes. This type of forthright reasoning is particularly applicable to agreements involving less than all of the stockholders such as the one in *Abercrombie v. Davies*.[69] But the important thing is that the courts should recognize that close corporations engaging in joint ventures are necessarily different in structure from public issue corporations. Accordingly, where no injury to third parties is involved, the strict rules of corporation law designed primarily for the public issue corporation should not be applied woodenly to such joint venture corporations. To give automatic obeisance to the rigid requirements of the corporate form in this area of the law is to render a disservice both to equity jurisprudence and to modern American industrial and business operations.

69. Agreements entered into by less than all the stockholders have been sustained in a number of cases. Thompson v. Thompson Carnation Co., 279 Ill. 54, 116 N.E. 648 (1917); Faulds v. Yates, 57 Ill. 416 (1870); Hart v. Bell, 222 Minn. 69, 23 N.W.2d 375, *aff'd*, 24 N.W.2d 41 (1946); Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N.W.2d 288 (1954). *Contra*, Teich v. Kaufman, 174 Ill. App. 306 (1912); Williams v. Fredericks, 187 La. 987, 175 So. 642 (1937); Woodruff v. Wentworth, 133 Mass. 309 (1882); Guernsey v. Cook, 120 Mass. 501 (1876); Snow v. Church, 13 App. Div. 108, 42 N.Y. Supp. 1072 (2d Dep't 1897); Creed v. Copps, 103 Vt. 164, 152 Atl. 369 (1930).