THE UNIFORM PARTNERSHIP ACT
A CRITICISM*

THE conference of commissioners on Uniform State Laws, held at Washington, October 14, 1914, approved the eighth draft of the "Act to Make Uniform the Law of Partnership" (hereinafter called the "Act"), and have recommended it to the state legislatures for adoption. It has already been introduced in the legislatures of Massachusetts, Pennsylvania and other states. The literature on the subject at present available consists in explanatory notes by the learned draftsman, Dr. William Draper Lewis, contained in a pamphlet [1] issued by the Conference, and magazine articles by Dr. Lewis, Professor Samuel Williston and Edmund Bayly Seymour.[2] As the law of partnership is not a branch of the law with which the legal profession is especially familiar, comment and criticism from every point of view should be of welcome assistance. The writer proposes to call attention to features of the Act not fully dealt with in the articles referred to, but which, it is submitted, should be given consideration by anyone forming a judgment as to the desirability of adopting the Act.

The initial difficulty in undertaking a codification of the law of partnership is involved in the question of the nature of the partnership. Professor James Parsons, commenting on statements of Lindley and Pollock to the effect that the law was ripe for codifica-

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[1] "The Uniform Partnership Act, adopted by the conference of Commissioners on Uniform State Laws, with explanatory notes."

[2] Lewis, "The Desirability of Expressing the Law of Partnership in Statutory Form," 60 UNIV. OF PA. L. REV. 93; Williston, "The Uniform Partnership Act, with Some Remarks on Other Uniform State Laws," 63 UNIV. OF PA. L. REV. 196 (Prof. Williston is a member of the Conference's Committee on Commercial Law); Lewis, "The Uniform Partnership Act," LEG. INTELL., Feb. 12, 1915; Seymour, "The Uniform Partnership Act, An Appreciation," LEG. INTELL., Feb. 19, 1915.

tion, said, "They stumble and halt on the very threshold. The definition of partnership breaks them all up. Having no guiding principle to start with, how can they create a system?" [3] Ten years later, referring to the English Partnership Act of 1900, he declared that " it ignores the theories by which the cases must be classified. This is codification run mad. The Act leaves out of its purview the theory or fundamental principle which underlies the relation, and by enacting makes inflexible the commonplace details of partnership." [4]

The issue is whether the partnership is in itself a legal person, owning the property and incurring obligations to the partners individually and to third persons, or whether the partners are the only legal persons owning the so-called partnership property and owing the so-called partnership obligations. The former view is called the mercantile or entity theory; the latter, the common-law or aggregate theory.

A legal person is an entity having legal capacity for rights and obligations.[5] Whether or not the partnership is an entity distinct from its members is a question of fact. It appears that modern jurists are coming to accept the view that any group of human beings united for a common purpose forms a real or natural entity distinct from its members.[6] Whether or not the partnership entity is or should be treated as a legal person is a legal question. Let us see how the matter has been dealt with by various legal systems. The classical Roman law took cognizance of the contract between the partners under the name of *societas*. Like other contracts it had no effect as to persons not parties thereto, and the partnership was not treated as a juristic person.[7] Partners could not, unless duly authorized, bind each other to obliga-

[3] PARSONS, PARTNERSHIP, 1 ed., Intro. lxiii.

[4] *Id.*, 2 ed., Pref. viii.

[5] SALMOND, JURISPRUDENCE, 4 ed., 273; HOLLAND, JURISPRUDENCE, 11 ed., 93, MARKBY, ELEMENTS OF LAW, 6 ed., 84; 1 PLANIOL, DROIT CIVIL, 6 ed., § 362; GAREIS; SCIENCE OF LAW, § 15 (1); GRAY, NATURE AND SOURCES OF THE LAW, 27.

[6] GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES, Intro. by Maitland, xxvi ff; Machen, "Corporate Personality," 24 HARV. L. REV. 253, 258; MORAWITZ, PRIVATE CORPORATIONS, 1; Pollock, "Has the Common Law Received the Fiction Theory of Corporations?" 27 L. QUART. REV. 219; Bibliography of Foreign Literature in 1 PLANIOL, DROIT CIVIL, 6 ed., § 2015.

[7] 2 CUQ, INSTITUTIONS JURIDIQUES DES ROMAINS, 441; MOYLE, INSTITUTIONUM, 3 ed., 453.

tions,[8] and were not liable *in solido*, but could require the creditor to exhaust the joint assets before seeking execution against the separate assets of the partners.[9] The limited development of partnership law among the Romans was largely influenced by the analogy of *consortium* among co-heirs.[10]

During the later middle ages partnership law was developed as a branch of the law merchant. The member of a firm acquired the power to represent his partners and bind them to obligations, to which they were liable *in solido*.[11] Modern civil law countries have by their commercial codes made of the partnership something quite different from the old Roman *societas*.

The German commercial code, while not expressly declaring the commercial partnership to be a juristic person, in many ways treats it as such, providing that "A partnership can in its firm name acquire rights and contract obligations, acquire property and other real rights in immovables, can sue and be sued." [12] Gareis, one of the most authoritative commentators on the commercial code, says that its juristic personality is thus recognized,[13] and Lehmann appears to admit that conclusion with some qualifications.[14] The Swiss code is in this respect similar to the German.[15] The Japanese code, modelled on the German, explicitly declares the partnership to be a juristic person.[16]

Though there is no explicit provision in the French code, doctrinal writers agree that the commercial partnership has from time immemorial been recognized as a juristic person,[17] and since 1890 at least all partnerships have been treated by the courts as

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[8] 2 ROBY, ROMAN PRIVATE LAW, 132; MOYLE, INSTITUTIONUM, 3 ed., 454.

[9] MOYLE, INSTITUTIONUM, 3 ed., 453.

[10] SALKOWSKI, INSTITUTES, § 124; Pound, "Scope and Purpose of Sociological Jurisprudence," 24 HARV. L. REV. 603; PARSONS, PARTNERSHIP, 1; 2 ROBY, ROMAN PRIVATE LAW, 128, n. 1.

[11] MITCHELL, EARLY HISTORY OF THE LAW MERCHANT, 124–140; also printed as "Early Forms of Partnerships," 3 Select Essays Anglo-American Legal History, 183.

[12] HANDELSGESETZBUCH (1897), § 124, Platt's Translation.

[13] GAREIS, HANDELSGESETZBUCH, 124 (1). See also Ames's comments in American Bar Association Reports, 1905, 736.

[14] LEHMANN, HANDELSRECHT, 2 ed., 293 ff.

[15] Code des Obligations (1911), § 559.

[16] Commercial Code (1899), §§ 43, 44, Yang's Translation.

[17] 1 PLANIOL, DROIT CIVIL, 6 ed., § 3040; 2 *id.*, § 1956; 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 11 ed., § 1021.

juristic persons.[18] Belgium,[19] Spain,[20] Chili[21] and Mexico[22] explicitly declare the partnership to be a juristic person. Italy,[23] Roumania[24] and Portugal[25] declare it to be a juristic person so far as third persons are concerned. In Russia,[26] Scotland[27] and Louisiana[28] it is treated as a juristic person. The fact that in all of these civil law countries the solution of recognizing the legal personality of the partnership has been reached, although not to be found in the classical Roman law, is strong evidence of its inherent merit and utility in commercial environments not unlike our own, and makes it probable that eventually we shall reach the same result.

The Anglo-American law of partnership is a mixture of the civil law, the law merchant and the common law.[29] The earliest treatises were full of citations to civilians,[30] and the argument of counsel in a leading English case shows that practitioners also were familiar with the continental writers.[31] The custom of merchants at first was matter of fact to be found by the jury, not the court. This accounts for the barrenness of early cases in propositions of substantive law.[32] Lord Mansfield undertook the task of incorporating the law merchant into the common law, himself making a diligent study of its customs,[33] but unfortunately had few occasions to deal with partnership cases.

The important contributions of the common law to the subject of partnership were joint ownership of property and joint obliga-

[18] 1 PLANIOL, DROIT CIVIL, 6 ed., § 2500; 2 *id.*, § 1957.
[19] Code de Commerce (1873), LX art. 2.
[20] Code de Commerce (1885), § 116.
[21] Code de Commerce (1865), § 348.
[22] Code de Commerce (1889), § 90.
[23] Code de Commerce (1882), § 77.
[24] Code de Commerce (1887), § 78.
[25] Code de Commerce (1888), § 108.
[26] Code de Commerce (1893), Tshernow's Translation 21.
[27] Bell Laws of Scotland, 6 ed., § 357. English Partnership Act of 1890, § 4 (2).
[28] Stothart *v.* Hardie, 110 La. 696, 700, 34 So. 740 (1903).
[29] COLLYER, PARTNERSHIP, 1.
[30] WATSON, PARTNERSHIP (1794). STORY, PARTNERSHIP (1841).
[31] Waugh *v.* Carver, 2 H. Bl. 235 (1793).
[32] SCRUTTON, ELEMENTS OF MERCANTILE LAW, 13.
[33] 2 CAMPBELL, LIVES OF CHIEF JUSTICES, 407 n.; BIGELOW, CENTRALIZATION AND THE LAW, 16. Mansfield was also well read in the continental writings on mercantile law, as appears from his opinion in Luke *v.* Lyle, 2 Burr. 882 (1759).

tions.[34] With these incidents firmly fastened upon it the firm was naturally regarded not as a unit in itself, but as an aggregate of the several partners who were joint owners of all its assets and joint obligors of its liabilities. This is the so-called "common-law" view affirmed by the majority of text writers and courts.[35]

In dealing with many of the problems arising out of partnership transactions courts have in numerous cases been forced to accept and apply the entity view of the nature of the partnership. As Jessel, M.R., said, "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners."[36] A large number of cases can be found in which the courts for the purpose of reaching their decisions avowedly recognize the partnership as a legal person.[37] As pointed out by Professor Burdick,[38] this conception of the partnership is of long standing, dating back to 1832.[39]

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[34] West *v.* Scip, 1 Ves. 239 (1749); Kendall *v.* Hamilton, 4 App. Cas. 504 (1879).

[35] LINDLEY, 8 ed., 136; BURDICK, 2 ed., 81; 1 BATES, § 171; GILMORE, 117; SHUMAKER, § 53. *Contra*, BEALE'S PARSONS, 1.

Riddle *v.* Whitehill, 135 U. S. 621, 633 (1890); Percifull *v.* Platt, 36 Ark. 456 (1880); Chambers *v.* Sloan, 19 Ga. 84, 85 (1885); State *v.* Krasher, 170 Ind. 43, 47, 83 N. E. 498 (1907); Faulkner *v.* Hyman, 142 Mass. 53, 55, 6 N. E. 846 (1886); Tidd *v.* Rines, 26 Minn. 201, 211, 2 N. W. 497 (1879); Matter of Peck, 206 N. Y. 55, 60, 99 N. E. 258 (1912); Byers *v.* Schlupe, 51 Oh. St. 300, 314, 38 N. E. 117 (1894); Wiggins *v.* Blackshear, 86 Tex. 665, 668, 26 S. W. 939 (1894).

[36] Pooley *v.* Driver, 5 Ch. D. 458, 476 (1876).

[37] Lacey *v.* Cowan, 162 Ala. 546, 549, 50 So. 281 (1909); Jones *v.* Bliss, 45 Ill. 143, 145 (1867); Johnson *v.* Shirley, 152 Ind. 453, 456, 53 N. E. 459 (1899); Lansing *v.* Bever Land Co., 158 Ia. 693, 698, 138 N. W. 833 (1912); Cross *v.* Burlington Nat. Bank, 17 Kan. 336, 340 (1876); Duquesne Distributing Co. *v.* Greenbaum, 135 Ky. 182, 187, 121 S. W. 1026 (1909); Woodman *v.* Boothby, 66 Me. 389, 391 (1876); Robertson *v.* Corsett, 39 Mich. 777, 784 (1877); Clarke *v.* Laird, 60 Mo. App. 289, 294 (1894); Clay, Robinson & Co. *v.* Douglas County, 88 Neb. 363, 365, 129 N. W. 548 (1911); Curtis *v.* Hollingshead, 2 Green (N. J.), 402, 410 (1834); Peyser *v.* Myers, 135 N. Y. 599, 604, 32 N. E. 699 (1892); Clarke *v.* Railroad Co., 136 Pa. 408, 413, 20 Atl. 562 (1890); Trumbo *v.* Hamel, 29 S. C. 520, 526, 8 S. E. 83 (1888); Good *v.* Jarrard, 93 S. C. 229, 237, 76 S. E. 698 (1912); Pierce's Adm'r *v.* Twigg's Heir, 10 Leigh (Va.) 406, 423 (1839). The firm has also been referred to as an "entirety." Pratt *v.* McGuinness, 173 Mass. 170, 172, 53 N. E. 380 (1899); Costello *v.* Costello, 209 N. Y. 252, 259, 103 N. E. 148 (1913); and as a "quasi-person," Drucker *v.* Wellhouse, 82 Ga. 129, 133, 8 S. E. 40 (1888).

[38] "Some Judicial Myths," 22 HARV. L. REV. 393.

[39] Warner *v.* Griswold, 8 Wend. (N. Y.) 665, 666 (1832).

Of equal interest are decisions not expressly based on the entity view of the nature of the partnership, but not to be reconciled with any other view, and therefore unconsciously applying it. A creditor holding security given by a partner individually is not treated as a secured creditor for the purpose of proving against the insolvent estate of the firm.[40] Joint creditors of all the partners on obligations not arising out of partnership transactions cannot prove against the firm estate.[41] When a firm signs a note as co-maker with an individual the liability of the firm is that of one person for purposes of contribution.[42] A bill bearing the names of two firms engaged in two distinct trades, but composed of the same members, is signed by two persons.[43] A promissory note given by a firm to a partner or *vice versa*, or by one firm to another having a common member, is not enforceable at law by the original parties because of procedural difficulties, as the same person cannot be both plaintiff and defendant.[44] But the contract is valid and may be enforced if the procedural difficulty is removed, as by assignment to a third person,[45] even for the benefit of the assignee. So in the case of a balance of account due from the firm to a partner.[46] A promissory note given by a firm to a partner may be enforced, though transferred after maturity.[47] So also even though it be negotiated before maturity, re-transferred and again negotiated after maturity when it would be extinguished if the firm

[40] *In re* Levin Bros'. Estate, 139 Cal. 350, 63 Pac. 335 (1903); *In re* Thomas, 8 Biss. 139 (1878); In the Matter of Plummer, 1 Phill. 56 (1841); Hiscock *v.* Varick Bank, 206 U. S. 28 (1906); AMES, CASES ON PARTNERSHIP, 352, n. 4.

[41] Forsyth *v.* Woods, 11 Wall. (U. S.) 484 (1870) (*semble*); *In re* Nims, 16 Blatch. 439 (1879); *In re* Weisenburg & Co., 131 Fed. 517 (1904).

[42] Hosmer *v.* Burke, 26 Ia. 353 (1868); Chaffee *v.* Jones, 19 Pick. (Mass.) 260 (1837).

[43] Second Bank *v.* Burt, 93 N. Y. 233 (1883).

[44] Thompson *v.* Young, 90 Md. 72, 44 Atl. 1037 (1899); Walker *v.* Wait, 50 Vt. 668 (1878); 1 AMES, CASES, BILLS AND NOTES, 747, n. 1.

[45] AMES, CASES ON PARTNERSHIP, 418, n. 4. Stettheimer *v.* Tone, 114 N. Y. 501, 21 N. E. 1018 (1889). So under the New York code the procedural difficulty is removed and actions are brought between firms having common members. Cole *v.* Reynolds, 18 N. Y. 74 (1868); Schnaier *v.* Schmidt, 13 N. Y. Supp. 725 (1891); Mangels *v.* Schaen, 21 N. Y. App. 507, 48 N. Y. Supp. 526 (1897).

[46] Bingham *v.* Tuttle, 82 Hun (N. Y.) 51 (1894); Beacannon *v.* Liebe, 11 Ore. 443, 5 Pac. 273 (1884).

[47] Thayer *v.* Buffum, 11 Met. (Mass.) 398 (1846); Richards *v.* Fisher, 2 Allen (Mass.) 527 (1861); Knaus *v.* Givens, 110 Mo. 58, 19 S. W. 535 (1892); Norton *v.* Downer, 15 Vt. 569 (1843); Sherwood *v.* Barton, 36 Barb. (N. Y.) 284 (1862). But see Cutting *v.* Daigneau, 151 Mass. 297, 23 N. E. 839 (1889).

were not personified.[48] A deposit by a partner with bankers of collateral as security for any sum in which he may become indebted does not authorize its application to a partnership debt.[49] Two firms consisting in part of the same members are joined in an insolvency proceeding. A non-resident creditor who has proved against one is not barred thereby from later seeking to enforce a claim against the other.[50] One partnership having joined with natural persons to form a second partnership, and both being insolvent, the assets of the first partnership are to be applied to payment of its own debts, then to payment of those of the second partnership of which it was a member.[51] A sheriff seizing firm property on an execution against a partner is subject to an action of trespass by the firm.[52]

These and other cases which might be cited indicate the impossibility of consistently applying the common-law theory of partnership. The courts have been consciously or unconsciously tending toward the entity theory, and it is not unreasonable to expect that it may eventually be openly accepted and consistently applied, if the courts are not hindered in so doing by legislation.

Heretofore legislators having occasion to deal with the partnership incidentally, while legislating for some purpose other than that of codifying the law of partnership, naturally treat the partnership as a legal person, the subject of rights and duties like a natural person or corporation. The Sales Act, Sec. 76 (1), the Bills of Lading Act, Sec. 49, the Warehouse Receipts Act, Sec. 58, produced by the Conference of Commissioners on Uniform State Laws, all define "person" for the purpose of the respective Acts as including partnerships. In five states the firm

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[48] Woodman *v.* Boothby, 66 Me. 389 (1876). But see Easton *v.* Strother & Conklin, 57 Ia. 506, 10 N. W. 877 (1881); Deavenport, etc. *v.* Green River Dep. Bank, 138 Ky. 352, 128 S. W. 88 (1910).

[49] City Bank Case, 3 DeG. F. & J. 629 (1861); *In re* Starkey, *Ex parte* Freen, 2 Glyn & Jameson Bankruptcy Cases, 246 (1827); Wolstenholm *v.* Banking Co., 54 L. T. R. N. S. 746 (1886); Bank of Buffalo *v.* Thompson, 121 N. Y. 280, 24 N. E. 473 (1890). *Contra*, Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281 (1891); *In re* Hill & Sons, 186 Fed. 569 (1911).

[50] Pattee *v.* Paige, 163 Mass. 352, 40 N. E. 108 (1895).

[51] *In re* Knowlton & Co., 196 Fed. 837 (1912).

[52] Russell *v.* Cole, 167 Mass. 6, 44 N. E. 1057 (1896); Haynes *v.* Knowles, 36 Mich. 407 (1877); Garvin *v.* Paul, 47 N. H. 158 (1866); Dunbarrow's Appeal, 84 Pa. 404 (1877).

may sue or be sued in the firm name.[53] In eight it may be sued in the firm name.[54] Many of the state tax laws treat the partnership as the subject of taxation in the same way that they do the corporation, requiring property to be listed and assessing it in the firm name.[55] Other statutes, such as Fish and Game Laws,[56] and Anti-Trust Laws,[57] treat the partnership as having capacity to commit a crime and be punished therefor. The Federal Bankruptcy Act, for many purposes, treats the firm as a person.[58]

The first draft of the Uniform Partnership Act was prepared by the late James Barr Ames on the mercantile or entity theory, acting under instructions to that effect by the Conference.[59] A few years later, after Professor Ames' death, when the work had fallen into other hands, the Committee on Commercial Law was persuaded that it was undesirable that the draftsman should be limited to the entity theory and by vote of the Conference the Committee was directed to consider the subject at large as if no such restriction had been placed upon it.[60] The Committee subsequently requested Dr. Lewis to prepare a draft on the so-called common-law theory.[61]

Though the intention of the draftsman was apparently to proceed on the aggregate theory, the question of whether the Act embodies that theory, or any other, depends primarily on the meaning and effect of the several provisions of the Act itself.

[53] Iowa Code, § 3468; 5 Howell's Mich. Stats., § 12217 (in Justice's Court); Neb. Rev. Stats., § 7594; Ohio 5 Gen. Code, § 11260; Wyo. Comp. Stats., § 4329.

[54] Ala. 2 Code, § 2506; Cal. Code Civ. Proc., § 388; 2 Idaho Rev. Codes, § 4112; Minn. Gen. Stats., § 7689; Nev. 2 Rev. Laws, § 5007; Utah Comp. Laws, § 2927; W. Va. Code, § 1976 (in Justice's Court); Wisc. Stats. (1911), § 2612.

[55] Ark. Kirby Dig. Stats. (1904), § 6903; Ala. 1 Code, § 2108; Ariz. Rev. Stats. (1913), § 4860; Cal. Pol. Code, § 3629 (2) (6); Col. 2 Mill Anno. Stats., § 6231; Idaho 1 Rev. Codes, § 1673; Ill. 5 Stats. Anno., § 9219; Ind. 4 Burn's Anno. Stats., § 10162; Iowa Code (1897), §§ 1313, 1317; Mass. Acts (1909), ch. 490, §§ 27, 41, 43; Mich. 1 Howell's Stats., § 1780; Minn. Gen. Stats. (1913), § 1994; Mont. 1 Rev. Codes, § 2521; Nev. 1 Rev. Laws, §§ 3626, 3629; Neb. Rev. Stats., §§ 6298, 6313; Okla. 2 Rev. Laws, § 7311; Ohio 3 P. & A. Anno. Gen. Code, §§ 5320, 5370; Pa. 5 Purdon's Dig., § 6060; Tex. 3 Civil Stats., § 7509; W. Va. Code (1906), § 744.

[56] Ohio 1 P. & A. Anno. Gen. Code, § 1462; W. Va. Code Supp. (1909), § 2803 a 4.

[57] Neb. Rev. Stats., §§ 4029, 4030; Okla. 2 Rev. Laws, §§ 8222, 8225.

[58] Sec. 1 (19), 5. See cases collected in COLLIER, BANKRUPTCY, 8 ed., 146.

[59] Report C. U. S. L. (1905), 29; Report Amer. Bar Assn. (1905), 738.

[60] Report C. U. S. L. (1910), 53; Report Amer. Bar. Assn. (1910), 1044.

[61] Report C. U. S. L. (1911), 149; Report Amer. Bar Assn. (1911), 827.

Sec. 2 contains the definition of "person," to be found in the other Uniform Acts referred to.[62] Sec. 6 defines partnership as "an association of two or more persons to carry on as co-owners a business for profit."[63] The term "association" is ambiguous — an association may or may not be treated as a legal person. The significance of "co-owners" will be discussed later. Sec. 8 is entitled "Partnership Property," and this term is used continually throughout the Act. It implies ownership by the partnership, an entity, distinct from the partners. Sec. 8 (3) enables the partnership to take title to real estate in the partnership name, and such estate can be reconveyed only in the partnership name.[64] This would seem to make the partnership as such the subject of rights, and thus a legal person. Cases which have denied the right to take legal title in the partnership name were so decided on the ground that only a legal person can take a title to real estate, and that the partnership is not a legal person.[65] Sec. 9 (1) makes every partner the agent of the partnership, not of the partners.[66] Sec. 12 speaks of a fraud by a partner on the partnership, not on his co-partners. If "partnership" means merely "all the partners," this involves a partner's committing a fraud on himself.[67] Sec. 18 (*a*) makes it the duty of a partner

[62] Sec. 2. (Definition of Terms.) "Person" includes individuals, partnerships, corporations, and other associations.

[63] Sec. 6. (Partnership Defined.) (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

[64] Sec. 8. (Partnership Property.) (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

[65] Holmes *v.* Jarrett, Moon & Co., 7 Heisk. (Tenn.) 506 (1872); Tidd *v.* Rines, 26 Minn. 201, 211, 2 N. W. 497 (1879); Riddle *v.* Whitehill, 135 U. S. 621, 633 (1889).

[66] Sec. 9. (Partner Agent of Partnership as to Partnership Business.) (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

[67] Sec. 12. (Partnership Charged with Knowledge of or Notice to Partner.) Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

to contribute to losses sustained by the partnership,[68] a duty to the partnership, not to his co-partners, for by Sec. 40 (*a*) (2) [69] the right to contributions is a partnership asset. Sec. 18 (*b*) requires the partnership, not the co-partners, to indemnify the partner in respect of certain payments.[70] Sec. 21 makes the partner accountable to the partnership, not to his co-partners.[71] Sec. 35 speaks of the partner's power to bind the partnership, not his co-partners, after dissolution.[72] These extracts seem more consistent with the entity than with the aggregate view of the nature of the partnership and illustrate the difficulty, if not impossibility, not only of writing and talking about the partnership, but of formulating its rights and obligations without treating it as a legal person.

It may be argued that the section which declares the partners to be co-owners of the partnership property is inconsistent with the recognition of the partnership as an entity.[73] The answer to

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[68] Sec. 18. (Rules Determining Rights and Duties of Partners.) (*a*) Each partner . . . must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

[69] Sec. 40. (Rules for Distribution.) (*a*) The assets of the partnership are: (I) the partnership property; (II) the contributions of the partners necessary for the payment of all the liabilities specified in clause (*b*) of this paragraph.

[70] Sec. 18. (*b*) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

[71] Sec. 21. (Partner Accountable as a Fiduciary.) (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

[72] Sec. 35. (Power of Partner to Bind Partnership to Third Persons After Dissolution.) (1) If the partnership is not dissolved because it has become unlawful to carry on the business, a partner cannot, after dissolution, bind the partnership to third persons. . . .

[73] See definition, Sec. 6, n. 63.

Sec. 25. (Nature of a Partner's Right in Specific Partnership Property.) (1) A partner is co-owner with his partners of specific partnership property holding as tenant in partnership.

(2) The incidents of this tenancy are such that:

(*a*) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(*b*) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(*c*) A partner's right in specific partnership property is not subject to attachment

this suggestion is to be found in an analysis of the quality of ownership which under this Act is vested in the partners as co-owners.

"Ownership is merely a collective term denoting the aggregate of several independent rights. It has no meaning other than the sum of its component parts, and it admits of no other definition than an enumeration of these parts. Little difference of opinion exists respecting this enumeration. The rights which collectively constitute ownership are the right to possess, the right to use, the right to the produce, the right to waste, the right of disposition, whether during life or upon death, and the right to exclude all other persons from any interference with the thing owned. In the language of the Civilians, *dominium* includes *jus possidendi, jus utendi, jus fruendi, jus abutendi, jus disponendi,* and *jus prohibendi.*" [74]

Let us examine under each of these six heads the ownership of the partner as limited by the Act in this and other sections.

The partner may possess for partnership purposes and for such purposes only.[75] Even the surviving partner or partners has no right to possess except for a partnership purpose.[76] As he may rightfully possess only for partnership purposes, his possession when exercised is as agent for the partnership, what the Civilians call "*alieno nomine.*" It appears, then, that possession is in the partnership.

As partnership property is permitted to become such for the purpose of being used in the partnership business, it follows that the partnership enjoys the use of partnership property.

Property acquired by the use of partnership funds or otherwise

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or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(*d*) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(*e*) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

[74] HEARN, LEGAL RIGHTS AND DUTIES, 186.

[75] Sec. 25 (2) (*a*), see n. 73.

[76] Sec. 25 (2) (*d*), see n. 73.

is partnership property.[77] Hence the produce of partnership property belongs to the partnership to the same extent as does the original fund.

As the use of partnership property within the scope of the firm business is a matter for the partnership to decide, it follows that the partnership may waste, *i.e.*, change the form of the partnership property.

A partner cannot, acting singly, assign any right in specific partnership property;[78] nothing can be attached or seized on execution by his creditors;[79] on death his rights pass to the surviving partner.[80] The partner has no power of disposition except as he is acting as agent for the partnership.[81] The power of disposition is evidently in the partnership.

One partner could not recover against third persons for injury to his rights as co-owner of partnership property. The partnership may exclude the partner from possessing except for partnership purposes.

Of these six rights which constitute ownership it appears that none is held exclusively by the partners, and that the most important, the power of disposition, is held exclusively by the partnership. The nature of co-ownership by the partner under this Act is not such as to exclude the legal personality of the partnership, but on analysis appears rather to be in harmony with that theory than with any theory which denies the legal personality of the partnership. The right of ownership vested in the partner is no more than nominal, and it does not materially impair the ownership of partnership property by the partnership entity.

The conclusion is that while the Act does not explicitly adopt either the entity or aggregate view of the nature of the partnership, it ought to be very difficult for an open-minded court carefully analyzing the whole Act to hold that a partnership is not vested

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[77] Sec. 8. (Partnership Property.) (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

[78] Sec. 25 (2) (*b*), see n. 73.

[79] Sec. 25 (2) (*c*), see n. 73.

[80] Sec. 25 (2) (*d*), see n. 73.

[81] Sec. 9 (1), see n. 66.

with rights and obligations, and therefore a person before the law. But mistrust of codification and the habit of endeavoring to construe any statute so as not to change the common law may lead those courts which conceive that the partnership is not a legal person at common law to deny that it is made one by this Act, though in particular instances they will, as they have done in the past, treat it as if it were a legal person in order to accomplish justice unattainable in any other way. It seems likely that in matters not expressly covered by any provision of the Act, and which depend upon the nature of the partnership, different results will be reached by different courts, and so we shall not attain the uniformity sought for by the Act.

The most important matter in which this lack of uniformity can be foreseen is in regard to the rights of creditors to set aside dispositions of partnership property whereby they are hindered or delayed.[82] At least four situations may arise, which are not provided for by the Act, which turn on the nature of the partnership, and as to which there is conflict among the state and federal decisions to such extent that it is impossible to say where is the weight of authority.

(1) The firm being insolvent applies its assets, or part of them, to pay a debt of the partners not a partnership debt.[83]

(2) The firm being insolvent applies its assets or part of them to the payment of separate debts of one or more partners.[84]

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[82] See W. H. Cowles, "The Firm as a Legal Person," 57 CENT. L. J. 343.

[83] This has been held valid in the following cases: Victor *v.* Glover, 17 Wash. 37, 48 Pac. 788 (1897); Saunders *v.* Reilly, 105 N. Y. 12, 12 N. E. 170 (1887) (*semble*); Bernheimer *v.* Rindskopf, 116 N. Y. 428, 22 N. E. 1074 (1889); Farwell *v.* Huston, 151 Ill. 239, 37 N. E. 864 (1894); Carver Gin & Machine Co. *v.* Bannon & Co., 85 Tenn. 712, 4 S. W. 831 (1887); Couchman's Adm'r *v.* Maupin, 78 Ky. 33 (1879) (*semble*).

Contra, Cron *v.* Cron's Estate, 56 Mich. 8, 22 N. W. 94 (1885); Hilliker *v.* Francisco, 65 Mo. 598 (1877); Brownlee *v.* Lobenstein, 42 S. W. 467 (Tenn. Ch. App., 1897).

[84] Held valid in the following cases: Boyd *v.* Arnold, 103 Ark. 105, 146 S. W. 118 (1912); Ellison *v.* Lucas, 87 Ga. 223, 13 S. E. 445 (1891) (*semble*); Hargodine & McKettrick Dry Goods Co. *v.* Belt, 74 Ill. App. 581 (1897); Smith *v.* Smith, 87 Ia. 93, 54 N. W. 73 (1893); Old Nat. Bank *v.* Heckman, 148 Ind. 490, 47 N. E. 953 (1897); Kincaid *v.* Nat. Wall Paper Co., 63 Kan. 288, 65 Pac. 247 (1901); Goddard Peck Grocery Company *v.* McCune, 122 Mo. 426, 25 S. W. 904 (1894); Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835 (1889) (*semble*); Stahl *v.* Osmers, 31 Ore. 199, 49 Pac. 958 (1897); Sigler *v.* Knox County Bank, 8 Oh. St. 511 (1858); Wiggins *v.* Blackshear, 86 Tex. 665, 26 S. W. 939 (1894); Fitzpatrick *v.* Flannagan, 106 U. S.

(3) The firm being insolvent transfers its assets to a partner.[85]

(4) The firm being insolvent divides its assets among the partners.[86]

Cases holding these transactions valid appear to proceed on the ground that there is no firm entity known to the law, that the property is that of the partners, that the obligations are those of the partners, that each partner as against his co-partner has a contractual right to have the firm assets applied to firm liabilities, that this right which is called "partner's equity" may be released, waived or transferred, and the creditor whose rights are merely

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648 (1882); Huiskamp *v.* Moline Wagon Co., 121 U. S. 310 (1887); Sargent *v.* Blake, 160 Fed. 57 (1908).

Contra, on the ground that equity takes jurisdiction over a general assignment, Bartlett *v.* Meyer-Schmidt Grocer Co., 65 Ark. 290, 45 S. W. 1063 (1889): on the ground that such an act is fraudulent, Pritchett *v.* Pollock & Co., 82 Ala. 169, 2 So. 735 (1886); Keith *v.* Funk, 47 Ill. 272 (1868); Patterson & Co. *v.* Seaton, 70 Ia. 689, 28 N. W. 598 (1886); Collier *v.* Hanna, 71 Md. 253, 17 Atl. 1017 (1889); Clark-Jewell-Wells Co. *v.* Tolsma, 151 Mich. 561, 115 N. W. 688 (1908); Bannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066 (1895); James *v.* Vanzandt, 163 Pa. 171, 29 Atl. 879 (1894) (*semble*); Bedford *v.* McDonald, 102 Tenn. 358, 52 S. W. 157 (1899); Goodby *v.* Cary, 16 Fed. 316 (1883): on the ground that it is unlawful to destroy the derivative right of creditors worked out through the so-called partner's equity, Bank *v.* Durfey, 72 Miss. 971, 18 So. 456 (1895).

[85] Held valid in the following cases: *In re* Suprenant, 217 Fed. 470, 472 (1914) (*semble*); Howe *v.* Lawrence, 9 Cush. (Mass.) 553 (1852) (insolvency not apparently known to firm); Russell *v.* McCord, Fed. Cas. 12,157 (1878); Reese & Heylin *v.* Bradford, 13 Ala. 837 (1848); Hanford *v.* Prouty, 133 Ill. 339, 24 N. E. 565 (1890); Armstrong *v.* Fahnestock, 19 Md. 58 (1862); Sanchez *v.* Goldfrank, 27 S. W. 204 (Tex. Civ. App. 1894).

Contra, Conroy *v.* Wood, 13 Cal. 626 (1859); Schleicher *v.* Walker, 28 Fla. 680, 686, 10 So. 33 (1891) (*semble*); Franklin Sugar Refining Co. *v.* Henderson, 86 Md. 452, 38 Atl. 991 (1897) (on the ground that partners cannot destroy derivative right of creditors); Roop *v.* Herron, 15 Neb. 73, 17 N. W. 353 (1883) (on the ground that the firm as a legal person is the owner of the assets); Bulger *v.* Rosa, 119 N. Y. 459, 465, 24 N. E. 853 (1890) (*semble*); Conaway's Adm'rs *v.* Stealey, 44 W. Va. 163, 28 S. E. 793 (1897); Saloy *v.* Albrecht, 17 La. Ann. 75 (1865); *In re* Denning, 114 Fed. 219 (1902); *In re* Terens, 175 Fed. 495 (1910) (interpreting terms of instrument of transfer as retaining "partner's equity"); Amundson *v.* Folsom, 219 Fed. 122 (1914) (actual intent to hinder creditors found as a fact).

[86] Held valid: Sackett *v.* Rumbaugh, 45 Fed. 23, 33 (*semble*); Allen *v.* Center Valley Co., 21 Conn. 130 (1851); Bates *v.* Collender, 3 Dak. 256 (1883); Lee *v.* Bradley Fertilizer Co., 44 Fla. 787, 33 So. 456 (1902); Davis *v.* Smith, 113 N. C. 94, 18 S. E. 53 (1891); Singer Nimick & Co. *v.* Carpenter, 125 Ill. 117, 17 N. E. 761 (1888). *Contra, In re* Head, 114 Fed. 489 (1902), and also cases in second paragraph of preceding note. None of these lists purports to be complete.

derivative cannot prevent it, that it is not fraudulent for the partners to apply their property, including firm property, to the payment of their separate debts, but at most a preference, that generally partners may do as they please with the firm assets while not yet in bankruptcy unless they act in "actual fraud;" and what actual fraud is one cannot say, but it would seem, according to these courts, that it is not actual fraud to pay separate debts or to put the firm property in such a situation that separate creditors will have a priority therein, although firm creditors are thereby hindered. It is submitted that these results are unsatisfactory and at variance with the accepted principles of right and justice which give priority in firm assets to firm creditors whenever the assets fall into the hands of a court of equity or bankruptcy for distribution. This seems to have been the opinion of the draftsman, for in an earlier draft of the Act the matter was thoroughly and satisfactorily dealt with by a section entitled "Fraudulent Conveyances." [87]

The section on Fraudulent Conveyances does not appear in the present draft because, as the writer is informed, it was felt that it pertained rather to another branch of the law and was out of place in a partnership code. But there would be little left of the present Act if everything pertaining to agency, property, bankruptcy, evidence [88] and other recognized departments of the law

[87] Seventh Draft. Sec. 21. (Fraudulent Conveyances.) (1) Every conveyance or encumbrance of partnership property by a partner made or given voluntarily and without a present and fair consideration to the partnership, as distinguished from a consideration to the individual members, when the partnership is or will be thereby rendered insolvent or in contemplation of insolvency, shall be void as against the partnership creditors, except as to purchasers in good faith and for a present fair consideration.

(2) Every conveyance or encumbrance of partnership property, every obligation incurred and every judicial proceeding taken by any partner, with intent to hinder, delay, or defraud any partnership creditor, or other person, of his demand against the partnership or which will have this effect, is void as against the partnership creditors, except as to purchasers in good faith and for a present fair consideration.

(3) Under the provisions of this section every conveyance or encumbrance of partnership property by any partner, to any partner made when the partnership or the assignee partner is insolvent, is void as against the partnership creditors, whether such insolvency be known to the partners or not.

[88] Sec. 3. (Interpretation of Knowledge and Notice.) (1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

were removed.[89] The question under discussion turns on the nature of the partnership and the relation of its assets to the partnership and to the partners, which are decidedly questions of partnership law. In omitting to deal with this subject, the Act leaves unanswered questions as to which there has been probably greater conflict of authority than on any other point of partnership law, and the Act herein signally fails of its avowed purpose to make uniform the law of partnership.

It does not seem to the writer that Sec. 41 [90] disposes of the

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice,

(*a*) States the fact to such person, or

(*b*) Delivers through the mail, or by other means of communication, a written statement of such fact to such person or to a proper person at his place of business or residence.

[89] See Seymour's comment on this. "The Uniform Partnership Act, An Appreciation," LEG. INTELL., Feb. 19, 1915.

[90] Sec. 41. (Liability of Persons Continuing the Business in Certain Cases.) (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (*2b*) either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

matter, for that applies only in case the business as a whole is assigned to a partner, or to a third person or persons who assume the debts and continue the business. Moreover under this Act not only are new creditors let in on a parity with the old creditors, but if the assets are assigned to one person, his separate creditors, including those who became such before the assignment, come in on a parity with the creditors of the old partnership. It is therefore submitted that the section on Fraudulent Conveyances which was deleted from the previous draft should be restored to the Act.

One objection which has been made to declaring the partnership a legal person is that such a course would result in confusing it with the corporation. This objection has been especially urged in view of the definition of a corporation contained in several of our state constitutions, whereby the corporation is defined substantially as "any association or joint stock company having any of the powers or privileges not possessed by individuals or partnerships." [91] This objection ought not to deter us from the attempt to draft a scientific code of partnership law, if the law on this subject is to be codified. The fact, if true, that some states would be embarrassed by their constitutions or by other statutes in adopting

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any of the conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

[91] Ala., art. 12, § 241; Cal., art. 12, § 4; Kan., art. 12, § 6; Idaho, art. 11, § 16; La., art. 268; Mich., art. 12, § 2; Minn., art. 10, § 1; Miss., art. 7, § 199; Mo., art. 12, § 11; Mont., art. 15, § 18; N. C., art. 8, § 3; N. D., art. 7, § 144; Pa., art. 16, § 13; S. D., art. 17, § 19; S. C., art. 9, § 1; Utah, art. 12, § 4; Va., art. 12, § 153; Wash., art. 12, § 5.

such a code ought not to deprive other states of the best code that can be drafted. The desirability of framing a code which all states can adopt with the least inconvenience is a consideration to which too much weight can be given. Uniformity is not the only thing to be sought. But whatever the above objection amounts to, it seems that it may be urged against the Act in its present form. The partnership is by this Act empowered to acquire and convey the title to real estate in the partnership name.[92] This is a power or privilege not heretofore enjoyed by partnerships or individuals.[93] The partnership is by this Act made into such an association as to come within the constitutional definition of corporation which has been referred to. It is probably only a corporation for the purpose of being submitted to the provisions regarding corporations contained in these constitutions.[94] Each state constitution should be examined from this point of view.

In the interests of the title searcher the adoption of the provision contained in Sec. 8 (3) should be accompanied by such amendments of the laws regulating the acknowledgment and registration of deeds as are necessary to make it appear on the record that the person executing the deed in the partnership name is a partner and is authorized to convey.

The partner has under this Act authority to bind the partnership by any act "for apparently carrying on in the usual way the business of the partnership of which he is a member." [95] This may be taken to mean an act within the apparent course of business as carried on by his particular firm. It has been generally held that not only the course of business of his firm may be relied on as evidence of his authority, but the course of business of other firms in the same locality engaged in the same general line of business.[96]

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[92] Sec. 8. (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

[93] Holmes *v.* Jarrett, Moon & Co., 7 Heisk. (Tenn.) 506 (1872); Tidd *v.* Rines, 26 Minn. 201, 211, 2 N. W. 497 (1879); Riddle *v.* Whitehill, 135 U. S. 621, 633 (1889); 30 Cyc. 431. But see Byam *v.* Bickford, 143 Mass. 31 (1885); Walker *v.* Miller, 139 N. C. 448, 52 S. E. 125 (1905).

[94] Great Northern Fire Proof Hotel Co. *v.* Jones, 177 U. S. 449 (1899); Att'y General *v.* McVichie, 138 Mich. 387, 389, 101 N. W. 552 (1904). Compare Keystone Bank *v.* Donnelly, 196 Fed. 832 (1912). In Missouri a similar definition of corporation appears in the statutes. 1 Rev. Stats. (1909), § 2963.

[95] Sec. 9. See n. 66.

[96] Woodruff *v.* Scaife, 83 Ala. 152, 154, 3 So. 311 (1887); Standard Wagon Co.

It is submitted that a narrower rule imposes an undue burden on the third person to learn the habits of the particular firm, and because this Act is susceptible of a narrow interpretation the language of the English Act, "any act for the carrying on in the usual way business of the kind carried on by the firm," should be substituted.

Sec. 16 [97] is believed by the draftsman to overrule *Thayer* v. *Humphrey*.[98] In that case there was a holding out of A as partner of B, but no real partnership. The court held that creditors of the ostensible firm were entitled to priority in distribution of the insolvent estate of B, the real sole proprietor of the business. This result was based on the ground of estoppel, and on the authority of *In re Rowland*[99] and *Ex parte Hayman*.[100] But, as clearly shown by the opinion in the latter case, both these cases rest on the statutory doctrine of reputed ownership,[101] which does not

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v. Few & Co., 119 Ga. 293, 295, 46 S. E. 109 (1903); Smith *v.* Collins, 115 Mass. 388, 399 (1874); Buckley *v.* Wood & Co., 4 Pa. Sup. Ct. 391 (1897); Irwin *v.* Villiar, 110 U. S. 499, 505 (1883).

[97] Sec. 16. (Partner by Estoppel.) (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(*a*) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(*b*) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

[98] 91 Wis. 276, 64 N. W. 1007 (1895).

[99] L. R. 6 Ch. App. 421 (1866).

[100] L. R. 8 Ch. Div. 11 (1878).

[101] English Bankruptcy Act 1883, Sec. 44.

exist in this country.[102] It is submitted that, while *Thayer* v. *Humphrey* is unsupportable and ought to be overruled, this Act, in declaring the liability to be joint, does not prevent a court which takes the same views as the Wisconsin court of the effect of the law of estoppel, from, as in that case, distributing the insolvent estate as if there had been a partnership. The law of estoppel still applies under this Act.[103]

Sec. 18 (*h*) empowers the majority to decide a question in the ordinary course of business as to which there is disagreement.[104] No provision is made for cases of even division, as where there are two partners. The decisions are in conflict on this point.[105]

While the word "lawful" is omitted from the definition of partnership,[106] we are assured by the draftsman that because unlawfulness is a cause of dissolution,[107] a partnership for a wholly unlawful purpose "is dissolved the moment it is created."[108] While the unlawfulness of the agreement of partnership may well make it unenforceable as between the partners by any legal proceeding, yet it should be recognized in the interests of innocent third persons that a partnership has in fact been created, and such third persons should have the usual rights against the members of the partnership and its assets.[109] Suppose a partnership formed for an entirely unlawful business and one partner without authority from his co-partner orders goods, which might be used for a lawful purpose,

[102] Harkness *v.* Russell, 118 U. S. 663, 669 (1886).

[103] Sec. 4. (Rules of Construction.) (2) The law of estoppel shall apply under this act.

[104] Sec. 18. (Rules Determining Rights and Duties of Partners.) (*h*) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

[105] That the act may be done although the third person knows of the disagreement: Johnson Clark & Co. *v.* Bernheim, 76 N. C. 139 (1887); Campbell & Jones *v.* Bowen & Bird, 49 Ga. 417 (1873). *Contra*, Dawson *v.* Elrod, 105 Ky. 624, 49 S. W. 465 (1899); Monroe *v.* Connor, 15 Me. 178 (1838).

[106] Sec. 6. (Partnership Defined.) (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

[107] Sec. 31. (Causes of Dissolution.) Dissolution is caused: (3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

[108] The Uniform Partnership Act, with explanatory notes, p. 16.

[109] A corporation formed for a wholly unlawful purpose may make valid contracts with innocent third persons. WALD'S POLLOCK ON CONTRACTS, 3d ed. Williston 490, n. 5.

from an innocent third person. Is the latter without remedy save against the person he actually dealt with, and has he no priority over separate creditors in joint assets? Such would seem to be the unfortunate result if the attempted partnership is as a matter of law never in existence. The root of the difficulty is in the conception of the illegal contract as a nullity, instead of as an actual contract subject to a personal defense as between the parties to it.

Notice of dissolution is required in all cases except where the partnership is dissolved because it has become unlawful to carry on the business.[110] It is a commendable change to require notice in case of dissolution by death or bankruptcy of a partner, but why not require it in case of dissolution because the business has become unlawful? No provision is made by the Act for such a case, and so the matter is left as at common law. It seems to be assumed that at common law notice is unnecessary in such a case, but the decisions to that effect are, so far as the writer has been able to ascertain, cases of dissolution by reason of war between the two countries wherein members of the firm are resident.[111] One may well be bound to take notice of so public an event as war, but it seems an injustice in cases where the third person does not know of the foreign residence of a member of the firm with which he believes himself to be doing business, to refuse him a remedy against all members of the firm resident in his own country who might have given him notice. In many other cases of illegality there is no reason for presuming notice. Suppose a partnership is formed for engaging in the liquor business in a city where such a business is licensed. Later the city votes for

[110] Sec. 35. (Power of Partner to Bind Partnership to Third Persons after Dissolution.) (1) If the partnership is not dissolved because it has become unlawful to carry on the business, a partner cannot, after dissolution, bind the partnership to third persons by any act which is not necessary to wind up the partnership affairs or to complete transactions then unfinished unless,

(*a*) Such third person, having had relations with the partnership by which a credit was extended upon the faith of the partnership, has had no knowledge or notice of the dissolution; or

(*b*) Such third person, not having had business relations with the partnership by which a credit was extended to the partnership, has no knowledge or notice of the dissolution, and the fact of dissolution has not been advertised in a newspaper of general circulation of the place (or of each place if more than one) at which the partnership business was regularly carried on.

[111] Griswold *v.* Waddington, 16 John. 439 (1819); 30 Cyc. 655, 671.

"no-license" and the liquor business becomes unlawful. One member of the partnership, without the knowledge of his partner, undertakes to continue the business unlawfully and orders goods in the firm name of a third person in a distant state who has dealt with the firm and who has no knowledge of the fact that in the city where the business is carried on the sale of liquor has been forbidden. If no notice of dissolution has been given he should be allowed to hold both partners. It is submitted that an innocent third person should be entitled to notice where the dissolution is due to illegality as much as in any other case, and that the qualification "if the partnership is not dissolved because it has become unlawful to carry on the business" should be stricken out.

In an indirect way, using a double negative, Sec. 35 [112] makes a retired partner liable on a contract made after his retirement with a third person who has never had any previous dealings with the partnership, if he does not know of the dissolution and if no public notice has been given. The reason for such a rule is that the third person should be allowed to assume that the partner's connection with the firm and liability for its obligations continues unless he has some notice to the contrary. It is an estoppel. If the third person has never been informed of the partner's connection with the firm, no credit is extended in reliance upon his supposed liability, and the reason for holding him liable on a contract to which he is not a party disappears. Accordingly it is generally held that a dormant partner need not give notice of retirement.[113] Some courts refuse to treat him as a dormant partner where the style of the firm name is such as to suggest other partners than those whose names are part of the firm name, *e. g.*, "The X Company," or "A, B & Co." There is a conflict of authority on this point.[114] But the cases are agreed upon the proposi-

[112] See n. 110.

[113] Park *v.* Wooten's Ex'r, 35 Ala. 242 (1859) (*semble*); Hornaday *v.* Cowgill, 54 Ind. App. 631 (1913); Nuisbaumer *v.* Becker, 85 Ill. 287 (1877); Gorman *v.* Davis & Gregory Co., 118 N. C. 370, 24 S. E. 770 (1896); Kelley *v.* Hurlburt, 5 Cow. (N. Y.) 534 (1826); Baptist Book Concern *v.* Carswell, 46 S. W. 858 (Tex. Civ. App., 1898); Vaccaro *v.* Toof, 9 Heisk. (Tenn.) 194 (1872); Bigelow *v.* Elliot, 1 Cliff. 28 (1858) (*semble*); *In re* Stoddard Bros. Lumber Co., 169 Fed. 190 (1909).

[114] That notice is necessary: Goddard *v.* Pratt, 16 Pick. (Mass.) 412, 428 (1835); Elkinton *v.* Booth, 143 Mass. 479, 10 N. E. 460 (1887); Shamburg *v.* Ruggles, 83 Pa. 148 (1876); and see Magill *v.* Merrie & Bullin, 5 B. Mon. (Ky.) 168 (1844); Edwards *v.* McFell, 5 La. Ann. 167 (1850); Deford *v.* Reynolds, 36 Pa. 325 (1860). *Contra*,

tion that one who has had no knowledge of the existence of the firm is not entitled to notice in any form.[115]

Under Sec. 35 it appears that a retired partner is liable on obligations incurred in the firm name after dissolution even though the third person never heard of the firm while he was a member. It is submitted that this change of the law is unwarranted. As no note is made of it in the annotations on this section, it is possibly inadvertent. The section ought to be reconstructed so as to dispense with some of the confusing negatives and affirmatively to impose liability in the absence of knowledge or notice; and in the case of third persons who have had no business relations with the partnership whereby credit was extended to it the necessity for notice should be limited to such third persons as had knowledge of the existence of the partnership.

Sec. 38 (1) [116] confers on each partner certain rights as to the application of partnership property after a dissolution. It should be expressly stated that such rights may be enforced by the representative of a deceased partner.

According to the English Bankruptcy Act,[117] our Federal Bankruptcy Act,[118] and the weight of authority among our states,[119] partnership creditors cannot share in the insolvent estate of a partner until his separate creditors are paid in full. For a history of this rule, *Re Wilcox*[120] and *Robinson* v. *Security Co.*[121]

Grosvenor *v.* Lloyd, 1 Met. (Mass.) 19 (1840); Hornaday *v.* Cowgill, 54 Ind. App. 631, 101 N. E. 1030 (1913); Warren *v.* Ball, 37 Ill. 76 (1865); Kennedy *v.* Bohannon, 11 B. Mon. (Ky.) 118, 120 (1850).

[115] Puritan Trust Co. *v.* Coffey, 180 Mass. 510, 62 N. E. 970 (1902); Swigert *v.* Aspden, 52 Minn. 565, 54 N. W. 738 (1893); Dowzelot *v.* Rawlings, 58 Mo. 75 (1874); Bank of Monongahela Valley *v.* Weston, 159 N. Y. 201, 211, 54 N. E. 40 (1899) (*semble*); Cook *v.* Slate Co., 36 Oh. St. 135 (1880); Benjamin *v.* Covert, 47 Wis. 375, 385, 2 N. W. 625 (1879) (*semble*); Pratt *v.* Page, 32 Vt. 13 (1859); EWART, ESTOPPEL, 518.

[116] Sec. 38. (Rights of Partners to Application of Partnership Property.) (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. . . .

[117] English Bankruptcy Act 1883, § 40 (3).

[118] U. S. Bankruptcy Act 1898, § 5 f.

[119] 30 Cyc. 551.

[120] 94 Fed. 84 (1899).

[121] 87 Conn. 268, 87 Atl. 879 (1913).

may be consulted. It is illogical under any theory of partnership, is contrary to the practice in civil law countries,[122] and as was said from the first by English courts, has nothing to support it but precedent.[123] Some of our states have a contrary rule at common law.[124] Others have, by statutes making joint obligations joint and several, overturned the conventional rule, at least so far as estates of deceased partners are concerned.[125] It is to be hoped that eventually in all our courts of insolvency the liability of the partner to contribute to the payment of partnership liabilities, correctly described by this Act as a partnership asset,[126] will be treated as on a parity with his other liabilities for purpose of distribution of his insolvent estate. Meanwhile it is not to be expected that a state such as Connecticut, whose highest court has so recently after the fullest consideration deliberately departed from the conventional rule, will return thereto in order to secure uniformity.

The Act substantially adopts the conventional rule [127] and provides for payment of claims against the separate estate in the

[122] Brannan, "The Separate Estates of Non-bankrupt Partners," 20 HARV. L. REV. 588, 592.

[123] *Ex parte* Clay, 6 Ves. 813 (1802); Dutton *v.* Morrison, 17 Ves. 193 (1810).

[124] Robinson *v.* Security Co., 87 Conn. 268, 87 Atl. 879 (1913); Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 45, 47 Atl. 176 (1900); Hutzler *v.* Phillips, 26 S. C. 136, 1 S. E. 502 (1887); Webb *v.* Gregory, 49 Tex. Civ. App. 282, 108 S. W. 478 (1908). This result is reached by statute in Louisiana. Flower *v.* Creditors, 3 La. Ann. 189 (1848). In Kentucky separate creditors share the separate assets until their rate of dividend equals that received by partnership creditors from partnership assets; thereafter both classes of creditors share *pari passu*. Southern Bank of Kentucky *v.* Keiser, 2 Duval, 169 (1865); Hill *v.* Cornwell, 95 Ky. 512, 26 S. W. 540 (1894). This rule is adopted by statute in Georgia. Johnson *v.* Gordon, 102 Ga. 350, 30 S. E. 507 (1897).

[125] McLain & Blodgett *v.* Carson's Adm'r, 4 Ark. 164 (1842); Ashby's Adm'r *v.* Porter, 26 Gratt. (Va.) 455 (1875); Freeport Stone Co. *v.* Carey's Adm'r, 42 W. Va. 276, 26 S. E. 183 (1896). Similar statutes have been construed as not changing the rule of distribution. Smith *v.* Mallory's Ex'r, 24 Ala. 628 (1854); Hundley *v.* Farris' Adm'r, 103 Mo. 78, 15 S. W. 312 (1890); Irby *v.* Graham, 45 Miss. 425 (1872); Williams Adm'r *v.* Bradley, 7 Oh. Cir. Ct. 227 (1892).

[126] Sec. 40. (Rules for Distribution.) (*a*) The assets of the partnership are: I. The partnership property, II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (*b*) of this paragraph.

[127] Sec. 40. (*i*) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

I. Those owing to separate creditors.

II. Those owing to partnership creditors.

III. Those owing to partners by way of contribution.

following order: (*a*) those owing to separate creditors; (*b*) those owing to partnership creditors; (*c*) those owing to partners by way of contribution. This however introduces several changes into the law as it is established by the weight of authority. (1) A partner who has paid the partnership debts can at present prove for contribution against the insolvent partner's estate and share *pari passu* with his other separate creditors.[128] Under this Act he would apparently be postponed until all other separate creditors had been paid. (2) At present a partner is not allowed to prove against the insolvent estate of his co-partner for a claim unconnected with the partnership and receive any dividend until all firm creditors have been paid, on the ground that otherwise he would be competing with his own creditors, *i. e.*, the unpaid partnership creditors.[129] But he is allowed to take as a separate creditor where it would not injure the partnership creditors.[130] Under this Act a partner may apparently share with the other separate creditors of his insolvent co-partner in any case except when his claim is one for contribution. (3) At present, where there is no partnership estate and no living solvent partner, the partnership creditors are allowed in the majority of the states to share *pari passu* with the separate creditors in the separate estate.[131] As no provision is made for such exceptional case by this Act, it would probably be construed as excluding such exception. The Bankruptcy Act of 1898 has been thus construed.[132]

Sec. 43 [133] provides that the right to an account accrues at the

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[128] Olleman *v.* Reagan's Adm'r, 28 Ind. 109 (1867); Buseby *v.* Chenault, 13 B. Mon. 554 (1852); Payne *v.* Matthews, 6 Paige (N. Y.) 19 (1876); Amsinck *v.* Bean, 22 Wall. (U. S.) 395, 403 (1874); *In re* Dell, 5 Sawy. 344 (1878); Matter of Hirth, 26 Amer. Bank. Rep. 666 (1911). *Contra*, Kirby *v.* Carpenter, 7 Barb. (N. Y.) 373 (1849).

[129] *Ex parte* Ellis, 2 Gl. & J. 312 (1827); *Ex parte* Maude, L. R. 2 Ch. App. 550 (1867); Estate of Bennett, 13 Phila. 331 (1880).

[130] No possible surplus for firm creditors in insolvent debtor partner's estate. *Ex parte* Topping, 4 DeG. J. & S. 551 (1865). Insolvent creditor partner's estate sufficient to pay his separate debts, so that whatever additional came to his estate would enure solely for benefit of partnership creditors. *In re* Head, [1894] 1 Q. B. 638.

[131] AMES, CASES ON PARTNERSHIP, 343, n. 2. 30 Cyc. 552.

[132] *Re* Wilcox, 94 Fed. 84 (1899); *Re* Henderson, 142 Fed. 588 (1906), aff'd 149 Fed. 975 (1906); *Re* Janes, 133 Fed. 912 (1904), *certiorari* refused *sub nom.* MacNabb *v.* Bank of Le Roy, 198 U. S. 583 (1904). *Contra*, *Re* Green, 116 Fed. 118 (1902); *Re* Conrader, 121 Fed. 801 (1902); *In re* Gray, 208 Fed. 959 (1913).

[133] Sec. 43. (Accrual of Actions.) The right to an account of his interest shall

date of dissolution in the absence of any agreement to the contrary. Under this section the ordinary orderly course of winding up by the liquidating partner might be disturbed at any time by an action brought by the retired partner or the representative of a deceased partner without showing any facts other than a dissolution and the absence as yet of an accounting. The liquidating partner should be treated as a fiduciary, and if he has neglected or refused to perform his duty or acted in any other way adversely to the rights of those to whom it is his duty to account, an action should lie against him as against a trustee under similar circumstances. He should not be subject to interference by the courts while in no way neglecting his duty.[134] If a court grants an accounting it must in due course make a decree, holding the partner who as a result of the accounting proves to be a debtor to his co-partner or co-partners liable in a certain amount, although some assets of the partnership cannot immediately be exactly appraised, and as to any of the assets the amount of the appraisements may not be realized. Moreover, if the action accrues at once, the Statute of Limitations begins to run, and if assets are received by a partner at a time subsequent to the dissolution by a period longer than the statutory period, there is no enforceable obligation to account for them. There is at present considerable conflict on this point, but Professor Burdick has said, "This holding is correct in principle, that the statute does not begin to run until the partnership affairs have been settled and a balance struck." [135]

The surviving partner should be treated not as a debtor, but as a fiduciary, and this view seems to be embodied in the sections declaring him to be a fiduciary as to benefits received without

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accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

[134] It has been held that the right of action does not as a matter of law accrue on dissolution. McPherson *v.* Swift, 22 S. D. 165, 116 N. W. 76 (1908); Riddle *v.* Whitehill, 135 U. S. 621 (1889); but only after a reasonable time has elapsed, Gilmore *v.* Ham, 142 N. Y. 1, 36 N. E. 826 (1894); Gray *v.* Green, 142 N. Y. 316, 37 N. E. 124 (1894); or an account is stated, Matthews *v.* Adams, 84 Md. 143, 35 Atl. 60 (1896); or an adverse claim has been made by the partner in possession, Thomas *v.* Hurst, 73 Fed. 372 (1896).

[135] 30 Cyc. 720. Cases showing different rules on this point are collected in 30 Cyc. 719, 721.

consent of co-partners,[136] and denying his right to possess partnership property except for partnership purposes.[137] Moreover, the representative of the deceased partner or a retired partner can elect to claim the profits attributable to the continued use of his share, instead of its value at the date of dissolution.[138] These provisions seem inconsistent with the section under consideration. In a comment on the corresponding section in a previous draft,[139] the learned draftsman said, "The English Act makes the debt due at the time of dissolution. The provision here drawn is based on the principle that when one person manages property for another nothing is due until an account is stated." Sec. 43 of the Act now recommended by the Conference is obviously drawn on a different principle, but the draftsman does not in his explanatory notes give any reason for the change or make any comment whatever on this section. It is submitted that the provision of the previous draft should be substituted for Sec. 43.

This article has been devoted primarily to a consideration of what are in the opinion of the writer important defects in the proposed Act. The Act contains, nevertheless, many commendable features, which cannot because of lack of space be enumerated.

[136] Sec. 21. (Partner Accountable as a Fiduciary.) (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

[137] Sec. 25 (2) (*d*). See n. 73.

[138] Sec. 42. (Rights of Retiring or Estate of Deceased Partner when the Business is Continued.) When any partner retires or dies, and the business is continued under any of the conditions set forth in § 41 (1, 2, 3, 5, 6), or § 38 (2*b*), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by § 41 (8) of this act.

[139] Draft D. Sec. 50. (Accrual of Actions.) Subject to any agreement between the partners the amount due from the liquidating partner or the surviving partners or the person or partnership continuing the business to the other partners or the representative of a deceased partner in respect to their shares in the partnership is a debt due at the time an account is stated as to all matters covered by the account.

The greater part of the provisions whereby the law is changed or conflicts settled are mitigations of the logical consequences of applying the aggregate theory on which the draftsman has ostensibly proceeded, such as the qualifications of the partner's right in specific partnership property,[140] which would necessarily be implied without express formulation if the entity theory were avowedly adopted. While the Act contains improvements in the law of many states, it is submitted that no state should adopt it without eliminating the defects which have been indicated.

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[140] See n. 73.