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Kentucky Adopts the Uniform Partnership Act

By WILLBURT D. HAM

The dominant position assumed by the corporation in modern American business life has tended to obscure the fact that the partnership is still in widespread use as a form of business organization in this country. While the carrying on of any sort of large scale interstate business activity almost of necessity calls for use of the corporate device, the partnership remains the frequent choice in the small closely held enterprise where the scope of business activity is of a more limited and restricted nature. It is not without significance, therefore, to the bench and bar of the Commonwealth of Kentucky that the General Assembly, during its 1954 session, enacted the Uniform Partnership Act.

By this action Kentucky added itself to the growing list of states that have found it desirable to make this particular Uniform Act a part of their statute law. At the end of the year 1953, thirty-two states had adopted the Act, including the seven states bordering Kentucky. In this latter group, Illinois and Tennessee had adopted the Act in 1917, Virginia in 1918, Missouri and Ohio in 1949, Indiana in 1950, and West Virginia in 1953. It is thus not surprising to find Kentucky joining the ranks of its sister states in becoming one of the now clear majority of states that have enacted this legislation.

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For an interesting and instructive study of the modern private business corporation, see BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

An excellent survey of the factors to be considered by the lawyer in helping his clients choose the form of business organization best suited to their needs will be found in SARNER, ORGANIZATIONAL PROBLEMS OF SMALL BUSINESSES (1951).


The Act was passed by the Indiana legislature in 1949, but its effective date was January 1, 1950. See Table of States Wherein Act Has Been Adopted in 7 U.L.A., 1953 Cumulative Annual Pocket Part.

It is interesting to note the renewed interest in this particular Uniform Act in recent years. When the State of Washington adopted the Act in 1945, this brought the list of state adoptions to twenty-four, exactly one-half of the states. No further adoptions occurred until 1947. During the period 1947-1953, eight
The Uniform Partnership Act first made its appearance in 1914, when it was approved for adoption by the National Conference of Commissioners on Uniform State Laws, after some twelve years of painstaking work by its Committee on Commercial Law. In the drafting of the Act, the intent was not to revolutionize the law of partnership by creating a completely new set of principles, but rather to bring together in one unified statute the basic common law conceptions of partnership along with such modifications and additions as were deemed necessary or desirable to achieve the desired uniformity among the states in this important area of commercial law.

There were other advantages, however, in addition to that of uniformity, which the Commissioners believed would result from adoption by the states of a general statute covering the law of partnership. In certain areas of partnership law, particularly those related to partnership property, it was found that the common law had failed to develop any consistent legal theory, with the result that theory and practice were many times hopelessly confused. It was also found that in some areas of partnership affairs judicial treatment was so infrequent as to provide no adequate guide for business men and their legal advisors. It was believed that adoption of the Act by the states would reduce these uncertainties and fill these gaps, thereby bringing about improvement in the practical administration of the law of partnership.

These were the considerations which, forty years ago, prompted the drafting of the Act. Its adoption by such a large group of states since that time has served to confirm the belief

states adopted the Act. They were: Delaware (1947), Indiana (1950), Missouri (1949), Montana (1947), New Mexico (1947), Ohio (1949), South Carolina (1950), and West Virginia (1953). The Executive Secretary of the National Conference of Commissioners on Uniform State Laws advised under date of October 1, 1954, that Arizona has also adopted the Act during 1954. This, along with Kentucky, brings the total of state adoptions to thirty-four. It has been suggested that an increased use of the partnership form of business because of heavy corporate taxes during World War II may have caused the revival of interest in the Act. See Mathews and Folkerth, Ohio Partnership Law and The Uniform Partnership Act, 9 Ohio St. L.J. 616, 617 n. 11 (1948).

A more detailed account of the drafting of the Act will be found in 7 U.L.A., Commissioners’ Prefatory Note. See also Lewis, The Uniform Partnership Act, 24 Yale L.J. 617 (1915).


7 U.L.A., Commissioners’ Prefatory Note.
held by the Commissioners that a real need and justification existed for the preparation of such a statute. The Act has now achieved a respectable maturity and there exists a substantial and growing body of judicial precedent interpreting and applying its provisions. Moreover, the widespread adoption of the Act by the states has served to intensify its importance in the development and unification of this phase of our commercial law.

Now that Kentucky is numbered among those states whose law of partnership is governed by this Act, the natural question which presents itself is the effect passage of the Act will have on existing partnership law in Kentucky. This article has been prepared in the hope that a general survey of the Act in relation to existing law might prove helpful. Needless to say, no attempt will be made to deal exhaustively with the law of partnership at common law, in Kentucky, or under the Act. This must be reserved for general treatises on the subject. The effort here will be to indicate in a general way the areas of existing partnership law most affected or influenced by the Act and some of the more important changes the Act makes, or may make, in the present law of partnership in Kentucky.

Legal problems involving a partnership have tended to group themselves around three distinct phases of partnership life: (1) those incident to the creation of the partnership, (2) those arising as incident to the partnership as a going concern, and (3) those concerned with the dissolution and termination of the partnership. The discussion which follows, therefore, will be broken down into these three categories, with the exception of problems relating to partnership property, which, because of their tendency to cut across all three of the categories and the special treatment given them by the Act, will be discussed separately.

**Creation of the Partnership Relation**

1. **Definition of Partnership—Tests and Indicia of the Relation.**

One of the more frequent questions that has been presented to the courts in the law of partnership is whether a particular
business arrangement constitutes a partnership. Many attempts at defining a partnership have been made by courts and text-writers, a task which has proven surprisingly difficult; but the definitions, while differing somewhat in verbiage, will be found to bear a remarkable similarity. They all tend to stress, in one way or another, the necessity that parties share the profits of a business as joint owners. In *Marshall v. Bennett*, the Kentucky court adopted the following definition:

A partnership is a status arising out of a contract entered into by two or more persons whereby they agree to share, as common owners, the profits of a business carried on by all or any of them on behalf of all of them. (Citing Shumaker on Partnership, 2nd Ed., p. 2)13

Except for the reference to partnership as a status, this definition closely parallels the one contained in Section 6 of the Uniform Partnership Act which reads as follows:

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

It will be observed that neither of these definitions refers to the necessity that losses as well as profits be shared. Some of the common law definitions, however, do speak of the sharing of losses as well as profits, and the Kentucky court itself has remarked that the partnership relation "contemplates the sharing of profits and the expressed or implied agreement to bear losses."
This is no doubt, in general, an accurate observation since parties who share profits as co-owners in a business venture will more than likely also agree to share the losses or will be deemed by the law to have so agreed in the absence of any indication of a contrary intention. However, it has been pointed out that a partnership can exist even though there is an agreement for indemnification of one or more of the partners against loss. Thus, sharing of losses, at least as between the partners themselves, does not seem to be an indispensable element where a partnership otherwise clearly exists. The definition contained in the Act by omitting reference to sharing of losses protects against the possibility that undue emphasis will be placed on this factor.

Common to all definitions, including that in the Uniform Partnership Act, is the notion that partnership is the result of a voluntary act whereby the parties have associated themselves together for the purpose of carrying on a business. Fundamentally, then, the question is whether the parties have intended to form a partnership, and the importance of intention as a test for finding the existence of a partnership has been frequently stressed in the Kentucky decisions. It is agreed, however, that the question is not what the parties have called their relation, but whether by their agreements and actions they show an intent to create the legal relationship which the law recognizes as constituting a partnership.

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17 See Mechem, Partnership sec. 73 (2d ed. 1920).
18 Id. at sec. 81.
19 Ibid. Nevertheless, absence of loss sharing may be of significance, when coupled with other factors, in leading to the conclusion that a partnership does not exist. See, e.g., Roy C. Whayne Supply Company v. McGowan, 213 Ky. 102, 280 S.W. 491 (1926).
20 "The presence of an agreement to share losses will increase the prospect of partnership, its absence will lessen it. However, the idea of the sharing of losses as indispensable needs to be deflated." Karesh, Partnership Law And The Uniform Partnership Act In South Carolina, 3 So. Car. L.Q. 193, 228 (1950).
21 In their note to Section 6 of the Act the Commissioners stated: "It is not indicated that the association must be a voluntary one. In the domain of private law the term association necessarily involves the idea that the association is voluntary." 7 U.L.A. 11, 12 (1949).
23 Crawford v. Wiedemann, 159 Ky. 18, 23, 166 S.W. 595, 597 (1914); Marshall v. Bennett, supra note 22.
In the eyes of the law, profit-sharing is undoubtedly the most important single factor indicating that parties intend to carry on business as partners. Indeed, at one time in England, profit-sharing was considered as constituting conclusive evidence that a partnership existed as to third persons, even though no partnership in fact existed as between the parties. In 1860, the English House of Lords reconsidered this doctrine, and in the well-known case of *Cox v. Hickman*, rejected the position that a sharing in the profits of an enterprise was necessarily conclusive that the parties were partners, even as to third persons. Lord Cranworth stated that the true test for partnership liability should be whether the person sought to be charged was in the position of principal as to those carrying on the trade, and that participation in profits would afford cogent, often conclusive, evidence that the trade was being carried on in part for him or on his behalf as principal. Under this view, which has been generally followed in the United States as well as England, there must be added to the element of sharing profits the further evidence that the parties shared such profits as principal proprietors in the business and not in some other relation. The Kentucky court summarized the test as follows in *Boreing v. Wilson*:

But, however great the diversity of opinion among the courts, the law is well settled that where the parties, by their acts, conduct, and writings show that they intended a partnership, and did in fact agree to share the profits of the business as *joint owners*, such parties are partners.

(Emphasis supplied)

The Uniform Partnership Act recognizes this test by the requirement in its definition that profits be shared by the parties as “co-owners.”

Under this test, profit-sharing remains as the strongest single

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26 Id. at 306, 11 Eng. Rep. at 446-447.
28 128 Ky. 570, 108 S.W. 914 (1908).
29 Id. at 596-597, 108 S.W. at 922.
30 In the Commissioners' Note to Section 6 it is said: "Ownership involves the power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control." 7 U.L.A. 11, 12 (1949).
indication that the parties are "joint owners" or "co-owners" of the business. Lord Cranworth recognized this when he said participation in profits afforded "cogent" evidence that a partnership relation existed,\textsuperscript{31} the Kentucky court recognized it in \textit{Boring v. Wilson} when it stated that while profit-sharing is not a conclusive test of partnership, it is still "an important consideration as an item of evidence tending to prove" the relation,\textsuperscript{32} and it is recognized in the Uniform Partnership Act by the provision in Section 7(4)\textsuperscript{33} that the "receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner."\textsuperscript{34}

Under certain more or less well-defined situations, however, the inference arising from profit-sharing is not drawn. They are listed in Section 7(4) of the Act\textsuperscript{35} as receipt by a person of profits in payment of a debt, as wages of an employee or rent to a landlord, as an annuity to a deceased partner's widow or representative, as interest on a loan, and as consideration for the sale of good will of a business or other property. These are all situations in which the sharing of profits is on a basis other than that of co-owners, and the inference which would otherwise arise from the sharing of profits is, therefore, effectually rebutted. Counterparts of some, if not all, these situations will be found in the existing case law of Kentucky, particularly with reference to the receipt of profits as interest on a loan\textsuperscript{36} and as payment for services as an employee.\textsuperscript{37}

In general, then, it may be said that in this area of partnership law the Act attempts no change, but merely seeks to bring into somewhat sharper focus principles already well established.

\textsuperscript{31} See note 26 \textit{supra}.
\textsuperscript{32} 128 Ky. 570, 595, 108 S.W. 914, 922 (1908).
\textsuperscript{33} KY. REV. STAT. 362.180(4) (Supp. 1954).
\textsuperscript{34} The sharing of gross returns does not of itself establish a partnership. Section 7(3) of the Act so provides. KY. REV. STAT. 362.180(3) (Supp. 1954). This was also recognized recently by the Kentucky court in \textit{Shelley v. Hill}, 265 S.W. 2d 34 (Ky. 1953). Likewise, both at common law and under the Act, joint ownership of property does not of itself establish a partnership, whether the co-owners share in any profits made by the use of the property or not. See Section 7(2) of the Act; KY. REV. STAT. 362.180(2) (Supp. 1954). And see the following Kentucky cases: \textit{Ford v. Jellico Grocery Company}, 194 Ky. 552, 240 S.W. 65 (1922); \textit{Crider v. Providence Coal Mining Company}, 242 Ky. 514, 46 S.W. 2d 1072 (1932).
\textsuperscript{35} See note 33 \textit{supra}.
\textsuperscript{36} The leading case appears to be \textit{Edwards v. Johnson}, 219 Ky. 113, 292 S.W. 750 (1927), which contains a good discussion of the proposition.
2. **Partnership by Estoppel.**

After the decision in *Cox v. Hickman*, it was clear that partnership liability to third persons was to depend primarily upon the existence of a partnership in fact between the parties. However, it was also recognized at common law, as well as in Section 16 of the Act, that a person may come under a partnership liability to third persons by having held himself out, or having consented to his being held out, as a partner on which third persons have relied. In other words, there is recognition that the principle of equitable estoppel may serve as a basis for partnership liability. The cases at common law, however, differed over whether this estoppel should be applied against a person who had knowledge that he was being held out as a partner, and who was not otherwise active in creating the appearance, but who failed to adopt affirmative measures to refute the representation. One line of cases adopted the position that there was no duty to deny such representations. Another group adopted the position that such a duty existed, the duty to be measured by the steps an ordinarily prudent person would take under similar circumstances to manifest his refusal. The Kentucky Court adopted this latter position in *E. L. Martin & Co. v. A. B. Maggard & Son*, holding a father liable for debts contracted by his son where he knew the son was carrying on a store business in the joint names of both as partners.

The rule of estoppel is stated in Section 16 of the Act in the following language:

> 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.

The Commissioners, as well as the draftsman, have stated that this provision was designed to remove the existing conflict.

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28 Stone v. Turfmen’s Supply Co., 103 Ky. 318, 45 S.W. 78 (1898).
29 Green, Huffaker & Co. v. Taylor & Son, 98 Ky. 330, 32 S.W. 945 (1895).
31 Crane, Partnership sec. 86 (2d ed. 1952).
32 206 Ky. 558, 287 S.W. 1102 (1925).
33 See note 40 supra.
by imposing liability only where there was a consent in fact to the holding out. According to the Act, the liability would seem to reject the broad basis on which the Kentucky case was decided, since the implication from it, and like cases, is that mere knowledge is enough in all cases to show consent unless affirmative steps have been taken to deny the representations.

On the other hand, the Act does not seem to go so far as to require the position that denial is never necessary where mere knowledge is involved. The language of the Act is that the representation shall have been by "words spoken or written or by conduct." It is well recognized in the law of contracts and agency that under certain circumstances silence and inaction may give rise to consent. Conduct can be negative as well as positive. Therefore, it would seem permissible under the Act to say that failure to contradict under some circumstances may be evidence from which a finding of fact could properly be made that consent to the holding out actually existed. Indeed, it is believed that the facts of the E. L. Martin & Co. case itself suggest the existence of such a possibility, although it is true the father did say that he had told his son that he would bring suit against him if he bought any more goods in his name.

The Act provides that partnership liability through estoppel results only where all the members of an existing partnership consent to the representation and that where there is no existing partnership or less than all the partners in an existing partnership have consented to the representation, the liability is a joint obligation of the person acting and the persons consenting.

44 Commissioners' note to Section 16, 7 U.L.A. 94, 95 (1949); Lewis, The Uniform Partnership Act, 24 Yale L. J. 617, 625 (1915).
45 Williston, Contracts sec. 91 (Rev. Ed. 1937); Restatement, Agency sec. 94 (1933).
46 See Note, 6 Md. L. Rev. 337 (1942), wherein this suggestion was made with reference to a similar problem which has arisen in the Maryland case law since the passage of the Act in that state. But see Burdick, Partnership, 72-73 (3d ed. 1917) in which he says as to Section 16 of the Act: "If this be compared with the corresponding provision of the British Act, it will be noticed that it requires proof of actual consent by the defendant to the holding out, while the British Act requires proof only of the fact that he has suffered himself to be held out. Under the latter rule affirmative action repudiating the representation is necessary at times. Under the former, it is not."
47 Section 16(1) (b) and (2); Ky. Rev. Stat. 362.225(1) (b) and (2).
ship obligation, apply in the event of insolvency the ordinary partnership rule as to priority of joint creditors in joint property and of separate creditors in separate property.\(^8\)

3. **Partnership as a Legal Entity.**

Where a partnership in fact has been created, it has not always been clear whether the law should treat the resulting business unit as a mere aggregate of the individuals who compose it or whether it should be personified and treated as a separate entity distinct from its members similar to the position adopted as to the corporation.\(^9\) The business man, unhampered by the legal concepts which constantly influence the thinking of the lawyer and judge, has had no difficulty in conceiving of the “firm” as being something distinct from the members, particularly in the setting up and keeping of the firm accounts with the individual members.\(^50\) Moreover, courts have on occasion found it expedient to refer to the enterprise as an entity, although in most instances the result reached would have been the same regardless of the description used.\(^51\) The common law, however, for the most part rejected the entity or “mercantile” theory and adopted the position that partnership activities were to be regarded as those of the partners and not as those of the partnership as a separate legal unit.\(^52\) This lack of receptiveness to the mercantile or entity

\(^8\) See Commissioners’ Note to Section 16, 7 U.L.A. 94, 95 (1949); CRANE, PARTNERSHIP sec. 36 (2d ed. 1952); Mathews and Folkerth, Ohio Partnership Law and The Uniform Partnership Act, 9 Ohio St. L. J. 616, 622 (1948).

\(^9\) CRANE, PARTNERSHIP sec. 3 (2d ed. 1952); MECHEN, PARTNERSHIP sec. 3 (2d ed. 1920).

\(^50\) See MECHEN, PARTNERSHIP sec. 7 (2d ed. 1920).

\(^51\) Two Kentucky decisions will serve to illustrate how a court may buttress its decision by reference to the partnership as an entity. In Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 187, 121 S.W. 1026, 1028 (1909), the court, in considering the extent of liability of a partnership for slander uttered by an agent of the firm, said: “A partnership in so far as its liability for the slanderous utterances of an agent or servant is concerned stands on the same footing as a corporation. A partnership is a legal entity as well as a corporation, except in a more limited sense. The firm as well as the corporation may have agents, and be liable for their acts of commission and omission in all states of case that a corporation would be liable.” In Bemiss v. Widows’ & Orphans’ Home of the Christian Church of Kentucky, 191 Ky. 316, 320, 230 S.W. 310, 312 (1921), the court, in speaking of the general rule denying a partner compensation for his services, said: “The reason for the rule lies in the fact that each partner in taking care of the partnership property and in managing and conducting the business is taking care of his own interest and is performing his own duties and obligations growing out of the partnership relation, since the partnership is considered an entity of which each partner forms a part.” See the interesting critique on the Greenbaum case in Lewis, The Uniform Partnership Act—A Reply, 29 Harv. L. Rev. 158, 175 n. 26 (1915).

\(^52\) See note 49 supra.
theory was no doubt encouraged by the traditional common law attitude that recognition of group entities must come through special dispensation of the sovereign, which in this country would mean through legislative action. So, when thought turned to the drafting of a partnership act, concern arose as to whether the act should preserve the traditional common law position or whether the occasion had now presented itself for introducing into legal theory the mercantile understanding of the partnership. We are told that one reason for the extended time of twelve years taken in the drafting of the Act was the inability to solve the fundamental question as to the general theory on which the Act should be drafted. The decision was ultimately made that it be drafted on the common law or aggregate theory. However, modifications in the aggregate theory were authorized with respect to the ownership of partnership property, and these, as well as other provisions of the Act, will be found to be consistent with the legal entity concept.

THE GOING CONCERN

1. Partnership Contract Liability.

Partnership law, as related to the conduct of the business by the partners, is in large part an application of the law of contracts, torts, and agency, particularly the latter. In transacting business the partners are in the position of agents. They are sometimes referred to as agents of each other, a mode of statement consistent with the aggregate theory of the nature of the partnership relation; at other times, they are referred to as agents of the firm for the transaction of its business, a mode of statement consistent with the entity view of the partnership. The manner of statement,

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58 See Crane, Partnership sec. 3 (2d ed. 1952).
60 7 U.L.A., Commissioners' Prefatory Note.
61 An extended discussion took place between Professor Crane and Dean Lewis shortly after the Act was approved for adoption over the extent to which its provisions departed from the common law aggregate theory. See Crane, The Uniform Partnership Act—A Criticism, 28 Harv. L. Rev. 762 (1915); Lewis, The Uniform Partnership Act—A Reply, 29 Harv. L. Rev. 158, 291 (1915-1916); Crane, The Uniform Partnership Act And Legal Persons, 29 Harv. L. Rev. 833 (1916).
however, seems of little practical importance here. The important consideration is that, as agents, they may bind the other partners by any action which is within the scope of the partnership purposes and business. In the language of the Uniform Partnership Act, “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.”

This language, on the whole, preserves well-established common law principles as to the scope of the power of a partner in his capacity as an agent. It is true ambiguity lurks in the phrase “for apparently carrying on in the usual way the business of the partnership of which he is a member” since “usual way” may mean “usual” as to the manner in which the affairs of the particular partnership are conducted or “usual” as to the manner in which similar partnerships in the same locality operate their business. However, both sources of authority were recognized at common law, and both are no doubt intended to be applied under the Act. Even if the language of the Act be held to refer only to the course of business of the particular partnership, evidence as to the course of business of similar partnerships would seem available through Section 4(3) which states broadly that “The law of agency shall apply under this act,” or Section 5(1) that “In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.” Provisions

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60 Russell v. Halteman’s Adm’x, 287 Ky. 404, 153 S.W. 2d 899 (1941).
62 Kentucky, at common law, took the position that one partner could not bind another by a sealed instrument without authority under seal. Trimble v. Coons, 9 Ky. (2 A. K. Marsh.) 375, 13 Am. Dec. 411 (1820); Cummins v. Cassely, 44 Ky. (5 B. Mon.) 74 (1844). But see McCart v. Lewis, 41 Ky. (2 B. Mon.) 267 (1842). The Act, by its provision as to execution of instruments in Section 9(1), puts the emphasis on the execution being found to be within the scope of the partnership business, thus abrogating the old common law rule. See Commissioners’ Note to Section 9, 7 U.L.A. 64 (1949).
63 Crane, Partnership sec. 49 (2d ed. 1952).
such as these would appear to make it clear that recognized common law doctrines are not abrogated by the Act except where the language and context of particular sections so require.

Conversely, "An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners."66

These broad principles, as thus stated in the Act, leave untouched the vast body of case law which has attempted to mark out those acts that may or may not be considered as coming within the scope of the partnership business. This body of case law must still be considered an integral and essential part of the law of partnership even in those states which have adopted the Act.

Generality has been departed from, however, to a limited extent by the Act. In Section 9(3),67 five types of transactions are listed which are not to be considered as coming within the authority of a partner (or less than all the partners) unless authorized by the other partners or unless they have abandoned the business. They are: (1) assign the partnership property in trust for creditors68 or on the assignee's promise to pay the debts of the partnership, (2) dispose of the good will of the business, (3) do any other act which would make it impossible to carry on the ordinary business of a partnership, (4) confess a judgment, or (5) submit a partnership claim or liability to arbitration or reference.69

In working out the extent of the powers of partners to act for the partnership, the common law observed a distinction between commercial and non-commercial partnerships, and a number of Kentucky decisions reflect this distinction.70 It is said that with a commercial, or trading, partnership, certain powers, such as the power to borrow money and execute negotiable paper, are implied as a matter of law from the very existence of the partnership and the nature of its business, whereas with a non-com-

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68 See Bull v. Harris, 57 Ky. (18 B. Mon.) 195 (1857).
69 Compare Southard v. Steele, 19 Ky. (3 T. B. Mon.) 435 (1826).
70 The leading Kentucky case appears to be Judge v. Braswell, 76 Ky. (13 Bush) 67, 26 Am. Rep. 185 (1877). See also Alsop v. Central Trust Co., 100 Ky. 373, 36 S.W. 510 (1897).
mercial, or non-trading, partnership, no such implication arises and the authority of the partners must be established affirmatively by the person seeking to hold the firm liable. The Uniform Partnership Act leaves this distinction untouched, and in view of the fact that it has become, and remains, such an integral part of existing partnership law, it will no doubt continue to be used by courts in the solution of cases arising under the Act. Basically, the distinction seems to be recognition of the simple fact that some partners, just as some agents, have more authority than others, and that the scope of that authority may depend on the nature of the business in which the firm is engaged. If the business is one of a trading nature, there is the likelihood of more extensive authority than if the business is of a more restricted or special nature such as found in the case of many partnerships of the non-commercial or non-trading variety. Nonetheless it is still true that, "One partner may bind the firm in all business relating to the partnership and in the regular and necessary course of the business whether the copartnership be commercial or non-commercial."

2. Partnership Tort Liability.

The power of a partner to subject the partnership to a tort liability while acting within the scope of the business is specifically recognized in Section 13 of the Act. It is there stated that the partnership is to be considered liable "to the same extent" as the partner committing the wrongful act. This language has proven significant in the solution of cases where the acting

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71 In Linn v. Valz, 11 Ky. L. Rep. 846 (1890), the court held that one member of a non-trading partnership could not bind his copartner by the execution of a note unless he had authority to do so and that this authority must be established as a fact by the person seeking to hold the firm liable. Furthermore, the court said, the fact that the indebtedness for which the note was executed was such as the partner had the right to incur in the conduct of the business did not of itself confer the authority since by the execution of the note the form and character of the indebtedness is changed and a new and different obligation is attempted to be imposed on the firm. Accord, Cooper v. Nelson & Dabney, 12 Ky. L. Rep. 890 (1891).

72 Davis, Moody & Co. v. Wiley, 3 Ky. L. Rep. 315, 320 (1881). Even in a non-trading partnership it may appear that the power exists on the part of a single partner to execute commercial paper in view of the original agreement between the partners and the course of business pursued by them. O'Conner v. Sherely, 107 Ky. 70, 52 S.W. 1056 (1899).

partner enjoys a personal immunity from suit because of family relationship to the person injured. In a leading New York case,\textsuperscript{74} it was used in support of a decision refusing to impose liability on a partnership or the other partners individually for injuries suffered by the wife of one of the partners as a result of the careless operation of an automobile on his part in the course of partnership business. In the law of agency, the modern trend, following the lead of Schubert v. Schubert Wagon Co.,\textsuperscript{75} has been to deny the principal the benefit of the agent's immunity.\textsuperscript{76} Since partnership tort liability is considered as being joint and several and since a partner is considered as being an agent for his co-partners, it is arguable that under the ordinary principles of agency, made a part of the Act in Section 4(3),\textsuperscript{77} the copartners may be held to individual liability for the tort committed regardless of the personal immunity of the acting partner. Nevertheless, the language of Section 13 as literally applied pulls in the opposite direction, and though it may not have been formulated with such a special case in mind,\textsuperscript{78} it will no doubt continue to influence results in cases of this character. In some states, including Kentucky, this problem would seem to be less acute, since personal immunity in domestic relation situations, particularly the marital relationship, has been removed in varying degrees by statute or decision.\textsuperscript{79}

3. \textit{Nature of Partnership Liability.}

Section 15 of the Act\textsuperscript{80} preserves the common law conception that a partner's liability in tort is joint and several while his liability on contract debts and obligations is joint. This is recognized as a rule of substantive law which is not intended to affect procedural modifications introduced in a number of states whereby joint liability is made in effect joint and several.\textsuperscript{81} It would not, for example, interfere with the statutory provision in Kentucky which provides that if two or more persons are jointly

\textsuperscript{74} Caplan v. Caplan, 268 N. Y. 445, 198 N.E. 23 (1935).
\textsuperscript{75} 249 N. Y. 253, 164 N.E. 42 (1928).
\textsuperscript{77} See note 64 supra.
\textsuperscript{78} See Note, 36 Col. L. Rev. 501 (1936). See also Note, 21 Cornell L. Q. 157 (1935).
\textsuperscript{79} See Note, 42 Ky. L. J. 497 (1954).
\textsuperscript{81} See Commissioners' Note to Section 15, 7 U.L.A. 86 (1949).
bound by contract, the action on such contract may be brought against all or any of them at the plaintiff's option.82

4. Rights of Partners in Management.

The Act provides that, in the absence of agreement to the contrary, "All partners have equal rights in the management and conduct of the partnership business,"83 and that, "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners."84 Where the division is equal, such as in a two-man partnership, the situation is complicated by the practical inability to settle any differences through majority rule. In such instances, it has been held at common law that a partner who dissents and notifies third parties should not incur liability on a transaction entered into by his copartner with such third persons.85 Although the Act does not deal specifically with such a situation, there is nothing contained therein which suggests that this common law solution should not be continued.86

The Act recognizes,87 as have numerous Kentucky decisions,88 that, in the absence of agreement to the contrary, a partner is not entitled to compensation for his personal services in conducting the partnership business.89 Furthermore, the Act recognizes,90

82 Ky. Rev. Stat. 411.180 (1953). A good discussion of the nature of joint liability at common law and as affected by the statutory modifications in Kentucky will be found in Williams v. Rogers, 77 Ky. (14 Bush) 776, 782-786 (1879), a partnership case.


85 Dawson, Blackmore & Co. v. Elrod, 105 Ky. 624, 49 S.W. 465 (1899). But existing contracts may be completed. Burns v. Treadway & Webb, 174 Ky. 123, 191 S.W. 685 (1917) (where one partner told debtor of firm not to settle with a copartner this did not deprive the latter of authority to make settlement with the debtor or in any way affect validity of the settlement).

86 Some support might be found from the provision in Section 9(4) that "No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction." Ky. Rev. Stat. 362.190(4) (Supp. 1954). Dean Lewis, the draftsman, has said of Section 18(h), in reply to a criticism that it should have contained something specific on the two-man situation, "A contract made by one of two partners against the protest of the other is not made by a majority. The implication from the section as worded, therefore, is that such a contract, the third person knowing of the protest, would not be a partnership contract." Lewis, The Uniform Partnership Act—A Reply, 29 Harv. L. Rev. 301, 302 (1916).


88 Gordon v. Gordon, 291 Ky. 244, 163 S.W. 2d 454 (1942); Johnson v. Tri-Union Oil & Gas Co., 278 Ky. 693, 129 S.W. 2d 111 (1939); Bemiss v. Widows' & Orphans' Home of the Christian Church of Kentucky, 191 Ky. 316, 230 S.W. 310 (1921); Robertson v. Mechanics Trust & Savings Bank, 184 Ky. 287, 211 S.W. 858 (1919).

89 This rule is held to apply even though there exists an inequality in the serv-
as has the Kentucky court, that profits are to be shared equally unless the parties have agreed to share them in some other proportion.91

5. Fiduciary Relationship Between Partners.

The Kentucky court has found occasion frequently to stress the fiduciary nature of the relationship between partners in the conduct of the business affairs.92 Indeed, the court has said that "there is no relation of trust or confidence known to the law that requires of the parties a higher degree of good faith than that of a partnership."93 The court has also stressed that this obligation of good faith is not confined to persons who are actually engaged in conducting a partnership, but extends also to persons negotiating for a partnership and to persons engaged in the settlement of partnership affairs after dissolution.94 Section 21 of the Act95 recognizes the broad scope of this fiduciary relationship. It provides that, "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by

ices rendered and one partner may have performed the major portion, or even all, the work involved in the conduct of the business. See cases cited note 88 supra. Cf. Mattingly v. Stone, 18 Ky. L. Rep. 187, 35 S.W. 921 (1896) (where both parties agree to contribute services and only one does so, an agreement will be implied to compensate the active partner). Under Section 18(f) of the Act, supra note 87, surviving partners are given the right to reasonable compensation for their services performed in the winding up process. At common law such compensation was generally refused except in extraordinary circumstances or where the partnership agreement provided for it. See, e.g., Terrell v. Rowland, 86 Ky. 67, 4 S.W. 825 (1887). Compare Collins v. Hudson's Adm'r, 232 Ky. 810, 140 S.W. 2d 365 (1939).


91 In Johnson v. Jackson, 130 Ky. 751, 755, 114 S.W. 260, 262 (1908), the court said: "The law of partnership is well settled that, where the question is one of division of profits, the presumption is that the profits are to be divided equally. . . . Furthermore such equality will be presumed notwithstanding the fact that the contributions to the firm capital are not equal, and whether the partners are or are not on a par in regard to skill, connection, or character, or whether they have or have not labored equally for the benefit of the partnership." But see Pirtle v. Penn. 33 Ky. (3 Dana) 347, 250, 28 Am. Dec. 70, 72 (1835); Warring v. Arthur, 98 Ky. 34, 40, 32 S.W. 221, 223 (1895).

92 Some of the more recent cases include: Betts v. Smither, 310 Ky. 402, 220 S.W. 2d 989 (1949); Smith v. Gibson, 310 Ky. 114, 220 S.W. 2d 104 (1949); Stephens v. Stephens, 298 Ky. 638, 183 S.W. 2d 822 (1944). Earlier decisions include: George v. Sohn's Adm'r, 191 Ky. 428, 230 S.W. 904 (1921); Axton v. Kentucky Bottlers Supply Company, 159 Ky. 51, 173 S.W. 1151 (1915). But it was held inapplicable in Miles v. Ashby, 295 Ky. 500, 174 S.W. 2d 753 (1943) where the transaction was unconnected with the partnership business.

93 See cases cited notes 92 and 93 supra. The fiduciary principle was applied to a liquidating partner in Breyfogle v. Bowman, 157 Ky. 62, 162 S.W. 787 (1914). It was extended to negotiations for the sale of a partner's interest to a copartner in Rankin v. Kelley, 163 Ky. 463, 173 S.W. 1151 (1915). But it was held inapplicable in Miles v. Ashby, 295 Ky. 500, 174 S.W. 2d 753 (1943) where the transaction was unconnected with the partnership business.

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." This provision serves to emphasize the trust nature of the obligation imposed on the offending partner. The claim against him under the Act is not just that of an ordinary creditor but in the form of a trust as to such property or money that can be traced.

It has long been recognized that, as a general rule, a suit at law cannot be maintained by one partner against another on a claim growing out of a partnership transaction. Furthermore, it is also the well settled common law rule that, in general, one partner cannot maintain an action against another in equity for an accounting so long as the partnership continues but must await a dissolution of the partnership at which time there can be a full settlement of the accounts. Courts have frowned on encouraging partners to appeal to the judiciary to settle their differences, since in addition to encouraging wasteful and needless litigation, it tends to destroy the mutual trust and confidence which are at the very foundation of the partnership relation. Section 22 of the Act gives a partner the right to an account as to partnership affairs (a) where he has been wrongfully excluded from the partnership business or possession of its property

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Kentucky cases in which a partner has been held accountable for profits include Marshall v. Bennett, 214 Ky. 328, 283 S.W. 115 (1926) (partner who transferred partnership land to a relative without profit as cloak for sale to another at a profit held accountable to his copartners for their share of the profits); Chambers v. Johnston, 180 Ky. 73, 201 S.W. 468 (1918) (partner held accountable for profits received from transaction entered into on his individual account but falling within scope of the partnership business); White v. Jouett, 147 Ky. 197, 144 S.W. 55 (1912) (partner held to account for profits received through appropriating to himself a business opportunity which belonged to the partnership); Deavenport v. Green River Dep. Bank, 138 Ky. 352, 128 S.W. 88 (1910) (partner who purchased a one-half interest in partnership note not allowed to profit by enforcing this one-half interest against firm at its face value); Anderson v. Whitlock, 65 Ky. (2 Bush) 398, 92 Am. Dec. 489 (1867) (administrator of deceased partner not allowed to keep profits received by partner as result of investment of partnership funds).

Hibbard v. Browning, 237 Ky. 754, 36 S.W. 2d 371 (1931); Baker v. Ramey, 222 Ky. 694, 2 S.W. 2d 369 (1928); Lawrence v. Clark, 39 Ky. (9 Dana) 257, 55 Am. Dec. 123 (1840). This general rule, however, does not prevent an action by one partner to a partnership contract against the other for its breach by reason of defendant's failure to perform those things required of him for the purpose of creating the partnership. Tevis v. Carter, 111 Ky. 938, 65 S.W. 17 (1901).

Young v. McKenney, 197 Ky. 768, 247 S.W. 964 (1923).

See the elaborate discussion in Lord v. Hull, 178 N. Y. 9, 70 N.E. 69 (1904).

by his copartners,101 (b) where the right exists pursuant to the
terms of any agreement, (c) where he may charge his copartner
for benefits derived in violation of his fiduciary position, and (d)
"Whenever other circumstances render it just and reasonable."102
While this language may be somewhat more flexible than some
statements of the common law rule, the common law itself recog-
nized exceptions to the general rule, and courts will no doubt
continue under the Act to exercise the same degree of caution
and circumspection in granting an account prior to dissolution
as they did at common law.103

PARTNERSHIP PROPERTY

1. In General.

At common law, the determination as to what constitutes
partnership property is governed by the intention of the parties.104
It is therefore said to be within the power of the partners to
determine what property shall be made a part of the firm assets
and what property shall be and remain that of the individual
partner or partners.105 Kentucky cases have accepted the rule of
presumption that, in the absence of a clearly indicated intention
to the contrary, real estate acquired with partnership funds and
used for partnership purposes is presumed to be partnership
property,106 and its correlary that if such property was not paid
for with partnership funds but with the individual funds of the
partners, the presumption is that the parties did not intend to
hold it as partnership property even though it may have been
used in the firm business.107 These rules and presumptions are

102 In Pirtle v. Penn, supra note 101, the court said at 248, 28 Am. Dec. at 71:
"But both principle and authority tend to the conclusion that a bill for an account
between copartners, may be maintained without a prayer for a dissolution of the
partnership, if there is any good reason for compelling an account and settlement."
103 In their note to Section 22, the Commissioners said: "In view of the word-
ing of clause (d), the total effect of this section is to emphasize the fact, that a
partner, the partnership not being dissolved, has not, necessarily the right to de-
mand formal accounts, except at particular times and under particular circum-
104 Crane, Partnership sec. 37 (2d ed. 1952); Tiffany, Real Property
sec. 446 (3d ed. 1939).
105 Crane, Partnership sec. 37 (2d ed. 1952).
106 Spalding v. Wilson & Muir, 80 Ky. 589 (1883).
107 Wilhite's Adm'r v. Boulware, 88 Ky. 169, 10 S.W. 629 (1899). This pre-
sumption was extended to a real estate lease owned by a partner at the time of
formation of the partnership in Sanderfur v. Canter, 259 S.W. 2d 15 (Ky. 1953).
left undisturbed by the Uniform Partnership Act. Section 8(1)\(^{108}\) provides that "All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property", and Section 8(2)\(^{109}\) states that, "Unless the contrary intention appears, property acquired with partnership funds is partnership property."\(^{110}\)

2. Legal Title to Partnership Real Estate.

Other provisions of the Act pertaining to partnership property involve rather important changes in common law concepts. Section 8(3),\(^{111}\) for example, provides that title to real estate may be taken in the partnership name. Such a mode of conveyance was not possible at common law due to the requirement that legal title to real property must always vest in a legal person and the refusal of the common law courts to recognize the partnership as other than an aggregate of the individuals composing it. The common law did ameliorate its position somewhat by recognizing that if the partnership name included the surname of one or more of the partners, the legal title would be deemed to vest in such partner or partners, to be held in trust for the partnership.\(^{112}\) This has even been carried by some courts to the point of permitting parol evidence to be introduced, where a firm name is used, to establish the membership of the partnership with a vesting of the legal title in the members as tenants in common.\(^{113}\)

The need for resort to these techniques in order to save conveyances is now rendered unnecessary by the provision in the Act permitting the vesting of title in the partnership name.

It should be carefully observed, however, that the Act does not require that conveyances be made to the partnership in the partnership name. Conveyance, if desired, may still be made to one or more of the partners or to the partners jointly. However, there is a certain disadvantage involved, present under the Act

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\(^{110}\) Note that under the Act it is not necessary that the property actually be appropriated to partnership uses for the presumption to apply. Accord, Flanagan v. Shuck, 82 Ky. 617 (1884). But cf. Bank of Louisville v. Hall & Long, 71 Ky. (3 Bush) 672 (1872).


\(^{112}\) 2 Tiffany, Real Property sec. 444 (3d ed. 1939).

\(^{113}\) Ibid.
as well as at common law, in placing record title in the names of one or more, but less than all, of the partners. While it is true in such instances that the partners to whom conveyance is made will be deemed to hold the legal title in trust for the partnership, there is the ever present danger that the record title will not reveal the interest of the partnership, with the result that a bona fide purchaser for value from the individual partner or partners will cut off the equitable claim of the partnership.\textsuperscript{114}

Section 10 of the Act\textsuperscript{115} contains a series of provisions dealing with the power of a partner or partners to convey title to partnership real estate both in those cases where the title is in the partnership name and also in those cases where title is in the name of one or more of the partners. In the situation just considered where title is in the name of one or more but not all of the partners, and the record does not disclose the right of the partnership, the partnership is precluded from recovering the property from a bona fide purchaser even though the partner or partners in whose name the title stands exceeded his or their authority in making the conveyance.\textsuperscript{116} On the other hand, where the title is in the names of all the partners, a conveyance executed by all the partners passes all their rights in such property.\textsuperscript{117} If the title stands in the name of the firm, any partner may bind the partnership to a conveyance of the property in the partnership name provided he has acted within the scope of his authority.\textsuperscript{118} If he has exceeded his authority, the partnership may recover the property unless it has in the meantime been conveyed by the grantee to a holder for value who is without knowledge that the partner exceeded his authority in making the conveyance.\textsuperscript{119}

3. \textit{Equitable Conversion of Real Estate.}

The common law requirement that legal title to real estate be

\textsuperscript{114}See Seeley v. Mitchell's Assignee, 85 Ky. 508, 4 S.W. 190 (1887) (mortgage). And see Cain's Adm'r v. Hubble, 184 Ky. 38, 211 S.W. 413 (1919); Mildren v. Root, 262 Ky. 826, 91 S.W. 2d 523 (1936).
\textsuperscript{116}Subsection (3).
\textsuperscript{117}Subsection (5).
\textsuperscript{118}Subsection (1).
\textsuperscript{119}Ibid. Under subsection (2) where title is in the name of the partnership and conveyance is made in his own name by a partner within the scope of his authority, the conveyance passes the equitable interest of the partnership. A similar result follows under subsection (4) in the converse situation where title is in the name of one or more of the partners and conveyance is made in the partnership name.
taken in the name of one or more of the partners led to complications when a partner died in whose name title rested. Consider, for example, the case where the partners held title jointly as co-tenants. Legal title to the deceased partner's share would descend to his heirs at law, subject to the dower rights of his widow. There remained the equitable right on the part of the surviving partners to have the partnership property used first for satisfaction of partnership obligations and in the settlement of partnership affairs. This right was recognized by courts of equity through the fiction of treating the real estate as "converted" into personalty.\textsuperscript{120} Difference of opinion existed, however, over whether, after liquidation, the deceased partner's share should go to his personal representative as personalty or whether at that point a "reconversion" should take place and any remaining real estate should descend as real estate to the heirs with dower rights in the widow. The English courts adopted the "out-and-out" conversion theory, and this has been preserved in the English Partnership Act.\textsuperscript{121} In this country, however, the majority of the courts have adopted the "pro tanto" theory, that is, that the real estate is to be deemed personalty only for purposes of settling the partnership affairs. To that extent the partnership realty is impressed with a trust and is held by the partners as tenants in common subject to that trust. After the firm purposes have been satisfied, however, any remaining realty is held by the partners as tenants in common free from any trust and subject to the usual incidents of such a tenancy, including descent to the heirs of the deceased partner.\textsuperscript{122} Early Kentucky cases wavered as to which theory to adopt,\textsuperscript{123} until in \textit{Carter v. Flexner}\textsuperscript{124} it was settled in favor of the pro tanto theory.\textsuperscript{125}

\textsuperscript{120} \textit{Crane}, \textit{Partnership} sec. 45 (2d ed. 1952).
\textsuperscript{122} See \textit{2 American Law of Property} sec. 6.8 (1952). It is well established under the pro tanto theory that once partnership purposes have been satisfied and the land again takes on its character as real estate, dower interests of the widow attach. \textit{See} Bennett v. Bennett, 137 Ky. 17, 20, 121 S.W. 495, 496 (1910).
\textsuperscript{123} \textit{Compare} Galbraith v. Gedge, 55 Ky. (16 B. Mon.) 631 (1855) (pro tanto) \textit{with} Cornwall v. Cornwall, 69 Ky. (6 Bush) 369 (1869) (out-and-out); and see the attempt at reconciliation of the two cases on the basis of intent of the parties in Lowe v. Lowe, 76 Ky. (13 Bush) 688 (1878) (pro tanto). The early Kentucky cases are collected in Note, 25 A.L.R. 399, 397-400 (1923).
\textsuperscript{124} 92 Ky. 400, 17 S.W. 831 (1891).
\textsuperscript{125} The court reaffirmed this position in Strode v. Kramer, 293 Ky. 354, 169 S.W. 2d 29 (1943). In \textit{Carter v. Flexner}, \textit{supra} note 124, the court rejected the
While the situation under the Uniform Partnership Act is not as clear as it might be, the sum total of the pertinent provisions point rather strongly in the direction of the English rule of out-and-out conversion. The Act provides that on the death of a partner his right in specific partnership property vests in the surviving partner or partners and that a partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. It is stated that on dissolution each partner may have the partnership property applied to discharge its liabilities and the surplus applied to pay in cash the net amount owing to him. There is the further provision that a partner's interest in the partnership, that is, his share of the profits and surplus, is to be considered personal property.

Well-considered cases under the Act have found in these provisions an intent to adopt the rule that the property is converted into personalty for all purposes.

If this interpretation of the Act be accepted, the change thereby effected in Kentucky law will be of importance in at least two directions. In the first place, it will affect the rights of those concerned in the ultimate distribution of the deceased partner's share in the partnership. It may make considerable difference to the widow, for example, whether she receives a dower interest in the property as real estate or whether she may receive

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proposition that the solution should depend on the intent of the parties since it was felt this left too much room for speculation over the question of intent. However, under the pro tanto rule it has been generally agreed that the parties may effect a more complete conversion by agreement between them. The case is all the more striking in this respect since it involved a partnership to deal in land, and it has been said that in partnerships of that character it will be assumed that the parties intended an out-and-out conversion. See Mechem, Partnership sec. 163 n. 36 (2 ed. 1920).

The Act Section 25(2) (d) and (2) (e); Ky. Rev. Stat. 362.270(2) (d) and (2) (e) (Supp. 1954). These provisions, standing alone, are inconclusive since they are open to the interpretation that they merely recognize the existence of a conversion to the extent necessary to protect partnership creditors and the rights of the partners inter se but have nothing to do with the course of descent and distribution. See 3 American Law of Property sec. 14.16 (1952).


an outright share in the proceeds of the property as personalty. In the second place, it may well affect the mode of conveyance of the legal title by the surviving partners in the settlement and liquidation of partnership affairs. This, in fact, was the primary issue which confronted the Kentucky court in *Carter v. Flexner*, and it was concluded that, since the title of the deceased partner descended to his heirs, subject to the right of the surviving partner to sell the real estate in settlement of partnership claims, conveyance by the heirs, and widow, would be necessary to pass a complete legal title to the purchaser and the latter was not required to take merely the conveyance of the surviving partner. Under the out-and-out conversion theory adopted by the Act it is arguable that title to the real estate never descends to the heirs at all, but, as personalty, passes to the surviving partners with full power on their part to convey a complete legal title. It has been so held by the Supreme Court of Illinois in *Wharf v. Wharf*, a leading case involving the construction and application of the Act to this problem. The change thus effected would foreclose the conveyancing complication which confronted the Kentucky court recently under the pro tanto theory in the case of *Baker v. Wides' Ex'r*, where the son of a deceased partner was held as a prisoner of war by the Japanese during World War II. The court held that any sale of the real estate must be through the medium of a

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201 A third possible effect is in the area of state inheritance taxes. See Crane, *Partnership* sec. 45 (2d ed. 1952).

202 The case of *Strode v. Kramer*, 293 Ky. 354, 169 S.W. 2d 29 (1943) likewise involved a conveyancing issue, with the court holding that a bank, as the personal representative of a deceased partner, who was the surviving partner in a former partnership with his brother, could not convey partnership real estate, in the absence of powers conferred by his will, so as to bind adult children to whom the property had passed as legatees under his will. Compare the provision in Section 25(2) (d) of the Act to the effect that where the deceased is the last surviving partner, his right to specific partnership property vests in his legal representatives. Ky. Rev. Stat. 362.270(2) (d) (Supp. 1954).

203 306 Ill. 79, 137 N.E. 446 (1922).

204 This view is also expressed in Burdick, *Partnership* 109 (3d ed. 1917). Where, however, the legal title, instead of being held jointly by all the partners, is held in the name of the deceased partner, it is not so clear that the surviving partners can convey the legal title, although it is clear that they could transfer the equitable interest and seek court aid, if necessary, to compel the heirs of the deceased partner to make the necessary conveyance of the legal title. See 8 American Law of Property sec. 14.16 (1952).

205 290 Ky. 414, 185 S.W. 2d 699 (1945).
judicial sale, since the son obviously was not in a position to execute a deed.


It has been customary in the decisions at common law, Kentucky included, to speak of partners as tenants in common of partnership property, particularly real estate. This label, however, is not strictly accurate since, as Professor Mechem has aptly observed, a partner cannot deal with his interest as co-tenant with the same freedom as is ordinarily available to tenants in common. For one thing, his interest as tenant in common does not enable him to transfer that interest to another so as to put such person in his place with power as co-owner of partnership property to use it for partnership purposes. This would in effect be forcing a new partner on the other partners which would violate the fundamental precept that partnership is a voluntary relationship. Furthermore, it is said that each partner has a right, referred to as the partner's lien, to have the property of the partnership applied in payment of the debts and liabilities of the firm. This right is inconsistent with the ordinary incidents of tenancy in common.

Professor Mechem has also pointed out that partners should not be considered as mere joint tenants of partnership property, since in ordinary joint tenancy, a right of survivorship exists which gives the survivor a complete beneficial ownership.

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2. In Wilhite's Adm'r v. Boulware, 88 Ky. 169, 171, 10 S.W. 629, 630 (1889), the court said: "The principle is universally recognized that at law real estate owned by a partnership, even if purchased in the name of the partnership, and with partnership funds, is held by the members of the firm as tenants in common, and is subject to all the incidents of land held in common.
4. Hagan v. Hurst, 228 Ky. 645, 15 S.W. 2d 446 (1929); Mechem, Partnership sec. 143 (2d ed. 1920). The partner's lien extends not only to partnership obligations owing to outside third parties but also to obligations of the firm owed to individual partners.
5. Walter v. Herman, 110 Ky. 800, 62 S.W. 857 (1901); Holmes v. Stix, Krouse & Co., 104 Ky. 351, 47 S.W. 243 (1898). In McGlone v. Smith, 293 Ky. 131, 168 S.W. 2d 566 (1943), a partner sought a priority in partnership assets over all other liens on the theory of subrogation as a result of his payment of a partnership note which he and his partner had executed early in the venture and which was secured by a mortgage. This was denied on the ground that he was not entitled to any distributable share in the partnership property until all firm creditors had been satisfied.
the case of partners, however, the survivorship is of a more limited character, the survivor being entitled to the property only for those purposes related to a winding up of partnership affairs.142

Calling the ownership that of tenancy in common or joint tenancy would perhaps be of no particular consequence if it were a mere matter of attaching a descriptive label. It is not quite that simple, however, since the nature of the partner’s interest in partnership property has a marked effect in the solution of at least two other vexing matters concerning partnership property, namely, the extent to which a partner can transfer or assign his interest in partnership property and the extent to which separate creditors of a partner can reach his interest in such property.

The common law recognized that a partner could dispose of his share in partnership property but that, under the influence of the partner’s lien, the transferee took subject to the right of the other partners to have the property applied first to the satisfaction of partnership obligations. In *Fyffe v. Skaggs*,143 for example, the Kentucky court held that, where two partners were the joint owners of an oil rig and equipment, a sale of his half interest by one of the partners was subject to settlement of partnership debts incurred in the operation of the equipment and for which the property would be liable in the hands of the purchaser. The court said:

> It is an elementary rule that each partner has a lien upon all of the firm’s property for the payment of the partnership debts and that they have the right to have the property of the partnership applied to the payment of the firm’s debts. Such lien arises when the partnership is entered into and continues throughout its existence. . . . A partner has no interest in the partnership assets which may be subjected to his individual debts, nor can it be mortgaged or sold by him free of the firm’s debts, until the partnership debts are satisfied. (Emphasis supplied)144

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142 See 2 AMERICAN LAW OF PROPERTY sec. 6.8 (1952).
143 246 Ky. 5, 54 S.W. 2d 369 (1932).
144 *Id.* at 8-9, 54 S.W. 2d at 371. An assignment by way of mortgage of specific partnership property likewise comes under the protective cloak of the partner’s lien. In *Hagan v. Hurst*, 228 Ky. 645, 15 S.W. 2d 446 (1929), where a partner mortgaged his interest in the partnership assets to individual creditors, it was held in a contest between the mortgagees and partnership creditors on dissolution that the partnership creditors should prevail and that it was immaterial whether their claims arose prior to or subsequent to the mortgage since the lien
The partner's lien has also played a large part in the solution of cases involving the rights of individual creditors of a partner. It has been generally recognized that a partner's interest is subject to attachment and execution, but that the individual creditor, or purchaser at an execution sale, should not be allowed to interfere with the right of the other partners to have the partnership property made available for the satisfaction of firm debts. A separate creditor thus can subject to the payment of his debt only whatever his debtor is entitled to in the partnership assets on a full settlement of the partnership affairs.

It should be evident, then, that the interest of a partner which is transferable by him or which can be reached by his individual creditors at common law is not his interest in specific items of property but rather his interest in the partnership consisting in whatever may remain as his share after firm obligations are settled.

Attempt was made in the drafting of the Uniform Partnership Act to construct a series of provisions which it was thought would best recognize and promote these peculiar incidents that surround the ownership of partnership property. Section 24 divides the property rights of a partner into three distinct divisions: (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management. Section 25, in elaboration of the nature of a partner's right in specific partnership property, provides that, "A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership." The Act thus recognizes that co-ownership of partnership property is sui generis, and

arises at the time the partnership is formed and continues throughout the existence of the partnership. Accord, Gowin v. Lake, 243 Ky. 442, 48 S.W. 2d 1059 (1932).

100 Crane, Partnership sec. 43 (2d ed. 1952).

101 Wintersmith & Young v. Pointer & Conway, 59 Ky. (2 Met.) 457 (1859). In Perry Bank & Trust Company v. Napier, 240 Ky. 469, 42 S.W. 2d 694 (1931), it was held error to permit the individual indebtedness of a partner to be paid from a partnership bank account where there had been no partnership accounting. The court said at 472, 42 S.W. 2d at 695: "From the foregoing and numerous other authorities of similar import, we find the general rule to be that a partner has no individual title to firm assets, but that his interest in the partnership funds is but a chose in action or a right to his proportionate share of whatever remains after the partnership indebtedness is paid and the equities as between the parties adjusted by proper accounting."

102 See Mechem, Partnership sec. 146 (2d ed. 1920).

104 See Commissioners' Note to Section 25, 7 U.L.A. 144 (1949).


avoids the difficulties involved in attaching to the relationship the traditional common law labels of joint tenancy or tenancy in common. Section 26\(^{151}\) describes the nature of a partner's interest in the partnership as "his share of the profits and surplus".

The provisions of Section 25 which indicate the incidents to be ascribed to tenancy in partnership are of particular interest. It is there provided, among other things, that a partner's right in specific partnership property "is not assignable except in connection with the assignment of rights of all the partners in the same property",\(^{152}\) and that a partner's right in specific partnership property "is not subject to attachment or execution, except on a claim against the partnership."\(^{153}\) It is recognized, however, in Section 27\(^{154}\) that a partner may assign or convey his interest in the partnership, and by Section 28\(^{155}\) a procedure is provided through means of a "charging order" whereby judgment creditors of a partner may reach the debtor partner's interest in the partnership.

An assignee under his assignment receives only a right to such profits as the assignor partner would be entitled to during the continuance of the partnership\(^{156}\) and in case of dissolution to whatever would be coming to the assignor partner.\(^{157}\) The assignee has no right to interfere in the management or administration of the partnership business during its continuance,\(^{158}\) and

\(^{152}\) Subsection (2) (b); Ky. Rev. Stat. 362.270(2) (b) (Supp. 1954).
\(^{153}\) Subsection (2) (c); Ky. Rev. Stat. 362.270(2) (c) (Supp. 1954). This provision further states that, "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." The decisions at common law were in conflict. Crane, Partnership sec. 44 (2d ed. 1952). Kentucky seems to have been in accord with the position adopted by the Act. Green, Huffaker & Co. v. Taylor & Son, 98 Ky. 330, 32 S.W. 945 (1895).
\(^{158}\) See note 137 supra. It is also stated in this same section that a conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership. However, if the assigning partner neglects his duties to the partnership, the other partners may ask a court to dissolve the partnership under Section 31 of the Act, Ky. Rev. Stat. 362.305 (Supp. 1954). In Power Grocery Co. v. Hinton, 187 Ky. 171, 218 S.W. 1013 (1920) the court held that, while an assignment of an interest in a partnership as security for a debt does not work a dissolution where the transaction contemplates a continuance of the partner's interest and authority in the partnership, a general assignment for the benefit of creditors operated as an automatic dissolution.
may force a dissolution only where the term of the partnership has expired\textsuperscript{139} or where the partnership is one at will.\textsuperscript{160}

The charging order is an innovation taken directly from the English Partnership Act, where it is said to have "given great satisfaction."\textsuperscript{161} It provides, in substance, that any judgment creditor of a partner may apply to a court to have the interest of the debtor partner charged with payment of the unsatisfied amount of the judgment. The court may then or later appoint a receiver of his share of the profits, and make any other orders which the circumstances of the case may require.\textsuperscript{162} One distinct advantage which this procedure has over the common law procedure of attachment or execution is that it avoids interruptions which may occur in the continued operation of the business by the non-debtor partners where a sheriff must actually levy on the partnership property. Indeed, it has been observed that where the creditor can actually attach or levy execution, he possesses an effective weapon whereby he can hold up the whole firm for the debt of one of their members, since the non-debtor partners may be compelled to take action to protect their interests in the free use and enjoyment of the property.\textsuperscript{163}

It was in this area that some of the greatest confusion developed in the law of partnership at common law. Ordinarily, the sheriff levied a separate creditor's execution by seizing a part or all of the tangible property of the firm, taking actual possession of the property, and selling the debtor partner's interest in the property.\textsuperscript{164} The purchaser, however, was not entitled to take and hold possession of any specific chattel as against the firm.

\textsuperscript{139} The Act, Section 32(2) (a); KY. REV. STAT. 362.305(2) (a) (Supp. 1954).
\textsuperscript{160} The Act, Section 32(2) (b); KY. REV. STAT. 362.305(2) (b) (Supp. 1954).
\textsuperscript{161} Commissioners' Note to Section 28, 7 U.L.A. 163 (1949).
\textsuperscript{162} The Act, Section 28(1); KY. REV. STAT. 362.285(1) (Supp. 1954). Subsection (2) contains provisions enabling a redemption of the interest charged, and subsection (3) preserves to the debtor partner, with regard to his interest in the partnership, any right which he may have under the exemption laws. The Kentucky court recognized this exemption right in Southern Jellico Coal Co. v. Smith, 105 Ky. 105, 163, 49 S.W. 807 (1899).
\textsuperscript{163} WRIGHT, CALIFORNIA PARTNERSHIP LAW AND THE UNIFORM PARTNERSHIP ACT, 9 CALIF. L. REV. 206, 225 (1921).
\textsuperscript{164} BURDICK, PARTNERSHIP 270-273 (3d ed. 1917). Some difference of opinion existed as to whether the sheriff must seize all of the tangible property or could seize a part only. In Aldrich v. Wallace, 38 Ky. (8 Dana) 257 (1839), the court held that where the property consisted of a number of articles (composing the merchandise of a grocery store) the debtor's interest in the whole should not be sold in gross, but the articles should be taken separately, and his individual interest in each sold separately unless the peculiar character of the articles would make it improper to separate them.
He merely acquired the right to demand an accounting and receive whatever might be found to be coming to the debtor partner. In England, and in some American jurisdictions, equity intervened on behalf of the debtor or his copartners and appointed a receiver to ascertain the debtor partner’s interest, enjoining the sheriff from selling the interest. This prevented a needless sacrifice of the debtor partner’s interest through a sale of it at a time when its value would be highly speculative.

Kentucky law includes legislation specifically directed at regulation of the sale under execution of property held jointly by a debtor with others. It is broad enough to cover partnership situations as well as others involving jointly held property. Under this legislation, where an officer levies execution upon personal property held jointly by the debtor with another person, he is not permitted to deprive such person of possession of the property except for the purpose of having it inventoried and appraised. When he has performed these duties, he makes return of the execution to the office from which it was issued, and his powers are then exhausted. The execution creditor is given a lien which he may enforce by action in equity. It has been said of this legislation by the Kentucky court that its fundamental purpose was “to prevent sales of the interests of separate joint owners in personal property under executions, to avoid the sacrifice of the rights of the joint owner not in the execution and to substitute a

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105 Burdick, Partnership 273 (3d ed. 1917).
106 Id. at 274. In Watson v. Gabby, 57 Ky. (18 B. Mon.) 658, 663 (1857) the court said, in a suit on a claimant’s bond, that the right of an execution creditor to subject to levy and sale under his execution the interest of such partner in the effects belonging to the partnership concern was unquestionable, and that if the other partner in such case claimed the whole of the partnership effects for the benefit of the creditors of the firm, he must resort to a court of equity for settlement of the partnership. The court, however, found it unnecessary to determine at what stage of the proceeding under execution the aid of the chancellor should be invoked, whether before or after a sale had been completed by the sheriff, since the only question before the court was whether the property levied on was subject to execution. In Williams v. Smith, 67 Ky. (4 Bush) 540 (1868), where execution against a partner was levied on partnership property and a sale suspended under a claimant’s bond, it was held any equitable cause could be shown against judgment on the bond and that since the property involved was partnership property, a settlement of the partnership should be had and only the interest of that partner subjected to the bond.
107 Burdick, Partnership 274 (3d ed. 1917).
109 Jones v. Martin, 5 Ky. L. Rep. 227 (1883); Vicory v. Strausbaugh, 78 Ky. 425 (1880). If in such action it should develop that the debtor has no interest in the property because the partnership liabilities exceed the assets of the firm, the creditor will not be entitled to judgment. Holmes v. Miller, 41 S.W. 492 (Ky. 1897).
new and distinct mode of proceeding in equity by which the interests of all could be fully protected.\textsuperscript{170}

Much the same purpose lies behind the charging order procedure established by the Uniform Partnership Act. The application by the creditor to the court for a charging order will now, it appears, as to jointly held partnership property, supersede the suit in equity sanctioned under existing legislation as to jointly held property generally.\textsuperscript{171} However, the authority given the court under the charging order procedure is broad and would seem to afford as much opportunity, and possibly more, to protect the interests of all concerned as would be available to the chancellor exercising his equity powers under the proceeding in equity.\textsuperscript{172}

The foregoing discussion has been concerned with the rights of separate creditors against partnership property. The converse situation also presents itself, that is, the extent to which firm creditors may avail themselves of the processes of attachment or execution against the separate property of the individual partners. It is clear under Section 25(2)(c) of the Act\textsuperscript{173} that partnership property is subject to attachment or execution on a claim against the partnership, and, in view of the personal liability which each partner carries as to firm obligations, it follows that his separate estate is also open to being subjected to a lien by attachment or execution by partnership creditors.\textsuperscript{174} Here, the general law as to executions and attachments would appear to govern, un-

\textsuperscript{170}Jones v. Martin, \textit{supra} note 169 at 283. This legislation was applied to a levy on jointly owned real estate in Payne v. Pollard, 66 Ky. (3 Bush) 127 (1867).

\textsuperscript{171}See the excellent discussion of the nature of a partner’s right in specific partnership property and the charging order in Windom Nat. Bank v. Klein, 191 Minn. 447, 254 N.W. 602 (1934). A court, in its discretion, can direct a sale of the debtor-partner’s interest, if that seems most advisable. Frankel v. Frankel, 15 Pa. D. & C. 103 (1931). But a court should no doubt exercise such discretion with the utmost care lest it precipitate a situation whereby the purchaser could disrupt the partnership business. This would be a particularly grave danger in a partnership at will, since under the Act the purchaser of a partner’s interest in the course of a charging order proceeding is given the same right to seek dissolution as in the case of the purchaser where one partner has voluntarily sold his interest. See notes 156 and 157 \textit{supra}; Mathews and Folkther, \textit{Ohio Partnership Law and The Uniform Partnership Act}, 9 Ohio St. L. J. 616, 639-640 (1948).

\textsuperscript{172}The charging order would also appear to supersede, in partnership cases, the provisions of Ky. Rev. Stat. 425.250 prohibiting a sheriff, in executing an attachment on jointly held personal property, from taking possession until a bond is executed by plaintiff.


\textsuperscript{174}Burdick, \textit{PARTNERSHIP} 251 (3d ed. 1917); MECHEM, \textit{PARTNERSHIP} sec. 314 (2d ed. 1920).
affected by the Uniform Partnership Act.\textsuperscript{175} The picture changes somewhat, however, when the partnership and separate estates come under the protective cloak of the equity court or bankruptcy court in insolvency proceedings, as will be discussed later.

The general theory on which the property provisions of the Act are framed suggest another possible change in common law principles. As indicated, through subrogation to the partner's lien, creditors of a partnership have the right that partnership assets be appropriated to payment of their debts before individual creditors of a partner can acquire any rights in the property. Many courts, however, have emphasized that the right to the lien in favor of partnership creditors is not an inherent right, but only a derivative one through the members of the partnership, and if the members have in any way waived or otherwise lost their lien, the partnership creditors can possess no greater rights. In \textit{Jones v. Lusk},\textsuperscript{176} for example, the Kentucky court refused to sustain the propriety of an injunction issued by the chancellor on a petition to enjoin partners from selling partnership property and using the proceeds to pay their individual debts, where the allegations were otherwise insufficient to give the chancellor jurisdiction such as on grounds of fraud. Again, in \textit{Couchman's Adm'r v. Maupin},\textsuperscript{177} where the contest was between partnership creditors claiming under a deed of trust of the partnership property and an individual judgment creditor who had placed an execution in the hands of the sheriff on a joint non-partnership obligation several days prior to the execution of the deed of trust, the court denied the priority of the partnership creditors.\textsuperscript{178}

The results reached in the \textit{Jones} and \textit{Couchman} cases may well be considered logical and inevitable results of the "partner's lien" theory.\textsuperscript{179} Since the property provisions of the Act are not

\textsuperscript{175} E.g., \textit{Ky. Rev. Stat.} 425.250 (1953) pertaining to attachment proceedings against joint debtors would seem to be unaffected by the Act and to be applicable to proceedings against partners.

\textsuperscript{176} 59 Ky. 356 (1859).

\textsuperscript{177} 78 Ky. 33 (1879).

\textsuperscript{178} Although the sheriff did not actually make his levy until the day after the deed of trust was executed, the execution bound the property from the time it was placed in the hands of the sheriff. The property had thus been subjected to the lien of the individual creditor before the partnership creditors acquired their rights under the deed of trust.

\textsuperscript{179} In \textit{Springfield Fire & Marine Insurance Company v. Huntington National Bank}, 229 Ky. 674, 17 S.W. 2d 726 (1929), the court reaffirmed the derivative
constructed on this theory but more nearly on the theory that partnership property belongs to the partnership as an entity or at least that the rights of the partners in specific property are only such rights as center around the use of such property for partnership purposes, the results reached in these two cases, and others like them, would no longer seem required or even appropriate.¹⁸⁰

**Dissolution and Termination**

1. **Dissolution Defined.**

Dissolution is defined in the Uniform Partnership Act as “the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.”¹⁸¹ It is stated further that, “On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.”¹⁸² As explained by the Commissioners, “In this act dissolution designates the point in time when the partners cease to carry on the business together; termination is the point in time when all the partnership affairs are wound up; winding up, the process of settling partnership affairs after dissolution.”¹⁸³

nature of the lien of the partnership creditor and held that, in view of the partner's lien, a creditor of an individual partner could not garnishee insurance companies on money due the partnership, since partnership debts far exceeded the entire amount of the insurance involved and the aggregate sum of all possible assets belonging to the partnership. The court applied the general rule that the liability of the garnishee is to be determined by whether the principal debtor has a right of action against the garnishee, and since here nothing would be coming to the individual partners, there was no basis for the garnishment action. See also Planters'-Farmers' Warehouse Company of Louisville v. Citizens' Bank of Falmouth, 224 Ky. 466, 6 S.W. 2d 720 (1928) (partner's lien recognized in favor of a bank which had made loan to partnership so as to permit bank to garnishee funds in hands of warehouse company).

¹⁸⁰It seems clear that, under Section 25 (2) (c), Ky. Rev. Stat. 362.270(2) (c) (Supp. 1954), levy of execution by a separate creditor as in the Couchman case, or suing out of garnishment process as in Springfield Fire & Marine Insurance Company v. Huntington National Bank, supra note 179, are outlawed by the Act; but it is not so clear as to the effect of assignments by partners where all consent, in light of the statement in Section 25(2) (b), Ky. Rev. Stat. 362.270(2) (b) (Supp. 1954), that a partner's right in specific partnership property is not assignable "except in connection with the assignment of rights of all the partners in the same property," and the further provision in Section 25(2) (a), Ky. Rev. Stat. 362.270(2) (a) (Supp. 1954), that a partner has no right to possess specific partnership property for other than partnership purposes "without the consent of his partners." This seems to leave open transfers of the character involved in the Jones case, except as they might be condemned under the law of fraudulent conveyances.


¹⁸³Commissioners' Note to Section 29, 7 U.L.A. 165 (1949).
This care in defining the term "dissolution" and in distinguishing it from "termination" and "winding up" was thought necessary in view of the existing confusion in the use of the term by the legal profession. The Kentucky court has said, for example, that, "In the absence of an express agreement to the contrary, a partnership is dissolved by death of one of the partners", thus leaving the inference that the parties may by agreement prevent "dissolution" from occurring. This takes on added significance when it is realized that partnership agreements frequently do contain express provisions looking toward a continuation of the business after death or withdrawal of a member. It may be provided, for example, that in case of the death or withdrawal of a member, the surviving or remaining partners shall have the right to purchase the deceased or retiring partner's interest. Provision may be made that, on the death of one of the partners, his interest in the partnership shall become the property of the other partners, or that in the event of the death of any partner, his interest shall remain in the partnership for a certain length of time.

Agreements of this nature serve to insulate the partnership from the liquidation process, which is otherwise considered the normal incident following death or withdrawal of a member, and enable the surviving or remaining partners to continue the business without disruption. The business unit is thus left undisturbed, and going concern values are preserved. Nevertheless, a change in the personnel of the business brings into play certain legal principles, to be hereafter considered, which operate whether or not the business is continued from the economic stand-

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181 Ibid.
182 Snead's Executrix v. Jenkins, 225 Ky. 832, 835, 10 S.W. 2d 282, 284 (1928).
183 See, e.g., the agreements in Baker v. Wide's Ex'r, 229 Ky. 414, 185 S.W. 2d 699 (1945); Lockwood's Trustee v. Lockwood, 250 Ky. 262, 62 S.W. 2d 1053 (1933).
184 See More v. Carnes, 309 Ky. 41, 214 S.W. 2d 984 (1948) which contains an excellent discussion of the validity of such a provision in a partnership agreement where coupled with a life insurance feature whereby insurance was to be taken out on the lives of the partners (premiums to be paid by the partnership) so as to provide a fund with which to compensate the widow or estate of the deceased partner for his interest. This was held not to be "testamentary" in nature, to be supported by sufficient consideration (mutual promises of the parties), and not voided because of the fact that, at the time of death of one of the partners, the deceased partner's half interest which went to the surviving partner was more than twice the value of the life insurance.
point. These principles are predicated on the assumption that an old business has ceased and a new business has begun. Legally speaking, therefore, it seems appropriate to consider the old firm as “dissolved” and a new firm as taking its place. The Act so provides.

2. Causes of Dissolution.

The causes of dissolution are set forth in Section 31 of the Act and will be found to follow closely the pattern set at common law. One important clarification, however, has been achieved by the Act. While it was agreed at common law that in a partnership at will, any partner had the power, as well as the right, to dissolve the partnership at any time, there was not complete agreement as to whether in a partnership for a definite term or particular undertaking, a partner had the power to dissolve the partnership before the expiration of the stipulated term or the accomplishment of the particular undertaking. Although the English cases and the English Partnership Act have taken the view that no power exists on the part of a partner to dissolve the partnership in such a case, the majority of the courts in this country have adopted the position that there is “no such thing as an ‘indissoluble’ partnership,” and that accordingly the partner has the power to dissolve, whatever his right to do so may be. The Act recognizes this American view by providing that dissolution may be caused in contravention of the agreement between the partners “by the express will of any partner at any time.” The Act also recognizes, however, that this is a wrongful action by the partner causing the dissolution and therefore gives to the other partners a right against him to damages for breach of the agreement. Furthermore, the Act seeks to protect

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181 See Johnson v. Jackson, 130 Ky. 751, 755, 114 S.W. 260, 261-262 (1908). In Lockridge v. Fulkerson, 267 Ky. 70, 100 S.W. 2d 815 (1936) it was held a partnership was dissolved when one partner took charge of and removed the stock and appliances of the partnership to a new location where he set up business for himself. Accord, Moore v. Malis, 292 Ky. 106, 168 S.W. 2d 52 (1942). See also Golden v. Kirtley, 268 S.W. 2d 934 (Ky. 1954).

190 Partners may, of course, dissolve their partnership by mutual consent. See Townsend v. Freeman Co. v. Tabor, 190 Ky. 521, 228 S.W. 6 (1921); Axton v. Kentucky Bottlers Supply Company, 159 Ky. 51, 166 S.W. 776 (1914).


the interests of the innocent partners in the business by permitting them, if they so desire, to purchase the interest of the wrongdoing partner and continue the business in the same name, either by themselves or jointly with others, during the agreed term for the partnership.\textsuperscript{196}

The Act preserves the "events" which at common law were said to bring about dissolution automatically, such as illegality, death of a partner, or bankruptcy of a partner.\textsuperscript{197} It also recognizes that dissolution may be brought about by decree of a court,\textsuperscript{198} an entirely separate section being devoted to this method of dissolution.\textsuperscript{199} The established common law grounds for a decree of dissolution are there set forth, such as insanity, incapacity, misconduct, and impossibility of success, as well as when, "Other circumstances render a dissolution equitable."

The common law also permitted a party to rescind a partnership agreement where he had been induced to enter into such agreement by fraudulent representations.\textsuperscript{200} The Act contains a special section which embodies this right of rescission and which deals comprehensively with the rights of the defrauded party under such circumstances.\textsuperscript{201}

3. \textit{New Obligations—Notice of Dissolution.}

When a partner withdraws and retires from an existing partnership, this in theory relieves him from any future obligations incurred by those who continue the business. Nevertheless the fact remains that those dealing with the business may not know, or have any reason to suspect, that he has retired as a partner, and as to them justice and fairness calls for the giving of some sort of notice by the retiring partner so as to prevent them from being misled.\textsuperscript{202} Likewise, when a partner dies, it is said that the surviving partner has no right to enter into any contract which would bind the firm or prejudice the estate of the deceased

\textsuperscript{196} The Act, Section 38(2) (b); Ky. Rev. Stat. 362.335(2) (b) (Supp. 1954). The rights of the wrongdoing partner are set out in Section 38(2) (c); Ky. Rev. Stat. 362.335(2) (c) (Supp. 1954).
\textsuperscript{197} The Act, Section 31(3), (4), and (5); Ky. Rev. Stat. 362.300(3), (4), and (5) (Supp. 1954).
\textsuperscript{200} Hynes v. Stewart & Owens, 49 Ky. (10 B. Mon.) 429 (1850).
\textsuperscript{202} See Reid-Murdock Company v. Model Meat & Grocery Company, 204 Ky. 795, 798, 265 S.W. 322, 323 (1924).
partner except such contracts as are necessary in settling the affairs of the partnership.\textsuperscript{203} New contracts, however, may actually be entered into, and the question as to the need for notice to third parties again arises.

The common law recognized the need for notice in the first of the situations mentioned involving the retiring partner,\textsuperscript{204} but took the position that where dissolution occurred through death of a partner, no notice was required.\textsuperscript{205} This attitude in cases of death seems to have been based on the somewhat dubious assumption that such an event by its very nature would be accompanied by sufficient publicity of its occurrence.\textsuperscript{206} The exemption from the requirement of notice was also extended, for the same reason, to other events bringing about dissolution by operation of law such as bankruptcy, illegality, and dissolution by decree of court.\textsuperscript{207} Under the Act, notice seems to be required in all cases except those where the partnership is dissolved because of illegality and where, in the case of bankruptcy, the third person deals with the bankrupt partner himself.\textsuperscript{208} The most significant change thus brought about from the practical standpoint is, of course, the requirement that notice be given in the case of dissolution by death, since this is by far the most common “event” which brings about dissolution automatically by operation of law.

The expansion of the situations in which the giving of notice is required also serves to focus attention on the kind of notice which will satisfy the requirement. At common law, it was held that as to those who had previously dealt with the firm before dissolution actual notice must be given,\textsuperscript{209} but that as to others

\textsuperscript{203} Snead’s Executrix v. Jenkins, 225 Ky. 832, 835, 10 S.W. 2d 282, 284 (1928).
\textsuperscript{204} Booth v. Bell Grocery Company, 239 Ky. 521 (1931); Ach & Co. v. Barnes & Co., 107 Ky. 219 (1899).
\textsuperscript{206} See MECHEN, PARTNERSHIP sec. 388 (2d ed. 1920).
\textsuperscript{207} Ibid.
\textsuperscript{208} The Act, Section 85(3) (a) and (b); KY. REV. STAT. 362.320(3) (a) and (b); CRANE, PARTNERSHIP sec. 81 at 438 (2d ed. 1952).
\textsuperscript{209} Notice is defined in Section 3(2) of the Act as follows:

“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 the fact to such person or to a proper person at his place of business or residence.”

who may have known of the firm but not dealt with it a general public notice would be sufficient.\textsuperscript{210} The usual and best method of giving such public notice was said to be by publication in a newspaper published in the locality where the business of the partnership had been conducted, although other ways affording a reasonable opportunity of knowing the facts would also suffice.\textsuperscript{211}

The Act observes the same distinction between the two groups entitled to notice but the provisions are more tightly drawn. The need for actual notice is limited to those persons who “Had extended credit to the partnership prior to dissolution”,\textsuperscript{212} thus clarifying the ambiguity present in the common law language as to those who are to be considered “former dealers.”\textsuperscript{213} As to those who “had not so extended credit,” but “had nevertheless known of the partnership prior to dissolution,” the Act specifically requires the notice to be by publication in a newspaper, thus removing the possibility of any other kind of reasonable notice sufficing.\textsuperscript{214} In \textit{Gaar v. Huggins & Bro.},\textsuperscript{215} the Kentucky court held that a retiring partner is not required to give notice to those who for the first time deal with the firm after dissolution takes place. If the court by this meant to hold that no notice was necessary even though the third party may have known of the existence of the firm, as seems possible under the facts, the

\textsuperscript{210} MEChem, \textit{PARTNERSHIP} sec. 393 (2d ed. 1920).


\textsuperscript{212} The Act, Section 35(1) (b) (I); \textit{KY. REV. STAT.} 362.320(1) (b) (I) (Supp. 1954).

\textsuperscript{213} E.g., in Lieb & Son v. Craddock, 87 Ky. 525, 9 S.W. 388 (1888), the court held actual notice to be required where the plaintiffs alleged they knew a retired partner was a member and had sold the firm goods before his withdrawal. It was not alleged, nor did the court consider, whether the goods had been sold on credit. On the other hand in \textit{R. C. Poage Milling Company v. Joseph Howard & Company}, 227 Ky. 333, 355, 13 S.W. 2d 266 (1929), the court said, quoting from 30 Cyc. 671: “Those who have had dealings with and given credit to the partnership during its existence are entitled to personal or actual notice of its dissolution.” Most of the cases in which the general rule has been applied seem to have actually involved some sort of credit dealing even though the court may not have made any point of this in their opinion. In addition to the cases already referred to, see \textit{Booth v. Bell Grocery Company}, 239 Ky. 521, 39 S.W. 2d 994 (1931); \textit{Reid-Murdock & Company v. Model Meat & Grocery Company}, 204 Ky. 705, 265 S.W. 323 (1924); \textit{Pace v. Claffin & Co.}, 8 Ky. Opin. 706 (1874); \textit{Daniels v. Bayles}, 7 Ky. Opin. 264 (1873); \textit{Fleming v. Martin}, 3 Ky. Opin. 701 (1888). \textit{Compare, Middleton v. Francis}, 257 Ky. 42, 77 S.W. 2d 425 (1934) (tort case).

\textsuperscript{214} The Act, Section 35(1) (b) (II); \textit{KY. REV. STAT.} 362.320(1) (b) (II) (Supp. 1954).

\textsuperscript{215} 75 Ky. (12 Bush) 259 (1876).
decision calls for modification under the Act since public notice at least would be required in such case.216

It has long been accepted that the requirement of notice is removed if the third person has knowledge of the dissolution. It has not been altogether clear, however, just what constitutes knowledge. The Act states that, "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."217 This definition is comparable to a similar provision applicable to holders in due course in the Uniform Negotiable Instruments Act,218 where it is understood as establishing, in general, a subjective test of "honesty" rather than an objective test of "diligence."219 A like interpretation would seem appropriate in construing the Uniform Partnership Act, and if adopted would reject the notion that it is sufficient to find merely that the person knew enough facts to put a reasonable person in his position on inquiry.220 On the other hand, the "bad faith" test of the Act would seem to be consistent with the statement of the Kentucky court in Bowman & Cockrel v. Ed. Blanton & Co.,221 that where a long time has elapsed since the dissolution, and in the transaction with the former partner matters are brought to the third party's attention which would

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216 The court cited in support of its general rule the earlier Kentucky case of Kennedy v. Bohannon, 50 Ky. (11 B. Mon.) 119 (1850) in which the court said at 120: "So where an ostensible partner retires from the firm, he will still remain liable for the contracts of the firm as to all persons who have previously dealt with the firm and have no notice of his retirement. But as to persons who have had no previous dealings with the firm, and no knowledge who are or have been partners, a different rule may prevail." (Emphasis supplied)


218 "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."Ky. Rev. Stat. 356.056 (1953).

219 See Britton, Bills and Notes sec. 100 (1943).

220 See, however, the interpretation put upon this provision by the Michigan court in McIntosh v. Detroit Savings Bank, 247 Mich. 10, 225 N.W. 628 (1929). Nebraska, in order to remove all doubts as to the meaning of "knowledge", added a clause to Section 3(1) so as to make the section read: "A person has 'knowledge' of a fact, within the meaning of this act, not only when he has actual knowledge thereof and when he has knowledge of such other facts as in the circumstances show bad faith, but also when he has knowledge, or under the circumstances, should have had knowledge, of such facts as give rise to a duty of inquiry, which inquiry, if made, would have disclosed the facts to him." Neb. Rev. Stat. 67-303 (1943). See Williams, The Uniform Partnership Act Comes To Nebraska, 22 Neb. L. Rev. 215, 218 (1943).

221 141 Ky. 407, 411, 132 S.W. 1041, 1043 (1911).
indicate that the affairs of the partnership are in a state of liquidation and final settlement, the jury may infer knowledge of the dissolution from such circumstances.

The Act also takes cognizance of the possibility that the partners themselves may not always know that dissolution has occurred and that a partner may incur liabilities or expenses after dissolution for which he should be allowed contribution. It is therefore provided in Section 34 that where dissolution is caused by the act of any partner, a right of contribution will exist unless the partner acting for the partnership had knowledge of the dissolution, and that where dissolution is caused by the death or bankruptcy of a partner, contribution is available unless the partner acting for the partnership had knowledge or notice of the death or bankruptcy. This latter requirement of notice in the case of death or bankruptcy admittedly changes existing common law which took the position that every person, including the partners themselves, would be assumed to have notice of such facts.

4. Existing Obligations.

Whatever the complications may have been as to new firm obligations, it was well settled at common law that dissolution of itself had no effect on existing firm obligations. Indeed, in Henry v. Seiberling Rubber Company, the Kentucky court enforced this rule against a retired partner even as to merchandise delivered after the partner had withdrawn and at a time when it was established the creditor knew this fact, since the original contract under which the deliveries were made had been executed at a time when the retired partner was still a member of the partnership. The Act does not disturb this basic conception as to existing obligations.

Frequently, however, partners continuing a business agree with the retiring member to pay all partnership debts and relieve him from any further responsibility in consideration of their purchase of his interest. This is held to create the relationship

223 Commissioners' Note to Section 34, 7 U.L.A. 190, 191 (1949).
225 265 Ky. 241, 96 S.W. 2d 590 (1936).
of principal and surety between the parties, the continuing partners becoming the principal debtors on the obligations and the retiring partner a surety for their payment.\textsuperscript{226} The common law, however, could not agree on the extent to which creditors were required, on receiving knowledge of the agreement, to observe this principal-surety relationship between the parties. In the Seiberling Rubber Company case, the Kentucky court said that the company, as creditor, would not be affected by such an agreement unless it assented or agreed to it.\textsuperscript{227} The Uniform Partnership Act modifies this general rule by providing in Section 36(3)\textsuperscript{228} that, "Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations." Thus, to a certain extent at least, the creditor is required to recognize the principal-surety relation thereby created.\textsuperscript{229} In adopting this view, the Act made the choice in favor of what appears to be the majority view under the general law of suretyship at common law.\textsuperscript{230}

The Act provides that, "The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner, but subject to the prior payment of his separate debts."\textsuperscript{231} This provision has particular significance with reference to partnership contract obligations. Such obligations, being joint in nature, fell within the common law rule that on death of a joint obligor the obligation devolved upon the surviving obligors.\textsuperscript{232} The creditor thus had no claim he could assert against the estate of the deceased obligor. This proved particularly harsh where the remaining obligors were insolvent or for other reasons could not be reached to satisfy the claim. Courts of equity have long given relief from the operation of this rule in the case of partnership obligations,\textsuperscript{233} and there are statutes in many states, including Kentucky, which provide for the

\textsuperscript{226} Id. at 245, 96 S.W. 2d at 592.
\textsuperscript{227} Ibid.
\textsuperscript{229} Lenger v. Hulst, 259 Mich. 640, 244 N.W. 187 (1932).
\textsuperscript{230} See Crane, Partnership sec. 79 (2d ed. 1952).
\textsuperscript{231} The Act, Section 36(4); Ky. Rev. Stat. 362.325(4) (Supp. 1954).
\textsuperscript{232} 2 Williston, Contracts sec. 344 (Rev. Ed. 1936).
\textsuperscript{233} Ibid. See also 4 Corbin, Contracts sec. 930 (1950).
survival of joint obligations.\textsuperscript{234} Thus, in one way or another, a remedy has been made available against the deceased obligor's estate, and this is confirmed by the above provision of the Act. It will be found, however, that local law differs somewhat as to whether the remedy is an independent one against the estate of the deceased partner, or whether the creditor must first exhaust his remedies against the partnership assets and the surviving partners.\textsuperscript{235} The Act does not purport to affect local procedure in this respect. In Kentucky, by statute, it is provided that, in the case of death of a joint obligor or obligors, the action may be brought against any or all of the survivors in conjunction with the representatives of all or any of the decedents or against only the representatives of the decedents or any of them.\textsuperscript{236} Thus it would seem that provision is made for a direct and independent suit against the estate of a deceased partner with no requirements as to relief having been first sought against the survivors.

5. \textit{Continuance of Business Without Liquidation — Creditor's Rights.}

Although winding up and liquidation are frequently referred to as the normal results of dissolution, this, as already pointed out, by no means necessarily follows. There are numerous occasions in which a partnership business will continue without interruption even though there is a change in the membership. Where one partner withdraws from membership it is most likely to be under conditions whereby the remaining members continue to operate the business either themselves or in conjunction with one who buys the interest of the retiring member. If one of the partners dies, the surviving partners will frequently continue the business by purchase of the deceased partner's interest, or otherwise, pursuant to authority contained in the partnership articles. A new partner may be admitted by consent into an existing partnership.\textsuperscript{237} In all these situations, and others, where the busi-


\textsuperscript{235} Bubick, Partnership 317 (3d ed. 1917); Mechem, Partnership sec. 411 (2d ed. 1920); see Note, 61 A.L.R. 1410, 1419 (1929).


\textsuperscript{237} While it seems clear this should involve the legal incident of dissolution, technically it does not come within the definition contained in Section 29 of the Act, Ky. Rev. Stat. 362.290 (Supp. 1954), which defines dissolution in such manner as to require that an \textit{existing} member cease to be associated in the partner-
ness continues as an economic unit, there exists a possible clash between creditors of the old and new firms if both groups should later seek to reach the firm property in satisfaction of their claims.

At common law, the new firm was not liable for the debts of the old firm unless the new firm assumed such liability. This meant that the old firm creditors lost their right to reach firm property except as they might be able to establish that the transfer of assets from the old to the new firm amounted to a fraudulent conveyance. If no grounds existed for treating the transfer as a fraudulent conveyance, the result was that the new firm creditors could absorb all the partnership assets to the exclusion of the old firm creditors. On the other hand, we are told that courts in their anxiety to protect the old firm creditors sometimes found the transfer to be a fraudulent conveyance even though no fraud was intended, with the result that the old firm creditors gained priority in such assets to the exclusion of the new firm creditors. In either circumstance, hardship and inequity resulted to one or the other of the two groups of creditors.

The Uniform Partnership Act seeks to remove this injustice by providing in Section 41 that where existing members of a partnership continue the business, either with or without the addition of new members, the creditors of the first partnership are to be treated also as creditors of the partnership continuing the business. Thus, all creditors, both old and new, are put on a parity as to firm property. However, in the situation where all the partners in an existing partnership sell the business to one or more third persons, the creditors of the old firm are not

The problem of interpretation thereby presented is discussed in Karesh, Partnership Law And The Uniform Partnership Act In South Carolina, 4 So. Car. L. Q. 64, 111-112 (1951).

Commissioners’ Note to Section 41, 7 U.L.A. 229-230 (1949); Lewis, The Uniform Partnership Act, 24 Yale L. J. 617, 635-636 (1915).

A separate Uniform Act dealing generally with the subject of fraudulent conveyances covers this subject as applied to partnerships. See Uniform Fraudulent Conveyances Act, 9A U.L.A. 42 (1951). It was for this reason that the decision was made to omit the subject matter of fraudulent conveyances from the Uniform Partnership Act. See Lewis, The Uniform Partnership Act—A Reply, 29 Harv. L. Rev. 291, 296-298 (1916).

KY. REV. STAT. 362.350 (Supp. 1954). There is an error in the heading of this section in the Kentucky statute. The word “Inability” should read “Liability”.

In MECHEN, Partnership sec. 462 (2d ed. 1920) it is said: “The Uniform Partnership Act proposes, in general, to regard all of the creditors at the various stages as creditors of the business at any stage, where the business is in fact continuous notwithstanding the changes in the personnel of the members.”
given the status of creditors of the person or partnership continuing the business unless there exists a promise by such person or persons to pay the old firm debts. Although the assumption agreement in such case, as in other cases, would take care of the individual liability of those continuing the business, the Act makes it clear that the partnership assets are also committed to such liability.

The problem presented by the incoming partner needs special mention since it is given separate treatment in Section 17 of the Act. It is there provided that, "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that the liability shall be satisfied only out of partnership property." The wording of this provision may seem a bit puzzling to the uninitiated. It is fundamental, of course, that an incoming partner is not liable merely by virtue of becoming a member for debts contracted before his entrance into the partnership. However, he may, and frequently does, promise to answer for these debts as part of the consideration for his acquiring an interest in the partnership. In such case, his personal liability to old firm creditors under the third party beneficiary doctrine is clear.

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Footnotes:

243 The Act, Section 41(4); Ky. Rev. Stat. 362.350(4) (Supp. 1954). This provision has particular importance where a partnership is incorporated. There exists a difference of opinion whether a promise by the corporation to pay existing liabilities of the partnership is to be implied from the nature of the transaction or whether an express promise must be found for this result to follow. Compare Rodgers v. Lincoln Hospital, 239 Mich. 329, 214 N.W. 88 (1927) (requiring an express assumption), with Andres v. Morgan, 62 Ohio St. 236, 56 N.E. 875 (1900) (implied in fact from the circumstances). Since the Act aids the old firm creditors in such cases only where a promise exists, the cases in any particular jurisdiction on whether a promise is to be implied in fact still retain their significance. In Sowards Insurance Agency v. Ohio Valley Fire & Marine Insurance Company, Receiver, 243 Ky. 224, 47 S.W. 2d 1043 (1932) where an insurance agency was operated under the same name as an old firm which had become deeply involved financially but which was composed of different persons, it was held the two firms were distinct entities and the new firm was not liable for the old agencies debts to the insurance company.

244 See Commissioners' Note to Section 41, 7 U.L.A. 229 (1949).


246 Wolff v. Madden, 6 Wash. 514, 33 Pac. 975 (1893). See also Meador v. Hughes, 77 Ky. (14 Bush) 652 (1879); Elken v. Green, 76 Ky. (13 Bush) 612 (1878).

247 See Crane, Partnership sec. 88 (2d ed. 1952).

248 Wood v. Macafee, 172 N. Y. Supp. 703 (Sup. Ct. 1918). But cf. Francis v. Smith, 62 Ky. (1 Duv.) 121 (1863) (creditor held entitled to sue incoming partner by way of substitution to retiring partner on agreement of incoming partner to save harmless retiring partner on debts of the firm where retiring partner
but doubt still remains as to the rights of the old firm creditors in the partnership assets, which is intensified if there is no assumption agreement. Section 17 seeks to clarify this by treating the interest of the incoming partner in the partnership property as committed to old firm creditors as well as to those becoming such subsequent to his admission. This, when coupled with the provisions of Section 41, makes certain that the old firm creditors will be placed on a parity with those of the new firm.

6. **Priorities In Liquidation.**

When a business is liquidated after dissolution, there will inevitably arise the important question as to the proper order to follow in the distribution of the proceeds derived from sale and disposition of the partnership property. Section 40 of the Act contains a series of rules which are to be followed in the absence of agreement of the parties to the contrary. The following priorities are set up for the payment of the liabilities of the partnership: (1) those owing to creditors other than partners, (2) those owing to partners other than for capital and profits, (3) those owing to partners in respect to capital, and (4) those owing to partners in respect to profits. These priorities are in line with those recognized and applied at common law.

Where the partnership has operated at a loss, the Act places each partner under a duty to contribute toward the loss in the same ratio in which he shares profits, and this duty is made applicable to capital losses as well as those involving outside creditors. In *Meadows v. Mocquot*, the Kentucky court refused to apply this rule as to capital losses in a case where one

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240 See note 238 supra.
241 See Commissioners' Note to Section 17, 7 U.L.A. 100 (1949).
243 This would include loans and advancements to the partnership over and above capital contributions. Under Section 18(e) of the Act interest must be paid on any such payments or advancements from the date of the payment or advance, unless otherwise agreed. Ky. Rev. Stat. 362.235(3) (Supp. 1954).
244 Under Section 18(d) of the Act, there is no right to interest on capital contributions except from the date when repayment should be made, unless otherwise agreed. Ky. Rev. Stat. 362.235(4) (Supp. 1954).
245 See MECHEN, PARTNERSHIP sec. 469 (2d ed. 1930).
246 The Act, Section 40(d) and 18(e); Ky. Rev. Stat. 362.345(4) and 362.235(1) (Supp. 1954).
250 See Commissioners' Note to Section 17, 7 U.L.A. 100 (1949).
partner contributed all the money necessary to carry on the business, and the other partner furnished only his labor in running the business, the profits, if any, to be shared equally. The theory of the court seemed to be that under such an arrangement the partner contributing the capital will be considered as contributing its use merely and therefore not entitled to recover from his copartner for the loss of any part of the money so contributed by him for the use of the firm. "It may be answered," says Professor Crane in his book on the law of partnership, "that such a partnership, in which some partners contribute nothing to capital, is an unusual situation in a partnership where a substantial amount of capital is employed. In entering into an association with unusual features, the associates should foresee that application of the usual rules may bring about unusual results, and take advantage of their power to vary by agreement the rules which in the absence of agreement are implied." While, therefore, the Act would not directly affect the decision of the court in the Meadows case, it does provide an opportunity for re-examination of its soundness as a legal principle.

Special rules come into play when a partnership estate and the estate of the individual partners are in the hands of a court for administration and settlement. Claims of individual creditors and partnership creditors are then likely to compete for recognition in the distribution of the respective estates. Partnership creditors have, of course, the right to satisfaction of their claims not only out of partnership assets but also out of the estates of the individual partners. They thus have two sources or funds from which to receive payment. Separate creditors of the partners, on the other hand, have only the individual estate of their debtor to rely upon. While it is true they could reach the debtor's interest in the partnership property at common law, this interest, as previously indicated, was subject to the prior payment of partnership debts. The individual creditors, therefore, found themselves subordinated to partnership creditors in partnership

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257 That only the use of the money was being contributed seemed to follow, thought the court, from the fact that it was one of the conditions of the partnership that, before any division of profits could be had, all of the money contributed by the partner was to be restored to him. This, however, would follow in any case under the accepted rules for distribution of assets of a dissolved partnership.

258 CRANE, PARTNERSHIP sec. 65 at 346 (2d ed. 1952). See also Note, 24 Col. L. Rev. 508 (1924).
assets. Equity, in its pursuit of "equality" conceived that it should follow that separate creditors have a like priority in individual assets. As said by the Supreme Court of Ohio in Rodgers v. Meranda,\(^2\) a leading case on the subject, "The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results, as a principle of equity, from the preference of partnership creditors in the partnership funds, and their advantages in having different funds to resort to, while the individual creditors have but the one."\(^260\) This rule of correlative priority was adopted by the majority of the states at common law,\(^201\) and is specifically recognized and adopted in Section 40(h) of the Uniform Partnership Act.\(^202\)

Kentucky, at common law, applied a modified version of this rule, and Kentucky law has to this extent been changed by the Act. In Northern Bank of Kentucky v. Keizer,\(^263\) the court recognized that the individual creditor had a claim to priority in the individual estate "coextensively with his privation" in being restricted to this one fund when the partnership creditor had a right to look to two funds. So, the court said, the true rule should be that "if partnership creditors exhaust the partnership estate without full payment, the individual creditors have the reciprocal right to make as much of their debt out of the individual estate, and, if, then, any individual property should remain undisposed of, it shall be distributed pari passu among all the creditors, regardless of class."\(^264\) In other words, as soon as individual creditors received a return out of individual property which equalled the return received by the partnership creditors out of partnership property, both groups should share together in the remainder.\(^265\)

Actually, there seems to have been a good bit of "equity" in this Kentucky doctrine when one considers that partnership creditors have a right to look to the individual property of the partners as well as the partnership property for settlement of

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\(^{259}\) 7 Ohio St. 179 (1857).
\(^{260}\) Id. at 184-185.
\(^{261}\) Crane, Partnership sec. 94 (2d ed. 1952).
\(^{263}\) 5 Ky. (2 Duv.) 169 (1865).
\(^{264}\) Id. at 173.
\(^{265}\) The rule of the Keizer case was recognized and applied in Whitehead v. Chadwell's Adm'r, 63 Ky. (2 Duv.) 433 (1866), and in Hill v. Cornwall & Bro's. Assignee, 95 Ky. 512, 26 S.W. 540 (1894).
Indeed, in theory, it is arguable that the "equities" are all against any rule of correlative priority and that partnership creditors should share from the outset along with individual creditors in the individual assets. Nevertheless, the matter has been settled in favor of the complete, correlative priority rule by the Uniform Partnership Act. This at least has the advantage of making, and keeping, the rule consistent with that used in the administration of insolvent estates in bankruptcy.

It has generally been agreed that the partnership creditor may avoid the operation of the correlative priority rule by obtaining the separate obligation of the individual members as well as their joint liability as members of the firm, thus enabling the partnership creditor to make double proof. This possibility was rejected, however, by the Kentucky court in Fayette National Bank of Lexington v. Kenney's assignee. In that case two members of a firm signed their individual names to a firm note below the name of the firm. Later, the two members executed assignments for the benefit of their creditors, which was followed by a like assignment by the firm. The holders of the notes received a 31 per cent dividend out of the partnership assets. They then sought a pro rata dividend out of the individual estate of Kenney, one of the members, on the theory that the effect of requiring the individual signatures of the members on the note was to create both a partnership and an individual liability. The court rejected this contention saying that one partner will not be allowed, by becoming a surety for a firm debt, on which he is already liable individually anyway, to give the partnership creditors all the firm assets and in addition the same share in the individual estate of the partners as his individual creditors receive in the distribution. Double proof was, therefore, not allowed, and the general rule as to marshalling was deemed to apply, which meant that the holders of the notes could take nothing from Kenney's individual assets until the individual creditors had received as great a

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268 A partnership creditor may, for example, secure a lien on the individual property of a partner pursuant to judgment against the partners. The lien thus obtained will be recognized even in equity should a later insolvency proceeding occur. Meech v. Allen, 17 N. Y. 300 (1858). Section 40(h) of the Act likewise preserves the rights of lien creditors. Ky. Rev. Stat. 362.345(8) (Supp. 1954).

269 See the discussion in Robinson v. Security Co., 87 Conn. 268, 87 Atl. 879 (1913).

270 Crane, Partnership sec. 94 (2d ed. 1952).

271 79 Ky. 193 (1880).
dividend as had been paid the holders of the notes out of the firm assets. As the matter of double proof is not dealt with in the Uniform Partnership Act, decisions such as rendered by the Kentucky court in this case would appear to be left undisturbed whatever criticism may otherwise be directed at them.\textsuperscript{270}

There exists some case authority in this country to the effect that the rule of absolute priority of separate creditors does not apply where there are no partnership assets available with which to satisfy partnership creditors and that in such case the two groups of creditors should be allowed to come in together to share in the assets of the individual estate.\textsuperscript{271} This exception to the general rule has been rejected by the United States Supreme Court under the Bankruptcy Act,\textsuperscript{272} and the Uniform Partnership Act would appear to dictate its rejection since no exception of any kind is recognized in Section 40(i)\textsuperscript{273} which governs the relative priorities of claims in the estate of an insolvent partner.\textsuperscript{274} It there states that the claims against his separate property shall rank in the following order: (1) those owing to separate creditors, (2) those owing to partnership creditors, and (3) those owing to partners by way of contribution.

It is to be observed that this priority precludes a copartner from setting up a claim arising out of partnership matters, and for which he is due contribution, in competition with the outside creditors of the insolvent partner. On the other hand, it does permit such copartner to compete with the outside creditors of the insolvent partner on a claim arising out of matters disconnected with and unrelated to the partnership business,\textsuperscript{275} a privilege which it appears was not always extended by common law cases in this country.\textsuperscript{276} Under the Act, the copartner would himself be considered an outside creditor as to such a claim, which seems logically correct. Moreover, the aim and purpose of the

\textsuperscript{270} See Note, 15 Ky. L. J. 44 (1926). A general review and summary of Kentucky law as to the right of a secured creditor to make double proof will be found in Banco Kentucky Co.'s Receiver v. National Bank of Kentucky's Receiver, 281 Ky. 784, 818-820, 137 S.W. 2d 357, 375 (1939).

\textsuperscript{271} See CRANE, PARTNERSHIP sec. 94 at 516 (2d ed. 1952).


\textsuperscript{274} Id. at p. 522. This is also confirmed in Lewis, The Uniform Partnership Act—A Reply, 20 HARV. L. REV. 291, 307 (1916).

\textsuperscript{275} See Mechem, PARTNERSHIP sec. 451 (2d ed. 1920).
common law, as well as the Act, was, and is, to prevent a debtor from competing with his own creditors, a danger which becomes immediately apparent where the firm is indebted to a partner and he or his separate creditors seek to share with partnership creditors in the firm property,\(^{277}\) or where a partner is indebted to the firm and the firm seeks to share with the partner's separate creditors in the distribution of the partner's individual estate.\(^{278}\) Such competition is absent, however, on non-partnership claims between partners. It has been said that, in this respect, the Act "sharpens the distinction between claims related and those not related to the firm business."\(^{279}\)

**Conclusion**

It is hoped that the foregoing discussion, in addition to providing a general introduction to the Uniform Partnership Act, will have served to emphasize the point made at the outset, that the Act does not create a new body of principles for the law of partnership but on the whole seeks to unify and clarify the existing law. This is not to say no changes have been effected in common law principles by the Act. There are changes. It will be found, however, that many of the changes are localized in particular jurisdictions on particular points, resulting from the necessity that the Act make a choice where conflicting viewpoints existed at common law.\(^{280}\) The changes, therefore, to some extent fluctuate between jurisdictions, depending on the position adopted by any particular jurisdiction in its common law decisions. No doubt the biggest single change effected by the Act is that pertaining to partnership property with its new form of co-ownership called "tenancy in partnership." Yet even here the trail had already been blazed by equity, and the end result will be found not too different from that already forged by equity, although it is true the means to that end is much more direct in the Act and much less open to misinterpretation and misapplication along the way.

Two final matters suggest themselves. First, to what extent

\(^{277}\) *Ibid.*

\(^{278}\) *Id.* at sec. 456.


\(^{280}\) It was said in the case of *In re Safady*, 228 Fed. 538, 540 (1915) that the Act "is an attempt to codify the existing common law on the subject, rather than to change that system; but where the rules are conflicting it chooses the one supposed to be the better."
does the Act affect other forms of unincorporated business associations such as the joint stock association and the business trust, or special kinds of "partnerships" such as the joint adventure, the limited partnership or the mining partnership? Second, to what extent does the Act affect existing partnerships formed prior to the effective date of the Act?

As to the first question, it has been suggested that, in general, the Act will affect other associations to the extent that they are already deemed to be governed by the general law of partnership. The Act itself gives some, but not much, help. It is provided in Section 6(2) that the Act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent. It is also there provided that no association formed under any other statute shall be treated as a partnership under the Act unless such association would have been considered a partnership under the laws of the state prior to the adoption of the Act. Other than for these provisions, however, the Act is silent on the subject.

As to the second question, the answer centers around Section 4(5) of the Act which provides that the Act is not to be construed so as to impair the obligations of any contract existing when the Act went into effect, nor to affect any action or proceedings begun or right accrued before the Act took effect. Since the partnership relation is itself founded on voluntary contract, it might be assumed from this that the Act would have no application whatsoever to partnerships formed prior to its effective date.

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281 Mathews and Folkerth, Ohio Partnership Law and The Uniform Partnership Act, 9 Ohio St. L. J. 616, 625 (1948). In Dunning, Jr. v. Gibbs, 213 Ky. 81, 280 S.W. 483 (1926) the court applied to a joint stock association the rule of partnership law that where the power of a partner to bind his associates is limited, the limitation is effective as to a third person who contracts with knowledge of the limitation. Compare State Street Trust Co. v. Hall, 311 Mass. 299, 41 N.E. 2d 30 (1942) in which the court refused to apply to a business trust either the common law principles of partnership or those set forth in the Uniform Partnership Act so as to permit a dissolution of the association in violation of the provisions contained in the declaration of trust.


283 The Kentucky Limited Partnership statute appears in Ky. REV. STAT. 362.010 to 362.130 (1955). An excellent summary of the nature and incidents of a mining partnership will be found in the recent case of Stephens v. Allen, 314 Ky. 769, 237 S.W. 2d 72, 24 A.L.R. 2d 1353 (1951). It has been said of the joint adventure that "it is governed by the same principles of law" as applied to a partnership. Jones v. Nickell, 297 Ky. 81, 83, 179 S.W. 2d 135, 136 (1944). See also Comment, The Joint Adventure: Problem Child of Partnership, 38 CALIF. L. REV. 860 (1950).

No such broad interpretation, however, appears to have as yet been given to this section, and decisions have been rendered in other jurisdictions in which particular provisions of the Act have been applied to partnerships already in existence. The mere fact, then, that the partnership itself is the result of contract between the parties does not guarantee them complete insulation from the application of the Act to their business. Passage of the Act thus takes on added significance when it is realized that not only partnerships formed in the future but also existing partnerships may come within its scope.

It is believed that passage of the Uniform Partnership Act in Kentucky will prove to have been a desirable step to take, not only because it enables Kentucky to join its sister states in furthering the cause of uniformity in this area of mercantile law, but also because it should aid in stabilizing the essential principles of partnership law within the state, thereby improving the position of the partnership as a desirable form of business organization for use by the citizens of Kentucky.

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285 See Mathews and Folkerth, Ohio Partnership Law and The Uniform Partnership Act, 9 Ohio St. L. J. 616, 623 and n. 44 (1948).