

California Partnership Law and the Uniform Partnership Act

(CONTINUED FROM JANUARY ISSUE.)

XXV. RULES DETERMINING RIGHTS AND DUTIES OF PARTNERS.

U. P. A. SECTION 18. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

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

(c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

Parallel references:

- to subsection (a), C. C. §§ 2403, 2404.
- to subsection (b), C. C. § 2412, cf. § 2405.
- to subsection (c), none.
- to subsection (d), none.
- to subsection (e), cf. C. C. § 2428.
- to subsection (f), C. C. § 2413.
- to subsection (g), C. C. § 2397.
- to subsection (h), C. C. § 2428.

This section as a whole is perhaps open to the objection that it does not make clear when a partner may take advantage of the various rights here defined. For example, may a partner who has reasonably incurred a liability require indemnity before dissolution (subsection b); in other words, can he require exoneration? or must he wait until dissolution, contenting himself with the interest provided in subsection (c)? There is room here for question, and perhaps resulting litigation, but since the Civil Code is not more explicit no harm will arise from adopting the U. P. A. In other words, the time when the right of one partner to sue another for a breach of any of the rights here given or for breach of any agreement made between them may be asserted is left open; and the question must be governed by procedural considerations and by the express or implied terms of the partner's agreement. There are numerous cases here as elsewhere holding that one partner cannot sue another as to partnership matters, but when time for final accounting comes can then have these matters settled.⁷⁹ Other cases have allowed suit when circumstances warranted.⁸⁰

⁷⁹ *Fisher v. Sweet* (1885) 67 Cal. 228, 7 Pac. 657, partner to pay compensation or to account for proceeds of sales: *Buckley v. Carlisle* (1852) 2 Cal. 420; to recover personal property: *Ross v. Cornell* (1872) 45 Cal. 133; accounts not struck: *Coward v. Clanton* (1898) 122 Cal. 451, 55 Pac. 147 dictum, accounting when still executory transactions; accounts not struck: *Albery v. Geis* (1905) 1 Cal. App. 381; 82 Pac. 262; *Barnstead v. Empire Mining Co.* (1855) 5 Cal. 299, same, dictum; to recover misappropriation without seeking an accounting: *Dukes v. Kellogg* (1900) 127 Cal. 563, 60 Pac. 44; only remedy is in equity: *Pico v. Cuyas* (1873) 47 Cal. 174; no suit at law even though agreement for liquidated damages: *Stone v. Fouse* (1853) 3 Cal. 293; barred by statute: *Bell v. Hudson* (1887) 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791.

⁸⁰ Collateral agreements (i. e., those intended to be enforceable without accounts): *Case v. Maxsey* (1856) 6 Cal. 276, *Laffan v. Nagle* (1858) 9 Cal. 663; *Gorham v. Heiman* (1891) 90 Cal. 346, 27 Pac. 289; *O'Conner v. Stark* (1852) 2 Cal. 153; note given in payment for an outgoing partner's share without an accounting: *Clark v. Fowler* (1880) 57 Cal. 142; promise to pay for other partner's share: *Schurtz v. Romer* (1890) 82 Cal. 474, 23 Pac. 118; failure to make disclosure: *Richards v. Fraser* (1898) 122 Cal. 456, 55 Pac. 246; Statute of Limitations does not run until account stated: *Hendy v. March* (1888) 75 Cal. 566, 17 Pac. 702; rescission of contract to become partners on ground of fraud: *Bailey v. Fox* (1889) 78 Cal. 389, 20 Pac. 868; *Miller v. Kraus* (1916) 155 Pac. 834, 838; breach of agreement to become partners: *Goldsmith v. Sachs* (1882) 17 Fed. 726. There are a few cases that seem to sanction a division of real estate without an accounting, or, at least, unless defendant shows affirmatively that there are unpaid partnership obligations: *Koyer v. Willmon* (1907) 150 Cal. 785, 90 Pac. 135. Transactions not connected with the firm business: *Arnheim v. Gordon* (1913) 21 Cal. App. 754, 132 Pac. 840; loan: *Bull v. Coe* (1888) 77 Cal. 54, 18 Pac. 808; foreclosure of mortgage given to secure advances to firm: *Berman v. Rutley* (1915) 27 Cal. App. 67, 148 Pac. 963; money lent and not to be returned if, as was the fact, no partnership be formed, *semble*: *Burt v. Wilson* (1865) 28 Cal. 632; vendor's lien on sale outside partnership business: *Clark v. Fowler* (1880) 57 Cal. 142. To defeat a suit on the ground of a partnership relation, the defendant must do more

The rule for determining when suit will and when it will not lie (i. e., when an accounting is necessary) has never been very clearly phrased. Sometimes the court emphasizes procedural difficulties, which should not figure with us, once the right exists. The true reason would seem to be that the partners have agreed that the rights and credits arising out of ordinary partnership transactions must wait for adjustment until the agreed time or times for adjustment, which may be at periodic intervals or may be only at final dissolution. On this the U. P. A. is as silent as the Civil Code. Therefore its adoption will not change the law.

(a) This subsection deals with several things: (1) partners' contributions of advances, (2) of capital, (3) right in profits, (4) right in surplus, (5) liability for loss in general, and (6) in capital of other partners. The corresponding sections of the Civil Code make no provision for several of these items. There is nothing said in the Civil Code as to rights to the return of capital or advances, except as is provided by implication in the last sentence of section 2403, nor as to the liabilities of partners except as to the general subject of "loss", without stating whether there is any obligation to repay losses of capital. The U. P. A. has, then, the great advantage of fullness, an advantage which is real because of the few decisions on these subjects.

It will be noticed that the obligation to contribute towards losses is based on the share of the partners in the profits. In other words, if there are three partners and it is agreed that one is to take one-half the profits and the other two one-quarter each, then notwithstanding the amounts of capital they put in, the partner entitled to one-half of any profits earned must make good one-half of any deficit, which may be in capital, in which case the other partners putting in, let us say, more than he did, would, of course, be entitled to contribution from him. The rule is apparently the same under C. C. section 2403, but that section makes no statement that losses shall be shared in the same proportions as profits are to be shared, and it does not in so many words create a liability on the part of one partner to make good the capital loss of another who, for example, contributes more capital and has a less share in profits, and therefore in losses. On the other hand, U. P. A. section 18 (a) is none too clear as to what shall

than make vague allegations, *Marks v. Sayward* (1875) 50 Cal. 57. When partners who are payees of a promissory note indorse it to a firm of which one is a member, which member in turn indorses it to plaintiff, plaintiff can recover of the other partner payee, *McPherson v. Weston* (1883) 64 Cal. 275, 30 Pac. 842.

be done with surplus when capital is contributed in one set of proportions and profits (and losses) are to be shared in another. Nor has it anything upon the division of profits in the absence of agreement. Conceivably a partner who put in more capital might argue that he was entitled to a proportionately larger share than the other.⁸¹ Sometimes it pays to say the simplest things.

(b) There is little difference between this subsection and the corresponding provision of C. C. section 2412. Both impose the obligation upon the *partnership*, that is, do not treat it as one strictly of contribution, with the result that in both, though not expressed, an intention to treat the right as one properly to be settled on an accounting seems evident.⁸² The Civil Code speaks of "reimbursement" and the U. P. A. of indemnification, but there is no real difference here. The U. P. A. seems preferable with regard to payments by one partner, his right accruing when they are made in the ordinary and proper conduct of its business, whereas the Civil Code specifies payments properly expended for the benefit thereof. A payment might be in ordinary course and yet not in fact for the benefit of the partnership. As to liabilities incurred for the firm, under the Civil Code they must be necessarily incurred. The U. P. A., mentioning those reasonably incurred, seems more liberal.

Subsections (c) and (d). Neither of these subsections have any counterpart in the Civil Code. Since the law on these points in this state is unsettled and since they express the better view of American authority, their presence in the U. P. A. can only be an advantage.⁸³

(e) The same remarks apply to this subsection. It might be argued, however, that it tacitly creates a rule as to the power of the majority different from that expressed in C. C. section 2428, because if one partner is outvoted by two others, then as to the particular matter thus voted on he has not equal rights of manage-

⁸¹ Presumably our courts would stick to the ancient rule of equal division. See *Swanson v. Wilson* (1910) 13 Cal. App. 382, 110 Pac. 336; *Clark v. Brown* (1890) 83 Cal. 181, 23 Pac. 289.

⁸² Mr. Lewis states that the word *partnership* was used because "if the word 'co-partners' instead of 'partnership' had been used, a result not intended would have been had. The claim of the partner is not against his co-partners as a separate creditor of each of them, but is a claim against the partners, including himself, associated in partnership; and this joint liability as partners can be and is spoken of as a partnership liability, without involving the assumption that the liabilities of the partnership are the liabilities of a distinct legal person." 29 *Harvard Law Review*, 295. This section was construed in *Bank of Bellbuckle v. Mason* (1918) 139 *Tenn.* 659, 202 *S. W.* 931.

⁸³ *Burdick, Partnership* (3d. ed) 360, 363.

ment—in short, that unanimity is essential. But this subsection must be read with subsection (h), which is very nearly the equivalent of C. C. section 2428.

(f) This subsection refers not only to the right of the ordinary partner to remuneration (a more apt term than "compensation" used in the Civil Code, which suggests reimbursement) but also to that of a surviving partner, whose right is not referred to in C. C. section 2413, the present statute on the subject. So far as the right of the ordinary partner is concerned, there is little difference, except that again the U. P. A. seems more apt, because the words "services rendered to the partnership" in C. C. section 2413 literally might not cover services rendered for or on behalf of the partnership.⁸⁴ As to the second part of the subsection, the California law as expressed in decisions would seem to be slightly changed. The U. P. A. creates a right, in the absence of agreement otherwise, to remuneration for the surviving partner in winding up the firm's affairs, whereas at present such right seems to require the existence of peculiar facts as its basis.⁸⁵ The law generally is in confusion, cases holding that there is prima facie such a right, or that such a right may be implied from circumstances.⁸⁶ In this connection the adoption of the U. P. A. will be new legislation, but of a sort that seemingly corresponds to modern usage. But why limit it to surviving partners who wind up? Neither the U. P. A. nor C. C. section 2413 provides for the case where a partnership is dissolved by other cause than death. It is fairly clear that the partner who winds up the firm is "acting in the partnership business," and far less open to doubt than to say that he "renders services to the partnership"; for the necessary acts of settling affairs are to be looked on as "partnership business" though the partnership has been dissolved, but not as services to the partnership, because that has ceased to exist under the Code. Usually on such a dissolution there is an agreement intended to settle the parties' rights. It might come as a surprise to a partner to learn that his fellow left in charge has no right to remuneration unless there is an agreement. Would such an agreement be implied from

⁸⁴ Compensation allowed to a partner for services in connection with winding up a firm although not a surviving partner, *Forbes v. Scannell* (1859) 13 Cal. 243; but not allowed in general, *Nevills v. Moore Mining Co.* (1902) 135 Cal. 561, 67 Pac. 1054.

⁸⁵ *Little v. Caldwell* (1894) 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89; *Osment v. McElrath* (1886) 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; *Griggs v. Clark* (1863) 23 Cal. 427.

⁸⁶ See 33 *Harvard Law Review*, 1070; *Burdick, Partnership* (3d. ed.) 325.

an arrangement for dividing up assets? It should be, perhaps. The U. P. A. here leaves something to be desired, but the Civil Code has great ambiguities.

(g) Here there is almost literal correspondence with the second clause of C. C. section 2397.

(h) Once more the U. P. A. is very close to the section of the Code (C. C. section 2428) covering the same topic and again the variation is in small matters. The former allows the majority to control only in *ordinary* matters of firm business and then when not in contravention of an agreement on the subject, the latter apparently so allows in all matters connected with the firm's business and does not provide that the majority may not rule as to questions expressly covered by agreement. It is generally held that the power of the majority does not extend to all the firm's business, and that the problems to be determined by vote exclude those provided for by arrangement. The cases are not conclusive on this subject.⁸⁷ Therefore the U. P. A. would seem to establish the general rule in a clear fashion to a certain extent and to do away with some ambiguities latent in the Civil Code. But the U. P. A. does not cover the case of equal division of opinion among partners, as it well might.⁸⁸

XXVI. PARTNERSHIP BOOKS.

U. P. A. SECTION 19. The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business, and every partner shall at all times have access to and may inspect and copy any of them.

Parallel references: None.

There is some law upon this subject but not in California, either in report or code. The rules here phrased are obviously desirable, and their appearance in written form cannot possibly do harm.⁸⁹

XXVII. DUTY OF PARTNERS TO RENDER INFORMATION.

U. P. A. SECTION 20. Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

Parallel references: Cf. C. C. §§ 2410, 2412.

The obligation here described is, of course, not the formal

⁸⁷ Burdick, *Partnership* (3d ed.) 228.

⁸⁸ See Mr. Crane, 28 *Harvard Law Review*, 781.

⁸⁹ *Katz v. Brewington* (1889) 71 Md. 79, 20 Atl. 139.

obligation to account, later set forth in U. P. A. section 22. The purpose of the section is to make complete a partner's right to knowledge of the firm business, covering those things not set out in the partnership books.

Does the enumeration of the rights specified in this and the preceding section create rights of action where none existed before? Seemingly it does not, for the right by an excluded partner to compel access to the partnership property is everywhere conceded, and this right should certainly be extended to compel discovery of other facts not there set forth.⁹⁰

XXVIII. PARTNER ACCOUNTABLE AS A FIDUCIARY.

U. P. A. SECTION 21. (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

Parallel references:

C. C. §§ 2410, 2411, 2412; Cf. §§ 2435, 2436, 2437, 2438.

With regard to the character of a partner's obligation to his co-partners, the Civil Code is fuller than the U. P. A. There is nothing in the U. P. A. corresponding to the declaration of C. C. section 2410 that the relation of partners to each other is confidential, nor to the general expression of principles in C. C. section 2411, but the obligations to account for any advantage received, manifested by a combination of C. C. sections 2411 and 2412 and to hold as trustee manifested by C. C. section 2410 in connection with C. C. section 2412 find their equivalent in U. P. A. section 21. No doubt the language of the three sections of the Civil Code is diffuse and the ideas expressed there could be compressed, but even so, there nevertheless would remain more in the Code than in the

⁹⁰ Cf. *Smith v. Fagan* (1860) 17 Cal. 179, on right to an accounting (dissolution) in such a case. Cf. U. P. A. § 32 (1) (c). Can the excluded partner obtain an injunction protecting his rights? U. P. A. does not say so. U. P. A. § 22 (b) gives him a right to an account. See par. XXIX. Does the rule of *inclusio unius*, etc., apply? An injunction was granted, *Thompson v. Gibb* (1865) 1 Cal. Unrep. Cas. 173; and a right to have the firm wound up, *Doudell v. Shoo* (1912) 20 Cal. App. 424, 129 Pac. 478. While U. P. A. § 32 (1) (c) sanctions a result like that of the second of these cases, it is not so clear how a plaintiff in a case like the former could obtain relief.

U. P. A., which seems rather too brief and not wholly clear.⁹¹ The obligation to account is verbally limited to profits derived without the consent of the other partners and seemingly to benefits so obtained as well, unless a comma be read in between the words "partners" and "from". Of course the obligation is broader; for example, a partner would have to account for a benefit or profit received for the firm with its consent. Perhaps the intention is that he should be liable as *trustee* only when there is no consent, but, if so, the effort to make this clear has resulted in an unfortunate possibility of narrow construction and resulting confusion.⁹² A court must imply that the obligation to account extends to what is received with consent if received for the benefit of the firm. In C. C. sections 2410-2412 no such implication is necessary.

U. P. A. section 21 does, however, gain in making it clearer that at least as to profits derived without consent, the partner holds as trustee, and that the others can reach property that can be traced.⁹³

Subsection (2) would seem to be quite workable in connection with C. C. P. section 1585.

This section (U. P. A. section 20) would seem to continue the fiduciary relation into matters of dissolution. There are California cases intimating otherwise.⁹⁴ But here as well as under the act the relation is fiduciary with regard to formation.⁹⁵

XXIX. RIGHT TO AN ACCOUNT.

U. P. A. SECTION 22. Any partner shall have the right to a formal account as to partnership affairs:

- (a) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners,
- (b) If the right exists under the terms of any agreement,

⁹¹ See *Dennis v. Gordon* (1912) 163 Cal. 427, 125 Pac. 1063, which in discussing the mutual obligations of partners enumerates a more thoroughgoing set of confidential relations than the U. P. A. seems to imply. In *Cottle v. Leitch* (1868) 35 Cal. 434, there was fraud by one partner in falsifying accounts which he presented to the other. This was held to give rise to a right to dissolution. How would this be decided under the U. P. A.? See U. P. A. § 32 (b). Cf., also, cases like *Swanton v. Jacks* (1916) 30 Cal. App. 66, 157 Pac. 11.

⁹² One "fraudulently" withholding property is liable as trustee. *Falkner v. Hendy* (1889) 80 Cal. 636, 22 Pac. 401; *White v. Conway* (1885) 66 Cal. 383, 5 Pac. 672.

⁹³ Right based on "fraud", *Stenian v. Tashjian* (1918) 178 Cal. 623, 174 Pac. 883. Right apparently looked on as that of a *cestui* against his trustee, *Warren v. Schainwald* (1882) 62 Cal. 56, *Spencer v. Barnes* (1914) 25 Cal. App. 139, 142 Pac. 1088.

⁹⁴ Cf. *Arnold v. Arnold* (1902) 137 Cal. 291, 70 Pac. 23; *Bradbury v. Barnes* (1861) 19 Cal. 120; *Gunter v. Laffan* (1857) 7 Cal. 588, and *Taylor v. Ford* (1901) 131 Cal. 440, 63 Pac. 770; but see *Richards v. Fraser* (1898) 122 Cal. 456, 55 Pac. 246.

⁹⁵ *Humburg v. Lotz* (1906) 4 Cal. App. 438, 88 Pac. 510.

- (c) As provided by section 21,
- (d) Whenever other circumstances render it just and reasonable.

Parallel reference: cf. C. C. § 2412.

There is nothing in the Civil Code corresponding to this section. The questions there settled are, however, of practical importance with regard to matters upon which California reports are also silent. The solution of these questions is in accordance with the general view.

Subsections (a) and (b) require no comment, except to say that a partner who is excluded from the firm's books and so cannot find out the firm's condition for himself ought to be allowed an account as a means to discovering what he has a right to know, and, of course, any partner should be allowed an account when his co-partners have agreed to make it. The action in (c) is in the nature of a bill for discovery, and the discretion given the court in (d) would seem to be properly given, because certainly the instances where an account short of a dissolution should be allowed are so various as not to lend themselves readily to specific enumeration.

It must be assumed that the right here given is to an account without dissolution. Otherwise there would be no reason for the section since an account necessarily accompanies a dissolution with or without the existence of the facts stated in the subsections. As to subsection (a) it should not be argued that the rights here given are the only rights the excluded partner has.⁹⁶

XXX. CONTINUATION OF PARTNERSHIP BEYOND A FIXED TERM.⁹⁷

U. P. A. SECTION 23. (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is *prima facie* evidence of a continuation of the partnership.

Parallel reference: C. C. § 2450; cf. C. C. § 2449.

If C. C. section 2450 be taken to mean what it says, a partner-

⁹⁶ See note 90.

⁹⁷ In the first instalment of this article, 9 California Law Review, 117, at 128, n. 39, erroneous reference was made to paragraph XXX. The reader who has pursued that reference is re-referred to paragraph XL.

ship for a fixed term is totally dissolved when the term has run, and consequently, even though the partners continue to do business as before they are not partners—at least, they are not the same partnership, for it was totally dissolved. This is a ridiculous result, and cannot be law, for if it were, then if we assume the partners were still partners, they are a new firm and creditors of a date later than the end of the term must be preferred to those becoming such before that end, and if we assume there was no partnership, then we have a business run as such, having the appearance of such, and reasonably supposed to be such by all in it and by all dealing with it, but not such in fact. Without going further, the existence of U. P. A. section 23 is desirable because it means the removal of an absurdity from the face of the statute books. Yet U. P. A. section 23 is not wholly satisfactory. It doubtless means that if partners continue to do business as such after the end of the term, they are still partners but are partners at will, and that their mutual rights and duties are to be governed by the terms of the agreement in force at the end of the period so far as these terms can be applied to a partnership at will; but the section as it stands does not any too clearly express the idea of continuing rights and duties, for it rather suggests that the rights and duties become and remain crystallized as of that date. However this may be, U. P. A. section 23 (1) is certainly an improvement over C. C. section 2450.

Subsection (2) so far as it provides a presumption when third parties sue such a continuing firm is clearly reasonable and desirable; and, also, if it be taken as providing what shall prima facie show a continuation of the partnership as against a non-active partner, no fault can be found with it, since he can rebut the presumption by showing efforts to wind up, and if no such efforts were made, the others should be allowed to look on him as assenting to such a continuance. The only trouble, a minor one, is that it is not made clear whether this subsection applies only in the latter case, because coming under a title: "Relations of Partners to One Another."

XXXI. PROPERTY RIGHTS OF A PARTNER,

U. P. A. sections 24 to 28, grouped under Part V having the above title, cover much the same ground as is covered by Article II, Chapter II, Title X and the Civil Code entitled "Partnership Property," and included in sections 2401 to 2406.

XXXII. EXTENT OF PROPERTY RIGHTS OF A PARTNER

U. P. A. SECTION 24. The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

Parallel references: cf. C. C. §§ 2402, 2401, 2405.

There is nothing in the Civil Code to correspond with the enumeration of a partner's property rights in U. P. A. section 24, nor are the property rights here recognized exactly the equivalent of rights existing under the Civil Code. It should be noticed that there is no mention among these rights of the partner's lien on firm property to compel its application to firm debts given in C. C. section 2405.⁹⁸ The extent of the rights here listed will appear in the discussion of the next sections, and subsequently the reason why no provision is made for a partner's lien.⁹⁹

XXXIII. NATURE OF A PARTNER'S RIGHT IN SPECIFIC PARTNERSHIP PROPERTY

U. P. A. SECTION 25. (1) a partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

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

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

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

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests

⁹⁸ *Duryea v. Burt* (1865) 28 Cal. 569.

⁹⁹ See upon the latter topic, paragraph XLVII, to appear.

in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

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

Parallel references: C. C. §§ 682, 684, cf. C. C. § 2401.

(1) This is generally regarded as one of the most radical of the provisions of the U. P. A., but it is far less radical here than in many other states, or rather it should not be regarded as radical by any one familiar with the Civil Code. It will be noticed that the old theory that partners owned property jointly at law, or in common as to real estate, but so owned it subject to liabilities in equity, has been boldly repudiated and a new tenancy, "tenancy in partnership," quite unknown to the common law, created. This new tenancy is, however, not so different in its incidents from the unnamed complex of rights that has resulted from the modification of the ancient tenancies by the more intelligent equity judges. In a state where law and equity are merged, as in California, there is no longer place for a split between rights recognized at law and rights recognized in equity. Their commingled operation has really resulted in a cohesive body of rights and privileges with reference to partnership property, wholly different from joint tenancy and wanting only a name. But, as everyone knows, old legal ideas have begotten the many anomalies which still obtain as to partnership real estate. Real estate, so the courts reasoned, could not be jointly owned because of statutes; therefore it must be owned in common. After so deciding the courts forgot that equity had long been a corrective in the case of partnership joint tenancy and was potentially as much a corrective in the case of partnership tenancy in common. Somehow tenancy in common had sanctity that left it immune to the touch of equity. There is more excuse for thus doing violence to the intent of the partners and to common sense by applying strictly the rules incident to tenancy in common when statutes recognize joint tenancy and tenancy in common as the only two possible forms, but such an excuse scarcely exists when statutes expressly create a tenancy in partnership as *sui generis*. This was done in California in C. C. sections 682 and 684. These sections must have been due to the Code Commissioners' realization that the merger of law and equity had really created a new tenancy.

That they neglected to describe the incidents thereof perhaps explains why the sections were, as seems, forgotten. However that may be, they are still on the statute books unrepealed. They should have their due emphasis today in determining the rights of partners, creditors, survivors, and representatives as to real estate. If this were done, no one could say that U. P. A. section 25 creates a form of tenancy unknown in California.¹⁰⁰

In what respects does U. P. A.'s tenancy in partnership differ from what has been recognized to be law in California?

(2) Clause (a) This subsection regulates as between partners the right of each partner to possession of partnership property. The right has no expression in the Civil Code except inferentially in C. C. section 2401, but the law is undoubtedly as here stated.¹⁰¹

(b) This clause may perhaps change our law in one respect. It is true that an assignment by a partner expressly of his interest as a partner does not carry title to any specific property, but carries merely that partner's right to a surplus upon an accounting together with his right to compel an accounting. As to this case no change is wrought in our law. But suppose that a partner makes an assignment, not of his interest as partner but in terms of the property itself, and that the purchaser has no knowledge that he is a partner; then it would seem that the purchaser would get what that partner at law had title to, namely an undivided interest in the property itself—nor would he be compelled to prove a full estoppel to establish his right, or to bring his case within rules as to assignments by ostensible owners.¹⁰² Apparently under this subdivision of the U. P. A., however, such an assignment would not have this effect, and

¹⁰⁰ In several cases involving real estate held for partnership property, our courts have, however, spoken of the partners as tenants in common, ignoring C. C. sections 682, 684, altogether; e. g., *Grant v. Bannister* (1911) 160 Cal. 774, 118 Pac. 253; *Shirron v. Dallas* (1913) 21 Cal. App. 405, 132 Pac. 454; in others involving personal property, attention to these sections would perhaps have aided the court in reaching a conclusion, but again they were ignored; e. g., *Myers v. Moulton* (1886) 71 Cal. 498, 12 Pac. 505; *Carrie v. Cloverdale Banking, etc. Co.* (1891) 90 Cal. 84, 27 Pac. 58.

¹⁰¹ See *Buckley v. Carlisle* (1852) 2 Cal. 420; *Thompson v. Gibbs* (1865) 1 Cal. Unrep. Cas. 173; *Doudell v. Shoo* (1912) 20 Cal. App. 424, 129 Pac. 478.

¹⁰² Though some California cases proceed as though title passed, the court is scrupulous to protect co-partners and creditors: *McCaughey v. Fulton* (1872) 44 Cal. 355; *Sheehy v. Graves* (1881) 58 Cal. 449; but see *Marks v. Sayward* (1875) 50 Cal. 57; and cf. *Myers v. Moulton* (1886) 71 Cal. 498, 12 Pac. 505; but in other cases it has been said that nothing passes: *Simmons v. Rowe* (1907) 4 Cal. App. 752, 89 Pac. 621 and see *Miller v. Brigham* (1875) 50 Cal. 615.

presumably there could be no estoppel unless the necessary representation were made by the other partners.

The Commissioners, in their notes to this clause, point out its effect when a partner assigns, not his interest in the whole firm, but his interest in a single item of firm property. An interest in such chattel can not pass without a full estoppel of all the partners except, of course, in the case of real estate under U. P. A. section 10(3), unless the act of assignment falls within the scope of the assigning partner's power. But suppose the assignment purports to cover no more than the assignor's interest in the single item. Under the clause as it reads and as it is explained by the Commissioners, nothing at all passes. The assignee's rights, if any, must be worked out against the assignor personally on the basis of fraud or warranty, if the facts or the tenor of the instrument permit.

There is nothing here subversive on the whole of existing California law on the subject, even though the U. P. A. does not give the rare bona fide purchaser the protection that he would ordinarily expect.¹⁰³

(c) The clause most certainly alters the law radically. It takes from the separate creditor of one partner his right to hold up the firm by attaching, and taking possession of, and selling firm property,—a right that is now recognized in California.¹⁰⁴ Under the U. P. A., a sheriff in such case cannot make an actual, or apparently even a constructive, seizure of all or any part of the firm's property. The collection agency will have to go slowly in attaching property of a debtor in business with others, for if the property prove to be partnership property, his attachment fails and his club over the firm is taken away from him. Furthermore, because the debtor has no attachable interest in firm property, any seizure of such property would seem to be

¹⁰³ *Crites v. Wilkinson* (1884) 65 Cal. 559, 4 Pac. 567, emphasizes the purchaser's *bona fides* and absence of knowledge, in holding him entitled to retain specific property bought by him of one partner, although the principal ground for decision was that the sale was within the partner's power. It is singular that more cases have not occurred involving this question.

¹⁰⁴ See cases cited in ns. 118, 119. The rights of the other partners and firm creditors are, of course, protected: *Leedom v. Ham* (1897) 5 Cal. Unrep. Cas. 633, 48 Pac. 222; *Whelan v. Shain* (1896) 115 Cal. 326, 47 Pac. 327; *Isaacs v. Jones* (1898) 121 Cal. 257, 53 Pac. 793, 1101. Cases in which attachment of firm property for a firm debt has been followed to sale, etc., are of course numerous: e. g. *Whelan v. Shain*, *supra*. None of these last will be affected by the U. P. A.

a trespass, and the attaching creditor must at his peril discriminate between firm and separate property.

The separate creditor's rights in lieu of those here taken away will be discussed under a later section.¹⁰⁵

The clause also declares as law the usual rule that exemptions and homesteads cannot be claimed in partnership property by the firm.¹⁰⁶ The question as to the right of a partner to claim such exemption is covered by U. P. A., sections 28(3), paragraph XXXVI, below.

(d) and (e) These clauses are primarily aimed to do away with the anomalies already mentioned in connection with firm real estate. A change is here worked in our law, assuming that C. C. sections 682, 684, do not apply, and that partners are tenants in common of real estate.¹⁰⁷ The administrators or the heirs of a deceased partner under the U. P. A. no longer may contend that they are tenants in common with the survivor. Certainly the process of winding up a partnership owning real estate on the death of one member is greatly facilitated by this provision, and though the law is changed, the change is not so great with us as in some other states, where different persons inherit real and personal estate and dower and curtesy still remain. These clauses will enable the surviving partner to wind up the firm without making any call on the heirs of deceased partners for their signature to deeds of real estate. Allowances to widows and the like can come only out of the surplus, if any, due the estate of the deceased partner.¹⁰⁸ It would also seem that the widow can take her share of the community property only in that surplus. It might be well to insert in clause (e) a statement to this effect, for the wording is more appropriate to states not having that institution. The widow's right to community property is scarcely an "allowance." To the subdivision might well be added: "and is not community property." This will not change

¹⁰⁵ See paragraph XXXVI.

¹⁰⁶ Burdick, p. 112.

¹⁰⁷ See cases cited in n. 100 which recognize the relationship between partners as that of tenants in common. The rule is also latent in cases like *McCauley v. Fulton* (1872) 44 Cal. 355, but California courts make every effort to minimize the heir's interest: *Cooley v. Miller & Lux* (1914) 168 Cal. 120, 142 Pac. 83; see also, on nature of surviving partner's interest, *Smith v. Walker* (1869) 38 Cal. 385; *McGorray v. O'Connor* (1898) 87 Fed. 586.

¹⁰⁸ This would be the law in California, certainly as to a partnership organized to deal in real estate. *Tutt v. Davis* (1910) 13 Cal. App. 715.

our law, but will only make clear that the specific enumeration of interests to which the right is not subject does not show an intention to exclude the community interests.¹⁰⁹

The second sentence of clause (d) is doubtless inserted to make it clear that if the surviving partner fails in his duty of winding up the partnership, he forfeits his rights to some extent. Obviously he should, but exactly how will the matter be adjusted in such a case? The right of the deceased partner has vested in the survivor, who therefore apparently has title, but possession can be taken from him even though on an accounting he could establish, let us say, a right in the surplus many times greater than that of the deceased partner. Surely this right has not been forfeited. Is the possession of the property transferred in order to give the estate of the deceased partner a pledge of performance by the survivors, or to enable that estate to do the task that the survivor neglected? There is a possibility of confusion here. Perhaps the Commissioners had in mind only cases where after paying debts the survivor refused to carry winding up further and merely held the property to his own use, or cases where the partnership required no winding up except in the direction of distributing assets on hand. If so, a forfeiture of the right to possession seems scarcely the way to accomplish the desired result—a sale or a distribution in kind. It would seem that the Commissioners have been unconsciously influenced by those cases which give the survivor a power as distinguished from a title.¹¹⁰

XXXIV. NATURE OF PARTNER'S INTEREST IN THE PARTNERSHIP.

U. P. A. SECTION 26. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

Parallel reference: none.

This section is somewhat puzzling, not so much in the idea that underlies it as in the expression of that idea. The right described is a property right (U. P. A. section 25). Why not say in U. P. A. section 24, instead of "his interest in the partnership," "his share in the profits and surplus," and limit U. P. A. section 26 to a statement that this share is personal

¹⁰⁹ See 19 Columbia Law Review, 404, for discussion of a Pennsylvania case (Hall's Est. (1919) 28 Pa. Dist. Rep. 312) applying this rule.

¹¹⁰ See for California law bearing upon the right to possession, Cooley v. Miller & Lux, Smith v. Walker and McGorray v. O'Connor, supra n. 107,

property? The term "interest in the partnership" is not defined. It would seem that in effect we have a statement in U. P. A. section 24 that among the partners property rights is x , and in U. P. A. section 26 the further information that x equals "his share in the profits and surplus." Very likely this circumlocution was adopted in order to have a convenient short name to use in U. P. A. section 27, and to make it clear that his interest in partnership property is, for certain purposes, only in profits and surplus; but the phrase chosen is perhaps unfortunate, for it suggests some right against or in the partnership as an entity.

The last clause of this section shows clearly that however much real estate partners as partners may own, that real estate will not, so to speak, color the inheritance from a partner.¹¹¹ His share in surplus and profits on his death goes to his next of kin. Where, as in California, the same persons inherit real and personal property, the section is less needed, but there are many imaginable cases, such as those involving taxation, where a flat statement is highly desirable. No such statement exists in the Civil Code, and section 3641 of the Political Code does not apply to the taxation of a partner's "interest in the partnership," which, indeed, is not yet covered except so far as it is income.

XXXV. ASSIGNMENT OF PARTNER'S INTEREST.

U. P. A. SECTION 27. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

Parallel references:

To subsection (1), C. C. § 2450(4).

As to subsection (2), none.

(1) This subsection will change our present law.¹¹² When a

¹¹¹ See n. 108.

¹¹² See also paragraph XL, to appear.

partner does an act of a sort likely to disrupt the firm, should there be a hard and fast rule to the effect that the act *ipso facto* dissolves the partnership, or the scarcely less rigid rule that any partner, including him who did the act, may if he likes sue for a dissolution and obtain it of right? If it could be truly said that in ninety-nine cases out of one hundred, the doing of a particular act will raise a desire on the part of all to cease to be partners, such rules are perhaps justified. The hundredth case is so exceptional that no great harm is done by leaving it out of account. What is the situation when one partner transfers his right to surplus and profits? Conceding that in the majority of cases of sale everyone will want the firm to be wound up, because the non-acting partners will scarcely wish to remain in partnership with one having no longer any financial interest with them, there will still be a very considerable number of cases, particularly when the partners are numerous or the interest of the transferring partner is small, in which the non-active partners will not desire a dissolution. Furthermore, as Mr. Lewis points out,¹¹³ the usual assignment is by way of security, which presumably the assigning partner will hope to redeem, leaving his interest in a going concern intact. Civil Code section 2450(4) says that there is a dissolution in such case, irrespective of the desires of everybody. In other words, partner Brown, one of ten, holding a twentieth interest, will by assigning that interest to secure a small loan inevitably dissolve the firm even when it is for a fixed term yet unexpired. U. P. A. section 27 is otherwise, and seems preferable, for it provides that the transfer does not *ipso facto* dissolve the firm. The U. P. A. does, however, entitle the non-acting partners to dissolve the firm notwithstanding the fact that there is a term provided (cf. subsec. (1) clause (c), U. P. A. section 31),¹¹⁴ and furthermore, the purchaser whether voluntary or involuntary has this right at any time if the partnership is at will, or at the end of the term, if not (U. P. A. section 32(2), if the reference there made be corrected to read section 27 or 28 instead of section 28 or 29, the obvious intent). In other words, the U. P. A. will effect a change in our law which seems desirable. ¹¹⁵

¹¹³ 24 Yale Law Journal, 626.

¹¹⁴ See also paragraph XL, to appear.

¹¹⁵ An assignment dissolves: *Miller v. Brigham* (1875) 50 Cal. 615. Here a partner sold his share in a stage business.

The Civil Code has little about the rights of the assignee, which is only natural, because he should be content, the firm being dissolved, and his right to demand an accounting having accrued. U. P. A. section 27 must specify these rights, because a dissolution does not necessarily take place. It limits his right to such profits as his assignor would get. He does not step into the shoes of his assignor to the extent of being allowed to examine the partnership books, nor can he make suggestions as to management. Could he, if denied profits which would in ordinary course have been paid to his assignor, bring suit for them? Presumably, if his assignor could not bring such a suit, he could not—i. e., he gets no greater right in that regard than his assignor had. He has no greater right to sue the partnership than his assignor, and like him must wait until dissolution. In short, the assignee gets very little, and the U. P. A. is precise in protecting the rights of the non-assigning partners. Once it is conceded that the assignment should not *ipso facto* dissolve the partnership, it logically follows that the assignment should not place them under greater burdens than they would otherwise have.

(2) It should be noted, however, that in the event of a dissolution, the assignee can compel an account, but cannot compel the partners to reopen old accounts that have been agreed to. This is another manifestation of the principle by which an assignment does not enlarge the duties of the non-active partners.

The assignee's right to demand an accounting will be discussed in a later paragraph.¹¹⁶

XXXVI. PARTNER'S INTEREST SUBJECT TO CHARGING ORDER.

U. P. A. SECTION 28. (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

¹¹⁶ See paragraph XLI, to appear.

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

Parallel references: none.

As has been pointed out¹¹⁷ a separate creditor of one partner, who looks for something to attach and, coming upon no separate property, attempts to reach whatever his debtor has in the firm, will find that this section and U. P. A., clause (c) of section 25 (2) have completely changed the situation from the present law. Today he can attach property of the firm and have a sale of the debtor's interest in it, and neither he nor the sheriff nor the purchaser will be guilty of a conversion unless the last named sells to some fourth person. In other words, the ancient theory which saw only a joint tenancy at law, though not obtaining any longer as to the quantum of interest attached, still obtains so far as possession and the right to sell are concerned. This rule as a practical matter gives creditors a right to hold up the whole firm for the debt of one, for it is obvious that if an essential part of the partnership property is attached, the non-debtor partners will be compelled to take action to protect it.¹¹⁸ Except for its "hold-up" value the rule brings little to the creditor, for the interest that is sold is usually of a purely speculative value.¹¹⁹ The State of Georgia by statute has deprived the creditor of this

¹¹⁷ See paragraph XXXIII.

¹¹⁸ The sheriff may take possession: *Clark v. Cushing* (1878) 52 Cal. 617; sell and even put a purchaser in possession: *Commercial Bank of Los Angeles v. Mitchell* (1881) 58 Cal. 42; but see *Crane v. Morrison* (Dist. Ct. D. Cal., 1876) 4 Sawy. 138, Fed. Cas. No. 3355. This is not the law in some other states: *Burdick*, p. 270; *Aultman v. Fuller* (1880) 53 Iowa 60, 4 N. W. 809.

¹¹⁹ The reason why the interest taken is of speculative value is because a sale may take place before an accounting fixes the value of what is sold: *Clark v. Cushing*, supra, n. 118. *Commercial Bank v. Mitchell*, supra, n. 118; *Isaacs v. Jones* (1898) 121 Cal. 257, 53 Pac. 793 1101; *Burdick*, p. 270. Some states take a middle ground and provide for suspension of the sale until after an accounting has taken place: *Nixon v. Nash* (1861) 12 Ohio St. 647, 80 Am. Dec. 390; furthermore, a purchaser at the execution sale is guilty of conversion if he sells (*Wright v. Ward* (1884) 65 Cal. 525), and the fact the property is unsalable till after an accounting, which may take a long time, will not tend to increase its value. The creditor or purchaser has, of course, a right to demand an accounting, and the firm is dissolved: cf. *Miller v. Brigham* (1875) 50 Cal. 615. On this whole subject, see *Lewis*, 24 *Yale Law Journal*, 630.

club over the heads of those who owe him nothing, substituting for it a process of garnishment.¹²⁰ The English partnership act has done much the same, and U. P. A. section 28 is based on that act. The Commissioners state that this act has given great satisfaction, and cite a few cases.¹²¹ A search for English authorities adds nothing to the list that bears out their contention. Absence of litigation may be evidence that they are right. It should also be remembered that in England a charging order is nothing new. With us it would be new. How would an ordinary elected judge in the ordinary court, without the fortification of precedent and text-book, handle this section, which gives him so much discretion? The success of the new system for collecting debts depends on an answer to this question, which cannot be given. Rightly applied, however, the section would certainly obviate the hardship which the present rule puts upon the non-active partners; and though the creditor would lose a valuable means to compel payment of debts, he would not lose his claim on the real interest of his debtor. The creditor can object to this section only by contending that the non-active partners have no right to complain when they receive some of the blows aimed at one whom they voluntarily invited into their midst. *Volenti non fit injuria!* A system that seeks to screen off the recipients of indirect blows while preserving the creditor's right to beat the debtor to the limit certainly deserves a trial.

It should further be noticed in connection with this section that the non-debtor partners may with partnership property redeem the interest charged. Apparently the debtor partner cannot object to this course. Suppose that his share of profits is likely to be \$10,000, that his interest is charged on a \$20,000 debt, and that the non-debtor partners make an agreement with the judgment creditor whereby the charging order is discharged on payment of \$15,000; can the debtor partner be debited with the difference between \$15,000 and his actual profits, or is that difference to be written off as a firm loss, to be shared by all? Suppose that the interest is redeemed by one partner out of his separate property; will he be looked on as a purchaser? Do

¹²⁰ Code (1895) §§ 2661, 4705-4729; *Willis v. Henderson* (1871) 43 Ga. 325; *Armand v. Burrin* (1882) 69 Ga. 758.

¹²¹ *Sutton v. English Co.* [1902] 2 Ch. 502; *Howard v. Sadler* [1893] 1 Q. B. 1; *Cooper v. Griffin* [1892] 1 Q. B. 740, *Scott v. Lord Hastings* (1858) 4 K. & J. 633, 70 Eng. Rep. R. 263. These cases show something of the working of charging orders but not in connection with partnerships.

clauses (a) and (b) of subsection (2) apply to redemptions as well as to sales ordered by court? Seemingly they do, but if so, is the distinction between redemption and purchase intended, so that in the cases put the persons settling with the creditor cannot take rights as a purchaser? It would seem that the section as it stands cannot but beget some difficult problems.

Again, will the charging order system substitute the equity rule of equal division among several successive creditors obtaining such orders for the common law rule, which rewards the diligent?¹²² It should not do so, for it does not change the nature of the proceeding merely because the relief given is of a sort originally worked out in equity. It is, after all, merely a method devised to assist the separate creditor without injuring the firm, taking the place of one regarded as unfair to the firm. Its adoption for this purpose is no evidence that it was intended to accomplish any other.

To administer U. P. A. section 28, judges of broad nature will be required.

As to subsection (3), it will be noticed that under it the U. P. A. refrains from passing upon the question of the exemption of a partner's rights from attachment. Since this is primarily a problem turning for solution upon the policy of the exemption law itself, this section will leave our law unaffected, because there is nothing in the Code sections on partnership relating to exemptions.¹²³ It is rather strange, however, that the U. P. A. leaves this question to local policy, but purports to abrogate local policy as to firm exemption¹²⁴—if local policy did permit such exemption.¹²⁵ And why not include homestead laws here as well as in U. P. A. section 25 (c)?

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(To be continued.)

¹²² *Naglee v. Minturn* (1857) 8 Cal. 540; *Bullock v. Hubbard* (1863) 23 Cal. 495; 83 Am. Dec. 130. This rule is presumably law today.

¹²³ Cf. *Shinn v. Macpherson* (1881) 58 Cal. 596.

¹²⁴ See paragraph XXXIII.

¹²⁵ *Burdick*, p. 113.