

THE UNIFORM PARTNERSHIP ACT.¹

That Pennsylvania has been the first State to enact into its law the Uniform Partnership Act, as drafted and adopted by The Conference of Commissioners of Uniform State Laws, is eminently fitting, since the theory and principles underlying the Act are those so ably enunciated by the late James Parsons and taught by Mr. George Wharton Pepper of our local Bar. Furthermore, the substance, form and phraseology of the Act are principally the work of Dr. William Draper Lewis and other members of the Philadelphia Bar. To these men is due the fact that this Act adheres to the common law theories and ideas and in great part conforms to the existing law in this and most other States,² rather than to the theories and ideas of the legal fiction of an entity, as originally intended. While the actual formulation and drafting of the Act are the work of Dr. Lewis and his associates, yet the thoughts and ideas are not theirs alone. Professor Burdick, of Columbia University, the greatest authority in this country on the subject, has, at all times assisted in the preparation of the Act and has been of invaluable service in maintaining the common law ideas. Professor Mechem, of the University of Chicago, at a considerable sacrifice of time, has generously contributed of his knowledge and ability to its preparation. Professor Williston of Harvard, one of the Commissioners and a member of the Committee having charge of the preparation of the Act, by reason of his experience in the drafting of other acts, his profound knowledge of the existing law in general and his adherence to conservative ideas, has been of invaluable service and is entitled to especial mention as one of the sponsors of the Act. By this specific mention of theorists and teachers of the law, no detraction is intended towards the active practitioners. Walter George Smith, formerly the president of

¹ Act of the General Assembly of Pennsylvania, No. 15, approved March 26, 1915, to be effective July 1, 1915.

² See "Partnerships" by Prof. Burdick, 30 Cyc. 343; Burdick on Partnerships (2nd ed.); Gilmore on Partnerships; Partnerships in the United States, 5 The Commercial Laws of the World.

The Conference of Commissioners, and now chairman of the Committee on Commercial Law, and Judge Staake, a member of the Executive Committee, both of Philadelphia, Pennsylvania, T. Moultrie Mordecai, of Charleston, South Carolina, George Whitlock, of Baltimore, Maryland, Talcott H. Russell, of New Haven, Connecticut, and many other Commissioners and lawyers of long and extensive experience in the practice of the law, have made like contributions from their knowledge and experience to the formulation of the Act.

Any intensive study of the cases on partnership law, in this or any other jurisdiction, will readily disclose the present confusion which exists on many branches of the subject. A discussion by the authorities on the subject discloses how difficult is a definite declaration of the law with respect to particular facts. The difficulty of maintaining a particular contention or the theories or principles underlying such contention is well illustrated by the very able article, "The Firm as a Legal Person," by W. H. Cowles, Esq.,³ and the cases of *In re Bertenshaw*,⁴ and *Sargent v. Blake*.⁵ Such confusion is believed to be sufficient justification for the codification of the law of partnerships. The fact that the law has been codified in England, in most of our western States, and in quite a number of the other States, is ample evidence of the fact that the law is sufficiently established for codification. The sole question to be determined is to what extent shall the law be codified and is the act in question a proper codification.

The work of the codification of the law of partnership was first undertaken by the late Dean Ames of Harvard University, who attempted to eliminate many of the difficulties by the adoption of the legal person or mercantile theory as the underlying theory of partnerships. While this theory solved many existing problems, new and perhaps more difficult problems were encountered. When Dr. Lewis and his associates undertook the work, upon the death of Dean Ames, it was intended to main-

³ 57 Cent. L. J. 343.

⁴ 157 Fed. Rep. 363 (1907).

⁵ 160 Fed. Rep. 57 (1908).

tain the theory adopted by him. So many and such difficult problems were encountered that it was deemed advisable to prepare one draft of an act upon the aggregate or common law theory and another upon the entity theory, and to submit both drafts for consideration to those most familiar with the law on the subject. As a result, the aggregate or common law theory was determined upon as the proper basis for the Act. The common law of Pennsylvania and all other States, excepting Louisiana, which adheres to the civil law of the Code Napoleon, and the statute law of the code States are all based upon this theory. The entity or mercantile theory does appear in the cases, but it is believed that a close study will disclose the fact that they have to do with questions of account or a differentiation between separate and partnership property and liability. Since the weight of authority, as evidenced by statute, decision and the writings not judicial, supports the aggregate or common law theory, the adoption of that theory appears appropriate even though some authority may support the other theory.

The intent and purpose of the Conference of Commissioners of Uniform Laws, of the Committee of Commercial Law of that body, and of the persons participating in the drafting of the Act, has been, on the whole, not to create new law, but to declare the existing law; not to declare the law of any particular State, but the law as evidenced by the weight of authority in all of the States. While some may contend that new law has been created by a number of the sections of the Act, such contention can be supported by decisions only with respect to a few sections, which will hereafter be noted. It must be admitted that some sections have established new forms of expression, though it is believed that no change in substance is thereby made in existing law. Thus in Section Eight it is declared that real property, including any interest or estate therein, may be conveyed in the partnership name. There are but few States, if any, Louisiana excepted, in which conveyance may be so made under existing law. The difficulties encountered with respect to the conveyance and holding of real property by partnerships under existing law is ample justification for this creation of a

new form of conveyance. Even if some new difficulties may be encountered by conveyances under the provisions of the Act, it is believed that these provisions will still be justified, since the change is one of form rather than of substance.

Part V of the Act, declaring the property rights of a partner, has been said to be a creation of new law. Lengthy discussions of the property rights of a partner can be found in the decisions. It has been definitely established in most jurisdictions that partners are co-owners, but not tenants in common, joint tenants, or tenants by entirety, the generally recognized forms of co-ownership. It is also established that every partner is entitled to the possession of partnership property for partnership purposes only, and that the same is subject to the payment or satisfaction of liabilities to partnership creditors prior to liabilities to the partners or their separate creditors. A confusion exists as to whether the interest of a partner is solely personal property, or may comprise both real and personal property; whether the specific property is subject to attachment by a separate judgment creditor of a partner; and whether as against partnership creditors, rights of exemption, dower, courtesy, homestead, or similar allowances can be claimed. The Western code States have, by statute, declared partners acquire and hold property as tenants in partnership, the incidents of which ownership are practically the incidents declared in Section Twenty-five of the Act. The actual result of the decisions in most other States is a declaration of the incidents of partnership ownership as set forth in Section Twenty-five. The specific recognition of a new tenure, tenancy in partnership, appears, therefore, to be quite appropriate, especially since the change produced thereby appears to be only one of form rather than of substance. If further justification be needed, the elimination of the confusion of decisions and statutes relating to the rights of a judgment creditor or a partner to attach or seize a partner's interest in a partnership, or the specific property of the partnership, would appear to be in itself sufficient justification. The adoption from the English law of the "Charging Order" for the purpose of subjecting the interest of a partner in a partnership to the payment and satisfaction of his separate liabilities appears to be a justifi-

able innovation in the remedial law of this country, the success of which will depend upon the flexibility of our procedure and the attitude of our courts.

By Sections Twenty-four, Twenty-five and Twenty-six, it is believed, there has been achieved those benefits which might have resulted from the adoption of the legal entity theory with the elimination of its concomitant evils. Though changes may be introduced in some respects by these sections, such changes are clearly declared, and little confusion should result.

With respect to the liability of partners, such liability is, as heretofore, joint and several with respect to torts, and joint with respect to other debts and obligations.

The questions of actions, judgments, executions, service, pleadings, accounts, compromises, and other questions of procedure, are not affected by the Act, and remain as heretofore, except as provided by Section Twenty-eight, which creates a "charging order" for the enforcement of the judgment of a separate creditor against a partner's interest. Actions upon firm liabilities will hereafter be instituted and maintained in the form and manner permitted by existing law, the only remedial statute affected by the Act being the statute relating to judgments against partners upon separate liabilities, in Pennsylvania, the Act of April 8, 1873,⁶ which is repealed.

Section Sixteen of the Act declares the rights and liabilities of a partner by estoppel. The existing confusion and uncertainties with respect to the rights and liabilities of such person are ample justification for the insertion of this section. Even if some problems be left unsettled and new problems be introduced by this section, as drafted, the specific declaration of the nature of the liability of a person made liable as a partner by estoppel, and the elimination of the uncertainty as to the rights of creditors and the character of action, will doubtless justify this section.

The precise and intended departures from existing law are five in number: Section Seventeen, creating a liability of an incoming partner for pre-existing obligations of the partnership, which liability shall be satisfied out of partnership property only; Section Twenty-nine, declaring that the dissolution of a partner-

⁶P. L. 65, §1.

ship is 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; Section Thirty-four, b, which declares that when the dissolution is caused by the death or bankruptcy of a partner, each remaining partner is liable to his co-partners for his share of any liability theretofore created by a partner, unless such partner, acting for the partnership, had knowledge or notice of the death or bankruptcy; Section Thirty-five, a, requiring notice of dissolution to be given only to persons who have had relations with the partnership by which a credit was extended upon the faith of the partnership; and Section Forty-one, which in certain cases imposes liability upon persons continuing the business of a partnership, the affairs of which have not been liquidated. It is submitted that Section Seventeen is expedient and justifiable for the protection of creditors. The admission of a new partner has heretofore created a new partnership and two separate classes of partnership creditors and partnership assets, even though neither the assets, authority or liability of the members of the existing partnership were diminished. The incoming partner, as heretofore, may, by contract, protect himself against such liability. Whether or not procedural difficulties will be encountered will depend upon the procedural statutes and the attitude of the court. The intent and purpose of Section Twenty-nine is to differentiate between dissolution and termination of a partnership, and to eliminate the creation of a new partnership by the admission of a new partner when no partner retires, thereby preventing the creation of two classes of creditors and the confusion of their respective rights as to partnership assets. The protection of creditors appears to justify this innovation. At common law agents and partners were required to take notice of the death of the principal or co-partner, which forthwith terminated authority. This rule has been modified by modern statutes in this country and in England, and may not have been the law of Pennsylvania. Under Section Thirty-four, a, this modern movement is introduced into partnership law when the dissolution is by death or bankruptcy to the extent of imposing liability upon the partners not deceased or bankrupt for the act of any partner acting for the partnership,

without knowledge or notice of the death or bankruptcy. Business expediency and the equities as between the remaining partners appear to justify the innovation. Under the general common law, notice of dissolution was required with respect to all persons who had business dealings with the partnership, if subsequent liability was to be prevented. A few jurisdictions limited this requirement of notice to persons who had previously extended a credit to the partnership. The section as drafted adheres to this minority rule. The several provisions of Section Forty-one are intended to protect the rights of creditors of several succeeding partnerships, and to eliminate the confusion resulting from the assets of one partnership being transferred to another partnership without notice of dissolution or liquidation of affairs.

Attention is called to the repeal of the Act of April 6, 1870,¹ relating to a loan to a partnership upon agreement to receive a share of the profits in lieu of interest.

The limitations of space will not permit a detailed discussion of the various sections of the Act or their bearing upon the law of Pennsylvania. The Act is a general statute, defining with more or less particularity the rights of partners, partnership creditors, and the separate creditors of the partners, and is such as should be noted by persons interested in partnership business or affairs. Though one may dissent from the provisions of a particular section, or the phraseology or substance of other sections, such dissent would be merely a personal opinion and of little weight in view of the character and reputation of the persons who have assisted in and are responsible for the formulation and adoption of the Act. The skill and ability which have been employed in the drafting of the Act appear to justify its enactment into the law of any State. Adverse criticism, unless supported by clear and precise authority, should not be permitted to prevent its enactment, especially since the Act as a whole is conservative, and generally adheres to existing law.

James B. Lichtenberger.

Philadelphia.

¹ P. L. 66, §1.