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Professor Jensen reviews the conflict between the aggregate and entity theories of partnership. The author concludes that neither theory can be used to explain satisfactorily the results of all problems arising under the Uniform Partnership Act.

Soon a half century will have passed since the National Conference of Commissioners on Uniform Laws, held at Washington, D.C., approved the eighth and final draft of the "Act to Make Uniform the Law of Partnership" (hereinafter called the "act") on October 14, 1914.[1]

The first committee appointed to draft the act in 1902 was chaired by Dean James Barr Ames of Harvard Law School.[2] The original charge to the committee was to draft a uniform act based on the mercantile or entity theory,[3] adopted by the civil law countries. The drafting committee was staffed in large part by practicing lawyers, psychologically imbued with stare decisis, who had practised partnership law under the common law aggregate doctrine that a partnership was not a legal person in addition to the natural persons who were the partners. Nevertheless the two first drafts contained a single definition that a partnership was a legal person. That definition was never adopted.[4]

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1. UNIFORM PARTNERSHIP ACT [hereinafter cited as U.P.A.]. The act was adopted in 40 states and in Guam, the Virgin Islands, and the District of Columbia through December 31, 1962. In 1961 Tennessee exempted associations of three or more persons engaged in a profession or occupation for profit from provisions of the act. TENN. CODE ANN. § 61-105(3) (Supp. 1962). For general background information and annotations, see volume 7 of UNIFORM LAWS ANN. [hereinafter cited as U.L.A.]

2. Crane, *The Uniform Partnership Act—A Criticism*, 28 HARV. L. REV. 762, 769 (1915).

3. Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158, 159 (1915). See also Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617 (1915). See also In Succession of Pilcher, 39 La. Ann. 362, 1 So. 929 (1887). Louisiana early adopted the entity view regarding ownership of partnership property. The court denied any family allowance to the infant son of a deceased partner, the partner being insolvent except for his claim against the firm. The court said, "'The ideal being thus recognized by a fiction of law is the owner. . . .'" *Id.* at 932.

4. LEWIS, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158, 165 (1915).

Dean Ames, who was loyally wedded to the entity theory of partnership, pursued his efforts to secure support for his views on each of the succeeding sections and subdivisions wherever he and his colleagues regarded the entity idea of the civil law as superior to the burdensome rules of common law partnerships. Illustrative are provisions designed to obviate the dangers of the concept of joint property[5] subject to a partner's liens in favor of firm creditors which by successive transfers would be wiped out,[6] and the disastrous rule that a partner's creditor had a right to interrupt or destroy the continuity of the firm by attaching and selling firm property to satisfy a partner's non-firm debt.[7] After seven years as draftsman, chairman Dean Ames died in 1909 and Dean William Draper Lewis was appointed as chairman of the committee.

Partly as a result of the deep cleavage between members of the committee on the entity-aggregate controversy the Commissioners on Uniform Laws directed the reorganized committee to consider the subject at large and disregard the original directive to draft an act on the entity theory.[8]

More important perhaps was a reason implied from a further stated objection namely, "that the constitutions of some states made a legal but non-natural person a corporation."[9] Before the final draft was unanimously approved, the sixteenth amendment and a federal income tax thereunder had both become law. It may have been thought that a clear entity definition of partnership might lead to income taxation of a partnership as an entity. This has in fact resulted for business trusts in spite of their partnership characteristics.[10]

This late, radical switch to a committee directive not to continue to draft the act on the entity view but to work on the project "at large" made it virtually inevitable that the final draft of the proposed act would reveal strong internal evidence of compromise, and so it did. The seven years of work by the committee with Dean Ames as draftsman accomplished so many committee agreements on specific provisions based on the entity concept that these provisions were bound

5. Heydon v. Heydon, 1 Salk. 392, 91 Eng. Rep. 340 (K.B. 1936).
6. Case v. Beauregard, 99 U.S. 119 (1879).
7. Doner v. Stauffer, 1 Pen. & W. 198 (Pa. 1829).
8. Lewis, *supra* note 4, at 159.
9. *Id.* at 165.
10. Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110 (1925). In many states all business trusts regarded as partnerships for the purpose of personal liability of the beneficiaries. Weber Engine Co. v. Alter, 120 Kan. 557, 245 Pac. 143 (1926); Thompson v. Schmitt, 115 Tex. 53, 274 S.W. 554 (1925).

In other states business trusts are held to be partnerships for purposes of liability only when the beneficiaries by the trust agreement are interpreted to be multiple principals with the rights to direct the trustees as their agents. Goldwater v. Oltman, 210 Cal. 408, 292 Pac. 624 (1930); Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N.E. 355 (1913).

to appear in the act. It is fair to say that the Ames committee was victorious in securing approval of the entity view in a score of specific, substantive provisions of the act wherein the law needed alteration,[11] while the Lewis committee won approval of exclusion of the right of the firm to sue and be sued and inclusion of a definition of partnership as an aggregate association.[12] This compromise produced ambiguities between the numerous specific provisions of the act espousing the entity principle and the act's general aggregate definition. These ambiguities became, and to a considerable degree still remain, a source of legal controversy as different problems arise.

That the act adopts both the entity and the aggregate theory of partnership, depending upon the particular problem involved was the position of Professor Crane, as his view is succinctly summarized in the reply of Dean Lewis: "That though the intention of the draftsmen was apparently to proceed on the aggregate theory, the Act does not explicitly adopt either the entity or the aggregate theory of the nature of a partnership."[13]

The reply of Dean Lewis to Mr. Crane's clear exposition of what the act says in its specific provisions on partnership as an entity is a confession and legally novel attempt at avoidance, albeit an economically sound explanation that the natural person partners are annual economic beneficiaries of partnership operations. Dean Lewis could not avoid the admission that the act while defining the partnership as an aggregate association in section 6, also defines a partnership as a "person" in section 2.[14]

He admits that section 9 declares a new relationship unknown to the common law in making the partners the agents of the partnership.[15] He also admits that the act creates new law contrary to the property concepts of partnerships at common law by providing that "Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name."[16]

11. The following sections of the U.P.A. contain references to a partnership as an entity: §§ 2, 8, 9, 10, 12, 13, 14, 15, 18, 19, 21, 24, 25, 26, 27, 28, 30, 35(1)(b), 40(a)II, (h) and (i). They recognize in different particulars that a partnership is an entity distinct from its partner members in contract, tort, property rights and duties and in the relations of the partners to the partnership and in the strong but conditional insulation of the separate creditors of the partners from partnership property.

12. "A partnership is an association of two or more persons to carry on as co-owners a business for profit." U.P.A. § 6(1).

13. See Lewis, *supra* note 4, at 158. Professor Crane writing a little over twenty years later again declared negatively, "The Act cannot be said to have definitely settled the question of whether the partnership form of association is to be treated as a legal entity or not." Crane, *Twenty Years Under the Uniform Partnership Act*, 2 U. PITT. L. REV. 129, 132 (1936).

14. Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 291, 293 (1916).

15. *Id.* at 294, 299-300.

16. U.P.A. § 8(3). See Lewis, *supra* note 14, at 292.

He agrees that sections 24 to 28 inclusive create a new and unique type of tenancy, unknown to the common law, now known as a tenancy in partnership.[17] He concedes that this new tenancy in partnership limits the property interest of the partners in partnership assets strictly to their "possession" for partnership purposes only, and that their relationship to the firm assets is indirect, like that of stockholders in a profit-corporation: a bundle of choses in action.[18] He could hardly deny the uncontradictable result of the clear language of the act which makes the partnership a juridical person in substantive law in owning and using partnership real estate when it declares that firm property "is not subject to dower, courtesy, or allowance to widows, heirs, or next of kin."[19]

How then could Dean Lewis make a legally plausible argument that the twenty or more distinct modifications of the common law now written into the act in the direction of creating a partnership entity did not accomplish the result in those particular matters which Dean Ames had songht so diligently, for so long, to accomplish?

To do so, Dean Lewis adopted an explanation which, perhaps inadvertently, recognized the partnership as a legal entity. He ingeniously analogized the firm as a (non-profit) trustee, admittedly owning firm assets, but operating exclusively for the economic benefit of its participating partners.[20] That Lewis theory, although legally logical and economically sound, has not, since the first adoptions of the act in Pennsylvania and Wisconsin in 1925[21] received judicial approval as a harmonious integration of the compound entity-aggregate phases of a U.P.A. partnership. However that non-profit trustee or trustee-agent and multiple beneficiaries theory has found repeated judicial approval in cases providing a sound legal explanation for the relationship between an incorporated, non-profit cooperative and its actively participating members or stockholders, where income tax treatment is the same as for a partnership.[22]

The following legal test of a true cooperative as trustee-agent for its members supplies the missing legal requirement which would support Dean Lewis' partnership as a trustee entity for its partners. There must be an obligation of the non-profit entity prior to receipt of in-

17. U.P.A. §§ 25-28. This point is also discussed in Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 629-34 (1915).

18. "A Partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." U.P.A. § 26. No annual-accounting is required by the act.

19. *Id.* § 25 (2)(e).

20. See, *e.g.*, Lewis, *supra* note 14, at 309.

21. See note 1 *supra*.

22. See Jensen, *Cooperative Corporation Law on the Marketing Transaction*, 22 WASH. L. REV. 1, 8-15 (1947) and Jensen, *The Federal Income Tax Status of Nonexempt Cooperatives*, 6 UTAH L. REV. 23, 38-39 (1958).

come to allocate and distribute to its members the annual net receipts above expenses.[23]

What is the problem? It is primarily one of legally explaining the scope and purposes of an incomplete, hybrid legal personality. The initial problem appears to be basically psychological. Laymen, lawyers and many judges conceive artificial legal personality as either black or white—a firm must have all the powers of a competent natural person or none. Thus Professor James Parsons in an early comment on the problem implied that it would be necessary in the codification of partnership law to adopt either the entity or the aggregate view. He wrote: "They stumble and halt on the very threshold. The definition of partnership breaks them all up. Having no guiding principle to start with how can they create a system."[24] It requires difficult legal ratiocination to conceive of a juristic entity as existing for purposes of contract, tort and property ownership without analogizing the entity with that of a private-profit corporation—a juristic person all the way. But it should be obvious that a partnership may be an entity for some purposes and not for others.

Cooperative corporate association law, as it has developed over the past half century, legally verbalizes the true economic purpose and result of operation of a non-profit corporation as a trustee or agent, or both, for its unidentified, limited-liability members.[25]

Dean Lewis agreed that the grouping of rights and duties in partnership as an additional entity was like the activities of a trustee in dealing with the trust estate for the benefit of the cestuis. He is right. The problem is one of securing a satisfactory legal explanation for a particular type of unincorporated association, which is provided with numerous but not all statutory powers identical with those possessed corporations. Primary liabilities of partners are still preserved.

I. The Legal Essentials of Juristic Personality

The corporation codes of all the states indicate the basic essentials of corporate personality. They are that the entity have its own name, a continuous life separate from that of its stockholders, the rights to contract, to acquire, to manage, and to dispose of real and personal property, to be solely liable for torts, and the right to sue and be sued.[26] Other special rights are not indispensable. Whether stockholders are made liable for the debts of the corporation is not determinative of corporate personality, although it is good law that

23. United Cooperatives, Inc. v. Commissioner, 4 T.C. 93 (1944). The reasoning of this case was approved in American Box Shook Export Ass'n v. Commissioner, 156 F.2d 629 (9th Cir. 1946).

24. Parsons, Partnership xiii (1867).

25. Notes 22, 23 *supra*.

26. Tenn. Code Ann. § 48-117 (1956).

stockholders' liability on a contract entered into by the corporation is not primary, but a statutory imposed obligation when it exists.

The act grants to a partnership the same rights and imposes on it the same liabilities that a corporate person has, except that a firm is not granted by the act the right to sue and be sued in its own name. Also, it is not granted continuity of life by the statute except to the limited extent that no separate creditor of a partner can interfere with the life of the firm for the duration thereof as agreed upon by the partners, but can reach the choses in action which are the debtor partner's rights against the firm only indirectly through an equitable charging order.[27] Again death works a dissolution[28] but not a termination[29] of a partnership. A firm may be dissolved for several other causes.[30]

The cases generally hold that the contractual liability of the partners under section 15(b) are additional contractual liabilities, which are regarded generally as primary liabilities.[31] However, the New York rule as to the liability of the estate of a deceased partner is that the partnership as an entity is primarily liable and the liability of the deceased partner's estate is secondary in nature.[32]

II. PARTNERSHIP'S RIGHT TO SUE OR BE SUED

A study of the partnership cases under the act impresses one with the importance of a procedural right to sue and be sued to effect full entity standing before the courts. All or nearly all states have statutes requiring the filing of assumed or fictitious partnership names with the county clerk or recorder. Most of such statutes make the act of doing firm business without filing a misdemeanor. Many of them make filing a condition precedent to an action by the partners or the partnership.[33]

England granted partnerships the right to sue and be sued in the partnership name by the Judicature Acts of 1873 and 1875.[34] Two

27. U.P.A. § 28. See Weisinger v. Rae, 19 Misc. 2d 341, 188 N.Y.S.2d 10 (Sup. Ct. 1959) and numerous cases in Annot., 7 U.L.A. § 28.

28. U.P.A. § 29. Dissolution is caused by a partner ceasing to be associated in the carrying on of the business.

29. U.P.A. § 30. Dissolution does not cause termination of a firm. This occurs when there is a winding up of the firm.

30. U.P.A. §§ 31, 32.

31. Geisenhoff v. Mabrey, 58 Cal. App. 481, 137 P.2d 36 (Dist. Ct. App. 1943); Thomas v. Benson, 264 Mass. 555, 163 N.E. 181 (1928); Wheatley v. Carl M. Halvorson, Inc., 213 Ore. 228, 323 P.2d 49 (1958).

32. Friedman v. Gettner, 6 App. Div. 2d 647, 180 N.Y.S.2d 446, *aff'd*, 194 N.Y.S.2d 35, 7 N.Y.2d 764, 163 N.E.2d 141 (1959). "Liability of copartners is joint and several only when joint property is inadequate to pay partnership debts, or there is no effective remedy without resort to individual property." 180 N.Y.S.2d at 447.

33. Uhlmann v. Kin Daw, 97 Ore. 681, 193 Pac. 435 (1920) summarizes different types of assumed name statutes.

34. LINDLEY, PARTNERSHIP 344 (7th ed. 1924).

states, Texas[35] and Oklahoma,[36] have statutes allowing joint stock associations to sue as parties plaintiff.

A number of states have statutes allowing partnerships to be sued or have reached that result by judicial construction of the act. In these jurisdictions a judgment against the partnership is valid and execution thereon may be levied only on partnership property. Included in this group are California,[37] New Jersey,[38] New York,[39] Tennessee,[40] and Utah.[41]

Missouri, on the other hand, held that when suit had been filed and judgment entered against the partnership in the firm name without any procedural statute authorizing such suit, the judgment was a nullity.[42] One law review article suggests that because in Ohio a partnership can neither sue nor be sued, the Ohio cases "overall take the aggregate view."[43] This writer suggests that if a section 8 case arose in Ohio wherein the partnership had purchased real estate in an assumed firm name and specific performance had to be brought in the names of the partners, the equity court should regard such suit as a representative one, similar to a stockholders derivative suit, and decree that the defendant convey the realty to the firm in the firm name, as section 8 clearly states that realty may be acquired, held, and conveyed in the firm name.

III. Large Majority of States Adopt Entity View for Various Substantive Law Purposes

While the Missouri Supreme Court has held that a judgment against a partnership in the partnership name is void,[44] the same court in 1959 declared: "[T]he Act 'is consistent with the entity approach for the

35. Graham v. Omar Gasoline Co., 253 S.W. 896 (Tex. Civ. App. 1923) construed the statute to apply to business trusts, all of which are partnerships in Texas. Thompson v. Schmitt, 115 Tex. 53, 274 S.W. 554 (1925).

36. General Am. Oil Co. v. Wagoner Oil & Gas Co., 118 Okla. 183, 247 Pac. 99 (1925).

37. Deeney v. Hotel & Apartment Clerks' Union, 57 Cal. App. 2d 1023, 134 P.2d 328 (Dist. Ct. App. 1943).

38. Eule v. Eule Motor Sales, 34 N.J. 537, 170 A.2d 241 (1961).

39. Travelers Indem. Co. v. Unger, 4 Misc. 2d 955, 158 N.Y.S.2d 892, 896 (Sup. Ct. 1956). "[U]nder . . . the Civil Practice Act a partnership is to be regarded as a legal entity for the purposes of pleading."

40. Karns v. Loftis, 1 Tenn. App. 574 (E.S. 1925).

41. Hamnar v. B. K. Bloch & Co., 16 Utah 436, 52 Pac. 770 (1898). Utah Comp. Laws § 3191 (1888) gave the right to sue a partnership as an entity. Execution was limited to joint property. Accord under the act: Palle v. Industrial Comm'n, 81 Utah 372, 18 P.2d 299 (1933). Dictum: An award of workmen's compensation against the partnership alone would be limited to partnership property. The partners are jointly, not severally, liable under § 15(b) of the act.

42. Davison v. Farr, 273 S.W.2d 500 (Mo. App. 1954).

43. Mathews & Folkerth, *Ohio Partnership Law and the Uniform Partnership Act*, 9 Ohio St. L.J. 616 (1948).

44. See text accompanying note 42 *supra*.

purposes of facilitating transfers of property, marshaling assets and protecting the business operation against the immediate impact of personal involvements of the partners.' "[45]

The New Jersey Supreme Court stated the matter in different language: "[I]n divers respects a partnership may . . . come within the legal conception of a distinctive being, viz., an entity."[46]

IV. PARTNERSHIP ENTITY—SOMETIMES YES SOMETIMES NO

It is now apparent from the foregoing that whether a partnership is to be regarded as an entity under the act will and should be governed by the particular question to be decided by the appellate court of the particular state jurisdiction or of a federal court following state substantive law under *Erie R.R. v. Tompkins*.[47]

Many generalizations are found in the various decisions stating that a partnership is not an entity separate from the partners.[48] When

45. McKinney v. Truck Ins. Exch., 324 S.W.2d 773, 776 (Mo. App. 1959), *quoting* Mazzuchelli v. Silberberg, 29 N.J. 15, 148 A.2d 8, 11 (1959). *Semble*: Silberfeld v. Swiss Bank Corp., 273 App. Div. 686, 79 N.Y.S.2d 380, 383 (1948) ("For the purpose of marshaling assets equity will regard the partnership as a legal entity . . . ."); Cultra v. Cultra, 188 Tenn. 506, 221 S.W.2d 533 (1949) (real estate purchased with partnership funds for partnership purposes thereby converted into personalty by U.P.A. and remains such for purposes of descent and distribution); see U.P.A. § 40(h).

46. Finston v. Unemployment Compensation Comm'n, 132 N.J.L. 276, 39 A.2d 697, 698 (Sup. Ct. 1944), *aff'd per curiam sub nom.* Naidech v. U.C.C., 134 N.J.L. 232, 46 A.2d 734 (Ct. Err. & App. 1946); *accord*, Zion v. Sentry Safety Control Corp., 258 F.2d 31 (3d Cir. 1958); Buckley v. Chadwick, 274 P.2d 673 (Cal. App. 1954), *vacated*, 45 Cal. 2d 183, 288 P.2d 12 (Sup. Ct. 1955) ("[E]ach partner is an agent of the firm, and, as in any other case of agency, his acts are held to engage his principal's delictual as well as contractual liability." 274 P.2d at 680); Park v. Union Mfg. Co., 45 Cal. App. 2d 401, 114 P.2d 373 (Dist. Ct. App. 1941) ("[I]n those jurisdictions where the Roman law is the basis of the jurisprudence, the entity of the partnership is frankly recognized, and actions are even allowed between the partner and the partnership." 114 P.2d at 375); Gerding v. Baier, 143 Md. 520, 122 Atl. 675 (1923) (contract for continuation of partnership for 5 years after partner's death held binding against petition of heirs for receivership); Ryder's Case, 341 Mass. 661, 171 N.E.2d 475 (1961); Chisholm v. Chisholm Constr. Co., 298 Mich. 25, 298 N.W. 390 (1941) ("[I]n order to prevent an injustice or fraud, we do not hesitate to disregard the fictional entity of the partnership. . . ." *Id.* at 30, 298 N.W. at 393); Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); Southard v. Oil Equip. Corp., 296 P.2d 780 (Okla. 1956); Brooks v. Ulanet, 116 Vt. 49, 68 A.2d 701 (1949).

Generally partners are not employees of the firm of which they are members and therefore not covered by workmen's compensation laws, but under UTAH CODE ANN. § 36-1-43(4) (1953), partners may elect to come under the act and the salary or wage is then set at $400 per month for rate making purposes.

47. 304 U.S. 64 (1938).

48. State v. Spears, 57 N.M. 400, 259 P.2d 356 (1953). A firm is not an entity for criminal responsibility. Cases generally declaring no entity are: Neustadter v. United Exposition Serv. Co., 14 N.J. Super. 484, 82 A.2d 476 (Ch. 1951) (See notes 38 & 46 *supra*, New Jersey cases contra on specific problems); Angell v. White Eagle Oil & Ref. Co., 169 Minn. 183, 210 N.W. 1004 (1926) (See note 56 *infra* for later Minnesota case contra); Lewis v. West Side Trust & Sav. Bank, 377 Ill. 384, 36 N.E.2d 573 (1941) (See note 54 *infra* for Illinois case contra on property ownership);

such cases are carefully analyzed they frequently rest on the absence of a procedural statute granting the right to a partnership to sue or be sued or upon some specific legal question not coming under the twenty-odd specific sections of the act listed in note 11, creating an entity for some specific purpose.

The Pennsylvania case of *McElhinney v. Belsky*[49] is illustrative.

> A "partnership," unlike a corporation, is not a legal entity having as such a domicile or residence separate and distinct from that of the individuals who compose it, but is rather a relation or status between two or more persons who unite their labor or property to carry on a business for profit, except that it is treated by legal fiction as a quasi person or entity for such purposes as keeping of partnership accounts and marshaling assets.[50]

It is interesting to observe that the same Pennsylvania Supreme Court ten years after the *McElhinney* case held that a partnership was an entity for receipt of income and therefore subject to the Philadelphia income tax ordinance for purposes of taxation.[51]

Two leading cases illustrate the willingness of the courts to adopt the entity approach when business utility or the implications of the act seem to require it. One is *Hartigan v. Casualty Co. of America.*[52] Defendant company issued an automobile liability policy insuring "Hartigan and Dwyer No. 85-91 Congress St., Troy, Rensselaer County, New York, department store merchant," against loss and expense by reason of claims made against the assured. The plaintiffs, Hartigan and Dwyer, were members of two partnerships, one carrying on business at the address listed in the policy, the second one being located at Albany, New York. This second firm included an additional member, one John O'Brien. An automobile while being used in the business of the Albany firm was negligently operated and killed a child. The plaintiffs paid, as a compromise settlement, two-thirds of the amount of the claim against the Albany firm and on its first appeal had recovered a judgment against the Casualty Company for that amount in an action on the policy.

The court of appeals reversed the appellate division and held unani-

Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935) (See notes 32 & 39 *supra*, which are contra for different specified purposes).

49. 165 Pa. Super. 546, 69 A.2d 178 (1949).

50. 69 A.2d at 179. It should be noted however that the statutory definition requiring that a partuership must be engaged for profit is not observed as mandatory when the question of liability of members of a non-profit unincorporated consumers or purchasing cooperative comes before the courts. See Tyrrell v. Washburn, 88 Mass. (6 Allen) 466 (1863); Ashley v. Dowling, 203 Mass. 311, 89 N.E. 434 (1909); INT. REV. CODE OF 1954, § 1385(b)(2) (Act of 1962) provides that mandatory patronage refunds of a purchasing cooperative "attributed to personal, living or family items" are not taxable income by savings only.

51. Quaid v. Tax Review Bd., 188 Pa. Super. 623, 149 A.2d 557 (1959).

52. 227 N.Y. 175, 124 N.E. 789 (1919).

mously that the unambiguous words of the policy insured the partnership (entity) located at Troy and not the partners as aggregate members of the partnership at Albany in which O'Brien was also a member. The firm of Hartigan and Dwyer had "committed no wrong and incurred no liability"[53] at its Albany place of business.

Another leading case is *Wharf v. Wharf*[54] which involved rights of the surviving partner, the son of a father-and-son real estate partnership, to deal with real estate and to grant clear title to purchasers of parcels of land purchased by them on installment contracts. A bill was brought by the surviving partner against the widow and other children of the deceased for a declaration of his rights as surviving partner.

The judgment of the trial court denying relief on the bill because no equitable relief was needed, was affirmed. The court by dicta declared that under the tenancy in partnership the entity continued for purposes of winding up the firm and indicated that the conveyances were to be made to purchasers in the firm name. The heirs received no rights in real estate which, by fiction, was equitably converted under the statute to personalty for purposes of descent. Nor could the heirs interfere with the orderly liquidation of the firm as an entity.

The foregoing supports the conclusion of the Minnesota Supreme Court of two decades ago that in the specific problems that have arisen under about twenty sections of the act,[55] namely, "The modern tendency . . . is to treat a partnership as distinct from and independent of the individuals composing it."[56]

In all states having the Uniform Partnership Act the firm is recognized as an entity for owning its own property and property rights. Practically all such states grant literal recognition to the declaration of section 9 of the act, which declares that in matters of contract the active partners are agents of the partnership. Contractual liability of the partnership carries with it the added primary liability of both dormant and active partners.

Except for one lone Pennsylvania case which held that a partnership had its own entity income for income tax purposes,[57] partnerships have been uniformly treated as non-profit trustees of their members (not including business trusts having partnership liability.)[58] It is unfortunate that the simple legal explanation of a partnership as a non-profit trustee for its members, a concept so well established in cooperative law, has not been adopted by the courts to rationalize the

53. 124 N.E. at 790.
54. 306 Ill. 79, 137 N.E. 446 (1922).
55. Note 11 *supra.*
56. Gleason v. Sing, 210 Minn. 253, 297 N.W. 720 (1941).
57. Quaid v. Tax Review Bd., *supra* note 51.
58. Note 10 *supra.*

economic purpose and result of partnership operation. Perhaps the missing fact is that few if any partnership articles ever spell out an obligation of the trustee partnership to make an annual accounting to its members, both dormant and active, as is required for agricultural cooperatives.[59] As has been pointed out, Dean Lewis, except for a mandatory accounting contract, argued for the firm trustee concept almost four decades ago.[60]

The conflict in entity versus aggregate views of a partnership is materially lessened in those jurisdictions which have removed the procedural disability of partnerships to be sued in their own names.[61] The advantages secured by having a procedural statute allowing partnerships to be sued in their own names argue strongly for the adoption of such act in all of the states having the Uniform Partnership Act, as is indicated by the foregoing analysis.

The recognition of the Internal Revenue laws of partnerships as an aggregate for purposes of income taxation[62] will most surely long continue, even though partnerships may be sued in their own names, because small unincorporated businesses need the economic advantage of a single tax on the income allocated to the members to grant them much needed aid in the competition of the market place.

59. INT. REV. CODE OF 1954, § 1388(a)(2).
60. See text accompanying notes 20-23 *supra.*
61. See text accompanying notes 33-34 *supra.*
62. INT. REV. CODE OF 1954, §§ 701-711(c).