XLV. Effect of Dissolution on Partner's Existing Liability.

U. P. A. Section 36. (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

Parallel references:

In this section the outlook is no longer upon liability for post-dissolution acts, but upon the effect of dissolution upon liabilities arising out of pre-dissolution acts.

(1) This subsection states an obvious rule, but a rule which, singularly enough, though at the bottom of all partnership settlements, is nowhere stated in the Civil Code, and can only be inferred. Here again, is an advantage, though small, in favor of U. P. A. 170

(2) It is self-evident that upon a novation with a firm creditor and successor, an outgoing partner is freed from liability to the

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firm creditor if that be the intention and effect of the novation.\textsuperscript{171} This seems to be all that subsection (2) intends to say except for the additional phrase making it clear that some of the six premises necessary to complete the novation may be inferred from the conduct of the three members of the triangle. The repetition of the obvious—the reiteration of the fact that ordinary rules of contract apply—is desirable, because we have to do, not with a complete statutory series of relationships, but with obligations still primarily contractual. The necessity of doing so is not, however, so necessary with us, where the Civil Code is but a part of a theoretically complete code, and its partnership sections are to be read in connection with the rest.

One is, however, tempted to ask whether the Commissioners intended the release of the outgoing partner when there is an agreement between him, the remaining or new partner, partners, or person, and the creditor, but one without consideration to the firm creditor. Subsection (2) seemingly so provides, unless the word "agreement" imports the idea of consideration.\textsuperscript{172} The case is one not likely to arise, and furthermore since by U. P. A. section 41 (1) the firm creditor will in the majority of cases get what are really new rights, such a transaction might be looked upon as sufficient to support the release without more.

(3) This subsection will seemingly effect a change in the law. The outgoing partner is the primary obligor in the absence of a novation. This subsection in effect transforms him into a surety for his remaining partner, purchaser or successor, provided that the latter assume his debt, releasing him under circumstances that would release a surety. This is the weight of authority, although some courts take the stricter and perhaps logically more correct view that the contract between outgoing partner and creditor cannot be varied without the latter's consent.\textsuperscript{173} Of course, the creditor must know of the agreement between the others.

The subsection, however, has one minor feature that raises a doubt whether or not it will enact the view of the weight of authority. It speaks of "consent" by the creditor without specifying whether this consent must take place with regard to the outgoing

\textsuperscript{171} Mission Fixture Co. v. Potter (1915) 26 Cal. App. 691.
\textsuperscript{173} Burdick, pp. 163-165. The successor does not become a guarantor: Stover v. Stevens (1913) 21 Cal. App. 261, 131 Pac. 332.
partner's obligation or with regard to the new materially altered obligation offered by his successor. Suppose, for example, the creditor writes the successor in response to an offer by him: "I consent to your paying the old firm's debt by delivering 100 bushels of wheat instead of $200." Is the outgoing partner released? He should be, for otherwise we are nullifying subsection (3) by making it identical with subsection (2)—i.e., by requiring a novation.

(4) This subsection comes very near to creating a lien upon a deceased partner's individual property in favor of firm creditors, subject to prior payment of separate creditors. The creation of a lien, however, was doubtless not intended, but merely the safeguarding of the ancient rule which in cases of bankruptcy or insolvency gives firm property to firm creditors and separate property to separate creditors.

XLVI. RIGHT TO WIND UP.

U. P. A. SECTION 37. Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.


When a man's enemies are storming the breach he frequently will take so exaggerated a view as to the danger of one and become so engrossed in killing that one that he will lose sight of the rest who flock into the fortress unopposed. This is one of the great difficulties of our codes, and it seems to be exemplified in Civil Code sections 2459, 2460. In providing that when all partners agree that one may liquidate, the others cannot act contrary to their agreement—obvious on the face of it—except so as to give rights to those without notice of the agreement, which is according to the almost equally obvious rules of estoppel, those who enacted the Civil Code lost sight of other troublesome invading questions. On the face of it, only members may act in liquidation, a rule which omits the representative of the last surviving partner; members who wrongfully dissolved the firm may act; bankrupt members may act; and, seemingly, have a right to act. 174 U. P. A. provides otherwise in all the above cases; and

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174 As to who may act in liquidation, see Quinn v. Quinn (1889) 81 Cal. 14; 22 Pac. 264; Von Schmidt v. Huntington (1850) 1 Cal. 55; as to the appointment of a receiver: Fischer v. Superior Court (1893) 98 Cal. 67, 32 Pac. 875.
in addition safeguards the rights of those who are not satisfied by providing that they may—presumably only in a proper case, and not as a matter of right—obtain winding-up by the court. There is, however, a problem of interpretation involved in U. P. A. section 35. Does the phrase "not bankrupt" apply to "last surviving partner" only or to "partners who have wrongfully dissolved" as well? The phrase ought to apply to both if it applies to one, and would probably be so interpreted. A bankrupt partner is deprived of his power to act in winding-up, perhaps because in theory he will be administering his own property in possible conflict with his trustee in bankruptcy. There are practical reasons why he should be excluded, but the ordinary trustee is not legally incapable of continuing to be trustee because personally bankrupt and the bankrupt partner stands in a very similar position.  

As between a surviving partner and the representatives of the deceased partner, the well-recognized right of the former to possess firm property and wind up the firm perhaps came into existence because the property was owned jointly and continued to exist because it was more reasonable for him to act than for the representative. In the absence of statute it is not necessary to designate him as the proper person to wind up because of the nature of his title. The same would seem to be true under U. P. A. under section 25 (a) and (d) for the incidents of tenancy in partnership are in this respect the same as at common law.

XLVII. RIGHT OF PARTNERS TO APPLICATION OF PARTNERSHIP PROPERTY.

U. P. A. SECTION 38. (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partner and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment

175 The British Act excludes him, Partnership Act of 1860, § 38.
176 The surviving partner has the exclusive right to possess partnership property and wind up its affairs in California: People ex. rel. Allen v. Hill (1860) 16 Cal. 114; Miller v. County of Kern (1902) 137 Cal. 516, 70 Pac. 549; Cooley v. Miller (1914) 168 Cal. 120, 136, 142 Pac. 83; Andrade v. Superior Court (1888) 75 Cal. 459, 17 Pac. 531.
177 See Paragraph XXXIII, 9 California Law Review, 220.
or agreement under section 36 (2), he shall receive in cash only the net amount due him from the partnership.

(2) When the dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,
   I. All the rights specified in paragraph (1) of this section, and
   II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2aII) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:
   I. If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2aII), of this section,
   II. If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

Parallel references:
   to subsection (1): C. C. § 2405, cf. § 2402.

(1) The more important of the rights here given is the right as against the other partners and all others claiming through them in respect of their interests to have the partnership property applied to discharge partnership debts and to have the surplus applied to pay
in cash the net amount owing the respective partners. This calls for comment in several particulars. The Civil Code section 2405 is similar in giving to each partner a right to have partnership property applied to the discharge of partnership debts, but differs from U. P. A. section 38 (1) in that it gives this right in an Article (II) relating to partnership property and not in Articles (V and VI) relating to dissolution and to liquidation; in that it does not provide against whom the right exists and does not provide for payment of the surplus in cash, and in that it specifically provides for a lien on the shares of the other partners. As to the place in the Code given to the right, there is nothing in Articles V and VI to drive one to the absurd conclusion that upon dissolution and liquidation the right in question, which there certainly has its greatest application, ceases. On the other hand, under U. P. A. can a partner compel his co-partners to apply partnership assets to the payment of a partnership debt when there has been no dissolution and none is desired? This cannot be done under section 38, which provides for the right only when there is the condition precedent of dissolution. Undoubtedly the court could in most cases work out the right through other sections of U. P. A., such as section 9 and sections 24 and 25 (2) (a), but if the articles of association give the right to possess to the other partners, it is hard to see how the non-possessing partner can procure the payment of firm debts without precipitating a dissolution. On the other hand, the provision of U. P. A. providing for the payment in cash of a partner's surplus is probably advantageous because in effect providing for reduction of all partnership property to cash and doing away with the difficulties arising in connection with real estate, when one partner demands distribution in cash and another in kind, and the latter bases his claim upon partition statutes, etc. Again, U. P. A., by specifying the persons against whom the right may be asserted and by including among them those who claim through partners in respect to a partner's interest, certainly gains in precision, and the fact that U. P. A. does not add to the right a lien, as the Civil Code purports to do, seems an improvement. The right in question is essentially equitable, that is, it is a right to compel certain per-

179 A sale of real estate was required in Meraw v. McInerney (1900) 129 Cal. 29, 61 Pac. 575; see also Arnold v. Loomis (1915) 170 Cal. 95, 148 Pac. 518.
sons so to act or not to act that specific property may be used for a certain purpose. The right is fundamentally in personam. It is not a full property right, nor is it based on possession. Because it has reference to specific property, it may not be wrong to speak of it as quasi in rem or as an equitable quasi lien, but to call it a lien is dangerous, because if the right be so characterized it is likely to be treated as a common-law lien. The danger is not very great under the Civil Code, because first the right is defined and then a lien is given seemingly only to assist in enforcing it—the whole right is not the "lien"; and though the lien is upon the "shares" of the other partners, there is nothing to show that it will not follow those shares when sold or taken on execution, nor that the right cannot be enforced against the partnership assets as a whole, not merely against each partner's share in the surplus after paying firm debts. It is, certainly usual to speak of liens in this connection, but in omitting the word, U. P. A. has perhaps forestalled a likelihood of confusion.

As has been previously noted, the Civil Code has no counterpart in the expulsion provisions of U. P. A. The second sentence of U. P. A. section 38 (1) defines the rights of an expelled partner, but only when he is discharged from all partnership liabilities. When not so discharged, presumably he has the right as against the other partners and those claiming their shares under them to have partnership assets applied to partnership debts. He is, according to the sentence in question, only so "discharged" upon payment or agreement under section 36 (2). "Payment" must mean payment of the firm creditors. The agreement referred to

182 The right to have partnership property applied to the payment of partnership debts is spoken of as a lien in Duryea v. Burt (1865) 28 Cal. 569, Crane v. Morrison (1876) 7 Sawy. 138, Fed. Cas. No. 3355. The lien or right continues as to property sold not to a bona fide purchaser; Duryea v. Burt, supra, n. 182; Leedom v. Ham (1897) 5 Cal. Unrep. 633, 48 Pac. 222. Each partner has a lien on partnership property for his share; Duryea v. Burt, supra, n. 182; and see also Shinn v. Macpherson (1881) 58 Cal. 596, and Sterling v. Hanson (1851) 1 Cal. 479. As to the nature of one partner's rights when legal title is held by another partner, see: Dupuy v. Leavenworth (1861) 17 Cal. 263, McCauley v. Fulton (1872) 44 Cal. 355, Bates v. Babcock (1892) 95 Cal. 479, 95 Pac. 605, 29 Am. St. Rep. 133, 16 L. R. A. 745.
183 The right may be lost by agreement: Rapple v. Dutton (1915) 226 Fed. 430, which takes the view that a retiring partner loses the right when the remaining partner undertakes to pay firm debts; but see Conroy v. Woods, supra, n. 180. See also Crane v. Morrison, supra, n. 182.
184 A provision of forfeiture, similar to an expulsion, was enforced against a partner who deserted the firm: Von Schmidt v. Huntington, supra, n. 174; see also Swanson v. Wilsen (1910) 13 Cal. App. 389, 110 Pac. 336.
is the novation previously discussed. In short, he has no right to have firm property applied to firm debts, when the firm debts no longer exist as to him. It hardly seems necessary to say this. The important thing to specify is that, though expelled, he does not lose his right to his share of surplus in cash, and that he does not lose his right to require the application of assets when not so discharged. The first of these is made quite clear, and the second is obvious on careful reading of the subsection.

(2) This subsection relates to the same subject, but in cases where dissolution is caused in contravention of the partnership agreement. The innocent partners have all the rights previously discussed, both among themselves and as to the guilty one. They have additional rights against him, and he has diminished rights. All is provided for with particularity. The same cannot be said for Civil Code section 2451. While courts are disagreed upon the effect of a dissolution that is in contravention of a partnership agreement, the best considered cases allow the innocent partners to recover damages from the guilty one, although no clear tests for ascertaining these damages have been laid down. In this state the subject has not yet been passed upon.

The right to damages for such an act is given in section 38, (2) (a) II, and in this respect U. P. A. resembles Civil Code section 2451. The right given in subsection (2) (b) is, however, something new. Under U. P. A. section 31 (2) there is a dissolution even though the act was in contravention of the agreement, and therefore the majority rule of the United States is followed, but much of the injustice that might result from this rule is obviated by subsection (2) (b), under which the majority cannot be compelled to wind up when they give a bond approved by the court. These provisions bear an analogy to the right of majority owners of a vessel to put her to a use not having the consent of the minority and to take profits, provided security against loss be given. Difficulties in practice may possibly arise, due to the fact that apparently under subsection (2) (a) II there is a separate right to damages for the wrongful dissolution in each innocent partner, and not in the firm.

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188 Hughes, Admiralty (2d ed.), p. 338.
Suppose that there is a partnership for a fixed term of five persons, one of whom wrongfully dissolves it; that of the remaining four one desires to sue separately the guilty one and carry his action through to judgment, but that the other three and also the guilty one wish to proceed under subsection (2)(b) or (2)(c) II; what will be the rights of the parties? There is much room for debate. This, however, is the exceptional case, and the fact that difficulties may arise in such a situation should not obscure the great merit of the new rules here laid down.

It will be noticed that the guilty partner forfeits his right to the good will, provided the innocent choose to continue the business. This seems only fair.

XLVIII. RIGHT WHERE PARTNERSHIP IS DISSOLVED FOR FRAUD OR MISREPRESENTATION.

U. P. A. SECTION 39. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

Parallel reference:

cf. C. C. §§ 2410, 2411.

The Civil Code has no equivalent to this section. Section 2411 binds every partner to act in the highest good faith towards his co-partners in the formation of the partnership, as well as in its conduct and dissolution, but does not lay down any rules as to the

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189 In Behlow v. Fischer (1894) 102 Cal. 208, 36 Pac. 509, application of a somewhat similar rule indicates the difficulties likely to arise.

190 For cases involving fraud between partners after formation, see notes 91 to 94, 9 California Law Review, 213, and Meyers v. Merillion (1897) 118 Cal. 352, 50 Pac. 662; Soule v. Hayward (1850) 1 Cal. 345, Behlow v. Fischer, supra, n. 189; Loftus v. Fischer (1896) 114 Cal. 131, 45 Pac. 1058; Humburg v. Lotz (1906) 4 Cal. App. 438, 88 Pac. 510; Spencer v. Barnes (1914) 25 Cal. App. 139, 142 Pac. 1088; Shinn v. Macpherson, supra, n. 182; Black v. Merrill (1884) 65 Cal. 90, 3 Pac. 113; Wallace v. Sisson (1893) 4 Cal. Unrep. 34, 33 Pac. 496.
consequences of a failure to do so. In an earlier paragraph, the nature of the relationship between partners before and after the partnership has been formed is discussed. Here U. P. A. takes up the consequences of a consummated fraud, but it is fairly clear that only frauds in the formation of the partnership are covered. The term “partnership contract” must refer to the contract under which the partners became such; it does not mean the contractual bond of partnership. This appears in the use of the word “rescinded”, which can properly apply only to the original contract, for otherwise the word “dissolved” would be used, and by the fact that subsection (a) would be unfair even to a partner later guilty of fraud, when once an unobjectionable agreement for formation has been put into effect. In the latter case (fraud after proper formation) U. P. A. sections 38 and 40 control.

With this interpretation in mind, U. P. A. section 39 would serve to fill a gap in our law. Read in connection with section 40, it ranks the right of the defrauded partner after that owing by the firm to firm creditors, but also gives him very broad rights in the firm and against his guilty partner. The obvious purpose of the section is to enable the innocent partner to put himself as nearly as possible in the place where he would have been had no partnership ever been formed. Subsection (a) entitles him to the repayment of his investment before the guilty partner can come in at all. This, of course, might make it to his advantage to have been defrauded, as, for example, when he contributes $1000 of cash and the guilty one property which is fraudulently represented to be of $1000 value but in fact is worth $500, and when for other reasons there is a loss of $500; for under subsection (a), assuming no firm debts to exist, he recovers the full $1000, whereas had he not been defrauded he would ordinarily have shared the loss equally with the guilty one, and have recovered $750. But while such a result is demonstrable on paper, as a matter of fact it is difficult in practice to separate consequences due to the fraud from those due to other causes, and the guilty partner has morally little ground to complain.

191 See paragraph XXVIII, 9 California Law Review, 212.  
193 See Bailey v. Fox, supra, n. 192.  
194 See Burdick, pp. 11, 320.
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To safeguard the innocent partner, however, he should have a greater right in the handling of the partnership property, but under U. P. A. he is given a lien on or a right of retention of the surplus only. On the face of it, these rights will be effective only when there is a surplus, and therefore he has no greater voice in settling up the partnership than the guilty partner, but in practice a court could easily meet this difficulty.

The rule laid down in subsection (b) is open to the same mathematical criticism as applies to that laid down in subsection (a), and it can be answered in the same way. The right is substantially one of subrogation.

Subsection (c) gives a right of indemnification against partnership debts. Is there any reason why this right should not have been of exoneration?

XLIX. RULES FOR DISTRIBUTION.

U. P. A. SECTION 40. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:
   I. The partnership property,
   II. The contributions of the partners necessary for the payment of all liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:
   I. Those owing to creditors other than partners,
   II. Those owing to partners other than for capital and profits,
   III. Those owing to partners in respect of capital,
   IV. Those owing to partners in respect to profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18 (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

195 See Miller v. Kraus supra, n. 192.
196 Burdick, p. 12.
(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

I. Those owing to separate creditors,

II. Those owing to partnership creditors,

III. Those owing to partners by way of contribution.

Parallel references:

to subsection (a): C. C. § 2401.
to subsection (b): Cf. C. C. §§ 2403, 2404.
to subsection (c): C. C. § 2403, Cf. §§ 2435, 2402, 2417, 2418.
to subsection (d) (e) (f) (g): Cf. C. C. §§ 2405, 2412.
to subsection (h): none.
to subsection (i): none.

The parallelism between U. P. A. section 40 and the sections of the Civil Code above given is by no means close. All the sections of the latter appear in articles entitled Partnership Property, Mutual Obligations of Partners, and Renunciation of Partnership. They apply, in the first instance at any rate, to predissolution conditions, and must be somewhat strained in their application to winding-up proceedings, because doing double duty in situations quite different. The adoption of U. P. A. will in this particular greatly clarify and round out our law without changing it materially, as will appear.

Subsection (a). The definition of partnership assets under U. P. A. includes of course partnership property, defined in section
8. So far the parallelism is close; but U. P. A. then adds a further asset, not mentioned in the Civil Code, namely, the contributions of the partners necessary to pay all liabilities. It is true that Civil Code section 2412 gives each partner a right to reimbursement for debts that he pays, but the right is one personal to himself. The treatment of the obligation of each partner to contribute as an asset tends to obviate much of the confusion that has arisen in determining whether or not a partnership is bankrupt. If the partnership's assets include claims to contribution against solvent partners, the partnership cannot be insolvent. Towards this result the Federal courts have been working,198 and from this point of view the provision therefore seems an improvement upon our law. Again, the treatment of this right as a firm asset—as something collectively owned by all the partners—is of value in solving the difficulties that have arisen in connection with the preferential right of firm creditors to payment out of firm assets, when that right is based solely upon each partner's personal right to require the application of firm assets to firm debts and to exact contribution for firm debts personally met.199 These difficulties are partly responsible for much criticized decisions like Case v. Beauregard200 and Doner v. Stauf-fer.201 Under this subsection of U. P. A. there is added reason why the preferable rule of Menagh v. Whitwell202 must be followed.203 Although our courts have already shown a tendency to adopt the doctrine of that case,204 this is after all only a tendency and on the face of the Civil Code a swing the other way seems quite possible.

Subsection (b) specifies the order in which liabilities of the partnership shall be paid. This is a fundamental matter, yet the Civil Code is silent upon it. The same rules are latent in many of the California cases cited in footnotes to this paragraph, but have

200 (1878) 99 U. S. 119.
201 (1829) 1 P. & W. (Pa.) 198. See Burdick, pp. 134 ff.
202 (1873) 52 N. Y. 146.
203 See also U. P. A. § 27, paragraph XXXV, 9 California Law Review, 222.
204 Whelan v. Shain (1896) 115 Cal. 326, 47 Pac. 57; Commercial Bank of Los Angeles v. Mitchell (1881) 58 Cal. 42; Crane v. Morrison, supra, n. 182 (approving Menagh v. Whitwell).
never been clearly stated. Again, the adoption of U. P. A. will
serve to clarify and complete existing law.\textsuperscript{205}

Subsections (d) (e) (f) and (g) further particularize upon the
obligation of contribution declared to be a partnership asset in
subsection (a). The obligation here in question has been looked
upon as arising \textit{quasi ex contractu}, that is, as being inherent in the
contract of partnership and independent of the rules of agency.
Such a theory leaves one in some doubt as to what acts give rise to
the obligation. More often the obligation has been based on the
agency relationship existing between partners, according to which
a partner meeting a firm liability has the same rights of reimburse-
ment as exist in favor of an agent against his principal.\textsuperscript{206} This
latter theory seems to be that of Civil Code section 2412. Section
18(b) seems to follow the same doctrine, but it is none too clear
that this subsection controls the enforcement of contributions after
dissolution, for under the dissolution section (U. P. A. section 40,
subsections a, b, d) partnership assets include contributions neces-
sary for the payment of all partnership liabilities, which might in-
clude some—such as those arising out of the personal tort of a
partner claiming contribution\textsuperscript{207}—for which under the second theory
no contribution could be had. Such an interpretation is somewhat
forced, because it leaves U. P. A. subsection 18(b) little ground to
cover, but although subsection 18(b) logically should cover disso-
lution situations,\textsuperscript{208} the interpretation is not wholly absurd, (1) be-
cause the preceding subsection, 18(a), is mentioned while subsec-
tion 18(b) is not, (2) because section 40 can be looked upon as
complete in itself, and (3) because subsection 18(b) can have a
limited field of operation in any case.\textsuperscript{209}

Aside from this very minor objection, the subsections of U. P. A.
section 40 relating to contribution seem wholly desirable. Civil
Code section 2412 merely states a general obligation; whereas
U. P. A. provides its extent in case one or more partners are in-
solvent or out of reach,\textsuperscript{210} and specifies with particularity, although

\begin{footnotesize}
\textsuperscript{205} See Brandt v. Salomonson (1911) 17 Cal. App. 395, 119 Pac. 946.
\textsuperscript{206} Clause II: Von Schmidt v. Von Schmidt (1896) 115 Cal. 239, 46 Pac. 1056;
\textsuperscript{207} Chase v. Steel (1858) 9 Cal. 65. Clause III: Laffan v. Naglee (1858) 9 Cal.
\textsuperscript{208} 663, 70 Am. Dec. 678.
\textsuperscript{209} Burdick, pp. 326 ff.; see Sears v. Starbird (1889) 78 Cal. 225, 20 Pac.
\textsuperscript{210} 547.
\textsuperscript{206} Burdick, p. 363.
\end{footnotesize}
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perhaps not with the necessary inclusiveness and exclusiveness,211 who has it and who is bound by it. California judges have to a certain extent worked out rules similar to those here expressed, but not so definitely and often with reference to peculiar circumstances.212

Subsection (h) adopts the familiar rule which in equitable or bankruptcy proceedings gives firm property to firm creditors and separate property to separate creditors—a rule which, though often criticized, is the law in nearly all jurisdictions213 and is certainly our present law in California.214 In the last clause the rights of lien or security holders is not defined but is preserved "as heretofore." The reason is perhaps respect for the Federal Bankruptcy Law, section 57(h), which lays down the harsh rule that secured creditors can prove for the balance owing them only after deducting the value of their security. It is not only in bankruptcy, however, that secured creditors will have occasion to enforce their security and prove their claims, but in equity as well, where proof in full has often been allowed, although there is also a conflict of opin-

211 Such as the purchaser of a partner’s share, upon which see Clayton v. Davett, supra, n. 207; or a firm creditor, upon which see Stokes v. Stevens (1870) 40 Cal. 391; Grossini v. Perazzo (1885) 66 Cal. 545, 6 Pac. 450 (firm creditors allowed to intervene to enforce claim against partner who had made a fraudulent abstraction of property of firm, when firm insolvent); Flynn v. Seale (1906) 2 Cal. App. 665, 84 Pac. 253.

212 In general, upon right to contribution: Sears v. Starbird, supra, n. 206 (partner had paid firm debt after dissolution, and firm assets had been distributed); Shuken v. Cohen (1918) 179 Cal. 279, 176 Pac. 447 (similar); Clark v. Gridley (1871) 41 Cal. 119 (similar); Williams v. Williams (1894) 104 Cal. 85, 37 Pac. 784 (limited to debts to firm); Flynn v. Seale, supra, n. 211 (similar); Stower v. Kamphefner (1907) 6 Cal. App. 80, 91 Pac. 424 (no personal decree until firm assets marshalled and turned into money); Painter v. Painter (1887) 4 Coff. Prob. Rep. 339; Subsection (f): London, Paris and American Bank Ltd. v. Smith (1894) 101 Cal. 415, 35 Pac. 1027; Subsection (g): see Griggs v. Clark (1863) 23 Cal. 427; Painter v. Painter, supra, n. 212; McKay v. Joy (1886) 2 Cal. Unrep. 639, 9 Pac. 940. See also Gillespie v. Salmon (1905) 2 Cal. App. 501, 84 Pac. 310 (partner having paid debt sues on renewal of it obtained by concealment and cannot recover).

213 Burdick, pp. 280 ff. Mr. Crane doubts whether those states which have repudiated this rule will depart from it for the sake of adopting U. P. A.: 28 Harvard Law Review, 784.

It would seem that a question that could have been settled, at least in equity, is still left open with no great reason. After all, the marshalling of assets is a matter rather of partnership law than of general equity principles because the secured creditor's plight—his exclusion from separate property, etc.—is due to a peculiar partnership doctrine.\textsuperscript{216}

Subsection (i) supplements subsection (h), but will vary the rule laid down in many jurisdictions in several particulars, as has been pointed out by Mr. Crane.\textsuperscript{217} Because of clause III, a partner who pays a firm debt would as to his right to contribution no longer rank equally with separate creditors.\textsuperscript{218} Since non-partnership debts owing to a partner are not excluded from clause I, it would seem that as to such debts the creditor partner would rank ahead of firm creditors.\textsuperscript{219} The exception to the rule of section (h) made in some cases, that where there is no partnership estate and no solvent living partner, firm creditors rank equally with separate creditors, is not saved either in that section or in this.\textsuperscript{220} The Civil Code has nothing upon any of these points and there are no decided cases in California.\textsuperscript{221}

L. LIABILITY OF PERSONS CONTINUING THE BUSINESS IN CERTAIN CASES.

U. P. A. SECTION 41 (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of

\textsuperscript{216} Burdick, pp. 284 ff.
\textsuperscript{218} 28 Harvard Law Review, 786.
\textsuperscript{219} Id., n. 128.
\textsuperscript{220} Id., n. 128.
\textsuperscript{221} Id., p. 314.
\textsuperscript{222} Id., p. 293.

\textsuperscript{223} In this note are collected a few additional California cases bearing on the general subject of dissolution: Grant v. Bannister (1911) 160 Cal. 774, 118 Pac. 253 (rights of partners where one to give property and other to give labor); Clark v. Jones (1875) 50 Cal. 425 (profits accruing after termination); Boskewitz v. Nickel (1892) 97 Cal. 19, 31 Pac. 732 (as to office expense, and interest on debts created after dissolution); Forsyth v. Butler (1907) 152 Cal. 356, 93 Pac. 90 (interest due on overdrafts and withdrawals by partners creditors of firm); Stretch v. Talmadge (1884) 65 Cal. 510, 4 Pac. 513 (effect of previous partial settlement); Butler v. Beech (1880) 55 Cal. 28 (alteration of books after termination); Behlow v. Fischer, supra, n. 189 (apparently if one partner defrauds the other partners upon a sale to him of partnership assets, the latter cannot join in a suit for dissolution in which the frauds are set up!); Loftus v. Fischer, supra, n. 190 (nor can one intervene in a suit by the other!); Bremner v. Leavitt (1895) 109 Cal. 130, 41 Pac. 859 (matters properly considered); Fischer v. Superior Court, supra, n. 174 (appointment of receiver).
the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

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

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

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

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

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

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

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

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

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

Parallel references:
Cf. C. C. §§ 2451, 2445.

This section will effect a change perhaps in every state where the U. P. A. is adopted, for it will enact an entirely new rule as to the rights of creditors of a firm when that firm is dissolved but the business is continued, in effect putting them on an equality with the creditors of the new business. With reference to this change, the Commissioners say in their notes to the Act:

"At present the whole subject is in doubt and confusion. It is universally admitted that any change in membership dissolves a partnership, and creates a new partnership. This section as drafted does not alter that rule. Neither does it alter the rule that on any change of personnel the property of the dissolved partnership becomes the property of the partnership continuing the business. At present, however, creditors of the dissolved partnership do not become creditors of the new partnership. Thus, if A, B and C are partners and A assigns to B and C, who continue the business without any agreement to pay the partnership debts, under the present law the property of the first partnership becomes the property of the second partnership, but the creditors of the first partnership are not the creditors of the second partnership, though they are the creditors of all of the members of that partnership. Such creditors, therefore, are often unable to secure satisfaction of their claims, though at the time of the assignment the partnership was solvent, and the business may have been continued by the second partnership without any notification of the change in membership. On the other hand, the creditors of the second partnership may be paid in full out of the property. This inequitable result the courts have attempted, in not a few instances, to prevent, by declaring that the assignment of the property of the

first partnership to the second partnership was a fraud on the creditors of the first partnership, though no fraud was intended, the result being that the creditors of the second partnership are postponed until the creditors of the first partnership are paid in full.

"The paragraph as drawn changes the law in the case supposed, and, thereby, does away with an injustice. In making the creditors of the first partnership creditors of the second it prevents such an assignment from affecting the rights of partnership creditors in the property embarked in the business.

"Again, in the case supposed if B and C promise to pay the debts of the partnership of A, B and C, it is uncertain whether the court will hold that they promise as individuals or as a new partnership. If as individuals, the old partnership creditors are not creditors of the new partnership. If A and B are considered as promising as a new partnership, then, whether the old partnership creditors can sue the new partnership as beneficiaries depends on the jurisdiction. The paragraph as drawn ends this uncertainty. In every case the creditors of the first partnership become creditors of the second; though, of course, they do not cease to be creditors of the first partnership. As, however, the first partnership has assigned all its property, this is of little value to such creditors, unless the assignees have promised the retiring partner an additional consideration beyond the payment of the debts. . . .

"The paragraph as a whole, as well as this entire section, is based on the opinion that when there is a continuous business carried on first by A, B and C, and then by A, B, C and D, or by B and C, or by B and D, or by C and D, or by B, C and D, without any liquidation of the affairs of A, B, C, both justice and business convenience require that all the creditors of the business, irrespective of the exact grouping of the owners at the times their respective claims had their origin, should be treated alike, all being given an equal claim on the property embarked in the business."

Something of an argument might be made to the effect that in some situations the results reached by this section may now be reached with us. When a partnership is dissolved by the expressed will of a general partner notwithstanding his agreement for its continuance, seemingly under Civil Code section 2451 it is dissolved

223 In California when there is an assumption by the new firm of the debts of the old, the persons so doing are liable: Smith v. Millard, supra, n. 222; Olmstead v. Dauphiny (1894) 104 Cal. 635, 38 Pac. 505; Stover v. Stevens, supra, n. 173; Burritt v. Dickson (1857) 8 Cal. 113; First National Bank v. Simmons (1893) 98 Cal. 287, 33 Pac. 197. Whether they are liable on an equality with creditors of the new firm is not clear. Whether an agreement for assuming debts must be in writing is not clearly settled: cf. Freeman v. Bagley, supra, n. 222, with Stover v. Stevens, supra, n. 173.
“as to himself only.” Comment has already been made upon this curious section.\textsuperscript{224} In the present connection, unless the words in quotation marks are disregarded altogether, it is certainly arguable that creditors before and after this “dissolution” rank equally, because creditors of the same firm.

Only in cases where all the partners assign to a third person, is an actual assumption of debts necessary before the liability arises (subsection 4).\textsuperscript{225} Furthermore, in all cases where a new partnership comes into being, the liability is a partnership liability, and not a separate joint or several liability of the members. This provision, of course, will place the creditors of the old firm on a basis of equality with those of the new, a result that would not be reached under existing California law if the liability were only that of the persons forming the new firm and were not their partnership obligation.\textsuperscript{226}

It should also be borne in mind that although the extent of the liability is not measured by the amount of assets received from the old firm—in other words that the liability is not similar to that of a fraudulent transferee—it does not exist to an unlimited extent against persons not partners in the old firm. It binds persons who assume the debts only to the extent that they choose to assume it (subsection 4), and persons not members of the old firm but who become liable irrespective of such assumption under subsections (1), (2), (3), (5), and (6) only to the extent of the “partnership property” which must mean the property of the new partnership, subsection (7) which so provides being evidently but a supplement to the rules laid down in U. P. A. section 17.

The liability here created is independent of the existence of fraud, or assumption of debts, except as noted. Nor is it material whether or not the new firm makes a new contract.\textsuperscript{227} It would seem clear, however, that the new liability is not exclusive of that already existing when debts are assumed or a new contract made; and the rights of these creditors to overturn a fraudulent conveyance is preserved explicitly in subsection (9). In short, the section under discussion adds to the firm creditor’s quiver of more or less imperfect rights one that is sometimes capable of more effec-

\textsuperscript{224} See paragraph XL, 9 California Law Review, p. 312.
\textsuperscript{225} Seemingly not changing the present California law: Cf. Noonan v. Nunan (1888) 76 Cal. 44, 18 Pac. 98; Herman v. Paris (1889) 81 Cal. 625, 22 Pac. 971; Freeman v. Badgley, supra, n. 222.
\textsuperscript{226} Whelan v. Shain, supra, n. 204; Burdick (3d ed.) pp. 152 ff.
\textsuperscript{227} Cf. Mission Fixture Co. v. Potter, supra, n. 171.
tive use. Proof that a case falls under subsections (1) to (3), (5) and (6) is comparatively easy; proof of a fraudulent conveyance, estoppel, a new contract, or an assumption of debts is quite difficult, and tracing the assets even more so. From the point of view of the firm creditor the section is highly desirable. It will also alleviate the labors of courts and juries, for even though the old arrows in the quiver can still be used, and may be the best under certain conditions, they will not be resorted to so often. It will also save the conscience of judges whose inclinations urge them to strain existing rules further than is really logical. On the other hand, there are cases where the rule may bear rather harshly upon him and upon creditors of the new firm as well. Suppose, for example, that a firm with small assets but with a very large unreported debt sells out to one of its members and a new group, who together form a new firm carrying on the old business with greatly increased capital, and that large creditors of the new firm come into existence ignorant of its past history; in such case, if the old law applied, the creditor of the old firm might show that the old firm made a fraudulent conveyance and take from the new the small value of the assets transferred, and might pursue its former members; but if these are without resources, the new group, *ex hypothesi* innocent, may easily be wiped out under the U. P. A., though doing a normal business act, merely because they happened to include in their new partnership one who was a member of the old firm, and the firm creditors of the new firm in the event of its insolvency may find themselves faced with a competitor whose existence they had little reason to expect. It seems rather illogical to make this great financial difference turn upon the inclusion or non-inclusion in the new firm of a partner who may have figured in both old and new to a minor extent—to make it possible to avoid such a result by employing him instead of taking him into partnership, perhaps at an equivalent in earnings.

Again, the rules here laid down will not operate when the new firm does not continue the old business. When does a business continue and when does it not? Some new difficult questions of fact will take the place of the old ones driven out by the new rule.

Mr. Crane has pointed out that the U. P. A. does not clarify

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228 Estoppel as basis of liability, see: Reid v. F. W. Kreling's Sons Co. (1899) 125 Cal. 117, 57 Pac. 773; Burritt v. Dickson, supra, n. 223; White v. Kincaid (1919) 180 Cal. 135, 179 Pac. 685.

229 See Smith v. Kansas Sheet Co. (1898) 120 Cal. 517, 52 Pac. 811.
the law with regard to questions of fraudulent conveyances by partners. This Mr. Lewis in effect concedes, stating that a Uniform Act on Fraudulent Conveyances, the preparation of which the Commissioners had undertaken, was deemed the proper place to treat fraudulent conveyances by partners. Mr. Crane has further shown that U. P. A. section 41 does not take the place of an action to set aside a fraudulent conveyance in all cases. He suggests that a section on Fraudulent Conveyances, struck out from the present draft of the Act, should be restored. Whether or not from the point of view of the larger uniformity the Commissioners have done wisely, the fact remains as Mr. Crane states it and Mr. Lewis concedes it: the law as to fraudulent conveyances by partners is not made any more certain. It is hard to say, however, that the act would leave us in this respect any worse off than we now are.

Subsection (7) has been referred to above. U. P. A. section 17 lays down for a person joining an existing partnership the same limited rule of liability that is there laid down for the new blood that joins those continuing the business. Apparently the subsection covers those who join after the creation of the new firm as well as those who are, so to speak, its charter members. There is no apparent reason why both classes should not be included, if either one comes in.

Subsection (8) presupposes that the new firm is indebted to the retiring partner for his interest, and that creditors of the old partnership are in competition with the separate creditors of the retiring partner for this debt. The Commissioners in their note to the subsection state in effect that the former should be preferred to the latter because, after all, the separate creditors claim through the retiring partner who is owed money for a sale of an interest in property formerly available to the firm creditors in preference to the separate creditors. Seemingly, under present law, if the transfer were not fraudulent, the debt owed by the new firm should be treated like any debt owed by a third party to the retiring partner, and should be available to the separate creditors. The new rule has the decided merit of making inquiry into solvency and possibly motive at the time of the transfer often unnecessary; but assuming

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that there was solvency at that time and afterwards, there seems no very good reason why the firm creditors, because they were not paid at the time of the transfer, should fare better than the separate creditors would ordinarily fare, for cannot the latter with equal force complain of the retiring partner's conduct in not paying off their rivals, so that all received by him from the partnership was clearly theirs, and possibly sometimes of the firm creditors as well for allowing the retiring partner to appear in the world like a creditor himself?

The criticisms made against U. P. A. section 41 seem to be outweighed by its advantages. It should be remembered that much of the present confusion in the law is in many, perhaps a majority, of the cases due to an attempt by judges to reach the result which here is made law. It seems to answer to what is currently thought socially desirable more often than the present law, and with us it has the added advantage of blazing clear at least one path through an almost virgin forest which sooner or later our courts and lawyers must traverse.

Subsection (10) apparently was enacted because it was felt that the rules of estoppel based upon continued use of the firm name were, so far as the estates of deceased partners were concerned, too harsh. Those interpreting U. P. A., section 16, also, should not forget section 41(10).

LI. RIGHTS OF RETIRING OR ESTATE OF DECEASED PARTNER WHEN BUSINESS IS CONTINUED.

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

Parallel references:

cf. C. C. P. §§ 1524, 1585.
This section relates only to the rights of retiring partners or of the representatives of those who have died when the business is continued, and is part of the set of rules laid down in the preceding section and in section 38. Under existing laws (Code of Civil Procedure section 1585) the interest of the deceased partner is to be appraised in the usual manner that property of all dead persons is appraised (Code of Civil Procedure section 1445). Although U. P. A. section 42 does not set forth the manner in which the ascertainment of the value of a partner is to take place, this must certainly be by an ordinary trial court exercising equitable functions in case the interest of a retiring partner is involved and presumably by such a court in case the interest in question is that of a dead partner. That there may be two varying appraisals is somewhat objectionable, but the cure for such a difficulty should lie, not in an alteration of U. P. A. section 42, but in a provision protecting the representative in the probate court, when the appraisal under U. P. A. section 42 is less than that under Code of Civil Procedure section 1585. The latter appraisal does not finally liquidate the debt of the surviving partners to the representative of the deceased partner, but the former exists with that purpose in view.

In one other respect this section affects existing law. The right of the retiring partner or the representative of the deceased partner at his option to take a share of profits in lieu of interest seems quite fair, even though possibly involving the trouble and expense of continued appraisal proceedings. If the firm is earning more than the legal interest rate, it seems hardly fair that it should have the use of his investment without paying what it brings even though the retiring or dead partner's hand is not there to assist in the making of profit. Retirement or death of a co-partner and dissolution is not an unforeseen circumstance. The remaining partners who are running the business should not be heard to complain if called upon to pay out the other partner's share or to pay a share of the profits until they do. They have their option as well as he or his representative.

Seemingly the option once declared cannot be altered, though U. P. A. does not say so, for it would be unfair to the remaining partner to allow the outgoing interest to blow hot and cold according to the changes of fortune of the firm.

233 Green v. Thornton (1892) 96 Cal. 67, 30 Pac. 965; see Cooley v. Miller (1914) 168 Cal. 120, 142 Pac. 83; Andrade v. Superior Court, supra, n. 176.
LII. ACCRUAL OF ACTIONS.

U. P. A. SECTION 43. The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the persons or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

Parallel reference: none.

This section renders a demand unnecessary before the right to an account accrues. While it is not a Statute of Limitations it fixes a date from which any appropriate statute may run, and thereby will in most states remove an existing uncertainty. It is to be regretted that the Commissioners did not turn their practiced hands to the subject of Statutes of Limitations, although such statutes are so much matters of general policy that there is good reason why they did not. In California with regard to partnership matters there is much confusion.

Section 43 is the last section of U. P. A. except that repealing inconsistent legislation and declaring the date upon which the act shall go into effect (section 44). What should appear in this section will be discussed in paragraph LV.

LIII. MISCELLANEOUS SUBJECTS OF CALIFORNIA LAW IN THEIR RELATION TO THE ACT.

There are several subjects, upon some of which a certain amount of California case law has developed, that do not fall for discussion under any of the foregoing provisions of U. P. A. The question arises as to the effect of that Act upon them.

1. Neither the Act nor the Civil Code treats separately the dormant partner. The theory underlying both undoubtedly is that the fact that a man, though a partner, remains in the background unknown to those dealing with the firm and is excluded from active

234 Hanna v. McLaughlin (1902) 158 Ind. 292, 63 N. E. 475.
235 Queried, in suit for dissolution, when statute begins to run: Barber v. Barnes (1878) 52 Cal. 650; four year statute applies in such cases: Osment v. McElrath (1886) 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17, dictum; the obligation of the surviving partner to account is not one of these implied trusts against which the statute runs: Bell v. Hudson (1887) 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791, dictum; but may be barred by laches: Robertson v. Burrell (1895) 110 Cal. 568, 42 Pac. 1086; West v. Russell (1888) 74 Cal. 544, 16 Pac. 392; Harris v. Hillegass (1880) 54 Cal. 463, dictum. Obligation to contribute barred after two years: Flynn v. Seale, supra, n. 211, semble. Upon liability of estate ten months statute does not begin to run until settlement of amount due: Gleason v. White (1867) 34 Cal. 258, but see McKay v. Joy (1886) 2 Cal. Unrep. 639, 9 Pac. 940. A suit by third persons against a surviving partner is not barred by the running of the time specified in C. C. P. § 1493: Corson v. Berson (1890) 86 Cal. 433, 25 Pac. 7; see also White v. Conway (1885) 66 Cal. 383, 5 Pac. 672 (running of statute after suit for accounting) Hendy v. March (1888) 75 Cal. 566, 17 Pac. 702.
participation in its affairs, does not bring into being peculiar questions of law but rather questions of fact for which the ordinary provisions are adequate. The dormant partner who has permitted his co-partner to appear as sole owner or trader is estopped to assert otherwise. The liability of a dormant partner for acts done after dissolution is treated in the usual way in U. P. A. section 35(2). The rule of the few cases on the whole subject in California seemingly will not be changed by the adoption of U. P. A.

2. In California, as elsewhere, there has been the usual difficulty over the Statute of Frauds in connection with partnerships formed to deal in real estate, and with regard to titles in firm real estate and their conveyance. U. P. A. section 10 in many cases does away with problems arising because one partner has not given another a power of attorney. The application of the Statute of Frauds to partnerships formed to deal in real estate will not be affected by the Act, the problem as a matter of policy not being one of partnership law.

3. There are a number of cases bearing upon the part that good will plays as a partnership asset and upon the distribution or assignment of good will at dissolution. Except for U. P. A. section 38(2)(c), in effect providing for a forfeiture of good will by a partner causing dissolution wrongfully if the business is continued, the Act is silent on the subject. The same is true of those sections of the Civil Code relating to partnerships. With the above exception, if then, seemingly the law will not be changed.

LIV. CHANGES IN THE ACT BEFORE ADOPTION.

If the U. P. A. be adopted, it should be adopted as it now stands without striking out anything. Uniformity of law with other states will be lost if a patchwork quilt of the U. P. A. and the Civil Code is the result of legislative action. The Act was drafted to procure...
uniformity and not as a basis for state legislatures to build upon.

In Senate Bill No. 132, introduced by Senator Sample, January 17, 1919, and referred to the Committee on Judiciary, the proposal was to repeal chapter one and articles one, two, three, four, five, and six of title ten of part four of division third of the Civil Code (sections 2395 to 2462, inclusive) and to substitute a new chapter one of title ten of part four of division third, beginning with a new section 2395 of the Civil Code corresponding to section 1 of U. P. A. and so continuing to a new section 2437 corresponding to section 43 of U. P. A., and, in order to preserve the form of the rest of the Civil Code, to entitle “Articles” the first six “Parts” of U. P. A. The last or seventh Article will be referred to in the next paragraph.

This proposal treats U. P. A. as the Uniform Negotiable Instruments Law was treated, and makes it an integral part of the Civil Code. Senator Sample’s bill, however, repeated what seems to the author a misreference in his new Civil Code section 2426 (2), which is U. P. A. section 32(2), referring to new Civil Code sections 2422 or 2423, the same as U. P. A. sections 28 and 29. This reference should be corrected to read new Civil Code sections 2421 or 2422, the same as U. P. A. sections 27 and 28, which are obviously intended.244

It perhaps would be desirable also to change Senator Sample’s new Civil Code section 2400(2), which is U. P. A. section 6(2), by striking out the word “limited” and substituting for it “special” and “mining.” This is merely a change in nomenclature. We have no “limited partnerships” in California, but we do have “special” and “mining partnerships”, and these sorts of partnerships are obviously what are intended by the subsection (2) above mentioned.245 Again, the proposed new section 2419(2)(e), that is, U. P. A. section 25(2)(e), provides in effect that a partner’s right in specific partnership property is not subject to the rights of widows, heirs or next of kin, leaving them, of course, to work out their rights in the partner’s share in the surplus.246 Among the rights of widows, etc., which shall not attach to specific partnership property, her right by

114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265 (same, sale being according to term in articles); Bell v. Ellis (1867) 33 Cal. 620 (to be valued in ascertaining solvency); Little v. Caldwell (1894) 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89 (no allowance for, in settling up partnership between attorneys); Wulf v. Superior Court (1895) 110 Cal. 215, 42 Pac. 638, 52 Am. St. Rep. 78 (sale of business ordered including). See also Meyers v. Merillion, supra, n. 190.

244 See paragraph XLI, 9 California Law Review, 315.
245 See paragraph XI, 9 California Law Review, 126.
246 See paragraph XXXIII, 9 California Law Review, 216.
virtue of the community of goods is not mentioned, probably because the Commissioners momentarily forgot that such an institution existed in the United States. This last right certainly should not attach to specific partnership property, which might be real estate, or great confusion would result. The subsection would be made applicable to our peculiar local conditions as intended if the phrase "and is not community property" or some equivalent phrase be added.

LV. NECESSARY CONCURRENT LEGISLATION.

In Senator Sample's proposed draft there was a final Article VII as follows:

"2438. All acts or parts of acts inconsistent with this act are hereby repealed.

"Sec. 2. That article seven of title ten of part four of division third of the Civil Code of the State of California, be amended by making said article seven, chapter two of title ten of part four of division third of the Civil Code of the State of California."

The purpose of section 2 is to preserve the present continuous chapter numbering of Title X relating to partnerships of all kinds. The repeal of Civil Code sections 2395 to 2462 would strike out two chapters and substitute but one. The present Article VII of Chapter II (sections 2466 to 2472) relating to fictitious names therefore quite properly becomes a new chapter II by itself. These sections and all the law that has grown up about them—equal in bulk to that on any topic of partnership litigation concerned with the merits—will not be affected by the adoption of U. P. A., which leaves this subject open to local legislators.

Is section one of the proposed new Civil Code section 2438 sufficient? By cutting out thirty-nine sections of the Civil Code and by substituting forty-three quite different ones, will it be necessary to make changes elsewhere in our Codes in order to preserve their consistency?

A few slight changes seem to be desirable, if the U. P. A. is adopted.

1. The present partnership sections of the Civil Code classify partnerships into general, special and mining. In the sections of the Civil Code that will be repealed, there is frequent mention of the duties, rights and liabilities of a "general" partner, and in the sections of the Civil Code relating to special partnerships (2477 to 2510) the general partner is spoken of in contradistinction to the special partner. U. P. A., however, does not use the term "general
partner," and its adoption with the repeal of all sections relating to general partner would leave the references to general partners in the above-mentioned sections dealing with special partners with no antecedent. It would seem that Civil Code section 2424, which at present effects a transition between the general and special partnership, should be re-enacted, perhaps as a new section 2438—Senator Sample's section 2438 becoming new section 2439—changing only the phrase "general partners" to read "general partners, which term shall mean all partners who are not special partners." (Cf. Civil Code section 2478.)

A similar change does not seem to be necessary with reference to the mining partnership (sections 2511 to 2520), which is sui generis, although subject to some of the rules applying to general partnerships.

To forestall an argument that the U. P. A. covers all partnerships and that its adoption indicates an intent to repeal all other laws relating to partnerships, it might be well to add to section 1 of new section 2438 or 2439 a phrase to the effect that sections 2477 to 2510 (special partnerships) and sections 2511 to 2520 (mining partnerships) shall remain in effect.

2. The provisions in the Code of Civil Procedure (sections 1524, 1585) relating to the settlement of the estate of deceased partners should be made subject to the U. P. A., particularly to section 38(2)(b). As suggested, Code of Civil Procedure section 1585 might well be altered by a proviso protecting a personal representative when the appraisal under that section shows the deceased's interest to be of greater value than a proceeding under U. P. A. section 42.

There are numerous sections in the Codes indirectly involving partnerships which will not be affected by a change to U. P. A.,

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248 Dellapiazza v. Foley (1896) 112 Cal. 380, 44 Pac. 727 (applying C. C. § 2453, notice of termination); Jones v. Clark (1871) 42 Cal. 180.

There is no reason why such provisions as are applicable should not be those of U. P. A. as well as those of the Civil Code. Cases in which rules substantially those of general partnerships were applied: Neville v. Moore Mining Co. (1902) 135 Cal. 561, 67 Pac. 1054; Stuart v. Adams (1891) 89 Cal. 367, 26 Pac. 970; Settembre v. Putnam (1866) 30 Cal. 490; in which peculiar rules were applied: Nisbet v. Nash (1878) 52 Cal. 540.

249 C. C. P. § 1585 and various cases, e. g., Painter v. Painter (1886) 68 Cal. 395, 9 Pac. 450, insist upon settlement by the surviving partner without delay. So far as these impose an obligation to settle more quickly than U. P. A. calls for, they should give place to it.

250 See paragraph LI. 9 California Law Review, 413.
such as Civil Code section 1163 (service of process), section 1675 (agreements upon dissolution not to compete), sections 2557, 2590 (insurance upon partnership property), 3158 (presentation for payment of a negotiable instrument made by a partnership), 3180 (notice to partner in connection with negotiable instruments), Code of Civil Procedure section 172 (judges in law partnerships), section 388 (suit against partnerships in firm name), section 414 (suits against joint obligors, etc.), section 564 (receivers of partnerships), section 602(3) (challenge of jurors), section 641 (qualification of referees), section 1365 (persons eligible to administer estates), sections 1530 to 1532 (sale of interest of deceased mining partners), section 1870 (evidence), section 1963(29) (presumptions), section 103 (justices having law partners); Penal Code sections 162, 163 (attorney's right to defend prosecutions), section 358 (frauds in the affairs of special partnerships); Political Code section 3461 (taxation); General Laws: Stats. 1865-66 p. 828 (mining partnerships), Stats. 1919 p. lxxxiii (usury law), Sections 1, 13, of the Bank Act (Stats. 1909 p. 87 as amended, penal provisions of Act to apply, etc.), Corporate Securities Act (Stats. 1917 p. 673, as amended).

The foregoing analysis must have revealed the fact that U. P. A. will take its place in our statutory system without a perceptible jar to the rest of the fabric.

LVI. CONCLUSION.

It is hoped that the foregoing discussion will have placed the reader in a better position to judge for himself whether or not the adoption of the U. P. A. is desirable in California. A summary of the results may not be out of place. The four most important features of the act have already been mentioned in paragraph III. Of these three will certainly alter present law. Perhaps the greatest alteration is in the rights of the separate creditor. Under the U. P. A. he cannot attach firm property for his separate debt (par. XXXIII, § 25(c), par. XXXVI, § 28), and if his debtor is a retiring partner to whom a firm continuing the business is indebted, he is postponed as to that debt to firm creditors (par. L, § 41(8)). Though he probably fares better under the U. P. A. than at present when competing with a partner's right to obtain contribution from

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his debtor (par. XLIX, § 40(i)), on the whole it would seem that he will often find it less easy to obtain payment under the U. P. A. than at present. This change, however, would seemingly strengthen the partnership as a business institution, because strengthening the position of firm creditors and of the firm. The second of the important features, bearing upon the holding and conveying of firm real estate (par. XIII, § 8(3), par. XVI, § 10, cf. par. XXXIII, § 25(d) (e), though changing our present law will not injuriously affect any class of persons, and will again be of business advantage to the firm because freeing partnership real estate from the shackles of ancient inappropriate doctrines. The third feature, relating to the liability of those who continue a business to old creditors (par. L, § 41), will change our existing law so far as old creditors are concerned merely by adding a new right to those they already have, but will perhaps bear rather harder than the present law upon new creditors, separate creditors, and those carrying on the new business. The fourth feature, the creation of the tenancy in partnership (par. XXXIII, § 25), will change our present law only in the same way that the second feature will change it. That there will be a change at all is due only to the fact that existing sections of the Civil Code have been heretofore strangely ignored.

In addition to these, which might be called major changes, there are a number of minor ones: a communicated change in partnership name plainly indicating the fact of withdrawal of a partner will not necessarily relieve the withdrawing partner from liability to new creditors (par. VIII, § 3); the court will have power to wind up incompleted partnerships (par. XI, § 6); the rule of McCauley v. Fulton (1872) 44 Cal. 355, would probably no longer be law (par. XVI, § 10, n. 67); the liability of one partner for another's fraud will be settled (par. XX, § 14); the right to remuneration in winding up will be established in all cases of survivorship (par. XXV, § 18(f)); an assignment by one partner of his interest will no longer effect a dissolution (par. XXXV, § 27, par. XL, § 31); those who are prior dealers for the purpose of ascertaining who is entitled to notice of withdrawal and the place of publication of notices to all others will be slightly different (par. XLIV, § 35(1)(b), (1)(c); Civil Code sections 2417 and 2454 will no longer be law except as involved in other provisions (see par. XLIV); and a new method of settling with partners who wrongfully dissolve a firm will be created (par. XLVII, § 38(2)(b)). Perhaps there will be other changes also, if our law is assumed to be
that of the majority of states, such as the change in the rights of separate creditors already indicated (par. XLIX, § 40(I)).

In the author's opinion, which is given for what it is worth, none of these changes are for the worse, and though some are perhaps neutral, most are distinctly for the better. The simplification of the law as to partnership real estate seems highly desirable. The destruction of the separate creditor's "hold-up" right of attachment is an interesting experiment with very much in its favor, and the new liability of those continuing the business is at the least an interesting experiment. Most of the minor changes, also, seem thoroughly desirable.

The Act, again in the author's humble opinion, is not without imperfections: the doubt as to leasing arrangements of personal property (par. XII, § 7); the ambiguity introduced by the word "apparently" (par. XV, § 9, par. XX, § 14) and by the term "express will" (par. XL, § 31(1)(b)); in the uncertainty as to the antecedent of "then," in the phrase "then present to his mind" (par. XVIII, § 12) and as to when partners have some of the rights described in § 18 (par. XXV); the lack of a rule as to division of profits in the absence of agreement (par. XXV, § 18); the limitation of the right to remuneration for winding-up to cases of death (par. XXV, § 18 (f)) the perhaps too great brevity in setting forth the fiduciary nature of the partnership relation (par. XXVIII, § 21); the ambiguity as to the state of affairs when a firm continues to do business beyond a fixed term (par XXX, § 23(1)); the awkward way of reaching a desirable result when there is a failure by a surviving partner to do his duty (par. XXXIII, § 25(d)); the difficulty of interpreting § 31 owing to its confusing form (par. XL); the non-inclusion among prior dealers of some persons having dealings after dissolution (par. XLIV, § 35); possibly the failure to give "firm creditor" rights to creditors of an illegal partnership (par. XLIV, § 35(3)(a)); the lack of power in a bankrupt partner to bind the firm (par. XLIV, § 35(3)(b)); the confusion as to those in whom the right of action for wrongful dissolution is vested (par. XLVI, § 38(2)); the doubt as to the theory upon which the right to contribution rests (par. XLIX, § 40(b)); the lack of precision as to the rights of secured creditors (par. XLIX, § 40(h)); and perhaps the postponing of separate creditors so far as concerns the claims of their debtor partner against those continuing a business from which he has withdrawn (par. L, § 41(8)). This list may seem long, but it includes matters of almost wholly slight importance, some of which probably could not be avoided. Further-
more, upon many of these there is great room for difference of opinion.

On the other hand, in addition to what has already been mentioned, there are a number of points in which it seems to the author that U. P. A. is a distinct improvement over our existing law. Compared to it the Codes are very incomplete. Few of the gaps in them have been filled by judicial decision. Instances where such gaps are largely filled and where there is greater clarity include: the definition of knowledge and notice (par. VIII, § 3, par. XVIII, § 12); the removal of the ambiguity in the word authority in C. C. section 2429; and the fullness in the treatment of a partner as an agent for the firm (par. XV, § 9); the same with regard to admissions by a partner (par. XVII, § 11); the full treatment of estoppel (par. XXII, § 16); the same with regard to the rights and duties of partners (par. XXV, § 18) particularly as to the right of contribution (§ 18(b)) and as to a partner's right to remuneration (§ 18(f)); the explicit treatment of the right to an account (par. XXIX, § 22); and particularly the very thorough treatment of the whole subject of dissolution and winding-up, in marked contrast to the Civil Code. In this last connection the definition of the term "dissolution" is more precise (par. XXXVIII, § 29) and of what agreements are for fixed terms (par. XL, § 31(1)(a)); events causing dissolution include more that should be such cause than the Civil Code (par. XL, § 31, par. XLI, § 32), particularly with regard to insanity and incapacity for any cause; large gaps in the law as to the effect between partners of acts done after dissolution are filled (par. XLII, § 33, par. XLIV, § 35); the provisions as to the power of a partner to bind the firm to third parties are treated much more fully and clearly than the corresponding sections of the Civil Code (par. XLIV, § 35); the effect of dissolution on existing liability is in the U. P. A. expressed (par. XLV, § 36(1)); the right of partners to the application of partnership property to pay partnership debts is, unlike the cursory treatment in the Civil Code, fully covered (par. XLVI, § 38); the rights of partners when a partnership is dissolved for fraud in its creation are dealt with exhaustively, as is not the case in the Civil Code (par. XLVIII, § 39); and rules for distribution and marshalling of assets, wholly omitted from the Civil Code, are set forth fully (par. XLIX, § 40). Furthermore, the U. P. A. seems to the author superior to existing law in other particulars: a partner who receives a benefit by a breach of his fiduciary duty to his fellows is liable as a trustee even in transactions connected with dissolution (par. XXVIII, § 21); the absurdity of Civil Code sec-
tion 2450(1) in providing that a partnership is dissolved by lapse of the time set in an agreement for its duration is removed (par. XXX, § 23(1)); an assignment by a partner of his interest no longer works a dissolution (par. XXXV, § 27) and the possible method to defeat an action for wrongful dissolution by such an assignment is rendered impracticable (par. XL, § 31(1)); the unusual if possibly unintentional rule latent in Civil Code section 2451 no longer would exist (par. XL, § 31(1)); the rules as to dissolutions for prejudicial conduct are more logical (par. XLI, § 32(1)(c) and (d)); and assets are clearly defined to include the right to contribution (par. XLIX, § 40(a)).

This list of improvements upon existing law not only is longer but also includes more important matters than the list of imperfections. The adoption of the U. P. A. would of course be a step towards uniformity, for the important commercial states of New York, Pennsylvania, and Illinois, and others already have it. While it would change our law in some particulars, it would nearly always change it for the better. While it is not without imperfections, it would in many respects improve existing law particularly in the direction of settling matters now in doubt. In short, in the author's opinion, a case is made out for its adoption.

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252 Since the greater part of the above was finished, opinions were handed down in the following cases bearing upon topics discussed: Noon v. Martin (Mar. 28, 1921) 61 Cal. Dec. 428 (provisions for filing and publication of certificates of partners transacting business under a fictitious name do not apply to partnerships in other states doing an interstate mail order business in this state); Welch v. Alcott (May 27, 1921) 61 Cal. Dec. 635 (agreement to divide profits is more than an agreement to divide gross earnings and establishes a partnership); Rivara v. Bartolozzi (Mar. 22, 1921) 34 Cal. App. Dec. 816 (dissolution decreed on showing partnership was conducted at a loss); Weavering v. Schneider (Apr. 6, 1921) 34 Cal. App. Dec. 945 (Action for dissolution and accounting; clerk could not enter judgment on referee's finding and appellant on such appeal could not raise point that no final judgment could be entered prior to the sale of the partnership property); Caldwell v. Western Development Company (June 9, 1921) 35 Cal. App. Dec. 384 (action for money judgment; judgment for defendant upheld on ground that the evidence showed a partnership and that an accounting with the partner was the proper remedy); Scheimer v. James (June 15, 1921) 35 Cal. App. Dec. 425 (action for dissolution and accounting, extrinsic evidence of the actual agreement admissible under the circumstances).