An Appraisal of the Louisiana Law of Partnership: A Comparative Focus on Source Materials and Underlying Practices (Part II)

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A COMPARATIVE FOCUS ON SOURCE MATERIALS AND UNDERLYING PRACTICES

(PART II)†

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ENTITY AND AGGREGATE THEORIES: EFFECT ON UNDERLYING PRACTICES

Anglo-American scholars have debated vigorously the respective merits of the entity and aggregate theories of the nature of the partnership—whether a conception of the partnership as a legal entity (separate and apart from the individuals composing it) or as an aggregate of individuals (having in law no existence apart from its members) is more useful to an understanding of partnership practices or more conducive to the proper development of partnership law.† This article does not rehash the old arguments. Instead it (1) traces the development of the aggregate and entity theories and (2) inquires as to what extent doctrinal and conceptual differences as to the nature of the partnership have affected underlying partnership practices. Particular emphasis is placed on whether partnership practices in Louisiana, as a consequence of an entity concept adopted from French law and phrased in the language of the French commentators, differ materially from partnership practices in the aggregate or other entity jurisdictions. In short, the inquiry in this chapter is: Are doctrinal and conceptual differences as to the juridical nature of the partnership at present largely verbal? Or are those differences reflected in diversified practices?

Traditionally the common law treated the partnership as an

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1. That the partnership should be considered an entity: Crane, The Uniform Partnership Act—A Criticism (1915) 28 Harv. L. Rev. 762; Judge Learned Hand in In Re Samuels & Lesser, 207 Fed. 195, 198 (S.D. N.Y. 1913). That the partnership should be considered an aggregate: Lewis, The Uniform Partnership Act—A Reply to Mr. Crane’s Criticism (1915) 29 Harv. L. Rev. 158; Warren, Corporate Advantages Without Incorporation (1929) 2, 17, 29-140.
aggregate of individuals.\textsuperscript{2} In most respects, the firm was considered nothing more than an "abbreviation," occasionally useful to avoid the vexatious enumeration of the names of the individual members. Closely associated with the aggregate concept was the proposition, early laid down by the common law courts,\textsuperscript{3} that partners were co-owners of partnership property holding as joint tenants. The law relating to the rights of partners and separate creditors in partnership property became hopelessly confused\textsuperscript{4} because of the great variety of devices used by the courts in an effort to avoid applying certain incidents of joint tenancy to the partnership.

Businessmen and accountants long had regarded the partnership as a business unit which moves forward to success or failure as an entity separate from the individuals who compose it. This mercantile idea as to the nature of the partnership seemed to offer an escape from the confusion which existed under the aggregate theory and from the undesirable consequences of the common law rule that partners are co-owners of partnership property holding as joint tenants. Many courts in the United States, in some instances aided by legislation, soon gave the partnership, for certain purposes at least, a legal existence in keeping with the mercantile view.\textsuperscript{5}

The National Conference of Commissioners on Uniform State Laws drew several tentative drafts of the Uniform Partnership Act on the entity theory. Finally, however, a draft avowedly based on the aggregate theory was accepted by the commissioners.\textsuperscript{6} In spite of this seeming triumph of the aggregate theory, the controversy between the exponents of the two theories continues.\textsuperscript{7} Many courts, including some in jurisdictions which have enacted the Uniform Act,\textsuperscript{8} still treat the partnership as an entity and

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\item \textsuperscript{2} This is admitted even by the chief advocate of the entity view. Crane, Handbook of the Law of Partnership (1938) 8-12, § 3.
\item \textsuperscript{3} Heydon v. Heydon, 1 Salk. 392 (1693).
\item \textsuperscript{4} Lewis, supra note 1, at 162-163.
\item \textsuperscript{5} Drucker v. Wellhouse, 82 Ga. 129, 8 S.E. 40, 41 (1888); Rosenbaum v. Hayden, 22 Neb. 744, 36 N.W. 147 (1888); Note (1938) 25 Va. L. Rev. 104, 105.
\item \textsuperscript{6} Lewis, supra note 1, at 171-172.
\item \textsuperscript{7} Comparatively recent decisions expounding the aggregate view include Jung v. Bowles, 152 F.2d 726 (C.C.A. 9th, 1946); United States v. Posner, 3 F. Supp. 252 (S.D. N.Y. 1933); Fidelity Phoenix Fire Ins. Co. v. Howard, 182 Miss. 546, 181 So. 846 (1938); Williams v. Hartshorn, 296 N.Y. 49, 69 N.E. (2d) 557 (1946); In re Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941).
\item \textsuperscript{8} Keegan v. Keegan, 194 Minn. 261, 260 N.W. 318 (1935); Note (1938) 25 Va. L. Rev. 104, 105.
\end{itemize}
voice approval of the entity view.\textsuperscript{9} In fact, there is considerable evidence of a growing trend to adopt that view.\textsuperscript{10}

Most civil law jurisdictions treat the partnership as an entity with legal relations separate and distinct from those of its individual members.\textsuperscript{11} The impression conveyed by many American texts,\textsuperscript{12} however, that all civil law jurisdictions always have considered all types of partnerships as entities for all purposes is not accurate. In Roman law the partnership was not recognized as a legal person;\textsuperscript{13} and even now many civil law jurisdictions treat the partnership as a legal person only for limited purposes.\textsuperscript{14} And French law has not been entirely free from controversy. It is true that since the enactment of the Code Napoleon the French commentators and courts have been in agreement that the commercial partnership is a juridical person\textsuperscript{15} possessed of rights and privileges and subject to obligations distinct from those of the human beings composing it; that it is the owner of partnership property; that it, through the medium of its managers, contracts with third persons; and that it becomes creditor or debtor. But


\textsuperscript{11} 1 Rowley, The Modern Law of Partnership (1916) 127-128, § 122; Brinson v. Monroe Automobile and Supply Co., 180 La. 1064, 1076, 158 So. 558, 562 (1934); Perkins v. Benguet Consol. Mining Co., 55 Cal. App.(2d) 720, 129 P.(2d) 70, 75 (1942). The partnership is treated as a judicial person in Belgium, Chile, Mexico, Russia, and Scotland. This widespread recognition of the legal personality of the partnership has been said to be strong evidence of the inherent merit of the entity concept. Crane, supra note 1, at 764-765.

\textsuperscript{12} Burdick, Law of Partnership (3 ed. 1917) 82-83; Gilmore, Handbook on the Law of Partnership (1911) 117, § 40.

\textsuperscript{13} Crane, supra note 1, at 763; 1 Rowley, op. cit. supra note 11, at 127, § 122. Further, the doctrine of mutual agency as it is understood in Anglo-American law of partnership was unknown to the Roman law. Huebner, A History of Germanic Private Law: The Continental Legal History Series (1918) 159, § 23.

\textsuperscript{14} The partnership is an entity only as respects third persons in Italy, Roumania, and Portugal. Crane, supra note 1, at 765. With respect to the mercantile partnership of German law, see Huebner, op. cit. supra note 13, at 159, § 23: "The ordinary merchantile partnership of the private law of today constitutes, like the old community of collective hand, an entity in which are bound together the individual associates, and which, without actually possessing independent legal personality, has the appearance, particularly in relations with third parties, of a solidary and self-sufficient body. It can have its own social property, which, as a separate estate distinct from the private estates of the partners, belongs to these in collective hand. Similarly, partnership obligations are possible that are not at the same time private debts of the members, and for which these are liable in collective hand."

\textsuperscript{15} 23 Baudry-Lacantinerie et Wahl, Traité Théorique et Pratique de Droit Civil, de la Société, du Prêt, du Dépot (3 ed. 1907) 8, n° 11; 11 Huc, Commentaire Théorique & Pratique du Code Civil (1898) 33, n° 23.
whether the ordinary civil partnership of French law is an entity is a question beset with some difficulty. The commentators have always expressed the opinion that the redactors of the Code Napoleon did not consider such partnerships juridical persons. Formerly this view was followed by the courts. The Court of Cassation, however, since 1890, has handed down a number of decisions in which ordinary civil partnerships were treated as entities.

Louisiana courts have shown remarkable unanimity in their comments on the nature of the partnership. They might have been expected to encounter considerable difficulty in maintaining a consistent theory. Louisiana partnership law (including commercial partnership law, since a commercial code was never adopted) supposedly is grounded on the articles of the Louisiana Civil Code. Those articles do not correspond to provisions in the French commercial code pursuant to which the French commercial partnership uniformly has been treated as a legal person. The Louisiana codal provisions correspond rather to the articles of the Code Napoleon relating to the ordinary civil partnership, the juridical nature of which is in dispute in France. Further, in view of the tendency of Louisiana courts in most phases of partnership law to import Anglo-American concepts, it would not have been surprising to find the Louisiana courts at times borrowing entity ideas and on other occasions adopting aggregate theories. Such has not been the fact. Louisiana courts consistently have asserted that both the commercial partnership and the ordinary partnership are legal persons.

Louisiana courts unquestionably obtained their theory and the language in which it is expressed from the French commentators. In 1844, in Dick v. Byrne, a case involving the question whether compensation takes place by operation of law between a debt due by a commercial firm and one due to one of its mem-

18. Cass. 23 fèv. 1891, D.91.1.337; Cass. 2 mars. 1892, S.92.1.497, D.93.1.169; Cass. 22 fèv. 1898, D.99.1.593. See also Crane, supra note 1, at 764.
19. See p. 324, supra.
21. See authorities cited notes 27, 28, and 29 infra.
23. "When two persons are indebted to each other, there takes place between them a compensation that extinguishes both the debts. . . ." Art. 2207, La. Civil Code of 1870. See also Art. 2208, La. Civil Code of 1870; Stewart v. Harper, 16 La. Ann. 131 (1861).
bers, a Louisiana court apparently for the first time inquired into the legal nature of the partnership. In that case the court adopted the view of Toullier, that a commercial partnership is "an artificial being, distinct from the persons of which it is composed," on the ground that his view was "more consonant to the positive enactment" of the Louisiana Civil Code of 1825. The court did not specify what provisions of that code led them to accept the views of Toullier; nor did the court mention that Louisiana had no legislation corresponding to those provisions of the French Commercial Code relating to the commercial partnership.

In Smith v. McMicken, decided in 1848, the Louisiana Supreme Court again discussed the nature of the partnership. The partnership involved in that case also was a commercial one, but the language used by the court was not limited in its application to commercial partnerships. Citing Troplong as authority, the court stated:

"The partnership once formed and put into action, becomes, in contemplation of law, a moral being, distinct from persons who compose it. It is a civil person, which has its peculiar rights and attributes." This language has been quoted totidem verbis in numerous Louisiana cases in the century which has elapsed since Smith v. McMicken.

Although most Louisiana cases containing statements that a partnership is an entity have involved commercial partnerships,

24. 7 Rob. 465, 467 (La. 1844).
26. Id. at 322.
28. "The partnership is distinct from the individuals forming it." Christen v. Ruhlman, 22 La. Ann. 570, 572 (1870). The "component parts of a firm are distinct beings from the firm, as well as from each other, and their rights and liabilities must be tested and adjudicated accordingly." Paradise & Bro. v. Gerson, 32 La. Ann. 532, 534 (1880). "The partnership was a distinct personality from the individuals who compose it." Stothard v. William T. Hardie & Co., 110 La. 696, 701, 34 So. 740, 742 (1903). A partnership is "a legal entity entirely separate and distinct from the persons who compose it, and may have its own creditors and debtors to the same extent as the individual partners." E. B. Hayes Machinery Co. v. Eastham, 147 La. 947, 952, 84 So. 889, 899 (1920). See also Donohoe Oil & Gas Co. v. Mack-Jourden Co., 144 So. 169, 172 (La. App. 1932). The "mere termination of a partnership does not have the effect, ipso facto, of extinguishing the concern as a legal entity. It remains as such for the purpose of liquidation and until its affairs are completely wound up." Duvic v. Home Finance Service, 23 So.(2d) 790, 794 (La. App. 1945).
no doubt can exist that Louisiana courts also regard the ordinary partnership as an entity. As early as 1887, in *Succession of Pilcher*, the Supreme Court of Louisiana definitely committed itself to the view that even the ordinary partnership is an entity. That the ordinary partnership might differ in nature from the commercial partnership apparently did not occur to the court. The discord among French authorities as to the nature of the ordinary partnership evidently has never been brought to the attention of Louisiana courts.

In a few cases Louisiana courts have departed from the view that a partnership is an entity. One of these departures was made by the Louisiana Supreme Court in 1898 in *Drews v. Williams*. In that case Gus Drews and William Drews had agreed that the former would remove logs from certain land and that the latter would operate a mill and saw the logs into timber. Defendant, who claimed the land, obtained an injunction forbidding Gus Drews or his employees to trespass on it. The firm composed of Gus Drews and William Drews sued to recover damages caused the firm by the injunction. Defendant filed an exception of no cause of action on the ground that the partnership was a different person in law from Gus Drews, defendant in the injunction, and that the injunction did not enjoin the partnership. The court held that the injunction addressed to one of the partners had the effect of enjoining the partnership and therefore that the firm, if damaged, had a cause of action. Justice Breaux stated that the court did not feel "that always, and in every case, the firm is a legal entity, separate and distinct from its members." In addition he quoted with approval an excerpt from Lindley on *Partnership*, expounding the common law aggregate theory.

The year after *Drews v. Williams*, the Court of Appeal of the Parish of Orleans abandoned the entity theory and resorted to the aggregate view to decide *Davenport v. William Adler & Co*. In that case plaintiff had obtained in the district court a judgment *in solido* against a partnership and the individual mem-

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29. *Succession of Pilcher*, 39 La. Ann. 362, 1 So. 929 (1887); *Donohoe Oil & Gas Co. v. Mack-Jourden Co.*, 144 So. 169 (La. App. 1932). Cf. *Toelke v. Toelke*, 153 La. 697, 96 So. 536 (1923). The cases which have considered the nature of the commercial partnership also usually have used language broad enough to include all kinds of partnerships.
32. 50 La. Ann. 579, 583-584, 23 So. 897, 899.
33. Ibid.
34. 129 So. 382 (La. App. 1899).
bers. The firm, but not the individual members, applied for and obtained a suspensive appeal. The court of appeal held that an appeal by the firm brings up appeals for the individual partners who are condemned as an incident to or by reason of firm membership. Again the court quoted with approval an excerpt from Lindley on Partnership, advancing the aggregate theory, and the court left no doubt that its holding was based on the ground that a partnership is merely an aggregation of the individual members.

A comparative analysis of Louisiana and Anglo-American decisions indicates that the entity concept which Louisiana courts have adopted from the French commentators has not resulted in partnership law basically different from that of other states, even from that of aggregate jurisdictions. Most of the corollary principles which the Louisiana courts purport to deduce from the entity theory reflect themselves in underlying practices substantially the same as practices in Anglo-American jurisdictions.

One of the most important corollaries which the Louisiana courts deduce from the entity theory is that partnership property—both movable and immovable—is owned by the firm, not by the partners. They state that "the ideal being recognized by a fiction of law" is the owner, that it has the right to control and administer its property in order to fulfill its legal obligations, and that the partners own only the residuum of partnership property after firm obligations are discharged. Yet the Louisiana courts' conception of a partner's interest in partnership property actually is not essentially different from that of most Anglo-American courts. As early as 1827, in Purdy v. Hood, the Supreme Court of Louisiana noted the similarity.

In Anglo-American jurisdictions, although partners are occasionally referred to as joint tenants or tenants in common, it

35. Id. at 383.
37. The distinction drawn in Louisiana between "movable" and "immovable" property is roughly the same as the distinction made in common law jurisdictions between personalty and realty.
39. Ibid.
40. 5 Mart. (N.S.) 626 (La. 1827).
41. "The owners of property held in partnership, have not separately a particular interest in distinct portions of the common stock, but possess it each as proprietor of his undivided portion, and of the whole; or, as expressed by writers on the common law of England, in ancient Norman dialect, each partner is possessed per my et per tout." 5 Mart. (N.S.) 626, 630.
has long been settled that the partner’s interest in firm assets is not a joint tenancy or a tenancy in common. Like the Louisiana courts, many Anglo-American courts assert that the individual partners have no several rights in partnership property, even in real estate; that they own the residue remaining after the settlement of partnership accounts and the payment of firm obligations. When Anglo-American courts state that neither partner owns firm assets as such but only his share in the residue after all firm debts are discharged, that is exactly what Louisiana courts mean when they say that ownership is in the firm, a “fictitious moral being.” The Uniform Partnership Act seems to adopt the same view of the partner’s interest in firm property by referring to the partner as holding “as a tenant in partnership” and declaring that a “partner’s interest in the partnership is his share of the profits and surplus.”

If attention is focused on the rights and powers which a partner has in partnership property rather than on the verbal variations used to describe his interest, it becomes apparent that both in Louisiana and in other jurisdictions a partner’s ownership of firm property is subject to the same basic limitation: the property must be applied to partnership purposes before it can be applied to purposes not connected with the mutual enterprise.

In Louisiana, since partnership property is owned by the partnership entity, a partner cannot give a mortgage on specific firm property. In Harrington v. Harrington A sued B, his partner in a cotton ginning business, for a dissolution of the firm and sequestered all firm property. After the property had been seized under the writ of sequestration, B gave a bank a mortgage to a one-half undivided interest in firm real property. A obtained judgment and the firm property was adjudicated to him. On the day of the sale the bank intervened and asked that part of the proceeds be set aside to pay its claim. The court rejected the demands of the bank; it held that since B had only an unliquidated

42. Cowles, The Firm as a Legal Person (1903) 57 Central L.J. 343, 348; and authorities cited note 43 infra.
43. Clay v. Freeman, 118 U.S. 97, 6 S.Ct. 964 (1886); Paige v. Paige, 71 Iowa 318, 32 N.W. 360 (1887); Sherley v. Thomasson’s Ex’r, 8 Ky. L. Rep. 351, 1 S.W. 530 (1886); Mechem, Elements of the Law of Partnership (2 ed. 1920) 125-126, § 143.
44. U.P.A. § 25(1).
46. Lewis, The Uniform Partnership Act—A Reply to Mr. Crane’s Criticism (1915) 29 Harv. L. Rev. 153, 182(n); U.P.A. § 25(2). “And each partner has the privilege to possess, use and dispose of partnership property, but only for purposes of firm business.” Note (1927) 27 Col. L. Rev. 436, 437.
47. 151 So. 648 (La. App. 1934).
interest in an unliquidated partnership, the mortgage did not attach to specific pieces of partnership property. 48 Similarly, Anglo-American courts generally hold that a mortgage purportedly on a partner's interest in firm property does not vest the mortgagee with a lien on specific firm property. 49 Although the mortgage often is made effective on the partner's interest in the partnership, 50 the rights of the mortgagee are inferior to the rights of partnership creditors and to those of the other partners. 51

That a partner's individual creditor cannot attach a particular partnership asset or the debtor partner's interest in a particular asset, 52 is another important rule which Louisiana courts deduce from the entity nature of the partnership and the ownership of firm property by the entity. An individual creditor must seize the debtor partner's whole share or interest in the partnership. 53

The Civil Code of 1825 was ambiguous as to the rights of separate creditors. Article 2794 (which, incidentally, has been carried over into the present code) 54 provided:

"The partnership property is liable to the creditors of the partnership, in preference to those of the individual partner; but the share of any partner may, in due course of law, be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; 55 but such seizure, if legal, operates as a dissolution of the partnership."

Whether the redactors of the Code of 1825 meant that a separate creditor could seize the share of the debtor in specific partnership

48. Likewise, in Louisiana the sale by one partner of his interest in an unliquidated partnership is not a sale of specific property or of any interest in specific property; and therefore a vendor's lien is not created by such a transaction. Posner v. Little Pine Lumber Co., 157 La. 73, 102 So. 16 (1924).
49. Harvey v. Stephens, 159 Mo. 456, 60 S.W. 1055 (1901); Tarbell v. West, 86 N.Y. 290 (1881).
51. Note (1935) 19 Minn. L. Rev. 252; and authorities cited note 50, supra.
55. An error was made in translating the French text of this article into English; "debts of the partnership" should be "privilege of the creditors of the partnership on this property." 3 Louisiana Legal Archives, Compiled Edition of the Civil Codes of Louisiana (1942) 1541.
property or merely his interest in the firm is difficult to determine. The Code Napoleon does not contain an article which corresponds to Article 2794 of the Code of 1825.\footnote{56. Ibid.}

Even before the Louisiana courts gave verbal acceptance to the view that the partnership is an entity, they announced in several cases a rule that partnership property does not belong to the partners but is "a common stock and pledge for the payment of the debts of the firm" in preference to claims against the partners individually.\footnote{57. United States v. Baulos' Ex'r, 5 Mart (N.S.) 567 (La. 1827); Bank of Tennessee v. McKeage, 11 Rob. 130 (La. 1845).} Apparently these cases were litigated a number of years before the Louisiana courts had given consideration to the juridical nature of the partnership and adopted the entity theory.\footnote{58. See p. 456, supra.} In 1848, in Smith v. McMicken,\footnote{59. 3 La. Ann. 319 (1848).} however, the Louisiana Supreme Court grounded its decision on the entity theory. The court reasoned that, the partnership being a legal person distinct from its component members, an individual creditor cannot seize a particular asset of the partnership; that he must

". . . await the liquidation of the partnership, and, in the meanwhile, lay hold of the residuary interest of the partner in the partnership generally, by levying a seizure in the hands of the partnership, or the person charged with its liquidation and representing it."\footnote{60. Id. at 322.}

The court felt the procedure it required the separate creditor to follow was in accord with the French law as recorded in the writings of Troplong and Pardessus.\footnote{61. Cf. Fox v. Hanbury, Cowp. 445 (1776).} It recognized that a practice had grown up in Louisiana of seizing the assets of the partnership but attributed that practice to a mistaken reliance on common law authorities.\footnote{62. Id. at 323.}

The common law authorities to which the Louisiana court referred were early English decisions,\footnote{63. Heydon v. Heydon, 1 Salk 392 (1693); Jacky v. Butler, 2 Ld. Raymond 871 (1704).} holding that the sheriff in executing a judgment against a partner could seize partnership property and sell an undivided interest in it regardless of the state of accounts between the partners, and that the vendee became a tenant in common with the other partners. The Louisiana court noted that subsequent English decisions had ques-

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\footnotetext{56. Ibid.}
\footnotetext{57. United States v. Baulos' Ex'r, 5 Mart (N.S.) 567 (La. 1827); Bank of Tennessee v. McKeage, 11 Rob. 130 (La. 1845).}
\footnotetext{58. See p. 456, supra.}
\footnotetext{59. 3 La. Ann. 319 (1848).}
\footnotetext{60. Id. at 322.}
\footnotetext{61. Ibid.}
\footnotetext{62. Id. at 323.}
tioned the correctness of the early cases; but it was not aware, probably because the latest English legal materials were not available in Louisiana, that at the time Smith v. McMicken was decided the English practice already had been modified. By that time a sheriff in England could make only a constructive levy (he was not privileged to remove the specific items of property from the possession of the other partners) and could sell only an undivided interest in the property corresponding to the debtor's interest in the firm.

Only minor variations now exist in American jurisdictions in a separate creditor's rights to proceed against partnership property. Courts championing the entity theory, as might be expected, use language similar to that of the Louisiana courts. They assert that until partnership debts are paid and the surplus divided among the partners a separate creditor cannot attach partnership property, that all he can do is to attach the partner's interest in the firm. The results attained in aggregate jurisdictions are not radically different: courts in aggregate jurisdictions do not permit a separate creditor to attach and cause to be sold specific items of partnership property. Most aggregate courts, it is true, still permit a levy on partnership property and permit the sheriff actually to take possession. But they have adopted the English view (prior to the English Partnership Act of 1890) as to the nature of the interest sold: the purchaser does not receive title to an undivided share of the property but only to the indebted partner's interest in the firm. Other American jurisdictions have followed English practice prior to the English Partnership Act of 1890 both in limiting the levy to a constructive one and in permitting a sale only of the debtor partner's interest in the firm.

The Uniform Partnership Act, following in this respect the English Partnership Act of 1890, provides for a charging order in favor of a separate judgment creditor on a debtor partner's interest in the firm. The charging order authorized by the Uniform Partnership Act is similar in effect not only to the practice

64. 3 La. Ann. 319, 323 (1848).
65. Note (1927) 27 Col. L. Rev. 436, 439 and authorities there cited.
66. Lewis, The Uniform Partnership Act—A Reply to Mr. Crane's Criticism (1915) 29 Harv. L. Rev. 158, 181(n).
67. White v. Jones, 38 Ill. 159 (1865); Wickham v. Davis, 24 Minn. 167 (1877); Deal v. Bogue, 20 Pa. 228, 57 Am. Dec. 702 (1853); Crane, Handbook of the Law of Partnership (1938) 159-160, § 42.
68. See Note (1927) 27 Col. L. Rev. 436, 440.
69. 53-54 Victoria, c. 29, § 23.
70. U.P.A. § 28(1).
prevailing in England prior to the English Partnership Act but also to the practice followed in Louisiana. Under the Uniform Partnership Act and in Louisiana a partner’s interest in specific partnership property is not subject to attachment on the claim of a partner’s separate creditor. Under the act the debtor partner’s interest in the firm can be charged with the payment of a separate debt; in Louisiana “the residuary interest of the partner in the partnership generally” can be “seized,” but the partnership property remains in the possession of the partners. Neither under the act nor in Louisiana is the sheriff permitted to disrupt unnecessarily partnership affairs by taking possession of firm property. The act permits a sale of the interest charged; the Louisiana courts permit sale of the interest “seized.” The interest of the debtor partner which a separate creditor can charge under the act or attach in Louisiana is subject to the rights of firm creditors and of his co-partners. The only difference in practice—and the importance of this difference is questionable—is that in Louisiana a seizure of a partner’s interest in the firm operates as a dissolution of the partnership; under the Uniform Act a charging order does not of itself dissolve the partnership, but the court must decree a dissolution on application by the purchaser of the interest charged.

The Supreme Court of Louisiana has used the entity theory to support a holding that on the death of a partner firm funds cannot be applied to the allowance of his minor child left in necessitous circumstances if such an application of partnership

71. U.P.A. § 25(2c).
72. Authorities cited note 52, supra.
75. See U.P.A. § 28(2).
76. Art. 2823, La. Civil Code of 1870; Pittman & Barrow v. Robicheau, 14 La. Ann. 108 (1859). Numerous authorities for this proposition are listed in Toelke v. Toelke, 153 La. 697, 704, 96 So. 536, 539 (1923), but careful examination of the judgment of the district court for the Parish of Orleans which was reinstated by the Supreme Court of Louisiana in Toelke v. Toelke raises a serious question as to whether the sale of the interest of a partner in the firm or merely his interest in a specific firm asset was ordered.
77. U.P.A. § 40.
80. U.P.A. § 28(2).
81. U.P.A. § 32(2).
82. A widow or minor child left in necessitous circumstances has a preferred claim under certain conditions to $1,000 from the succession (estate) of the deceased. Art. 3252, La. Civil Code of 1870.
funds prejudices partnership creditors. Yet, the same result is reached in most aggregate jurisdictions. The Uniform Partnership Act expressly provides that a partner’s right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs or next of kin. As a matter of fact, an examination of the first Louisiana case holding that the privileged claim of a minor child left in necessitous circumstances cannot be asserted against partnership property to the prejudice of firm creditors shows that the court’s holding was in part supported by the writings of Story.

Louisiana partnership practice in actions by or against firms differs considerably from the practice in many Anglo-American jurisdictions. This dissimilarity is the only one of importance ascribable to Louisiana’s adherence to the entity theory.

At common law, of course, the partnership, since it did not have a legal existence separate from the individuals composing it, could not sue or be sued in its firm name. Actions for the firm had to be brought in the names of the partners, and actions to enforce firm liabilities had to be brought against the individual partners. These common law rules in many states have not been changed by statute.

Early Louisiana practice seems to have been similar, the partners joining to sue in their own names on firm claims and being joined as parties defendant in suits on firm obligations. In 1859, however, in Key v. Box the Supreme Court of Louisiana decreed that, during the existence of a partnership, suit must be brought against the firm and not against individual partners. The court did not mention the entity theory; but, since in cases decided only a few years before the court had given much thought to the nature of the partnership, the decision in Key v.

85. U.P.A. § 25(2a).
89. Hotchkiss v. Di Vita, 103 Conn. 436, 130 Atl. 668 (1925); Mechem, op. cit. supra note 84, at 296-297, § 333.
91. See David v. Elol, 4 La. 106, 107 (1832).
93. See p. 454, supra.
Box well might be attributed to the channeling of the court's thinking along entity lines.

Even after the *Key v. Box* decision and up to 1900, at least in suits brought on firm claims, the courts continued to permit partners to appear in their own names as parties litigant. In 1900, however, the Supreme Court of Louisiana in *Wolf v. New Orleans Tailor-Made Pants Company* affirmed dismissal of a suit brought in the names of individual partners and enunciated definitively that litigation on firm claims must be brought in the firm name. The decision was grounded on the idea that the firm was the legal entity which owned the cause of action. Subsequent decisions have followed the line of reasoning advanced in *Wolf v. New Orleans Tailor Made Pants Company*. In Louisiana law it is now firmly established not only that the firm is capable of bringing suit in the firm name and is subject to suit in the firm name but also that during the existence of the partnership actions on firm claims can be maintained by the firm alone and litigation based on partnership obligations must be brought against the firm and not against the individual partners.

In a number of Anglo-American jurisdictions the common law rules prohibiting actions by and against firms have been modified by statutes, the effect of which is to bring the practice in those jurisdictions more nearly into accord with Louisiana practice. Some statutes permit partnerships both to sue and to be sued in the firm names. Others permit suits against partnerships in their firm names, either generally or where the names of members are unknown when the action is commenced.

Most statutes permitting suits by or against a partnership are permissive, not mandatory. Unlike in Louisiana, partners in jurisdictions having these statutes still may bring suit on firm

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96. 52 La. Ann. 1357, 27 So. 893 (1900).
claims and third persons may sue a firm in the individual names of its members. Even in most entity jurisdictions, the statutes retain the common law practice as a permissible procedure.\textsuperscript{102}

Several statutes, as interpreted by the courts, carry the entity idea even further than the Louisiana decisions. The Louisiana courts, in spite of their adherence to the entity view and their holdings that the partnership is the proper party litigant, insist that the pleading show the partnership as appearing in court “through and represented by all of the partners composing the partnership; their full names and residence being set out.”\textsuperscript{103} On the other hand, an Alabama court, in applying the Alabama statute, held the designation of the defendant partnership by the firm name without more was sufficient.\textsuperscript{104} Similarly, under the Iowa statute a judgment can be obtained and enforced against the partnership entirely apart from its individual members.\textsuperscript{105}

Alabama courts also carry the entity theory to its logical conclusion in the effect they give a judgment obtained against a partnership. They hold that such a judgment binds only the property of the firm, that it cannot be made the basis of a suit against the partners.\textsuperscript{106} If the partners are sued at all, the suit must be on the original demand.\textsuperscript{107} Louisiana courts, on the contrary, seem in effect to abandon the entity theory at time of judgment. Partners in Louisiana, it is true, cannot be made to respond except in a suit against the firm;\textsuperscript{108} but, if the debt is established by suit, judgment is rendered against the partners as well as against the firm. If the firm is commercial, the judgment against the firm and the partners will be in \textit{solido};\textsuperscript{109} if the firm is an ordinary one, the judgment will be against the firm and against each partner for his “virile” share.\textsuperscript{110} The practice of rendering judgment against the partners appears to be a carry-over from

\textsuperscript{102} Code of Iowa (1935) § 10983.
\textsuperscript{104} Chero-Cola Bottling Co. v. Watford, 19 So.(2d) 77 (Ala. App. 1944).
\textsuperscript{105} See Western Mut. Fire Ins. Co. v. Lamson Bros. & Co., 42 F. Supp. 1007, 1011 (S.D. Iowa, 1941), and authorities there cited.
\textsuperscript{106} Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806 (1911).
\textsuperscript{107} Ibid.
\textsuperscript{108} E. B. Hayes Machinery Co. v. Eastham, 147 La. 347, 84 So. 898 (1920); Snyder v. Davison, 172 La. 274, 134 So. 89 (1931).
cases decided prior to the acceptance of the entity view by the Louisiana courts, cases which apparently approved the practice of rendering judgment only against the partners. The Louisiana courts consistently have held that, since the partnership is an entity separate and apart from the partners, partnership debts cannot be compensated against the claims of an individual partner or the debts of an individual partner against partnership claims. "Compensation," incidentally, is a civil law term roughly equivalent to common law set-off; the one difference is that compensation can take place by operation of law while a set-off must be pleaded. In Louisiana an individual defendant cannot plead in compensation to his debt a claim he has against a firm of which the plaintiff is a member; and a member of a firm sued by his individual creditor cannot plead in compensation a debt due by that creditor to the firm. Likewise, a firm debt cannot be compensated by a credit of an individual partner. Similarly, in a suit by a partnership to recover on firm claims the defendant cannot establish claims against an individual partner of the plaintiff firm and plead them in compensation. Yet the identical result is reached in aggregate jurisdictions in every one of these situations; a set-off is not allowed because of "a lack of mutuality of parties." Though the reason given by the Anglo-American courts differs from that given by the Louisiana courts, the underlying practice unquestionably is the same.

111. See David v. Eloi, 4 La. 106, 107 (1832); Chapman v. Early, 12 La. 230 (1838).
The Louisiana courts feel that still other rules follow from the fact that the partnership is an entity, but in each instance investigation will show that quite similar rules prevail in aggregate jurisdictions. For instance, in Louisiana the rule that a partnership can become a member of another firm is grounded on the idea that each partnership is a separate entity. Yet the same rule long has prevailed in common law jurisdictions. In *Jurgens v. Ittman* the supreme court utilized the entity theory in a rather unusual way. The mental capacity of one partner became impaired. His co-partner continued to carry on firm business and entered into a contract on behalf of the firm with a third person who was unaware of the other partner's mental condition. The court held that the validity of the contract was not affected by the mental weakness of one of the partners. The holding was based on the theory that, the partnership being a distinct entity, the consent of any one of the members is the consent of the firm. Yet, the same result has been reached in similar cases in aggregate jurisdictions. In fact, the court in deciding *Jurgens v. Ittman* relied much on a case from an aggregate jurisdiction.

The Louisiana cases thus far examined show that the Louisiana courts' devotion to the entity theory has not prevented them in most situations from attaining results virtually identical with those reached in Anglo-American jurisdictions. And in one comparatively recent case, *Dezendorf v. National Casualty Company*, a Louisiana court ignored the entity theory altogether when adherence to it made difficult a decision in accord with the jurisprudence of other states. In the *Dezendorf* case plaintiff and Prudhomme, carpenters, entered into a partnership contract. Each was to receive $35 a week, and profits were to be divided equally. The plaintiff, having been injured on a partnership job, brought suit under the Workmen's Compensation Act against the partnership and its insurer. The plaintiff's contention was that he was an employee and that the partnership, a distinct entity, was his employer. On appeal the Court of Appeal for the Second Circuit

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120. Clements v. Luby Oil Co., 15 La. App. 384, 387, 130 So. 851, 853 (1930), and authorities there cited.
121. Houston v. McCrory, 140 Okla. 21, 282 Pac. 149 (1929); McLaughlin v. Mulloy, 14 Utah 490, 47 Pac. 1031 (1897).
125. 171 So. 160 (La. App. 1936).
conceded that the partnership was an entity but failed to discuss the bearing, if any, that fact had on the question being litigated. The court completely disregarded the entity argument and instead looked to Anglo-American jurisdictions for guidance. It cited thirty-one Anglo-American cases and adopted the rule which, with the exceptions of Oklahoma and Michigan, prevails in Anglo-American jurisdictions, namely, that a partner cannot recover compensation as an employee from the partnership of which he is a member. That rule applies in Anglo-American jurisdictions even though the partner performs labor with the employees of the partnership and does the same kind of work as employees. The reason usually given for this rule is that the Workmen’s Compensation Act does not contemplate the “anomaly of one person occupying the dual relation of Master and Servant.” Perhaps if the question is ever presented, the Louisiana Supreme Court will carry the entity idea to its logical extreme as the Oklahoma courts have done. It is interesting to note, however, that at least one entity jurisdiction other than Louisiana has accepted the majority rule.

One problem which has interested legal scholars is whether a partner when acting within the scope of partnership business is the agent of the firm or whether he is the agent of his co-partners as individuals. In Louisiana and in other entity jurisdictions the partner is regarded as acting for the firm as principal. In aggregate jurisdictions, on the other hand, the partners are considered agents, not of the firm, but of one another; a partner is deemed an agent of his co-partners when he is acting, and as a principal of a co-partner when the latter is acting. Courts in aggregate jurisdictions find themselves involved in some logical difficulties because, according to the aggregate theory, the partner engaged in partnership transactions is acting as a principal for himself and at the same time as an agent for his co-partners.

126. Ibid.
In reality, the decisions even in aggregate jurisdictions in effect recognize the firm as the principal; and the Uniform Partnership Act expressly provides that every partner is “an agent of the partnership for the purpose of its business.”

Many Anglo-American courts utilize the theories as to the nature of the partnerships to support constructions of statutes or interpretations of insurance policies or other contracts. Williams v. Hartshorn and In re Morrison’s Estate are typical examples of the use of the aggregate conception in construing statutes. In Williams v. Hartshorn the deceased, an employee of a partnership, died as a result of injuries arising out of and in the course of his employment. One of the partners owned the premises where the partnership business was conducted and where the deceased was killed. The administrator of the deceased brought a common law action for negligence against the partner who owned the premises. The court held that the intent of the Workmen’s Compensation law was to relieve the employer of all liability other than compensation; and that, since a partnership is not a separate entity, the statute relieved the defendant from liability.

In the Morrison’s Estate case the court had under consideration the Liquid Fuel Tax Act of Pennsylvania, which provides that all taxes collected by a dealer shall be a lien upon his franchise or property. The court held that, a partnership not being an entity, the individual partners were the dealers within the meaning of the taxing statute, and that the lien extended not only to the property used in the partnership business but to all separate property of the partners.

A Mississippi case, Fidelity Phoenix Fire Insurance Company v. Howard, is an example of the use of the aggregate theory in interpreting a contract. In that case A and B operated as partners two businesses, one a radio shop, the other a motor company. The businesses were operated in the same building but they had separate firm names and the bookkeeping and all details of operation were kept separate. C, an employee of the radio

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139. 343 Pa. 157, 22 A.(2d) 729 (1941).
140. 182 Miss. 546, 181 So. 846 (1938).
shop, stole an automobile belonging to the motor company. The automobile was insured for the benefit of the motor company, but the policy excepted from its coverage thefts by employees of the insured. In a suit by A and B to recover on the policy, the court held that since a partnership has no legal existence distinct from the persons who compose it, the automobile belonged to the same persons who employed C and therefore the theft was not covered by the policy.

The courts in other jurisdictions, on the other hand, tend to interpret statutes in the light of the entity theory. In State v. Pielsticker defendants, officers and directors of a state bank, were members of a partnership which borrowed money from the bank. They were charged with violating a criminal statute prohibiting a bank's officers or directors from borrowing from it without first securing the consent of the bank's board of directors. The court held the defendants not guilty because the partnership which borrowed the money was a legal entity distinct from the partners. In Anderson v. Dukes the entity theory was used in the interpretation of an insurance contract. The insurer had issued a Workman's Compensation policy to A individually. As a defense in a suit on the policy the insurer claimed that the employee had been injured while working on operations of a partnership of which A was a member. The court held that a partnership constitutes an entirely different employer from one of the partners, and that the evidence would have to be reviewed to determine whether the employee had been injured on a partnership or on an individual operation.

The Louisiana courts also have utilized the entity concept in construing statutes and in interpreting contracts. In First National Bank of Shreveport v. Davis a partnership of which the plaintiff's debtor was a member transferred its assets in bulk to a corporation without complying with the provisions of the Bulk Sales Act. Plaintiff brought suit against his debtor and against the corporation for the amount of the indebtedness and prayed that the transfer of assets be set aside and that writs of attachment issue against the property. The court refused to dis-
turb the transfer, holding that the partnership, a civil person with distinct "rights and attributes," was not under an obligation to comply with the Bulk Sales Act with respect to the claim of the plaintiff.

In Terzia v. The Grand Leader\(^\text{147}\) plaintiff leased certain property to the deceased allegedly for the use and benefit of a commercial firm composed of the deceased and two other members. After the deceased died, the surviving partners continued to operate under the firm name and to occupy leased property. Plaintiff brought suit against the firm and the surviving partners for rent due, requesting a provisional seizure of merchandise in the leased building.\(^\text{148}\) The court held that even if that lease be conceded to have been made to the partnership, the firm was dissolved by the death of deceased; that, the firm being a distinct legal entity, the surviving partners were not tenants of the plaintiff; that where no contract, express or implied, exists between the owner of a building and the one who occupies it, the owner is not entitled to a lessor's privilege or a provisional seizure of property in the building.

The use of the entity or aggregate conception is not helpful in interpreting statutes or contracts. A scrutiny of many cases will show that the entity or the aggregate theory upon which the courts purport to rely is nothing more than a convenient rationalization of a result actually predicated on other considerations. In other cases the courts seem to become involved in the abstract question of whether or not a partnership is a legal unit and apparently lose sight of their objective, the ascertaining of legislative intent or of the intentions of contracting parties. In Fidelity Phoenix Fire Insurance Company v. Howard\(^\text{149}\) and in State v. Pielsticker,\(^\text{150}\) for instance, the courts seem to have complicated their problems unnecessarily by considering the legal nature of the partnership. In giving effect to statutes or to contracts, the courts, rather than following a predetermined theory as to the nature of a partnership, should attempt to carry out the purposes of the legislature or to determine the intentions of the parties to a contract. Unwary courts often carry deductions from a particular theory over into areas where such deductions properly have no application.

The aggregate and entity ideas are not premises from which

\(^{147}\) 176 La. 151, 145 So. 363 (1933).
\(^{149}\) 182 Miss. 546, 181 So. 846 (1938).
\(^{150}\) 118 Neb. 419, 225 N.W. 51 (1929).
to reason. These concepts are purely linguistic devices\textsuperscript{151} sometimes useful in clarifying ideas. That the use of such concepts is not at all essential is demonstrated by the fact that some courts frequently decide without mentioning the aggregate or the entity theory the same kinds of cases in which other courts discuss one or the other of those theories at great length. The courts should recognize frankly that to regard the partnership as an entity is useful for some purposes but not for others. It is definitely undesirable to accept a particular theory of the juridical nature of the partnership and then to reason abstractly from that theory, deducing rules rather than developing practical solutions for particular problems.

That neither the aggregate nor the entity theory can be followed consistently in all situations has been recognized by many judges. Courts in aggregate jurisdictions in particular often have shown a tendency to abandon the aggregate theory in certain situations,\textsuperscript{152} and quite often legislatures in aggregate jurisdictions find it desirable to treat a partnership as an entity for certain purposes.\textsuperscript{153} The departures from the aggregate theory often are made consciously. Thus a California court\textsuperscript{154} conceded that the partnership is frequently regarded as an entity in reference to particular rights and obligations, and a New Jersey court said that, while

"... a partnership does not have a separate existence for all purposes and is by no means of such detached individualism as is a corporation ..., nevertheless in diverse respects a partnership may, in this jurisdiction, come within the legal conception of a distinctive being, viz., an entity."\textsuperscript{155}

Even a New York court\textsuperscript{156} has conceded that, while as a general rule a partnership is not a legal entity separate and apart from

\begin{footnotesize}
\begin{enumerate}
\item Mason v. Mitchell, 135 F.(2d) 599, 600-601 (C.C.A. 9th, 1943).
\item "Obviously it was the legislative intent to treat a partnership as an employing unit separate and apart from its several partners." Schwartzman v. Miller, 262 App. Div. 635, 30 N.Y.S.(2d) 882, 884 (1941), affirmed In re Rose Schwartzman, 288 N.Y. 568, 42 N.E.(2d) 22 (1942). See also U.P.A. §§ 8, 10.
\item Finston v. Unemployment Compensation Comm., 132 N.J.L. 276, 29 A.(2d) 697, 698 (1944).
\end{enumerate}
\end{footnotesize}
the individuals composing the firm, "yet for many purposes a partnership is regarded by the courts as a separate entity."

Courts in entity jurisdictions similarly will disregard the entity theory under exceptional circumstances, much as courts pierce a corporate entity to achieve desired results. Thus, in *Chisholm v. Chisholm Construction Company* the Michigan court stated that "to prevent an injustice or fraud, we do not hesitate to disregard the fictional entity of the partnership and regard the members as individuals." *Dezendorf v. National Casualty Company*, previously discussed, is an example of a Louisiana case in which the court disregarded the entity.

The conclusion seems unavoidable that Louisiana's entity theory has not resulted in practices which differentiate Louisiana law from law in other states. In the first place, many states have adopted entity ideas which even verbally are not much different from the entity concept Louisiana borrowed from the French commentators. But more significant, this section has shown that many of the supposed differences between the aggregate and entity theories are purely verbal. In most situations where the Louisiana courts utilize the entity theory to explain their conclusions, underlying practices in Louisiana do not differ from practices prevailing in aggregate jurisdictions. Further, an analysis of the cases in Louisiana and in other jurisdictions shows that the courts often use the entity or aggregate concepts as a convenient rationalization for conclusions actually predicated on other grounds. That many courts are beginning to realize that neither theory furnishes an adequate premise from which to deduce rules to fit all problems is demonstrated by their departure from the prevailing theory whenever an occasion seems to demand. If partnership practice in Louisiana differs materially from practice in other states, those differences cannot be attributed to the Louisiana courts' adherence to the entity view.

**A Critical Appraisal of Louisiana Classifications of Partnerships**

The aim of this section is to examine the various kinds of Louisiana partnerships to ascertain (1) whether the Louisiana

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158. 298 Mich. 25, 298 N.W. 390, 393 (1941).

159. 171 So. 180 (La. App. 1938).

160. See p. 466, supra.
devices have counterparts in Anglo-American jurisdictions, (2) whether the Louisiana classifications serve useful purposes, and (3) whether the rules relating to each kind of Louisiana partnership are more satisfactory or less satisfactory than those relating to the most nearly corresponding Anglo-American devices. An initial difficulty encountered is to determine definitely what classes of partnerships exist in Louisiana law and what incidents are characteristic of each. Lawyers and jurists in Louisiana at times have used a single designation to refer to two distinct devices and on occasions have affixed two different appellations to a single device.

A number of articles in the Louisiana Civil Code purport to classify Louisiana partnerships and to define each kind of partnership. These provisions—read alone—are contradictory and perplexing. Article 2824 classifies partnerships “as to their object” into commercial partnerships and ordinary partnerships. Commercial partnerships are defined by Article 2825 as those partnerships which are formed:

1. For the purchase of any personal property and the sale thereof, either in the same state or changed by manufacture.
2. For buying or selling any personal property whatever, as factors or brokers.
3. For carrying personal property or passengers for hire, in ships, vessels or in any other vehicle for transportation.”

Article 2826 defines ordinary partnerships as “all such as are not commercial” and divides them into universal and particular partnerships. A universal partnership, according to Article 2829, is a contract by which the parties agree to make a common stock of either (1) all personal property they possess, or (2) the fruits from all such personal property, or (3) all property both real and personal possessed by the parties, or (4) the fruits from all property of both types. The universal partnership, by definition therefore, may include businesses of a commercial nature. That commercial firms can be carried on under universal partnership is confirmed by Article 2832.

164. Ibid.
165. Ibid.
166. Ibid.
167. For a definition of “fruits,” see Art. 545, La. Civil Code of 1870.
Article 2829, read in connection with Article 2832, seems inconsistent with Article 2826 since, as has been previously indicated, the latter article defines ordinary partnerships as "all such as are not commercial" and states that universal partnerships are a subdivision of ordinary partnerships. Furthermore, Article 2835 defines particular partnerships as "such as are formed for any business not of a commercial nature," a definition which makes particular partnerships identical with ordinary partnerships as defined by Article 2826. An additional reason exists for questioning the accuracy of the definition of particular partnerships contained in Article 2835. Under that definition those universal partnerships which are not commercial in nature would be particular partnerships; yet, as has been noted, universal partnerships and particular partnerships, according to Article 2826, are the two subcategories of ordinary partnerships.

To clarify the articles of the Louisiana Civil Code classifying partnerships, resort must be had to provisions of the French Civil Code, to those of earlier Louisiana codes, and to the writings of the French commentators. An examination of the backgrounds of the various kinds of Louisiana partnerships and a study of corresponding French concepts reveal a solution to the problems raised by the discrepancies in the provisions of the present Louisiana Civil Code.

The French Civil Code makes a primary classification of partnerships by stipulating that partnerships "are either universal or particular." In other words, all partnerships which are not universal are particular partnerships. The Louisiana Civil Code of 1808 contained an identical provision. As can be seen from Article 2829 of the Louisiana Civil Code or corresponding provisions in the French Civil Code, the universal partnership actually is a contract creating a community of property. The true partnerships are those which are not universal, that is, the particular partnerships. In universal partnerships the parties pool all their assets or all their personal property; in particular partnerships the partners pool only particular property or specified services. The French Civil Code describes the particular partnership as follows:

172. Arts. 1836, 1837, French Civil Code.
173. In Bougerol v. Allard, 6 Rob. 351, 352 (La. 1844), the court erroneously considered a particular partnership to be a partnership "confined to a single transaction."
"The particular partnership is that which relates to certain specified things, to their use, or to the benefit to be derived from the same."\textsuperscript{174}

"The contract by which several persons associate together either for a specified undertaking or for the exercise of some trade or profession is likewise a particular partnership."\textsuperscript{175}

The French subdivide particular or true partnerships into civil partnerships and commercial partnerships.\textsuperscript{176} The definition of the particular partnership incorporated into the Louisiana Civil Code of 1808 was practically identical with the French definition,\textsuperscript{177} but it was beclouded by subsequent articles of that code.\textsuperscript{178}

The redactors of the Louisiana Civil Code of 1825, when they drafted the counterparts of the articles numbered 2826 and 2835 in the present Louisiana code, departed from the French definitions. Their reason for incorporating those articles into the Code of 1825 is not clear. Obviously those articles were inconsistent with other provisions of that code. The redactors probably did not understand clearly the differences between the various partnership concepts; perhaps they were confused by the imprecise definitions contained in the Code of 1808. At any rate, about 1825, many members of the legal profession in Louisiana seem to have had conceptions of the characteristics of the "particular" partnership which did not accord with the traditional civil law definition.\textsuperscript{179}

In discussing the various kinds of Louisiana partnerships, this paper returns to the original civil law classifications. Article 2835 and the last clause of Article 2826 are disregarded since those provisions are meaningless and incomprehensible when read in connection with other articles of the code. The result is that in this paper Louisiana partnerships are divided first into universal partnerships and particular partnerships. The latter, or true partnerships, in turn are classified "as to their object" into ordinary partnerships and commercial partnerships. This classification corresponds to the French classification into civil and commercial partnerships. "Ordinary"\textsuperscript{180} rather than "particular"

\textsuperscript{174} Translation, Art. 1841, French Civil Code.
\textsuperscript{175} Translation, Art. 1842, French Civil Code.
\textsuperscript{176} 23 Baudry-Lacantinerie et Wahl, Traité Théorique et Pratique de Droit Civil, de la Société, du Prêt, du Dépot (3 ed. 1907) 72, n° 104; Guilloard, Traité du Contrat de Société (1892) 153, n° 89.
\textsuperscript{177} Arts. 12, 13, p. 390, La. Civil Code of 1808.
\textsuperscript{178} Arts. 14, 15, p. 390, La. Civil Code of 1808.
\textsuperscript{179} See cases cited note 181, infra.
\textsuperscript{180} Not to be confused with the classification "ordinary" that some Anglo-American writers make in partnerships. See Gilmore, Handbook on the Law of Partnership (1911) 103-104, §§ 31, 32.
is used to designate the Louisiana non-commercial partnership because (1) the former term historically is the sounder designation in view of the concepts existing in French law when the Louisiana Civil Code of 1825 was adopted; (2) "particular" is used to distinguish the true partnership from the universal partnership; (3) "ordinary" conforms to the terminology now used by Louisiana lawyers. Although the courts in some early cases used "particular" to refer to a non-commercial partnership, 181 "ordinary" is the term almost invariably employed at the present time. 182

The universal partnership can be dismissed with brief mention. It was never popular in Louisiana. 183 Only one reported case in Louisiana legal history has been found in which a universal partnership was held to have been created. 184 The articles of the Civil Code on the universal partnership 185 apparently were incorporated into the code through inadvertence. The universal partnership had disappeared from French law at the time the Code Napoleon was prepared, but the redactors provided for the universal partnership thinking that it might regain its popularity. 186 Little use has been made in France of the universal partnership since the adoption of the Code Napoleon. 187 The redactors of the Louisiana Civil Codes of 1808 and 1825, apparently with no inquiry into the utility of the universal partnership, brought that institution into Louisiana law. This archaic device, however, does not serve to differentiate Louisiana law from Anglo-American law. Strangely enough, a universal partnership practically identical with the device described in the Louisiana Civil Code


182. The court in In re Liquidation of Mitchell-Borne Const. Co., 145 La. 379, 382, 82 So. 377, 378 (1919), perhaps somewhat in doubt as to the distinctions between the various types of partnerships, referred to the firm there under consideration as "an ordinary and particular partnership." See also Buard v. Lemée, 12 Rob. 243, 247 (1845).

183. Saunders, Lectures on the Civil Code of Louisiana (ed. by Bonomo, 1925) 497, states: "No universal partnership ever existed under the sun, and I do not think that anyone who had sense or intelligence would have defined such an arrangement."

184. Reynaud's Heirs v. Peytavin's Executors, 13 La. 121 (1839). For cases in which such a relation was alleged to exist but was not found by the court, see Murrell v. Murrell, 33 La. Ann. 1233 (1881); Lagarde v. Dabon, 155 La. 25, 98 So. 744 (1924); Succession of Arnold, 170 La. 744, 129 So. 150 (1930); Gray v. Carter, 176 So. 885 (La. App. 1937).


186. The indecision of the redactors of the Code Napoleon on whether to prohibit partnerships of the universal type is discussed in Guilloard, Traité du Contrat de Société (1892) 169-171, no 102.

187. See 11 Huc, Commentaire Théorique & Pratique du Code Civil (1898) 56, no 44.
theoretically is possible in Anglo-American jurisdictions. In fact, a few associations have been created in Anglo-American jurisdictions which seem to coincide with the Louisiana definition of the universal partnership.

The classification of Louisiana partnerships into commercial and ordinary firms corresponds in general to the distinction drawn in some Anglo-American jurisdictions between trading or commercial partnerships and non-trading or non-commercial partnerships. The terms "trading" and "non-trading" at one time were used frequently by Anglo-American courts, and even today are used occasionally in some jurisdictions, to distinguish partnerships engaged in frequent purchasing for the purpose of sale in the same or improved form from those not so engaged. As in Anglo-American jurisdictions, in Louisiana the nature of the business conducted determines whether a partnership is commercial. Usually firms which are classified as trading in Anglo-American jurisdictions, namely, those which buy and sell as a business, also would be deemed commercial in Louisiana.

188. Gilmore, Handbook on the Law of Partnership (1911) 104, § 32. "We can see no reason why parties should not be competent to form a universal partnership. There is nothing impractical in it, nor against morality or public policy." Gray v. Palmer, 9 Cal. 616, 640 (1855).
190. Occasionally referred to as partnerships of employment and occupation. See Lee v. First Nat. Bank of Ft. Scott, 45 Kan. 8, 25 Pac. 196 (1890);
192. American Nat. Bank v. Reclamation Oil Producing Ass'n, 156 La. 652, 101 So. 10 (1924); Southern Coal Co v Sundbery & Winkler, 158 La. 386, 104 So. 124 (1925). "It is the dealings and business of a partnership which make it a commercial one, not the form of the obligations they may contract." McGehee v. McCord, 14 La. 362, 365 (1840). For discussions of the differences between the French civil and commercial partnerships, see 23 Baudry-Lacantinerie et Wahl, Traité Théorique et Pratique de Droit Civil, de la Société, du Prêt, du Dépot (3 ed. 1907) 72-86, nos. 104-124; Guillouard, Traité du Contrat de Société (2 ed. 1892) 157, n° 91. "Scientifiquement le caractère civil commercial d'une société se détermine par la nature des opérations de la société ..." 11 Huc, Commentaire Théorique & Pratique du Code Civil (1898) 58, n° 46.
194. The following cases illustrate the types of businesses which, when conducted by partnerships, result in commercial firms: Norris' Heirs v. Ogden's Ex's, 11 Mart.(O.S.) 455 (La. 1822) (firm conducting business as iron mongers); Hubbell v. Read, 14 La. 243 (1840) (firm doing business as "wood merchants, and running drays for hire"); English v. Wall, 12 Rob. 132 (La. 1846) (dealers in exchange); Nachtrib v. Prague and Sherman, 6 La. Ann. 759 (1851) (firm engaged in running sawmill, buying timber, and manufacturing lumber out for sale); Coward v. Pulley, 11 La. Ann. 1 (1856) (business of manufacturing carriage); Copley v. John Lawhead & Co., 11 La. Ann. 615 (1856) (enterprise "to run steam-sawmill, make and sell timber, and to carry
Conversely, those partnerships which would be classified as non-trading in Anglo-American jurisdictions, such as firms engaged in the practice of law, in engineering, or in carpentry, would be deemed ordinary partnerships in Louisiana.\textsuperscript{195}

By the last paragraph of Article 2825 of the Louisiana Civil Code partnerships "carrying personal property or passengers for hire" are designated as commercial. Prior to amendment by Act 150 of 1930, the paragraph listed as commercial partnerships those formed "3. For carrying personal property for hire, in ships or other vessels." The Louisiana courts uniformly construed the original provision to exclude from the category of commercial partnership those firms engaged in carrying personal property for hire other than in ships or other vessels.\textsuperscript{196} The amended version leaves no doubt that partnerships engaged in transporta-

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\textsuperscript{196} G. P. Eberle & Co. v. Schmidt Osborne Storage & Transfer Co., 9 La. App. 378, 119 So. 442 (1928). The term "vessel" was limited to "any structure which is made to float upon the water, for purposes of commerce or war, whether impelled by wind, steam or oars." John Chaffe & Bro. v. Ludeling,
Whether partnerships engaged in transportation would be classed as trading firms in Anglo-American law is doubtful. A definitive answer does not seem to have been given by Anglo-American courts.

Anglo-American courts often have difficulty in determining whether a certain partnership is a trading or a non-trading firm; Louisiana courts also frequently have trouble classifying a partnership as commercial or ordinary. Quite often the characteristics of a partnership are heterogeneous. The Louisiana courts have not resorted to either French or Anglo-American authorities for assistance in classifying partnerships with "mixed objects." Yet the jurisprudence which the Louisiana courts have developed independently is similar in large part to Anglo-American jurisprudence.

The Louisiana courts have held that an ordinary partnership does not become a commercial firm by engaging in incidental and comparatively unimportant and infrequent commercial acts. Thus, plumbers are not commercial partners because in connection with their business they furnish plumbing supplies, nor

27 La. Ann. 607, 611 (1875). Thus, common carriers by rail were not commercial partners. John Chaffe & Bro. v. Ludeling, supra. Likewise, a partnership engaged in the transfer and storage of movable property for hire by automobile was not a commercial one. G. P. Eberle & Co. v. Schmidt Osborne Storage & Transfer Co., supra; Independence Indemnity Co. v. Carmical & Woodring, 13 La. App. 64, 127 So. 10 (1930). The courts eventually recognized that policy dictated that carriers by rail and automobile be held to the responsibility of commercial partners but concluded that a contrary interpretation of Article 2824 had become a rule of property which could not be disturbed without legislative action. G. P. Eberle & Co. v. Schmidt Osborne Storage & Transfer Co., supra. The legislature acted in 1930.

197. A similar result was reached by French courts without legislative action. Cass., 8 nov. 1892, D.93.1.78; Cass., 3 fév. 1902, S.1902.1.72. See also Lyon, 4 juill. 1850, S.92.2.275 (partnership furnishing utilities).

198. See Guthiel v. Gilmer, 23 Utah 84, 63 Pac. 817 (1901) (firm engaged primarily in running stages and transporting mails, express matter, and passengers, held non-trading partnership); Jacobson v. Lamb, 267 Pac. 114, 115-116 (Cal. App. 1928) ("Under modern conditions it would seem that the business of hauling freight for hire is a commercial business.")

199. For an excellent discussion of the theories prevailing in France for determining the civil or commercial character of partnerships with "mixed objects," see 1 Pic, Traité Général Théorique et Pratique de Droit Commercial, des Sociétés Commerciales (2 ed. 1925) 165-167, n° 138.


are beauty parlor operators commercial partners because of the incidental sale of toilet articles. The Louisiana Supreme Court has suggested, however, that the rules governing commercial partnerships may be applied to the particular legal relations created by the commercial transactions.

Where the commercial business transacted by the firm is not merely incidental to non-commercial activities but forms a substantial portion of its total business, the Louisiana courts will treat the members as commercial partners with respect to all the firm's operations unless the commercial transactions are segregated from the non-commercial transactions. Anglo-American courts seem to reach practically the same results when they lay down the rule that a firm can be a trading partnership even though buying and selling is not the sole or even the most characteristic feature of the firm business. For example, in W. M. Barnett Bank v. Chiatovick members of a firm operating a ranch and running a store located on the ranch were held liable on a note executed by a co-partner. The court felt that, even though part of the firm business was non-commercial, the partners were clothed with all the apparent powers of trading partners since the mercantile business was commingled with the ranching.

The distinction between trading and non-trading partnerships has been used in Anglo-American law in determining the extent of a partner's power to affect the legal relations of his co-partners. Courts which make the distinction find by implica-

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202. Resor v. Capelle, 140 So. 699 (La. App. 1932). In Flower v. Williams, 1 La. 22, 27 (1830), the following language was used: "It is certainly true that the sale of medicines to the vendor's patients, and an incidental sale to a neighbor, are not acts which can be viewed as commercial transactions. An innkeeper sells wine to his lodgers, without thereby becoming a merchant... and the casual sale of a bottle to a neighbor, would not make it so.

203. "One transaction of a commercial character may perhaps be considered the act of a commercial partnership quoad the transaction; but it does not have the effect of changing an ordinary partnership into a commercial partnership." Bank of Monroe v. E. C. Drew Inv. Co., 128 La. 27, 1040, 53 So. 129, 133 (1910). Compare authorities cited note 243, infra.


LOUISIANA LAV PARTNERSHIP

cation a greater power in a member of a trading firm than in a member of a non-trading firm. They lay down a rule that a partner in a trading firm has an implied power to bind the firm and his co-partners by all acts within the scope of partnership business. On the other hand, they state that a presumption exists that a non-trading partner does not have power to bind his co-partner and that a plaintiff, to recover against the other partners on a contract made by a non-trading partner, must affirmatively show (1) that authority was conferred by the articles of partnership, (2) that authority was conferred specially by the other partners, or (3) that authority of the kind exercised is usually or customarily incident to other partnerships of like nature. Actually the effect of the rules seems to be that in trading partnerships the extent of a partner's power to bind the firm is a question of law while the extent of a partner's power in a non-trading firm is a question of fact.

The Louisiana courts use the commercial and ordinary classifications in determining the extent of a partner's authority much as the Anglo-American courts use the trading and non-trading categories. The power of a commercial partner is not discussed in the Louisiana Civil Code, but the Louisiana jurisprudence has held that the acts of a commercial partner in the course of partnership business bind the firm. Thus a commercial partner can make or endorse negotiable paper for the firm. On the other hand, power in an ordinary partner to bind his co-partners is not implied from the fact of partnership. The Civil Code expressly states that an ordinary partner purporting to act on behalf of the firm cannot bind his partners, "unless they have given him power so to do, either specifically or by the articles of partnership." However, members of an ordinary partnership in Louisiana, like members of a non-trading firm

212. See Dumaitrait v. Gay, 1 Rob. 62, 64 (La. 1841).
elsewhere, can ratify a partner's unauthorized act\textsuperscript{214} or estop themselves from denying that they authorized it.\textsuperscript{215}

The distinction made between trading and non-trading partnerships in Anglo-American jurisdictions is of little value and serves as a snare for the unwary. Naturally, a partner in a firm conducting commercial transactions ordinarily will have greater authority to bind his co-partners than will a partner in a non-trading firm. Yet a partner's authority should depend on an interpretation of the contract of partnership. Persons who enter into a partnership should be held, in the absence of manifestations to the contrary, to have authorized each other to commit acts which are usual and proper in other firms engaged in the same kind of business. Likewise, a partner's apparent authority should be measured by the authority usually conferred on partners in similar firms in that locality. The business of many firms which do not buy and sell nevertheless comprehends the employment of capital and credit and brings the partners into frequent contact with the commercial world. Even though such partnerships technically are classified as non-trading, to hold that a partner in such a firm is not authorized to bind his firm, on negotiable paper for instance, ordinarily violates the intentions of the partners.

Many Anglo-American jurisdictions expressly have abandoned the classification of partnerships into trading and non-trading firms.\textsuperscript{210} The Uniform Partnership Act does not mention the distinction. Today most Anglo-American courts in determining the extent of a partner's authority, regardless of whether he is a member of a firm which buys and sells, look to the limits commonly and usually fixed in similar businesses at that time and place and to the acts which are reasonably necessary to conduct the business. The Uniform Partnership Act\textsuperscript{217} provides that the partnership is bound by each partner's act, including the execution in the partnership name of any instrument, for carrying on apparently in the usual way the business of the partnership.

There are no indications that Louisiana courts similarly will

\textsuperscript{215} See Jamison v. Charles F. Cullom & Co., 110 La. 781, 790, 34 So. 775, 779 (1903). Where the co-partners in an ordinary partnership deny that they are liable for a contract made by one of them, the creditor who seeks to hold them has the burden of proving that either the defendant whom he seeks to hold authorized the contract, has benefited by it, or by his conduct has estopped himself. Hamilton v. Hodges, 30 La. Ann. 1290 (1878); Jamison v. Charles F. Cullom & Co., supra.
\textsuperscript{216} See, for instance, Haskins v. Throne, 101 Ga. 126, 28 S.E. 611 (1897); Jacobson v. Lamb, 267 Pac. 114 (Cal. App. 1928).
\textsuperscript{217} U.P.A. § 9.
abandon the distinction between commercial and ordinary partnerships. In the last fifty years, the holdings in numerous Louisiana cases have been based on that distinction. Louisiana courts are not free to disregard partnership categories set forth in the Civil Code.

Louisiana law grounds other rules, some of which have no counterparts in Anglo-American law, on the distinction between commercial and ordinary partnerships. The most important is that commercial partners are liable in *solido* (roughly equivalent to "jointly and severally" of Anglo-American law) for firm obligations, while an ordinary partner is liable only for his "virile share," that is, a share calculated "in proportion to the number of partners, without any attention to the proportion of the stock or profits each is entitled to." The solidary liability of commercial partners extends to firm torts, and the liability of the members of an ordinary partnership is *pro parte virili* rather than *in solido* whether the firm's obligation is based on tort or grounded in contract. A person recovering against an ordinary partnership is entitled to judgment against the firm for the amount proved and against each individual partner of the firm for his "virile share" of that amount.


The nature of the liability of commercial partners for rent due on real estate at one time was subject to uncertainty. Early decisions held commercial partners liable *in solido* for rentals due on buildings. Perrett v. Dupré, 3 Rob. 52 (La. 1842); Penn v. Kearny, Blois & Co., 21 La. Ann. 21 (1869). A later case, without citing the earlier decisions, held that since a commercial firm cannot own real estate, the lease of such property in the firm name creates a joint obligation rather than an obligation *in solido*. Hollingsworth v. Atkins, 46 La. Ann. 615, 15 So. 77 (1894). Finally, the Louisiana Supreme Court reverted to its original position and held that commercial partners are bound *in solido* on a contract to lease a business site even though a commercial firm as such cannot acquire the ownership of realty. Shreveport Ice & Brewing Co. v. Mandel Bros., 128 La. 314, 54 So. 831 (1911).


222. Independence Indemnity Co. v. Carmichael & Woodring, 13 La. App. 64, 127 So. 10 (1930); Haddad v. Endom's Transfer & Storage Garage, 150 So. 870 (La. App. 1933). In Hyams & Jonas v. Rogers, 24 La. Ann. 230 (1872), the court, relying almost entirely on French authority, held that an ordinary partner who did not actually join in the act of employing an attorney engaged by another partner for the firm was liable only "jointly" and not *in solido* for the services of said attorney. ("Jointly" is used by Louisiana courts to indicate that each party is liable for his virile share, not as an equivalent to "jointly" as used in Anglo-American partnership cases.)

Since each partner in an ordinary firm is liable only for a "virile share," he may act for himself, and his acts do not benefit or prejudice his co-partners.\textsuperscript{224} Thus he may obtain discharge from his obligations by paying his share, and his discharge does not result in the discharge of the other partners.\textsuperscript{225} Similarly, the acts of an ordinary partner or a suit brought against such a partner does not interrupt prescription as to his co-partners.\textsuperscript{226}

Anglo-American law, of course, differs from Louisiana law in that it does not distinguish between kinds of partnerships in imposing liability on partners for firm obligations. At common law a joint obligation of the partners resulted from partnership contracts, whether the partnership was a trading or a non-trading firm.\textsuperscript{227} That rule was incorporated into the Uniform Partnership Act.\textsuperscript{228} On the other hand, the rule is uniformly applied in Anglo-American jurisdictions that the liability of partners for torts committed within the scope of firm business is joint and several.\textsuperscript{229} By statute many states also have imposed joint and several liability on partners for firm contractual obligations.\textsuperscript{230}

An analysis of the Louisiana and Anglo-American rules shows the following: (1) Members of a commercial partnership in Louisiana are liable \textit{in solido} (jointly and severally) on firm contracts; members of a trading partnership in most Anglo-American jurisdictions are liable jointly on such obligations but in some jurisdictions, where the rule has been changed by statute, they are liable jointly and severally. (2) Members of a commercial partnership in Louisiana are liable \textit{in solido} on obligations arising out of firm torts, and members of a trading partnership in Anglo-American jurisdictions are liable jointly and severally on such obligations. (3) Members of an ordinary partnership in

\textsuperscript{224} Buard v. Lemée, 12 Rob. 243 (La. 1845).
\textsuperscript{225} Drew v. Bank of Monroe, 125 La. 673, 51 So. 683 (1910).
\textsuperscript{226} Buard v. Lemée, 12 Rob. 243 (La. 1845). Even though an ordinary partner is liable only for his "virile share" of firm debts, apparently he cannot recover the excess paid if he believes that he is liable for the entire debt and pays the whole amount. Schmidt v. Foucher, 38 La. Ann. 93 (1886). Cf. Bennett v. Allison, 2 La. 419 (1831). The members of an ordinary partnership may stipulate for a solidary obligation. Payne v. James, 36 La. Ann. 476 (1884). Ordinary partners can bind themselves by special contractual stipulation as they see fit; no reason exists why such partners should not bind themselves \textit{in solido} if they choose. Gantt v. Eaton & Barstow, 25 La. Ann. 507 (1873).
\textsuperscript{228} U.P.A. § 15.
\textsuperscript{229} U.P.A. §§ 13-15; Howe v. Shaw, 56 Me. 291 (1868); Roberts v. Johnson, 58 N.Y. 613 (1874).
\textsuperscript{230} Mechem, op. cit. supra note 227, at 273, § 308.
Louisiana are liable each for his virile share on firm contractual obligations, while members of a non-trading firm are liable jointly, or jointly and severally where that liability has been imposed by statute. (4) Members of an ordinary partnership are liable each for his virile share on firm torts, while members of trading partnerships in Anglo-American jurisdictions are liable jointly and severally.

The Louisiana rule limiting the liability of partners in an ordinary firm is subject to considerable criticism. Since the share of the liability is calculated in proportion to the total number of partners without regard to his contributions to the common stock or his share in the profits, a person who wishes to engage in a speculative enterprise theoretically can shield himself from substantial risk by associating with himself financially irresponsible "partners" entitled to infinitesimal shares in the profits. Perhaps that possibility influenced the Orleans Court of Appeal in Resor v. Capelle to ignore Article 287 and prior Louisiana jurisprudence and to impose liability in proportion to each partner's "interest" in the firm. Presumably by "interest" the court meant the proportion of the profits to which a partner is entitled, but conceivably it meant the proportion of the common stock which a partner contributed. Resor v. Capelle, however, stands alone; little likelihood exists that Louisiana courts will follow the rule established in that case.

Louisiana law possibly would be improved by modifying the ordinary partner's liability (1) to impose on him liability to third parties for firm obligations in proportion to the number of partners or in proportion to his participation in the profits, whichever is greater, and (2) to hold him liable to his co-partners for firm losses in proportion to his participation in the profits unless the partnership contract otherwise stipulates. A mere tinkering with the details of the Louisiana rules on the liability of ordinary partners, however, will not remove the principal objections. An examination of the Louisiana cases shows that great risks are assumed by persons who deal with partnerships. Time and again a person, on pressing a claim against a large firm, finds that it is an ordinary partnership, each member of which is liable only

231. 140 So. 699 (La. App. 1932). In that decision the court stated: "Therefore Mrs. Capelle, having been a partner in an ordinary partnership to the extent of an undivided two-thirds interest, at the time the claim arose, is responsible for two-thirds of the debts of the partnership prior to the time that she became the sole owner." (140 So. 699, 701). Query as to the liability the court would have imposed on Mrs. Capelle if she had been a partner to the extent of only a one-third "interest."

for his virile share, and that no complete remedy is available since most of the partners are non-resident, their whereabouts perhaps unknown.233

Many firms which the Louisiana courts classify as ordinary partnerships are of considerable size, employ large amounts of capital and credit, utilize large numbers of employees in their operations, and come into frequent contact with the commercial world. Newspaper publishers234 and large construction firms,235 for instance, have been held to be ordinary partnerships. Moreover, the Louisiana courts uniformly have held that firms processing and selling agricultural products, timber or minerals produced on or extracted from real estate of the partnership or of the individual partners are not commercial firms within the meaning of the Louisiana law.236 Thus in a number of cases persons purchasing an oil refinery to process oil produced from their own wells have been held ordinary partners.237 These holdings result from an application of the strict letter of Article 2825: the partnerships under consideration were not formed “for the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture.” (Italics supplied.) On the other hand, when a partnership purchases part of the products it processes and produces part on its own real estate, the partners will be deemed commercial partners with respect to all business unless they segregate the commercial from the non-commercial transactions.238

The rule of Louisiana law, set forth in Article 2093,239 that an obligation in solido is never presumed but must be expressly stipulated240 has fostered a tendency on the part of the Louisiana

233. See Young v. Reed, 192 So. 780, 785 (La. App. 1939).
237. American Nat. Bank v. Reclamation Oil Producing Ass'n, 156 La. 652, 101 So. 10 (1924); Miles v. Reclamation Oil Producing Ass'n, 1 La. App. 94 (1924).
238. Southern Coal Co. v. Sundbery & Winkler, 158 La. 386, 104 So. 124 (1925); Roane v. Bourg, 177 So. 373 (La. App. 1937).
courts to classify partnerships as ordinary rather than commercial.

Louisiana's law would be much simplified and policy considerations better served by amending the Civil Code to abolish the differences between rules applicable to commercial partnerships and those relating to ordinary partnerships and to impose liability *in solido* on both commercial and ordinary partners for firm obligations. At the very least, large ordinary partnerships which come into frequent contact with the commercial world should be subjected to the rules now applicable to commercial partnerships.

The Louisiana Civil Code subdivides commercial partnerships into "general" and "special" commercial partnerships.\(^{241}\) Apparently, by "general commercial partnership" the redactors of the code meant to designate a commercial partnership formed to conduct a business over a considerable period of time, while by "special commercial partnership" they intended to refer to the relations created when two or more persons engage in a single commercial transaction.\(^{242}\) The classification between general and special commercial partnerships seems to be of little or no utility. The Louisiana courts have not discussed the distinction in reaching decisions, apparently because the same rules apply to all commercial partnerships.\(^{243}\)

In Anglo-American law partnerships are divided according to their scope into general partnerships and special partnerships, a general partnership being one created for the general and more or less permanent conduct of a business and a special partnership being one created for one transaction.\(^{244}\) This classification, like the one drawn in Louisiana law between general and special commercial partnerships, does not seem to be advantageous.\(^{245}\)

The courts in Anglo-American jurisdictions are much more likely to refer to a partnership contemplating a single transaction as a "joint adventure" rather than as a special partnership; and Louisiana courts have adopted the term "joint adventure" from

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\(^{242}\) See Ward v. Brandt, 11 Mart.(O.S.) 331, 404 (1822); Norris' Heirs v. Ogden's Ex's, 11 Mart.(O.S.) 455, 459-460 (1822).

\(^{243}\) A single joint purchase by parties of movable property for the purpose of resale at a profit constitutes such parties commercial partners as to that transaction. Purdy v. Hood, 5 Mart. (N.S.) 626 (La. 1827); Robertson v. De Lizardi, 4 Rob. 300 (La. 1843).

\(^{244}\) Mechem, Elements of the Law of Partnership (2 ed. 1920) 34, § 32.

Anglo-American law and in recent years have made frequent use of it.\footnote{246}

Another kind of partnership recognized by Louisiana law is the partnership in commendam, a device which corresponds closely to the limited partnership in Anglo-American jurisdictions. The Louisiana partnership in commendam, however, unquestionably was modeled on the French société en commandite.\footnote{247} The commandite partnership long has been a recognized form of joint enterprise in most civil law jurisdictions.\footnote{248} Provision for it was included in the Louisiana Civil Code of 1808.\footnote{249} The French text of that code referred to the device as société en commandite and the English translation as “corporate partnership.” Detailed provisions on the partnership in commendam were contained in the Louisiana Civil Code of 1825.\footnote{250}

The New York legislature in 1822, fourteen years after Louisiana legislation had recognized the partnership in commendam, enacted the first limited partnership act to be adopted in an Anglo-American jurisdiction. The idea for the statute was drawn from the French legislation on the société en commandite;\footnote{251} thus the Louisiana partnership in commendam and the New York limited partnership are of the same parentage. Other states followed the example set by New York and enacted similar statutes.

The provisions of the early limited partnership statutes and the articles of the Louisiana Civil Code of 1825 relating to the partnership in commendam were roughly similar. The early limited partnership statutes generally provided that a limited partnership could be formed by one or more general partners and

... one or more persons who shall contribute, in actual cash payments, a specific sum as capital, to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership, beyond the fund, so contributed by him or them to the capital.\footnote{252}
Article 2810 of the Civil Code of 1825 defined the partnership in commendam:

“Partnership in commendam is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more.”

The principal difference between the two pieces of legislation was that the contribution of a special partner had to be in cash, while that of a partner in commendam could be either in cash or in property.

A condition precedent to the obtaining of limited liability under the early limited partnership statutes was that the parties file and publish a certificate setting forth certain enumerated matters, such as the name of the firm under which such partnership was to be conducted, the general nature of the business intended to be transacted, the names of the partners (distinguishing general partners from special partners), their respective places of residence, the amount contributed to the common stock by the special partners, and the respective times at which the partnership was to commence and terminate. The Louisiana Civil Code of 1825 provided that, if the partner in commendam was to avoid being treated as a general partner, the contract of partnership had to be in writing, signed by the parties in the presence of at least one witness, and contain the following stipulations:

1. the amount furnished by the partner in commendam or the amount he had agreed to furnish; (2) a statement whether the contribution had been received; and, if so, whether in goods, money or "however otherwise"; and, if not, a stipulation by the partner in commendam undertaking to pay it; (3) the proportion of the profits the partner in commendam was to receive and the proportion of the expenses and losses he was

to bear. The Civil Code further provided that the contract had to be recorded "in full" in the parish where the principal business of the firm was conducted and, if the firm was a commercial one, in every parish in which the firm maintained an establishment.

Both the Louisiana Civil Code of 1825 and the early limited partnership acts provided that the business of the partnership was to be conducted in the name of the general partners only and without the addition of the word "company." Both statutes also prohibited the special partners from participating in the conduct of firm business; they indicated that if these prohibitions were disregarded the special partners would be treated as general partners.

When the limited partnership acts were first subjected to judicial scrutiny, most courts adopted extremely technical interpretations. They required meticulous compliance with the provisions of the acts as a prerequisite to what they considered a privilege in derogation of common law, namely, limited liability. Minor infractions of the provisions, though made in good faith, subjected the special partners to general liability. The limited partnership came to be looked on as a trap in Anglo-American jurisdictions rather than as a usable business device. Louisiana courts, on the other hand, probably because they were not subject to the rule that statutes in derogation of common law must be strictly construed, early adopted a liberal attitude in interpreting the codal provisions on the partnership in commendam.

A few Anglo-American courts about 1860 began to give a somewhat more liberal interpretation to the limited partnership statutes. These courts shielded the limited partner from general liability where the parties had substantially complied with the

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derive from the business should be exclusively in the shape of a proportion of the profits. A party may be unwilling to advance money on such contingencies. . . ." Ulman & Co. v. Briggs, Payne & Co., 32 La. Ann. 655, 660 (1880).
265. For examples of the extremely strict constructions placed on limited partnership acts, see Note (1923) 2 Wis. L. Rev. 301, 302.
statutory requirements. Nevertheless, businessmen did not feel that they could with safety resort to the limited partnership device.

The articles of the Civil Code of 1825 relating to the partnership in commendam were incorporated without material change into the Civil Code of 1870. The Louisiana courts' liberal construction of the codal provisions did much to mitigate the risk of the partner in commendam. The courts in effect restricted the general liability of partners in commendam to situations expressly stipulated in the code. Further, the Louisiana Supreme Court, following French law, recognized a privilege in the partner in commendam to purchase property from the firm, sell to it, and lend money to it, without subjecting himself to general liability. Perhaps the most lenient Louisiana decision in shielding a partner in commendam from general liability was \textit{Ulman & Company v. Briggs, Payne & Company}. In that case the court held that the partner in commendam had not taken such an active part in the affairs of the firm as to subject himself to general liability, although he had consulted at least once with the general partner and had advised third parties that the firm was "all right." The liberal decisions encouraged utilization of the partnership in commendam by Louisiana businessmen.

In 1916 the National Conference of Commissioners on Uniform Laws approved a Uniform Limited Partnership Act; it now has been adopted by the legislatures of at least twenty states. The aim of the Uniform Act was to restore the usefulness of the limited partnership device by removing the possibility that per-

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268. "When those requirements are not fulfilled, he may incur the liabilities of a general partner, with this restriction, however, that the responsibility only attaches in the cases specially mentioned by law, which occur; when the act is not expressive of a specified limited liability, but provides for a general liability; when the act has not been recorded at all, or in such an improper manner that third parties were not bound to know its registry, as for instance if spread in the wrong book; when the partner has done or permitted some act to be done, from which it could be inferred that he was a general partner." Ulman & Co. v. Briggs, Payne & Co., 32 La. Ann. 655, 661 (1880). See also authorities cited note 266, supra.
sons who honestly believe themselves to be special partners might be held to unlimited liability because of some technical mistake.\textsuperscript{273} Unlimited liability is not imposed on a special partner unless the creditor actually has been misled by the special partner's name appearing in the firm name or by a false statement in the certificate, or unless the special partner, in addition to exercising his rights and powers as a special partner, has taken part "in the control of the business."\textsuperscript{274} The act further provides that a person who erroneously believes himself to be a special partner can escape general liability by renouncing his interest in the profits or income of the business.\textsuperscript{275} Finally, the act stipulates that the rule requiring strict construction of statutes in derogation of common law is inapplicable to it.\textsuperscript{276}

The Uniform Limited Partnership Act is superior in many respects to the Louisiana codal provisions on the partnership in commendam. First, the Louisiana Code subjects the partner in commendam to unlimited liability if the written contract is not properly prepared and recorded even though creditors are not misled.\textsuperscript{277} Second, the Civil Code does not contain a provision which affords protection to persons who erroneously believe that they are partners in commendam. Third, the Uniform Limited Partnership Act contains many desirable provisions which have no counterparts in the Louisiana Code. For instance, the Uniform Act sets forth in detail the rights, powers, and liabilities of a general partner,\textsuperscript{278} describes the relations of limited partners \textit{inter se},\textsuperscript{279} provides for the withdrawal or reduction of a limited partner's contribution,\textsuperscript{280} stipulates that a limited partner's interest is assignable,\textsuperscript{281} states explicitly the effects of a partner's retirement, death, or insanity,\textsuperscript{282} describes the rights of a limited partner's creditors,\textsuperscript{283} and provides the order in which assets are to be distributed among creditors, limited partners, and general partners on dissolution of the firm.\textsuperscript{284}

Both the Uniform Act and the provisions of the Louisiana Civil Code are defective in that they do not state exactly what

\begin{itemize}
\item \textsuperscript{273} Note (1923) 71 U. of Pa. L. Rev. 150.
\item \textsuperscript{274} U.L.P.A. §§ 5(2), 6, 7.
\item \textsuperscript{275} U.L.P.A. § 11.
\item \textsuperscript{276} U.L.P.A. § 28.
\item \textsuperscript{277} Arts. 2845-2846, La. Civil Code of 1870.
\item \textsuperscript{278} U.L.P.A. § 9.
\item \textsuperscript{279} U.L.P.A. § 14.
\item \textsuperscript{280} U.L.P.A. § 16.
\item \textsuperscript{281} U.L.P.A. § 19.
\item \textsuperscript{282} U.L.P.A. §§ 20-21.
\item \textsuperscript{283} U.L.P.A. § 22.
\item \textsuperscript{284} U.L.P.A. § 23.
\end{itemize}
participation in firm affairs subjects a limited partner or partner in commendam to unlimited liability. The Uniform Act indicates that a limited partner will become liable as a general partner if "he takes part in the control of the business."\(^\text{285}\) The term "control" is not defined.\(^\text{286}\) The Louisiana Civil Code provides that "if the partner in commendam shall take any part in the business of the partnership" he shall be liable as a general partner.\(^\text{287}\) As has been noted previously,\(^\text{288}\) the Louisiana Supreme Court has held that a partner in commendam did not take part in the business of the firm within the intendment of the code when he consulted with the general partners on one occasion and advised third parties that the firm was "all right."

Considerable doubt exists whether either the limited partnership or the partnership in commendam is a necessary device.\(^\text{289}\) Both in Anglo-American jurisdictions and in Louisiana the courts long ago repudiated the doctrine of *Waugh v. Carver*.\(^\text{290}\) Investors now can participate in the profits of a business without fear of personal liability. A general investor can secure for himself by contract all the privileges of a limited partner or partner in commendam; in fact, in some jurisdictions an investor can participate in the management of an enterprise to a considerably greater extent than a limited partner without becoming liable as a partner.\(^\text{291}\)

This section has shown that each class of partnership known to Louisiana law corresponds to a kind of partnership recognized in Anglo-American law, that this similarity is attributable not only to Louisiana's importation of Anglo-American ideas but also to Anglo-American law's borrowing from civil law sources and to a natural parallel development in the two systems. It further has pointed out that several of the Louisiana partnership classifications serve no useful purpose. Finally, this section has noted several respects in which Louisiana's partnership law has not kept pace in development with Anglo-American partnership law and now seems definitely inferior in those respects.

\(^{286}\) See Comment (1936) 45 Yale L.J. 895, 902-904 for possible interpretations of Section 7 of the Uniform Limited Partnership Act.
\(^{287}\) Art. 2849, La. Civil Code of 1870.
\(^{288}\) See p. 491, supra.
\(^{289}\) See Crane, Are Limited Partnerships Necessary? (1933) 17 Minn. L. Rev. 351.
\(^{290}\) See pp. 348, 358, 367, supra.
CONCLUSIONS

This paper, it is submitted, establishes that: (1) Louisiana courts in deciding partnership cases, due to the failure of the legislature to adopt a commercial code, have been forced to work with the partnership articles in the Civil Code—articles which at the time of drafting were not intended to apply to commercial partnerships and which clearly are inadequate to regulate business relations in a modern economy; (2) many of the articles in the Civil Code which relate to partnership are vague and confusing; (3) Louisiana courts, in filling the hiatuses in the partnership articles of the Civil Code, early began to resort to Anglo-American authorities with greater frequency than to French materials and, since the Civil War, seldom have cited French materials in partnership cases; (4) Louisiana courts, in a great number of partnership cases, including most of the important, hard-fought ones, have grounded their decisions on Anglo-American authorities, often adopting as a statement of Louisiana law rules exactly as worded in Anglo-American texts or cases; (5) Louisiana courts in some instances openly have borrowed concepts (the "joint adventure," for instance) from Anglo-American law; (6) the phases of partnership law which have caused the most difficulty to Anglo-American courts also have caused the Louisiana courts considerable trouble, and in solving these problems the Louisiana courts usually have applied the principles popular at that particular time in the other states; (7) even rules of Louisiana partnership law which are purely civilian in origin seldom result in underlying practices different from those which prevail in Anglo-American jurisdictions (often the civil law rules and Anglo-American rules even in their wording are quite similar, many rules in both systems having originated in Roman law; in other instances, though the rules are not stated in the same terminology, supposed differences are largely verbal and vanish when the rules are analyzed); and (8) where real and substantial differences in underlying partnership practices do exist, the law of the more progressive of the Anglo-American jurisdictions, though it often leaves much to be desired, generally is superior to Louisiana law.

This paper, it is believed, shows beyond question that drastic changes should be made in the Louisiana law of partnership. At the very least, the inconsistencies in the codal classifications of partnerships should be removed, provisions on the commercial partnership should be drafted and incorporated into Louisiana
law, and codal provisions on the liability of ordinary partners should be redrafted to impose the same liability on members of ordinary firms as is now imposed on members of commercial firms. But changes more fundamental are needed. In drafting new partnership rules, archaic civilian terminology and concepts should be abandoned and attention focused on the partnership law of the more progressive of the Anglo-American jurisdictions. Perhaps a study of modern French law would be profitable, but to model new articles of the Louisiana Code on modern French law would be to invite a recurrence of the same chaotic legal conditions which now exist. Law cannot long remain static. Since Louisiana law is cut off from French legal literature, Anglo-American ideas inevitably would permeate into the Louisiana jurisprudence causing confusion and uncertainty. The preparation in Louisiana of adequate commentaries for a separate system of law would be impractical because of the limited number of legal scholars in the state and the small market for Louisiana books. Duplicating and overlapping concepts again would evolve; a hybrid terminology would develop. The most satisfactory way to attack the problems of Louisiana partnership law, and probably the problems in other fields of Louisiana law, is for Louisiana to abandon civil law, renounce its legal isolationism, and join the other states in a quest for better, more uniform laws.