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DRAFTING GENERAL PARTNERSHIP LAWS ON THE “AGGREGATE” OR “ENTITY” THEORY

Peter Winship*

THE “Business Associations” course at SMU in the mid-1970s was without doubt Alan Bromberg’s course. Not only had Alan been an architect of the revised three-year curriculum a decade earlier, but he also taught one of the sections of the “BA” course. Looking back, the course comes from a different era. It was taught Monday-Wednesday-Friday in 50-minute sessions over two semesters. Although it was not a required course—Alan opposed any attempt to require courses—most second-year students enrolled in it. In the first semester Alan devoted significant time to agency and partnership law. Students quickly learned of Alan’s expertise. He was co-author of the *West Handbook on the Law of Partnership*¹ and had been a prime mover in the successful campaign to have the Texas Legislature enact the Uniform Partnership Act.²

Business Associations (BA) was the first course I was assigned to teach when I joined the faculty in the mid-’70s. Alan generously shared his mimeographed “Partnership Primer” but otherwise allowed me to find my way. My memory of my first semester is one of hours absorbed in mastering the Uniform Partnership Act, puzzling through the Texas amendments to that act, and reading Alan’s many publications. These memories flooded back when I was asked to contribute to this symposium in his honor. I dug out my old copy of the *Crane & Bromberg Handbook*, read the first chapter, and decided to write this short essay.

In what follows, I pick up on the observation in the Handbook that it has been “a matter of considerable dispute” whether partnership legislation should treat a general partnership as an entity.³ The dispute is about whether to draft the legislation on the “entity” theory (the partnership is a separate legal entity) or on an “aggregate” theory (the partnership is an association—but not a legal entity—of persons carrying on a business as co-owners). Scotland and civil law jurisdictions (including Louisiana)

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1. JUDSON A. CRANE & ALAN R. BROMBERG, *LAW OF PARTNERSHIP* (1968) [hereinafter CRANE & BROMBERG].

2. Alan R. Bromberg, *The Proposed Texas Uniform Partnership Act*, 14 Sw. L.J. 437 (1960). For a full listing of Alan Bromberg’s publications on partnership law, see the Bibliography appended to the contributions to this Symposium issue.

3. CRANE & BROMBERG, *supra* note 1, at 16.

have long recognized the partnership as an entity. Until the late 19th century, however, partnership law in common-law jurisdictions was judge-made law, and most judges treated partnership issues on the aggregate theory. Only when these common law jurisdictions seriously considered codifying partnership rules and principles did debate about the nature of a partnership become contentious. In England there was far less debate than in the United States.

I. THE [BRITISH] PARTNERSHIP ACT, 1890

At the end of the 19th century, the British Parliament enacted several partial codifications of commercial law. Inspired by the Indian codes drafted earlier in the century to bring common law rules to India and by James Fitzjames Stephen's Digests of Evidence Law and Criminal Law, several young English barristers prepared digests of the case law of bills of exchange, partnership, and sale of goods.⁴ M.D. Chalmers and Frederick Pollock went on to draft bills based on their digests. The result was the Bills of Exchange Act of 1882,⁵ the Partnership Act of 1890,⁶ and the Sale of Goods Act of 1893.⁷

Except in minor details, none of these Acts reformed the principles and rules of existing English case law. Each provided that prior law continued to apply unless expressly displaced by the express provisions of the Act. Section 46 of the Partnership Act stated, for example, that "[t]he rules of equity and common law applicable to partnership continue in force except so far as they are inconsistent with the express provisions of this Act."⁸ As Pollock, the draftsman of the initial Partnership bill, wrote, the Partnership Act "has to be read and applied in the light of the decisions which have built up the existing rules."⁹ The "right kind of consolidating legislation," he added, "is that which makes the law more accessible without altering its principles or its methods."¹⁰ No doubt this type of "consolidating" act made the legislation more acceptable to the practicing bar in England.

Grounded as it was on case law, the Partnership Act of 1890 did not recognize the partnership as an entity separate from its members except in Scotland. Commenting on section 4 (Meaning of firm) of the Act, Pollock wrote that "[t]he law of England knows nothing of the firm as a body or artificial person distinct from the members composing it," although he went on to concede that "the firm is so treated by the universal practice

4. Alexandra Braun, *The English Codification Debate and the Role of Jurists in the Development of Legal Doctrines*, in *THE IMPACT OF IDEAS ON LEGAL DEVELOPMENT* 204, 209-12 (Lobban & Moses eds., 2012).

5. Bills of Exchange Act, 1882, 45 & 46 Vict., c. 61 (Eng.).

6. Partnership Act, 1890, 53 & 54 Vict., c. 39 (Eng.).

7. Sale of Goods Act, 1893, 56 & 57 Vict., c. 71 (Eng.).

8. Partnership Act, *supra* note 6, sec. 46.

9. SIR FREDERICK POLLOCK, *A DIGEST OF THE LAW OF PARTNERSHIP, INCORPORATING THE PARTNERSHIP ACT, 1890*, vii-viii (6th ed. 1895), *digitally reproduced in Gale Cengage Learning, The Making of Modern Law*.

10. *Id.*

of merchants and by the law of Scotland.”¹¹ As a consequence, in England “[t]he law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and liabilities.”¹²

II. THE U.S. UNIFORM PARTNERSHIP ACT OF 1914

The appearance of the British Acts coincided with interest in the United States in uniform state laws. At the invitation of the state of New York and encouraged by the American Bar Association, state-appointed uniform law commissioners¹³ began to meet in 1892 to prepare drafts of uniform laws for state enactment.¹⁴ The commissioners adopted the Negotiable Instruments Law in 1896. By the end of the century, fifteen states had enacted the NIL and other states had expressed interest in enacting the law. Encouraged by this success, the commissioners began searching for suitable topics. Enter M.D. Chalmers and Frederick Pollock.

Both Chalmers and Pollock travelled to the United States prepared to talk about the British legislation. At the invitation of the uniform law commissioners, both appeared at one or more of the commissioners’ annual meetings. At the 1902 meeting, Chalmers spoke about “Mercantile Codification.” In the course of his address, he remarked that the Partnership Act of 1890 had “worked smoothly and well.”¹⁵ “It might,” he went on to suggest, “be worthwhile to consider the feasibility of enacting a similar statute for this country.”¹⁶ The commissioners agreed to begin work on either sales or partnership.¹⁷ The following year Pollock appeared at the annual meeting and spoke briefly about codification. He approved the commissioners’ decision to seek to unify the law of sales and added that they should next work on a partnership law. “The code on that subject in England,” he suggested, “having been in force about twelve years and having proven so satisfactory, would be an excellent working model for an American statute.”¹⁸

11. *Id.* at 21 (comment to sec. 4).

12. LINDLEY & BANKS ON PARTNERSHIP 32 (17th ed. 1995) (quoting Lord Lindley, 19th century author of the leading treatise on partnership law).

13. Since 1891, the uniform law commissioners have designated their organization under several different names. Today the organization is known as the Uniform Law Commission, although it has been known for most of the 20th century as the National Conference of Commissioners on Uniform State Laws (NCCUSL). In what follows “Uniform Law Commission” is used for all periods and the Commission’s annual Handbook will be cited simply as “ULC HANDBOOK.”

14. For a history of the Uniform Law Commission, see ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION (2013).

15. Proceedings, 12 ULC HANDBOOK 15 (1902).

16. *Id.*

17. 25 ABA ANN. REP. 477 (1902).

18. Proceedings, 13 ULC HANDBOOK 8 (1903). In a lecture to a different audience, Pollock even suggested that “it may not be many years before we see a substantially identical law of partnership enacted for the English-speaking world.” Frederick Pollock, *The*

The 1904 meeting of the Conference agreed to take up partnership law and directed its Committee on Commercial Law to find a suitable draftsman.¹⁹ The committee persuaded James Bar Ames, Dean of the Harvard Law School and a newly appointed uniform law commissioner from Massachusetts, to take up the task.²⁰

Dean Ames first appeared before the Conference at its 1905 meeting. At the meeting, he presented not an outline of a partnership act, but a request for direction. In a lengthy statement reproduced verbatim in the 1905 Conference Handbook, Ames pointed out how his task differed from that of an English draftsman. The latter "is dealing substantially with the law of one jurisdiction, and his object is to make a digest which shall receive Parliamentary sanction, while our attempt is to bring about uniformity in the laws of between forty-five and fifty jurisdictions."²¹ The English statutes on negotiable instruments and sales might be suitable sources because the laws of the States did not differ fundamentally among the States. "The law of partnership," he went on to say,

is altogether different, for almost from the beginning of the development of the law of partnership there has been a contest going on between the lawyers and the merchants. . . . The merchants have looked upon a partnership as a distinct personality; they speak of a partnership as a concern—as a person, in effect; they look upon it as owning property and as contracting. The lawyers, on the other hand, have steadily insisted that a partnership is simply a group of co-owners, co-obligors and co-obligees. With that difference of view between merchants and lawyers, it is obvious that there must be differences of decisions in different jurisdictions, accordingly as in one court or another the views of the merchant or the views of the lawyer happen to prevail.²²

Dean Ames gave numerous examples of these differences and observed that they were so numerous that it would be impossible to draft a uniform law that would not sacrifice the law of almost all the States on many points.²³ The solution, he suggested, was to draft the act on a sound fundamental principle, namely the mercantile conception of partner-

Law of Reason, 2 MICH. L. REV. 159, 165 (1903). At this height of the English Empire, many of its colonies were enacting the English commercial acts verbatim.

19. For the history of the evolution of the draft, see Report of the Committee on Commercial Law on a Proposed Act to Make Uniform the Law of Partnership (September 25, 1914), 24 ULC HANDBOOK 168-70 (1914).

20. Proceedings, 14 ULC HANDBOOK 3 (1904). Dean Ames was, *inter alia*, an expert on negotiable instruments law. The 1896 Negotiable Instruments Law (NIL) was drafted without consulting him. By the time he learned of the NIL, several significant States had already enacted it. In 1900, Ames published a law review article criticizing the NIL and urged states not to adopt it. There followed a spirited exchange of law review articles between Ames and defenders of the uniform law. After hearing from Ames in person, the uniform law commissioners decided not to withdraw or amend the act. It is in this context that Ames agreed to serve as a commissioner. ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN 1817-1967*, at 212-13 (1967).

21. Proceedings, 15 ULC HANDBOOK 24 (1905).

22. *Id.* at 24-25.

23. *Id.* at 28.

ship—a principle “recognized elsewhere throughout the commercial world, outside of England and the United States.”²⁴

That Dean Ames argued strenuously for the “mercantile” concept²⁵ and that the commissioners adopted a resolution directing him to proceed on that basis²⁶ is part of the collective memory. What is often forgotten, however, are his specific comments about whether the partnership had to be recognized as a legal person.

I do not mean by that to say that it is necessary to state categorically in the act that a partnership is a person. That is a mere matter of detail. But what I should deem of fundamental importance would be substantially this: That the partnership as such should be made the owner of the firm’s property; the title at law should vest in the partnership as such; the partnership as such should be treated as the obligor, and also as the obligee on firm contracts, and that actions by or against the partners should be brought in the firm name.²⁷

If these provisions were included, he argued, a draft would substantially recognize the mercantile concept of partnership without the need to state expressly that the partnership was a legal person. Similar provisions appeared in the latest German code without stating that a partnership had legal personality—what a “legal person” was being a hotly debated theoretical issue in German circles.²⁸

Dean Ames subsequently submitted a first and second draft to the Conference, but before he could submit a third draft, he fell victim to what today would be called early-onset Alzheimer’s, and he died in January 1910.

Fortunately, Dean William Draper Lewis of the University of Pennsylvania Law School promptly volunteered to take up the project. As an apparent believer in the common law concept of a partnership as an aggregate, Lewis’ first achievement²⁹ was to persuade the Uniform Law Conference at its meeting in 1910 to rescind its prior resolution limiting its Committee on Commercial Law to proceeding on the entity theory. The Conference did so at its 1910 annual meeting, substituting a resolu-

24. *Id.*

25. Ames concluded his lengthy presentation with a statement that nobody receiving free legal services likes to hear: “I feel so strongly that, if the Conference thinks my plan undesirable, I should much prefer to have someone else draw the act; . . . Let me add that I have no desire to draw this act and should be extremely glad to withdraw from the occupation, but I am in your hands.” *Id.* at 29.

26. *Id.* at 29–30. Before the vote was taken, a long-serving commissioner from Louisiana took the floor—no doubt with a twinkle in his eye—to thank Ames for adopting “the law of Louisiana.” *Id.* at 29.

27. *Id.* at 28.

28. *Id.*

29. For the events in 1910 and 1911 as seen by Lewis, see William Draper Lewis, *The Desirability of Expressing the Law of Partnership in Statutory Form*, 60 U. PA. L. REV. 93 (1911); William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 640 (1915) [hereinafter “*The UPA*”]; William Draper Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane’s Criticism*, 29 HARV. L. REV. 158, 171–72 (1915) [hereinafter “*A Reply*”]. The careful maneuvering with which Dean Lewis carried his cause demonstrates why he was subsequently such a successful Director of the American Law Institute.

tion allowing the Committee on Commercial Law freedom to determine the theory on which the drafting should proceed.³⁰ Lewis prepared two separate Acts, one on the entity theory and one on the aggregate theory. In February 1911, the Committee on Commercial Law met in Philadelphia at a meeting to which recognized experts in partnership law—teachers, writers, and practitioners—were invited. The first day of the two-day meeting was devoted to a detailed discussion of the two theories, and at the conclusion, it was the unanimous recommendation that drafting should proceed on the aggregate theory. As Lewis later reported:

[i]t is a significant fact that, with one exception, all those called to the conference had at one time believed that our law should adopt the legal-person theory of partnership. Several came to the meeting still believing that the Act should be drawn on that theory.³¹

As a consequence of this unanimous recommendation, Dean Lewis proceeded to draft the law on that theory with the approval of the Committee. At the August 1911 meeting of the Uniform Law Commission, Lewis delivered an address (not reproduced in that year's Handbook) to the commissioners on the different theories. After extensive discussion, the commissioners were not yet ready to commit themselves.³² When asked to comment on a proposed resolution to defer a decision on theory, Dean Lewis stated:

As I understand it, the only general thing which this draft is based on, as to the question of theory, is really in a sense positive negation [!] of the proposition that you can regard a partnership as a separate legal person. I am quite willing to agree with Professor Williston, however, that we have regarded a partnership as an entity in a great many instances, using that word as I have explained in the first part of my address, but merely that the draft has not endowed that entity with separate legal personality.³³

The Commission chose to defer a final decision on the theory and re-committed the draft to the Committee on Commercial Law.³⁴ Five drafts later, the Commission finally adopted the Uniform Partnership Act in 1914 without further debate about theory.³⁵

To explain the Act, Samuel Williston and Lewis published law review articles in early 1915. Williston, a member of the Committee on Commercial Law and draftsman of the Uniform Sales Act and many other earlier uniform commercial laws, published a lecture in the January issue of the

30. Proceedings, 20 ULC HANDBOOK 52-53 (1910).

31. Lewis, *A Reply*, *supra* note 29, at 172.

32. Proceedings, 21 ULC HANDBOOK 37-42 (1911).

33. *Id.* at 39.

34. *Id.* at 42.

35. Proceedings, 24 ULC HANDBOOK 30-31 (1914) (adoption of Act). The text of the Act is set out in *id.* at 287; the Report of the Committee on Commercial Law appears in *id.* at 168.

University of Pennsylvania Law Review.³⁶ In defense of the aggregate theory, he pointed out that American partnership case law was based on the theory, that lawyers would oppose a fundamental change, and that State enactments therefore would be difficult. He also noted several objections to the entity theory: the difficulty of reaching the assets of an individual partner when seeking to enforce an obligation of the partnership if it were a separate entity; the proposal to require partnerships to register; and the possible conflict with provisions regulating corporate entities in several state constitutions.³⁷ Lewis followed with an article in the June issue of the *Yale Law Journal*.³⁸ Only at the end of this article does he touch on the issue of theory. He echoes several of Williston's arguments: the impossibility of coming to a satisfactory solution when a creditor of the partnership sought to levy on the property of an individual partner, and the practical difficulty of requiring a partnership to register as Ames had proposed.³⁹

These benign commentaries were challenged, however, by Judson A. Crane, whose critical article appeared in the June issue of the *Harvard Law Review*.⁴⁰ Apparently stung by this criticism, Lewis responded vigorously later that year,⁴¹ and Crane, giving little ground, chose to reply.⁴² It is this "spirited exchange" that is remembered today.⁴³

Crane's principal criticism was that the Uniform Act did not expressly recognize the "inherent merit and utility" of treating a partnership as a legal person.⁴⁴ He cited the many foreign jurisdictions with commercial environments similar to the United States that did treat the partnership as a legal entity.⁴⁵ Even in the United States, numerous cases had, he alleged, expressly or implicitly tended toward the entity theory.⁴⁶ Legislation also frequently treated the partnership as a legal person.⁴⁷ Indeed, a close reading of the Uniform Act's provisions suggested that it had implicitly adopted the entity theory notwithstanding its claim to be based on the aggregate concept of the partnership.⁴⁸

36. Samuel Williston, *The Uniform Partnership Act, with some Remarks on Other Uniform Commercial Laws*, 63 U. PA. L. REV. 196 (1915).

37. *Id.* at 207-09.

38. Lewis, *The Act*, *supra* note 29.

39. *Id.* at 640-41.

40. Judson A. Crane, *The Uniform Partnership Act—A Criticism*, 28 HARV. L. REV. 762 (1915). At the time of publication, Crane had not yet taken up a professorship at George Washington University Law School. He later became Dean of the law school at the University of Pittsburgh.

41. William Draper Lewis, *The Uniform Partnership Act – A Reply to Mr. Crane's Criticism*, Parts I & II, 29 HARV. L. REV. 158 (1915), 29 HARV. L. REV. 291 (1916).

42. Judson A. Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838 (1916).

43. The reference to "spirited exchange" is found in Byron D. Sher & Alan R. Bromberg, *Texas Partnership Law in the 20th Century—Why Texas Should Adopt the Uniform Partnership Act*, 12 SW. L.J. 263, 269 n.31 (1958).

44. Crane, *supra* note 40, at 765.

45. *Id.* at 764-65.

46. *Id.* at 767-68.

47. *Id.* at 768.

48. *Id.* at 773-74.

In response, Lewis argued that the difficulties a creditor would face when seeking to reach the property of a partner not only created practical problems but also were not in accordance with the expectations of merchants.

To say that business men dealing with a partnership trust primarily the joint property of the partners, and secondarily their separate property, is to make a statement which every person who has ever been called upon to advise in transactions with a partnership knows to be false.⁴⁹

Given this inconsistency of business practice with the entity theory, he felt that the Uniform Law Commission would never adopt a partnership law based on that theory. Moreover, a law based on the entity theory would substitute radically different provisions for those that had grown up in the courts.⁵⁰ Almost parenthetically, he also adds that persons with the greatest practical experience think that treating the partnership as an entity "lessened the partner's sense of moral responsibility for partnership acts."⁵¹ Much space is then devoted to close readings of the many cases cited by Crane in support of the proposition that many courts expressly or implicitly adopt the entity theory or whose decisions can only be explained by that theory. Lewis is not persuaded. As for the criticism that the Act neither adopts nor rejects the entity theory, Lewis argues that Crane reads too much into the language used by the Act.⁵² "The theory . . . may be wrong," Lewis concludes, "but a reading of its provisions will show that the Commissioners have adhered to the aggregate theory, dominant in our partnership cases, and have not adopted the legal-person theory."⁵³

Not content to let Lewis have the last word, Crane responded with a more succinct summary of the reasons why the legal-person theory should be adopted as the basis for codification.

1. . . . The most effective way to make the law of partnership logical, scientific and uniform is to abandon the old premises and substitute one from which a body of law can be deduced with ease and certainty. . . .
2. The certainty and ease with which the details of the law could be developed under the legal-person theory would immensely shorten the labors of the judge, lawyer, student and business man.
3. Many important problems would receive solutions more nearly approximating current ideas of justice and business convenience than is now possible
4. The practical superiority of the legal-person theory is demonstrated by the fact that civil law countries have adopted it.

49. Lewis, *supra* note 41, Part I at 166-67.

50. *Id.* at 172.

51. *Id.* at 173.

52. Lewis, *supra* note 41, Part II at 291-96.

53. *Id.* at 296.

5. Although the common law is said not to recognize the partnership as a legal person, many courts have expressly declared it to be such and based their decisions upon the theory that it is to be regarded as a legal person.

6. Many decisions of cases involving questions of partnership law are irreconcilable with any other than the legal-person theory, although that theory is not expressly referred to as the basis of the decisions.

7. There is considerable legislation, aside from attempts to codify the law of partnership, which treats the partnership as a legal person by making it the subject of rights and obligations.

8. The language and the effect of provisions of the proposed Uniform Act are more nearly consistent with the legal-person theory of partnership than with any other theory.⁵⁴

As for points 5-8, Lewis had clearly not persuaded Crane about the proper reading of the cases and legislation Crane had cited in his first article.

Having set out the affirmative case, Crane turns to rebuttal of reasons given for rejecting the entity theory: to object that the entity theory would change the law as we know it is an objection raised against any reform of the law; Lewis is alone in thinking that businessmen do not consider the partnership as an entity; how a creditor of the partnership could reach the property of an individual creditor was a problem of procedural, rather than substantive law; registration is no more and no less desirable under either theory; and creating "tenure in partnership" does not solve all problems, especially when a partnership is insolvent.⁵⁵

And with publication of this last article, Crane and Lewis let the matter rest.⁵⁶

No matter what the merits of the arguments on each side, however, States responded to the Uniform Act affirmatively. With the exception of Louisiana, all States—including Texas—ultimately adopted the Act with remarkably few amendments.

III. ALAN BROMBERG AND THE TEXAS UNIFORM PARTNERSHIP ACT OF 1961

In 1952, when Alan Bromberg returned home to Dallas after graduating from Yale Law School, Texas partnership law was found in common law cases. As an associate of the Carrington, Coleman, Sloman and Blumenthal firm in Dallas, Alan was encouraged by Paul Carrington Sr. to work on the codification of Texas corporate law. When Alan joined the SMU law faculty in 1956, he focused on partnership law (especially Texas

54. Crane, *supra* note 42, at 839-45.

55. *Id.* at 845-50 (footnotes omitted).

56. Crane, of course, went on to publish in 1938 a *HANDBOOK ON THE LAW OF PARTNERSHIP*—the forerunner of the *CRANE & BROMBERG HANDBOOK*.

partnership law), both in his teaching⁵⁷ and publications.⁵⁸ At the same time, he continued his committee work in the Texas and Dallas Bar Associations. In 1959, he chaired a partnership committee of the Dallas Bar Association that prepared a report recommending adoption of the Uniform Partnership Act with specific amendments, most of which were made to conform to Texas law.⁵⁹ When published, the report with a draft bill was taken up by the Texas Bar and presented to the State legislature. After accepting several amendments, the legislature enacted the draft bill in 1961 as the Texas Uniform Partnership Act.⁶⁰ Alan continued his work with the Business Law Section of the Texas Bar Association until the end of his career.⁶¹

Alan Bromberg's task differed from that of the draftsman of the original Uniform Partnership Act. Ames and Lewis had to prepare a text for adoption in almost fifty jurisdictions, most of which had no statutes for general partnership. Alan had to persuade a single legislature, albeit the Texas legislature, that an existing text—a uniform law already adopted by thirty-nine other states—should be enacted. He made his case, first, by a detailed comparison of Texas case law with the Uniform Act,⁶² followed by a draft bill, with meticulous comments for each section, and then personally participating in the approach to the legislature.

There was no need to refight the battle over whether to start with an "aggregate" or an "entity" theory. Texas case law had rejected the concept of a partnership as an entity. "The Texas courts, following the common-law view, have repeatedly stated that the partnership is not a separate legal entity, a pronouncement that has sometimes affected the outcome of the problem at hand."⁶³ When making his case for enactment of the Uniform Partnership Law in Texas, Alan concluded:

The [original 1914 Uniform] Act, like other statutory, judicial, and scholarly views of partnership, hovers between entity and aggregate concepts. While it has been criticized for so doing, neither notion can be pursued with absolute consistency. The aggregate theory imports

57. ALAN R. BROMBERG & BYRON D. SHER, CASES AND MATERIALS ON THE TEXAS LAW OF PARTNERSHIPS (1958); ALAN R. BROMBERG, PARTNERSHIP PRIMER: PROBLEMS AND PLANNING (1961).

58. Byron D. Sher & Alan R. Bromberg, *Texas Partnership Law in the 20th Century—Why Texas Should Adopt the Uniform Partnership Act*, 12 Sw. L.J. 263 (1958) [hereinafter Sher & Bromberg]; Alan R. Bromberg, *The Proposed Texas Uniform Partnership Act*, 14 Sw. L.J. 437 (1960) [hereinafter *Proposed Act*]; Alan R. Bromberg, *Texas Uniform Partnership Act—The Enacted Version*, 15 Sw. L.J. 386 (1961) [hereinafter *Enacted Version*].

59. *Report of Dallas Bar Association Special Committee on Uniform Partnership Act* (March 25, 1960).

60. 1961 Tex. Gen. Laws 289 (expired Jan. 1, 1999).

61. For a summary of Alan Bromberg's work on the Texas Uniform Partnership Act, see Alan R. Bromberg, Byron F. Egan, Dan L. Nicewander, Robert S. Trotti, *The Role of the Business Law Section and the Business Law Foundation in the Development of Texas Business Law*, 41 TEX. J. BUS. L. 44, 54 (Spring 2005).

62. See generally Sher & Bromberg, *supra* note 58. See also Bromberg, *Proposed Act*, *supra* note 58, at 445.

63. Sher & Bromberg, *supra* note 58, at 269 n.31 (citing Texas cases and summarizing decisions); Bromberg, *Proposed Act*, *supra* note 58, at 445.

hopeless complications of property ownership and creditors' rights. The entity theory, carried to its extreme, would shield partners from personal liability, leaving little to differentiate a partnership from a corporation. The original Act compromises sensibly these and other problems. It leans toward the entity idea, which accords with business usage. The Texas Act goes a few steps further in permitting continuity beyond death and recognizing broader ownership of partnership interests by non-partners.⁶⁴

Alan did not hide provisions in the Act that could be understood as treating a partnership as an entity,⁶⁵ but he did not stress them either. Like the persuasive advocate that he was, before he addressed the entity and aggregate concepts, he stated that the Uniform Act is consistent with Texas law because "in large measure" the Act codified the common law, and he lists seven important features of the proposed Texas Act that clarify and modernize the Uniform Partnership Act.⁶⁶ In the event, there was no debate in the Texas legislature about whether a partnership is an entity.⁶⁷

That Alan himself, if starting from scratch, might have defined a partnership as a separate legal person is irrelevant.⁶⁸ He was less concerned with the abstract debate than with resolving specific issues, such as when should a change in membership dissolve a partnership and require a winding up of the partnership business.⁶⁹

IV. REVISION OF THE 1914 ACT: THE UNIFORM PARTNERSHIP ACT OF 1997.⁷⁰

In 1987, the Uniform Law Commission set up a Drafting Committee and appointed a Reporter to revise the 1914 Uniform Partnership Act. The Commission adopted the Revised Uniform Partnership Act in 1992. Responding to constructive criticisms, the Commission amended the Act in 1993, 1994, 1996, and 1997. In the process, the Commission dropped "Revised" from the name of the Act. The Act is now the Uniform Partnership Act of 1997, although its text has since been tweaked in response to the Commission's efforts to harmonize all its uniform acts dealing with

64. Bromberg, *Proposed Act*, *supra* note 58, at 467–68 (footnotes omitted).

65. *See id.* at 445 n.25 (listing provisions in the Uniform Act treating the partnership as an entity).

66. *Id.* at 467.

67. Bromberg, *Enacted Version*, *supra* note 58.

68. Sher & Bromberg, *supra* note 58, at 269 n.31 ("Many partnership property problems could also have been solved by defining the partnership as a separate legal person or entity which owns the property devoted to the business."). Note the phrase "could also have been solved . . ." The Uniform Act did solve the problem but did so by redefining the incidents of a partner's property interest in property co-owned by the partners—an indirect and potentially confusing solution.

69. *See, e.g.*, Alan R. Bromberg, *Partnership Dissolution – Causes, Consequences, and Cures*, 43 TEX. L. REV. 631 (1965) (including a suggested continuation form).

70. For a succinct history of the revision, see UNIF. P'SHIP ACT Prefatory Note (1997).

unincorporated organizations.⁷¹ Texas⁷² and thirty-eight other states have become party to the revised Act.⁷³

The Commission acted in response to a 1986 report of an American Bar Association subcommittee that suggested approximately 150 changes to the Act.⁷⁴ The ABA subcommittee recommended that any revision of the Act should adopt the entity theory whenever possible—as long as essential matters, such as the tax status of partnerships, was maintained⁷⁵ The 1997 Act follows this ABA recommendation, but the Reporter and drafting committee arrived at the result at the end rather than the beginning of the process.

[T]he Committee proceeded to answer a series of pragmatic questions that arise in the formation, capitalization, operation, and breakup of partnerships. [Before the drafting was complete] it became clear that the entity approach was adopted in virtually every situation. That approach provides simpler rules and is consistent with RUPA's attempt to give partnerships greater stability.⁷⁶

Section 201(a)—"A partnership is an entity distinct from its partners"—was added to state this approach expressly. The theory is not, however, applied relentlessly. Partners continue to be jointly and severally liable for partnership obligations,⁷⁷ and the partnership does not continue in all cases when a partner "disassociates."⁷⁸

In other words, the history of partnership law in the United States has come full circle. A century after Dean Ames proposed drafting the law starting with the entity theory, the Uniform Law Commission has returned to its original endorsement of his proposal.

71. UNIF. P'SHIP. ACT (1997) (*Last Amended 2013*), available at http://www.uniformlaws.org/Shared/Docs/Partnership/upa_final-2014.pdf.

72. Acts 2003, 78th Leg. ch. 182, sec. 152 (eff. January 1, 2006) (codified as TEX. BUS. ORGS. CODE ANN. § 152 (Vernon)).

73. For a map showing those States that have enacted the 1997 Act, see [http://www.uniformlaws.org/Act.aspx?title=partnership%20Act%20\(1997\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=partnership%20Act%20(1997)%20(Last%20Amended%202013)).

74. UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, *Should the Uniform Partnership Be Revised?*, 43 BUS. LAW. 121 (1987).

75. *Id.* at 124.

76. Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 3 (1993). Weidner, Reporter for the Revised Act, is yet another dean, in this case of the Florida State University Law School. Before being appointed Reporter, Dean Weidner reviewed the history of the aggregate v. entity debate and concluded that "[w]hether and how to directly embrace an entity model will be a central philosophical question for the Commissioners." Donald J. Weidner, *A Perspective to Reconsider Partnership Law*, 16 FLA. ST. U. L. REV. 1, 10 (1988).

77. UNIF. P'SHIP ACT (1997), *supra* note 71, § 306(a).

78. *Id.* § 801(1) (partner in partnership "at will" dissolves partnership on disassociation); § 801(2) (partner in partnership for a particular term or undertaking may dissolve partnership on disassociation).

V. REVISING THE BRITISH PARTNERSHIP ACT OF 1890?

History has also come full circle in the broader context of other common-law jurisdictions. A century earlier, the British Partnership Act of 1890 inspired the Uniform Partnership Act in the United States. A century later, the Revised Uniform Partnership Act inspired the English Law Commission to recommend a review of the 1890 Act.⁷⁹ Acting on this recommendation several years later, the U.K. Department of Trade and Industry asked the Law Commission and its counterpart in Scotland, the Scottish Law Commission, to undertake a joint study of partnership law. The two law commissions issued a joint consultation paper in 2000. Following consultation, the commissions published a joint report in November 2003.⁸⁰

The joint report thought “it would be much more satisfactory in today’s world that a partnership should be a legal entity.”⁸¹

Many people would be astonished to learn that a firm is automatically dissolved whenever there is a change of partner, or that it cannot own property, but that remains the law in England and Wales (although not in Scotland). In practice firms habitually operate as if they were legal entities and are regarded as entities by those who deal with them. The fact that they are not presently recognised by the law is a throw back to the nineteenth century. We believe that it is time to end this anomaly.⁸²

The “legal” (or “mercantile”) concept of partnership, in other words, would prevail—just as Dean Ames had proposed in 1905.

Familiar reasons are given for recognizing a partnership as an entity.⁸³

[T]he entity approach brings the law closer to the commercial perception of how a partnership works. We see it as an effective solution to practical problems. It is also much easier to understand and explain to non-experts than some of the pragmatic solutions which English law has adopted to problems which are created by the aggregate approach. That is an important consideration in law reform particularly in relation to small business ventures.⁸⁴

79. For a succinct summary of these reform efforts in the U.K., see J.J. Henning, *The Review of Partnership Law: The Entity Approach Prevails*, 25 COMPANY LAW. 193, 193–94 (2004).

80. THE LAW COMMISSION & THE SCOTTISH LAW COMMISSION, SUMMARY, PARTNERSHIP LAW: A JOINT REPORT LAW 1 (Law Com No. 283 & Scot Law Com No. 192) (Cm. 6015) (18 November 2003).

81. *Id.* at 19. During the public consultation period there was some opposition. The joint report notes that the Chancery Bar Association and the Law Reform Committee of the Bar Council, and The Law Society and Michael Twomey (author of a book on Irish partnership law) considered that legal personality was unnecessary. *Id.* at 45 n.4 (para. 5.3). The commissions nevertheless proceeded with its proposal.

82. THE LAW COMMISSION & THE SCOTTISH LAW COMMISSION, PARTNERSHIP LAW: A JOINT REPORT LAW 19 (Law Com No. 283 & Scot Law Com No. 192) (Cm. 6015) (18 November 2003).

83. *Id.* at 45–56 (Part V).

84. *Id.* at 54–55.

Support for the law commissions' recommendation is found in the analysis of leading treatise writers, the decisions of courts, and experience in other countries. Treatise writers, the joint report notes, have identified many difficulties created by the aggregate theory, especially with respect to the ownership of property and to continuation of rights and obligations following a change of membership.⁸⁵ Faced with these difficulties, judges struggle to reconcile the 1890 Act with contemporary commercial reality.⁸⁶ Such struggles are avoided in legal systems that recognize the partnership as an entity—Scotland, European civil law jurisdictions, and the United States.⁸⁷

Experience in the United States is highlighted.⁸⁸ Noting—with a quote from Bromberg and Ribstein⁸⁹—that the Uniform Partnership Act of 1914 drew on the 1890 Act and had been drafted on the “aggregate” theory, the joint report finds particularly telling that the Revised Uniform Partnership Act’s explicit statement in section 201 that a partnership is an entity has not—again quoting Bromberg and Ribstein⁹⁰—been controversial. “From our study of the commentaries, and discussion with those involved, it seems that this provision was adopted because it was seen as a logical development of the existing law rather than a radically new solution”⁹¹

The U.S. Revised Uniform Partnership Act and this 2003 British proposal also stirred interest in the Uniform Law Conference of Canada. Given that partnership acts in the common law provinces were based on the 1890 Act, the Canadian Conference took up the British proposal to reform that Act. In 2006, a report⁹² comparing the reforms proposed by the U.K. and implemented in the U.S. was submitted to the Conference, which appointed a working group to prepare a study paper.⁹³

Alas, this flurry of interest in both Britain and Canada ended, however, with a whimper rather than a bang. In September 2006, the then government in the United Kingdom resolved not to move forward with the pro-

85. *Id.* at 48–49.

86. *Id.* at 49–52.

87. *Id.* at 52–54.

88. *Id.* at 53–54, ¶¶ 5-31 to 5-36.

89. *Id.* at 53, ¶ 32 (citing ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP ¶ 103(b) (1988)). A footnote in the joint report expresses particular thanks to Larry Ribstein for persuading the publishers to provide the law commissions with “this authoritative, four volume work on Partnership Law.” *Id.* at n.42.

90. *Id.* at 54, ¶ 5-35 (citing BROMBERG & RIBSTEIN, *supra* note 89, ¶ 103(d)).

91. *Id.* at 53, ¶ 5-34. The joint report goes on to state “The reporters have commented that it was introduced towards the end of the revision project, in recognition that the single entity approach ‘provides simpler rules and is consistent with RUPA’s attempt to give partnerships greater stability.’” *Id.* at 53–54, ¶ 5-34 (Weidner & Larson, *supra* note 76).

92. Heather Heaven, *Reform of General Partnership Law: The Aggregate Versus Entity Debate*, UNIF. L. CONF. OF CANADA, CIV. L. SEC., Aug. 2006, available at http://www.ulcc.ca/en/component/jifile/?filename=images/stories/2006_en_pdfs/2006ulcc0018_General_Partnership_Law.pdf.

93. Closing Plenary Session Minutes 2006, Report from the Civil Section, available at <http://www.ulcc.ca/en/2006-Edmonton-ab/202-plenary-sessions/58-closing-plenary-sessions?showall=&start=1>.

posals with respect to general partnerships but to focus instead on the joint report's recommendation with respect to limited liability partnerships.⁹⁴ Possibly as a consequence, the Canadian Conference also allowed its work on reform of general partnerships to die.

VI. A CONCLUSION OF SORTS

What are you to make of the ultimate "triumph" of the entity theory in the United States and its continued rejection in other common-law jurisdictions? I suggest there are lessons about the limits of law reform and drafting technique. Ames proposed to start with simple fundamental rules (e.g., the partnership, rather than partners, holds title to partnership property) consistent with treatment of a partnership as a separate entity. Lewis, on the other hand, saw the task as one of providing simple, clear rules that the bar could recognize, with gaps in the uniform law to be filled in by judges on the familiar "aggregate" theory. Although he may or may not have been right that businesses did not think of the partnership as a separate entity, Lewis implicitly agreed with Ames that businesses wanted simple, uniform rules above all. By avoiding opposition from the legal professions and businessmen, Lewis was far more attuned to the realities of law reform than Ames. Similarly, in 21st century England, the U.K. government may have had in mind, at least in part, the potential opposition of the bar and indifference of businesses when it rejected the proposed reform.

There are also lessons about drafting technique. Ames began with three or four propositions for reform that he thought fundamental. All were consistent with the entity concept even if Ames did not insist on saying the partnership was a legal person. Lewis, on the other hand, sought to tweak rules derived from existing case law to address specific problems. For this approach, he could draw support from the model of the British Partnership Act, which, with simplification of its language, could be adapted for the United States. Eighty years later, the drafters of the Revised Uniform Act allegedly began without any "theoretical" preconceptions and resolved problems issue by issue until the drafters realized that most solutions could be explained most simply by designating the general partnership an entity.

94. House of Commons Ministerial Statements for 20 July 2006 (Minister of Trade, Mr. Ian McCartney, Partnership Law Reform), *available at* <http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmhansrd/vo060720/wmstext/60720m0004.htm>.

