

## Louisiana Law Review

---

Volume 42 | Number 4  
Summer 1982

---

# Louisiana's New Partnership Provisions: A Review of the Changes and Some Continuing Problem Areas

Mark C. Schroeder

---

### Repository Citation

Mark C. Schroeder, *Louisiana's New Partnership Provisions: A Review of the Changes and Some Continuing Problem Areas*, 42 La. L. Rev. (1982)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol42/iss4/9>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

## LOUISIANA'S NEW PARTNERSHIP PROVISIONS: A REVIEW OF THE CHANGES AND SOME CONTINUING PROBLEM AREAS

### *Introduction*

In 1980 the Louisiana Legislature enacted Acts 150, 151, and 152, which revised and amended Louisiana's partnership law.<sup>1</sup> The repealed Civil Code articles had existed since 1825, when the legislature rejected Edward Livingston's projet for a Commercial Code and apparently rewrote and placed in the Louisiana Civil Code the portion on partnership law.<sup>2</sup> In the rewriting process, many errors and illogical classifications crept in and produced an awkward and inconsistent body of law.<sup>3</sup> The 1980 revision was an effort to eliminate the confusion and inconsistencies, and to provide more practical provisions for use in a society where partnerships are popular vehicles of commerce.

Since their enactment, the provisions of the 1980 partnership revision have been the subject of four amendments.<sup>4</sup> Of these, only Act 797 of 1981, substantially amending article 2826 and providing for the causes of termination of a partnership, will be examined. The other amendments were primarily technical in nature.<sup>5</sup>

The 1980 revision brought about several significant theoretical changes. The first significant change is the elimination of the distinc-

---

1. Act 150 of 1980 repealed Title XI of Book III of the Louisiana Civil Code of 1870, containing articles 2801 through 2890, relative to partnerships, and revised, amended, and reenacted a new Title XI, Partnership, including articles 2801 through 2848, providing the rules governing partnerships and partnerships in commendam. Act 151 of 1980 amended Code Title XI of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950 by repealing Chapter 1, Partnerships, containing sections 3401 through and including section 3406, and by providing for the creation of a Central Registry for Contracts of Partnership. Act 152 of 1980 amended Code Title XI of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950 by enacting a new Chapter 2, Qualification of Foreign Partnerships, containing sections 3421 through 3427, providing particular rules governing foreign partnerships.

2. LA. CIV. CODE ANN. bk. III, tit. XI—Partnership, Reporter's Introduction 1980 at 9 (West Supp. 1981) [hereinafter cited as Reporter's Introduction]; O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LA. L. REV. 307, 324 (1949).

3. See authorities cited in note 2, *supra*.

4. 1981 La. Acts, Nos. 795, 796, 797, & 888.

5. Act 795 of 1981 elaborated on the concept that Act 150 of 1980 was not to be applied so as to divest already vested rights, stating that such rights include, but are not limited to, the right to use an existing partnership name. Act 796 of 1981 clarified section 2 of Act 151 of 1980, wherein it was provided that nothing in Act 151 of 1980 should affect any limitations on the liability of partners in commendam (limited partners), by adding that this provision applied to liabilities arising both prior to and subsequent to January 1, 1981, the effective date of Act 151 of 1980. Act 888 of 1981 amended article 2814 by adding that persons authorized to execute a mortgage on behalf of a partnership shall, for purposes of executory process, have authority to execute a confession of judgment in the act of mortgage without execution of the articles of partnership by authentic act.

tion between ordinary and commercial partnerships. Second, the revision adopted the theory of mutual agency among the partners and the partnership with regard to activities in the ordinary course of business. Third, the revision extended the concept that a partnership is an entity, a separate, juridical person:<sup>6</sup> it has a continuity of life in its own capacity, though one or more of the individual partners may cease to be partners.

Following a brief analysis of these changes, this note will focus upon three problem areas in the existing provisions: (1) the creation of inconsistencies between article 2826 and the remaining provisions as a result of the amendment of that article by Act 797 of 1981, (2) the failure of the new provisions to provide a clear statement of the method for determining an individual partner's liability for partnership debts, and (3) the continuing difficulties in partnership ownership of immovables.<sup>7</sup>

### *Significant Theoretical Changes*

#### *Classification of Partnerships*

The 1980 revision made a substantial step toward simplification of Louisiana's partnership law by eliminating the distinction between *ordinary* and *commercial* partnerships.<sup>8</sup> The Civil Code had defined commercial partnerships as follows:

Commercial partnerships are such as 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 of transportation.<sup>9</sup>

Ordinary partnerships were "all such as are not commercial."<sup>10</sup> Even though the Code further subdivided ordinary and commercial

---

6. The concept of the partnership as an entity was implicit in the articles of the Civil Code of 1870, and had long been recognized expressly in the jurisprudence, though not to the extent provided for in the 1980 Revision. See *Smith v. McMicken*, 3 La. Ann. 319, 322 (1848); *Succession of Pilcher*, 39 La. Ann. 362, 365 (1887).

7. A discussion of the new provisions governing limited partnerships, Civil Code articles 2836-2848, is beyond the scope of this note. The new provisions governing limited partnership are discussed in Comment, *An Examination of Louisiana Limited Partnership—The Partnership in Commendam*, 55 TUL. L. REV. 515 (1981).

8. LA. CIV. CODE art. 2824 (as it appeared prior to 1980 La. Acts, No. 150).

9. LA. CIV. CODE art. 2825 (as it appeared prior to 1980 La. Acts, No. 150).

10. LA. CIV. CODE art. 2826 (as it appeared prior to 1980 La. Acts, No. 150).

partnerships,<sup>11</sup> the definitions provided for these subdivisions served largely to create only additional uncertainty.<sup>12</sup> The jurisprudence broadly applied the provision defining commercial partnerships; what began as an ordinary partnership would automatically become a commercial partnership simply by engaging in any of the listed activities indigenous to commercial partnerships.<sup>13</sup> Important legal consequences flowed from this distinction. For example, commercial partners were bound *in solido* for debts of the partnership; ordinary partners were not.<sup>14</sup> Commercial partners possessed reciprocal powers of administration of the partnership assets;<sup>15</sup> ordinary partners did not.<sup>16</sup> Additionally, the courts held that commercial partnerships could engage only in the three activities defined in the Code and therefore could not own immovable property. Any immovable property acquired in the name of a commercial partnership was held to be owned by the partners jointly in their capacity as individuals.<sup>17</sup>

#### *The Mutual Agency Doctrine*

A second significant change brought about in the revision was the adoption of the doctrine of mutual agency.<sup>18</sup> Civil Code article 2814, as originally enacted in 1980, provides:

A partner is a mandatary of the partnership for all matters in the ordinary course of its business other than the alienation, lease or encumbrance of its immovables. A provision that a partner is not a mandatary does not affect third persons who in good faith transact business with the partner.<sup>19</sup>

With this provision, Louisiana is in conformity with the forty-eight states<sup>20</sup> that have adopted the Uniform Partnership Act (hereinafter UPA).<sup>21</sup>

11. LA. CIV. CODE arts. 2826 (as it appeared prior to 1980 La. Acts, No. 150) (dividing ordinary partnerships into universal and particular), and 2827 (as it appeared prior to 1980 La. Acts, No. 150) (dividing commercial partnerships into general and special).

12. O'Neal, *supra* note 2, at 472-77.

13. Southern Coal Co. v. Sundbery & Winkler, 158 La. 386, 387, 104 So. 124, 125 (1925).

14. LA. CIV. CODE art. 2872 (as it appeared prior to 1980 La. Acts, No. 150).

15. LA. CIV. CODE art. 2870(1) (as it appeared prior to 1980 La. Acts, No. 150).

16. LA. CIV. CODE arts. 2870(5) & 2874 (as they appeared prior to 1980 La. Acts, No. 150).

17. Brinson v. Monroe Auto. & Supply Co., 180 La. 1064, 158 So. 558, 562 (1934).

18. For a thorough discussion of the historical development of this concept in the civil law, see Stein, *The Mutual Agency of Partners in the Civil Law*, 33 TUL. L. REV. 595 (1959).

19. Article 2814 was amended by 1981 La. Acts, No. 888. See note 4, *supra*.

20. Only Georgia and Louisiana have not adopted the UPA. 6 UNIFORM LAWS ANNOTATED 1 (Supp. 1981).

21. Section 9 of the UPA provides, in part:

(1) Every partner is an agent of the partnership for the purpose of its business,

The comments to Civil Code article 2814 indicate that this agency binds the partnership in cases of both actual and apparent authority.<sup>22</sup> The doctrine of apparent authority, though not expressly provided for in the Civil Code, has been expressly articulated in the jurisprudence of the state and is well embedded in the law of Louisiana.<sup>23</sup> Under the former Code provisions<sup>24</sup> this mutual agency was one of the legal consequences flowing only from commercial partnerships. Now with only one, broad class of partnership, the extent of the agency power has been expanded to include the power to engage in any activity within the ordinary course of the partnership's business, including the purchase of immovables for cash, but excluding the alienation, lease or encumbrance of immovables.<sup>25</sup>

Although the Reporter's Introduction to the revision indicates only one class of partnership, "ordinary," the class might have been described more accurately as that of "general" partnership (as opposed to "limited" partnership); the revision did not simply reject one of the former classes, either ordinary or commercial, in favor of the other. This distinction should be noted because the revision adopted, for that general class, characteristics of both of the former classes. For example, the doctrine of mutual agency, and the commercial partners' powers of administration, which were formerly expressed only in commercial partnerships, are now both characteristics of the single class adopted by the revision.

### *The Entity Concept*

Another significant change effected by the 1980 revision was the expansion of the concept of the partnership as an entity to include

---

and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of the partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

22. LA. CIV. CODE art. 2814, comment (a) states in part:

A partner who has no authority to act for the partnership due to a stipulation in the partnership agreement can bind the partnership if the third person with whom he deals neither knows nor has reason to know of the partner's lack of authority to bind the partnership.

23. *Krautkramer Ultrasonics, Inc. v. Port Allen Marine Serv., Inc.*, 248 So. 2d 336 (La. App. 4th Cir. 1971), discussed in Harrison, *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Mandate*, 32 LA. L. REV. 231, 232 (1972).

24. See text at notes 14-15, *supra*.

25. LA. CIV. CODE art. 2814, comments (a) & (b).

the consonant concept of continuity of life of the entity. The idea that the partnership itself is an entity distinct from the individual partners composing it had been recognized in the jurisprudence since 1848, in *Smith v. McMicken*:

The partnership once formed and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compose it. It is a civil person which has its peculiar rights and attributes . . . . Hence, therefore, the partners are not the owners of the partnership property. The ideal being, thus recognized by fiction of law, is the owner; it has the right to control and administer the property to enable it to fulfill its legal duties and obligations; and the respective parties who associated themselves for the purpose of participating in the profits which may accrue, are not owners of the property itself but of the residuum which may be left from the entire partnership property, after the obligations of the partnership are discharged.<sup>26</sup>

The entity concept is recognized expressly in the new provisions. Civil Code article 2801 states that "a partnership is a juridical person, distinct from its partners . . . ." An alternative approach to the entity theory is the *aggregate theory* of partnership,<sup>27</sup> in which the partners in their capacity as individuals are considered the real parties in interest as owners of the partnership property. "A partnership, at common law, is not a legal entity, but only a contractual status."<sup>28</sup>

Although Louisiana prior to 1980 had adhered to some aspects of the entity concept, the former Code provision governing causes for termination did not allow for continuity of life for the partnership entirely independent of the membership of the partners. Article 2876 (as it appeared prior to 1980 La. Acts, No. 150) (hereinafter references to articles as they appeared before the 1980 revision will be made as "old," and as they appear after the 1980 revision, "new") provided:

A partnership ends:

1. By the expiration of the time for which such partnership was entered into.

---

26. 3 La. Ann. 319, 322 (1848). See, e.g., *Brinson v. Monroe Auto. & Supply Co.*, 180 La. 1064, 158 So. 558 (1934); *Toelke v. Toelke*, 153 La. 697, 96 So. 536 (1923); *Succession of Pilcher*, 39 La. Ann. 362, 1 So. 929 (1887).

27. An analysis of the relative merits of the aggregate and entity theories of partnership is beyond the scope of this article. For a discussion of these two theories see generally Crane, *The Uniform Partnership Act: A Criticism*, 28 HARV. L. REV. 762 (1915) (criticizing the UPA's adoption of aggregate concepts), and Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158 (1916) (supporting the UPA's adoption of the aggregate theory over the entity theory).

28. *Martin v. Hemphill*, 237 S.W. 550, 553 (Tex. App. § B, 1922).

2. By extinction of the thing, or the consummation of the negotiation.
3. By the death of one of the partners, or by his interdiction.
4. By his bankruptcy.
5. By the will of all the parties, legally expressed, or by the will of any of them, founded on a legal cause, and expressed in the manner directed by law.

New Civil Code article 2826 eliminated the death or interdiction of any partner as a cause for termination, and also eliminated the possibility of termination caused by the will of any one of the partners founded on legal cause. New article 2826 of the Civil Code (prior to Act 797 of 1981) stated:

Unless continued as provided by law, a partnership is terminated by: the unanimous consent of its partners; *a judgment of termination*; the granting of an order for relief to the partnership under Chapter 7 of the Bankruptcy Code; *the reduction of its membership to one person*; the expiration of its term; or the attainment of, or the impossibility of attainment of the object of the partnership.

A partnership also terminates in accordance with the provisions of the contract of partnership.<sup>29</sup>

The italicized clauses, additional causes of termination, were added by the 1980 revision. Clearly, neither provision creates a cause for termination based on a change in the membership of the partnership while the partnership might possibly continue to exist among the remaining partners. Additionally, none of the other provisions of Civil Code article 2826 (prior to 1981 La. Acts, No. 797) allow for the possibility of terminating the partnership solely due to circumstances involving a single partner. Under the prior law, the partnership terminated when any partner lost his legal capacity<sup>30</sup> or when any partner independently decided to withdraw from the partnership.<sup>31</sup>

### *Highlight of Current Problem Areas*

#### *Amending the Entity Concept*

As discussed previously, the 1980 revision made complete Louisiana's employment of the entity theory of partnership by providing for continuity of the entity's life. Additionally, this concept pervades

---

29. LA. CIV. CODE art. 2826 (as it appeared prior to 1981 La. Acts, No. 797) (emphasis added).

30. LA. CIV. CODE art. 2876(3) (as it appeared prior to 1980 La. Acts, No. 150).

31. LA. CIV. CODE art. 2876(5) (as it appeared prior to 1980 La. Acts, No. 150).

the entire regime.<sup>32</sup> Nevertheless, Act 797 of 1981 amended new Civil Code article 2826 to eliminate completely the entity's ability to continue after a change in membership absent unanimous consent of the remaining partners or an expressly stated contractual right to continue the partnership.<sup>33</sup> This single change in a regime entirely based on another concept has produced a number of inconsistencies between the articles. Moreover, this result is particularly problematical since it is contrary to the principle that the Civil Code's provisions should be susceptible to a reading *in pari materia*.<sup>34</sup> The amended version of Civil Code article 2826 precludes such a reading by departing significantly from the scheme of the other thirty-five articles.

Tax practitioners probably provided the impetus for this amendment; they found the continuity of life of the partnership entity inconsistent with the interests of their clients who sought classification as a partnership in order to avoid the tax consequences accompanying classification as a corporate entity. The basis for these conflicting considerations lies in the Internal Revenue Service's regulations concerning the criteria to be used for distinguishing between corporations and other forms of associations, such as partnerships and trusts.

The regulations contain six criteria for distinguishing the entities: 1) the existence of associates, 2) an objective to carry on business and divide the gains therefrom, 3) continuity of life, 4) centralization of management, 5) limited liability, and 6) free transferability of interests.<sup>35</sup> The first two criteria, existence of associates and an ob-

---

32. Reporter's Introduction, *supra* note 2.

33. 1981 La. Acts, No. 797 added after the last sentence of the first paragraph of new Civil Code article 2826 the following additional causes of termination:

retirement from the partnership, or the death, interdiction, or dissolution of any general partner unless the partnership is continued by the remaining general partners under a right to do so stated in the contract of partnership or with the consent of all the remaining partners.

34. LA. CIV. CODE art. 17 states: "Laws *in pari materia*, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another."

35. 26 C.F.R. § 301.7701-2(a) (1980) states:

(a) *Characteristics of corporation.* (1) The term "association" refers to an organization whose characteristics require it to be classified for purposes of taxation as a corporation rather than as another type of organization such as a partnership or a trust. There are a number of major characteristics ordinarily found in a pure corporation which, taken together, distinguish it from other organizations. These are: (i) associates, (ii) an objective to carry on business and divided (*sic*) the gains therefrom, (iii) continuity of life, (iv) centralization of management, (v) liability for corporate debts limited to corporate property, and (vi) free transferability of interest. Whether a particular organization is to be classified as an association must be determined by taking into account the presence or absence of each of these corporate characteristics. The presence or absence of these characteristics will depend



jective to carry on business and divide the gains therefrom, are indicative of either the corporate or partnership form of business organization. The test, then, lies in the remaining four criteria: continuity of life, centralization of management, limited liability, and free transferability of interests. As long as an alleged partnership meets no more than two of the four criteria,<sup>36</sup> the tax status cannot be said to be "more nearly a corporation than a partnership."<sup>37</sup> Some practitioners probably felt that although the regulations would require a failure to satisfy at least two more of the corporate criteria to lose partnership status for income tax purposes, a preferable situation would be to avoid "spotting" the Internal Revenue Service the issue of continuity of life and risking the possibility of losing on more than one of the remaining three criteria.

Aside from the questionable practice of amending one provision for such particularized reasons, the enactment of Act 797 has created inconsistencies in the partnership law as a body, and serves to defeat some of the valid improvements sought by the Revision Committee. One such inconsistency concerns new Civil Code article 2818 and its comments providing for the causes of cessation of membership. New article 2818 states:

A partner ceases to be a member of a partnership upon: his death or interdiction; his being granted an order for relief under Chapter 7 of the Bankruptcy Code; his interest in the partnership being seized and not released as provided in Article 2819; his expulsion from the partnership; or his withdrawal from the partnership.

A partner also ceases to be a member of a partnership in accordance with the provisions of the contract of partnership.

Comment (a) under Civil Code article 2818 further states:

This article substantially changes the law. Under prior law the occurrence of one of the enumerated events of itself may have terminated the partnership. Under the new law, the partnership itself does not terminate upon occurrence of the event unless there results one of the causes for terminating a partnership set forth in Article 2826. . . .

Each of the above enumerated causes for termination of a partner's

---

upon the facts in each individual case . . . . An organization will be treated as an association if the corporate characteristics are such that the *organization more nearly resembles a corporation than a partnership or trust.*

(emphasis added).

36. *Larson v. Commissioner*, 66 T.C. 159 (1976), *acq.* C.B. 1979-1.

37. 26 C.F.R. § 301.7701-2(a) (1980), quoted at note 35, *supra*.

membership naturally will be preceded by a dissolution<sup>38</sup> of *that partner's interest* in the partnership. Since the dissolution of any general partner's interest is now also a cause for termination of a partnership,<sup>39</sup> Civil Code article 2818 is inaccurate and redundant in that it actually restates the causes for the termination of *the partnership* found in the amended version of article 2826, not just of membership.<sup>40</sup>

The amending of article 2826 also creates an impediment to the *formation* of partnerships when read in conjunction with new Civil Code article 2820. New article 2820 provides, "A partnership may expel a partner for just cause. Unless otherwise provided in the partnership agreement, a majority of the partners must agree on the expulsion." Again, termination of the partner's interest by expulsion for just cause will require a dissolution of that partner's interest and cause the termination of the partnership pursuant to the requirement of article 2826 as amended by Act 797 of 1981. The Revision Committee had provided for the convenience of the partners a method for removing one from among them who was engaging in activities which prejudiced the business, was failing to perform obligations, or was willfully or repeatedly breaching the partnership agreement.<sup>41</sup> However, after the amendment the partners apparently must choose between retaining the partner or terminating the partnership. Similarly, withdrawal of a partner from a partnership

---

38. The term "dissolution" did not appear in the Louisiana partnership provisions until introduced by Act 797 of 1981, which amended Civil Code article 2826, by providing for termination of the partnership in the event of "dissolution of any general partner." Although various names are applied to the stages prior to the termination of the partnership, the term "dissolution" is generally understood to be only the act or event precipitating termination. Following "dissolution" is the process of partitioning the assets, often called "winding up" or "liquidation," at the conclusion of which the partner's interest is "terminated" or "extinguished." See A. CONARD, R. KNAUSS, & S. SIEGEL, *AGENCY—ASSOCIATIONS—EMPLOYMENT—LICENSING—PARTNERSHIPS* 559 (2d ed. 1977); R. HAMILTON, *CORPORATIONS—INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS* 95, 99 (2d ed. 1981). The process is defined clearly in the Uniform Partnership Act, section 29 which states, "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business," and section 30 providing further, "On dissolution the partnership is not terminated, but continues until the winding up of the partnership affairs is completed." In the absence of any other guidance from the Civil Code's provisions, defining dissolution and the process toward termination in a manner similar to the above should be acceptable and not inconsistent with any other codal provisions.

39. See note 33, *supra*, and accompanying text.

40. *But see* LA. CIV. CODE art. 2801, comment (e), which states in part, "As a juridical person, a partnership is a legal entity distinct from the partners who compose it." Act 797 of 1981 clearly makes this statement inaccurate, inasmuch as the continued existence of the entity is entirely dependent on the composition of its members remaining unchanged.

41. LA. CIV. CODE art. 2820, comment (a).

constituted for a term<sup>42</sup> or from a partnership without a term<sup>43</sup> will result in the termination of the partnership. An awareness of these problems by potential partners may deter them from deciding to operate in the partnership form.

Prior to Act 797, new Civil Code article 2823 read in conjunction with article 2824 implied that a partner who chose to terminate his membership, who was expelled for just cause, or who ceased to be a member because his interest had been seized and held under a writ of execution and his interest was not released within thirty days<sup>44</sup> acquired the status of a *creditor*. This former partner was entitled to be paid an amount equal to the value of his interest,<sup>45</sup> "as soon as that amount is determined."<sup>46</sup> Rather than ranking second as an unsecured creditor in new Civil Code article 2833's hierarchy of partnership creditors, the partner whose membership has terminated ranks equally with other former members of the now also terminated partnership; all are entitled first to their contributions and then to a division of the surplus.<sup>47</sup>

New Civil Code article 2827 provides, "a partnership may be expressly or tacitly continued when its term expires or its object is attained, or when a resolutive condition of the contract of partnership is fulfilled." In light of the last clause of the amendment added by Act 797 of 1981, "unless the partnership is continued by the remaining general partners under a right to do so stated in the contract of partnership or with the consent of all the remaining partners," new Civil Code article 2827's provision for continuation by tacit agreement apparently conflicts with article 2826 as amended. Since Act 797 of 1981 is the most recent expression of legislative will, this provision for continuation by tacit agree-

---

42. LA. CIV. CODE art. 2821 provides: "If a partnership has been constituted for a term, a partner may withdraw without the consent of his partners prior to the expiration of the term provided he has just cause arising out of the failure of another partner to perform an obligation."

43. LA. CIV. CODE art. 2822 provides: "If a partnership has been constituted without a term, a partner may withdraw from the partnership without the consent of his partners at any time, provided he gives reasonable notice in good faith at a time that is not unfavorable to the partnership."

44. LA. CIV. CODE art. 2819.

45. LA. CIV. CODE art. 2823.

46. LA. CIV. CODE art. 2824.

47. LA. CIV. CODE art. 2833:

The creditors of a partnership shall be paid in the following order of priority: secured creditors in accordance with their security rights; unsecured creditors who are not partners; unsecured creditors who are partners.

If any assets remain after the payment of all secured and unsecured creditors, the capital contributions shall be restored to the partners. Finally, any surplus shall be divided among the partners proportionally based on their respective interests in the partnership.

ment arguably must be considered implicitly repealed.<sup>48</sup> Clearly, new Civil Code article 2829 ("A change in the number or identity of partners does not terminate a partnership unless the number is reduced to one.") is totally inconsistent with the amended version of article 2826, and likewise arguably must be considered repealed by the more recent expression of legislative will.<sup>49</sup>

Finally, since the entity will terminate upon the occurrence of any of the conditions listed in new Civil Code article 2826, (as amended by 1981 La. Acts, No. 797), formally transferring title of the property from the old partnership entity to the new becomes necessary. Absent such a formal transfer, a cloud will remain upon the title since continuation of the title in the name of the former partners indicates that the former partners still have a residual interest in the property. Clearing this cloud may require a quitclaim deed from the estate of a former partner. The new provisions had made acquisition of immovable property by the partnership entity less difficult;<sup>50</sup> the amended form of article 2826 negates that result.

Now the partnership seeking to survive changes in membership must provide contractually that such a right exists, or in the absence of such a contractual right the remaining members must consent unanimously to continuing the life of the entity.<sup>51</sup> The consequences are substantial, and the singular purpose behind the amendment to article 2826<sup>52</sup> arguably does not justify such a complete turnaround in the concept of continuity: from one of ease of transition to one of devastating consequences for failure to make express provisions at the outset. Further, the awkwardness and inconsistency now existing between articles originally intended to be read in conjunction with one another should amply justify a reconsideration of Act 797 of 1981 and pave the way for reinstatement of the policy chosen by the Revision Committee, that the

---

48. LA. CIV. CODE art. 22 provides: "Laws may be repealed either entirely or partially, by other laws."

LA. CIV. CODE art. 23 states: "The repeal is either express or implied: . . . It is implied when the new law contains provisions contrary to, or irreconcilable with those of the former law."

49. LA. CIV. CODE art. 2829, comment, which provides in part that "this rule is consistent with the concept that a partnership is an entity distinct from its partners," is another example of the pervasiveness of the entity concept in the regime formulated by the Revision Committee, which regime has been set awry with the passage of Act 797 of 1981.

50. See text at notes 108-09, *infra*, discussing the hazards faced by partnerships acquiring immovable property and burdens imposed on those seeking to buy immovables purportedly owned by the partnership.

51. See 1981 La. Acts, No. 797 (amending Civil Code article 2826). See also note 33, *supra*.

52. See text at notes 35-37, *supra*.

partnership entity has a life of its own independent of the individual members composing it.

*Virile Share and Computing Partner Liability For Partnership Debts*

As discussed previously,<sup>53</sup> the distinction between ordinary and commercial partnerships no longer exists. Under the former Code provisions, commercial partners were bound *in solido*<sup>54</sup> (the creditor had the right to compel any one of several debtors obliged to the same thing to pay the whole debt, exonerating the others toward the creditor<sup>55</sup>). On the other hand, ordinary partners each were bound for their share of the partnership debt, calculating such share "in proportion to the number of partners, without any attention to the proportion of stock or profits each is entitled to."<sup>56</sup>

In addition, ordinary partners lacked powers of agency with respect to the partnership.<sup>57</sup> Old Civil Code article 2822 clearly provided that in the event an ordinary partner made unauthorized purchases for the joint account, the other partners could elect whether they would take such a purchase on the joint account. Similarly, old article 2870(5) provided that in other than commercial partnerships (*i.e.*, ordinary), a partner could not, solely as a result of his status as partner, alienate or engage the things which belong to the partnership. To do so required an agreement granting the partner the administration of the assets. In conjunction with this restricted power of agency, the burden of the risk of loss was borne by the creditor. An examination of old Civil Code article 2874 indicates that for a creditor to bind ordinary partnerships for the unauthorized debt incurred by one of the ordinary partners, the *creditor* must prove that the *partnership was benefited* by the transaction.<sup>58</sup> Thus, under the earlier law, with the limited exception of the rules applicable to the narrowly defined commercial partnership, the prior partnership provisions restricted the ability of partners to incur debts on behalf of the partnership and limited the partners' liability for partnership debts incurred.<sup>59</sup>

Under the 1980 revision, the partners possess virtually the same

53. See text at notes 8-17, *supra*.

54. LA. CIV. CODE art. 2872 (as it appeared prior to 1980 La. Acts, No. 150).

55. LA. CIV. CODE art. 2091.

56. LA. CIV. CODE art. 2873 (as it appeared prior to 1980 La. Acts, No. 150).

57. See note 16, *supra*.

58. LA. CIV. CODE art. 2874 (as it appeared prior to 1980 La. Acts, No. 150):

If a debt be contracted by one of the partners of an ordinary partnership, who is not authorized, either in his own name or that of the partnership, the other partners will be bound, each for his share, provided it be proved that the partnership was benefited by the transaction.

59. LA. CIV. CODE arts. 2872 & 2873 (as they appeared prior to 1980 La. Acts, No. 150).

powers of agency possessed by commercial partners under the old regime.<sup>60</sup> Absent any express agreement to the contrary,<sup>61</sup> partners nevertheless *apparently have been granted* the same limited liability possessed by ordinary partners under the former regime.<sup>62</sup> However, this construction is somewhat uncertain because the term "*virile share*" is never defined although it is used in article 2817<sup>63</sup> and in the comments to three other Code articles.<sup>64</sup>

The word *virile* comes from the Latin adjective *virilis*, and in the juridical context means that "which falls to a person" or one's "share or part."<sup>65</sup> The problem lies in computing this share or portion. In the absence of any clear mandate from the legislation, two possible approaches exist for interpreting and computing a partner's "*virile share*." One possibility is the continuation of old Civil Code article 2873's rule of calculating liability in proportion to the number of partners. Support for this alternative approach may be found by tracing the use of the word *virile* to its origin, article 44 of the Digest of 1808.<sup>66</sup> In this source provision, the amount constituting "*virile share*," although not clearly defined, is implicit in the clause, "bound . . . for his *virile share*, although his share in the partnership was less."<sup>67</sup> Additional support for this alternative may be found by looking to the origin of article 44 of the Digest of 1808, article 1863 of the Code Napoleon<sup>68</sup> which describes liability as "[E]ach one for an equal sum and share. . . ."<sup>69</sup>

60. See text at notes 18-25, *supra*.

61. LA. CIV. CODE art. 2817, comment (c).

62. LA. CIV. CODE art. 2817: "A partnership as principal obligor is primarily liable for its debts. A partner is bound for his *virile share* of the debts of the partnership but may plead discussion of the assets of the partnership."

63. See note 61, *supra*.

64. LA. CIV. CODE art. 2815, comment: "[A] partner is liable toward third persons for his *virile share* of the debts of the partnership." LA. CIV. CODE art. 2817, comment (c): "[F]or all partnerships, each partner is liable only for his *virile share*." LA. CIV. CODE art. 2828, comment (b): "[W]ithdrawing partners have *virile share* liability for debts incurred prior to withdrawal. . . ."

65. FREUND'S LATIN DICTIONARY 1996 (E. Andrews ed. 1879) (C. Lewis & C. Short rev. 1907).

66. LA. DIGEST of 1808, bk. III, tit. IX, ch. III, sec. II, art. 44:

In those partnerships every one of the partners is bound towards the creditors for his *virile share*, although his share in the partnership was less, if the parties who contracted the debt did not explain themselves on the subject.

67. See note 66, *supra*, and accompanying text.

68. Code Napoleon art. 1863 (1804):

Partners are liable to creditors with whom they have dealt, each one for an equal sum and share, even if the share of one of them in the partnership is smaller, unless the contract has specifically restricted the responsibility of one of the partners in proportion to his share.

(H. Cachard trans. 1930)

69. *Id.*

Upon the recommendation of the redactors,<sup>70</sup> article 44 of the Digest of 1808 was suppressed in 1825 in favor of the wording which appeared in article 2873 (1870) (then numbered article 2844 (1825)).<sup>71</sup> The word *virile* did not reappear until the 1980 revision. Support for retaining the earlier notion of "equal shares" is found in the Reporter's Introduction to the 1980 revision, which refers to the revision providing for "joint liability." In Louisiana Civil Code article 2086 the proportion due by joint obligors is calculated as, "by the number of obligors, each for an equal part." Lastly, comment (c) to Civil Code article 2817 states that "a partner of an ordinary partnership had *virile* share liability." However, for reasons to be discussed below, perhaps this statement should not have been made without including in the comment some elaboration as to the precise character of that liability.<sup>72</sup>

A second, preferable alternative exists for computing partners' liability for partnership debts. Although the term "*virile* share" has appeared only sporadically over the years in Louisiana's partnership provisions, the term is not completely foreign to the Louisiana Civil Code. The first paragraph of Civil Code article 2103, concerning liability as between themselves of debtors in *solido* states, "When two or more debtors are liable in *solido*, whether the obligation arises from a contract, a quasi-contract, an offense or a quasi-offense, the debt shall be divided between them. If the debt arises from a contract or a quasi-contract, each debtor is liable for his *virile portion*."<sup>73</sup> While commentary on partnership law by French legal writers is scarce,<sup>74</sup> an abundance of doctrine discusses the nature of "*virile* share" liability for solidary obligors pursuant to Code Napoleon article 1213, the source provision of Louisiana Civil Code article 2103.<sup>75</sup> Though Louisiana partners under the new regime are not solidarily liable, the method of computing a "*virile* share" as suggested by these authorities should nevertheless be applicable to Louisiana partners' "*virile* share."

---

70. 1 A REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825 340 (1937).

71. *Id.*

72. See text at notes 79-80, *infra*.

73. LA. CIV. CODE art. 2103 (emphasis supplied).

74. This scarcity results largely from the fact that the special rules of partnership law were provided by the commercial law, and most civil partnerships engaging in any significant business activity adopted the commercial form and were subject to commercial laws and usages. 2 M. PLANIOL, CIVIL LAW TREATISE pt. 2, no. 1933, at 159 (11th ed. La. St. L. Inst. trans. 1959).

75. Code Napoleon art. 1213 (1804):

An obligation contracted jointly and severally towards a creditor is divided, as a matter of right, between the debtors who are only liable between themselves for the share or part of each one.

(H. Cachard trans. 1930).

The term "*virile* share (or portion)" creates a presumption that the debt should be divided into equal shares. However, the presumption that the portion must be equal is inapplicable in two cases: 1) where the act indicates expressly a division on another basis, and 2) where it is demonstrated that the interests of the parties in the affair are unequal.<sup>76</sup> In the first instance, both the existence of the partnership contract and its required recordation<sup>77</sup> should serve to render the presumption inapplicable. Pursuant to the second exception, even if the partnership contract remains unrecorded, a creditor should be allowed to demonstrate the existence of unequal interests among the partners and to recover from them their share of the partnership's debts based on such interests. Aubry and Rau also conclude that the division by *virile* portions is presumed to be equal, barring proof to the contrary.<sup>78</sup>

Because the presumption of liability for equal shares is rebuttable, the statement in comment (c) of Civil Code article 2817 that partners in ordinary partnerships were bound for their *virile* share was only partially correct. Under the former regime ordinary partners were bound for their "*virile* share," to the extent that each partner was at least bound for his share or portion. But Civil Code article 2873 specifically provided that such share should be determined equally, as determined by heads.<sup>79</sup> Therefore, any complete statement of the law as it existed prior to 1980 must also include noting that the only method of determining "*virile* share" was by heads. This concept can be seen more clearly in article 44 of the Louisiana Digest of 1808,<sup>80</sup> which actually included the term "*virile* share"; former article 2873 did not.<sup>81</sup> Article 2873 mandated liability by heads because the term "*virile* share" was modified by the following clause, "although his share in the partnership was less . . .," thus rendering the issue of the presumption and its inapplicability moot.

Computing partners' liability for partnership debts based on contractual provisions finds support in other articles of the partnership

---

76. 2 M. PLANIOL, *supra* note 74, at pt. 1, no. 767 at 413.

77. LA. R.S. 9:3406 (1950), as amended by 1980 La. Acts, No. 151, § 1.

78. 4 C. AUBRY & C. RAU, DROIT CIVIL FRANCAIS § 298b (6th ed. Bartin 1965). It has also been written: "It is natural to suppose that they all have, therein, an equal interest. But the mode of division must be separated if it is proved . . . that convention has assigned them unequal shares." 2 G. BAUDRY-LACANTINERIE ET L. BARDE, TRAITE DE DROIT CIVIL, DES OBLIGATIONS § 1256 at 367 (3d ed. 1907) (translation provided by Mr. Kevin Reese, Center for Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, La.).

79. LA. CIV. CODE art. 2873 (as it appeared prior to 1980 La. Acts, No. 150):

In the ordinary partnership, each partner is bound for his share of the partnership debt, calculating such share in proportion to the number of the partners, without any attention to the proportion of the stock or profits each is entitled to.

80. See note 66, *supra*.

81. See note 79, *supra*.



regime. In particular, Civil Code article 2803 may be viewed as simply reiterating the presumption of equality, and the exceptions thereto, discussed by the French authorities. Article 2803 provides, "Each partner participates equally in profits, commercial benefits, and losses of the partnership, unless the partners have agreed otherwise."<sup>82</sup> The comment to article 2803 continues, "[I]f the parties agree, the participation may be unequal. . . ."<sup>83</sup> Although the article refers to *losses*, rather than liability for partnership debts, it is axiomatic that any debts the insolvent partnership is unable to liquidate are also ultimately losses to be shared by the partners upon termination of the partnership pursuant to the terms of the contract.

Furthermore, in the absence of contractual provisions expressly regarding "losses," Civil Code article 2804 provides additional guidance toward computing partner liability before resort to the *virile* share presumption of equal shares is necessary. That article states:

If a partnership agreement establishes the extent of participation by partners in only one category of either profits, commercial benefits, losses, or the distribution of assets other than capital contributions, partners participate to that extent in each category unless the agreement itself or the nature of the participation indicates the parties intended otherwise.<sup>84</sup>

The comment to article 2804 indicates its supplemental nature with regard to article 2803's provisions, stating, "This article merely creates a presumption that applies in the absence of a pertinent stipulation."<sup>85</sup> Application of article 2804 also might be extended to situations in which the extent of participation varies among the categories, but the agreement neglects to provide the extent of loss participation, to allow a judge discretion in fashioning an equitable remedy after considering the various levels of participation in the other categories.

The remaining articles and comments do not preclude use of the French interpretation of "*virile* share." A close examination of Civil Code article 2815<sup>86</sup> indicates that it only prohibits a complete exclusion of a partner from participating in losses, and does not apply to agreements whereby partners share losses based on their proportionate interest in the entity. Article 2815's comments simply reiterate that a creditor may not be denied the right to obtain from each partner that partner's *virile* share, a statement that does not in any way preclude determining those

---

82. LA. CIV. CODE art. 2803.

83. LA. CIV. CODE art. 2803, comment (a).

84. LA. CIV. CODE art. 2804.

85. LA. CIV. CODE art. 2804, comment (b).

86. LA. CIV. CODE art. 2815 states: "A provision that a partner shall not participate in losses does not affect third persons."

shares as proposed here. The comments to articles 2817 and 2828<sup>87</sup> do not modify or define their use of the term *virile* share and therefore do not create any inconsistencies with the suggested interpretation of the term.

This second alternative is advantageous primarily because the extent to which each partner shares in the debts of the partnership will reflect each partner's interest in the partnership. The method of computing liability by heads requires of creditors a heightened knowledge of Louisiana partnership law as opposed to the knowledge required under the French interpretation. For example, a partnership may be composed of six individuals, one partner's interest in all profits, losses, and commercial benefits being fifty percent, the remaining five partners each holding a ten percent interest. When the creditor examines the partnership agreement recorded in the public records he quite possibly will base his credit evaluation upon his knowledge of the partner holding a fifty percent interest. Under the suggested method of liability computation pursuant to the French doctrine, he rightfully would anticipate collecting at least half of any unliquidated debt from the fifty percent partner in the event of the partnership's insolvency. However, under the computation-by-heads method, each partner is liable for only one-sixth of any unliquidated partnership debts. If the facts in the example go one step further and each of the ten percent partners is also insolvent, then the creditor will only recover one-sixth of the total debt under the computation-by-heads method. It is far more realistic, and equitable, to expect the partner who stands to profit the most and whose investment is the largest to bear the greatest burden in the event of failure. Under the computation-by-heads method, the creditor could avoid the contract of partnership through the revocatory action only if the dominant partner had surrounded himself intentionally in the partnership with partners known to be poor credit risks in an attempt to defraud creditors in the event of business failure.<sup>88</sup>

The legislature could act to provide even greater protection to the creditor in a manner consistent with Louisiana's civilian heritage. In the example above, if the term "*virile* share" is interpreted as referring to the actual partnership interest and not by heads, the creditor may only collect ten percent from each of the lesser partners in the event the fifty percent partner is insolvent. Some French authorities argued that Code Napoleon article 1863<sup>89</sup> was for the benefit of the creditor, allowing him to sue either on the contract or for equal shares from each partner, depen-

---

87. See note 64, *supra*.

88. LA. CIV. CODE arts. 1978-1994. *Accord*, O'Neal, *supra* note 2, at 485.

89. See note 68, *supra*.

ding on which situation was most advantageous.<sup>90</sup> This principle was argued by Pothier even before the Code Napoleon with respect to non-trade partnerships, the predecessor of Louisiana's former ordinary partnerships.<sup>91</sup> Thus, in the situation postulated above, the creditor could proceed to obtain five-sixths of the debt from the five, ten percent partners in the event of the remaining, fifty percent partner's insolvency.

However, under either method of computing "*virile share*" liability, the creditor will still be unable to obtain complete payment of the debt if any individual partner is insolvent. The adoption of this scheme of liability seems inconsistent with the policy pervading the revision itself, the prior law, and the practice of other jurisdictions under the Uniform Partnership Act: to protect creditors dealing with partners and partnerships, by placing the burden for the risk of loss resulting from a partner's inability to share in partnership debts on the *partners* as between themselves, and not on the creditor.

The problem with the provisions of new Civil Code article 2817 is not that sophisticated lenders, such as banks and savings and loan institutions, will bear the risk of loss. These creditors simply will require an express agreement to the effect that the partners will be solidarily bound for the debt.<sup>92</sup> Instead, because the risk of loss resulting from a partner's inability to pay his share of the partnership debts is shifted onto unwitting, innocent third parties, these less sophisticated creditors will bear the loss. Certainly capable of being included in this class of losing creditors would be casual suppliers, employees, and judgment creditors whose rights arose from delictual acts of the partnership.<sup>93</sup> Obviously, these parties are either unable or unlikely to require all the partners to agree expressly to solidary liability for debts of the partnership arising out of these non-business and business relationships.

#### Illustrative of the new partnership provisions' protection of creditors

---

90. G. BAUDRY-LACANTINERIE ET A. WAHL, *TRAITÉ DE DROIT CIVIL SOCIÉTÉ* § 339, at 212 (3d ed. 1907) (translation provided by Mr. Kevin Reese, Center for Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, La.).

91. R. POTHIER, *TREATISE ON THE CONTRACT OF PARTNERSHIP* § 104, at 79 (O.D. Tudor trans. 1854).

92. LA. CIV. CODE art. 2817, comment (c).

93. The Reporter's Introduction implies incorrectly that individual partners, through the partnership, would be joint tortfeasors, and that the general rule of solidary liability among joint tortfeasors is not precluded by the provisions on *virile share* liability. Conceivably, a partnership could be liable *in solido* with an individual partner for the delictual act of the partner. However, the other individual partners are separate juridical entities from the partnership and the tortfeasor partner. The other partners cannot be said to be *in pari delicto* simply by virtue of an interest in the partnership, and hence, cannot be bound solidarily for torts committed by another partner. It is only in the event that the partnership is unable to satisfy the debt that the remaining partners will be called on to satisfy the obligation, and then only for their *virile share* under article 2817.

is Civil Code article 2817 which gives the partner the right to plead discussion of the partnership assets<sup>94</sup> and places the burden of pointing out the partnership's property on the partner.<sup>95</sup> However, this remedy is inadequate since, if the issue at hand is the extent of a partner's liability for partnership debts, the partnership's assets are not sufficient to meet its debts (*i.e.*, it is insolvent). Simply pointing out what assets do exist will not prevent the creditor from ultimately incurring a loss, but will serve only to mitigate it.

Another situation where the prohibition of shifting the risk of loss is exemplified is new article 2815's denial of giving effect to loss stipulations between the parties. Agreements on the liability for the partnership's debts are effective between the parties, but cannot serve to deny a creditor's right to obtain from each partner his virile share of the partnership's debts.<sup>96</sup> Strictly by analogy, similar protection is provided creditors relying on manifestations of the partnership under the limited partnership provisions of the 1980 revision, wherein use of a partner's name in the name of the partnership in commendam creates liability as to third persons as if the partner were a general partner.<sup>97</sup>

In light of the expanded ability of each partner to incur debts for the partnership,<sup>98</sup> some countervailing protection should be allowed creditors. Partners surely will not stipulate voluntarily solidary liability in the contract of partnership, and many casual suppliers will not endeavor to require an agreement to that effect. Arguably, the law itself should provide the basis for heightened creditor protection.

Perhaps adoption of a provision similar to UPA section 40(d) would be an appropriate solution. Section 40(d) provides that liability sharing shall be in proportion to the partner's relative share of profits.<sup>99</sup> In the event one partner is insolvent, the risk of loss does not then shift to the creditor, but instead remains with the partners, who each contribute to the satisfaction of the creditor's demand in proportion to their share of profits.<sup>100</sup> For example, consider the situation when three partners with

---

94. See note 62, *supra*.

95. LA. CIV. CODE art. 2817, comment (a).

96. LA. CIV. CODE art. 2815, comment.

97. LA. CIV. CODE art. 2838.

98. See text at notes 18-25, *supra*, for a discussion of the expanded powers of agency.

99. Uniform Partnership Act Section 18 provides that the rights and duties of the partners are subject to any agreements between the partners, but the fact that the partners may choose to share losses in proportions other than in the proportion in which they share profits does not in any way impair creditors' rights to collect from the other partners in the event one partner is insolvent and unable to contribute his share in satisfaction of the creditors' demands.

100. See generally *Glassell v. Prentiss*, 175 Cal. App. 2d 599, 604, 346 P.2d 895, 901 (Cal. App. 4th Dist. 1959); *Roberts v. Roberts*, 118 Colo. 524, 526, 198 P.2d 453, 455 (1948); *Greiss v. Platzer*, 131 N.J. Equity Rep. 160, 161, 24 A.2d 408, 409 (1942).

interests of 40 percent, 40 percent, and 20 percent, respectively, are members in a partnership whose assets are insufficient to satisfy the partnership's debts. Additionally, one of the partners owning a 40 percent interest is individually insolvent. Under the UPA, of the unsatisfied claims of the partnership's creditors, one of the remaining solvent partners will pay 40 percent of the debts, the other 20 percent. Of the other share, unsatisfied due to the partner's insolvency, the remaining two partners pay this unsatisfied portion in the ratio of 40:20 or 2:1.

*Continuing Difficulties With Partnership Ownership of Immovables*

Aside from the problems discussed previously concerning ownership of immovables and the lack of continuity of the entity under existing provisions,<sup>101</sup> certain other unavoidable problems relating to transfer of title were created by the 1981 legislation. The prior law required a written partnership agreement for an immovable to be owned by the partnership.<sup>102</sup> Additionally, the agreement had to be recorded in the parish where the business's principal establishment(s) were located.<sup>103</sup> Conceivably, property could be owned in the partnership name in a parish where the partnership did not maintain a "principal establishment" and no agreement would be recorded in the parish of the property's situs. Failure to record the partnership agreement, even though the title was recorded in the name of the partnership, resulted in the partnership's immovables being owned by the partners in indivision rather than by the partnership entity.<sup>104</sup>

Even more unfavorable to efforts of partners to own immovable property through the partnership entity were consequences flowing from the commercial/ordinary partnership distinction. The courts narrowly construed the definition of a commercial partnership under the prior law, and held that commercial partnerships were incapable of owning immovable property.<sup>105</sup> Additionally, engaging in any activity defined as being commercial transformed the partnership from ordinary to commercial.<sup>106</sup> Lastly, proof of the existence of a partnership as a commercial one could be made by use of parol evidence.<sup>107</sup> As a result, the only way to deter-

---

101. Discussed in text following note 50, *supra*.

102. LA. CIV. CODE art. 2836 (as it appeared prior to 1980 La. Acts, No. 150).

103. LA. CIV. CODE arts. 2846 & 2847 (as they appeared prior to 1980 La. Acts, No. 150).

104. See *Gulf Union Mortgage Corp. v. Michael & Barber Constr. Co.*, 251 So. 2d 459 (La. App. 1st Cir. 1971); *American Bank & Trust Co. v. Michael*, 244 So. 2d 882 (La. App. 1st Cir.), *writ refused*, 258 La. 368, 246 So. 2d 685 (1971); *Madison Lumber Co. v. Picheloup*, 12 La. App. 196, 125 So. 175 (La. App. Or. Cir. 1929).

105. See *Skillman v. Purnell*, 3 La. 494 (1832); *Hollier v. Fontenot*, 216 So. 2d 842 (La. App. 3d Cir. 1968).

106. *Southern Coal Co. v. Sundbery & Winkler*, 158 La. 386, 387, 104 So. 124, 125 (1925).

107. *Brown v. Bank of Minden*, 167 La. 421, 422, 119 So. 413, 414 (1928).

mine who owned immovable property in a parish in which title was recorded in the name of a partnership was first to find the recorded partnership agreement in the parish of the business's principal establishment (not necessarily the same parish) and then go to the situs of the business and observe whether the entity was a commercial or ordinary partnership. As a consequence of these laborious requirements, other devices were utilized by associated persons seeking to own immovable property for the use of their business, such as forming corporations to hold the immovables, or buying the immovable in a partner's individual capacity and leasing it to the partnership entity.

The new law was proposed, in part, to facilitate partnership ownership of property, and to avoid the pitfalls of *Gulf Union Mortgage v. Michael*,<sup>108</sup> which held that a failure to record the partnership agreement resulted in the immovable being owned by the partners individually, even though title was recorded in the name of the partnership. The new provisions also sought to avoid the dilemma noted above whereby immovable property of an ordinary partnership became vested in individual commercial partners. However, disparities remain under the new provisions as well. For instance, if the partnership agreement is written at the time the property is purchased, title might be recorded in the name of the partnership, yet be owned by the partners individually until the date the agreement is recorded, when ownership then vests in the partnership.<sup>109</sup> This "floating title" possibility merely adds additional uncertainty to the status of the immovable's ownership, but this problem can be cured by the subsequent recordation of the agreement.<sup>110</sup> A vice of an incurable nature results, however, when the agreement itself is not written until *after* the partnership acquires the immovable and records title in its name. This property will continue to be owned jointly by the partners as individuals.<sup>111</sup> A separate act is required to transfer title to the partnership. Thus, the provisions of the 1980 revision make necessary in every title search an accurate determination of the date of the written partnership agreement and the date the immovable was acquired. This change will require additional expenditures of time, militating against ease of transferability of any property which includes the name of any partnership in its title record. This additional requirement ultimately will cause parties to avoid recording title in a partnership's name and defeat the intended beneficial results of the new provisions.

Lastly, and unavoidably in the transition from one regime to the

---

108. 251 So. 2d 459 (La. App. 1st Cir. 1971).

109. LA. CIV. CODE art. 2806.

110. LA. CIV. CODE art. 2806, comment (d).

111. LA. CIV. CODE art. 2806, comment (e).

other, title searches will now require an examination of both the secretary of state's records and the clerk of court's records in conceivably every parish to locate the partnership agreement. Once title has been determined to have been recorded in the name of a partnership, it is necessary to find the recorded agreement under either the old provisions, which required recordation of the agreement in the parish of the principal place of business,<sup>112</sup> or under the new provisions, which require recordation of the partnership agreement with the secretary of state's office.<sup>113</sup> Partnerships formed prior to the new regime are not required to comply with the provisions concerning recordation of the agreement with the secretary of state, but may do so at their option.<sup>114</sup> Additionally, the new provisions do not require the partnership to file a copy of the partnership agreement in the parish in which the partnership owns immovable property for partnerships formed after January 1, 1981. The sole requirement for post-1981 partnerships is recordation of the agreement with the Central Registry for Contracts of Partnership, under the auspices of the secretary of state.<sup>115</sup> Quite likely, a title searcher will not know the date of the original partnership agreement for a partnership found in the chain of title. In the case of a partnership formed prior to January 1, 1981, which was not required to register with the secretary of state, the title searcher must check the records in both the parish of the partnership's principal establishment as well as the Central Registry. In this case, the title searcher conceivably could be forced to search the records of all sixty-four parishes to find the original agreement before a complete opinion could be given as to the validity of the title.

### Conclusion

The 1980 revision of Louisiana's partnership law effected several significant changes in the law. Of immense benefit are the elimination

---

112. LA. CIV. CODE arts. 2846 & 2847 (as they appeared prior to 1980 La. Acts, No. 150).

113. LA. R.S. 9:3402 (Supp. 1980):

The contract of partnership or a multiple original thereof, duly executed by the partners, or a certified copy thereof, or statements submitted by foreign partnerships in accordance with R.S. 9:3421, *et. seq.*, shall be filed for registry with the secretary of state in accordance with the provisions of this chapter to affect third persons as provided by Civil Code articles 2806 and 2841 (as provided by H.B. No. 695, Reg. Sess. 1980) or when the parties choose to comply with the provisions of this Chapter.

114. *Id.*

115. *Id.* § 3406 (1950 & Supp. 1980):

A multiple original of the contract of partnership, or a copy certified by the secretary of state, and a copy of the certificate of registry, shall be filed for registry with the recorder of mortgages of the parish in which the partnership maintains its principal place of business. Failure to file these documents with the recorder of mortgages as provided by this Section shall not affect the title of immovable property as being in the partnership or the status of a partner in commendam, or a limited partner.

of the archaic distinctions between ordinary and commercial partnerships, and the expanded powers of agency granted to the partners. These changes should make the partnership in Louisiana more useful as a vehicle for engaging in commerce in Louisiana. The revision further endeavored to give the partnership entity continuity of life, though this achievement was short-lived as a result of the unfortunate passage of Act 797 of 1981. This Act has rendered a cohesive, uniform body of law inconsistent and contradictory and should be repealed or at least modified.

In the absence of a complete return to the entity concept, the Legislature should at least eliminate some of the logical inconsistencies which resulted from Act 797's amending only one article in the midst of a body of law based on the alternate theory. Some of the more notable conflicts arise between articles which provide for partnership termination and membership terminations, the apparent incapacity of the partnership to expel a partner, and the inability of a partnership to continue even by tacit agreement in light of the express statutory requirement that continuance must be provided for contractually.

Failing either of the two aforementioned courses of action, legal advisers whose clients desire avoidance of the termination provisions of new Civil Code article 2826 should provide expressly in the contract of partnership for its continuation; otherwise when an event which precipitates termination occurs, the partnership will cease to exist unless the remaining partners unanimously agree to continue the entity.

The Louisiana Legislature should adopt at least a clarifying provision with regard to computing *virile* share. Absent any such enactment, the courts should adopt an interpretation of the term "*virile* share" liability which will result in partners' liability being a function of their interest in the partnership, rather than being based upon equal shares computed by heads. Louisiana also should adopt more expansive requirements of partner liability for debts of the partnership. Adoption of a scheme of partner liability for partnership debts in conformity with UPA section 40(d) would appear desirable. A provision similar to section 40(d) would conform with the public policy underlying the revision, that in the event of a partner's insolvency the burden of risk of loss is retained among the partners and not shifted to partnership creditors, some of whom are incapable of taking any action *a priori* to protect themselves.

Lastly, many of the goals of the revision with respect to ease of acquisition of immovables may go unrealized due to the continued, and unavoidable, existence of impediments present in the title search process. Some of the impediments to smooth transfer of title are the requisites of determining the date of the written partnership agreement



and locating the situs of the recorded agreement because of multiple potential depositories of the agreement.

The 1980 revision of Louisiana law of partnership marks a significant improvement in the law. However, the subsequent amendment of article 2826, the unexplained liability of partners for partnership debts, and the overlap of provisions in the new and former law with respect to ownership of immovables will continue to pose problems. Some of these problems can and should be addressed by the legislature. Remaining problems in the smooth transfer of title will simply require careful attention to detail when examining a title which has passed through partnership hands.

*Mark C. Schroeder*