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Farm Partnership: Ownership and Use of Real Property

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FARM PARTNERSHIP: OWNERSHIP AND USE OF REAL PROPERTY

References to associations which are akin to the modern partnership may be found in the laws of ancient pastoral civilizations.[1] And it is conceivable that some of the fundamental notions of partnership organization have evolved from a need in days long since past for two or more individuals to share ownership or control of agricultural land. In any event, the partnership is not a wholly recent form of farm business organization, nor does it involve any entirely new concept concerning ownership or use of land suitable for agrarian purposes. It continues to receive widespread consideration, perhaps influenced by the current state of agricultural economy which includes a declining number of farms and farm jobs, a generally unfavorable trading climate for farm products, and a greater need in the farming industry for capital, efficient management, and technical knowledge.

The partnership form is designed for situations where there is a unity of purpose and the parties want to share in the profits and control of the business. The primary feature of the association is suggested by the word "joint": typically, partners share in losses, profits, control, ownership, liability, contribution and other things; the partnership differs from individual proprietorship essentially by being a joint association. The principal reason in most cases for entering partnership is to pool resources—to combine talents and assets for increased efficiency, hence, to increase profits and enhance the value of contributions.

At the present time young people desirous of entering the business of farming may encounter serious difficulties. In the absence of parental or other help they find it nearly impossible to amass the capital needed to establish an efficient farming unit. While their technical knowledge may be quite adequate, they are frequently hampered by limited practical experience—a substantial drawback in today's low-margin agricultural industry. Nonavailability of farm land is likely to be another insuperable obstacle.[2] The resulting shift to nonfarm trades and professions is inevitable.

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[1] See 1 BARRETT & SEAGO, PARTNERS AND PARTNERSHIPS, LAW AND TAXATION ch. 1, §§ 1-3 (1956) (historical background of partnerships) [hereinafter cited as BARRETT & SEAGO].

[2] A recent study discloses figures indicating a decline in the number of commercial farms in Iowa from 178,238 in 1955 to a predicted 140,368 by 1965; by estimation, the number will be further reduced to 98,618 by 1975—a 44.7% decrease in number of units within twenty years. Joslin & Timmons, Procedures Used in the Identification and Measurement of Factors Affecting Future Farming Opportunities in Iowa, Nov. 1958, at 48 (unpublished thesis in State University of Iowa Agricultural Law Center library).

Technological advances have made it possible for one operator to farm more land than before, and economic conditions have made it advisable to increase the scope of each operation when possible. The return on investments in farm land is notoriously low and, while investors can protect themselves by investing their money elsewhere, the farmer is committed to farming and his only recourse frequently is to seek greater efficiency through expanded operations. As a result, there has been competition among operators for additional land, for purchase or lease, to supplement their previous holdings. This has been a substantial factor contributing to the general increase in the market value of farm land. In addition, landlords prefer to lease to experienced people. These conditions operate to deter young people from entering the farming industry; the strong competition for available land and job opportunities places a burden on the inexperienced.

Logically, this migration includes a large number of the most capable young farm people—those who can most easily adapt to new skills and ideas. As a consequence, the farming industry is losing some of its most promising operator replacement personnel. In an effort to help solve the problem of getting young men started in farming, much has been written urging farm fathers to join with younger members of their families in joint operation of family farms.[3] It is commonly suggested that the traditional self-operator or landlord-tenant forms of farm organization be replaced by partnerships.

Partnership between a farm-owning father and his son makes it possible for the son to acquire the use of property. Moreover, such an arrangement permits the pooling of labor skills and other production factors for greater efficiency, and the farm son is given a valuable opportunity to acquire the practical experience that is so essential to farming. A formal partnership arrangement might similarly be made between a farmer and his wife; in few other businesses is the wife so closely associated with the day-to-day operations.

In addition to being a useful business organization, the partnership is a convenient estate planning device for a farm owner to transfer real property rights to his partners—to his son or his wife.[4] The partnership agreement could arrange for the family members to buy out the father's interest on an installment basis.[5] This would be a convenient arrangement in a father-son farm partnership where the father wants to assist his son in getting started in the farming business. He may want to include suitable provisions to permit his own gradual retirement. Or the agreement might provide for continuation of the business when the farm owner dies, with provision for distribution or sale of his interests in the firm to the surviving members.[6]

The farm corporation presents an alternative operational and planning device, but consideration of the adaptability of the corporate form to farming

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[3] Some recent publications on the subject include: BENRUD, PLANNING A FATHER-SON FARM PARTNERSHIP (South Dakota Agricultural Experiment Station Circular No. 142, 1958); BRATTON, FATHER AND SON FARM PARTNERSHIP ARRANGEMENTS (Cornell Extension Bull. No. 861, rev. 1955); CASE & REISS, FATHER-SON FARM BUSINESS AGREEMENTS (University of Illinois College of Agriculture Extension Service Circular No. 587, rev. 1960); KRAUSZ & MANN, PARTNERSHIPS IN THE FARM BUSINESS (University of Illinois College of Agriculture Extension Service Circular No. 786, 1958); SMITH & WARREN, FATHER AND SON ARRANGEMENTS ON THE FARM (University of Vermont and State Agricultural College Agricultural Extension Service Circular No. NEC-26, 1953); STANGELAND, FATHER AND SON FARMING AGREEMENTS (North Dakota College Agricultural Experiment Station Bull. No. 413, 1958); THARP & ELLIS, FATHER-SON FARM-OPERATING AGREEMENTS (United States Department of Agriculture Farmer's Bull. No. 2026, 1951, repr. 1958); ESTATE PLANNING FOR FARMERS (California Agricultural Experiment Station Extension Service Circular No. 461, 1957).

[4] See generally Polasky, *Planning for the Disposition of a Substantial Interest in a Closely Held Business,* 45 IOWA L. REV. 46, 74-95 (1959).

[5] See Comment, *Father and Son Farm Agreements,* 1950 WIS. L. REV. 316, 325.

[6] See Wood v. Gunther, 98 Cal. App. 2d 718, 201 P.2d 874 (2d Dist. 1949); *cf.* Smith v. Wayman, 148 Tex. 318, 224 S.W.2d 211 (1949) (trust agreement by partners; trustee to wind up business); Polasky, *supra* note 4, at 54-58.

operations is beyond the scope of this Note.[7] The purpose of this discussion is to explore the general structure of farm partnerships, with emphasis on problems of ownership and use of land. Although a few basic concepts of partnership law such as sharing profits and losses have not changed since ancient times,[8] a great deal of the modern law has evolved more recently with commercial tradesmen rather than farmers providing the major impetus for its development.[9]

I. The Partnership Generally

A. Intent and its Manifestation: The Contract

The partnership relationship has been defined variously; the Uniform Partnership Act, in force in thirty-eight states,[10] defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[11] It originates in contract, express or implied,[12] creating a relationship with certain incidents recognized by law to facilitate the carrying on of a lawful business for profit. The intent of the parties is a governing factor in resolving disputes over the terms of contracts generally, and partnership agreements are no exception;[13] but intent is not the only element bearing on the existence and nature of a partnership. While two persons, perhaps a land owning farmer and another farm operator, might *intend* to create an association they call a "partnership," they could well fail in their purpose if the intent is not directed toward the substantive elements of partnership organization; merely labeling an association as a partnership

[7] See Harl, Timmons & O'Byrne, Farm Corporations, State University of Iowa Agricultural Law Center (August 1961).

[8] 1 Barrett & Seago ch. 1, § 1 (ancient origins of partnership organizations).

[9] *Id.* ch. 1, § 3.2 (law of merchants and development of partnership law); Crane, Partnership § 2 (2d ed. 1952) (discussing effect of mercantile law on development of partnership law) [hereinafter cited as Crane].

[10] Thirty-eight states—a very substantial majority—have adopted the Uniform Partnership Act: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See 7 Uniform Laws Ann. (Supp. 1960, at 7).

[11] Uniform Partnership Act § 6(1). A sampling of other definitions is given in Crane § 5, at 27 n.7; 1 Rowley, Partnership § 6.1 (2d ed. 1960).

[12] See, *e.g.*, Cook v. Lauten, 335 Ill. App. 92, 80 N.E.2d 280 (1948) (distinguishing between employment and partnership); Malvern Nat'l Bank v. Halliday, 195 Iowa 734, 192 N.W. 843 (1923) (determining existence of farm partnership); Schneider v. Newmark, 359 Mo. 955, 224 S.W.2d 968 (1949) (concerning obligations upon dissolution).

[13] See, *e.g.*, Malvern Nat'l Bank v. Halliday, *supra* note 12; Schneider v. Newmark, *supra* note 12; McGuire v. Hutchinson, 240 Mo. App. 504, 210 S.W.2d 521 (1948) (no intent found). In Macbie-Clemens Fuel Co. v. Brady, 202 Mo. App. 551, 556, 208 S.W. 151, 153 (1919), the court said:

> Whatever may be the obligations and incidents resulting from a partnership, such as sharing profits and losses, mutual agency, community of interests, etc., the formation of a partnership is by contract; and, as in the case of all contracts, the cardinal rule for interpreting the contract and determining whether it constitutes a partnership or not is the intention of the parties.

Similar quotations from the cases may be found in Crane § 5, at 28-29 & n.10.

or "intending" for it to have the same consequences as a partnership surely does not make it one.[14] Conversely, associations sometimes amount to partnerships although the parties may have intended far different consequences to apply. An express denial of the existence of a partnership might be futile if the substantive elements are actually intended or if the association has the appearance to third parties of being a partnership.[15] The courts examine the conduct of the parties, the provisions of any agreements they may have made, and the circumstances surrounding the transactions involved.[16]

A written contract designated as a partnership agreement serves as a fixed and formal manifestation of the intention to form a partnership. But the agreement is not conclusive; the courts will seek supporting evidence by way of overt acts consistent with the expressed intent.[17] While a written agree-

[14] CRANE § 5, at 28-30 & n.11. Two examples of cases where partnerships were claimed to exist but did not, are: Hanson v. Birmingham, 92 F. Supp. 33 (N.D. Iowa 1950), *appeal dismissed,* 190 F.2d 206 (8th Cir. 1951) (partnership failed because of incapacity of a trust to be a partner); Marshalltown Mut. Plate Glass Ins. Ass'n v. Bendlage, 195 Iowa 1200, 191 N.W. 97 (1922) (partnership organized for sharing of losses only, with no profit expectancy).

[15] See, *e.g.,* Nelson v. Seaboard Sur. Co., 269 F.2d 882, 887 (8th Cir. 1959) (intent is essential, but substance and not form controls); Kaufman-Brown Potato Co. v. Long, 182 F.2d 594, 599 (9th Cir. 1950) (parties' intent or belief not controlling, especially when third parties involved); Constans v. Ross, 106 Cal. App. 2d 381, 235 P.2d 113 (2d Dist. 1951) (very careful analysis of facts to support existence of partnership); Block v. Schmidt, 296 Mich. 610, 296 N.W. 698 (1941) (intent less important where third parties involved); Gustafson v. Taber, 125 Mont. 225, 234 P.2d 471 (1951) (concerning partnership by estoppel).

Where persons hold themselves out to be partners and act as interested in a business as if they were partners, a condition termed "partnership by estoppel" is created. As between the parties there is no partnership, but as to third persons relying on the apparent relationship, a partnership exists. See, *e.g.,* Mercer v. Vinson, 85 Ariz. 280, 336 P.2d 854 (1959) (joint venture; intent controls as between parties, but external facts control as to others); Calada Materials Co. v. Collins, 184 Cal. App. 2d 250, 7 Cal. Rptr. 374 (2d Dist. 1960) (conduct led third party to believe there was partnership); CRANE § 36.

[16] See, *e.g.,* Mauldin v. Commissioner, 155 F.2d 666 (4th Cir. 1946) (no partnership for tax purposes); Mercer v. Vinson, *supra* note 15 (external facts examined to determine if there is partnership); Potucek v. Blair, 176 Kan. 263, 264, 270 P.2d 240, 242 (1954) (syllabus by the court) (concerning how to determine if association is joint venture).

[17] Courts are especially apt to look behind the terms of the agreement in income tax cases. *E.g.,* Estate of Dorsey v. Commissioner, 214 F.2d 294 (5th Cir. 1954); Nelson v. Commissioner, 184 F.2d 649, 651 (8th Cir. 1950) (dictum) (look to other acts and conduct in addition to agreement).

See Boyd, *Business Organization for Social Security Self Employment Income,* SIXTEENTH ANNUAL TAX SCHOOL OF THE IOWA STATE BAR ASSOCIATION 93, 96 (1955):

> In ascertaining whether or not the parties intended to create a partnership, the [Iowa] courts will consider the terms of the agreement, the conduct of the parties under the agreement, and all other circumstances which are available for the interpretation of the agreement. See *Butz v. Hahn Paint & Varnish Co.,* 220 Iowa 995, 997-98, 263 N.W. 257 (1935); *Johnson Bros. v. Carter & Co.,* 120 Iowa 355, 361, 94 N.W. 850 (1903).

This is not to deny that, as a general proposition, "since partnership is a voluntary relation, the manifested will of the parties as found in their agreement as a whole, is controlling." CRANE § 5, at 32-33; see notes 12-13 *supra.*

ment is preferable, an oral one is valid if the other partnership incidents are clearly present—in fact, the agreement need not be expressed even orally; it can be inferred from the actions of the partners.[18] Oral farm partnership agreements are not unusual.[19] Under the statute of frauds a contract to form a partnership for a term longer than one year is generally unenforceable if there is no written memorandum.[20] But the partnership is not invalidated if the facts show it to be actively operating; the court merely treats the association as a partnership "at will," meaning that no definite termination date has been fixed.[21]

The partnership contract of a minor, like his other contracts, is voidable by him; but this is not to say that he cannot be a partner.[22] Even on avoidance his contributions to the partnership are subject to the claims of

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[18] See, *e.g.*, Weizer v. Commissioner, 165 F.2d 772 (6th Cir. 1948) (valid partnership for tax purposes without express agreement); Calada Materials Co. v. Collins, 184 Cal. App. 2d 250, 7 Cal. Rptr. 374 (2d Dist. 1960); Farmers & Merchants Bank v. Kirk, 165 Cal. App. 2d 470, 332 P.2d 131 (2d Dist. 1958) (evidence supported finding of partnership in absence of agreement); In Matter of Estate of Drennan, 9 Ill. App. 2d 324, 132 N.E.2d 599 (1956) (implied in fact farm partnership); Daniel v. Best, 224 Iowa 1348, 1358, 279 N.W. 374, 379-80 (1938) (relationship contractual as between parties, but need not be created by written or oral agreement); Butz v. Hahn Paint & Varnish Co., 220 Iowa 995, 263 N.W. 257 (1935) (oral agreement found not to create partnership); Stephens v. Stephens, 213 S.C. 525, 50 S.E.2d 577 (1948); Cavazos v. Cavazos, 339 S.W.2d 224 (Tex. Civ. App. 1960) (farm partnership upheld in absence of express agreement).

[19] Even implied farm partnerships are not infrequent. For examples, see In Matter of Estate of Drennan, *supra* note 18; Cavazos v. Cavazos, *supra* note 18.

[20] For example, the Iowa statute of frauds provides in part: "Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent: . . . . Those that are not to be performed within one year from the making thereof." IOWA CODE § 622.32 (1958).

[21] *E.g.*, Green v. Le Beau, 281 App. Div. 836, 118 N.Y.S.2d 585 (1953); Boxill v. Boxill, 201 Misc. 386, 111 N.Y.S.2d 33 (Sup. Ct. 1952); Powell v. McChesney, 170 Kan. 692, 228 P.2d 925 (1951) (*semble*).

The related problem of enforceability of oral contracts involving land transfers to partnerships is treated in part III. *C. infra.* Another section of the statute having to do with promises to answer for the debts of another would seem at first glance to apply when a new partner joins the firm promising orally to assume a share of the firm's debts as part of the consideration for his interest. Such a promise is not within the statute since it is given to the debtor and not the creditor. RESTATEMENT, CONTRACTS § 191 (1932); see IOWA CODE § 622.32 (1958).

[22] See CRANE § 7. See generally 1 BARRETT & SEAGO ch. 4, § 2.4 (competency of the parties); 45 IOWA L. REV. 402 (1960) (power of ward to enter into contracts). The child must be competent to contract, however. A contract of partnership between a mother and her ten-year-old child was held invalid because of the child's incompetency to contract in Shemper v. Hancock Bank, 206 Miss. 775, 40 So. 2d 742 (1949). The matter of competency relates only to the capacity to contract—to assume liability for acts of others. Of course, it is not necessary that a person have the competence to perform all the tasks of the business in order to become a partner. See Barrington v. Murry, 35 Wash. 2d 744, 215 P.2d 433 (1950).

partnership creditors although he may not be personally liable for partnership debts.[23]

As generally enumerated, the salient features of a partnership consist of communities of interest in profits and losses, in capital employed, and in management authority, these factors together creating a relationship predicated on mutual consent;[24] but these enunciated standards, some being more important than others in different situations and for different purposes, require refinement on application to any particular case.

B. Profits and Losses

There is no exclusive test for the existence of a partnership, but the sharing of profits is a universal requisite.[25] Although it is not necessary that the shares in profits be equal, there is a presumption to that effect which will control in the absence of a clear agreement to the contrary.[26] But it appears impossible to have a partnership if one of the alleged partners receives no share of the profits.

Profit-sharing alone is not enough to create a partnership.[27] If it were otherwise any landlord-tenant arrangement where rent is measured by a percentage of profits would involve a partnership, and a partnership would also result where a percentage of profits is paid to a farm manager or a hired man as incentive wages.[28] In either of these situations it would logically be

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[23] 1 BARRETT & SEAGO ch. 4, § 2.4, at 300-02 (quoting from cases taking opposite view); CRANE § 7, at 40. In Iowa, a minor cannot disaffirm contracts made under an appearance that he was an adult where the other party was thereby misled. See IOWA CODE § 599.3 (1958), Kuehl v. Means, 206 Iowa 539, 218 N.W. 907 (1928).

[24] See United States v. Wholesale Oil Co., 154 F.2d 745, 747-48 (10th Cir. 1946) (no partnership found); Butler v. Lloyd, 230 Iowa 422, 297 N.W. 871 (1941) (evidence insufficient to establish partnership); authorities cited notes 13-18 *supra* (relating to establishing contract and intent to enter partnership).

[25] CRANE § 14, at 61-62:

> In the ordinary partnership these four matters are shared: Profits, losses, ownership of capital, and control of administration or management. Only one of these, profit sharing, seems to be absolutely essential. No doubt, in every partnership, profits are to be divided among the partners. But the agreement may provide that the time when they shall be distributed may be determined by the majority, or by a managing partner.

See also 1 BARRETT & SEAGO ch. 2, § 2.2 (sharing profits); Note, *Share Tenancies and Partnerships,* 8 IOWA L. BULL. 95-96 (1923).

[26] See Weizer v. Commissioner, 165 F.2d 772 (6th Cir. 1948) (presumption operates regardless of comparative contributions); Constans v. Ross, 106 Cal. App. 2d 381, 235 P.2d 113 (2d Dist. 1951) (unequal sharing does not negate partnership).

[27] United States v. Wholesale Oil Co., 154 F.2d 745 (10th Cir. 1946) (no partnership found); Malvern Nat'l Bank v. Halliday, 195 Iowa 734, 738, 192 N.W. 843, 846 (1923) (farm partnership).

[28] Mere sharing of profits as rent paid does not justify the inference of partnership. Dickenson v. Samples, 104 Cal. App. 2d 311, 231 P.2d 530 (2d Dist. 1951) (no sharing of management); Randall v. Ditch, 123 Iowa 582, 99 N.W. 190 (1904) (landlord had no interest in livestock; received proceeds as rent from land); Perkins v. Langdon, 231 N.C. 386, 57 S.E.2d 407 (1950) (profit-sharing alone not enough). Compensation for services measured as a share of profits does not alone create partnership. McCarney v. Lightner, 188 Iowa 1271, 175 N.W. 751 (1920) (alleged partnership for purposes of buying and selling farm land); *cf.* Powell v. Bundy, 38 Tenn. App. 255, 272 S.W.2d 490 (1954) (agreement of real estate brokers to work together and share profits does not

inferred that the recipient of the share of profits did not intend to enter into a partnership. The risk that attends personal responsibility for the acts of partners might be a deterrent to partnership establishment. If the only purpose of an association is to invest money, or obtain a return from property, or to render services to another, the partnership form is likely to be inappropriate; in these cases other suitable arrangements can be made for profit-sharing without assuming the liability of a partner.

Some jurisdictions, including Iowa, require that there be a sharing of losses.[29] An agreement releasing a "partner" from obligation for losses negates partnership,[30] but sharing of losses alone is not enough to create a partnership.[31] Loss-sharing may be implied from the agreement to share profits and the contributions made of either services or capital.[32] Apparently, then, the sharing of profits is the *sine qua non* for the existence of a partnership. However, the loss-sharing element is used to distinguish the partnership form from the landlord-tenant, employer-employee, and other situations which also use profit-sharing as a measure of return.

C. Other Substantive Elements

In addition to agreeing to share profits, each partner ordinarily makes a contribution to the partnership.[33] Like profit-sharing, contributions need

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alone make partnership). Sharing of profits as interest does not necessarily indicate partnership either. Johnson Bros. v. Carter & Co., 120 Iowa 355, 94 N.W. 850 (1903) (sufficient evidence of partnership offered to go to jury); McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951) (no co-ownership of business). See generally CRANE §§ 15-20.

In connection with farm partnerships more specifically, see Boyd, *supra* note 17, at 96:

> While the Iowa Supreme Court regards profit sharing as important evidence of the existence of partnership, the mere sharing of profits is insufficient to constitute a partnership. This is particularly true in the case of farm arrangements since the sharing of profits is also a characteristic of farm leases.

[29] *E.g.*, Steele v. Steele, 262 Ala. 353, 79 So. 2d 8 (1955); Berry Seed Co. v. Hutchings, 247 Iowa 417, 74 N.W.2d 233 (1956); Darden v. Cox, 240 La. 310, 123 So. 2d 68 (1960). In Iowa sharing of losses is a *sine qua non* because profit sharing is also present in many lease arrangements. See Berry Seed Co. v. Hutchings, *supra*.

[30] See McCarney v. Lightner, 188 Iowa 1271, 175 N.W. 751 (1920) (one party could be charged with expenses out of his share of profits only); Johnson Bros. v. Carter & Co., 120 Iowa 355, 360, 94 N.W. 850, 852 (1903) (dictum). The *Johnson Bros.* case observed that loss sharing will be inferred from profit sharing agreements whenever possible, but that in prior cases striking down partnerships due to failure of the loss-sharing element there was no possible way to imply that element. Of course this restriction that all partners must share losses, applies only when third parties are involved. See CRANE § 14, at 62:

> Sharing of losses inter se is not necessary for partnership to exist. It may be agreed that one partner shall be *guaranteed by his associates* against personal liability to creditors, and even against any impairment of capital, and that he shall be guaranteed a certain return on his investment. (Emphasis added.)

[31] An example is Marshalltown Mut. Plate Glass Ins. Ass'n v. Bendlage, 195 Iowa 1200, 191 N.W. 97 (1922), where the only purpose of the "partnership" was the sharing of losses in breakage of plate glass.

[32] See, *e.g.*, Lutz v. Billick, 172 Iowa 543, 154 N.W. 884 (1915) (claimed farm partnership); Drummy v. Stern, 269 S.W.2d 198 (Ky. 1954) (no joint venture because no loss sharing). See also Boyd, *supra* note 17, at 97 (Iowa law).

[33] See Wisdom v. United States, 205 F.2d 30 (9th Cir. 1953) (no services or capital contributed; no control in management); Cobb v. Commissioner, 185 F.2d 255, 258

not be equal, and they may consist of either capital or services.[34] For example, in most father-son farm partnerships the father is likely to provide most of the initial capital with the son offering services as the major part of his contribution. The father's contribution to a family partnership would frequently be an interest in realty—perhaps an interest in an entire farm. In any case, all partners ordinarily contribute something in order to create a workable organization.

There are still other criteria which receive consideration. Partners must share in management, but they can allocate specific managerial duties by agreement.[35] True partners stand as principal and agent to one another; as between themselves, this relationship also may be modified by agreement.[36] Another element sometimes considered by the courts is the co-ownership of property; again, this factor is not decisive in itself, but it is persuasive when considered in conjunction with the other factors.[37]

D. Income Taxation

In the farming industry as elsewhere the creation of partnerships within close family relationships is viewed with suspicion by the income tax officials. Family partnerships are suspect because illusory business associations can be constructed so easily within the family circle and splitting the family income among several family members tends to lower the total amount of income tax paid.[38] Although the federal courts largely follow state law in

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(6th Cir. 1950) (very difficult burden to show partnership absent substantial contribution); Malvern Nat'l Bank v. Halliday, 195 Iowa 734, 192 N.W. 843 (1923) (claimed farm partnership).

[34] See, *e.g.*, Hardyman v. Glenn, 56 F. Supp. 269 (W.D. Ky. 1944) (contribution of capital only); Covell v. Johnsen, 196 N.W. 987 (Iowa 1924) (one party contributed capital, other labor to farm partnership); Van Hoose v. Smith, 355 Mo. 799, 198 S.W.2d 23 (1946) (similar).

See Boyd, *supra* note 17, at 97:

> Iowa law regards capital contribution as a partnership element but also recognizes that by agreement one partner can supply all of the capital. See *Butz v. Hahn Paint & Varnish Co.*, 220 Iowa 995, 1001, 263 N.W. 257 (1935); *Malvern National Bank v. Halliday*, 195 Iowa 734, 739, 192 N.W. 843 (1923); *Florence v. Fox*, 193 Iowa 1174, 1179-80, 188 N.W. 966 (1922).

See generally 1 BARRETT & SEAGO ch. 6, §§ 3-3.2 (contribution).

[35] See Miller v. Merritt, 233 Iowa 230, 8 N.W.2d 726 (1934); Florence v. Fox, 193 Iowa 1174, 188 N.W. 966 (1922); CRANE § 14, at 62-63. In absence of contribution, the management element is very important in sustaining the existence of a family partnership for tax purposes. See Note, 35 IOWA L. REV. 98, 100-02 (1949). Moreover, management rights are a significant element in farm partnerships. See Boyd, *supra* note 17, at 97 (Iowa law).

[36] See Hanson v. Birmingham, 92 F. Supp. 33 (N.D. Iowa 1950), *appeal dismissed*, 190 F.2d 206 (8th Cir. 1951); Note, *Share Tenancies and Partnerships*, 8 IOWA L. BULL. 95, 97-98 (1923). See generally CRANE §§ 48-49, 53; Boyd, *supra* note 17, at 98-99 (Iowa law).

[37] See Thomas v. King, 34 Del. Ch. 160, 99 A.2d 778 (1953) (no partnership found); Richards v. Grinnell, 63 Iowa 44, 18 N.W. 668 (1884).

[38] See Cooke v. Glenn, 78 F. Supp. 519, 528 (W.D. Ky. 1948), *aff'd*, 177 F.2d 201 (6th Cir. 1949). Partnership income is taxed not to the partnership but to the individual partners. INT. REV. CODE OF 1954, §§ 701-02. See generally 1 BARRETT & SEAGO ch. 2, §§ 9-9.2; CRANE § 23a.

determining whether a partnership exists,[39] the purpose for which the partnership is formed receives close scrutiny. If the motive is solely to manipulate income for tax reasons, the partnership is deemed a sham for tax purposes.[40] The partners must genuinely intend to join together to carry on a business. Their intent is determined from their agreement, conduct, relationship, and contributions as well as their actual control of income.[41] Each partner must be partially responsible for production of income during the tax year and ordinarily each must have made a contribution.[42]

In farm partnerships involving members of one family then, it is important that the partnership conform to the standards of the federal income tax law as well as state partnership law.[43] A farm partnership between father and son which is motivated by a bona fide desire to assist the son in entering the farming business should be valid for tax purposes; the possibility of advantageous income splitting would be incidental to the primary objectives of the parties.

II. Partnership Property Distinguished from Individual Property

When litigation involves realty used by a farm partnership, a distinction is often drawn between firm property and property belonging to the partners individually, just as in the case of other partnership businesses.[44] Partnership property is subject to the claims of partnership creditors. While individual property of the partners is subject to the same claims, in the event of insolvency proceedings in equity the creditors of an individual partner are given precedence in the distribution of the partner's individual assets.[45]

[39] See Estate of Dorsey v. Commissioner, 214 F.2d 294 (5th Cir. 1954); Boyd, *supra* note 17, at 94.

[40] See Commissioner v. Tower, 327 U.S. 280, 289 (1946); Ardolina v. Commissioner, 186 F.2d 176, 179-80 (3d Cir. 1950) (allowing partnership); Nelson v. Commissioner, 184 F.2d 649, 651 (8th Cir. 1950) (partnership not found).

[41] See, *e.g.*, Estate of Dorsey v. Commissioner, 214 F.2d 294 (5th Cir. 1954); Collamer v. Commissioner, 185 F.2d 146, 149 (4th Cir. 1950) (partnership not found).

[42] See, *e.g.*, Batman v. Commissioner, 189 F.2d 107 (5th Cir.), *cert. denied*, 342 U.S. 877 (1951) (partnership failed as a sham); Fletcher v. Commissioner, 164 F.2d 182 (2d Cir. 1947), *cert. denied*, 333 U.S. 855 (1948) (same); Leiber v. United States, 130 Ct. Cl. 810, 119 F. Supp. 951 (1954) (one partnership upheld, one a sham). Since 1948 the income tax law has permitted husband and wife to file a joint return in which the tax levied is twice the tax on one-half the taxable income. Int. Rev. Code of 1954, § 2. Consequently, income tax reduction is seldom a motive for forming partnerships between spouses. See also Int. Rev. Code of 1954, § 704(e) on family partnerships.

[43] Concerning the requirements for qualifying for federal social security, see O'Byrne, Farm Income Tax Manual §§ 1105-06 (rev. ed. 1958). See also *id.* §§ 1107-11 (non-partnership arrangements).

[44] See generally Hutchison, *Enforceability of Iowa Creditors' Judgments Against Partnerships and Partners' Assets*, 44 Iowa L. Rev. 643 (1959).

[45] See Simmons v. Simmons, 215 Iowa 654, 246 N.W. 597 (1933); Commissioner v. Lehman, 165 F.2d 383, 385 (2d Cir.) (dictum), *cert. denied*, 334 U.S. 819 (1948) (partner's creditors cannot reach firm's assets). See generally Crane § 37; Note, *The Right of a Partner's Separate Creditors to Share in the Distribution of Assets*, 17 Mo. L. Rev. 185 (1952). Each partner has a right to expect that partnership property will be used to pay or secure partnership debts, relieving him from personal liability. See Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1954); Herron v. McCurtain County Bldg. & Loan Ass'n, 203 Okla. 545, 223 P.2d 1078 (1950). Concerning the marshaling

Partnership property is also subject to distribution among the partners in adjustment of accounts upon dissolution.[46] And during the life of the business, it is often necessary to determine whether a particular asset is partnership property or not.

Partnership property can be used as security for loans made to the firm, thereby permitting the business to realize on its assets in furtherance of its purpose without any need for encumbering property of the individual partners. The firm's property can be conveyed in the course of normal partnership activity without interfering with the individual affairs of the partners. Without this freedom to encumber and alienate its realty, a partnership would be severely hindered in its normal business activities.[47] Restrictions on partnership action with regard to its realty might very well frustrate the purposes for which the partnership was created. Such a handicap would be especially acute in a farm partnership where real holdings are essential and where they often comprise a major portion of the partnership capital.

Consequently, the importance of distinguishing between farm property belonging to the partners individually and that belonging to the firm is apparent; but absent express agreement, the distinctions often are not easily made. The criterion for determining property ownership is the intent of the parties, except where apparent ownership misleads innocent third parties.[48] When record title is in the name of one partner with no showing of the partnership interest, a good faith purchaser without notice is protected by the record; a conveyance to him by the title-holding partner will be valid even if the partner has acted wrongfully in executing the conveyance.[49] The

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of assets to align partnership creditors with partnership assets during insolvency proceedings in equity, see Hutchison, *supra* note 44, at 656-58.

Liability on partnership contracts, while joint at common law, see Burdick, *Joint and Several Liability of Partners,* 11 COLUM. L. REV. 101 (1911), is now generally joint and several, see, *e.g.,* IOWA CODE § 613.1 (1958); Ryerson v. Hendrie, 22 Iowa 480 (1867). Tort liability was joint and several at common law. See MECHEM, PARTNERSHIP § 312 (2d ed. 1920).

[46] See generally 2 BARRETT & SEAGO ch. 9.

[47] See Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 240, 59 N.W. 1010, 1011 (1894) (dictum).

[48] See, *e.g.,* Wilkinson v. United States, 177 F. Supp. 101, 104 (S.D. Ala. 1959); Sneed v. Kanelos, 150 Cal. App. 2d 684, 310 P.2d 706 (3d Dist. 1957); Curtis v. Campbell, 336 S.W.2d 355 (Ky. 1960); *In re* Perry's Estate, 121 Mont. 280, 192 P.2d 532 (1948).

The partnership organization consists of something more than a joint ownership of property; while a tenancy in common is not an unusual way for partners to hold title to firm property, it does not of itself create the relationship, even when the owners share equally in the profits derived from the property. See Olive v. Turner, 120 F. Supp. 478 (W.D. Okla. 1954) (agricultural lease rather than partnership); Farris v. Farris Eng'r Corp., 7 N.J. 487, 81 A.2d 731 (1951); McCarney v. Lightner, 188 Iowa 1271, 1279-80, 175 N.W. 751, 754-55 (1920) (dictum) (no partnership found); Note, *Share Tenancies and Partnerships,* 8 IOWA L. BULL. 95, 98 (1923). See generally CRANE §§ 12, 14. But joint ownership of business property is an element to be considered in determining whether there is a partnership. See Richards v. Grinnell, 63 Iowa 44, 18 N.W. 668 (1884)

[49] CRANE § 38, at 191. The practice of imposing a fiduciary duty upon partners holding title to realty for the partnership is discussed later. See notes 82-85 *infra* and ac

other partners and the firm itself are given rights of action against the wrongdoing partner for the proceeds from the conveyance.[50]

A. Partnership Property Acquired by Contribution

While it is not necessary to the creation of a partnership that all partners contribute capital,[51] they usually must furnish sufficient initial contributions to provide the partnership with the wherewithal to commence and sustain activity. Original contributions to a farm partnership may consist of personalty such as machinery, livestock, supplies, or even cash assets; but it is assumed that in this type of firm at least one of the partners will contribute real estate. Real estate owned by a partner may be contributed either in fee or for use.[52]

The Uniform Partnership Act declares all contributions of realty to partnership capital to be firm property.[53] At common law the intent of the parties determines whether or not a real estate contribution is to be treated as firm property; terms of the partnership agreement, the parties' conduct, and the use made of the property are commonly examined to determine intent.[54] In drafting farm partnership agreements the intended status of any real property involved should be specified in detail. If the landowner intends to make an initial capital contribution of his realty, then his intention should be expressed and the estate fully described. But if his intention is to contribute only the use of his realty, he should expressly disclose that intention in the agreement.[55]

Transfer of a part interest in realty from the landowning partner to the other partners as individuals may have appeal in light of the circumstances and purposes assumed to be present when close family farm partnerships are considered. To avail himself of the survivorship feature the landowning partner might want to convey to himself and his partners as joint tenants

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companying text. Transfer of title to property held in trust extinguishes the equitable interest if the grantee is an innocent party. See Sullivan v. Sullivan, 321 Mass. 156, 71 N.E.2d 894 (1947) (breach of duty by guardian); *cf.* Pool v. Rutherford, 336 Ill. App. 516, 84 N.E.2d 650 (1949) (equitable lien). However, if the third party has knowledge of the equitable interest and the breach of duty he takes subject to that interest. See RESTATEMENT, TRUSTS § 296 & comment (1935).

[50] See *id.* § 199 & comment (equitable remedies of beneficiary).

[51] See Commissioner v. Culbertson, 337 U.S. 733 (1949) (income tax case; cattle business partnership); Watson v. Watson, 231 Ind. 385, 108 N.E.2d 893 (1952) (concerning existence of farm partnership); note 34 *supra*.

[52] See Littleton v. Littleton, 341 S.W.2d 484, 488-89 (Tex. Civ. App. 1960) (*semble*); CRANE § 37, at 174.

[53] UNIFORM PARTNERSHIP ACT § 8(1).

[54] See Sanderfur v. Ganter, 259 S.W.2d 15 (Ky. 1953) (found no contribution of leasehold); *cf.* Bode v. Prettyman, 149 Neb. 179, 30 N.W.2d 627 (1948) (machinery in dirt moving business).

[55] This caution was made in Roberts v. Roberts, 118 Colo. 524, 527, 198 P.2d 453, 454 (1958), where the original partners failed to specify their intent as to the status of partnership property when taking in a new partner:

> If it was the intention of the original partners to retain in themselves title to . . . [the] property theretofore held by the partnership, . . . it was their duty . . . to have inserted in the contract a suitable reservation to such effect. There is nothing in the agreement from which such an intention can reasonably be inferred.

with each contributing the use of the property to the firm. This arrangement mitigates the difficulties of continuing the business upon the landowning partner's death by leaving the surviving partners free to utilize the property as they wish. The gift and estate tax implications of the joint tenancy transfer warrant consideration in each instance.[56] Moreover, courts have been reluctant to permit the right of survivorship to arise from the partnership agreement itself; the common law deems right of survivorship to be "entirely inconsistent with the requirements of partnership law that partnership realty be applied to the extent necessary to pay partnership debts and adjust accounts between the partners and that the surplus be distributed equally on dissolution of the partnership."[57]

A conveyance to the grantor himself and his partners in their individual capacities as tenants in common is an alternative to joint tenancy. The undivided interest of each tenant in common survives at his death so it can be devised or inherited. However, there can be an agreement, as part of the partnership articles or otherwise, that the surviving partners may or must purchase his interest upon his death or withdrawal from the firm.[58]

Farm land owned by one or more partners individually is frequently used by the firm; this may be done by an agreement to contribute the use of the property with the reservation that the owner is to retain all other rights in it. Contributing the mere use of the property does not make it the property of the partnership.[59] Once the property is no longer needed, the owner is freed from his obligation to hold the property for partnership use.[60] Until then the contributing or landlord partner may not withdraw the use of the land with impunity except by consent of the other partners, since the partnership still has an interest in the property.[61] But upon termination of

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[56] In general, the entire value of property held jointly with a right of survivorship at the time of the decedent's death is included in his estate except for such part as is attributable to the amount of consideration given therefor by the other joint owner or owners. See INT. REV. CODE OF 1954, § 2040. In a husband-wife or parent-son partnership situation, it may be exceedingly difficult to prove the amount of consideration, if any. However, when property is held jointly with right of survivorship by husband and wife, on the death of one the value of the property may be included as part of the estate tax marital deduction. See INT. REV. CODE OF 1954, §§ 2056(a), (c), (e). Similarly, when such a property interest is passed to a spouse as a gift, a gift tax marital deduction is allowed. INT. REV. CODE OF 1954, §§ 2523(a), (d).

[57] 2 AMERICAN LAW OF PROPERTY § 6.8, at 36 (Casner ed. 1952); see Jones v. Schellenberger, 225 F.2d 784 (7th Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) (question of whether tenancy in partnership and joint tenancy can co-exist); Fleming v. Fleming, 194 Iowa 71, 174 N.W. 946 (1919) (joint tenancy could not have existed). *But see* Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919) (enforcing survivorship provision in partnership contract between husband and wife).

[58] See note 6 *supra* and accompanying text.

[59] See Hunter v. Parkman, 250 Ala. 312, 34 So. 2d 221 (1948) (by implication) (use of land and dairy equipment); Fenton v. State Indus. Acc. Comm'n, 199 Ore. 668, 264 P.2d 1037 (1953) (use of drilling rig).

[60] But the firm's creditors can still satisfy their claims out of the individual partner's assets. See MECHEM, PARTNERSHIP § 314 (2d ed. 1920). In an insolvency proceeding equity will marshal the assets and align partnership creditors with partnership assets. See generally Hutchison, *supra* note 44.

[61] See Hunter v. Parkman, 250 Ala. 312, 34 So. 2d 221 (1948).

the firm no other partner can claim any interest in the property predicated upon his interest in the partnership except insofar as there is a continuing leasehold as a partnership asset. If there is no unexpired lease, the land-owning partner has no further obligation to the partnership or to his partners; as against creditors of the firm the property is treated the same as any other property held by the partners individually.[62]

B. Property Acquired After Creation of Partnership

In order to compensate for the low return on farm capital that characterizes the current farm situation it is often necessary to improve the efficiency of labor, management, and high-priced equipment; and in many respects efficiency can be increased only through an expansion of operations. Spreading the fixed costs accompanying ownership of an expensive machine, for example, over a greater volume of production generally results in lower cost per unit. By way of simple illustration suppose the yearly fixed cost of owning a particular implement is $500; this represents static costs such as depreciation, interest on the investment, insurance, and storage—all of which accrue whether or not the implement is used during the year. If the implement is used to produce ten units—perhaps ten acres of grain—then the fixed cost per unit will be fifty dollars; but producing one hundred units with the implement lowers per unit cost to five dollars. For this reason expansion may be a desirable strategy for farm partnerships to adopt. Expansion might also result from normal growth of the firm or the ambition of its members.

Expansion of a farm partnership business often entails acquiring additional realty or the use thereof by investment of firm surplus in additional realty rather than by additional partner contributions. When a partner purchases realty it is frequently unclear for whose benefit the purchase was made. After-acquired property is presumed to be partnership property when acquired through expenditure of partnership funds.[63] Intent of the parties is the governing factor, and in the absence of explicit agreement the courts apply varied tests to determine the intent: it may be inferred from the general purpose of the parties, the nature of their business, and the manner with which the property is dealt.[64] Listing the property among firm assets and paying expenses incurred by the property with partnership funds are highly suggestive indications of firm ownership,[65] but merely paying expenses on the

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[62] See note 45 *supra*.

[63] That is to say, presumption favors the acquisition of an estate in fee simple. See Korziuk v. Korziuk, 13 Ill. 2d 238, 148 N.E.2d 727 (1958) (title held by third party); Todd v. Todd, 250 Iowa 1084, 96 N.W.2d 436 (1959) (farm partnership); Horowitz v. Le Lacheure, 81 R.I. 235, 101 A.2d 483 (1953). See also UNIFORM PARTNERSHIP ACT §§ 8(2), (4): "Unless the contrary intention appears, property acquired with partnership funds is partnership property. . . . A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears."

[64] See, *e.g.*, Sneed v. Kanelos, 150 Cal. App. 2d 684, 310 P.2d 706 (3d Dist. 1957); Peyton v. Peyton, 143 Cal. App. 2d 379, 299 P.2d 897 (4th Dist. 1956); Ward v. Ward, 197 Okla. 551, 172 P.2d 978 (1946).

[65] In Emerson v. Campbell, 32 Del. Ch. 178, 84 A.2d 148 (1951), the property was used in the business and carried on the partnership books as an asset along with the cost of repairs, maintenance, and taxes which appeared as operating expenses. In Ward v. Ward, *supra* note 64, the court mentions the following elements as indicators: use

realty with partnership funds is not decisive.[66] The expenses might be entered on the books as a deduction from a partner's share of the partnership earnings or from his capital account, indicating an intention to treat the property as his individually.

Similarly, the property could be shown to belong to the partners as co-owners rather than to the firm. They might acquire title with no intention of devoting the property to partnership purposes. Intent is again the controlling factor;[67] and the same result presumably obtains even when partnership funds are used to pay the purchase price so long as the intent is clearly expressed. While realty purchased with partnership funds and used in the business is presumed to be partnership property even when a third party, such as the wife of one of the partners, holds legal title,[68] a clear showing of contrary intent again should overcome the presumption. It is possible that the partnership funds might be thus used as a means of extracting profits from the firm.

By investing the firm's surplus in realty and taking title themselves, the partners can transform the firm's assets into their own property if that is their intention as evidenced by their conduct.[69] Investment of surplus partnership funds in realty to be used by the partnership indicates that it is intended to be partnership property. But even when the property is not to be used in the business it may be partnership property if the partners so intend.[70] As a practical matter, the acquisition of land suitable for farming purposes by a farm partnership will in all likelihood be used by the partner-

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by the partnership, payment of expenses and disposition of property income through the partnership, and agreements and accounts of the firm. The court in Lyons v. Lyons, 182 Okla. 108, 76 P.2d 887 (1938) looked toward the agreements, use by the firm, entries in the firm records of assets, and disposal of income from the property as partnership income.

[66] See Peyton v. Peyton, 143 Cal. App. 2d 379, 299 P.2d 897 (4th Dist. 1956) (firm paid taxes); Neilsen v. Holmes, 82 Cal. App. 2d 315, 186 P.2d 197 (4th Dist. 1947) (firm paid taxes and note); Smith v. Smith, 179 Iowa 1365, 160 N.W. 756 (1916) (firm paid taxes and paid for improvements).

[67] See, *e.g.*, McGowin v. Robinson, 251 Ala. 690, 39 So. 2d 237 (1949); Steinmetz v. Steinmetz, 125 Conn. 663, 7 A.2d 915 (1939) (farm partnership); Voth v. Hackley Union Nat'l Bank, 353 Mich. 596, 91 N.W.2d 857 (1958) (partners held as tenants in common).

Whenever partners hold property as co-owners there is some question whether or not it is partnership property. This can come about in at least three ways: 1) the partners are co-owners before the partnership is formed, 2) one partner owns the property initially and conveys one-half interest to the other partner when the partnership is formed, and 3) the partners acquire the property after the partnership is formed. In the first case there is a presumption that the property is not partnership property. See CRANE § 37, at 174. In the second case there might be a slight presumption the other way. See *id.* § 37, at 176 (by implication). In the third case, the use of partnership funds might be determinative. See *id.* § 37, at 175.

[68] See, *e.g.*, Bacon v. Bacon, 7 N.J. Super. 182, 72 A.2d 879 (App. Div. 1950) (title held by wife); Korziuk v. Korziuk, 13 Ill. 2d 238, 242, 148 N.E.2d 727, 729 (1958) (dictum) (title held by partner, then by trustee).

[69] See Smith v. Smith, 179 Iowa 1365, 160 N.W. 756 (1916); Ward v. Ward, 197 Okla. 551, 172 P.2d 978 (1946); Lyons v. Lyons, 182 Okla. 108, 76 P.2d 887 (1938).

[70] See Brown v. Brown, 320 S.W.2d 721 (Tenn. App. 1959); CRANE § 37, at 187.

ship and will probably be intended by the partners to be partnership property.

III. Holding Legal Title

A. *In General*

While a partnership can hold personal property in the firm name, acquisition of real property in the name of the firm is not possible in all jurisdictions. At common law a partnership, not being a legal entity, cannot hold title to real property in its own name.[71] However, in those jurisdictions where enabling legislation has been enacted, generally meaning those which have the Uniform Partnership Act, it is possible for realty to be conveyed directly to and from a partnership.[72]

The Iowa court has held in accordance with common-law principles that a partnership cannot hold title to real property in its own name,[73] although it has repeatedly asserted that a partnership is an entity for certain other purposes.[74] Consequently, a conveyance in Iowa to a partnership as an entity will not pass legal title to the firm itself, but rather vests the title in the individual partners as tenants in common in trust for the firm.[75] Otherwise, such a conveyance could be construed as a contract by the grantor to convey to the partners, or perhaps reformation would be allowed in equity on a showing of mistake by clear and convincing proof.[76]

At common law a conveyance to a firm whose name includes that of a partner vests the legal title in the partner alone.[77] For instance, conveyance to a farm partnership known as "John Brown Farms" in which John Brown

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[71] See, *e.g.*, Bankers Trust Co. v. Knee, 222 Iowa 988, 270 N.W. 438 (1936); Curtis v. Reilly, 188 Iowa 1217, 177 N.W. 535 (1920); Crane § 38, at 189. *But see* Coast v. Hunt Oil Co., 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952) (Louisiana law). The common-law view is that title to realty can vest only in a legal person, either real or artificial.

[72] See Uniform Partnership Act § 8(3): "Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name." The states having this legislation are listed in note 10 *supra*.

[73] See Bankers Trust Co. v. Knee, 222 Iowa 988, 270 N.W. 438 (1936); Curtis v. Reilly, 188 Iowa 1217, 177 N.W. 535 (1920).

[74] See, *e.g.*, Jensen v. Wiersma, 185 Iowa 551, 552, 170 N.W. 780 (1919) (partnership is entity for purpose of holding title to personalty); Ruthven v. Beckwith & De Groat, 84 Iowa 715, 717, 45 N.W. 1073, 1074 (1890) (partnership resident of county for purpose of attachment of property); Iowa R. Civ. P. 4 (partnership can sue and be sued in its own name).

[75] See Bankers Trust Co. v. Knee, 222 Iowa 988, 270 N.W. 438 (1936); Curtis v. Reilly, 188 Iowa 1217, 177 N.W. 535 (1920); 1 Barrett & Seago ch. 3, § 4.1, at 197 & n.32. Compare Crane § 38, at 189: "A conveyance naming, as grantee, a partnership by an artificial name, such as 'American Stove & Lumber Co.' did not [at common law] pass legal title."

[76] See Crane § 38, at 189-90 n.54.

[77] See *id.* § 38, at 190; Mechem, Partnership § 153, at 134 (2d ed. 1920):

> This [common-law practice of declaring conveyances to partnerships to be nullities] was especially true where the firm name was a purely artificial one; though where a firm name contained the individual name of one or more of the partners the courts were quite ready to seize upon that fact in order to save the conveyance, and would hold that the legal title vested in the partner or partners whose names so appeared, and such partner or partners would then hold the legal title in trust for the firm.

is a partner would transfer legal title to John Brown. But under the Uniform Partnership Act the same conveyance would vest title in the partnership rather than John Brown individually,[78] and it would pass the entire estate of the grantor unless a contrary intent appears.[79] John Brown would then hold a generally inalienable interest in the partnership property as a "tenant in partnership,"[80] which is to be distinguished from his interest in the partnership constituting a personal chose in action—a form of personalty.[81]

In jurisdictions holding that the partnership has no separate existence from its members for the purpose of holding legal title to realty, the firm must function through its individual members in taking title. In lieu of passing title to the partnership as named grantee, legal title may be passed to one of the partners—to the farm father or farm son in the farm partnership. In that event, the holder of legal title is impressed with a fiduciary duty to act as trustee of the property for the firm.[82] The partnership itself is said to hold equitable title to the property.[83] Every equitable right of ownership is indefeasibly in the partnership except where legal title is conveyed to a good faith purchaser for value and without notice.[84] In that case the equitable title also passes to the bona fide purchaser, leaving a right of action against the errant partner available to the firm and the co-partners.[85]

It is not fatal should the face of a deed fail to indicate the partnership's interest. The presumption that the grantee named on the face of the instrument is the absolute owner of the realty may be overcome, except as against third parties, by showing in equity that the true intent of the parties was otherwise.[86] The farm partner holding legal title to partnership property,

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[78] UNIFORM PARTNERSHIP ACT § 8(3), quoted note 72 *supra*. A partnership under the uniform act can pass title only in its own name. *Ibid.*

[79] *Id.* § 8(4), quoted note 63 *supra*.

[80] See *id.* § 25(1): "A partner is co-owner with his partners of specific property holding as a tenant in partnership." Concerning the general inalienability of this interest, see *id.* § 25(2). See generally CRANE § 40.

[81] See UNIFORM PARTNERSHIP ACT § 26: "A partner's interest in the partnership is his share in the profits and surplus, and the same is personal property." See also 2 AMERICAN LAW OF PROPERTY § 6.9, at 44 (Casner ed. 1952): "The partner's interest in the firm, a personal chose in action, is all that he may assign or bequeath and that alone passes to his administrator as personalty on his death intestate."

[82] See Dayvault v. Baruch Oil Corp., 211 F.2d 335 (10th Cir. 1954) (oil and gas leases held in name of one partner); Smith v. Smith, 179 Iowa 1365, 160 N.W. 756 (1916) (decree modified to show some land partnership property, some not); *cf.* Korziuk v. Korziuk, 13 Ill. 2d 238, 148 N.E.2d 727 (1958) (bank holding title as trustee for partnership). See also MECHEM, PARTNERSHIP § 153, at 134 (2d ed. 1920), quoted note 77 *supra*.

[83] See Kelliher v. Sutton, 115 Iowa 632, 89 N.W. 26 (1902) (judgment created lien on equitable title of firm); Miller v. Howell, 234 S.W.2d 925, 929 (Tex. Civ. App. 1950) (dictum).

[84] See note 49 *supra* and accompanying text. The general doctrine is that conveyance of legal title to a bona fide purchaser cuts off all outstanding equities.

[85] See RESTATEMENT, TRUSTS § 199 & comment (1935) (equitable remedies of beneficiary).

[86] Intent may be implied from the conduct of the parties and from their agreements, express or implied. See Smith v. Smith, 179 Iowa 1365, 160 N.W. 756 (1916) (partner acquiesced when other withdrew partnership funds for realty purchase); Horowitz v.

then, cannot convey or devise the title as his own with impunity; he holds only an interest in the partnership which he may assign or bequeath.[87] Of course, with the consent of his partners, he may convey title in the ordinary course of partnership business.

In farm partnerships where husband and wife hold title in land together either as joint tenants or as tenants in common, or where the son gains an interest in the land of the father by purchase or gift, it would be common for them to contribute the use of the jointly-held land to the partnership. Such jointly-held land is likewise held by the partners as trustees with equitable title in the firm. Although each partner holds a legal interest in the property according to the conveyance, he is not free to convey or devise the legal title any more than if he alone held title for the use of the partnership.[88]

B. Doctrine of Equitable Conversion

The splitting of legal from equitable title when a partner holds property for use by the partnership reflects a policy which is characteristic of trust law. A closely related device reflecting a related policy is the doctrine known as equitable conversion. Equitable conversion is a fictional notion designed to "do what ought to be done";[89] to accomplish various purposes realty may be converted into personalty or vice versa.[90]

When property is contributed to a partnership or purchased by it—that is, when property becomes "partnership property"—there is an implied agreement that it shall be used first for payment of partnership debts or adjustment of accounts among the partners or, if there be a surplus, distribution among the partners upon dissolution.[91] A partner holding partnership realty is under a duty of trust impressed by law[92] to use the property for the firm's benefit. Ultimately this could mean he should liquidate the realty and apply the proceeds to the payment of partnership debts and the like.

Le Lacheure, 81 R.I. 235, 101 A.2d 483 (1953). The significant elements are whether or not partnership funds or credit were used to obtain the property and whether the partnership used the property. See Martin v. Carroll, 259 Ala. 197, 66 So. 2d 69 (1953) (court found property was individual property).

Concerning the presumption that the grantee named in the deed is absolute owner, see CRANE § 38, at 190-91.

[87] See note 81 *supra*.

[88] See Williams v. Dovell, 202 Md. 351, 96 A.2d 484 (1953) (garage and filling station business); In the Matter of George & John Hurt, 129 F. Supp. 94, 98-99 (S.D. Cal. 1955) (dictum) (acknowledging common law before passage of Uniform Partnership Act); 2 AMERICAN LAW OF PROPERTY § 6.8, at 41 (Casner ed. 1952).

[89] See 1 TIFFANY, REAL PROPERTY § 296, at 505 (3d ed. 1939).

[90] The doctrine is occasionally applied in cases involving the sale of land by a specifically enforceable contract wherein the vendor retains legal title until the vendee performs the obligations on the contract. See 1 *id.* § 310a, at 541-42. The effect is "an equitable conversion of the vendor's interest in the land into money and of the purchaser's interest in the money to be paid into land." This application of the doctrine is criticized as being more confusing than helpful. *Ibid.*

[91] 1 ROWLEY, PARTNERSHIP § 8.5, at 223-24 (2d ed. 1960); see note 45 *supra*.

[92] It is important that the trust arise from law rather than from agreement because of a possible statute of frauds difficulty. See 2 AMERICAN LAW OF PROPERTY § 6.8, at 40 (Casner ed. 1952).

In this situation, there being a trust and a duty,[93] there is an equitable conversion. While it may appear as a matter of record that a partner holds title to partnership realty, the doctrine operates to convert his holding into personalty in the form of an interest in the partnership, but only if the property is needed to pay partnership debts or to adjust equities among the partners upon dissolution.[94]

The English version accomplishes a more complete conversion: it treats the partnership realty as personalty for all purposes; but few American jurisdictions have followed this view.[95] In the main, the American courts hold that the trust duty is relieved and all the ordinary qualities of realty revive once the partnership realty is no longer needed for partnership purposes. After all debts have been paid and equities among the partners adjusted the property reverts to realty with all of the former incidents, including dower and curtesy rights attaching thereto; all rights in the property again reside in the holder of legal title.[96]

C. Statute of Frauds

The statute of frauds requires a written memorandum for contracts involving land transfers but the requirement is often circumvented in the case of partnerships by the imposition of trust doctrines. It has been seen that a partner who acquires title to realty for partnership purposes and with partnership funds is a trustee. Similarly, a partner who is under a duty to procure specific realty for the firm might be made a trustee of the property if he acquires it for himself with his own funds. The partnership receives an equitable interest in either case—in the first instance as the beneficiary of a resulting trust;[97] in the second, as beneficiary of a construc-

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[93] On the necessity of there being a duty, see 1 TIFFANY, REAL PROPERTY § 297, at 506 (3d ed. 1939). See RESTATEMENT, TRUSTS § 131 (1935) (equitable conversion):

> (1) If real property is held in trust and by the terms of the trust a duty is imposed upon the trustee to sell it and hold the proceeds in trust or distribute the proceeds, the interest of the beneficiary is personal property.
>
> (2) If personal property is held in trust and by the terms of the trust a duty is imposed upon the trustee to expend it or its proceeds for the purchase of real property, the interest of the beneficiary is real property unless it is so limited in duration that if it were a legal interest it would be personal property.

[94] See note 96 *infra*.

[95] See 2 AMERICAN LAW OF PROPERTY § 6.8, at 37-41 (Casner ed. 1952); 1 BARRETT & SEAGO ch. 3, §§ 5-5.1; MECHEM, PARTNERSHIP §§ 163-64 (2d ed. 1920); ROWLEY, PARTNERSHIP § 8.5, at 223, 225-31 (2d ed. 1960).

In 1 BARRETT & SEAGO ch. 3, § 5.1, at 201 & n.42 (citing cases from Kentucky, Ohio, Tennessee, and Virginia), is the remark that "several of our states have followed . . . [the English] rule but they are very much in the minority."

[96] See Miller v. Howell, 234 S.W.2d 925, 929-30 (Tex. Civ. App. 1950) (dictum) (suit for accounting and division of partnership assets); 2 AMERICAN LAW OF PROPERTY § 6.8, at 38-39 (Casner ed. 1952): "Thus, partnership realty is held in trust for firm purposes, but in so far as it is not needed for such purposes, no trust exists and it is held by the partners as tenants in common exactly as though no partnership existed." To this the writer adds: "The injection of the doctrine of equitable conversion into this rule is entirely unnecessary, and tends to confuse these cases with cases in which that doctrine is really involved." On the effect of the Uniform Partnership Act, see 2 *id.* § 6.9.

[97] See RESTATEMENT, TRUSTS § 440 (1935) (general rule): "Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid . . . ."

tive trust.[98] Neither of these situations falls within the statute of frauds.[99]

Constructive and resulting trusts are equitable devices by which parties who unjustly or unconscionably obtain or retain property may be compelled to hold the property for the benefit of those who deserve it.[100] The trust is not based on agreement, but is raised by construction of law.[101]

Estoppel also avoids the statute; it is available when a partner denies his relationship to the other partners as principal and agent in the face of conduct manifesting his participation.[102]

IV. Individual Rights in Partnership Property

A. Right to Use

No partner has individual property in any specific firm asset except by agreement. Instead, each has a share of partnership profits and, upon dissolution, of the surplus capital after partnership debts are paid and accounts settled.[103] The Uniform Partnership Act, however, gives each partner a "tenancy in partnership" in each parcel of firm property, but the interest does not have any substantial incidents beyond the usual limited right to possession for partnership purposes.[104]

Subject to agreement among the partners, each member has an equal right to possess specific property for partnership purposes, but no member

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[98] See Bufalini v. De Michelis, 136 Cal. App. 2d 452, 288 P.2d 934 (3d Dist. 1955) (co-partner acting for partnership took purchase contract for mining claims in own name); *cf.* Nicolai v. Desilets, 185 Wash. 435, 55 P.2d 604 (1936) (lease on business location of corporation).

[99] See 1 Barrett & Seago ch. 4, § 2.7, at 317; Restatement, Trusts § 40 & comment *d*, § 406 (1935).

To illustrate the flexibility of equity in these situations, see Dayvault v. Baruch Oil Corp., 211 F.2d 335, 339-40 (10th Cir. 1954) (oral agreement to acquire oil leases):

> If title to partnership property is placed in the name of one of the partners, a fiducial relation is thereby created, as to which he owes the highest degree of honor and good faith. . . . The partnership property is regarded as personal property for the purpose of adjusting the equities of the parties, . . . or equity may impress a trust upon the property for the benefit of the joint adventure. . . . Or, equity may impress a constructive trust upon the real property for the benefit of the joint adventurers to prevent unjust enrichment and to enforce restitution. . . . Or, estoppel may be utilized to prevent the imposition of the statute of frauds as a shield for fraud. . . . Whatever procedural devices may be employed, courts of equity are not impotent to effect complete justice between the parties to a joint venture.

[100] See Nicolai v. Desilets, 185 Wash. 435, 55 P.2d 604 (1936) (misunderstanding as to lease); 1 Tiffany, Real Property § 274, at 465 (2d ed. 1939).

[101] See note 92 *supra*.

[102] See Dayvault v. Baruch Oil Corp., 211 F.2d 335, 340 (10th Cir. 1954), quoted note 99 *supra*.

[103] See Berry v. United States, 267 F.2d 298 (6th Cir. 1959) (valuing partnership interest sold for purpose of computing capital gain); Gaynes v. Conn, 185 Kan. 655, 347 P.2d 458 (1959) (applying assets first to partnership debts).

[104] See Uniform Partnership Act § 25. The interest cannot be assigned, devised, or inherited in the usual sense, and it is exempt from dower and like interests as well as from attachment or execution on a claim against the partner. The partners are given equal rights to possession, but only for partnership purposes—subject to agreement.

has any right to possession for other purposes.[105] The comparative amounts of capital invested by partners is not a basis for determining rights to use property once it is committed to partnership use.[106] Thus, if one member of a farm partnership is to have the exclusive use of a residence located on partnership property, or of an orchard or garden plot, for instance, the others must consent specifically. A foreseeable desire of one partner to have exclusive use of specific property or portions thereof can be taken into account in drafting the partnership agreement. A partner wrongfully taking exclusive possession is subject to an accounting upon dissolution and winding up of the firm for benefits derived therefrom.[107]

B. Improvements

When real property is contributed outright to a firm or when the firm purchases property for its own use, the obvious conclusion is that all improvements thereon become property of the partnership unless the partners have agreed otherwise. But a more difficult question emerges when one partner contributes realty only for the use of the partnership.

Suppose a dairy barn is erected on property being used by a farm partnership and it is paid for out of partnership funds. If, upon dissolution, the law deems that the land-owning partner receives the improvement in addition to his liquidation share, he thereby receives a windfall at the expense of his co-partners. Such a rule would tend to discourage the firm from making needed improvements. Hence, non-severable improvements made at the expense of the partnership upon real property owned by one partner are treated as partnership assets, and the non-landowning partners are entitled to their proportionate shares of the value of the improvement.[108] To avoid the possibility of litigation later due to misunderstanding, it is advisable that provision be made in the original partnership agreement concerning the dis-

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[105] See Bode v. Prettyman, 149 Neb. 179, 30 N.W.2d 627 (1948) (dirt moving equipment); *accord,* UNIFORM PARTNERSHIP ACT § 25(2)(a) (discussed note 104 *supra*), State v. Elsbury, 63 Nev. 463, 175 P.2d 430 (1946) (larceny of partnership property).

[106] In State v. Elsbury, *supra* note 105, a grand larceny conviction was reversed upon determination that a partnership existed and the alleged larcenist was actually a partner appropriating partnership funds during the existence of the partnership. The court stated in dictum:

> The amounts of money invested by the partners respectively in the firm would be no criterion in determining their ownership of the partnership property, for the partner who furnished in the first instance the largest amount of capital, on final settlement might be found to have no interest whatever in the assets then on hand. *Id.* at 469, 175 P.2d at 433.

[107] See Hasday v. Barocas, 10 Misc. 2d 22, 115 N.Y.S.2d 209 (Sup. Ct. 1952) (partner required to account for personalty of partnership); Smith v. Bolin, 261 S.W.2d 352, 364-65 (Tex. Civ. App. 1953) (lease taken personally by joint venturer violated trust relationship); CRANE § 41, at 200:

> Though it may be a wrong to deprive a partner of possession, he cannot maintain a possessory action, such as replevin, against a co-partner. If a partner assumes exclusive possession wrongfully, he must account for profits derived therefrom, as a part of the process of dissolution and winding up proceedings in equity.

[108] See Minikin v. Hendrix, 15 Cal. 2d 338, 101 P.2d 473 (1940) (no agreement made concerning improvements; found to be firm assets); Wiese v. Wiese, 107 So. 2d 208 (Fla. Dist. Ct. App. 1958); Gabrielle v. Marini, 80 R.I. 458, 98 A.2d 363 (1953) (lien on property for improvements).

position of improvements placed on individually-owned property that is contributed to firm use.

C. Dower Interests

A partner's interest in specific partnership property is not subject to dower.[109] But in the case of a married partner holding legal title to realty for the firm's benefit, inchoate dower or curtesy rights may create a problem. Partnership property purchased with partnership funds and held in the name of a married partner is treated as trust corpus with no inchoate dower rights attaching.[110] Similarly, realty acquired for the partnership by a married partner with his own funds and in his own name while under a duty to do so would also be held in trust with no dower attaching.[111] But contribution of real property would not extinguish an inchoate dower interest which already attached.[112] Once realty has achieved the status of partnership property the partners have freedom to convey or encumber it in the normal course of business without the joinder of their spouses.[113]

The partners may wish to convey or mortgage realty in the course of the partnership business. For example, while financing of a specific operation, such as cattle-feeding, within the overall farm business can be secured by a chattel mortgage, it may be more convenient to use realty as security for other types of financing. An inchoate dower interest could effectively preclude mortgaging realty in case the interested spouse refuses to join in the mortage instrument.[114]

No dower rights attach to a deceased partner's share in realty that has achieved partnership property status until the partnership debts have been paid. The surviving partners have the right to possess and sell assets belonging to the partnership so long as necessary to pay firm debts and settle

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[109] See Paige v. Paige, 71 Iowa 318, 32 N.W. 360 (1887) (partners and firm all insolvent); 1 BARRETT & SEAGO ch. 3, § 6.3; CRANE § 45, at 220-21:

> Whatever right of dower is incident to property acquired by the partnership . . . is subject to the rights of partners and of creditors. It is unnecessary for the wife to join in a conveyance by the partnership for partnership purposes, either before or after dissolution. But after partnership purposes are satisfied the widow takes by right of dower as real estate rather than as personal property, according to the general prevailing common law rule.

In this connection see the discussion on equitable conversion in part III.*B. supra*. Dower similarly does not attach to a partner's interest as tenant in partnership under UNIFORM PARTNERSHIP ACT § 25(2)(e), discussed note 104 *supra*.

[110] See Attaway v. Stanolind Oil & Gas Co., 232 F.2d 790 (10th Cir. 1956) (no need to join wife in execution of lease of firm property); *cf.* Beers v. Beers, 204 Ore. 636, 283 P.2d 666 (1955) (no partnership; heirs must be given notice in trying title). See also CRANE § 45, at 220-21, quoted note 109 *supra*.

[111] See note 98 *supra* and accompanying text.

[112] CRANE § 45, at 220.

[113] See Attaway v. Stanolind Oil & Gas Co., 232 F.2d 790 (10th Cir. 1956) (no need to join wife in execution of lease of firm property).

[114] The Iowa statutory share provision excludes the dower right from perfecting in property that is "sold on execution or other judicial sale." IOWA CODE § 636.5 (1958). Although it might be possible for dower interests to be cut off by foreclosure and judicial sale of mortgaged property, financers would probably insist on the spouse joining in the mortgage in case the fee owner should die before sale, thereby perfecting the dower interest. Moreover, a serious problem of fraud could arise if this possibility were used to defeat dower interests.

accounts.[115] Even firm property standing in the name of a deceased partner is treated as personalty for purposes of winding up partnership affairs. Under the Uniform Partnership Act the deceased partner's rights in specific partnership property vests for this purpose in the surviving partners rather than the deceased partner's representative.[116] After the winding up is accomplished, the property is subject to the ordinary rules of descent and distribution, dower, and other interests to the same extent as any other property owned by the decedent. A transfer by the surviving partners to a bona fide purchaser extinguishes the equitable interest of the partnership creditors, and the deceased partner's heirs may be compelled to surrender their interests as well; a bona fide purchaser is protected even if the surviving partners do not apply the proceeds of the transfer to partnership purposes.[117]

V. Conclusion

The partnership as a form of business organization offers advantages to some farm families: it provides one means for helping young farm people to enter the business when this is desired; it brings together needed resources for greater efficiency of operation; and it reduces income taxes by allowing the income from the farm unit to be split into two or more parts. At the same time it is an informal arrangement with sufficient flexibility to permit easy adjustment to unexpected economic conditions. However, there are some legal difficulties likely to be encountered in regard to the holding of realty.

Problems of holding title are alleviated when the partnership can be treated as an entity for that purpose as is permitted in jurisdictions having the Uniform Partnership Act; in other jurisdictions forethought can be expended and steps taken to mitigate possible ownership problems. On the issue of holding title to realty the common law has managed to bring itself into accord with the entity theory of partnerships in overall effect. Even where the entity theory is not followed there is a notion of "partnership property." It appears that partnership is enough of an "entity" to hold personalty and beneficial interests in realty. Because of artificial devices such as equitable conversion, constructive and resulting trusts, and the like, the greatest difference between holding realty in an entity jurisdiction and an aggregate jurisdiction is a large amount of unnecessary inconvenience.

Usually real property is made available to farm partnerships initially by either contribution in use or contribution in fee. While skillful drafting may

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[115] See Western Sec. Co. v. Atlee, 168 Iowa 650, 151 N.W. 56 (1915) (surviving partners hold title in trust for firm creditors); Hannold v. Hannold, 4 N.J. Super. 381, 67 A.2d 352 (App. Div. 1949) (partition allowed against survivor because firm had abundance of assets); Smith v. Wayman, 216 S.W.2d 837 (Tex. Civ. App. 1948); Crane § 83, at 446:

> The surviving partner, at common law, has the right to continue to administer the partnership affairs so long as he acts honestly and with due diligence . . . . Under the common law . . . the share in the legal title held by a partner would descend to his heirs, and it would be necessary for them to convey, which a court of equity would compel them to do, if necessary to make payments to creditors.

[116] See Uniform Partnership Act § 25(d): "On the death of a partner his right in specific partnership property vests in the surviving partner or partners . . . ."

[117] See Smith v. Wayman, 216 S.W.2d 837, 841 (Tex. Civ. App. 1948); Crane § 83, at 446, quoted note 115 *supra*.

provide for the continuation of a farm operation after a landowning partner who has contributed only the use of land has died, such an arrangement is cumbersome and inconvenient since the farming business is so dependent on realty. If the design in entering a partnership is partly to provide family members a way of acquiring eventual property rights in farm land, it appears that a fee simple estate should be contributed to the firm if at all possible. Adjustments can be made at the time of formation to incorporate the contribution into a comprehensive estate plan. For example, provisions for a gradual transfer of ownership to other members of the family partnership can be included in the partnership agreement.