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## PARTNERSHIP -- UNIFORM PARTNERSHIP ACT--RIGHT OF SURVIVING PARTNER TO PURCHASE PARTNERSHIP PROPERTY

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PARTNERSHIP — UNIFORM PARTNERSHIP ACT — RIGHT OF SURVIVING PARTNER TO PURCHASE PARTNERSHIP PROPERTY—Defendants, administrators of the estate of the deceased partner, agreed with the surviving partner to continue the partnership hotel business, with the approval of the probate court. After some operation, the surviving partner sued to compel the administrators to sell him the interest of the deceased at a value to be judicially determined. Defendants cross-complained, asking the court to liquidate the business and award them the amount of the interest of the deceased in the proceeds. *Held*, reversing the decree below, the

assets of the dissolved partnership should be liquidated, in accord with defendants' prayer. *Zach v. Schulman*, (Ark. 1948) 210 S.W. (2d) 124.

A surviving partner who has a legitimate desire to continue the partnership business cannot sell the partnership property to himself or compel the representatives of the deceased partner to sell it to him, absent a provision in the partnership articles, or in the will of the deceased partner, or a statute conferring this right.<sup>1</sup> This rule is designed to protect the representatives from fraud and overreaching by the surviving partner resulting from the dangerous inequality of knowledge as to the value of the business.<sup>2</sup> Thus, the representatives may insist upon a liquidation of the partnership assets by a sale, even though this is not necessary to pay the debts of the business.<sup>3</sup> Even if the representatives agree to sell the interest of the deceased to the survivor, courts will scrutinize the sale closely because of the latter's fiduciary relationship to the representatives, and will invalidate the sale if it was unfair or fraudulent.<sup>4</sup> In the principal case, the court held that section 42 of the Uniform Partnership Act<sup>5</sup> did not give the surviving partner the right to buy the share of the deceased partner. This conclusion was based on the fact that the language of section 42 is permissive and purports to give the privilege there set forth only to the representatives of the deceased partner. Thus, a retired partner or the representative of a deceased partner seems to have the uncontrolled option either to proceed under section 42 or to demand a liquidation under section 37.<sup>6</sup> If the choice is the latter, the surviving partner may buy at the judicial sale, but he has no priority.<sup>7</sup> Though the decision accords with the general view that section 42 is merely a statement of the pre-existing law,<sup>8</sup> it is submitted that the result here announced is not inevitable. In some situations courts have ordered or authorized

<sup>1</sup> 40 AM. JUR., Partnership, § 309; Ann. Cas. (1917C) 948; 47 C.J., Partnership, § 653; LINDLEY, PARTNERSHIPS, 10th ed., 642, 712 (1935); CRANE, PARTNERSHIPS, 377-384 (1938). Nor can he tortiously convert the personal property and thus become the owner; *In re McCormick's Estate*, 286 Ill. App. 90, 2 N.E. (2d) 967 (1936).

<sup>2</sup> Ann. Cas. (1917C) 946 et seq.

<sup>3</sup> *Crawshay v. Collins*, 15 Ves. Jun. 219, 33 Eng. Rep. 736 (1808); LINDLEY, PARTNERSHIPS, 10th ed., 642-644, 712 (1935).

<sup>4</sup> 40 AM. JUR., Partnership, § 309; *Mosher v. Lee*, 32 Ariz. 560, 261 P. 35 (1927).

<sup>5</sup> Sec. 42 U.P.A.; Ark. Acts (1941) No. 263. "When any partner . . . dies, and the business is continued . . . without any settlement of accounts as between . . . his estate and the person or partnership continuing the business, unless otherwise agreed, . . . his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or . . . at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership. . . ."

<sup>6</sup> U.P.A., § 37; Ark. Acts (1941) No. 263. ". . . provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain a winding up by the court."

<sup>7</sup> Ann. Cas. (1917C) 948; LINDLEY, PARTNERSHIPS, 10th ed., 712 (1935).

<sup>8</sup> *Cahill v. Haff*, 248 N.Y. 377, 162 N.E. 288 (1928); *Froess v. Froess*, 284 Pa. 369, 131 A. 276 (1925); principal case at 128.

a sale of the interest of a deceased partner to his survivor.<sup>9</sup> Certainly, the objection that the representatives will be exposed to fraud and overreaching should not control when the court can protect the representatives fully, and at the same time permit the surviving partner to accomplish directly what he may do indirectly by purchasing at the judicial sale. Moreover, a sale direct to the surviving partner may be advantageous to both litigants, since the survivor, in order to avoid liquidation proceedings, is likely to pay more than a purchaser at a judicial sale.<sup>10</sup> This policy is exemplified by a Washington statute which gives the surviving partner the right to buy all the personal property of the partnership at prices and terms to be fixed by court order.<sup>11</sup> In view of the decision in the principal case, however, the best solution under a statute of the type there involved is to provide in the partnership agreement that the survivor shall have the right to purchase.<sup>12</sup>

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<sup>9</sup> In *James v. Wade*, 200 Ark. 786, 141 S.W. (2d) 13 (1940), a sale to the surviving partner by the receiver on court order, at an evaluation by court appraisers, was upheld. Where the partnership property was an unassignable contract, the court simply charged defendant, the surviving partner, with the deceased partner's share as evaluated by the court below; *Ambler v. Bolton*, L.R. 14 Eq. 427 (1872). See also, *Colgate's Executors v. Colgate*, 23 N.J. Eq. 372 (1873).

<sup>10</sup> *Colgate's Executors v. Colgate*, *ibid.*

<sup>11</sup> Wash. Rev. Stat. (Remington, 1932) § 1459. Although the statute limits this right to personalty, it probably includes all partnership property, when construed together with U.P.A., § 25; Wash. Rev. Stat. (Remington, Supp. 1945) §§ 9975.40-9975.82.

<sup>12</sup> Such provisions will usually be specifically enforced. See, *MECHEM, PARTNERSHIP*, 2d ed., 352-3 (1920).