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Partnership--Rights and Liabilities as to Third Persons--Estoppel as Basis of Liability

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balanced against the policies within the concept of joint ownership expressed in Section 7(2) of the Act. Courts have seemingly found little difficulty in absolving joint purchasers of land from liability as partners, even where there existed profit-sharing agreements. If, as appears to be the case, these decisions are based on the intent of the parties, it would seem only proper to apply the same criteria to joint heirs of land. While they may clearly become partners if they choose to do so, an absence of manifested intent to become partners should protect them at least to the same extent as those who voluntarily assume joint ownership of property.

Henry R. Snyder

PARTNERSHIP—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—ESTOPPEL AS BASIS OF LIABILITY—The defendant and another procured from the State of Ohio a vendor's license in the name of "Henry F. Lucas and Clarence F. Roy, DBA F. & M. Truck Stop". The license application was signed by both men, and the license was posted at the place of business. Plaintiff sued for the amount of goods sold and delivered to Lucas, alleging liability of the defendant as a member of a partnership. Defense: the evidence did not disclose that the plaintiff was aware of, or relied upon, the information contained in the vendor's license. The trial court rendered judgment for the amount claimed. Held: Affirmed: The court below properly found the defendant liable as a partner. In arriving at its decision, the Appellate Court relied upon section 16 of the Uniform Partnership Act, finding that posting of the license was in itself sufficient to establish defendant's liability to third persons. Brown and Bigelow v. Roy, 132 N.E. 2d 755 (Ohio App. 1955)

It was well-established at common law that where one has consented to be held out as a partner, or holds himself out as a partner, he will be liable, under the doctrine of estoppel, to third parties extending credit on the basis of such representations. It was not so clear, however, as to whether a person unaware of being thus held out had an affirmative duty, upon discovery of the holding out, to disclaim the reputed partnership. This question is apparently resolved today in

2 40 Am. Jur. sec. 76 (1942); Mechem, Partnership 90 (2d ed. 1920).
3 E. L. Martin & Co. v. A. B. Maggard & Son, 206 Ky. 558, 267 S.W. 1102 (1925), where a father was liable for debts contracted by his son in a store business carried on in the names of both as partners, after he knew that the business was being so carried on, and when he took no action until creditors were suing
those states which have adopted the Uniform Partnership Act, since the Commissioners have stipulated that, under the Act, one who is held out as a partner is liable to third persons only where he in fact consented to such holding out, the question of fact being for the jury.

The problem of "partnership by estoppel" is treated in section 16 of the Act as follows:

When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made. . . .

This section of the Act apparently embodies the three factors which at common law were necessary to establish liability to a third party under the doctrine of estoppel: (1) a holding out by the party charged or one acting under his authority or with his consent, (2) reliance thereon by the third party and (3) action, to his detriment, by the third party so relying. Thus, regardless of whether or not one has an affirmative duty to deny existence of his purported status as a partner, he cannot be made liable to a third party who acted without reliance on the representations made to him.

The latter part of the section quoted above, however, is drafted in a somewhat ambiguous manner. A casual reading conveys the impression that representation of partnership status "made in a public manner" is sufficient to establish liability to the creditor with or

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4 7 U.L.A. 95 (1949). But cf. McBriety v. Phillips, 180 Md. 569, 26 A. 2d 400 (1942), decided under the Act, which imposed an affirmative duty upon the person so held out to deny his purported status as a partner. A note in 6 Md. L. Rev. 337 (1942) suggests that the decision was not intended to indicate a general rule, but rather, that a duty of affirmative denial may arise in specific instances. to decide.


7 Sparks & Co. v. Hawks, 42 N.M. 636, 88 P. 2d 981 (1938).

without knowledge of the holding out. Closer examination, in light of the entire section, indicates a different interpretation. In effect, this portion of the section provides that representation of partnership status, made in a public manner, creates liability to a creditor, whether or not the person held out knew of the representations, but only if there exist the three factors enumerated above. In other words, even though the holding out is done in a public manner, the third party creditor must, to recover, have acted in reliance on the representations, and suffered damage as a result.

The necessity for a finding of the third party’s actual reliance upon such holding out was not always so firmly established, and at least a few early cases held that there might be a “holding out to the world”, so that anyone who had given credit to the purported partner might recover, even though he knew nothing of the holding out at the time he extended credit. This theory apparently gained few adherents, and has been effectively repudiated by subsequent cases.

The requirement that, before estoppel will be invoked, credit must have been given on the faith of the act of holding out appears to be consistently applied in the more recent cases. In Cooper v. Knox a third party, as plaintiff, was precluded from asserting partnership by estoppel against a wife who was active in her husband’s business on the ground, inter alia, that the plaintiff had never relied upon any statements made by the wife when he extended credit. This theory appears to be a driving force in the business, and was responsible to a considerable degree for its success.

A more rigorous application of the “reliance factor” appears in Wisconsin Telephone Co. v. Lehmann. There, the defendant had formerly been engaged with his son in conducting a partnership, and subsequently the two men operated separate businesses on the father’s farm. The son changed his telephone listing from his own name to that of the defendant’s sole proprietorship, which bore the name, “W. R. Lehmann & Son–Dairy Cattle”. Subsequently he failed to pay his telephone bill. The jury found that the defendant was responsible for the misleading appearances and that there was reasonable ground

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9 This interpretation of sec. 16 of the Act was followed in Orofino Rochdale Co. v. Fred A. Shore Lumber Co., 43 Idaho 425, 252 P. 467 (1927). West Side Trust Co. v. Gascoigne; Cooper v. Knox, supra note 8.
10 Poillon v. Secor, 61 N.Y. 456 (1875); Rizer & Co. v. James, 26 Kan. 221, 224 (1881).
11 See, for example, Thompson v. Toledo First Nat. Bank, 111 U.S. 529, 28 L. Ed. 507 (1884); also Bates v. Simpson, 239 P. 2d 749 (Utah, 1952).
12 197 Va. 602, 90 S.E. 2d 844 (1956).
13 80 N.W. 2d 267 (Wis. 1957).
for the plaintiff's employees to believe that the defendant and his son were partners. Nevertheless, judgment for the plaintiff in the lower court was reversed, and the complaint was ordered dismissed, since the plaintiff had failed to offer any evidence that it changed its position to its detriment in reliance on the belief of existence of a partnership. 14

Such a result seems to be proper under the provisions of subsection 2 in section 16 of the Act, which emphasizes that,

When a person has been thus represented to be a partner in an existing partnership... he is an agent of the persons consenting to such representation to bind them... with respect to persons who rely upon the representation. ... 15

Thus, it seems clear that the necessity for the third party creditor to prove his reliance upon the alleged misrepresentations of partnership status is fully established under the Act. In absence of proof of such reliance, the person giving credit cannot make out a case for recovery.

In the principal case, the court apparently felt that the posting of the vendor's license was an act of so public a nature as to of itself invoke the operation of estoppel. The theory that there can be a "holding out to the world", creating liability to any creditor, is, as we have seen, no longer given effect under the Act. While the language of section 16 of the Act is ambiguous, creating the initial impression that a public holding out establishes liability to all third party creditors, it nonetheless preserves the requirement that there be reliance on the alleged representations, with resultant detriment to the creditor, before recovery will be permitted. The opinion of the principal case makes it clear that no evidence of such reliance was presented by the plaintiff. For that reason alone, it is submitted that the decision was unfortunate in its interpretation of the Act.

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15 KRS sec. 362.225(2) (1956).