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PARTNERSHIP-INCORPORATION-LIABILITY TO PREVIOUS CREDITORS

PARTNERSHIP—INCORPORATION—LIABILITY TO PREVIOUS CREDITORS—The two defendants, partners in the operation of the Mulkey Motor Co., an automobile sales establishment, had indorsed promissory notes in the name of the firm and had sold them to the plaintiff. Later the defendants incorporated under the same name and continued to carry on the business as before. Thereafter the plaintiff, without knowledge of the incorporation, purchased from the defendants certain notes which were indorsed in the accustomed fashion. In an action against the defendants as partners, based on such indorsements of the latter notes, it was contended that the debt was that of the corporation. *Held*, that since the plaintiff, who had dealt with the defendants during the existence of the partnership, had received no notice of the incorporation, the defendants could not evade liability. *Mulkey v. Anglin*, (Okla. 1933) 25 Pac. (2d) 778.

Although the court relies, at least in part, upon a statute,[1] it probably would

[1] This statute provides:
"The liability of a general partner for the acts of his co-partners continues, even after the dissolution of the partnership, in favor of persons who have had dealings with, and given credit to the partnership during its existence, until they have had personal notice of the dissolution; . . . to the extent . . . to which such per-

have arrived at the same result in the absence of specific legislation. The individual liability of partners for debts incurred after their incorporation to creditors who had dealt with them during the lifetime of the partnership and who later extended credit without notice of the incorporation has been asserted repeatedly.[2] There appears to be some authority to the effect that a creditor who has had no notice of the formation of a corporation need not have dealt with the partnership prior to the incorporation to acquire the right to pursue his remedy against the individual partners.[3] The Uniform Partnership Act requires at least a notice by publication to creditors who have known of but have not dealt with the firm before its dissolution if the partners are to be shielded from personal liability.[4] It would seem that this provision might be applied to the case where a partnership incorporates. Of course, where the conversion of the partnership into a corporation is attended by such a change of name or place or methods of business as to put one dealing with the corporation upon notice that a corporation may have been formed, he will not be heard to say that he believed he was dealing with the defendants as partners.[5] Kindred cases are those in which partners who retire from the firm or dissolve their business completely are held responsible for the acts of their erstwhile associates to former creditors of the partnership who have received no notice of the dissolution.[6] Liability in cases

sons part with value, in good faith, and in the belief that such partner is still a member of the firm." Okla. Stat. (1931), sec. 11655.

[2] Overlock v. Hazzard, 12 Ariz. 142, 100 Pac. 447 (1909); Hyder v. Barton Hat Co., 29 Ariz. 380, 241 Pac. 959 (1926); Bynum & Paschal v. Clark, 125 N. C. 352, 34 S. E. 438 (1899); Frankel v. Wathen, 58 Hun 543, 12 N. Y. S. 591 (1890); Goodin v. Smith, 23 Ky. L. R. 1810, 66 S. W. 179 (1903) (personal injuries action by employee); Perrault v. Central Agency, 37 Quebec Official L. Rep. (K. B.) 305 at 307 (1924) (" . . . elle n'a même connu ni la dissolution de la société commerciale, ni la constitution de la compagnie à fonds social. . . .").

[3] Weise v. Gray's Harbor Commercial Co., 111 Ill. App. 647 (1904). It is not clear whether plaintiff had dealt with the partnership, but the court quotes from another opinion statements to the effect that such dealing is not necessary.

Goddard v. Pratt, 16 Pick. (Mass.) 412 (1835). The trial court instructed the jury that no dealing with the partnership was necessary, and appellate court did not disturb the instruction.

[4] Sec. 35 of the Uniform Partnership Act provides:

"After dissolution a partner can bind the partnership . . . by any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction . . . though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place . . . at which the partnership business was regularly carried on."

[5] Edwards v. Wheeler's Estate, 130 Mich. 219, 89 N. W. 679 (1902).

"Ordinarily, a change from a partnership to a corporation is attended with such change of name and frequently with such other changes as not to require personal notice of such change." Overlock v. Hazzard, 12 Ariz. 142 at 145, 100 Pac. 447 at 448 (1909).

[6] Knapp v. Knapp, 28 App. Div. 324, 51 N. Y. S. 144 (1898); Askew v.

similar to the principal case is said to rest upon "a principle akin to that of equitable estoppel." [7] It can be contended that a filing of a certificate of incorporation should be constructive notice to the world of the change in legal status of the firm. Such a position might be supported by many analogies in the law.[8] But the practical value to creditors of any notice furnished by the filing of a certificate is indeed questionable. Protection of creditors of the partnership would seem to justify a requirement that they receive some form of actual notice before the incorporating partners are permitted to compel them to look only to the corporation for settlement of their claims. Thus the principal case is in accord with authority, and with sound policy as well.

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Silman, 95 Ga. 678, 22 S. E. 573 (1895); Mims v. Brook & Co., 3 Ga. App. 247, 59 S. E. 711 (1907).

[7] 8 FLETCHER, CYCLOPEDIA OF CORPORATIONS, Perm. ed., sec. 4019 (1931); Overlock v. Hazzard, 12 Ariz. 142 at 145, 100 Pac. 447 at 448 (1909).

[8] The recording acts, for example. See Pittsburgh Sheet Mfg. Co. v. Beale, 204 Pa. 85, 53 Atl. 540 (1902), in which plaintiff sought the aid of equity, claiming defendants had held themselves out as a corporation when they were but a partnership so that a judgment obtained by plaintiff against defendants as a corporation was useless, and the court held that the public records were notice to plaintiff that defendants were not a corporation. And see California Sav. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831 (1897), holding that one dealing with a corporation must take notice of its corporate powers.