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Partnerships - Partnership by Estoppel - Proof of Reliance by Creditor Dealing With Persons in Belief of Partnership

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PARTNERSHIPS—PARTNERSHIP BY ESTOPPEL—PROOF OF RELIANCE BY CREDITOR DEALING WITH PERSONS IN BELIEF OF PARTNERSHIP—Plaintiff telephone company sued to collect for local and long distance telephone service rendered through telephone number 196W. Defendant Walter R. Lehmann denied liability on the ground that the service was not furnished to him but to his son, Wayne R. Lehmann. The telephone was located in Wayne's business headquarters, a building on defendant's farm, over which hung a sign "W. R. Lehmann & Son—Dairy Cattle." Plaintiff carried the telephone in Wayne's name for fifteen months, until, at Wayne's request, the listing was changed to W. R. Lehmann & Son. The change was made for the 1953 and 1954 directories, and monthly bills were then mailed to W. R. Lehmann & Son. All bills for the first eighteen months after the new listing were paid by checks signed by Wayne or his wife. Plaintiff's employees believed defendant and Wayne were partners, although in fact they were not. The jury found for the plaintiff. On appeal, *held,* reversed. Even if it be assumed that defendant was responsible for the misleading appearances, plaintiff had not made out a case of partnership by estoppel under section 16 of the Uniform Partnership Act,[1] since it had not shown that it gave credit to defendant's son only in reliance upon the alleged partnership. *Wisconsin Telephone Co. v. Lehmann,* (Wis. 1957) 80 N.W. (2d) 267.

The principal case illustrates the difficulties that may arise when a creditor seeks to hold a person liable as a partner by estoppel when the creditor has previously extended credit to the recipient of goods or services as an individual rather than as a partner of the person sought to be held liable. The difficulty lies in proving that the credit was given "on the

1 "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. . . ." Wis. Stat. (1953) §123.13.

faith of such representation"[2] of a partnership. In the more typical case where there are no dealings prior to the transaction sued upon, the courts require only that the creditor show he believed there was a partnership and extended credit in the partnership name.[3] The Wisconsin court in the principal case and at least two other courts[4] have, however, applied a more stringent test of reliance where such prior dealings were present. The test, as given in the principal case, is a "but-for" causal one: but for the alleged partnership with the defendant, would the creditor have furnished goods or services to the recipient as an individual? If so, then he cannot be said to have relied to his detriment upon defendant's misrepresentations of partnership and he cannot hold defendant liable by estoppel. The apparent theory underlying this test is that prior extension of credit to the recipient[5] tends to negate the otherwise reasonable assumption that the creditor relied equally upon the financial status of all members of the alleged partnership. The test limits partnership by estoppel, as a theory of recovery after earlier dealings with the recipient, to cases in which the creditor can show a refusal, prior to the transaction in question, to continue to extend credit to the recipient as an individual. Possible bases for a refusal include, e.g., (1) a tightening of the credit policies of plaintiff, (2) previously unknown information concerning the recipient's

2 Uniform Partnership Act, §16. Prior to the Uniform Partnership Act, there were two views of the test of liability where defendant did not himself make the misrepresentations. The minority view held one liable if he *knew* he was being held out as a partner but took no action to prevent the holding out. See Fletcher v. Pullen & Anderson, 70 Md. 205, 16 A. 887 (1889). The majority view was that defendant must *in fact* have consented to the holding out or he was not liable. The Uniform Partnership Act was intended to adopt the majority view. Lewis, "The Uniform Partnership Act," 24 YALE L. J. 617 (1915). It may be questioned whether it has been accepted as changing the law in Maryland, however. See McBriety v. Phillips, 180 Md. 569 at 578, 26 A. (2d) 400 (1942), where the Fletcher case is cited with apparent approval. See also 3 MD. L. REV. 189 (1939). Which view is followed in Wisconsin is not ascertainable as the court in the principal case, apparently the first in this state to consider §16 of the act, refused to pass on the issue. The only Wisconsin case involving partnership by estoppel which reached the Supreme Court of Wisconsin prior to the act was Jenkins v. Davis, 54 Wis. 253, 11 N.W. 548 (1882), in which the defendant himself made the misrepresentations so that this issue did not arise.

3 Flock v. Williams, 175 Ill. App. 319 (1912); Look v. Watson & Sons, 117 Me. 476, 104 A. 850 (1918); McBriety v. Phillips, note 1 supra; Bissell v. Warde, 129 Mo. 439, 31 S.W. 928 (1895); Friday v. Rowen & Barton, 111 Ore. 7, 224 P. 632 (1924); C.A. Babcock Co. v. Katz, 121 Ore. 64, 253 P. 373 (1927). GILMORE, PARTNERSHIPS 67 (1911): ". . . [I]t is not necessary for him to show that he relied solely on the credit of the defendant. It is sufficient to charge the defendant if he gave credit to a firm of which he believed him to be a partner." The above cases were decided prior to the enactment of the UPA in the respective jurisdictions, but there are no later cases to impugn their authority.

4 Elliott v. Floyd, 85 Ga. App. 416, 69 S.E. (2d) 620 (1952) and Yarbrough v. Donoghue, Dee & Co., 134 Miss. 578, 99 S. 380 (1924). These were the only other cases found by the writer where the opinion revealed there was a record of prior dealings. Neither of these cases was decided under the Uniform Partnership Act.

5 A record of prior dealings with *defendant* as an individual will, of course, strengthen plaintiff's assertion of reliance. See Woodward, Faxon & Co. v. Clark, 30 Kan. 78, 2 P. 106 (1883).

credit rating, or (3) a reversal in the recipient's financial position. This test of reliance has the merit of requiring the creditor to show he gave some weight to the misrepresentations before he may hold another liable for them. It should be noted that it is not altogether clear that the Wisconsin court intended to restrict this rigorous test of reliance to cases involving prior dealings, although this seems the more reasonable interpretation. The ambiguity is heightened by the fact that in the prior leading Wisconsin decision[6] on partnership by estoppel, although the court made no discussion of reliance as a necessary element, it noted that plaintiffs had testified that they would not have sold to the recipient alone as he was irresponsible.[7] It is submitted that the doctrine enunciated in the principal case should not be extended beyond those cases in which the recipient has previously been extended credit as an individual. To require a creditor to show in every case that the recipient's financial standing did not warrant extension of credit to him as an individual would greatly reduce the effectiveness of the partnership by estoppel doctrine as a means of preventing injustice and allow many defendants to escape liability when traditionally they would have been held for their misrepresentations.

Allen Dewey, S. Ed.

[6] Jenkins v. Davis, note 2 supra.

[7] "The plaintiffs testified positively that they sold the property to and solely on the credit of the firm, and that they would not have sold it to Crane alone, because he was irresponsible." Jenkins v. Davis, note 2 supra, at 256.