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Professor Painter considers the concept of partnership by estoppel in the context of sections 4(2) and 16 of the Uniform Partnership Act and discusses the analogous liability of the retired partner as set forth in section 35 of the act. The author concludes that the doctrine of estoppel in the law of partnership is outdated and suggests that liability under section 16 as well as section 35 should be based on other grounds.

"Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."[1] This statement, repeated with tedious frequency in the cases, is both obvious and misleading in its simplicity, for of all the maxims of law based on notions of natural justice, this is one of the most difficult to apply. This discussion will explore it as applied in the law of partnership, so-called "partnership by estoppel." In addition, the liability of those who have retired from partnerships will be considered since, although this is not based on "partnership by estoppel" in the strict sense of the term,[2] the problems involved are analogous.

I. Partnership by Estoppel

Section 4(2) of the Uniform Partnership Act, now adopted in 41 states,[3] provides that "the law of estoppel shall apply . . . ." The concept of estoppel *in pais,* through constant usage, has become a familiar instrument of torture to first year law students, if not grist for the mills of faculty and bar examiners. Despite the numerous classifications of the requisite factors, most of them seem to include at least the following:

(1) A representation, either by words or conduct,
(2) Made to another, who
(3) Reasonably believing the representation to be true,
(4) Relies upon it, with the result that
(5) He changes his position to his detriment.

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1. Lickbarrow v. Mason, 2 T.R. 63, 70, 100 Eng. Rep. 35, 39 (1787).
2. See text discussion following note 59 *infra.*
3. UNIFORM PARTNERSHIP ACT § 4(2).

Thus in the words of Professor Williston "it is essential that the party estopped shall have made a representation by words or acts and that some one shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction."[4]

Although, as previously indicated, the "law of estoppel" is made expressly applicable to partnerships by section 4(2) of the Uniform Partnership Act, section 16 of the act sets forth in more detail the conditions of liability:

> 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.[5]

It is clear from section 16 that liability by estoppel may result either from the defendant's representation of himself as a partner, "by words spoken or written or by conduct" or the defendant's "consent" to such a representation by another. The first basis of liability presents relatively little difficulty, being founded on little more than the principle, well established in the law of contracts, that one should be held responsible for the apparent or "objective" manifestations of his intent. If he behaves like a partner, then let him be held liable as a partner. Hence it is immaterial that the defendant may secretly deny

4. 2 Williston, Sales § 312 (rev. ed. 1948). See Restatement (Second), Agency § 8B (1957). Ewart, in a classic discussion of estoppel, lists no fewer than eleven elements. Ewart, An Exposition of the Principles of Estoppel by Misrepresentation 10 (1900). For an excellent discussion of the origins of the rule in England (supposedly from Lord Ashhurst's dictum in Lickbarrow v. Mason, *supra* note 1, or as "one of Lord Mansfield's numerous importations from equity") see Pickering, *Estoppel by Conduct,* 55 L.Q. Rev. 400, 401 (1939).

5. Uniform Partnership Act § 16(1). This language is obviously derived from its British counterpart and predecessor, section 14 of the Partnership Act of 1890, 53 & 54 Vict., c. 39, § 14:

"(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made."

Like section 4(2) of the Uniform Partnership Act, section 46 of the British statute in somewhat more general terms makes applicable the "rules of equity and of common law . . . except so far as they are inconsistent with the express provisions of this Act."

to himself all connection with the partnership, or even that he is unaware of the significance of his behavior, if his outward conduct is such that others believe him to be a partner.[6]

More difficult, perhaps, is the question of the defendant's liability based not on his own acts but on the acts of others, namely the matter of "consent." Since this may be the most controversial feature of section 16, it is worthy of more detailed consideration.

A. Consent to "Holding Out"

According to a note by the Commissioners on Uniform State Laws, section 16 was intended to clarify "several doubts and confusions of our existing case law . . . [in that it had been] held that a person is liable if he has been held out as a partner and knows that he is being held out, unless he prevents such holding out, even if to do so he has to take legal action." The cases adopting such a view were, in the opinion of those who drafted the act, unwise; and it was suggested that "the weight of authority is to the effect that to be held as a partner he must consent to the holding and that consent is a matter of fact."[7]

Among the oldest authorities taking the view that a person, aware that he is being held out as a partner by others, may be under a duty to speak out and warn third parties to avoid their being misled is *Fletcher v. Pullen*,[8] decided in Maryland before adoption of the Uniform Partnership Act. There, Bramble, a person of dubious financial standing, represented by means of printed letters, circulars, and newspaper advertisements that the defendant, Fletcher, was his partner. There was evidence which indicated that Fletcher was aware of the holding out and that on several occasions he had denied to others that he was a partner. Yet he took no further steps to inform the public of the misrepresentation and, in particular, never published a newspaper notice denying the partnership. The plaintiffs extended credit to Bramble in reliance on the printed circulars distributed by him, although they had never seen the newspaper advertisements. In holding that the question of whether a partnership by estoppel had been created was one for the jury, the court indicated that, if there was a holding out of the defendant to the public as a partner "with his knowledge or assent," this would be sufficient for liability, even though the plaintiff may not have relied upon the particular form of

6. Fredericktown Milling Co. v. Rider, 179 Ark. 387, 16 S.W.2d 9 (1929); John Deere Plow Co. v. Klaurens, 153 Kan. 151, 109 P.2d 98 (1941).

7. Commissioners' Note, Uniform Partnership Act § 16 as contained in 7 U.L.A. § 16 (1949).

8. 70 Md. 205, 16 Atl. 887 (1889).

holding out known to the defendant.[9] Hence, assuming that there is holding out in a sufficiently public manner, the defendant may be under a duty to do "all that a reasonable and honest man should do, under similar circumstances, to assert and manifest his refusal, and thereby prevent innocent parties from being misled."[10] Interestingly enough, however, the court did not require a printed denial in the newspaper in order to avoid liability as a matter of law, the question of the reasonableness of the defendant's efforts to forewarn the public being one of fact for the jury.

For reasons not immediately apparent, and despite the express repudiation of the doctrine of *Fletcher v. Pullen* by the Commissioners on Uniform State Laws in drafting section 16 of the Uniform Partnership Act,[11] the Maryland courts continue to espouse this view and to cite *Fletcher* with either studied indifference to the act or with apparent carelessness.[12] Although, in jurisdictions which have not adopted the Uniform Act, the *Fletcher* doctrine continues to enlist a respectable following,[13] where the act has been adopted, actual "consent" rather than mere knowledge or passive acquiescence is required.[14]

In the final analysis, as has been pointed out by some who have attempted to explain or reconcile the Maryland decisions with section 16, it is possible to conceive of situations where "consent" may be implied from knowledge of the holding out and continued acquies-

9. *Id.* at 214-15, 16 Atl. at 888-89. For a discussion of this interesting question of the relationship between the defendant's awareness or consent to the holding out and the particular form of the plaintiff's reliance, see text discussion following footnote 35 *infra.*

10. *Id.* at 215, 16 Atl. at 889, quoting from PARSONS, PARTNERSHIP 134 (1867 ed.).

11. See note 7 *supra.*

12. McBriety v. Phillips, 180 Md. 569, 26 A.2d 400 (1942); see Brocato v. Serio, 173 Md. 374, 196 Atl. 125 (1938).

13. *E.g.*, Martin & Co v. Maggard & Son, 206 Ky. 558, 267 S.W. 1102 (1925); Lutz v. Miller, 102 W. Va. 23, 135 S.E. 168 (1926); see Kahn Co. v. Bowden & Co., 80 Ark. 23, 96 S.W. 126 (1906); Deputy v. Harris, 15 Del. (1 Marv.) 100, 40 Atl. 714 (Super. Ct. 1893), *rev'd on other grounds sub nom.* Grier v. Deputy, 15 Del. (1 Marv.) 19, 40 Atl. 716 (1894); Bivins v. Oldham, 224 S.W. 240 (Tex. Civ. App. 1920); *cf. In re* MacDougall, 235 Fed. 445 (S.D. Fla. 1922) (dictum); Tanner & Delaney Engine Co. v. Hall, 86 Ala. 305, 5 So. 584 (1889) (dictum); Orndorff v. Cohen, 62 A.2d 794 (D.C. Mun. Ct. App. 1948) (dictum); Triangle Mach. Co. v. Dutton & Adams, 13 La. App. 14, 127 So. 54 (1930).

14. *E.g.*, Standard Oil Co. v. Henderson, 265 Mass. 322, 163 N.E. 743 (1928); Munton v. Rutherford, 121 Mich. 418, 80 N.W. 112 (1899) (decided prior to the passage of the Michigan Act in 1917); *cf.* Hartford Acc. & Indem. Co. v. Oles, 152 Misc. 876, 274 N.Y. Supp. 349 (Sup. Ct. 1934). A similar result has been reached in jurisdictions which have never adopted the act. Anfenson v. Banks, 180 Iowa 1066, 163 N.W. 608 (1917) appears to be the leading case. For other cases and discussion see 1 ROWLEY, PARTNERSHIP 429-31 (2d ed. 1960).

cence therein over a relatively prolonged period.[15] The question of the existence of "consent" in such a case is still one for the jury but the scope of section 16 is broadened to include instances where, although the defendant has done nothing affirmative to manifest "consent," his behavior is inconsistent with the holding out's being without his implied permission. There is considerable merit to this view, as there is to many a compromise between extreme positions. In addition, it realistically holds responsible one who passively stands by and does nothing while others in open and obvious reliance upon his credit are changing their positions to suffer a detriment. Although it may be unduly arduous to impose an affirmative duty of notification co-equal with the extent of holding out, it is not too much to require a person to behave reasonably under the circumstances, although this may sometimes entail a duty to take affirmative action to warn others. If this is all that the *Fletcher* doctrine means, it is not inconsistent with the "consent" requirement in section 16, although those who drafted the act may have thought otherwise.[16] In fact, a respectable argument may be made that the change introduced into the statute by the use of the word "consents" as opposed to its English statutory analogy "knowingly suffers," was unwise. If one knows of his being held out and that others may be hurt as a result of a misunderstanding, is it not his social responsibility to avert the harm, if he can do so without undue effort? Although it may be true that, in some areas of the law of torts, I am not my brother's keeper and have no legal duty to act to prevent others from being hurt, should the same result be reached in the law of partnership where others are hurt by *relying on my good name*? Perhaps the doctrine of non-liability for "passive acquiescence" is more consistent with a philosophy of indifference to the welfare of others than it is with a supposed policy of protecting the interests of individuals from the frequently minimal inconvenience of a public denial of what is being said about them. Moreover, it seems consistent with the underlying theory of estoppel that, where one of two innocent persons must suffer by the acts of a third, the loss should fall upon the individual who, with the least effort, could have averted the harm. Unless the circumstances are such as to put the plaintiff on notice of the defendant's being misrepresented as a

15. 6 Md. L. Rev. 337 (1942); 3 Md. L. Rev. 189 (1939). It goes without saying that silence in a face-to-face introduction to the plaintiff of the defendant as a partner may impose an immediate duty to correct any erroneous impression of apparent partnership (*i.e.*, where *X* is introduced by *Y* to *Z* as a partner). *E.g.*, Clarke v. Woodward, 76 Ga. App. 181, 45 S.E.2d 473 (1947).

16. This of course entails the supposition that the act should not be construed in the manner suggested by the draftsmen; and yet, words having, since the time of Holmes, retained their flexibility, there is no necessity that the word "consent" should have an epidermis so rigid as to preclude liability based on passive acquiescence alone.

partner, the latter is generally in a better position to act affirmatively to avoid injury to others. Why, then, should he not be legally required to do so?

B. Reliance

Of equal importance with the requirement of consent is that of reliance by the third party upon the representation. This is made explicit in section 16 of the act in that the plaintiff must have "on the faith of . . . [the] representation, given credit to the actual or apparent partnership."[17]

The reliance requirement is but an application of the traditional rules of estoppel *in pais* to the law of partnership. This became evident in an early holding by the United States Supreme Court involving the liability of an alleged partner of a bank upon a draft accepted by the partnership.[18] The court held that, in the absence of a partnership in fact, liability can be based only on the plaintiff's having extended credit to the partnership in reliance upon the defendant's connection with it, and hence, where the plaintiff is not aware of the holding out, there can be no recovery. Moreover, it was suggested that "There may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question . . . is, as in other cases of estoppel *in pais*, a question of fact for the jury, and not of law for the court."[19]

Reliance, then, is essential, but what sort of reliance and upon what? The act requires that the plaintiff, "on the faith of . . . [the] represen-

17. See text discussion prior to note 5 *supra*.

18. Thompson v. First Nat'l Bank, 111 U.S. 529 (1884).

19. *Id.* at 537. Note the similarity of the suggestion raised by the court's dictum to the problem of the "consent" requisite to establish holding out, discussed in text prior to note 16 *supra*. With regard to the latter, the significance of public reputation is less in that not only must it be shown that there has been a sufficiently notorious holding out to the public, but also that the defendant knew of the holding out and that, in view of such knowledge, there was a correlative duty to warn others. See, *e.g.*, the observation of the court in Anfenson v. Banks, *supra* note 14, to the effect that, where the defendant has no actual knowledge of a report or reputation in the community that he is a partner, "he is under no duty to inquire or investigate whether anything of that kind is afloat in the community, and, if in fact ignorant thereof, he cannot be held to liability as for the truth of the report on the theory that he ought to have known it." 163 N.W. at 618-19. This is of course different from saying that the jury may still consider the extent of public knowledge of the holding out on the question of whether the defendant *in fact* knew of it. Even if such knowledge were found, however, it is further necessary, as pointed out above, that there be a duty to act affirmatively to warn others and, as indicated by the holdings referred to in note 14 *supra*, many courts have been reluctant to go this far. Hence it seems safe to say that, if public reputation is at all relevant to the merits of the controversy, as bearing upon the state of mind of the plaintiff or defendant, evidence in this area should be more readily admissible as affecting reliance by the plaintiff than consent by the defendant.

tation [must have] given credit to the actual or apparent partnership."[20] Must the plaintiff's reliance be reasonable under the circumstances? Is it necessary to show that, but for the holding out of the defendant, the plaintiff would not have advanced credit to the supposed partnership? Must there be specific reliance upon the defendant's financial standing?

First, as to the question of reasonableness, although the act makes no mention of this, it has traditionally been a part of the law of estoppel, and hence it is not surprising, in view of section 4(2) of the act,[21] that reasonable reliance has been required in cases based upon the statute or otherwise.[22] This implies that occasionally the plaintiff may have a duty to investigate. Thus, in *Weil Brothers v. Hanks*,[23] one Coughlin was doing business as a cotton merchant and was permitted by the defendant to use his store as his center of operations. The defendant acted also as Coughlin's agent in the purchase and sale of cotton, receiving and making payments on Coughlin's behalf, retaining a commission of twenty-five cents per bale for himself. In such a situation it was held that, the circumstances being ambiguous, it was the plaintiff's duty to investigate further into the relationship between Coughlin and the defendant and that, without such further inquiry, the plaintiff would not have been justified in assuming the existence of a partnership. "As a matter of law," the court said, "we think his failure to [make inquiry] . . . must be regarded as negligence . . . even conceding that [the defendant's] . . . conduct was equivocal and possibly misleading."[24] In contrast, where the representations of partnership have been made directly to the plaintiff and little is left for him to surmise, he may have no obligation to inquire further.[25] Between these two extremes, the question of reasonableness is one for the jury, unless, of course, there is no evidence of reliance itself, in which case the question of reasonableness cannot arise.[26]

A more difficult problem is presented by whether there must be specific reliance upon the defendant's financial standing in order to impose liability upon him. Essentially this involves the causal re-

20. See text discussion prior to note 5 *supra*.
21. See text discussion prior to note 4 *supra*.
22. *E.g.*, Weil Bros v. Hanks, 201 Ala. 39, 77 So. 333 (1917); West Side Trust Co. v. Gascoigne, 39 N.J. Super. 467, 121 A.2d 441 (Super. Ct. 1956).
23. 201 Ala. 39, 77 So. 333 (1917).
24. *Id.* at 40, 77 So. at 334.
25. Gershner v. Scott-Mayer Comm'n Co., 93 Ark. 301, 124 S.W. 772 (1910).
26. Threads, Inc. v. Williams, 84 Ga. App. 804, 67 S.E.2d 591 (1951) (no reliance due to plaintiff's assumption that he was dealing with a corporation); West Side Trust Co. v. Gascoigne, *supra* note 22 (jury question); Goodwin v. Winston, 241 Mo. App. 357, 230 S.W.2d 793 (1950); Eastern Elec. Supply Co. v. Ekdahl Bros., 84 N.H. 339, 150 Atl. 549 (1930).

lationship between the holding out of the defendant as a partner and the plaintiff's extension of credit. Here section 16 of the act, in providing merely that the plaintiff be one "who has, on the faith of such representation, given credit," is of little assistance. Need it be shown that, but for the holding out of the defendant as a partner, the credit would not have been given (a showing that involves all the difficulties of proof entailed in what logicians term a "contrary-to-fact assumption")? Or is it sufficient to show merely that (1) the defendant was held out to the plaintiff as a partner, and (2) the plaintiff, with knowledge of the holding out, extended credit to the partnership? If the latter be true, it is of course irrelevant that the plaintiff would have extended credit in any case, even if he were unaware of the holding out. The determining factors would be that he *was* aware and *did* extend credit.

At first glance the language of the act might incline one to believe that, since the credit must be given "on the faith of such representation," a specific "but-for" causal relationship is necessary. Judicial discussion of the problem has been unsatisfactory and infrequent. Little significance has been given to the language of section 16 and varying results have been achieved whether or not the statute happened to govern. Thus a recent California decision, *Hunter v. Croysdill*,[27] albeit perhaps by dictum, is quite emphatic in expressing the view that the plaintiff's reliance need be only upon the existence of the partnership and the defendant's membership in it, and not on defendant's financial standing. Similarly, in Indiana, before adoption of the statute, it was held erroneous to have instructed the jury that in order to find for the plaintiff it would be necessary to demonstrate that, by reason of his having associated the defendant with the firm, the plaintiff "has sustained some financial loss, or stands to sustain a financial loss."[28] In contrast, in Wisconsin, a statutory state, the supreme court, on a somewhat specialized set of facts, has held the standard of reliance to be so strict that the plaintiff must show that, but for the holding out, he would not have given credit to the firm.[29]

27. 169 Cal. App. 2d 307, 337 P.2d 174 (Dist. Ct. App. 1959). Here there was some evidence to the effect that the plaintiff had relied on the defendant's financial standing in extending credit, but the court considered this to be irrelevant.

28. Irvine v. Baxter Stove Co., 70 Ind. App. 105, 123 N.E. 185 (1919). The instruction was held to have been harmless error, however, since, the judgment having been for the plaintiff, it was obviously more favorable to the defendant than necessary and hence could form no basis for a reversal.

29. Wisconsin Tel. Co. v. Lehmann, 274 Wis. 331, 80 N.W.2d 267 (1957). The case involved the rights of a telephone company where a telephone number listing was changed from the name of Wayne R. Lehmann to that of W. R. Lehmann & Son (allegedly implying an association between Wayne, the son, and his father, W. R. Lehmann, on whose farm the son had been permitted to set up a business). The likelihood of confusion was made even greater by the fact that the son and father had formerly been in business together, but the father had discontinued the relationship.

It has been suggested that this extreme view should be applied only where there have been prior dealings between the plaintiff and the supposed partner of the defendant, *i.e.*, prior extension of credit. In such a case, the plaintiff could recover only if it were shown that he had become dissatisfied with the credit rating of the defendant's supposed partner and continued to extend credit in reliance on the defendant's financial standing. Under other circumstances, however, where the plaintiff has not previously dealt with the firm, it seems unduly burdensome to impose upon him the rigors of a "but-for" test, since this complicates the problems of proof to the point that recovery is unusually difficult.[30] This seems to be a reasonable view; in most instances where the plaintiff is aware of the holding out and, being so aware, extends credit to what he supposes is a partnership, he will be motivated at least in part by an assumption, albeit a vague one, that the defendant is financially responsible and that his credit stands back of that of the firm. Hence there should be at least a presumption of reliance on the defendant's financial responsibility, subject to possible rebuttal by a showing of complete indifference on the part of the plaintiff to the representation.[31]

C. Reliance in Tort Recovery

The most formidable obstacle to recovery in tort based on partnership by estoppel is the reliance requirement. It is only in a rather unusual situation that the plaintiff will have relied on the holding out of the defendant as a partner in the enterprise. More often than not, although the cause of action is characterized as one in tort, it partakes of contractual aspects. Fraud or deceit in connection with the sale of

Hence it was not surprising that the plaintiff's employees may have assumed that the business association was continuing. This, however, was held to be irrelevant in the absence of a showing that the plaintiff would not have continued a telephone listing had it known the true facts. Under the circumstances, since the son had had a prior listing under his own name and the telephone company had not been dissatisfied with this arrangement, the holding seems reasonable and thus may not stand for the broader view that, under other conditions, a "but-for" relationship must be shown.

30. 56 Mich. L. Rev. 139 (1957). But see Montgomery Ward & Co. v. Barger, 108 Ohio App. 67, 160 N.E.2d 554 (1958), where, despite the lack of previous dealings between plaintiff and defendant's supposed partner, the court emphasized the fact that the plaintiff apparently paid little attention to the identity of the persons with whom he was dealing and their business relationship, being interested only in obtaining the services of persons who could do a job (installing a heating system) at the lowest bid. Perhaps the holding is based less on a "strict" view of reliance than it is on the possibility that there may have been a complete absence of reliance, such as was the case in Threads, Inc. v. Williams, 84 Ga. App. 804, 67 S.E.2d 591 (1951), where the plaintiff mistakenly thought he was dealing with a corporation instead of a partnership. See note 26 *supra*.

31. Indifference such as that displayed in Wisconsin Tel. Co. v. Lehmann, *supra* note 29, or amounting to complete absence of reliance, as was present in Threads v. Williams, *supra* note 30.

goods is an obvious example. Here, although there may be liability in contract as well, the underlying considerations are the same with regard to reliance and hence it is not surprising that tort recovery has been allowed on the ground of estoppel.[32] More difficult are cases involving the performance of services, but even here, if there is an implied undertaking to use reasonable care, there may be recovery. Thus in a malpractice action against purported physician-partners who owned a hospital, the plaintiff, in submitting to treatment, presumably relied on the skill and financial responsibility of those who appeared to be in charge.[33] Analogous, but perhaps less convincing, is a case which allowed recovery by a business invitee for injuries sustained on premises apparently under the control of a father, who had retired to leave his son in sole charge of the business.[34] And passengers in taxicabs have been held to rely on the apparent ownership of the taxi, on which they presumably would not have embarked if it were not for the name of the defendant prominently displayed on the vehicle. Pedestrians in the street are of course not entitled to the comparative luxury of choosing the vehicle which inflicts their injuries and hence estoppel is of no avail.[35]

Arguably, even though there may be some form of reliance in specialized tort situations, recovery should not be available under section 16, since the latter requires that "credit" be given in reliance upon the representation. Except, perhaps, for fraud or deceit in sale of goods or other contract cases, it is doubtful, to put it mildly, that the injured party has "given credit" in reliance upon anything. At most he may have relied upon the defendant's financial responsibility and his control of the premises whereon he is hurt, or the instrumentality which inflicts the harm, but it would be incongruous to characterize him as thereby "giving credit" to anyone. Possibly liability may be available under section 4(2) of the statute, making applicable the general "law of estoppel." Here again, however, problems arise with regard to the reliance requirement and the causal relation between reliance and the harm. Is it realistic to suppose that, when entering a building, embarking in a taxicab, or entrusting myself to the care of a physician, I am warmed with an inner reassurance that, in case of a fall down an elevator shaft, a collision, or a slip of the knife, the apparent partner, as well as the actual partner, will be responsible in damages? If asked concerning this the average person would be inclined to think more in terms of the availability of insur-

32. Cases collected in 55 MICH. L. REV. 1190 (1957).
33. Cook v. Coleman, 90 W. Va. 748, 111 S.E. 750 (1922).
34. Jewison v. Dieudonne, 127 Minn. 163, 149 N.W. 20 (1914).
35. 55 MICH. L. REV. 1190 n.9 (1957) (citing cases). Of course, even in the case of passengers, reliance may be difficult to show. See, *e.g.*, Middleton v. Frances, 257 Ky. 42, 77 S.W.2d 425 (1934).

ance than the possibility of his being able to add more parties as defendants. Unlike the contract situation, where "credit" is given, reliance by the plaintiff is likely to be totally absent or, even assuming a vague assumption of the defendant's responsibility for what may happen, there is little if any motivation or causal relation between the apparent partnership and the defendant's conduct. Hence it could hardly be said that the plaintiff has, in the words of section 16, done anything "on the faith of [the] . . . representation."

D. Defendant's Knowledge of Plaintiff's Reliance

Suppose that the defendant is aware that he is being held out as a partner through advertisements in a local newspaper, but he is not aware of his also being held out as a partner by other means, such as printed circulars and word of mouth. The plaintiff, unaware of the newspaper advertisements, relies on the printed circulars. Can there be recovery? To put the question in terms of section 16 of the Uniform Partnership Act, need the representation upon which the plaintiff has relied be one to which the defendant has consented? The few authorities on this rather abstruse point, including the statute, indicate an answer in the negative, provided that the defendant has consented to some form of holding out in a public manner (*e.g.*, a newspaper). Perhaps the earliest case to raise this question was *Edmundson v. Thompson & Blakey*,[36] where two persons, Thompson and Blakey, agreed to form a partnership at some time in the future (the agreement having later been abandoned). Before formation of the partnership, Thompson had introduced Blakey to several persons as his partner. But Blakey was never so introduced to the plaintiff, who had heard of his connection with the supposed partnership through others. The court concluded that, since Blakey had not held himself out as partner nor had he authorized Thompson to do so, no recovery could be had on a theory of estoppel. Significantly, the decision was prior to the enactment in England of the Partnership Act of 1890, which, in section 14, may have repudiated the holding.[37] At approximately the same time, *Fletcher v. Pullen*,[38] which became a leading American case in the field, was decided on facts similar to the hypothetical suggested above. That the plaintiff had never seen the newspaper advertisements which held Fletcher out as a

36. 2 F. & F. 564, 175 Eng. Rep. 1188 (1861).

37. See note 5 *supra*. The language of the latter part of the British statute is substantially identical with that in section 16 of the Uniform Partnership Act, except for the addition, in the latter, of the requirement that the representation be made "in a public manner" and the use of the word "consents" in the Uniform Act instead of the English word "suffers." For this interesting suggestion as to the possible origins of the statutory language in the Partnership Act of 1890 I am indebted to Mr. Brian Hogan, Lecturer in Law, Nottingham University, England.

38. 70 Md. 205, 16 Atl. 887 (1889).

partner, relying on printed circulars instead, was said to have made no difference, if there was a holding out in a public manner. Despite the rejection by the Commissioners on Uniform State Laws of the main part of the *Fletcher* case, namely the basing of liability upon mere knowledge and passive acquiescence,[39] this subsidiary aspect of the holding appears to have been left undisturbed by the importation into the statute, apparently from section 14 of its English counterpart, of the following rather mysterious language:

> [A]nd if . . . [the defendant] 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.[40]

This awkward clause is apparently little more than an attempt to codify what may have been the law in America and what in England was the law by statute; namely that, if there is a holding out "in a public manner" either by the defendant or by another with the defendant's consent, then the defendant need not consent specifically to the particular form of holding out upon which the plaintiff has relied. Why this relatively simple concept required such complex terminology is an enigma. For example, the same effect could be achieved by the following:

> and if such representation has, either by the apparent partner or with his consent, been made in a public manner, he may be held liable to one who relies upon the apparent partnership even though he is not aware of being held out as a partner to the individual seeking recovery.

Aside from these niceties of draftsmanship, however, the result achieved seems correct for, if the defendant has consented to a public holding out, why should he complain if he is unaware of the manner in which the plaintiff acquired his knowledge of the apparent partnership? This of course assumes that there is some form of reliance by the plaintiff, *i.e.*, that, even though he may not have read the newspaper, he still believes the defendant to be connected with the firm.

39. See note 7 *supra*.

40. UNIFORM PARTNERSHIP ACT § 16. See note 37 *supra*. Although no authorities have been found construing the statutory language, several common law holdings, in addition to Fletcher v. Pullen, *supra* note 38, are available: Fredericktown Milling Co. v. Rider, 179 Ark. 387, 16 S.W.2d 9 (1929); see Kahn Co. v. Bowden & Co., 80 Ark. 23, 96 S.W. 126 (1906); Folks v. Burletson, 177 Mich. 6, 142 N.W. 1120 (1913) (alternative holding). Significantly, the court in the *Folks* case suggests that liability based on "holding out to the public" differs from that based upon estoppel, which requires a representation directly to the plaintiff. In this respect, section 16 may provide for a form of liability broader than the traditional concept of estoppel. See text discussion following note 71 *infra*.

If, because of the newspaper, to which the defendant has consented, the rumor of his purported connection with the partnership is abroad in the community, why should recovery be limited to newspaper readers?

II. Liability After Retirement

One of the most frequently encountered problems in this area is the liability of a former partner after his retirement. Prior to dissolution, unless the partner is "dormant,"[41] there is a holding out of him to the public which, since it is consented to, would make him liable under section 16 of the Uniform Partnership Act. But he is liable for partnership obligations not under section 16 but, rather, on the general principle that all persons who are partners in fact, whether they be "dormant" or known to the public, whether there be reliance by others or not, are liable for all partnership obligations.[42] However, retirement of a partner ordinarily results in dissolution of the partnership,[43] and hence liability based on partnership "in fact" disappears. If there is a continued holding out of the retired person as an existing partner, it is obvious that liability based on estoppel may result. But there is an important difference between this situation and that where no partnership "in fact" was ever brought into existence. Due to the previous association of the retired person with the firm, liability need not be based upon his consent to a holding out. Rather, he continues liable as a partner for obligations entered into subsequent to his retirement unless a rather specialized form of notice is given to those who deal with the firm. Thus section 35 of the act provides, in part:

> (1) After dissolution a partner can bind the partnership except as provided in Paragraph (3)
>
> (a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;
>
> (b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction
>
> (I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or
>
> (II) 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 (or in each place if more than one) at which the partnership business was regularly carried on.
>
> (2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution
>
> (a) Unknown as a partner to the person with whom the contract is made; and

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41. See discussion in text following note 63 *infra*.
42. See Uniform Partnership Act § 15.
43. *Id.* § 31.

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

Ignoring for the moment paragraph (2) relating to the so-called "dormant" partner, it is clear that section 35 provides for liability based not on holding out, but rather on failure to give certain kinds of notice. Thus subparagraph (1)(b)(I) provides that those who had extended credit prior to dissolution, in the absence of their knowledge of dissolution, are entitled to actual notice.[44] For all others, including those who may have dealt previously with the partnership on other than a credit basis,[45] a form of constructive notice by newspaper publication is sufficient.

The liability of a retired partner to those who have extended credit prior to dissolution and continue to do so in the absence of knowledge or notice is comparatively strict. The burden is on the defendant to show notice, rather than on the plaintiff to show lack of notice.[46] And, unlike liability based on estoppel, unless the partner is "dormant,"[47] the "prior dealer" may recover even though he may not have known of the defendant or his connection with the partnership, and a fortiori it need not be shown that the credit was subsequently extended on the faith of the retired partner's continued membership.[48]

44. *E.g.*, Credit Bureaus v. Shipman, 167 Cal. App. 2d 673, 334 P.2d 1036 (Dist. Ct. App. 1959); Security State Bank v. Nelson, 171 Minn. 332, 214 N.W. 51 (1927); Schwartz Bros. & Co. v. Beacham, 157 Miss. 93, 127 So. 689 (1930); Johnson Tire Co. v. Maddux, 188 Tenn. 626, 221 S.W.2d 948 (1949). Note that a distinction is drawn between "knowledge" and "notice" of dissolution. Section 3 of the act provides that a person has "knowledge" of a fact "not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith." "Notice," on the other hand, depends not upon the state of mind of the plaintiff, but on certain actions taken by the defendant or by another on his behalf. Thus a person is held to have "notice" of a fact, "when the person who claims the benefit of the notice: (a) States the fact to such person, or (b) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence." Under section 35 of the act, either "knowledge" or "notice" of dissolution is sufficient with regard to those who prior to dissolution have extended credit. A fortiori a subsequent creditor with knowledge of dissolution is bound. *E.g.*, Carvalho v. McCoy, 128 Cal. App. 2d 702, 276 P.2d 21 (Dist. Ct. App. 1954).

45. *E.g.*, Askew v. Silman, 95 Ga. 678, 22 S.E. 573 (1895).

46. *E.g.*, Torvend v. Patterson, 136 Cal. App. 120, 28 P.2d 413 (1933). Thus, although the mailing of a written notice may raise a presumption of delivery, in the absence of testimony to the effect that the notice was properly stamped and addressed the presumption vanishes on testimony as to non-receipt and the burden of proof thus remains with the defendant. Meyer v. Krohn, 114 Ill. 574, 2 N.E. 495 (1885); Poage Milling Co. v. Howard & Co., 227 Ky. 353, 13 S.W.2d 266 (1929); Reid-Murdock & Co., v. Model Meat & Grocery Co., 204 Ky. 795, 265 S.W. 322 (1924); Austin v. Holland, 69 N.Y. 571 (1877).

47. See discussion in text following note 63 *infra*.

48. Leib & Son v. Craddock, 87 Ky. 525, 9 S.W. 838 (1888); Elkinton v. Booth, 143 Mass. 479, 10 N.E. 460 (1887); Elmira Iron & Steel Rolling Mill Co. v. Harris,

It is perhaps obvious that the requisite notice may be given to a plaintiff through an agent who was authorized, either actually or apparently, to receive notice on his behalf, or perhaps through one who, although without actual or apparent authority, had a "power" to bind his principal.[49] More specifically, section 35 speaks in terms of the creditor's "knowledge or notice" of dissolution, and it is clear from section 3 that the two terms are not necessarily synonymous. Thus a person is held to have "knowledge" of something either when he in fact knows of it or when he has knowledge of "such other facts as in the circumstances shows bad faith." "Notice," on the other hand, depends on whether the person who seeks to benefit by the giving of notice has performed certain acts: either orally informing another of the firm's dissolution or delivering a written statement to that effect to the person or his agent at his place of business or residence.[50] Thus, in the words of Professor Seavey,

> [Notice] exists where one performs an act, specified by legal rules, by which he acquires certain rights against others, who, for the purposes for which the act was done are treated, in general, as having knowledge. [With regard to knowledge] . . . the only important fact to be determined . . . is whether or not action has been taken with knowledge of certain facts. In the first type we look at the act of the one claiming rights under the notice; in the second, at the knowledge of the one whose responsibility is increased because of it.[51]

The distinction seems clear enough in theory, unless, that is, one should be foolish enough to read the decisions, which often fail to appreciate it.[52] But what is its utility? Despite the confusion in the

124 N.Y. 280, 26 N.E. 541 (1891); see Rowland v. Estes, 190 Pa. 111, 42 Atl. 528 (1899). According to the court in the *Elmira* case, the rule is founded upon "the methods largely adopted in business circles for the purpose of ascertaining whether credit shall be given. The competition in bnsiness and rapidity with which orders must be filled make it necessary for business houses to promptly ascertain . . . the financial condition of . . . firms aud individuals engaged in business. The inquiry addressed naturally is, what is the financial condition of Jones & Co.? For, having no acquaintance with the individuals comprising the firm, information as to membership does not aid the inquirer." Elmira Iron & Steel Rolling Mill Co. v. Harris, *supra* at 292-93, 26 N.E. at 545.

49. *E.g.*, Hunt & Co. v. Colorado Milling & Elevator Co., 1 Colo. App. 120, 27 Pac. 873 (1891); Ach & Co. v. Barnes & Co., 107 Ky. 219, 53 S.W. 293 (1899); Westinghouse Elec. & Mfg. Co. v. Hubert, 175 Mich. 568, 141 N.W. 600 (1913); Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 N.W. 972 (1905); Jenkins Bros. Shoe Co. v. Renfrow & Co., 151 N.C. 323, 66 S.E. 212 (1909); Hurst Boillin Co. v. Jones, 152 Tenn. 535, 279 S.W. 392 (1926).

50. UNIFORM PARTNERSHIP ACT § 3. See note 44 *supra*.

51. Seavey, *Notice Through an Agent*, 65 U. PA. L. REV. 1, 2 (1916). The distinction and terminology have been adopted by the Restatement. RESTATEMENT (SECOND), AGENCY § 9 (1957).

52. *E.g.*, Union Nat'l Bank v. Dean, 154 App. Div. 869, 139 N.Y. Supp. 835 (1913). This is apparently a case of knowledge since no notice had been given by the defendant. Since there was evidence that the cashier and at least one director of the plaintiff

cases, liability based on notice may be broader than that based on knowledge. Thus a notice given to one who is apparently authorized to act on another's behalf, or even in the absence of apparent authority, notice to one who has a so-called "power" to bind another, may be effective under circumstances where knowledge would not ordinarily be imputed. Similarly, liability based on notice encounters none of the obstacles of "imputed" knowledge, such as the perplexing "adverse interest" rule, preventing the imputation of the agent's knowledge to his principal where he is acting adversely to him.[53] On the other hand, where the defendant has not given "notice" to the other party or to his agent, he may yet be relieved from liability on the somewhat less effective ground of imputed knowledge, provided that the agent, in acquiring the knowledge, was acting within the scope of his authority.

In some situations the knowledge of the agent, even though acquired in connection with a previous employment, may be imputed to the principal. Thus in *Haines v. Starkey*,[54] the plaintiffs, having had no previous dealings with the defendants, made sales to them subsequent to dissolution of the partnership, through Berkemeyer, who acted for the plaintiffs as agent for undisclosed principals. Berkemeyer had previously represented others who, prior to the partnership's dissolution had sold on credit (thus being prior dealers). Although the plaintiffs extended credit subsequent to the dissolution on the assumption, based on a statement made to them by Berkemeyer, that the partnership was still in existence, normally they would not have been entitled to actual notice of the dissolution, since they were not prior dealers. It was held, however, that the defendants would be liable as partners unless actual notice of dissolution were given the plaintiffs through their agent, Berkemeyer, since the latter's knowledge of the firm acquired in connection with his prior transactions on behalf of those who were prior dealers, would be imputed to his present principals. The latter then, by virtue of the wondrous doctrine of imputed knowledge, for all practical purposes were promoted to the perhaps undeserved status of prior dealers as regards the defendants.[55]

bank knew of the dissolution, the jury was justified in finding for the defendant, the court observing that "If the jury found that sufficient *notice* of a dissolution came to the *knowledge* of the officers and directors of the bank . . . that would constitute *notice* to the bank." Union Nat'l Bank v. Dean, *supra* at 874, 139 N.Y. Supp. at 839-40. (Emphasis added.) Conversely, in Straus, Gunst & Co. v. Sparrow & Co., 148 N.C. 309, 62 S.E. 308 (1908), the plaintiff, a prior dealer, was given notice both by mail and by oral notification to his agent within the scope of the latter's authority, and yet the court speaks in terms of "imputed knowledge."

53. See RESTATEMENT (SECOND), AGENCY §§ 271, 282 (1957); SEAVEY, REUSCHLEIN & HALL, CASES ON AGENCY AND PARTNERSHIP 289-90 (1962 ed.); Seavey, *supra* note 51.

54. 82 Minn. 230, 84 N.W. 910 (1901).

55. Here obviously the principal, by imputed knowledge, acquired additional rights.

Since the case was decided prior to the adoption in Minnesota of the Uniform Partnership Act, it is interesting to speculate whether it would have come out the same way under section 35, which provides for actual notice in the case of prior dealers and for constructive notice by publication with regard to all others who have "known of the partnership prior to dissolution." Clearly it is only by virtue of the imputed knowledge doctrine that the plaintiff could qualify for even the second of these two categories. To give him the status of a prior creditor as well, and require actual, rather than constructive, notice, may be to extend the fiction of imputed knowledge to produce an incongruous result. Yet, in view of the agent's having previously acted on behalf of other undisclosed principals who were prior dealers and thus, as far as the defendants were concerned, the agent was apparently acting on his own and was a prior dealer, it seems reasonable to require that they give actual notice of the firm's dissolution to the agent, as they normally would to any person who previously had extended credit. Moreover, since as agent for an undisclosed principal, the agent could have sued on the contract, why should not his principal have rights of equal dignity and hence be able to recover in the absence of actual notice?[56]

As already indicated, those who have not extended credit to the partnership prior to dissolution are entitled to a form of constructive notice by publication in a newspaper of general circulation,[57] but subject to an important condition, namely that they must have "known of the partnership prior to dissolution."[58] This is apparently little more

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It goes without saying that he may similarly acquire additional liabilities, as where the agent, in a previous employment, acquired knowledge of the dissolution of the partnership and such knowledge is now imputed to the plaintiff. See RESTATEMENT (SECOND), AGENCY § 276 (1957).

56. Haines v. Starkey, 82 Minn. 230, 233, 84 N.W. 910, 911 (1910).

57. The statutory method of notice by publication appears to be exclusive. Thus no other method of constructive notice is adequate, although other methods of publication may serve as evidence of "knowledge" of the plaintiff as distinct from "notice." See note 44 *supra* and text discussion prior to note 51 *supra*. *Cf.* Credit Bureaus v. Shipman, 167 Cal. App. 2d 673, 334 P.2d 1036 (Dist. Ct. App. 1959) (by implication). Prior to the adoption of the Uniform Partnership Act, there were numerous cases involving the question of adequacy of certain types of notice by publication. *E.g.*, Lovejoy v. Spafford, 93 U.S. 430 (1876); Ellison v. Sexton, 105 N.C. 356, 11 S.E. 180 (1890) (publication once in a local newspaper insufficient); Citizens' Nat'l Bank v. Weston, 162 N.Y. 113, 56 N.E. 494 (1900) (publication in Dun & Bradstreet's insufficient); Bank of Monongahela Valley v. Weston, 159 N.Y. 201, 54 N.E. 40 (1899) (same).

58. UNIFORM PARTNERSHIP ACT § 35 (1)(b)(II). See discussion in text prior to note 44 *supra*; see, *e.g.*, Vogler v. Ingrao, 123 Cal. App. 2d 341, 266 P.2d 826 (Dist. Ct. App. 1954), holding that, although the burden may be on the defendant to show that notice, where required, has been given, it is part of the plaintiff's case to show that he had known of the partnership prior to dissolution. Hence the plaintiff's failure to establish prior knowledge may relieve the defendant of the burden of showing notice.

than a codification of the common law, since the same result has been reached in jurisdictions in the absence of statute.[59] Non-prior dealers who, as of the time of dissolution of the partnership, have no knowledge of its existence, should not be entitled to maintain thereafter that they advanced credit in reliance upon it, except in situations where liability is based on estoppel. Liability of the latter type is, of course, based on the "holding out" theory of section 16, discussed above and not on section 35. Section 16 liability depends not upon the absence of knowledge or notice but on the defendant's "consent" to others continuing to hold him out as a partner, and the plaintiff's reliance thereon. Thus in many situations two types of liability are present, one based on section 35, requiring merely that the plaintiff have "known of the partnership prior to dissolution" and not have been given the requisite form of notice, and the other based on the more burdensome requirements of section 16. The two are quite different. Thus it does not follow that because a former partner has not given the notice requisite to relieve himself from liability under section 35, he thereby "consents" to a continued holding out by others of himself as a partner. Conversely, if a partner retires without giving notice, prior dealers and those who knew of the partnership prior to dissolution may recover, despite the fact that the defendant may have done nothing affirmative to justify others in assuming that he has consented to a further holding out.[60]

This does not mean that a case may not involve questions relating to both section 35 and section 16. For example, even though the requisite notice has been given to relieve the defendant from liability under section 35, if he should, at some later date, hold himself out as a partner, or consent to being so represented by others, he would,

59. *E.g.*, Raywinkle v. Southern Coal Co., 117 Ark. 283, 174 S.W. 524 (1915) (statute adopted subsequent to holding); Morris v. Brown, 115 Conn. 389, 162 Atl. 1 (1932) (same); Martinez v. Jacobson & Sons, Inc., 174 A.2d 735 (D.C. App. 1961); Swigert v. Aspden, 52 Minn. 565, 54 N.W. 738 (1893) (statute adopted subsequent to holding); Thompson v. Harmon, 207 S.W. 909 (Tex. Comm'n App. 1919) (same); see First Int'l Bank v. Brown, 130 Minn. 210, 153 N.W. 522 (1915). The same result has been reached in England under section 36 of the Partnership Act of 1890, 53 & 54 Vict., c. 39. Tower Cabinet Co. v. Ingram, [1949] 2 K.B. 397.

60. See discussion in text following note 5 *supra*. In some situations it may seem incongruous to draw a distinction between prior and subsequent creditors. Thus, suppose that, there having been no notice by publication, a prior creditor, having no knowledge of the dissolution, tells the plaintiff, a subsequent creditor who had never heard of the partnership, that the defendant is still a partner. If the plaintiff should advance credit in reliance upon this assumed state of affairs, presumably his only ground of recovery would be under section 16 of the act, since he had not "known of the partnership prior to dissolution" and hence could not recover under section 35. Arguably the defendant, by failing to give the requisite notice by publication, has "consented" to his being held out by others (*i.e.*, the prior creditor) as a partner and hence should be liable by estoppel. However, no cases appear to have taken the position that mere failure to publish notice amounts to "consent" for the purpose of section 16 and, in fact, the implication from related holdings may be otherwise. See note 59 *supra*.

of course, be liable under section 16 in the same manner as if he had never in fact been a partner.[61] Similarly, liability may co-exist under both sections of the statute where there has been a holding out and, in addition, no notice of retirement has been given.[62] Finally, where there has been no holding out subsequent to retirement, and hence no liability under section 16, it goes without saying that liability under section 35 may be absent as well, as where the requisite notice has been given, or where the defendant has been a so-called "dormant" partner.[63]

With regard to the question of "dormancy" section 35(2) of the act provides that a partner's liability shall be satisfied out of partnership assets alone where, prior to dissolution of the partnership, he has been "unknown as a partner to the person with whom the contract is made; and . . . [so] far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it."[64] This language was due largely to a critique of the original version of the act by Professor Crane where he pointed out that, as drafted, the act might impose liability upon a dormant partner, a result which was not only inconsistent with case law,[65] but also unjust, since the reason for imposing liability, namely reliance by the third party, is not present where the defendant is dormant.[66] This criticism was subsequently acknowledged as well taken, and section 35 was redrafted to clarify it and bring it more in accord with existing law.[67]

Section 35 (2) in effect relieves a dormant partner of the requirement of giving either actual or constructive notice. The concept of dormancy is fairly well articulated: Not only must the defendant be

61. UNIFORM PARTNERSHIP ACT § 35 (4). See LINDLEY, PARTNERSHIP 291 (11th ed. 1950) (citing authorities).

62. *E.g.*, Fisher v. Colorado Cent. Power Co., 94 Colo. 218, 29 P.2d 641 (1934).

63. *E.g.*, Warner v. Modano, 340 Mass. 439, 164 N.E.2d 904 (1960).

64. See discussion in text prior to note 44 *supra*.

65. *E.g.*, Hornaday v. Cowgill, 54 Ind. App. 631, 101 N.E. 1030 (1913).

66. Crane, *The Uniform Partnership Act—A Criticism*, 28 HARV. L. REV. 762, 783-84 (1915). Unfortunately, Professor Crane characterized section 35 liability as being based on estoppel. "The reason for such a rule," he observed, "is that the third person should be allowed to assume that the partner's connection with the firm and liability for its obligations continues unless he has some notice to the contrary. *It is an estoppel.* If the third person has never been informed of the partner's connection with the firm, no credit is extended in reliance upon his supposed liability, and the reason for holding him liable on a contract to which he is not a party disappears." *Id.* at 783. (Emphasis added.) It should be clear from the foregoing discussion that such an analysis is possible only if the term "estoppel" is used in a nontechnical sense, although admittedly, the fundamental considerations of justice involved are analogous.

67. See Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 291, 311-12 (1916). Dean Lewis was one of the principal draftsmen of the act, although the task had originally been assigned to Dean James Barr Ames of Harvard, who managed to complete a preliminary version of the statute prior to his death on January 8, 1910.

"unknown as a partner to the person with whom the contract is made" but he must fulfill roughly analogous requirements as regards the partnership's business reputation generally, or how the enterprise appears to the public as a whole. Thus, if the plaintiff knew the defendant to have been a partner and relied upon his having continued to be such, it is irrelevant that the partner's association with the firm was such as to have had no effect upon its business reputation because of his having been otherwise unknown and inactive.[68] The important thing is what the plaintiff knew and relied upon, although the defendant must show that he was similarly unknown to others as well. Assuming that this comparatively rigid test is met, however, the defendant is relieved of liability to prior dealers as well as to those who may have dealt with the firm for the first time on a credit basis subsequent to its dissolution.

From what has already been said, it appears that a retired partner may be held liable for obligations subsequently incurred even if he is unknown as a partner to the person with whom the contract is made, where he is known to the public as a partner in such a way that the business reputation of the firm is affected by his connection with it. Thus suppose that the plaintiff knows of the partnership prior to its dissolution by *X*'s retirement and yet does not know *X* to be connected with the firm. Suppose, in addition, that it is generally assumed by the public that *X* is still a partner because he has never given the requisite actual or constructive notice under section 35. In such a situation, the two-fold test of "dormancy" under section 35(2) has not been met ("dormancy" both to the public and to the particular person with whom the contract is made). If the plaintiff knew of the partnership prior to its dissolution and no constructive notice was given, he may recover despite his total ignorance of *X* and his apparent connection with the partnership. The result is the same as with regard to prior dealers,[69] and different from the situation where liability is founded upon estoppel under section 16, where the plaintiff must be aware of the defendant's being held out as a partner, although it may not be necessary that he go further and show reliance upon the defendant's financial standing.[70] Thus liability of a retired partner under section 35, although it has a superficial resemblance to liability based on estoppel, especially when the exception regarding "dormant" partners is considered, is not in fact estoppel. Indeed it may be analogous to responsibility of an undisclosed principal for the acts of his agent, where liability may exist in complete ignorance of the principal's

68. See Milmo Nat'l Bank v. Carter, 1 Tex. Civ. App. 151, 20 S.W. 836 (1892) (non-statutory holding).

69. See text discussion prior to note 48 *supra* and cases cited therein.

70. See text discussion following notes 16 & 26 *supra*.

identity. Yet, since the retired partner is not in fact a principal, except under the conditions of section 35 or section 16, his liability is not as broad as that of an undisclosed principal, who may be liable despite his "dormancy."[71]

III. SECTION 16–RENVOI

Since it should be evident from the above discussion that liability under section 35 is not based on estoppel, and hence extends beyond liability under section 16, it remains to be demonstrated that, despite its title, "Partner by Estoppel," section 16 itself provides for a form of liability more akin to that of apparent authority than to estoppel.

The classic controversy, which may be more semantic than real,[72] as to whether apparent authority is based on estoppel or something else may still be unresolved. Yet, after endorsement for a number of years by the American Law Institute of the view that apparent authority and estoppel are not equivalents,[73] it may have become apparent that the trend of the law is in this direction. This is so particularly in view of other types of liability which are obviously not based on estoppel, such as liability of an undisclosed principal and the so-called "power" of an agent to bind his principal.[74] If this view is correct, the principal's liability is based not upon estoppel to deny agency or authority, but on fundamental assumptions of the "objective" theory of contract law, that a person should be bound by his words and behavior rather than by his secret and unmanifested intent. Thus where a principal indicates, either by words or conduct, his willingness to be bound by the acts of an agent, he is bound just as if he had dealt with the third party directly.[75] The result is a contract and the principal is not only bound but may have corresponding rights thereunder, rights which are not dependent upon ratification.[76]

71. *E.g.*, the now familiar principle of liability under the rule of Watteau v. Fenwick, [1892] 1 Q.B. 346. See RESTATEMENT (SECOND), AGENCY § 195 (1957).

72. See, *e.g.*, the battle between Cook and Ewart: Cook, *Agency by Estoppel*, 5 COLUM. L. REV. 36 (1905); Ewart, *Agency by Estoppel*, 5 COLUM. L. REV. 354 (1905); Cook, *Agency by Estoppel: A Reply*, 6 COLUM. L. REV. 34 (1906).

73. RESTATEMENT (SECOND), AGENCY § 8 (1957). The position of the Institute may have been due largely to Professor Seavey's pioneering efforts in this area. See, *e.g.*, Seavey, *Agency Powers*, 1 OKLA. L. REV. 3 (1948); Seavey, *The Rationale of Agency*, 29 YALE L.J. 859 (1920). Seavey's position is similar to that of Cook, *supra* note 72, and both are opposed to Ewart's analysis, which may have been more appropriate to the older cases than it is to more modern materials.

74. See Seavey, *supra* note 73.

75. See RESTATEMENT (SECOND), AGENCY § 8, comment *d* (1957).

76. *Ibid.* See particularly illustrations 8 and 9. Compare this form of liability with that based on ratification, where the third party may withdraw from the contract up until the time of affirmance by the principal. RESTATEMENT (SECOND), AGENCY § 88 (1957). The English view which denies the third party such a right of withdrawal, supposedly justified by a literal interpretation of the "relation-back" aspect of ratification, is more akin to liability created by apparent authority, except for the crucial

Although the point may be somewhat academic, except in cases where the third party has attempted to withdraw from the contract before the principal ratifies or otherwise seeks enforcement of his rights, it is nonetheless worth making if only to establish the true character of liability based on apparent authority or "power" of an agent to bind.[77]

Against this background it is instructive to look at section 16(2) of the Uniform Partnership Act, which provides:

> When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

Does the above resemble more liability based on estoppel or does it partake of at least some of the characteristics of apparent authority? To be sure, reliance upon the representation is required, but this is true with apparent authority as well as with estoppel. More important is the fact that those who consent to the representation are bound and, where all the members of the partnership consent to the representation, a partnership act or obligation results in precisely the same manner as an obligation arising from the authorized act of one who is a partner in fact. This implies, not that the partner or the partnership is estopped, but that it is bound, and correspondingly, that the third party is bound. In other words, there is not so much estoppel here as there is an existing contract, created under conditions analogous to those required in the traditional estoppel situation. Hence, where the members of the partnership consent to the representation, the partner "by estoppel" assumes the same status as a partner in fact with regard to third parties, binding the partnership as fully as any partner under section 9 of the act.[78] Although it is still possible to

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distinction that, if there is apparent authority, the principal is of course bound from the beginning. See Bolton Partners v. Lambert, 41 Ch. D. 295 (1889). An excellent recent discussion of the *Bolton* case appears in POWELL, AGENCY 141-47 (2d ed. 1961).

77. See the Reporter's Notes to RESTATEMENT (SECOND), AGENCY § 8 (app. 1957).

78. UNIFORM PARTNERSHIP ACT § 9, imposing liability with regard to acts "for apparently carrying on in the usual way the business of the partnership . . . ." Merely because a partner is liable as such to third parties does not of course mean that he is a partner. The converse in fact is generally true, and partners by estoppel are not partners *inter se*. See section 7 of the act and 1 ROWLEY, PARTNERSHIP § 7.1 (2d ed. 1960). Thus, for example, merely because a person may be liable as if he were a partner, and makes others liable if they consent to his being represented as such, he does not have rights as a partner, *e.g.*, for an accounting from his colleagues. On the other hand, it does not follow that the partnership may acquire no rights against third parties based on the combined effect of section 16(2) and section 9.

refer to the other members of the partnership as being "estopped," it is significant that section 16 states that not only a partnership obligation has resulted but also a partnership "act." Thus it seems appropriate that the usual consequences of a partnership act would follow, namely the creation of contractual relationships with third parties, instead of an anomalous one-sided liability by estoppel. This is perhaps as it should be. If the members of the firm are to be held to liability incurred by the partner "by estoppel" they should be entitled to any benefits which may accrue from his activities ostensibly on behalf of the firm. Although, as in the case of unauthorized acts of an agent, it is frequently possible to reach the same result by way of ratification, the difference in theory may be more than merely academic in cases where the third party has attempted to withdraw before ratification has taken place.[79] If the members of the partnership are bound *ab initio,* then why should the third party have such a right of withdrawal, giving him an option to disaffirm which he never expected or bargained for? Hence the ratification doctrine may be inappropriate in this area and section 16 cases should be governed more by the policies and approaches used with regard to apparent authority and "power" to bind, than by the somewhat antique concept of "estoppel."

It is without doubt ironic that a discussion of "partnership by estoppel" should conclude with a suggestion that liability under both sections 16 and 35 should be based not on estoppel but on some other doctrine. It is, in addition, unlikely that courts will discontinue the use of the well-worn phrase "estoppel." On the other hand, it is becoming rapidly apparent that, like some other pieces of furniture in our legal household, "estoppel" is inadequate and inappropriate in dealing with modern problems. Perhaps it should be consigned to the attic along with grandmother's antimacassar, and first year law students be cautioned against use of this tongue-twister with the pretentious sound and doubtful meaning. Obscuring more issues than it resolves, it may add little and confuse greatly.

79. See notes 76 & 77 *supra.*