[HIGH COURT OF AUSTRALIA.]

LYNCH . . . . . APPELLANT;
DEFENDANT,

AND

STIFF . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1943.

SYDNEY, *Dec.* 6, 8.

Latham C.J., Rich, McTiernan and Williams JJ.

Partnership—Holding out as partner—Credit given on faith of representation—Necessity to show that credit would not have been given apart from representation—Partnership Act 1892 (*N.S.W.*) (55 *Vict. No.* 12), *s.* 14 (1).

In order to render a person liable under s. 14 (1) of the *Partnership Act* 1892 (N.S.W.) as a partner by holding out it is not necessary for the person who has given credit to the firm on the faith of the representation to show that, apart from the holding out, he would not have given credit.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales and tried as a commercial cause without a jury, the plaintiff, Edward Stiff, claimed that one John Williamson, a solicitor, had received moneys of the plaintiff for which he had failed to account, and that the defendants, Thomas Davis Lynch and Benjamin Melville Salmon, were liable to pay these moneys to him because at all relevant times they were, or had held themselves out to him to be, partners of the said John Williamson in the transaction of the business in connection with which the moneys had been received by Williamson.

The said John Williamson, who in 1940 was convicted of fraudulent misappropriation of money and was struck off the roll of solicitors, had since 1931 been carrying on the business of a solicitor under the name of John Williamson and Sons, and the evidence showed that for at least sixty years a firm under that name had carried on business in Sydney.

In 1928, the members then constituting the firm dissolved partnership, and John Williamson Senior carried on under the old firm name. At that time, John Williamson Junior, his son, was an articled clerk, and the defendant Lynch, who had been a clerk in the employ of the firm, then became a salaried partner of John Williamson Senior.

In 1930, John Williamson Senior died. His son was not yet qualified and for a time the defendant Lynch carried on the business on behalf of the executors of the will of John Williamson Senior.

In 1931, John Williamson Junior was admitted to practice as a solicitor, and he then purchased the business from the executors. For a time he carried on without any partner, salaried or otherwise, Lynch continuing in his employ, apparently acting as previously but without any definite arrangement.

In 1933, Williamson, then carrying on business as "John Williamson & Sons," solicitors, entered into an agreement with Lynch and one Roger Neale Breden, a solicitor, under which they were admitted as salaried partners in his business on, *inter alia*, the following terms and conditions:—1. That the term of the partnership should be for a period of five years and should be deemed to have commenced on 1st July 1931, subject to sooner determination as therein provided. 2. That the partnership business should be carried on at such place in Sydney as Williamson should from time to time determine. 3. That Lynch and Breden should devote their whole time and attention to the partnership business during all proper business hours and should in all matters connected therewith obey the lawful orders and directions of Williamson and during such business hours should not engage in any other work or business without the consent of Williamson. 4. That neither Lynch nor Breden should pledge the credit of the firm without the consent of Williamson, and, further, that neither of them should at any time represent themselves or hold out that they were employed otherwise than as salaried partners of the firm or as having any interest in or relationship to that firm otherwise than as was thereby created or expressed. 6. That Williamson should pay to Lynch and Breden such salary as Williamson should from time to time determine provided that it should not be less than a specified minimum amount per week, together with such percentage of the net profits derived by the firm from the business in each year as Williamson should think fit. 8. That Williamson should pay the rent, salaries and wages and generally all working expenses, outgoings, debts and liabilities of the partnership and should indemnify Lynch and Breden against the payment thereof. 9. That the partnership could be determined at any time by

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any of the members giving at least six weeks previous notice in writing of such determination.

In 1935, Breden retired from the partnership and by an agreement dated 15th January 1935 between Williamson and Benjamin Melville Salmon and similar in all material respects, *mutatis mutandis*, to the agreement referred to above, Williamson admitted Salmon as a salaried partner in the business.

Lynch and Salmon were never partners of one another, though each was a salaried partner of Williamson.

From 1935 until the dissolution of the partnership the firm's letterheads bore the name John Williamson & Sons, and underneath the full names of Williamson, Lynch and Salmon. Lynch and Salmon had full practising certificates. The register of legal practitioners showed that Lynch was entered as practising with Williamson and Salmon as John Williamson & Sons, and that Salmon was practising with Williamson and Lynch. The banking account was Williamson's own account and could be operated on by (i) himself, or (ii) any one of the salaried partners with a countersigning by the accountant, or (iii) the two salaried partners. The business of the firm belonged to Williamson.

Stiff, the plaintiff, was a retired business man and an investor. He had been doing business with the firm of John Williamson & Sons for very many years. He said in evidence that after the death of John Williamson Senior in 1930 he had had all his dealings with Lynch ; that he had known Lynch for a long time, and had a very high opinion of Lynch and his honesty. He felt from his experience of Lynch that he was a man on whom he, Stiff, could rely. Stiff said that he knew that after the death of John Williamson Senior Lynch was carrying on the business in actual fact although he did not know under what arrangements he was so doing. Soon after his father had died, and at a time when Stiff was only doing conveyancing business with the firm, Williamson told Stiff that Lynch would do all his business; otherwise, said Stiff, "I would not have been perhaps inclined to have stopped on with them after the father died." Stiff said that he knew that afterwards the names of Williamson, Lynch and Breden appeared on the firm's letterpaper, and, subsequently, that of Salmon in lieu of Breden's. He had never spoken to or had any direct dealings with Salmon. Lynch did not deny that he actually did the greater part of Stiff's work, and correspondence and documents which were put in supported this fact.

In 1938, there was a sale of property on behalf of Stiff, and, on the settling, the firm of John Williamson & Sons acted for him. He invested the proceeds, about £3,000, with or through Williamson.

In this investment transaction Williamson acted personally, and Lynch had nothing to do with it except that he signed on behalf of the firm a receipt for the first sum of £250, the amount being shown as for a loan to blank.

Williamson purported to invest the moneys in loans to various persons. The moneys were posted in the firm's books as having been lent on mortgages to these persons, but actually there were not any loans or mortgages. The moneys were misappropriated by Williamson, and cheques for interest were regularly forwarded to Stiff up till just before Williamson's conviction.

When asked whether at the time that he gave instructions for the mortgages, that is, the investments, he had formed any opinion as to the ability, experience and reliability of Williamson, Stiff replied: "That part of the business I did, but I was more satisfied when Mr. Lynch was doing my other part of the business." He said he could not say much about Williamson's ability. His trust was more trusting on the other man, Lynch. He said, also, that when he saw the letterheads he felt it was a stronger firm, he thought, "by the appearance of that, of them being partners." This, he said, operated on his mind when he made the investments.

Halse Rogers J. drew the inference that the transaction in 1938 was entered into by Stiff because of a trust founded on the knowledge or belief that Lynch was a partner in the firm. Consequently, he held that Lynch was as much responsible as if he had been a partner. His Honour found a verdict for Stiff for the amount claimed against Lynch, but found a verdict for Salmon.

An appeal by Lynch to the Full Court of the Supreme Court was dismissed.

From that decision Lynch appealed to the High Court.

The provisions of s. 14 (1) of the *Partnership Act* 1892 (N.S.W.) are set forth in the judgment hereunder.

Barwick K.C. (with him *Webb* and *Holden*), for the appellant. The respondent gave no direct evidence by express statement that in handing the cheques to Williamson for investment he acted on the representation contained in the firm's letterheads. That, if it is to be found at all, must be found as a matter of inference from his statements. The holding out, if at all, was by the letterheads and only by the letterheads. The respondent cannot be heard to say that when he handed the cheques to Williamson for investment purposes he did so in the confidence in the firm, then present to his mind, that he had acquired during the course of many years. That confidence existed long before there was any representation by

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letterheads. The doctrine of "holding out" is a branch of the doctrine of estoppel (*In re Fraser*; *Ex parte Central Bank of London* (1); *Lindley* on *Partnership*, 10th ed. (1935), p. 68). It was necessary for the person complaining to prove that he acted on the faith of the estoppel; therefore the respondent must prove not only that he relied upon the firm, but also that he would not have relied upon the firm if the appellant had not been a partner (*Waugh* v. *Carver* (2); *De Berkom* v. *Smith and Lewis* (3)). It must be shown, either expressly or by necessary inference, that the result complained of was caused by the holding out, that is, that the representation was the *causa sine qua non* (*Craine* v. *Colonial Mutual Fire Insurance Co. Ltd.* (4)). The evidence does not establish that but for the firm's letterheads the respondent would not have invested the money. Although for many years the appellant only, as an employee of the old firm, attended to the respondent's conveyancing matters and thereby earned the trust of the respondent, it is quite a different thing to say in relation to investments that when the respondent paid this firm the money he relied upon the appellant being a partner as distinct from what the appellant had been, namely, an employee. A distinction must be drawn between the conveyancing transactions and the investment transaction. The evidence shows, either expressly or inferentially, that on matters involving the advancement of money the respondent dealt only with Williamson.

A. R. Taylor K.C. (with him *May*), for the respondent. It is established by the evidence that for some time subsequent to the death of Williamson's father the appellant carried on the business on behalf of the executors; that during that period the respondent interviewed the appellant concerning many matters; that the respondent had gained implicit confidence in the appellant; that the respondent regarded the appellant as the real "corner stone" of the firm; that the respondent believed that the appellant was a partner in the firm; and, that such belief was a determining factor. Those are most material matters in considering what it was that determined or decided the respondent to deal with and to continue to deal with the new firm. In the language of s. 14 of the *Partnership Act* 1892 (N.S.W.), the respondent did act upon the faith of the appellant being a partner. The passage in *Waugh* v. *Carver* (5) was not intended accurately to state the test where a person to whom a representation

(1) (1892) 2 Q.B. 633, at p. 637.
(2) (1793) 2 Bl. H. 235, at p. 246 [126 E.R. 525, at p. 532].
(3) (1793) 1 Esp. 29 [170 E.R. 270].
(4) (1920) 28 C.L.R. 305, at p. 327.
(5) (1793) 2 Bl. H., at p. 246 [126 E.R., at p. 532.]

has been made had acted on the faith of it. Even if the representation was not the deciding factor, it was a material factor upon which the respondent relied (*Silver* v. *Ocean Steamship Co. Ltd.* (1); *The Skarp* (2)). It was immaterial that the holding out was not done with the intention of causing the respondent to act upon it in any particular way (*Seton, Laing & Co.* v. *Lafone* (3))—see also *Halsbury's Laws of England*, 2nd ed., vol. 13, pp. 476, 477. The test is differently stated in *Mollwo, March & Co.* v. *Court of Wards* (4). At the most the respondent should show the cause or connection, but in any event, and apart from the express evidence given by the respondent as to the effect of the representation on his mind, the effect can be inferred from the whole of the circumstances of the case.

Barwick K.C., in reply. There is no evidence that the respondent had any knowledge of the internal organization of the firm's office at the relevant time. The whole bulk of the respondent's confidence in the appellant grew before the holding out. The holding out is directed only to the question of financial responsibility; it would not add anything else to the relationship.

Cur. adv. vult.

Dec. 8.

THE COURT delivered the following written judgment:—

The appellant Lynch was for many years employed as a clerk by a firm of solicitors, variously constituted from time to time, known as John Williamson & Sons. When a second John Williamson (son of the founder of the firm) died in 1930, a third John Williamson, his son, was not qualified as a solicitor and Lynch, who was a qualified solicitor, carried on the business for nine months until the son became qualified and purchased the business from his father's executor. He then took first Lynch and one Breden, and then one Salmon in substitution for Breden, into his employment. They have been described as salaried partners, but they were in fact employees of Williamson. The letterpaper of the firm was headed:—

"John Williamson & Sons
Solicitors.
John Williamson
Thomas Davis Lynch
Benjamin Melville Salmon."

The respondent Stiff had employed the firm for many years in conveyancing business, but not until 1938 for the purpose of making

(1) (1930) 1 K.B. 416, at pp. 428, 431, 434.
(2) (1935) P. 134, at pp. 146, 147.
(3) (1887) 19 Q.B.D. 68, at p. 72.
(4) (1872) L.R. 4 P.C. 419, at p. 435.

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investments. In conveyancing matters he had always dealt with Lynch. In 1938, he sold a property and invested part of the proceeds of the sale through the firm. In making this investment he dealt with Williamson. John Williamson misappropriated the money which was invested, and Stiff sued Lynch on the basis that he had been held out as a partner in the firm, and was liable to recoup him for his loss. *Halse Rogers* J. held that Lynch was liable and his judgment was affirmed by the Full Court. An appeal is now brought to this Court.

The decision upon the appeal depends upon the application to the facts of s. 14 (1) of the *Partnership Act* 1892 (N.S.W.). This provision is in the following terms :—

" 14.—(1) Everyone 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 anyone 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."

The section operates in cases (1) where a person has by words or by conduct represented himself or knowingly suffered himself to be represented as a partner in a firm ; (2) where another person has given credit to the firm ; and (3) where that person has so given credit on the faith of the representation.

Upon the basis of *Waugh* v. *Carver* (1) it was contended that it was not sufficient to show that the person giving credit in fact gave credit on the faith of the representation, but that it was also necessary to show that, apart from the representation, he would not have given credit, and the following passage was quoted from the decision in that case : " But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing " (2).

In our opinion there is no justification for making any addition to the requirements of the section by holding that the person who has given credit must show that, apart from the holding out, he

(1) (1793) 2 Bl. H. 235 [126 E.R. 525].
(2) (1793) 2 Bl. H., at p. 246 [126 E.R., at p. 532].

would not have given credit. The doctrine of holding out is a branch of the law of estoppel. So far as the element of action by the party relying upon an estoppel is concerned, it is sufficient if that party acts to his prejudice upon a representation made with the intention that it should be so acted upon, though it is not proved that in the absence of the representation he would not have so acted.

In the present case it is proved that Lynch held himself out and suffered himself to be represented as being a partner in a firm of John Williamson & Sons. The heading of the letter paper is conclusive upon this point. Secondly, it is proved that the respondent gave credit to the "firm" in that he entrusted the "firm" with his money for purposes of investment. In the third place there is evidence that he so gave credit because he believed that Lynch, whom he trusted, was a partner. Evidence which, if accepted (and it was accepted by the learned trial judge) is sufficient to establish the latter proposition is found in the following testimony of the plaintiff:—"Mr. *Kinsella*: Q. You were aware that there were three names on the letterheads? A. Yes. Q. Did that operate in your mind when you were making the investments? A. Yes; I felt it was a stronger firm, I thought, by the appearance of that, of them being partners. His Honour: Q. You said you took no interest in the third man, Mr. Salmon? A. Yes, that is right, not particularly, not in the business at all. Mr. *Kinsella*: Q. As to John Williamson personally, had you formed any opinion as to his ability, experience and reliability? A. I could not exactly say much about his ability. My trust was more trusting on the other man, Mr. Lynch."

And further:—"Mr. John" [Williamson] "himself in the first place said Mr. Lynch would do all my business, or else I would not have been perhaps inclined to have stopped on with them after the father died, not with young John." The fact that confidence in Lynch was developed before he apparently became a partner does not displace the conclusion that the respondent entrusted his money to the firm because Lynch appeared to be a partner: on the contrary, it tends to support that conclusion.

For these reasons in our opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *Joseph D. Spora.*

Solicitors for the respondent, *Densley & Downing.*

J. B.