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CONTRACTS—EQUITABLE LIEN ON PARTNERSHIP ASSETS—The plaintiff and X, now deceased, entered into a partnership agreement whereby each was given the option, upon the death of the other, to wind up the partnership affairs according to law or to purchase the deceased's interest. On X's death, plaintiff exercised the option to purchase. In this suit plaintiff seeks to have a certain agreement construed as a deed and to quiet title. Defendants, as legal representatives of X, answered and filed cross bills claiming a lien on all partnership assets or decedent's partnership interest for the balance due on the purchase price. Defendants allege that the language of the agreement contemplated the creation of such a lien. From a judgment for the plaintiff, defendants appeal. *Held,* affirmed. The language of the agreement did not show an intent to charge the property as security for the obligation. *Wiltse v. Schaeffer,* (Mich. 1950) 42 N. W. (2d) 91.

A court in attempting to determine whether an equitable lien arises from the language of a contract faces essentially a problem of construction. A specific intent to charge or pledge property as security for an obligation must be found.[1] The language of the agreement upon which the defendants lay their greatest stress as evidence of this intent is, "In the event the surviving partner elects to purchase the interests of the deceased partner, he shall give written notice . . . and shall thereupon become sole owner of the business, subject only to the payment of the purchase price."[2] This certainly does not spell out the creation of a lien in clear, unequivocal terms. Nowhere is the word "lien,"[3] "charge,"[4] "pledge,"[5] or "security"[6] used. The language is ambiguous since the word "subject" could be seen as introducing a condition rather than creating a lien. Moreover, when the language used is susceptible to more than one meaning, it should be construed in the light of the attending circumstances.[7] The

[1] Jamison Coal and Coke Co. v. Goltra, (8th Cir. 1944) 143 F. (2d) 889; Walker v. Brown, 165 U.S. 654, 17 S.Ct. 453 (1897); Cheff v. Haan, 269 Mich. 593, 257 N.W. 895 (1934); In re Farmers' Supply Co., (D.C. Ohio 1909) 170 F. 502; In re Friedlander's Estate, 178 Misc. 65, 32 N.Y.S. (2d) 991 (1941). For a thorough discussion of the creation of liens by express contract and the intent required, see 4 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §1235 (1941).

[2] Principal case at 92.

[3] Childs Real Estate Co. v. Shelburne Realty Co., 23 Cal. (2d) 263, 143 P. (2d) 697 (1943); Whiting v. Eichelberger, 16 Iowa 422 (1864).

[4] Phillipson v. Phillipson, 302 Mich. 84, 4 N.W. (2d) 477 (1942); Pinch v. Anthony, 8 Allen (90 Mass.) 536 (1864). See also, Noremac, Inc. v. Centre Hill Court, Inc., 164 Va. 151, 178 S.E. 877 (1935).

[5] Chase v. Peck, 21 N.Y. 581 (1860); In re Assignment of Snyder, 138 Iowa 553, 114 N.W. 615 (1908); National Bank of Deposit of the City of New York v. Rogers, 166 N.Y. 380, 59 N.E. 922 (1901).

[6] Higgins v. Manson, 126 Cal. 467, 58 P. 907 (1899); Nau v. Santa Ana Sugar Co., 79 Cal. App. 685, 250 P. 705 (1926); Chattanooga Nat. Bank v. Rome Iron Co., (5th Cir. 1900) 102 F. 755. Cf. Knott v. Shepherdstown Mfg. Co., 30 W. Va. 790, 5 S.E. 266 (1888).

[7] Moore v. Kimball, 291 Mich. 455, 289 N.W. 213 (1939); Thomas v. Jewell, 300 Mich. 556, 2 N.W. (2d) 501 (1942); Taylor v. Taylor, 310 Mich. 541, 17 N.W. (2d) 745 (1945).

court, therefore, looked to the purpose of the agreement set forth in the preamble, which spoke of perpetuation of the partnership beyond the death of either partner under the sole ownership of the survivor. The imposition of a lien would not further any such purpose. The surviving partner would not be able to sell or encumber any asset of the firm without first obtaining a release from the representative lienors. This would hamper the continued existence of the business. In addition, the fact that payments were to be made in periodic installments over a number of years, coupled with silence as to any specific security device other than a right to an accounting upon default, would seem to indicate that each partner was willing to compel his representative to rely on the personal responsibility of the other.[8] If the partners so intended it, the court has no power to interfere for the benefit of the representatives.[9] One more factor is present in that the claimed lien was to cover the assets of a partnership. The court could construe the contract with regard to the spirit of the Uniform Partnership Act. The whole tenor of this act, as evidenced by its various provisions,[10] tends toward protection of the interests of partnership creditors as against the interests of the partners themselves and those who legally represent them. The imposition of a lien here would have an obvious adverse effect against general creditors, while favoring partnership interests. Because of this, the court should hesitate to find a lien where the question of intent is a close one.

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[8] Hull v. Cartledge, 45 N.Y.S. 450 (1897).

[9] Courts cannot make a contract between the parties. See 17 C.J.S., Contracts, §296, 702 et seq. for collected cases.

[10] Under §40 (b) of the U.P.A., enacted in Mich. Comp. Laws (1948) §449.40, dealing with the liabilities of the partnership, the claims of partners for capital and profits are classes III and IV respectively; the lowest classes of claims are the partnership claims indicating their inferiority to the claims of creditors. In addition, the entire section concerning the liability of persons continuing the business, §41 of the U.P.A., enacted in Mich. Comp. Laws (1948) §449.41, stresses protection of the creditor in cases where there has been a technical dissolution but no liquidation of assets. In particular, subsection (8) emphasizes the prior right of the creditor as against the retiring partner or the deceased partner's representative. Section 42 of the U.P.A., enacted in Mich. Comp. Laws (1948) §449.42, and the proviso thereto concerning the rights of the estate of the deceased partner when the business is continued, likens the interest of the representatives of the deceased partner to that of an ordinary creditor and specifically preserves the priority of the creditors of the dissolved partnership.