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PARTNERSHIP BY ESTOPPEL BASED ON A HOLDING OUT BY ONE OTHER THAN THE PARTY SOUGHT TO BE HELD

Brocato v. Serio[1]

Suit was brought on a renewal note of "S. Brocato & Son," a firm operating a market stall. Both defendants, husband and wife, had been for some years closely connected with this business, although it appeared that there was no actual partnership. The plaintiff's knowledge of this connection was slight. The original loan had been made fourteen years before trial by the plaintiff in the presence of both defendants and S. Brocato, the husband's father. All later negotiations had been through plaintiff's sister-in-law. On the death of the father, and at plaintiff's request, the defendant wife signed her name to the renewal note and signed her husband's name without his consent. The trial court held that the defendants were estopped to deny lia-

[21] Clark and Marshall, *op. cit. supra* n. 20, Sec. 239.
[22] *Ibid*, Sec. 197.
[23] The principal case involved exactly such a situation. The defendant fired through a closed door.
[1] 173 Md. 374, 196 Atl. 125 (1937).

bility on the note as partners and, on appeal, this ruling was affirmed.

The case came to the appellate court solely for a ruling on the refusal by the trial court to grant certain prayers for a directed verdict on the adduced evidence. In making this ruling the opinion set out in some detail the evidence and conflicting testimony brought forth at the trial. As there was no demand for it, the Court evidently felt no need to pass on the questions of partnership law presented at the trial. For this reason it is somewhat difficult to gather from the opinion a complete and clear picture of the findings of fact and rulings of law comprising the sum total of the decision finally rendered.

However, certain comments by way of dicta lend a peculiar interest to the case in their application to partnership by estoppel. In speaking of the acts of the defendants, the Court defined this type of relationship as follows:[2]

> "A person not a partner in fact may be liable as such to third persons, upon the ground that he has held himself out to the world as such, or has permitted others to do so, and is therefore estopped from denying that he is one, as against those who have in good faith dealt with the firm, or with him as a member of it. But it must appear that the person dealing with the firm believed and had a reasonable right to believe that the party he seeks to hold as a partner was a member of the firm, and that the credit was to some extent induced by this belief, and the holding out must have been by the authority or with the *knowledge* of the party sought to be charged. Whether the defendants in this case held themselves out as members of the firm of S. Brocato and Son, or permitted it to be done, is a question of fact and not of law. *Fletcher v. Pullen.*"

The foregoing quotation seems to be an almost verbatim statement from the opinion rendered in *Fletcher v. Pullen.*[3] It appears to hold that the mere knowledge on the part of a person that he is being held out as a partner may be sufficient to bind that person with partnership liability. However, in order not only to weigh the meaning of the words used, but to discover the connotations the entire definition has accumulated, it is necessary to know the facts in the latter case and to trace its history as part of the doctrine it sought to express.

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[2] *Ibid,* 173 Md. 384-5.
[3] 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355 (1889).

Partnership by estoppel is the term given to a particular application of the old principle of equitable estoppel.[4] Certain facts must be established before, as a matter of law, the bar of estoppel will be raised. There must be, first, a holding out by the party sought to be charged (i. e. that there is a partnership in which he holds himself out as a member); second, a reliance by the plaintiff on this holding out; and, third, damage to the plaintiff.[5] On this much of our statement of the elements necessary to create a partnership by estoppel there seems to be general accord. Dispute may arise only on the question of whether the evidence establishes the necessary facts. However, what of the situation where the holding out has been by a third party, and the plaintiff, by bona fide and reasonable reliance thereon, has been damaged? Here also the courts agree that an estoppel may be created. But in determining the circumstances of fact under which this estoppel will be held, the courts have differed.[6]

At common law, two lines of thought were followed on this question. The weight of authority held that in a case of a holding out by a third party, no liability on the part of the person so held out would result unless he consented to the representation.[7] The minority view followed by some courts felt that mere knowledge that there had been such a representation could fix liability on the ostensible partner.[8]

Fletcher v. Pullen,[9] decided prior to the act, has been considered as definitely placing Maryland with the minority jurisdictions on this point. In that case, the defendant's lessee had written letters to the plaintiff alleging a partnership between himself and his lessor, the defendant. In reliance on this supposed partnership the plaintiff had sold the lessee goods, and in the suit sought to recover the price from the defendant. The lessee had also caused to be published in two local papers an advertisement likewise representing that a partnership existed. The defendant had not

[4] Hartford Accident & Indemnity Co. v. Oles, 152 Misc. 876, 274 N. Y. S. 349 (1934); Hackney Co. v. Lee Hotel, 156 Tenn. 243, 300 S. W. 1 (1927); Rowley, Modern Law of Partnership, Sec. 91; 47 C. J., Partnership, Sec. 104, and cases cited.

[5] 47 C. J., Partnership, Secs. 104, 107; Rowley, *op. cit. supra* n. 4, Sec. 95.

[6] For a good discussion of partnership by estoppel under the common law, see Thompson v. First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507 (1884).

[7] 47 C. J., Partnership, Sec. 106; Rowley, *op. cit. supra* n. 4, Sec. 475; Thompson v. First National Bank, *supra* n. 6.

[8] Lutz v. Miller, 102 W. Va. 23, 135 S. E. 168, 50 A. L. R. 426 (1926); 20 R. C. L. 1067; for further cases on these two views see those cited in Crane, Partnership, Sec. 36, and in the Commissioners' note to Sec. 16, Uniform Partnership Act, Sub-div. 1-b.

[9] *Supra* n. 3.

known of the letters but had seen the advertisement which had run for some weeks. Evidence by the defendant lessor tending to show that he had denied to the editors of the papers the alleged partnership asserted in the advertisement and also had several times publicly stated that there was no such partnership was denied admission, as was a copy of the lease. The appellate court reversed the judgment for plaintiff because of the non-admission of this evidence. But in spite of the negative character of this holding, the effect of the decision would seem to be strong. An implication is raised that had the defendant merely stood on the absence of proof of actual consent—had there been no offered proof of affirmative denial by the defendant—the judgment of the trial court would have gone undisturbed. This is the more apparent because the language of the opinion in several places appears to state in unequivocal terms the minority rule that in some cases knowledge alone may bind a person held out as partner.[10] Later cases restated the doctrine,[11] and it had become by 1915 a well known landmark in the field of partnership by estoppel.[12]

In 1916, the Uniform Partnership Act became a part of Maryland law.[13] This uniform statute purports to take the majority view contrary to the implication of *Fletcher v. Pullen*.[14] In the words of the Commissioners:

> "The section clears several doubts and confusions of our existing case law. It has 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.

[10] See the quotation from the principal case, *supra* n. 2. For a very real conception of how far the doctrine that mere knowledge may create an estoppel can be carried, see Lindley, Partnership, 75, and the cases there set out.

[11] Lighthiser v. Allison, 100 Md. 103, 59 Atl. 182 (1904); Porter v. Connolly, 112 Md. 250, 75 Atl. 510 (1910); Cantor v. Balto. Overall Mfg. Co., 121 Md. 65, 87 Atl. 1115 (1913); Erdman v. Trustees M. P. Church, 129 Md. 595, 99 Atl. 793 (1917).

[12] Mechem, Elements of Partnership, in the text of Sec. 104, cites Fletcher v. Pullen as a leading case, while criticising the decision on the facts in the footnote to that section.

[13] Md. Code, Art. 73A.

[14] Md. Code, Art. 73A, Section 16 (1) reads: "When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actually 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."

(Citing Fletcher v. Pullen). On the other hand, 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. (Cited cases omitted). The Act as drafted follows this weight of authority and better reasoning.''[15]

Text writers recognized this stand taken by the act.[16] It was apparently believed that the wording was incapable of misconstruction. All in all it appeared to offer a happy solution—a reasonably clear and logical legal framework upon which to place factual questions as to holding out and consent, and a theory which satisfactorily embraced the correlative problems of agency and liability between persons or partnerships so estopped.

Maryland law remains confused in the decisions by citations of, and quotations from *Fletcher v. Pullen,* without any direct indication of whether its narrow view is meant to be retained despite the adoption of the Uniform Act or whether it is being cited for such sections of its opinion as are consistent with the Act. Section 16 has been cited in the Court of Appeals twice since its enactment.[17] During the same period there have been three citations of *Fletcher v. Pullen,* including that in the principal case.[18]

The Maryland Court in this oft quoted excerpt seems to differ with the Commissioners' own statement as to the effect of Section 16 on *Fletcher v. Pullen.* The Court may feel, however, that by a broad interpretation, the expression ''by conduct . . . consents'' in Section 16 under certain circumstances may be made to embrace mere knowledge.[19] If this is the explanation, then it would seem that the Commissioners had signally failed in their draftsmanship of this section to achieve the result which they were apparently

[15] Commissioners' note to Sec. 16, Sub-div. 1-b.

[16] Rowley, *op. cit. supra* n. 4, Sec. 12; Burdick, Partnership, 72-3; Crane, *op. cit. supra* n. 8, 127 says: "A duty to affirmatively disclaim reputed partnership has been imposed in some cases (citing Fletcher v. Pullen). Other cases have held that there is no duty to deny false representations of partnership, to the making of which one is not a party (cases omitted). The Uniform Partnership Act is designed to impose liability only where there is consent in fact to the representations."

[17] Blaustein v. Oldfield, 135 Md. 162, 108 Atl. 485 (1919); Southern Can Co. v. Sayler, 152 Md. 303, 136 Atl. 624 (1927). In the latter case the citation is merely a passing reference to Sec. 16, as being an exception to Sec. 7(1).

[18] Blaustein v. Oldfield, *supra* n. 17; West v. Driscoll, 142 Md. 205, 120 Atl. 445 (1923); *supra circa* n. 2.

[19] As is suggested by such cases as Triangle Machine Co. v. Dutton & Adams, 13 La. App. 14, 127 So. 54 (1930), where the court stated: "If one knows his name is used as a partner, though without his consent his acquiescence may be inferred if he does not publicly disclaim the connection."

confident they had accomplished. However, it is equally possible that the citations since the passage of the Act were never intended to be taken as confirmations of the minority rule of the Commissioners' interpretation of *Fletcher v. Pullen,* since that was never necessary for the decision in hand.

The Court when presented once more with a proper case, may find it desirable to clarify its position as to the real effect of Section 16 on its former doctrine of partnership by estoppel.