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Partnership by Estoppel Based on a Holding Out with Knowledge Of, but Without Consent Of, the Party to Be Charged - Mcbriety, et.al., v. Phillips, et.al.

PARTNERSHIP BY ESTOPPEL BASED ON A HOLDING OUT WITH KNOWLEDGE OF, BUT WITHOUT CONSENT OF, THE PARTY TO BE CHARGED

McBriety, et al., v. Phillips, et al.[1]

This was an action by the plaintiffs, wholesalers of beer and ale, against the defendants, X and Y, allegedly doing business as a partnership under the name Cozy Spot, to recover the price of beer and ale delivered on credit. The apparently active partner, Y, went bankrupt before the commencement of the suit, and X denied that he had ever been in partnership with Y. While the case involved a favorable ruling as to whether X's denial was appropriately pleaded, the main issue was whether there was any evidence legally sufficient to show that X was a partner. The trial court had directed a verdict in favor of X. The Court of Appeals reversed and granted a new trial, reasoning that the evidence admitted, plus certain evidence wrongfully excluded, was sufficient to justify submission of the case to the jury to determine whether a partnership existed in fact or by estoppel.

While the purpose of all the excluded evidence is not clear, it would seem that the evidence in its entirety could have been taken to establish that X financed the enterprise and directed Y to run it as his manager, or at least that X consented to representations as to his interest in the business; and that the plaintiffs issued credit in reliance on this. The details of the rulings on the evidence, however, are not material to this note, which is directed solely to the Court's statement with reference to the doctrine of partnership by estoppel. The Court said:

> "The principle of law is firmly established that a person, even though not a partner in fact, is liable as a partner to those persons who deal in good faith with the firm or with him as a member of it with the reasonable belief that he is a member of the firm, provided that he so holds himself out to such persons or the public, or is so held out by his authority or with his knowledge and assent, and credit is to some extent induced by this belief. The doctrine of partnership by estoppel is founded upon principles of justice for the purpose of preventing fraud. When a person has induced others to believe that he is a partner and to

[1] 26 A. (2d) 400 (Md., 1942).

extend credit to the partnership by reason of such belief, he should not be permitted to deny that participation which he has asserted or permitted to appear to exist, even though not existing in fact. *Thomas v. Green,* 30 Md. 1; *Fletcher v. Pullen,* 70 Md. 205, 16 A. 887, 14 Am. St. Rep. 355; *Lighthiser v. Alison,* 100 Md. 103, 59 A. 182; *West v. Driscoll,* 142 Md. 205, 120 A. 445 The statute provides that when a person consents to be represented in a public manner as a partner, he is liable to any person who gives credit on the faith of such representation, even though the representation is communicated to the creditor without the apparent partner's knowledge. Acts of 1916, ch. 175, Code, art. 73A, § 16. In order to invoke the doctrine of estoppel, it must be shown that the creditor acted in reliance upon the representations at the time he entered into the transaction. *Thompson v. First National Bank of Toledo,* 111 U. S. 529, 4 S. Ct. 689, 28 L. Ed. 507; 3 *Page on Contracts,* §§ 1706, 1707, 1708. If a person knows that he is held out as a partner by another, he is just as liable as though he had called himself a partner, unless he does all that a reasonable and honest man would do under similar circumstances to assert his denial in order to remove the impression and prevent innocent parties from being misled. *Fletcher v. Pullen,* 70 Md. 205, 215, 16 A. 887, 14 Am. St. Rep. 355; *Parsons on Partnership,* 3rd Ed., 146."

The reason this language evokes comment is that it is the first pronouncement of the Court of Appeals on the doctrine of partnership by estoppel since the case of *Brocato v. Serio,*[2] which called forth a comment[3] in this REVIEW seeking clarification of the Maryland law as to when mere knowledge of the party to be bound that he was being represented as a partner would bind him as a partner by estoppel. In that comment it was observed that the wording of Section 16 of the Uniform Partnership Act as adopted in Maryland,[4] was meant to repudiate the so-called minority rule of *Fletcher v. Pullen*[5] that mere knowledge was enough, and to adopt the view that consent to the representations was necessary, with this consent left as a matter of fact for the jury.

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[2] 173 Md. 374, 196 A. 125 (1937), noted (1939) 3 Md. L. Rev. 189.
[3] *Ibid.*
[4] Md. Code (1939) Art. 73A, Sec. 16.
[5] 70 Md. 205, 16 A. 887, 14 Am. St. Rep. 355 (1889).

It is questionable if the language of the instant opinion clarifies the problem in its reference with approval to both Section 16 of the Uniform Act requiring consent, and to the doctrine of *Fletcher v. Pullen* that knowledge is enough. This is particularly open to criticism if it occurs without reflection on the problem or without an awareness of the possible interpretation of *Fletcher v. Pullen* that *mere* knowledge is enough in *all* cases unless the party to be bound takes active steps to prevent representations of his being a partner.[6]

If, however, the Court is aware of the intention of the Uniform Act[7] to bind a silent person only if he has consented to representations that he is a partner, but is insisting that there may be circumstances under which knowledge of his being held out as a partner without doing anything at all to repudiate it may amount to such consent (is evidence of it), and that this is the correct interpretation of both *Fletcher v. Pullen* and the Uniform Act, its citation of both with approval is understandable. It may be that such an interpretation would do no injustice to the intention of the Commissioners or to the language of the Act. For, if consent is a question of fact for the jury, there well might be certain circumstances where knowledge of repeated representations of his partnership, coupled with his complete inaction, might be taken to amount to consent to such representations by the party to be bound,[8] just as there might be other situations where mere knowledge would not be enough. At least, no great injustice would seem to come from such an approach, and it is to be hoped that this is the correct explanation of the Court's repeated reference to the language of *Fletcher v. Pullen* as applicable since the passage of the Uniform Partnership Act.

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[6] See such interpretation of the Commissioners on Uniform Laws in the note (1939) 3 Md. L. Rev. 189, 192, 193. It is questionable if Fletcher v. Pullen, or its citations, were ever meant to express a doctrine as broad as the minority view disapproved by the Commissioners. See *infra*, n. 8.

[7] *Supra*, n. 4.

[8] This would be quite different from the minority view as stated by the Commissioners in their notes to Section 16, subdivision 1-B (see reference *supra*, n. 6), for which they cited Fletcher v. Pullen, when they said "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, if to do so he has to take legal action."