

obtained very general acceptance, and is to-day very widely quoted:

"We may lay it down as a broad general principle that whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it."<sup>1</sup>

Although stated too broadly, and lacking therefore in scientific value, this rule embodies the principle of estoppel by assisted misrepresentation.<sup>2</sup> It does not so profess; but this causes no surprise when it is remembered that we are accustomed to date common-law recognition of estoppel, even in its more simple form, from *Pickard v. Sears*,<sup>3</sup> which was not decided until 1837. That the relation of the *dictum* to estoppel should still be frequently denied is due entirely to the lack of recognition of the distinction between personal and assisted misrepresentation.<sup>4</sup>

Another classification (by no means new, save in uses subserved) is the division of personal misrepresentation into (1) active, and (2) passive misrepresentation. By it the conflict between those who affirm and those who deny that fraud is necessary to estoppel is terminated.

*Active* misrepresentation will estop irrespective of its moral quality:

"If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be true."<sup>5</sup>

*Passive* misrepresentation is impossible without *malâ fides* (innocent passivity cannot be misrepresentation), and therefore fraud is in such case necessary — necessary however not to the estoppel, but to the existence of the misrepresentation,<sup>6</sup> upon which the estoppel is founded.

<sup>1</sup> *Lickbarrow v. Mason*, 2 T. R. 63.

<sup>2</sup> See ch. XIV.

<sup>3</sup> 6 A. & E. 469.

<sup>4</sup> See ch. XIV.

<sup>5</sup> Per Lord Cairns in *Reese v. Smith* (1899), L. R. 4 H. L. 79; 89 L. J. Ch. 849.

<sup>6</sup> See ch. VIII.