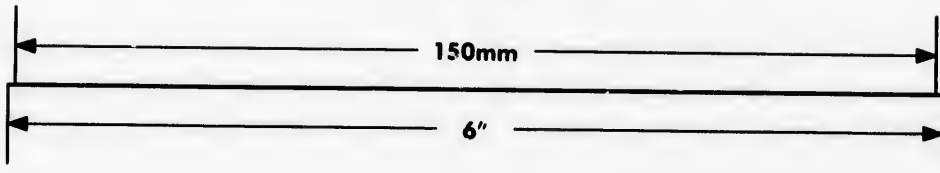
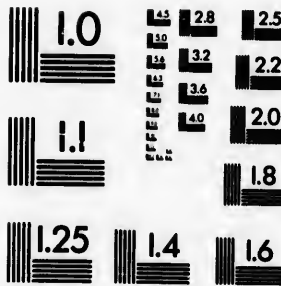
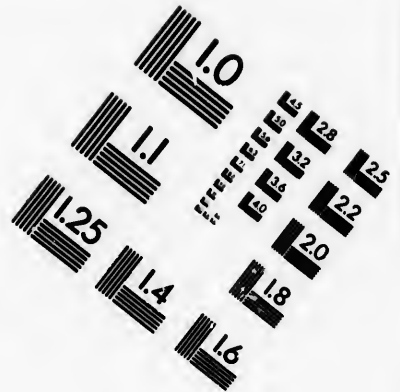
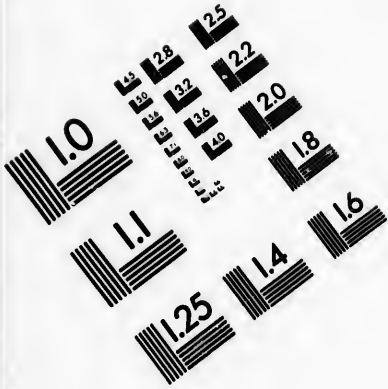


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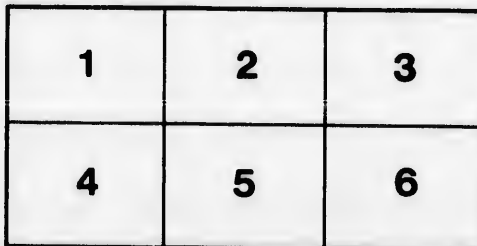
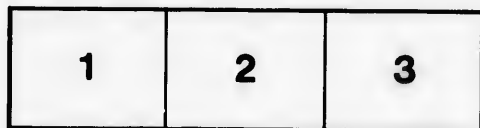
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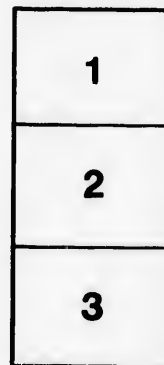
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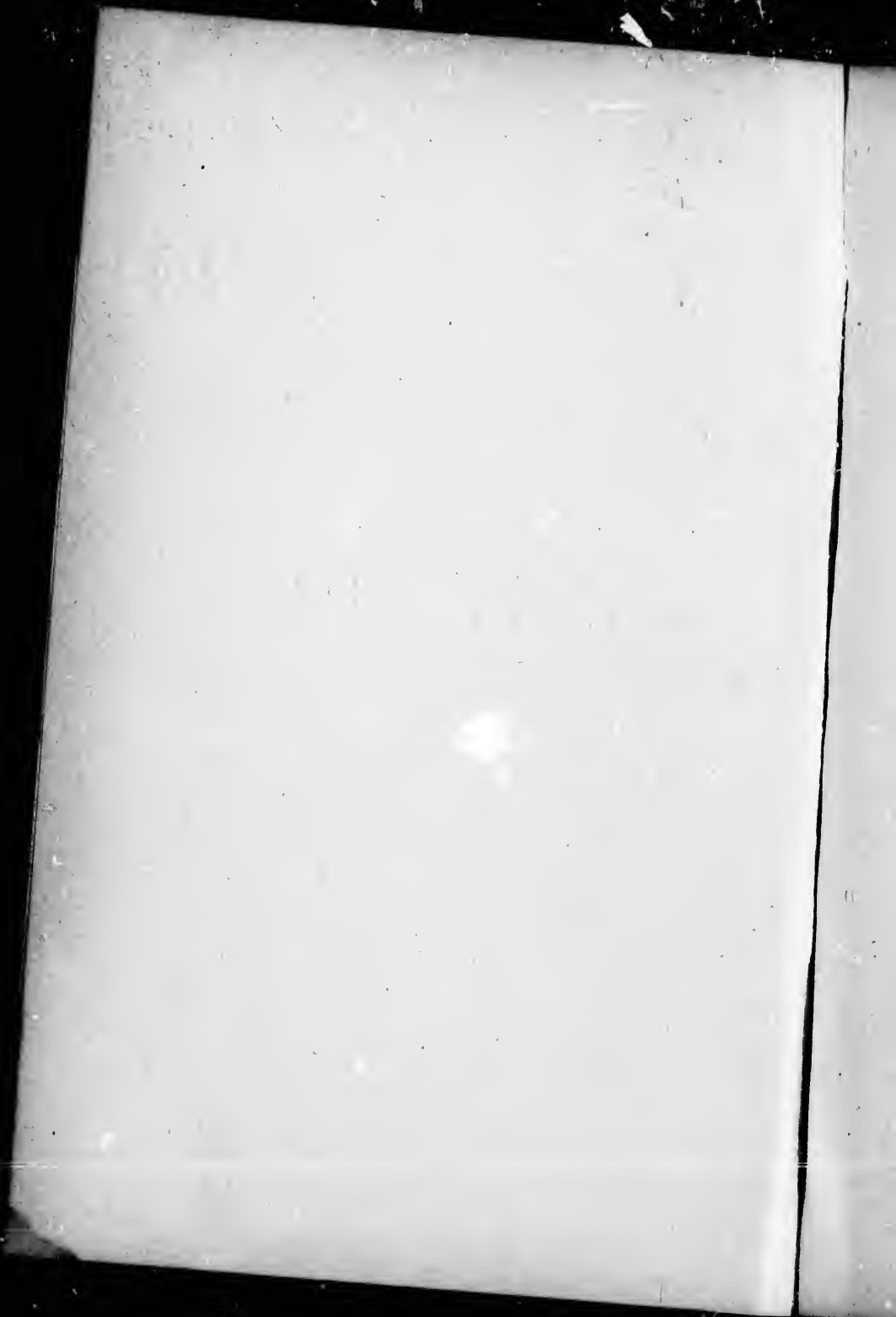
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7

AN EXPOSITION

OF THE

PRINCIPLES OF ESTOPPEL

BY MISREPRESENTATION

BY

JOHN S. EWART

WINNIPEG, MANITOBA, CANADA

TORONTO

THE CAESWELL COMPANY, LIMITED

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## PREFACE.

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We are sadly in need of some short phrases wherewith to distinguish the actors in cases of estoppel. There is "the party to whom the representation is made." More shortly we might say "the party asserting the estoppel,"—in other words, the "estoppel-asserter," as we shall style him. And there is "the person by whom the representation is made." Him we shall call, in sharp contrast, "the estoppel-denier." Such phrases are preferable to the arbitrary designation of the parties as A. and B.—a plan resorted to in sheer desperation by some writers;<sup>1</sup> for there is nothing in the letters to help one to remember which is which. Even head-notes are often too long for easy identification of A. and B.

Remembering that special glossaries for single volumes may be necessary, but, at the hazard of rejection, must be capable of comfortable assimilation and effortless recollection, the present writer hesitates to do more at present than submit for approval a word which may, in discussing estoppel, be substituted for the ever-recurring phrase: "One who changes his position prejudicially upon the faith of some misrepresentation."

*Falsdvert*<sup>2</sup> has the advantage of having for its first syllable a word familiar enough to all lawyers, and for its second that

<sup>1</sup> Cababé on Estoppel, 53.

<sup>2</sup> Kindly suggested by the Rev. Prof. John Campbell, Presbyterian College, Montreal. The Rev. Father Drummond, S. J., St. Boniface College, St. Boniface, offers "*Pithalactos*," as indicating sufficiently the main idea. It is a combination of

"*Pith*," the radical of a Greek verb signifying to persuade; and "*alactos*," a verbal adjective (from the Greek verb *allaso*, to change) signifying something that has been changed—some one, therefore, who has been persuaded to change his position.



which is readily recognized (with the same meaning) in convert and pervert. *Falsâ* is preferable to *falso*, the last letter of which would frequently be taken as belonging to the *vert*, instead of to the first factor in the combination; and it is used as an adjective in the ablative having the word *re* understood — the whole word thus indicating one who has changed his position by reason of a falsity.

---

The writer believes that the chief characteristics of the present work are (1) a completer and more scientific analysis and classification of estoppel; (2) a clearer apprehension and appreciation therefore of the bases and methods of estoppel; and (3) a successful substitution in various departments of the law of the principles of estoppel for others now in vogue.

(1) *Analysis and Classification.*— Estoppel by misrepresentation has not hitherto been divided into its two most obvious classes, namely, (1) estoppel by personal misrepresentation; and (2) estoppel by assisted misrepresentation; and much perplexity has arisen from the absence of the distinction.

It is often affirmed, for example, that a misrepresentation must be *mala fide* in order to work estoppel; whereas the fact is that there may be estoppel although the estoppel-denier has made no misrepresentation at all, nor indeed been aware of the existence of misrepresentation by any other person. Estoppel sometimes arises because the estoppel-denier (perhaps quite innocently) has assisted the misrepresentation of a third person — he has furnished the means or occasion for the misrepresentation, done that which has made it credible, and for that reason alone is estopped. The moral quality of the misrepresentation in such cases cannot be material.

That the classification just suggested has been overlooked is all the more extraordinary when it is remembered that as early as 1787 Mr. Justice Ashhurst enunciated a rule which has

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 *mala 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* (1869), L. R. 4 H. L. 79; 39 L. J. Ch. 849.

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

A third classification, or rather distinction, will be much insisted upon in the present work, namely, that between ostensible ownership and ostensible agency. It is indeed obvious enough when pointed to, but its disregard has led to the strangest confusion and misconception.<sup>1</sup>

(2) *Bases and Methods of Estoppel*.—The first of the above distinctions (that between personal and assisted misrepresentation) aids in very material degree the fuller apprehension of the bases and methods of estoppel; brings into clearer relief the concept of duty as underlying all its principles; and compels a closer examination of social obligations in the affairs of business and commerce.

The existence of a duty, not purposely and by palpable untruth to mislead another into a prejudicial change of position, is easily recognized; and the common law action of deceit has provided a remedy in damages for breach of it. The prescription of a legal duty, in the physical domain also, "to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to one another,"<sup>2</sup> appears to be a natural and inevitable consequence of the establishment of social relations of even the most imperfect character. But the application of this latter conception to the realm of affairs is plainly of later growth. It must (such is human limitation), through a long course of struggle between it and its denial, become patently necessary and obviously right, before it can take its place as a principle of decision.

That the imposition of a duty of "an appropriate measure of prudence" in commerce is as essential for the effective conduct of business as it is for physical safety seems to the present writer to be a conviction now within measurable distance of complete acceptance. The strong tendency is in that direction, notwithstanding that the House of Lords has recently inti-

<sup>1</sup> See ch. XVII.

<sup>2</sup> Pollock on Torts (5th ed.), 22.

mated its adhesion to the view that every one must take care of himself—the criminal law being there to give him such satisfaction, or rather gratification, as he can get out of it.<sup>1</sup> The case before their lordships, however, related to a bill of exchange, with regard to which we have been taught to think in a groove made specially for “negotiable instruments,” and been trained to believe that such documents and their vagaries are quite outside of all possibility of explanation according to the ordinary principles of law. Estoppel will help us to reduce their distracting fractiousness to order and principle.<sup>2</sup>

(3) *Substitution of Estoppel for Other Principles.*—(A) For it is the belief of the present writer that the hollowness of the word “negotiable,” as a distinguishing characteristic of certain instruments, has in later years become very apparent. A “negotiable” instrument was said to have two peculiarities: (1) a transferee could sue upon it in his own name, and (2) a purchaser might take a better title than that of his vendor. Recent legislation, by sanctioning the legal assignment of other choses in action, has abolished the first of these distinctions. And as to the second, there are scores of cases (other than those relating to bills and notes) in which a purchaser takes a better title than that of his vendor. Is there anything more “non-negotiable” than land? and yet is there no such thing as purchaser for value without notice of a prior claim? An owner of goods stands by while an ostensible owner sells them; and is not the purchaser in a better position than the vendor? Estoppel will supply the reason for the decision of all such cases, and afford a harmonizing principle.

(B) The law relating to bills of lading, warehouse receipts, dock warrants and other “documents of title,” with its antag-

<sup>1</sup> *Schofield v. Londesborough* (1894). 1 Q. B. 536; 64 L. J. Q. B. 298; (1896) 2 Q. B. 690; 69 L. J. Q. B. 649; (1905) A. C. 514; 65 L. J. Q. B. 598.

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

onistic principles of (1) "negotiability" of the documents, and (2) *caveat emptor* as to the goods they represent, can be rationalized and rendered consistent only by the steady application to it of the law of estoppel by assisted misrepresentation.

(C) Rules governing priorities to real estate — those relating to the legal estate, to possession of the deeds, to *Qui prior est tempore potior est jure* — must be superseded by the principles of estoppel.

(D) The distinction between void and voidable instruments (with reference to their obligatory character upon the signers of them when obtained by fraud) is unscientific, and must give place to estoppel.

(E) Distinction between general and special agency, so far as estoppel is concerned, will be denied. The same principles apply to agencies of all kinds.

(F) Perplexing points in the law of partnership will be found to yield easily when treated upon the lines of estoppel.

(G) "Estoppel by negligence," for which elaborate rules have been framed, but of which it is said there is no example in the law, will, it is hoped, with the help of "assisted misrepresentation," be reduced to intelligibility. Various classes of such cases will be discovered, but the rules provided for their decision will be found to be unsupportable.

(H) The relation of estoppel to deceit is in need of explanation. Its elucidation will be attempted.

---

The method of the present work is to investigate and establish (in succeeding chapters) the essential requisites of estoppel by misrepresentation, and to formulate them in such terms as will permit of their being carried into and effectively applied in all the departments of the law in which estoppel operates.

This accomplished, the fourteenth chapter is devoted principally to the widely, and above quoted rule laid down in *Lickbarrow v. Mason*.<sup>1</sup>

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

And the assertion is ventured that that rule is "but a short and pregnant statement of the essential principles of estoppel by assisted misrepresentation." Chapter XV is an endeavor to declare with precision the nature and effect of estoppel. And chapter XVI discusses the relation of estoppel to deceit.

The way having been thus cleared — the principles of estoppel having been defined, and their effect and foreign relations (as it were) determined — the remaining twelve chapters are devoted to the application of those principles to different forms of property and various departments of the law — to lands, goods, choses in action, documents of title, execution of documents, principal and agent, and partnership; with the result, as is hoped, that the principles of the earlier half of the book will be found not only workable in each of these departments, but of much service in the elucidation of problems which at present (for lack of them) are either relegated to the unsatisfactory catalogue of anomalies, or are recommended to our understandings by fictions of more or less impossibility.

---

The writer cannot fail to be impressed with the gravest apprehensions as he hands over to the profession the result of his labors upon a programme such as this. Nevertheless he has a strong conviction that although many defects in his work may be found, the main positions which he has assumed are right, or very nearly so, and that into harmony with them must be

<sup>1</sup>(1787) 2 T. R. 63.

brought several departments of the law. He has, at all events, contributed something towards a scientific synthesis of a very difficult subject.

---

To prevent frequent repetition, it may be said here, once for all, that liberty has been taken with many of the quotations appearing in the book, to the extent of italicizing some of the words, in order that the mind of the reader may be the more easily carried to the point to which attention is at the moment desired.

J. S. E.

WINNIPEG, MANITOBA, 1900.

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# TABLE OF CONTENTS.

PREFACE . . . . .	iii-x
TABLE OF CASES CITED . . . . .	xxv-xli
TABLE OF ABBREVIATIONS USED IN THIS WORK . . . . .	xliii-xlvii

## CHAPTER I.

INTRODUCTION . . . . .	1-9
Estoppels <i>in pais</i> . . . . .	1
Subdivisions . . . . .	2
Definition of estoppel . . . . .	3
Justification of estoppel . . . . .	5
History of estoppel . . . . .	7

## CHAPTER II.

CONDITIONS OF ESTOPPEL . . . . .	10-11
----------------------------------	-------

## CHAPTER III.

THERE MUST BE A MISREPRESENTATION . . . . .	12-17
Definition of misrepresentation . . . . .	12
Necessity for misrepresentation . . . . .	12
Classification of misrepresentation . . . . .	13
Personal and assisted . . . . .	13
Direct and indirect . . . . .	13
Active and passive . . . . .	14
Expressed and implied . . . . .	14
Distinction where fraud . . . . .	17

## CHAPTER IV.

THE MISREPRESENTATION MUST BE MADE EITHER (1) BY THE ESTOPPEL-DENIER (PERSONAL MISREPRESENTATION); OR (2) BY SOME PERSON WHOSE MISREPRESENTATION THE ESTOPPEL-DENIER HAS MADE CREDIBLE (ASSISTED MISREPRESENTATION) . . . . .	18-27
Personal misrepresentation . . . . .	18
Assisted misrepresentation . . . . .	18
Principal and agent . . . . .	21
Bills and notes . . . . .	22
Partnership . . . . .	22
Certificates of shares . . . . .	23
Priorities . . . . .	23
Ostensible ownership . . . . .	24
Standing-by . . . . .	26



## CHAPTER V.

<b>THERE MUST BE A DISREGARD OF SOME DUTY</b> . . . . .	29-87
Social duties . . . . .	28
An appropriate measure of prudence . . . . .	30
Application to estoppel . . . . .	31
Denied . . . . .	32
Principle already in operation . . . . .	34
But other reasons given . . . . .	35
Egoism and altruism . . . . .	37
The altruistic view advocated . . . . .	38
Various cases of duty . . . . .	30
Ostensible ownership . . . . .	30
agency . . . . .	40
Lulling into security . . . . .	40
Partnership . . . . .	41
Spaces carelessly left in documents . . . . .	42
Young v. Grote . . . . .	42, 44
Schofield v. Londeborough . . . . .	43, 45
Distinction between checks and bills . . . . .	46
Acceptor not responsible for form of bill . . . . .	47
No duty to guard against crime . . . . .	48
Crime and any other fraud . . . . .	50
Suggested views supported . . . . .	55
Impossibility of a rule not to facilitate fraud . . . . .	57
Test cases . . . . .	50
Custody of negotiable instruments . . . . .	61
seal of company . . . . .	63
rubber stamps . . . . .	65
Miscellaneous cases of no duty . . . . .	65

## CHAPTER VI.

<b>THE MISREPRESENTATION MUST BE AS TO FACT OR LAW; NOT AS TO INTENTION OR OPINION</b> . . . . .	68-70
Fact and intention . . . . .	68
Intention may involve fact . . . . .	68
as ground of estoppel . . . . .	69
Fact and opinion . . . . .	72
Fact and law . . . . .	73
Law well known . . . . .	73
Law a matter of opinion . . . . .	74
Distinction between . . . . .	75
Advantage taken of ignorance of law . . . . .	78
Innocent misrepresentation . . . . .	79

## CHAPTER VII.

<b>THE MISREPRESENTATION MUST BE OF SOMETHING MATERIAL</b> . . . . .	80-82
Several representations, and one of them untrue . . . . .	81
Assisted misrepresentation . . . . .	82

TABLE OF CONTENTS.

xiii

CHAPTER VIII.

	<b>FRAUD OR BAD FAITH IS NOT ESSENTIAL</b>	83-97
	Misrepresentation and deceit . . . . .	83
	rescission . . . . .	85
	estoppel . . . . .	85
	by passive assistance — Fraud a part of the misrepresenta- tion . . . . .	88
	1. I must be aware of my own right . . . . .	90
	2. The other party must be unaware of my right . . . . .	90
	3. I must have reasonable ground for assuming the other party's ignorance . . . . .	90
	Illustrations . . . . .	90
	Personal misrepresentation — Fraud not essential . . . . .	93
	Actively assisted misrepresentation — Fraud not essential . . . . .	94
	Mortgage cases . . . . .	95
	Certificates of shares . . . . .	95
	Ostensible ownership . . . . .	96
	Partnership . . . . .	96
	Trustees . . . . .	96
	Negotiable instruments . . . . .	96
	Infants . . . . .	96
	Distinction between goods and lands . . . . .	97
	Summary of chapter . . . . .	97

CHAPTER IX.

	<b>NEGLIGENCE (CARELESSNESS) IS SOMETIMES ESSENTIAL</b> . . . . .	98-121
	Meaning of negligence and carelessness . . . . .	98
	Estoppel by carelessness . . . . .	100
	Misrepresentation an essential element . . . . .	100
	Personal misrepresentation — No instances in this class . . . . .	101
	Assisted misrepresentation — General rule . . . . .	102
	Execution of documents . . . . .	103
	Priorities . . . . .	104
	Ostensible agency . . . . .	105
	Verification of accounts rendered . . . . .	105
	Standing-by . . . . .	106
	Bills of lading . . . . .	106
	Bills and notes . . . . .	107
	Leading cases . . . . .	108
	Bank of Ireland v. Evans . . . . .	108
	Ex parte Swan; Swan v. N. B. A. . . . .	108
	Rules deducible from them . . . . .	109
	Mr. Bigelow's criticism . . . . .	109
	Mr. Cababé's criticism . . . . .	111
	Rule I. There must be the neglect of some duty . . . . .	112
	II. The neglect must be in the transaction itself . . . . .	112
	This impossible . . . . .	113
	Cases reviewed . . . . .	115

28-67

28

30

31

32

34

35

37

38

39

39

40

40

41

42

42, 44

43, 45

46

47

48

50

55

57

59

61

63

65

65

68-79

68

68

69

72

73

73

74

75

78

79

80-82

81

82

NEGLIGENCE (CARELESSNESS) IS SOMETIMES ESSENTIAL— <i>Continued</i>	
Result and its explanation . . . . .	116
" In the transaction itself " . . . . .	117
Analogy from torts . . . . .	119
III. The neglect must be the proximate cause of the leading of the person into the mistake . . . . .	119
This impossible . . . . .	119
Proximate and real . . . . .	120
Summary of chapter . . . . .	121

## CHAPTER X.

THE ESTOPPEL-ASSERTER MUST BE A PERSON TO WHOM IMMEDIATELY OR MEDIATELY THE MISREPRESENTATION WAS MADE	123-129
Immediately . . . . .	123
Mediately: Intended to be passed on . . . . .	124
Ambulatory and non-ambulatory representations . . . . .	124
Representation as to solvency . . . . .	124
Partnership . . . . .	124
Commercial instruments . . . . .	125
Delivery orders . . . . .	125
Warehouse receipts . . . . .	126
Letters of credit . . . . .	126
Bills of lading . . . . .	126
Certificates of shares . . . . .	126
Prospectuses . . . . .	127
Commercial agencies . . . . .	128
Stock exchange . . . . .	128
Title-deeds . . . . .	128
" No defenses " . . . . .	128
" Negotiable " instruments . . . . .	129
Choses in action . . . . .	129
Misrepresentation to person who will probably be applied to for information . . . . .	129
Misrepresentation by appearing to subscribe for shares . . . . .	130

## CHAPTER XI.

THE ESTOPPEL-ASSERTER MUST, ON THE FAITH OF THE MISREPRESENTATION, HAVE CHANGED HIS POSITION PREJUDICIAALLY	131-154
I. Change of position . . . . .	131
Creditors of transferrer of shares, where transfer unregistered . . . . .	133
Lulled into security . . . . .	133
By appearance of having received money . . . . .	133
Not advising of forgery . . . . .	135
Not objecting to accounts . . . . .	136
Means of knowledge . . . . .	138
Registered instruments . . . . .	138
What is a change of position . . . . .	139
Change in style of living . . . . .	139
Change by bringing an action . . . . .	139
A possible change . . . . .	140

TABLE OF CONTENTS.

XV

THE ESTOPPEL-ASSERTER...MUST HAVE CHANGED, ETC.—Continued.

II. On the faith, etc.	
Misrepresentation not believed . . . . .	140
Withdrawn . . . . .	140
Investigated . . . . .	140
Examples . . . . .	140
Principal and agent . . . . .	141
Certificates of shares . . . . .	141
Seeming exceptions to rule . . . . .	141
Classes of persons . . . . .	141
Shareholders . . . . .	143
Creditors . . . . .	143
Reputed ownership . . . . .	142, 143
The actuating motive . . . . .	143
Onus of proof . . . . .	144
Several reasons for changing position . . . . .	145
III. Prejudicially . . . . .	146
Damage, real or assumed . . . . .	146
IV. Purchaser for value without notice, and falsævert . . . . .	147
Auxiliary jurisdiction . . . . .	149
Concurrent jurisdiction . . . . .	150
Estoppel . . . . .	150
Legal estate . . . . .	151
Summary . . . . .	153

CHAPTER XII.

THE ESTOPPEL-DRNER MUST HAVE REASONABLE GROUND FOR AN-  
TICIPATING SOME CHANGE OF POSITION UPON THE FAITH  
OF THE REPRESENTATION . . . . .

Distinction . . . . .	155-163
Personal misrepresentation . . . . .	155
Deceptive answer to impertinent question . . . . .	156
Mr. Markby's view . . . . .	156
Intention or negligence . . . . .	159
Assisted misrepresentation . . . . .	160
Active . . . . .	160
Summary of the chapter . . . . .	161

CHAPTER XIII.

THE CHANGE MUST BE REASONABLY CONSEQUENT UPON THE MIS-  
REPRESENTATION OR ASSISTANCE . . . . .

The Barry v. Croskey rules . . . . .	163-176
Carr v. London rules . . . . .	163
These rules compared . . . . .	164
Classification necessary . . . . .	165
Personal misrepresentation . . . . .	166
The two cases applied . . . . .	167
The rules criticised . . . . .	167
Rule suggested . . . . .	168

<b>THE CHANGE MUST BE REASONABLY CONSEQUENT, ETC.—Continued</b>	
Assisted misrepresentation (passive) . . . . .	169
Rule suggested . . . . .	169
Assisted misrepresentation (active) . . . . .	170
Rule suggested . . . . .	171
Application of suggested rule to the cases . . . . .	171
Proximate cause . . . . .	174
Summary of the chapter . . . . .	175

## CHAPTER XIV.

<b>THE LICKBARROW v. MASON AND HALIFAX v. WHEELWRIGHT</b>	
RULES	
Lickbarrow v. Mason rule . . . . .	177-186
Equivalent to estoppel by assisted misrepresentation . . . . .	177
Disparate from estoppel? . . . . .	178
Priorities . . . . .	179
Bill of exchange . . . . .	179
Principal and agent . . . . .	180
Sale of goods . . . . .	181
Mr. Pomeroy's concurrence . . . . .	182
Rule cannot be supported? . . . . .	183
The case itself . . . . .	184
Halifax v. Wheelwright rule . . . . .	185

## CHAPTER XV.

<b>NATURE AND EFFECT OF ESTOPPEL</b>	
Estoppel as a cause of action . . . . .	187-221
Estoppel as a rule of evidence . . . . .	187
Questions do not so arise . . . . .	188
Evidence must go to jury . . . . .	189
Not affect weight of evidence . . . . .	189
Testimony must be admitted . . . . .	190
Nature of relief affected by it . . . . .	190
Amount of damages affected by it . . . . .	191
Parties and privies . . . . .	191
1. Does estoppel bind purchasers from the estoppel-denier . . . . .	196
Rule as to parties and privies . . . . .	196
Mr. Bigelow's qualification . . . . .	197
Rule not intended for estoppel by misrepresentation . . . . .	198
Method of solution . . . . .	199
Estoppel as an "equitable right" . . . . .	200
Applications of proposed method . . . . .	203
Does estoppel pass an estate . . . . .	206
2. Does estoppel bind creditors of the estoppel-denier . . . . .	208
Privity and no privity . . . . .	209
The cases . . . . .	210
Ground of error . . . . .	212
True position . . . . .	212

TABLE OF CONTENTS.

xvii

NATURE AND EFFECT OF ESTOPPEL—*Continued.*

Joint and separate creditors of partnership . . . . .	218
<i>Bona fide</i> and fraudulent debentures . . . . .	217
Shares paid by estoppel only . . . . .	219
3. Does estoppel bind in favor of an assignee of the estoppel-asserter . . . . .	220

CHAPTER XVI

DECEIT AND ESTOPPEL . . . . .

1. Deceit . . . . .	222-237
2. Restitution . . . . .	222
3. Estoppel . . . . .	222
Conditions for relief diverse . . . . .	223
1. Deceit—Fraud necessary . . . . .	224
2. Restitution—Is fraud necessary . . . . .	224
3. Estoppel—Fraud unnecessary . . . . .	225
Peculiarity in application of remedies . . . . .	226
The anomalous result . . . . .	226
Anomaly induces harmony . . . . .	227
The present situation . . . . .	229
A suggestion . . . . .	231
Unsatisfactory . . . . .	233
Principal and agent . . . . .	234
1. Tort . . . . .	236
2. Deceit . . . . .	237
3. Estoppel . . . . .	237

CHAPTER XVII

OSTENSIBLE OWNERSHIP AND AGENCY . . . . .

Confusion between the two . . . . .	238-250
In the text-books . . . . .	239
Factors Acts . . . . .	239
Sale of Goods Act . . . . .	240
Current phraseology . . . . .	241
Where ostensible owner is really an agent . . . . .	241
Basis of distinction . . . . .	242
Negotiable instruments . . . . .	243
Priorities . . . . .	243
Sale of goods . . . . .	243
Ostensible ownership explained . . . . .	246
Universal applicability . . . . .	248

CHAPTER XVIII

LAND--THE LEGAL ESTATE . . . . .

Where the equities are equal the law will prevail . . . . .	251-275
Four objections to this rule . . . . .	251
The scramble for the legal estate . . . . .	251
A general view of it . . . . .	252
Origin of the doctrine . . . . .	254
<i>Cessat ratione legis, cessat ipsa lex</i> . . . . .	255
b . . . . .	258

169  
169  
170  
171  
171  
174  
175

177-186  
177  
178  
179  
179  
190  
181  
183  
188  
184  
185

187-221  
187  
188  
189  
189  
190  
190  
191  
195  
196  
196  
197

198  
199  
200  
203  
206  
208  
209  
210  
212  
213

## LAND—THE LEGAL ESTATE—Continued.

“Nothing but fraud or evidence of fraud will oust the priority”	259
Meaning of fraud	259
Estoppel substituted	263
Application	264
<i>Caveat emptor</i>	265
Standard of conduct	267
Apologies for the old rule	268
Actual and contractual estates	269
Support for new methods	271
Factors Acts	274
American law	274

## CHAPTER XIX.

LAND—POSSESSION OF THE DEEDS	276-289
Various rules current	276
Possession of deeds only a circumstance	278
Tabulated view of cases	279
Examination of them	283
Possession of deeds no effect upon priority	283
Conduct with reference to them may estop	284
“Fraud” as explained by the cases	285
Estoppel the applicable doctrine	287

## CHAPTER XX.

LAND—QUI PRIOR EST TEMPORE, POTIOR EST JURE	290-295
Subsidiary to two other rules	290
Conventional meaning and application	291
Contrast between the rule and estoppel	292
Opposing conclusions	293
An involuntary trustee	295

## CHAPTER XXI.

GOODS—POSSESSION	296-305
Lands and goods, divergent rules usually applied	296
Mere possession not evidence of ownership	297
Possession implying ownership	298
1. Character of the goods	298
2. Character of the place where they are	298
3. Usual employment of the person who has them	299
Reputed-ownership clause compared with estoppel	300
4. Possession accompanied by other circumstances	301
Obtained by fraud	302
Other circumstances	304

## CHAPTER XXII.

GOODS—DOCUMENTS OF TITLE	305-349
Classification of documents of title	305
Division of the subject	307
1. Documents usually spoken of as conveyances	307

TABLE OF CONTENTS.

xix

GOODS — DOCUMENTS OF TITLE — *Continued.*

259	2. Bills of lading . . . . .	307
259	Intended as a representation by its signer . . . . .	308
263	And also by its transferrer . . . . .	308
264	3. Dock warrants, etc. . . . .	309
265	Intended as representations . . . . .	309
267	4. Shares in companies . . . . .	309
268	Certificates intended as representations by company . . . . .	309
269	Transfers intended as representations by transferrers . . . . .	310
271	Resemblances between the four classes . . . . .	310
274	Exposition of estoppel as applied to these documents . . . . .	311
274	Purchase of merchandise from a merchant . . . . .	312
	First conclusion . . . . .	313
	Second conclusion . . . . .	313
	Shares . . . . .	314
	Estoppel of the signer of the documents . . . . .	316
	When carelessness essential . . . . .	316
	Upon what points are signers estopped . . . . .	318
	Estoppel of the transferrer . . . . .	319
	Bills of lading . . . . .	320
	Do transfers pass the property . . . . .	322
	Negotiability . . . . .	324
	Symbolism . . . . .	325
	Negotiability, symbolism and estoppel . . . . .	327
	The true view . . . . .	328
	American law . . . . .	330
	Some later cases . . . . .	333
	American authorities . . . . .	335
	Dock warrants, etc. . . . .	335
	A commencement upon principle . . . . .	336
	Submergence . . . . .	336
	Courts versus Parliament . . . . .	336
	Resemblance to bills of lading . . . . .	340
	Shares in companies . . . . .	341
	Estoppel usually applied . . . . .	342
	McNeil v. Tenth Nat. Bank . . . . .	343
	Estoppel sometimes repudiated . . . . .	343
	Comment . . . . .	343
	Seals . . . . .	345
	Lost or stolen documents . . . . .	345
	Usual rule — No title from a thief . . . . .	346
	Modifications in some cases . . . . .	346

CHAPTER XXIII.

GOODS — LEGISLATION . . . . .

305-349	Estoppel principles wide enough for factors . . . . .	350-369
305	1. Case of a factor in possession . . . . .	351
307	2. Case of a factor specially accredited . . . . .	351
307	3. Case of a merchant . . . . .	352
	4. Case of a merchant who is also a factor . . . . .	352



GOODS — LEGISLATION — *Continued.*

Review of Factors Acts and Sale of Goods Act . . . . .	353
"Factors cannot pledge"—Why? . . . . .	353
1. Mercantile agent in possession . . . . .	356
2. Consent to his possession . . . . .	358
3. Possession given for consignment or sale . . . . .	360
4. Vendor retaining possession . . . . .	361
5. Vendee prematurely obtaining possession . . . . .	364
Summary of the legislation . . . . .	366
Objections to it . . . . .	367
American legislation . . . . .	368

## CHAPTER XXIV.

CHOSES IN ACTION — AMBULATORY AND NON-AMBULATORY . . . . .	370-425
The law merchant . . . . .	370
Its alleged antagonism to the general law . . . . .	372
What is it . . . . .	373
Negotiability—Two characteristics . . . . .	375
1. Transferee sue in his own name . . . . .	376
No distinction there . . . . .	376
2. Honest acquisition confers title . . . . .	378
No distinction there . . . . .	379
Negotiability and transferability . . . . .	380
What is negotiability?—Two meanings . . . . .	383
1. Transferability . . . . .	384
2. Effects of transferability . . . . .	384
Ambulatory and non-ambulatory . . . . .	386
The cycle through which we have come . . . . .	386
Decay of the old system . . . . .	387
Summary . . . . .	389
Freedom from equities . . . . .	390
1. Equities of the obligor . . . . .	391
2. Title of the true owner . . . . .	393
Estoppel by ostensible ownership . . . . .	393
Or ostensible agency . . . . .	395
Lost or stolen instruments . . . . .	396
Appropriate measure of prudence . . . . .	396
Estoppel and ambulatory instruments . . . . .	397
Illustrations . . . . .	398
"Negotiability by estoppel" . . . . .	401
Considerations in support of new methods . . . . .	404
Market overt . . . . .	404
Loss of seal . . . . .	405
New methods contrasted with old . . . . .	406
Summary . . . . .	409
Ambulatory instruments . . . . .	409
Bonds . . . . .	409
Scrip for bonds . . . . .	412
shares . . . . .	414

TABLE OF CONTENTS.

xxi

CHUSES IN ACTION — AMBULATORY AND NON-AMBULATORY — *Continued.*

	Mortgage debentures	414
853	Mortgages	415
856	Vouchers	416
858	Bank documents	417
860	Policies of insurance	417
861	Transfers of shares	418
864	Charter-parties	418
866	Generally	419
867	Bills and notes with extra clauses	420
868	"Intended to be assigned"	421
	Conclusion	422
	Overdue paper	423

CHAPTER XXV.

EXECUTION OF DOCUMENTS — WHERE SIGNER DEFRAUDED . . . . . 426-473

Estoppel the ground of decision . . . . . 426

I. Execution fraudulently obtained . . . . . 427

Review of authorities . . . . . 428

Void and voidable — Unsatisfactory . . . . . 431

Solution . . . . . 434

American law . . . . . 436

Analogy . . . . . 437

II. Execution fraudulently completed . . . . . 438

1. Documents confided to another person . . . . . 439

A. Negotiable instruments . . . . . 439

(1) Completed documents . . . . . 440

(2) Blank documents . . . . . 442

(a) Known to transferee . . . . . 443

Customary effect . . . . . 443

Estoppel the ground of decision . . . . . 444

(b) Unknown to transferee . . . . . 447

(3) Spaces as distinguished from blanks . . . . . 447

(4) Signed but otherwise blank slips . . . . . 448

(a) Imperfection known . . . . . 448

(b) Imperfection unknown . . . . . 448

Summary . . . . . 449

B. Non-negotiable instruments . . . . . 449

Deeds included with other instruments . . . . . 449

(1) Completed instruments . . . . . 453

(2) Blank instruments . . . . . 453

(a) Known to transferee . . . . . 453

(b) Unknown to transferee . . . . . 455

1. Documents stolen or found . . . . . 456

A. Negotiable instruments . . . . . 456

Present uncertainty in the law . . . . . 456

Complete and incomplete instruments . . . . . 458

Criticism of present rules . . . . . 459

370-425

370

372

373

375

376

376

378

378

380

383

384

386

386

387

389

390

391

392

393

395

396

396

397

398

401

404

404

405

406

409

409

409

412

414

<b>EXECUTION OF DOCUMENTS — WHERE SIGNER DEFRAUDED — <i>Continued</i></b>	
Egoism and altruism . . . . .	460
Ostensible ownership . . . . .	461
Incomplete instruments . . . . .	461
Signed slips . . . . .	463
Appropriate measure of prudence . . . . .	464
Current practice . . . . .	465
The codes . . . . .	466
B. Non-negotiable instruments . . . . .	467
An appropriate measure of prudence . . . . .	467
"Negotiable" — Meaning of word . . . . .	469
Summary of the chapter . . . . .	470

## CHAPTER XXVI

<b>PRINCIPAL AND AGENT . . . . .</b>	<b>478-512</b>
Four difficulties . . . . .	478
Some tentative propositions . . . . .	478
I. General and special agency . . . . .	474
The customary distinction valueless . . . . .	474
Review of the text-writers . . . . .	474
Summary . . . . .	482
II. Estoppel . . . . .	483
As to existence of agency . . . . .	483
extent of agency . . . . .	486
In what cases . . . . .	488
General proposition . . . . .	488
Medium powers . . . . .	488
Rules, authorities and illustrations . . . . .	488
Estoppel where powers withheld . . . . .	490
Application of principles . . . . .	491
Unauthorized warranty upon sale of a horse by an agent . . . . .	492
1. Sale at a fair . . . . .	492
2. The owner is a horse-dealer . . . . .	493
3. The agent is a horse-dealer . . . . .	493
4. No special circumstances . . . . .	493
Opinions of the text-writers . . . . .	493
III. "For the master's benefit" . . . . .	496
Two opposing cases and rules . . . . .	496
Tort compared with estoppel . . . . .	497
Deceit classed with estoppel . . . . .	499
Reconciliation by this method . . . . .	500
IV. "Within the scope of his authority" . . . . .	501
Appearance as to the authority . . . . .	502
act . . . . .	502
"Class of acts" — Extrinsic facts . . . . .	502
Bills of lading — A present exception . . . . .	508
Appearance of authority . . . . .	511

CHAPTER XXVII.

**PARTNERSHIP** . . . . . 513-520

Relation of estoppel to partnership and agency . . . . . 513

Division of the subject . . . . . 515

I. There must be a misrepresentation . . . . . 515

    (1) Defendant never was a partner . . . . . 516

    (2) Defendant is a retired partner . . . . . 516

        (a) Creditors who had prior dealings . . . . . 518

        (b) Creditors who had knowledge of membership . . . . . 518

        (c) Creditors who had neither dealings nor knowledge . . . . . 510

    Name of firm . . . . . 510

        Historic and indicative names . . . . . 520

    II. Misrepresentation must be by the defendant . . . . . 521

    III. Misrepresentation must be to the plaintiff . . . . . 522

        Not to the world . . . . . 522

        May be indirect, if "suffered" . . . . . 522

    IV. Credit must be given upon faith of the misrepresentation . . . . . 525

        Nature of the representation . . . . . 525

    V. Election and estoppel . . . . . 526

        Liability in tort . . . . . 529

**INDEX** . . . . . 531-548

ved.  
460  
461  
461  
463  
464  
465  
466  
467  
467  
469  
470  
  
473-513  
473  
473  
474  
474  
474  
482  
483  
483  
486  
488  
488  
488  
490  
491  
  
493  
493  
493  
493  
496  
496  
497  
499  
500  
501  
502  
502  
502  
508  
511



## TABLE OF CASES CITED.

- Abbott v. Rose, 443.  
Ackerman v. Humphery, 320.  
Adams v. Folly, 321.  
Adamson, Ex parte, 12, 131, 147.  
Ætna v. Franks, 436.  
African Gold Co., Re, 140.  
Agra & Masterman, Re, 126, 129, 377, 379, 417.  
Agra Bank v. Barry, 260, 261, 279.  
Agricultural v. Federal, 112, 136.  
Akins v. Kellogg, 72.  
Alderson v. Maddison, 70, 71.  
Alderson v. Pope, 525.  
Alexander v. Campbell, 493.  
Alexander v. Gibson, 490, 492, 493.  
Alexander v. Harkins, 519.  
Alexander v. McKenzie, 504.  
Allan v. Knight, 281.  
Allan v. McTavish, 212.  
Allcroft v. Bishop of London, 84.  
Allen v. Ayer, 449.  
Allen v. Knight, 253, 283.  
Allen v. Louis, 354.  
Allen v. Shaw, 89.  
Allen v. South Boston, 496.  
Allis v. Billings, 433.  
Allum v. Perry, 156.  
American, etc. v. American, 412.  
American, etc. v. Crowes, 417.  
American, etc. v. Hammond, 72.  
American, etc. v. Henderson, 321.  
American, etc. v. Maddock, 511.  
American, etc. v. Venner, 47.  
Anderson v. Hubble, 26, 94.  
Andrews v. Lyons, 5, 157, 187.  
Andrews v. Mockford, 127, 164.  
Angle v. N. W. Mutual, 453.  
Angus v. Clifford, 84, 224.  
Antem v. Crahan, 417.  
Argentina, The, 326, 331.  
Arlington v. Yates, 275.  
Armour v. Michigan, 40, 126, 273, 417.  
Armstrong v. Potter, 139, 523.  
Arnold v. Cheque Bank, 44, 51, 178, 183, 396.  
Arnold v. Hart, 518.  
Arthur v. Barton, 492.  
Ashurst v. Ashurst, 26.  
Ashwix v. Stanwix, 30.  
Atchison v. Brassfield, 49, 437.  
Atkins v. Payne, 123, 226.  
Atkyns v. Kinnier, 53.  
Atlanta v. Hunt, 297, 299, 302, 335, 357, 439.  
Attorney-General v. Great Eastern, 490.  
Audenried v. Betteley, 210.  
Austin v. Bahn, 69.  
Austin v. Dye, 298.  
Austin v. Great Western Ry. Co., 62.  
Awde v. Dixon, 439, 443.
- B.
- Babcock v. Lawson, 96, 181, 183.  
Bacon v. Harris, 25.  
Backhouse v. Charlton, 207, 256.  
Badeley v. Consolidated, 25.  
Bahia, Re, 23, 40, 102, 126, 141, 187, 230, 235, 309, 315, 317, 340.  
Bailey v. Barnes, 251, 252, 255.  
Bailey v. Bensley, 439.  
Bailey v. Seymour, 81, 145.  
Baillie v. McKewan, 253, 260.  
Baines v. Ewing, 490.  
Baines v. Swainson, 96, 346, 355.  
Baird v. Planque, 525.  
Baker v. Barnett, 503.  
Baker v. Nottingham, 512.  
Baker v. Seavey, 25.  
Baker v. Taylor, 297.

- Balkis v. Tomkinson, 40, 126, 187, 230, 315.  
 Baldry v. Bates, 493.  
 Baldwin v. Kingstone, 75.  
 Baltimore v. Wilkins, 511.  
 Bangor v. Robinson, 177, 347, 397, 461, 463.  
 Bank v. Duffington, 136.  
 Bank v. Flathers, 20.  
 Bank v. Keene, 149.  
 Bank v. Morgan, 136.  
 Bank v. Wentzell, 143.  
 Bank v. Whitney, 300.  
 Bank of Batavia v. New York Ry. Co., 308, 373, 503, 511.  
 Bank of England v. Vagliano, 102, 178, 183.  
 Bank of Green Bay v. Dearborn, 322.  
 Bank of Hamilton v. Gillies, 420.  
 Bank of Hamilton v. Harvey, 411.  
 Bank of Hamilton v. Imperial Bank, 43.  
 Bank of India v. Henderson, 320, 323, 331, 334.  
 Bank of Ireland v. Evans, 43, 44, 45, 63, 108, 109, 115, 116, 117, 118.  
 Bank of Monongahela v. Weston, 519.  
 Bank of Montreal v. Baker, 450.  
 Bank of Montreal v. Thomas, 417.  
 Bank of New York v. American Co., 503.  
 Bank of Pittsburgh v. Neal, 442.  
 Bank of Toronto v. Cobourg, 411, 412, 450.  
 Bank of U. S. v. Bank of Georgia, 133, 148.  
 Banks v. Everst, 477.  
 Banner, Ex parte, 349.  
 Barber v. Clark, 75.  
 Barber v. Myerstein, 331.  
 Barber v. Van Horn, 513.  
 Barnard v. Campbell, 133, 302, 325, 339, 381.  
 Barrington, Re, 332.  
 Barry v. Croskey, 163, 164, 165, 166, 167, 168, 169, 171, 175.  
 Barry v. Kirkland, 131.  
 Barry v. Wachosky, 383.  
 Bartlett v. Board, 451.  
 Bartlett v. Raymond, 520.  
 Barton v. London, etc. Co., 140.  
 Barwick v. English, 237, 496, 498, 501, 503.  
 Batchelder v. Sanborn, 39.  
 Bates v. Swiger, 26.  
 Baxendale v. Bennett, 6, 12, 43, 48, 180, 379, 380, 440, 445, 457, 463.  
 Baxter v. Bradbury, 207.  
 Baxter v. Sherman, 512.  
 Bayley v. Manchester, 287, 498.  
 Bayliffe v. Butterworth, 439.  
 Beckerer v. Asher, 247.  
 Bechuanaland v. London, 65, 371, 380, 397, 409, 412.  
 Bedford v. Bagshaw, 123, 169.  
 Beauchamp v. Winn, 75, 78.  
 Beem v. Lockhart, 480.  
 Bell v. Macklin, 65.  
 Bell v. Moss, 381.  
 Bellamy, Re, 133.  
 Belmont v. Talbot, 494.  
 Benedict v. Cowden, 60.  
 Bennett v. Mattingly, 433.  
 Benterick v. London, 452.  
 Berisford v. Milward, 284.  
 Berkling v. Watling, 381.  
 Berry v. W. D. Allan & Co., 495.  
 Bickerton v. Walker, 19, 95, 129, 233, 416.  
 Biddle Boggs v. Merced, 86.  
 Biggerstaff v. Rowatts, 496.  
 Biggs v. Evans, 246, 484.  
 Bilbee v. Lumley, 73.  
 Bill v. Richards, 284, 289.  
 Birch v. Steppler, 160.  
 Bishop v. Balkis, 17, 340.  
 Bissell's Ex'rs v. Warde, 139.  
 Black v. Christ Church, 30, 59.  
 Blackwood v. London, 253.  
 Blain v. Walt, 94.  
 Blake v. Belfast, 320.  
 Blakely, Re, 123, 377, 410, 422.  
 Blaky v. Johnson, 60.  
 Blaisdell v. Leach, 436.  
 Bloomenthal v. Ford, 17, 74, 137, 200, 219.  
 Blyth v. Birmingham, 30, 100.  
 Boggs v. Hargrave, 73.  
 Bonzi v. Stewart, 354, 356, 360.  
 Booth v. Moffatt, 33, 63.  
 Boulton v. Gzowski, 342.  
 Boulton v. Hamilton, 206, 207.

- Boulton v. Jones, 528.  
 Bourne v. Freeth, 516.  
 Bowen v. Evans, 150.  
 Bower v. Peate, 58.  
 Boyce v. Edwards, 417.  
 Boyson v. Coles, 21, 238, 254, 296, 311,  
 335, 353.  
 Brace v. Duchess of Marlborough,  
 255.  
 Bracewell v. Williams, 71.  
 Bradley v. Luce, 26.  
 Bradley v. Riches, 265.  
 Brady v. Todd, 493.  
 Braithwaite v. Power, 524.  
 Braley v. Powers, 225.  
 Brandt v. Bowlby, 322.  
 Brant v. Virginia, 86, 96, 160.  
 Brayton v. Harding, 25.  
 Breckenridge v. Lewis, 363, 448.  
 Breeze v. Brooks, 25, 144.  
 Brigham Young v. Wagner, 86.  
 Bridge v. Connecticut, 417.  
 Briggs v. Jones, 272.  
 British Mutual v. Charnwood, 496,  
 499, 500, 506.  
 Brocklesby v. Temperance, 244, 273,  
 379, 393, 399, 446.  
 Brooke v. New York, 511.  
 Brooks v. Hassal, 492.  
 Broughton v. Hutt, 76.  
 Brown v. Equitable, 342, 417.  
 Brown v. Foster, 518, 525.  
 Brown v. Holland, 78.  
 Brown v. Leonard, 514.  
 Brown v. Pierce, 302.  
 Brown v. Powell, 508, 509.  
 Brown v. Probate, 452.  
 Brown v. Reed, 50, 60, 107.  
 Brown v. Sims, 124.  
 Brown v. Wilmerding, 362.  
 Bryant v. La Banque, 496, 505.  
 Bryant v. Moore, 473, 482, 494.  
 Bryant v. Witcher, 25.  
 Buchanan v. Young, 38.  
 Budd v. McLaughlin, 85.  
 Building, etc., Re, 496.  
 Bullard v. Bell, 376.  
 Bullitt v. Farrar, 225.  
 Burbridge v. Manners, 466.  
 Burohfield v. Moore, 379.  
 Burgess v. Seligman, 132.  
 Burk v. Clark, 529.  
 Burkenshaw v. Nicolls, 6, 15.  
 Burrowes v. Lock, 96, 102, 223, 224, 225,  
 228.  
 Burrows v. Grover, 125, 522.  
 Burrows v. Klemk, 60.  
 Burson v. Huntingdon, 439.  
 Burton v. Curyea, 324, 337.  
 Bush v. Brown, 433.  
 Bush v. Fry, 302.  
 Butler v. Maples, 474.
- C.
- Cady v. Owen, 26.  
 Cahn v. Pockets, 332, 365.  
 Cairncross v. Lorimer, 114, 136.  
 Caldwell v. Accident, 139.  
 Calvert v. Baker, 379.  
 Cameron v. Cameron, 527.  
 Camp v. St. Louis, 26.  
 Campbell v. Edwards, 73.  
 Campbell v. Gemmill, 25.  
 Canadian P. Ry. v. Burnett, 201.  
 Carnegie v. Morrison, 417.  
 Carpenter, Re, 201.  
 Carpenter v. Longan, 20.  
 Carr v. La Fevre, 412, 420.  
 Carr v. London, 109, 158, 164, 165,  
 166, 168, 179, 171, 172, 173, 175,  
 318.  
 Carritt v. Real, 263, 266.  
 Carter v. Carter, 283.  
 Carter v. Palmer, 377.  
 Carter v. Whalley, 519.  
 Cartwright v. Wilmerding, 357, 493.  
 Case v. Bartlett, 25.  
 Cason v. Grant, 444.  
 Castell, Re, Roper v. Castell, 276, 281,  
 284, 288.  
 Castle v. Castle, 19.  
 Caswell v. Worth, 62.  
 Catholic Bishop v. Troup, 477.  
 Cator v. Burke, 409.  
 Caulkins v. Whisler, 464.  
 Cave v. Cave, 151, 153, 254, 265, 283,  
 293, 294.  
 Cave v. Mills, 139.  
 Cawthorn v. Lusk, 490.  
 Central Bank, Re, 407, 417.  
 Chadwick v. Manning, 63, 201.



- Champlain v. Layton, 78.  
 Chaplin v. Vermont, 412.  
 Chapman v. Pingree, 26.  
 Chase Nat. Bank v. Faurot, 439.  
 Chatham v. Moffatt, 224.  
 Chew v. Barnet, 268, 275.  
 Chicago v. Troup, 432.  
 Chicago v. Werner, 72.  
 Chipman v. Tucker, 440.  
 Citizens v. Booze, 420.  
 Citizens v. First National, 68, 201.  
 Citizens v. Lepitre, 83, 62.  
 City Bank v. Barlow, 398, 512.  
 City Bank v. Rome, 322.  
 Clark, Re, 143, 144, 210.  
 Clark v. Dillman, 94, 137.  
 Clark v. Eckroyd, 86, 143.  
 Clark v. Kirby, 203.  
 Clark v. National Bank, 137.  
 Clark v. Roberts, 264, 407.  
 Clarke v. Palmer, 103, 280, 287, 343.  
 Claxton v. Shibley, 27.  
 Cleveland v. Cleveland, 207, 275.  
 Cleveland v. Shoeman, 363.  
 Close v. Holmes, 360.  
 Coates v. London, 51.  
 Cochrane v. Nebeker, 107.  
 Cockrill v. Cockrill, 433.  
 Cocks v. Masterman, 143.  
 Coffey v. Coffey, 343.  
 Cohen v. Mitchell, 144.  
 Cole v. Northwestern, 308, 337, 357,  
 486, 491, 495, 511.  
 Cole v. Pope, 73.  
 Coles v. Jones, 409.  
 Coles v. Pilkington, 71.  
 College v. Tuttle, 70.  
 Collier v. Miller, 43.  
 Colling, Re, 201.  
 Collingwood v. Berkeley, 96, 102.  
 Collins v. Archer, 151.  
 Collins v. Martin, 394, 401.  
 Collins v. Rosenbaum, 300.  
 Colonial Bank v. Cady (and sub nom.  
 Williams v. Colonial Bank), 116,  
 233, 272, 342, 343, 344, 345, 373,  
 404, 408, 412, 418, 420, 440, 454.  
 Colonial Bank v. Hepworth, 253, 271,  
 342, 454.  
 Colonial Bank v. Whitney, 310.  
 Columbia v. Cornell, 60, 217, 379, 458,  
 466.  
 Colyer v. Finch, 150, 151, 205, 252,  
 262, 280.  
 Comer v. Cunningham, 293.  
 Commercial Bank, Re, 417.  
 Commercial Bank v. Colt, 346.  
 Commissioners v. Clark, 394.  
 Conard v. Atlantic, 333.  
 Concessions, Re, 17, 317, 340, 496.  
 Confederation v. Merchants, 66.  
 Conrad v. Fisher, 131.  
 Consort v. Deep Level Gold Mines  
 Co., Re, 483, 486.  
 Continental Bank v. National, 93,  
 133, 136, 144.  
 Cooke v. Eshelby, 140, 141, 512.  
 Cooke v. United States, 453.  
 Coolidge v. Payson, 417.  
 Coombs v. Chandler, 303, 407, 408.  
 Cooper v. Great Falls, 140.  
 Cooper v. Phibbs, 75, 76, 78.  
 Corbett v. Brown, 15, 25.  
 Cornish v. Abington, 15, 96, 102.  
 Corser v. Paul, 143.  
 Cory v. Eyre, 265.  
 Cottrell v. Carter, 298.  
 Couchman v. Maupin, 211.  
 Court v. Berlin, 525.  
 Coventry v. Great E. Ry. Co., 35, 40,  
 95, 114, 125, 172, 173, 316, 317, 509.  
 Covil v. Hill, 297.  
 Coward v. Hughes, 73.  
 Cowdry v. Vandenburg, 396, 407,  
 416.  
 Cowgill v. Pettifish, 436.  
 Cox v. Bruce, 593.  
 Coxe v. Hardin, 322.  
 Craig v. Vicksburg, 394.  
 Crane v. London, 404.  
 Crocker v. Crocker, 341.  
 Cromwell v. Sac, 424, 425.  
 Cross v. Currie, 439.  
 Crotty v. Hodges, 370.  
 Crouch v. Credit Foncier, 376, 410,  
 411, 412, 413.  
 Crowley v. Crowther, 406.  
 Crystal Lake v. Hill, 452.  
 Cudahy Co. v. Sioux, 417.  
 Cuming, Re, 201.

Cummings v. Gilman, 362.  
 Cummings v. Powell, 432, 435  
 Cundy v. Lindsay, 302.  
 Curtis v. Wilcox, 25.

## D.

Dane v. Bank, 137.  
 Daniel v. Sinclair, 139.  
 Daugherty v. Yates, 153.  
 Davenport v. Homeyer, 381.  
 Davey's Appeal, 342.  
 David v. Park, 74, 137, 138.  
 David Stevenson v. Iba, 425.  
 Davis v. Allen, 524.  
 Davis v. Bank of England, 140, 195.  
 Davis v. Beckstein, 407.  
 Davis v. Best, 457.  
 Davis v. Bigler, 362.  
 Davis v. Bradley, 343.  
 Davis v. Snyder, 26.  
 Dean v. Crall, 131.  
 Dean v. Driggs, 317, 319.  
 Dean v. King, 511.  
 Dean v. McCarty, 38, 63, 349.  
 De Berkom v. Smith, 125.  
 De Berry v. Wheeler, 86.  
 De Bussche v. Alt, 89.  
 De Lay v. Carney Bros., 84.  
 Degg v. Midland R. Co., 28, 100.  
 Delafield v. Illinois, 412.  
 Denishorne v. Hock, 125.  
 Denton v. Great Northern, 377.  
 Derry v. Peek, 84, 85, 187, 224, 226,  
 228, 230, 231, 233, 235, 236.  
 Desbrow v. Wetherly, 379.  
 Devaynes v. Noble, 35, 106, 136.  
 Dezell v. Odell, 87.  
 Diamond v. Lawrence, 412.  
 Dickenson v. Valpy, 125, 515, 524.  
 Dickerson v. Colgrove, 207.  
 Dickson v. Reuters, 84, 427.  
 Dickson v. Swansea, 421.  
 Dillaye v. Commercial Bank, 264, 407.  
 Dingle v. Hare, 439.  
 Directors of Central Ry. Co. v. Kisch,  
 137.  
 Dixon, Ex parte, 174, 242, 299, 490.  
 Dixon v. Bell, 30, 396.  
 Dixon v. Bovill, 377.

Dixon v. Muckleston, 205, 252, 255,  
 282.  
 Dobell v. Stevens, 137.  
 Dodds v. Hills, 253.  
 Dodge v. Pope, 133.  
 Dolbeer v. Livingston, 452.  
 Dolman v. Orchard, 521.  
 Dominion Bank v. Blair, 431.  
 Dorwin v. Thompson, 43.  
 Dowle v. Saunders, 259, 262, 282.  
 Dows v. Greene, 177.  
 Dreher v. Connolly, 519.  
 Dunlap v. Lambert, 174.  
 Dunlop v. Silver, 374, 387.  
 Dunston v. Paterson, 195.  
 Durrant v. Ecclesiastical, 66.  
 Dyer v. Hargrave, 137.  
 Dyer v. Pearson, 336.

## E.

Eaglesfield v. Londonderry, 76, 87,  
 102.  
 East India v. Hensley, 477.  
 East India v. Vincent, 89.  
 Easton v. London (and sub nom.  
 Sheffield v. London), 15, 377, 401,  
 403, 411, 512.  
 Edgington v. Fitzmaurice, 63, 69, 146.  
 Edmonson v. Thompson, 520, 522.  
 Edmunds v. Bushell, 247.  
 Edwards v. Brown, 428, 431.  
 Egerton v. Earl Brownlow, 260.  
 Ehrler v. Braun, 132, 157.  
 Eldridge v. Railroad Co., 436.  
 Ellis v. Schmoeck, 96, 102.  
 Ellis v. Wait, 422, 454.  
 Elmendorf v. Tejada, 436.  
 Elmira v. Harris, 525.  
 Emmerson v. Ind, 258.  
 Engstad v. Syverson, 436.  
 Ensley v. Lewis, 293.  
 Erb v. Great Western Ry. Co., 161,  
 303, 509.  
 Espin v. Pemberton, 261, 279.  
 European Bank, Re, 424.  
 Evans v. Bank of Ireland, 95.  
 Evans v. Bicknell, 7, 33, 98, 105, 160,  
 201, 222, 223, 225, 234, 252, 278,  
 281.

Evans v. Farstall, 138.  
 Evans v. Grey, 451.  
 Evans v. Hadfield, 521.  
 Evans v. Roanoke, 268.  
 Everett v. Hydraulic, 62.  
 Everts v. Agnes, 449.  
 Ewell v. Dags, 433.  
 Exchange Bank v. People's Bank, 60,  
 504.  
 Eyre v. Burmester, 200.

## F.

Fairweather v. Archball, 75.  
 Fall River v. Buffinton, 193.  
 Faris v. Briscoe, 20.  
 Farmeloe v. Bain, 339.  
 Farmers v. Butchers, 504.  
 Farmers v. Norrich, 444.  
 Farmers v. Orr, 133, 136.  
 Farrand v. Yorkshire Banking Co.,  
 101, 282, 286, 288.  
 Farrant v. Barnes, 119.  
 Farrar v. Deffinne, 525.  
 Farrow v. Rees, 252.  
 Favill v. Roberts, 201, 206.  
 Fearing v. Clark, 439.  
 Featherstone v. McDonnell, 207.  
 Fenn v. Harrison, 477, 493.  
 Fenner v. Mears, 388.  
 Fifth Avenue Bank v. Forty-Second,  
 496.  
 Fine Art Society v. Union Bank, 51.  
 Finks v. B ich, 16.  
 Finlay v. Liverpool, 314.  
 First Nat. Bank v. Allen, 137.  
 First Nat. Bank v. Bremer, 461.  
 First Nat. Bank v. Cody, 18, 522.  
 First Nat. Bank v. Compo, 439, 441,  
 442, 444.  
 First Nat. Bank v. Dean, 319.  
 First Nat. Bank v. First Nat. Bank,  
 19, 20.  
 First Nat. Bank v. Marshall, 125, 156.  
 First Nat. Bank v. Security, 417.  
 First Nat. Bank v. Zeims, 458.  
 First State Sav. Bank v. Webster,  
 444.  
 Fish v. Clelland, 74.  
 Fisher v. Mellen, 225.  
 Fisher v. Mossman, 188.

Fitzherbert v. Mather, 177.  
 Flanagan v. Elliot, 26.  
 Fletcher v. Heath, 495.  
 Florida v. Hope, 158.  
 Ford, Ex parte, 143, 216.  
 Ford v. Anger, 464.  
 Ford v. Fellows, 158.  
 Fordyce v. Kosminski, 60.  
 Forse v. Sovereign, 153.  
 Forsyth v. Day, 114, 133.  
 Foster v. Green, 406.  
 Foster v. McKinnon, 103, 371, 378, 429,  
 435, 445.  
 Fountain v. Whelpley, 156.  
 Fourth Nat. Bank v. American, 495.  
 Fourth Nat. Bank v. Compress, 94.  
 Fourth Nat. Bank v. St. Louis, 334.  
 Fox v. Clifton, 18, 522.  
 Frank v. Chemical, etc. Bank, 137.  
 Frankel v. Wathen, 518.  
 Franklin v. Lynch, 417.  
 Franklin v. Merida, 5.  
 Fraser, Re, 126, 515, 521.  
 Frazer v. Jones, 151.  
 Freeman v. Buckingham, 511.  
 Freeman v. Cooke, 34, 93, 94, 140, 158,  
 170, 183, 223.  
 Freeny v. Hall, 157.  
 Frere v. Moore, 281.  
 Friedlander v. Texas, 177, 325, 348,  
 406.  
 Frigg v. Read, 77.  
 Frith v. Cartland, 232.  
 Fuentes v. Montis, 353, 359, 495, 511.  
 Furlong v. Carroll, 35.  
 Furnace Co. v. Moffatt, 225.

## G.

Gabarron v. Kreeft, 297, 461.  
 Gage v. Rogers, 518, 519.  
 Galvin v. Syfers, 439.  
 Gammill v. Johnson, 133.  
 Gardner v. Walsh, 379.  
 Garland v. Thompson, 224.  
 Garland v. Towne, 62.  
 Garland v. Wells, 452.  
 Garnham v. Skipper, 253, 261, 279.  
 Garrard v. Lewis, 447.  
 Gaston v. Brandenburg, 88.  
 General Estates Co., Re, 391, 422.

- General Finance Co. v. Liberator, 6.  
 General Horticultural, Re, 25.  
 General Provident, Re, 142.  
 George v. Cutting, 80.  
 Gerhard v. Bates, 69, 127.  
 Gerner v. Mosher, 224.  
 Gettysburg Bank v. Chisholm, 444.  
 Giannonne v. Fleetwood, 298.  
 Gibbons v. Wilson, 496.  
 Gibson v. Bank, 321.  
 Gibson v. Stevens, 322.  
 Gilbert v. Erie, 342.  
 Gilbert v. Richardson, 70.  
 Gillson v. North Grey, 38.  
 Girault v. A. P. Hotaling, 25.  
 Glassur v. Rolls, 224.  
 Glenn v. Gill, 215.  
 Glyn v. Baker, 410.  
 Glynn v. East & West India, 308.  
 Goetz, Jonas & Co., Re, 800, 363.  
 Goffey v. O'Reilly, 138.  
 Gold Medal v. Lumbers, 224.  
 Goodall v. Middaugh, 225.  
 Goodenow v. Ewer, 78.  
 Goodman v. Eastman, 48, 60.  
 Goodman v. Simonds, 442.  
 Goodtitle v. Morgan, 86, 105, 257, 276,  
 280.  
 Goodwin v. Roberts, 15, 75, 374, 388,  
 402, 407, 411, 412, 413, 422, 440, 455.  
 Gordon v. James, 133, 177.  
 Gordon v. Street, 51.  
 Gorgier v. Mieville, 335, 407, 410.  
 Gorham v. Gross, 62.  
 Gorman v. Davis, 525.  
 Gould v. Close, 409.  
 Gould v. Legee, 457.  
 Gould v. Wise, 452.  
 Grabill v. Bearden, 149.  
 Grabenheimer v. Rindskoff, 215.  
 Graff v. Logue, 439.  
 Graham v. Furber, 142, 301.  
 Graham v. Thompson, 25, 137, 138.  
 Grant v. McKee, 73.  
 Grant v. Nbrway, 303, 317, 508.  
 Grant v. Vaughan, 347, 377, 385, 396.  
 Graves v. Horton, 476.  
 Graves v. Key, 8.  
 Gray v. Agnew, 352, 354.  
 Gray v. Bank, 128.  
 Gray v. Harris, 62.  
 Gray v. McLennan, 89.  
 Great Northern Ry. Co. v. Harrison,  
 62.  
 Green v. Wilkie, 436.  
 Greene v. Smith, 106, 160.  
 Greenfield, Re, 436.  
 Greenfield v. Edwards, 452.  
 Greenfield v. Stowell, 43, 60.  
 Gregg v. Wells, 21, 93, 130.  
 Griffin v. Nichols, 26.  
 Griffith v. Brown, 160.  
 Griffith v. Wright, 160.  
 Grissler v. Powers, 192.  
 Gunn v. Bates, 139.  
 Gunn v. Bolckow, 308, 339.  
 Gurney v. Behrend, 324, 346, 331,  
 408.
- H.
- Hadcock v. Osmer, 224, 225.  
 Hager v. Buffalo, 417.  
 Hahn v. Kenefich, 519.  
 Hale v. Milwaukee, 319.  
 Halifax v. Wheelwright, 43, 44, 185.  
 Hall v. West End, 282.  
 Hall v. Wilson, 457.  
 Hambleton v. Central, 146.  
 Hamlin v. Abell, 512.  
 Hannah v. Taylor, 125.  
 Hanover v. American, 132.  
 Harding, Ex parte, 138.  
 Hardy v. Chesapeake, 106, 186, 187,  
 160.  
 Harkraeder v. Clayton, 449.  
 Harlem v. Mercantile, 149.  
 Harpham v. Shacklock, 153, 253.  
 Harris v. Brooks, 70.  
 Harris v. Truman, 209.  
 Harrison v. Cotgreave, 370.  
 Harrison v. Kansas, 489.  
 Hart v. Frontino, 191, 317.  
 Hart v. Mead, 452.  
 Hart v. Swaine, 78.  
 Harvey v. Smith, 107.  
 Hatch v. Searls, 443.  
 Hatchett v. Gibson, 396.  
 Hatfield v. Phillips, 308, 356, 300.  
 Haveland v. Willets, 77.  
 Hawken v. Bourne, 490.  
 Hayman, Ex parte, 214, 216, 520.

- Hayner v. Churchill, 490.  
 Heald v. Henely, 105, 484.  
 Heane v. Rogers, 4, 8, 140, 211, 218.  
 Heath v. Crealock, 151.  
 Heath v. Sansom, 519.  
 Heath v. Stoddard, 299, 357, 499.  
 Heaven v. Pender, 40.  
 Hedderly v. Backus, 297.  
 Hefner v. Palmer, 524.  
 Helly v. Matthews, 305.  
 Henderson v. Case, 425.  
 Henderson v. Comptoir, 308, 331.  
 Henderson v. Lacon, 127.  
 Henderson v. Williams, 95, 96, 177,  
     303, 304, 327, 332, 337, 438.  
 Henry v. Carson, 449.  
 Henty v. Miller, 408.  
 Herchmer v. Elliott, 103, 133, 431.  
 Hern v. Nichols, 510.  
 Herring v. Skaggs, 489.  
 Helting & Merton, Re, 133.  
 Hewitt v. Loosemore, 253, 261, 279.  
 Heyman v. Flewker, 355.  
 Hibblewhite v. McMorin, 434, 451.  
 Higgins v. Burton, 239.  
 Higgs v. Northern, 201, 422.  
 Hill v. Cumberland, 201.  
 Hill v. Epley, 86, 87, 89.  
 Hill v. Jewett, 497.  
 Hill v. Lewis, 377.  
 Hill v. Van Sandt, 25.  
 Hill v. Yarbrough, 436.  
 Hinckley v. Bank, 461.  
 Hiorns v. Holton, 423.  
 Hirsch v. Norton, 132.  
 Hirschfield v. London, 78.  
 Hirschfield v. Smith, 379.  
 Hirschman v. Budd, 379.  
 Hockley v. Bantock, 207, 250.  
 Hodgkinson, Ex parte, 523.  
 Hogarth v. Latham, 443.  
 Hoig v. Gordon, 170.  
 Hoffman v. Tuolumne, 62.  
 Holcomb v. Boynton, 86.  
 Holland v. Anderson, 133.  
 Holland v. Swain, 303.  
 Hollins v. Fowler, 302.  
 Hollis v. Harris, 452.  
 Holman v. Herscher, 522.  
 Holmes v. German, 322.  
 Holmes v. Mather, 58.  
 Holmes v. Trumper, 60.  
 Holt v. Schneider, 105, 491.  
 Holton v. Sanson, 40, 123, 220, 308,  
     316.  
 Hone v. Boyle, 342.  
 Hooper v. Gumm, 284.  
 Hopkins v. Hemsworth, 415.  
 Horn v. Baker, 354.  
 Horn v. Cole, 6, 94, 158.  
 Horne v. Boyle, 408.  
 Hosegood v. Bull, 123.  
 Hosler v. Beard, 379.  
 Hostetter v. Alexander, 19.  
 Howard v. Baillie, 489.  
 Howard v. Hudson, 5, 86, 93, 182, 187.  
 Howard v. Sadler, 265.  
 Howard v. Sheward, 493.  
 Howard v. Tucker, 508.  
 Howland v. Woodruff, 174.  
 Hubbard v. Tenbrook, 247.  
 Hubbersty v. Ward, 308, 508.  
 Huber v. Guggenheimer, 76, 81.  
 Hughes v. Percival, 59.  
 Hughes v. Twisden, 17, 145.  
 Humbleton v. Central, 141.  
 Hume v. Bolland, 139, 194.  
 Hunt v. Elmes, 203, 280.  
 Hunt v. Mississippi, 511.  
 Hunt v. States, 452.  
 Hunter v. Walters, 36, 102, 103, 104,  
     150, 179, 275, 276, 430, 432, 436.  
 Hutchinson v. Calder, 81.  
 Hutchinson v. Gill, 129.  
 Hyde v. Casey-Grimshawe, 523.

## I.

- Ibbotsen v. Rhodes, 284.  
 Ida, The, 316.  
 Imperial Land Co., Re, 421, 422.  
 Ind v. Emerson, 151.  
 Indiana v. First Nat. Bank, 147.  
 Ingals v. Ferguson, 25.  
 Ingham, Re, 205, 281.  
 Ingham v. Primrose, 22, 107, 372, 379,  
     406, 457, 459, 402.  
 Inglis v. Robertson, 213.  
 Insurance Co. v. Eggleston, 73.  
 Insurance Co. v. Mawry, 72.  
 International v. Bowen, 26, 183, 203,  
     209.

Ireland v. Livingstone, 480.  
 Irish Bank v. Gudlum, 125.  
 Irving Bank v. Wetherald, 149.  
 Iseminger v. Criswell, 25.  
 Isnard v. Torres, 60.

## J.

Jackson v. Allen, 68, 103.  
 Jacobs v. Shorey, 515.  
 James v. James, 207, 250.  
 Jamison v. Miller, 131.  
 Janberry v. Britten, 355.  
 Jamie v. London, 186.  
 Jarmain v. Hopper, 505.  
 Jarvis v. Davis, 362.  
 Jenkyns v. Osborne, 320, 321, 323,  
 339, 365, 366, 373, 406.  
 Jessel v. Bath, 509.  
 Jewel v. Rook River, 453.  
 John Shillito Co. v. McClung, 221.  
 Johannessen v. Munroe, 417.  
 Johnson v. Credit, 49, 231, 337, 356,  
 361, 495, 511.  
 Johnson v. Gulick, 225.  
 Johnson v. Hurley, 492.  
 Johnson v. Investment Co., 491.  
 Jones v. Clifford, 75.  
 Jones v. Derliok, 20, 415.  
 Jordan v. Money, 68, 86, 123, 157, 200,  
 226.  
 Jordan v. Picket, 225.  
 Jordan v. Provincial, 45.  
 Jordan v. Stevens, 78.

## K.

Kagel v. Totten, 440, 457.  
 Kalamazoo v. Clark, 436.  
 Keane v. Boycott, 432.  
 Keate v. Phillips, 8, 201, 203, 204.  
 Keating v. Orme, 14, 68, 189.  
 Kemp v. Falk, 184, 323.  
 Kennedy v. Green, 103, 432.  
 Kepp v. Wiggett, 14.  
 Kern v. Day, 25, 211.  
 Kettlewell v. Watson, 173, 273, 294.  
 Keyes v. Merrill, 73.  
 Keys v. Williams, 207, 256.  
 Kiefer v. Rogars, 133.  
 Klersky v. Nichols, 158.

Kinder v. Shaw, 254.  
 King v. Box, 332.  
 King v. Doolittle, 75.  
 Kingman v. Graham, 25, 56, 163, 158.  
 Kingsford v. Merry, 96, 303.  
 Kingston Sav. Bank v. Bosserman,  
 379.

Kinnear v. Markey, 221.  
 Kinney v. Whitou, 123.  
 Kirk v. Hamilton, 207.  
 Kirkwood v. First Nat. Bank, 417.  
 Kirkwood v. Smith, 420.  
 Knights v. Wiffen, 147.  
 Knouff v. Thompson, 198.  
 Knoxville Bank v. Clark, 60.  
 Krause v. Busacker, 225.  
 Krause v. Lutly, 525.  
 Krothowhl v. Dawson, 69, 221.  
 Kuriger v. Jæst, 26, 136, 143.

## L.

Laing v. Taylor, 73, 78.  
 Lake v. Argyll, 514, 516.  
 Lamb v. Attenborough, 355.  
 Lanfear v. Summer, 362.  
 Lang v. Smyth, 412.  
 Langdon v. Doud, 68, 187, 183.  
 Lange, Ex parte, 433.  
 Lansdown v. Lansdown, 77.  
 Lart Wilkinson v. Blades, 193.  
 Lausatt v. Lippincott, 299, 354, 357,  
 439.  
 Layard v. Maud, 86, 105, 179, 276, 281.  
 Laythcarp v. Bryant, 69.  
 Le Lievre v. Gould, 123, 224, 226.  
 Leas v. Walls, 60, 107.  
 Leather v. Morgan, 85, 136, 137, 461.  
 Leduc v. Ward, 303.  
 Ledwick v. McKim, 440, 457, 461.  
 Lee v. Bank, 417.  
 Lee v. Butler, 365.  
 Lee v. Taylor, 223.  
 Lee v. Zagury, 424.  
 Lees v. Fisher, 207, 256.  
 Leete v. State Bank, 25.  
 Legge v. Croker, 73.  
 Leggo v. Newbold, 62.  
 Leonard v. Merritt, 450.  
 Lester v. Snyder, 105, 484.  
 Lewenberg v. Hayes, 299, 357, 489.

- Lewer, *Re*, 16.  
 Lewis v. Carstairs, 189.  
 Lewis v. Jones, 78.  
 Libel v. Craddock, 525.  
 Lickbarrow v. Mason, 7, 21, 177, 183,  
 184, 319, 320, 322, 323, 327, 328, 333,  
 347, 381, 384, 390.  
 Lightner's Appeal, 132.  
 Limpus v. London, 237, 493.  
 Lines v. Grange, 27.  
 Lingonner v. Ambler, 131.  
 Lloyd v. Attwood, 279.  
 Lloyds v. Bullock, 452.  
 Lloyds v. Jones, 36, 105, 179, 261, 276,  
 280.  
 Loffus v. Maw, 71.  
 London Celluloid Co., *Re*, 6, 219.  
 London v. Bank of Liverpool, 148.  
 London v. Goddard, 253.  
 London v. Simmons, 403, 495.  
 London v. Suffield, 24, 133, 136.  
 London v. Wentworth, 178, 180, 371,  
 445.  
 Long Island v. Columbus, 439.  
 Losee v. Buchanan, 62.  
 Louisiana v. Laveille, 511.  
 Louisville v. Gray, 420.  
 Low v. Bouverie, 14, 15, 17, 89, 94, 111,  
 131, 187, 225, 227, 228.  
 Lowden v. National, 64.  
 Lowe v. Raleigh, 346, 463.  
 Lucas v. Dorrien, 309.  
 Lynch v. Nurdin, 33, 62.  
 Lyon v. Morgan, 210.  
 Lyon v. Reed, 1.  
 Lyon v. Travellers, 72.  
 Lysaght v. Edwards, 201.  
 Lythe v. Bank, 476.  
 Lyttle v. Cozard, 452.
- M.
- MacAleer v. Horsey, 80, 146.  
 MacKreth v. Symmons, 203.  
 McAdow v. Hassard, 144.  
 McArthur v. MacDowell, 424.  
 McBeth v. Craddock, 84.  
 McClain v. Abshire, 25.  
 McCord v. Levi, 225.  
 McCormick v. Bay City, 452.  
 McCravey v. Kemson, 203.  
 McDiarmid v. Hughes, 26.  
 McDonald v. Muscatine, 443.  
 McDonald v. Weeks, 293.  
 McEwan v. Smith, 339.  
 McFarlane v. McHugh, 525.  
 McGee v. Kane, 80, 96.  
 McKay v. Commercial Bank, 496, 506.  
 McKenzie v. British Linen, 22, 41,  
 114, 136.  
 McKenzie v. Montreal, 393, 412, 422,  
 424.  
 McKowan v. Ferguson, 225.  
 McInnis v. Milton, 441, 459.  
 McLean v. Buffalo, 229, 316, 317.  
 McLean v. Clark, 125, 137, 138, 515,  
 520, 522, 525.  
 McLean v. Fleming, 538.  
 McLenmore v. Rankin, 518.  
 McMahan v. Sloan, 393.  
 McManus v. Watkins, 132.  
 McMullen v. Williams, 490, 493, 495.  
 McNeil v. Tenth Nat. Bank, 297, 342,  
 407, 408, 454, 468.  
 McNeillan's Estate, 523.  
 Mack v. Piang, 20.  
 Maddick v. Marshall, 96, 102, 514.  
 Maddison v. Alderson, 68.  
 Maguire v. Selden, 123.  
 Makins v. Piggott, 33, 62.  
 Man v. State, 374.  
 Mander v. Royal, 417.  
 Mangan v. Atterton, 62.  
 Mangles v. Dixon, 66, 90, 94, 136, 157,  
 249, 418.  
 Manitoba v. Bank, 136.  
 Manley v. London, 19.  
 Manufacturers v. Hazard, 101, 157.  
 Market v. Sargent, 441, 442.  
 Markham v. O'Connor, 138.  
 Marschall v. Aikin, 23, 522.  
 Marsh v. Falker, 225.  
 Marsh v. French, 475, 476.  
 Marshall v. Furgason, 225.  
 Marshall v. National Bank, 116, 341.  
 Marshall v. Nelwood, 62.  
 Marshall v. Pierce, 39.  
 Marston v. Allen, 371, 445.  
 Martin v. Bearman, 415.  
 Martin v. Hanning, 450.  
 Martin v. Martin, 394.  
 Martinez v. Cooper, 252.

- Martini v. Coles, 351, 352, 353, 354.  
 Martyn v. Gray, 17, 125, 522, 523.  
 Mason v. Bickle, 16, 208.  
 Mason v. Bradley, 379.  
 Mason v. Frick, 412.  
 Master v. Hill, 379.  
 Masters v. Miller, 378, 388.  
 Masury v. Arkansas, 132, 342.  
 Mather v. Maidstone, 148.  
 Maxfield v. Burton, 253.  
 Mayor v. Bank of England, 43, 40, 64,  
 65, 95, 108, 116.  
 Meggy v. Imperial, 293, 489.  
 Mercer v. Hackett, 412, 414.  
 Merchants v. Bank of England. See  
 Mayor v. Bank.  
 Merchants' Bank v. Good, 371, 439,  
 441, 446.  
 Merchants' Bank v. Lucas, 68, 114,  
 136, 147, 148.  
 Merchants' Bank v. McKay, 436.  
 Merchants' Bank v. Monteith, 219.  
 Merchants' Bank v. Morrison, 253.  
 Merchants' Bank v. Phoenix, 309, 316,  
 317, 318, 339, 342, 343.  
 Merchants' Bank v. State Bank, 504.  
 Meridian Nat. Bank v. M'Conica, 210.  
 Merrimac v. Illinois, 503.  
 Merritt v. Williams, 518.  
 Metcalf v. Metcalf, 436.  
 Michigan v. Phillips, 309, 321, 325.  
 Midaugh v. Elliott, 379.  
 Midland Ry. Co. v. Johnson, 73, 75, 76.  
 Miles v. Furber, 514, 518.  
 Miles v. McIlwraith, 132.  
 Miller v. Minor, 432.  
 Miller v. Parker, 177, 298.  
 Miller v. Race, 365, 408.  
 Miller v. Ross, 26.  
 Milmo Nat. Bank v. Carter, 525.  
 Mississippi v. Ottumwa, 157.  
 Mitchell v. Warner, 376.  
 Moakes v. Nicholson, 322.  
 Mollett v. Robinson, 489.  
 Molson's Bank v. Brockville, 496.  
 Monk v. Whittenbury, 355.  
 Montagu, Ex parte, 142, 301.  
 Montagu v. Forwood, 242.  
 Montagu v. Perkins, 36, 243, 440.  
 Montaignac v. Shitta, 503.  
 Montgomery v. Hardaway, 476, 489,  
 Montgomery v. Keppel, 160.  
 Moors v. Albro, 132, 143.  
 Moore v. Bank, 407.  
 Moore v. Brownfield, 86.  
 Moore v. Harper, 515.  
 Moore v. Kane, 265, 272.  
 Moore v. Metropolitan, 233, 278, 408,  
 416, 424.  
 Moore v. Moore, 96.  
 Moore v. Northwestern, 254.  
 Moore v. Spiegel, 158, 163.  
 Moore v. Trimmer, 70.  
 Moores v. Citizens, 340, 407.  
 Moran v. Pitt, 492.  
 Moreland v. H. C. Frick, 26.  
 Morgan, Re, 234, 282.  
 Morgan v. Knight, 144.  
 Morgan v. Railroad Co., 6, 26.  
 Morgan v. United States, 412, 424,  
 425.  
 Morris v. Preston, 489.  
 Moss v. Hall, 69.  
 Moss v. Hancock, 406.  
 Mott v. Clark, 238, 425.  
 Mount Morris v. Lawson, 379.  
 Mowatt v. Castle, 217.  
 Moyce v. Newington, 181.  
 Mumford v. Stohwasser, 253.  
 Munroe v. Philadelphia, 333, 334.  
 Munroe v. Pritchett, 225.  
 Murphy v. Barnard, 132.  
 Murray v. Eagle Bank, 504.  
 Murray v. Lardner, 394.  
 Murray v. Lylburn, 425.
- N.
- Nash v. Frigate, 452.  
 Natal Investment Co., Re, 404, 431.  
 National v. Chicago, 511.  
 National v. Gray, 396.  
 National v. Jackson, 104, 286, 288, 420,  
 431.  
 National v. Texas, 423.  
 National v. Thomas, 525.  
 National v. Wilson, 491.  
 Neal v. Robinson, 27.  
 Neal v. Williams, 302.  
 New Albany v. Meyers, 482.  
 New Brunswick v. Conybeare, 127,  
 156.



- New England v. Brown, 453.  
 New York v. Bailey, 62.  
 New York v. National, 504.  
 New York v. Rothery, 33.  
 Newall v. C. P. R. Co., 293.  
 Newbold v. Wright, 297, 354.  
 Newell v. Williston, 132.  
 Newman v. King, 379.  
 Newman v. Newman, 103, 257, 261.  
     283.  
 Newsome v. Coles, 520, 521.  
 Newson v. Thornton, 321.  
 Newton v. Newton, 151.  
 Nichols v. Peck, 156.  
 Nicholson v. Sedgwick, 417.  
 Niven v. Belknap, 138.  
 Nixon v. Brown, 348.  
 Nodle v. Hawthorne, 26.  
 Nofsinger v. Goldman, 125, 522.  
 Norquist v. Dalton, 518, 524.  
 Norris v. Morrison, 39.  
 North River Bank v. Aymar, 504.  
 Northern Counties v. Whipp, 21, 98,  
     105, 160, 179, 252, 281, 288, 468,  
     496.  
     O.  
 Oak Creek v. Helmer, 131.  
 Oberfelder v. Kavanagh, 210.  
 O'Connor v. Clark, 304.  
 Odlin v. Gove, 189.  
 Ogilvie v. Jeaffreson, 103, 104, 429.  
 Ogilvie v. West Australia, 28.  
 Ogle v. Atkinson, 317.  
 Old Colony v. Dubuque, 63.  
 Oliver v. G. W. R. Co., 509.  
 Oliver v. Hinton, 260.  
 Olson v. Royern, 436.  
 Ontario Bank v. Gibson, 439.  
 Ontario Bank v. McTaggart, 233.  
 Onward v. Smithson, 14, 188, 224, 376,  
     431, 432, 434.  
 Oregon v. Forrest, 433.  
 Ormond v. Holland, 30.  
 Orr v. Orr, 63.  
 Otis v. Gardner, 272, 342.  
 Ottos, Re, 187, 315, 316, 317, 340, 347.  
 Overend, Re, 424, 496.  
 Owens v. Burgess, 38, 63.  
     P.  
 Paisley v. Bannatyne, 476.  
 Palacios v. Brasher, 452.  
 Parbury's Case, 146.  
 Parker v. Carolina, 261.  
 Parker v. Clarke, 19.  
 Parker v. Crittenden, 209, 211.  
 Parsons v. Kruger, 523.  
 Pasley v. Freeman, 64, 222.  
 Partridge v. Bank of England, 417.  
 Patterson v. Hitchock, 160.  
 Patterson v. Lytle, 37.  
 Patterson v. Tash, 354, 495.  
 Peacock v. Rhodes, 377, 385, 394.  
 Pearson v. Brown, 31, 225.  
 Pearsoll v. Chapin, 435.  
 Pease v. Gloahac, 96, 253, 303, 320, 326,  
     331, 346.  
 Peavy v. Seigler, 199.  
 Peck v. Gurney, 15, 127, 128, 164, 223.  
 Peerless v. Gates, 297.  
 Pence v. Arbuckle, 456.  
 Pennsylvania Ry. Co.'s Appeal, 116,  
     123, 177, 342.  
 People v. Bank, 136, 362.  
 People's Bank v. Gridley, 132.  
 Perry v. Lawless, 69.  
 Perry-Herrick v. Attwood, 243, 245,  
     273, 379, 393, 399.  
 Pertuit v. Damare, 20.  
 Peter v. Russell, 284.  
 Petrie v. Guelph, 85.  
 Phelps v. Illinois Ry., 15.  
 Phillips v. Hunt, 336.  
 Phillips v. Huth, 356, 360.  
 Phillips v. Phillips, 151, 153.  
 Phoenix v. Gray, 477.  
 Pickard v. Sears, 8, 44, 89, 93, 178, 220,  
     238, 284, 289, 402.  
 Picker v. London, 412.  
 Pickering v. Busk, 8, 9, 246, 299, 335,  
     353, 354, 357, 443, 473, 476, 486, 489,  
     491, 511.  
 Pickert v. Marston, 489.  
 Pieratt v. Young, 225.  
 Pierce v. Andrews, 156.  
 Pierce v. Horner, 133, 144.  
 Pierson v. Dunlop, 417.  
 Piggott v. Stratton, 68.

Piloher v. Rawlins, 253.  
 Pillans v. Mierop, 417.  
 Pitcher v. Dove, 86.  
 Pitkin v. Benfer, 525.  
 Plumb v. Fluitt, 252, 261, 268, 279.  
 Plumer v. Lord, 157.  
 Poillon v. Secor, 514.  
 Polak v. Everett, 39, 63.  
 Pole v. Leask, 487.  
 Pollard v. Reardon, 321, 325, 329, 330,  
 334, 369.  
 Pollard v. Vinton, 308, 511.  
 Pooley v. Driver, 513.  
 Polson v. Degeer, 298.  
 Pott v. Eyton, 525.  
 Potter v. Faulkner, 28, 396.  
 Potts v. Temperance, 60, 91.  
 Powell v. Fall, 38.  
 Powell v. London, 153, 179, 253, 254,  
 271, 286, 288.  
 Powell v. Rogers, 86.  
 Powell v. Smith, 73, 75.  
 Powers v. Large, 25.  
 Pratt v. Drake, 186.  
 Prentice v. Page, 303.  
 Preston v. Mann, 69, 138, 173.  
 Proctor v. Bennis, 16, 26, 91, 140.  
 Prole v. Soady, 68.  
 Proserpino, The, 316.  
 Provident v. Mercer, 412, 439.  
 Pryca v. Bury, 276.  
 Pullen v. Ready, 73.  
 Pulsford v. Richards, 80, 222.  
 Putnam v. Sullivan, 49.  
 Pyne v. Wilson, 365.

## Q.

Quebec Bank v. Taggart, 126, 417.  
 Quinn v. Davis, 299.  
 Quirk v. Thomas, 303, 523.

## R.

Railroad Co. v. Howard, 381.  
 Raleigh v. Lowe, 325, 348.  
 Ramozotti v. Bowring, 174, 242, 299.  
 Ramboll v. Soojumnull, 260.  
 Ramsden v. Dyson, 22, 33, 39, 47, 89,  
 198, 249, 510.  
 Rashdall v. Ford, 73, 76.

Rastrup v. Prendergast, 2.  
 Ratcliffe v. Barnard, 263, 270.  
 Rathburn v. Snow, 490.  
 Raynell v. Sprye, 81.  
 Rector v. Board of Improvement, 526.  
 Redfern v. Ferrier, 425.  
 Redgrave v. Hurd, 137, 144.  
 Reed v. Ingham, 376.  
 Reese v. Bates, 489.  
 Reese v. Smith, 85, 87, 103.  
 Reid, Ex parte, 282.  
 Reid v. Coleman, 519.  
 Reg. v. Blenkensop, 139.  
 Reg. v. Charnwood, 191, 230, 235, 237.  
 Reg. v. Chesley, 452, 455.  
 Reg. v. Shropshire, 253, 205, 267, 271,  
 296, 341.  
 Reg. v. Wilson, 52.  
 Reynell v. Lewis, 516.  
 Rice v. Rice, 251, 270, 281.  
 Richards, Re, 265, 282.  
 Richards v. Bank of Nova Scotia, 490.  
 Richards v. Jenkins, 196, 210.  
 Richards v. Johnston, 4, 196, 209, 210,  
 212, 220, 221.  
 Richardson v. Richardson, 332.  
 Richardson v. Silvester, 124.  
 Richer v. Voyer, 417.  
 Ricketts v. Scothorn, 70.  
 Riggs v. Pursell, 129.  
 Rimel v. Hayes, 523.  
 Rives v. Michaels, 525.  
 Rizey v. James, 524.  
 Roach v. Karr, 436.  
 Roberts v. Tucker, 441.  
 Robb v. Pennsylvania, 65, 107, 139,  
 175, 177.  
 Robinson v. Cook, 26.  
 Robinson v. Floyd, 518.  
 Robinson v. Jenkins, 310.  
 Robinson v. Montgomeryshire, 218,  
 245, 342, 418, 478, 496, 507.  
 Robinson v. Nail, 111.  
 Roberts v. Croft, 205, 282.  
 Roberts v. Trammel, 25.  
 Robertson v. Hay, 123.  
 Rockford v. Young M. C. Ass'n, 425.  
 Rodger v. Comptoir, 321, 323.  
 Rodriguez v. Hefferman, 354.  
 Rogers v. Backman, 298.  
 Rogers v. Robinson, 174.

- Romford, Re, 15, 75, 194, 201, 421.  
 Rooper v. Harrison, 252, 256.  
 Root v. French, 25, 96, 182.  
 Roots v. Williamson, 153, 253.  
 Rose v. Douglas, 452.  
 Rose v. Watson, 201.  
 Royal Ins. Co. v. Byers, 80, 140.  
 Royal v. Turquand, 213.  
 Rowland & Crankshaw, Re, 213, 214.  
 Rumball v. Metropolitan, 414.  
 Rumensnyder v. Gans, 70.  
 Russell v. Langstaffe, 243, 371, 441, 447.  
 Russell v. Wiggins, 417.  
 Rutz v. Kehr, 203.  
 Ryan v. Bank of Montreal, 143.  
 Ryckman v. Canada Life, 19.  
 Rylands v. Fletcher, 62.
- S.
- Saderquist v. Federal Bank, 118.  
 Saderquist v. Ontario, 95.  
 Sage v. Shepherd, 297.  
 Salem v. Gloucester, 143.  
 Saltus v. Everett, 297, 333, 346, 394, 399.  
 Sanders v. McLean, 321.  
 Sandys v. Hodgson, 13.  
 Sanitary v. Cook, 140.  
 Sauce v. Exchange, 417.  
 Saunders v. Dehew, 253.  
 Scarf v. Jardine, 41, 517, 518, 526, 528.  
 Schmidt v. Ittman, 537.  
 Scholfield v. Londesborough, 42, 43, 44, 46, 47, 48, 55, 57, 58, 107, 109, 117, 140, 185, 378, 441.  
 Schooner Freeman v. Buckingham, 308.  
 Schuchardt v. Allens, 494.  
 Schultz v. Astley, 441, 447.  
 Schuster v. McKellar, 334.  
 Schuykill v. Copley, 440, 437.  
 Sohway v. Bank, 136.  
 Solauch v. O'Hare, 420.  
 Scollans v. Rollins, 109, 396.  
 Scotland v. O'Connell, 60.  
 Scott v. Bank, 114, 136.  
 Scott v. Dixon, 127.  
 Scott v. Pilkington, 377.  
 Searles v. Seippi, 60.  
 Second Nat. Bank v. Hewitt, 378.  
 Second Nat. Bank v. Wallbridge, 95.  
 Sessions v. Rice, 153.  
 Seton v. Lafone, 120, 171, 172, 187, 193, 309, 317.  
 Sewell v. Burdick, 308, 331.  
 Seylar v. Carson, 435.  
 Sharp v. Foy, 205.  
 Sharples v. Adams, 253.  
 Shaw v. Levy, 362.  
 Shaw v. Picton, 139.  
 Shaw v. Port Philip, 50, 52, 64, 95, 108, 237, 496, 499.  
 Shaw v. Railroad Co., 325, 346, 348, 376, 378, 383, 466.  
 Sheffield v. London (and sub nom. Easton v. London), 15, 377, 401, 403, 411, 512.  
 Sheffield v. Woodstock, 434.  
 Sheldon v. Hurtley, 377.  
 Sheldon v. Parker, 382.  
 Sheppard v. Union Bank, 96, 346.  
 Sherrod v. Langdon, 516.  
 Shields v. McClure, 131, 156.  
 Shorthard v. Sutton, 203.  
 Shott v. Streatfield, 522, 523.  
 Shrewsbury v. Smith, 62.  
 Shroeder v. Young, 70.  
 Sibley v. Quinsigamon, 132.  
 Sioux v. First Nat. Bank, 511.  
 Sioux v. Trust Co., 213.  
 Simm v. Anglo-American, 4, 6, 147, 187, 191, 227, 235, 236, 317.  
 Simmons v. Atkinson, 60.  
 Simmons v. London, 239, 329, 373, 376, 377, 383, 411, 512.  
 Simpson v. Accidental, 66.  
 Showkegan v. Cutter, 132.  
 Skyring v. Greenwood, 130.  
 Slim v. Croucher, 223, 223.  
 Sliney v. Davis, 143.  
 Small v. Attwood, 140.  
 Smith v. Chadwick, 137, 144.  
 Smith v. Grouette, 174, 242, 299.  
 Smith v. Hughes, 66, 91.  
 Smith v. Hull, 490.  
 Smith v. Kay, 66, 81, 145.  
 Smith v. Kendall, 382.  
 Smith v. Land & House, 144.  
 Smith v. London, 100.  
 Smith v. Mercer, 143.  
 Smith v. McGuire, 230.

- Smith v. Missouri, 511.  
 Smith v. Slavin, 194.  
 Smith v. Smith, 71.  
 Smith v. Walkerville, 317, 490.  
 Smith v. Wegnellin, 412.  
 Smith v. Peoria, 451, 452.  
 Smith v. Roach, 157.  
 Smith v. Rogers, 342, 408.  
 Snell v. Insurance Co., 73, 79.  
 Société v. Metropolitan, 43, 48, 49, 58,  
 60, 467.  
 Société v. Walker, 845.  
 Soltau v. Gerdau, 302, 304, 495.  
 Somers v. Brewer, 311, 484.  
 Sornborger v. Sanford, 483.  
 South Essex, Re, 209, 218.  
 Southall v. Rigg, 78.  
 Southard v. Sutton, 70.  
 Southern v. Silva, 10.  
 Spear v. Travers, 386, 353, 365.  
 Spencer's Case, 376.  
 Spencer v. Clarke, 36, 105, 179, 270.  
 Spooner v. Browning, 475.  
 Spooner v. Cummings, 299, 475.  
 Squire v. Whitton, 451.  
 St. Cesaire v. McFarlane, 412.  
 St. Louis v. Larned, 316.  
 Stables v. Eley, 529.  
 Stackhouse v. Jersey, 151.  
 Stanhope v. Verney, 203, 204.  
 Stansfeld v. Cubitt, 133.  
 Stanton v. Estey, 131.  
 Starr v. Bennett, 74, 76.  
 Starr v. Newman, 123.  
 State v. Flathers, 416.  
 State v. Dean, 451.  
 State v. Hastings, 395.  
 State v. Peck, 451.  
 State v. Pepper, 451.  
 State v. Potter, 452.  
 State v. Matthews, 49, 437.  
 Staton v. Bryant, 86.  
 Stephens v. Baird, 8.  
 Stephens v. Barfoot, 293.  
 Stephens v. Dennett, 39, 36.  
 Stephens v. Head, 26.  
 Stevens v. Dermott, 7, 39, 86.  
 Stevens v. Irwin, 362.  
 Stevens v. Ludlum, 123.  
 Stevens v. Wilson, 363.  
 Stewart v. Brown, 525.  
 Stewart v. Kennedy, 78.  
 Stewart v. Rounds, 182, 475.  
 Stewart v. Stewart, 78.  
 Stiff v. Ashton, 86.  
 Stinson v. Whitney, 517.  
 Stoddard v. Chambers, 207.  
 Stoessing v. Southeastern, 441.  
 Stollenwerck v. Thatcher, 333.  
 Stone v. Denny, 225.  
 Stone v. Engstran, 27.  
 Stone v. Georgia, 199.  
 Storer v. Keith, 452.  
 Strand v. Griffith, 137.  
 Strauss v. United Tel. Co., 412.  
 Strecker v. Conn, 517, 525.  
 Stronge v. Hawkes, 284.  
 Studdard v. Lemmond, 26.  
 Sullivan v. Colly, 86, 160.  
 Summers v. Heard, 523.  
 Sunderlin v. Struthers, 211.  
 Sutton v. Tatham, 443, 478, 489.  
 Swamell v. Watson, 436.  
 Swan, Ex parte, 44, 108, 109, 341, 347,  
 397, 447, 450, 463.  
 Swan v. N. B. A., 18, 33, 36, 43, 44, 47,  
 49, 104, 108, 109, 110, 117, 120, 129,  
 173, 183, 184, 341, 347, 370, 372, 397,  
 433, 445, 447, 449, 450, 452, 459, 463.  
 Swaisland v. Davidson, 60, 107.  
 Swigert v. Aspden, 519.  
 Swinbanks, Re, 133.  
 Swinney v. Edwards, 379.  
 Swire v. Francis, 503.  
 Swift v. Winterbotham, 124, 125,  
 156, 506.  
 Sylvester v. Henrich, 25.

## T.

- Tailby v. Official Receiver, 201.  
 Tapham v. Curtis, 62.  
 Tapp v. Lee, 15, 25.  
 Tapscott v. Williams, 376.  
 Tasker v. Small, 201.  
 Taunton v. Royal, 490.  
 Tayler v. Great Eastern, 177.  
 Taylor v. Ely, 39.  
 Taylor v. Gardiner, 433.  
 Taylor v. Great Indian, 454.  
 Taylor v. Kymer, 356.  
 Taylor v. Medham, 96.

- Taylor v. Pope, 299, 303, 357, 489.  
 Taylor v. Russell, 253, 262, 263, 285.  
 Taylor v. Stray, 489.  
 Taylor v. Truman, 356.  
 Telegraph Co. v. Davenport, 141.  
 Texira v. Evans, 451.  
 Third Nat. Bank v. Merchants, 149.  
 Third Nat. Bank v. Spring, 420.  
 Thistle v. Buford, 197.  
 Thomas v. Brown, 15.  
 Thomas v. Grise, 146.  
 Thompson v. Dominy, 320.  
 Thompson v. First Nat. Bank, 524.  
 Thompson v. Perrine, 376.  
 Thompson v. Shelton, 105, 491.  
 Thomson v. Clydesdale, 406.  
 Thorman v. Burt, 509.  
 Thorne v. Heard, 496.  
 Thornton v. McDonald, 522.  
 Thoroughgood's Case, 104, 428.  
 Thorpe v. Houldsworth, 105, 276, 286.  
 Tillotson v. Mitchell, 156.  
 Timpson v. Allen, 177, 486.  
 Tinson v. Francis, 423.  
 Tobin v. Allen, 133.  
 Tobin v. Manhattan, 461.  
 Todd v. Coshell, 62.  
 Tomkinson v. Balkis, 6, 17, 224, 317, 340.  
 Torrance v. Bolton, 260.  
 Tower v. Hoslam, 131.  
 Towle v. Leavitt, 299, 478, 489, 512.  
 Tracy v. Lincoln, 158.  
 Traill v. Baring, 81, 145.  
 Trenton v. Duncan, 25, 26.  
 Trevivian v. Lawrence, 207.  
 Trimble v. Bank, 141, 340.  
 Tripp v. Martin, 512.  
 Troughton v. Gitley, 143, 299.  
 Tryon v. Whitmarsh, 225.  
 Trust & Loan Co. v. Hamilton, 397.  
 Trust & Loan Co. v. Ruttan, 206.  
 Trustees v. Smith, 86, 96.  
 Trustees v. Wheeler, 177.  
 Turner v. Francis, 84.  
 Two Rivers Co. v. Day, 188, 158.
- U.
- Udell v. Atherton, 493.  
 Union v. Kent, 48, 282.
- Union v. Laird, 132.  
 Union v. Mersey, 45, 48, 53, 55, 110.  
 Union v. Southern California, 496.  
 Union v. Wilmot, 196.  
 Upton v. Tribilcock, 74, 75.  
 Utica v. Mersereau, 207.  
 Utterson v. Rennie, 153.
- V.
- Vagliano v. Bank of England, 43, 96.  
 Vallett v. Parker, 439.  
 Van Dusen v. Jungleblut, 299, 489.  
 Van Duzen v. Howe, 53, 57, 441, 448.  
 Van Hasselt v. Saok, 139.  
 Van West v. First Nat. Bank, 141, 149.  
 Vance v. Lowther, 379.  
 Vaughan v. Menlove, 80, 88.  
 Vaughan v. Taff Vale Ry. Co., 88, 99.  
 Venables v. Baring, 380, 397, 410, 412, 422, 468.  
 Vermilyea v. Canniff, 76.  
 Vernon, Re, 282.  
 Vice v. Anson, 125.  
 Vickers v. Hertz, 303, 337.  
 Viele v. Judson, 33, 39, 136.  
 Vilmont v. Bently, 131.  
 Vineberg v. Anderson, 174, 299.  
 Vorley v. Cooke, 103, 429, 432.  
 Vulcan v. Rapid City, 298.  
 Vulliamy v. Noble, 522.
- W.
- Wachsman v. Columbia Bank, 136.  
 Wachussett v. Sioux City, 25, 143, 209.  
 Waldron v. Sloper, 101, 105, 173, 282.  
 Walker v. Hyman, 140, 304.  
 Waller v. Missouri, 121.  
 Wallerick v. Smith, 158.  
 Walls v. Ritter, 131.  
 Walsh v. Hunt, 60, 167.  
 Walters v. Tielkmeyer, 461.  
 Warden v. Greer, 319.  
 Warlow v. Harrison, 377.  
 Warner v. Martin, 495.  
 Warner v. Watson, 25.  
 Warrington v. Early, 379.  
 Waterhouse v. Bank of Ireland, 342, 408.

- Watkins, Ex parte, 300, 303.  
 Watson v. Jones, 84, 224.  
 Watson v. Russell, 459.  
 Watson v. Threlkeld, 27.  
 Watteau v. Fenwick, 246, 247.  
 Waugh v. Carver, 125.  
 Weaver v. Barden, 341.  
 Webb v. Corbin, 436.  
 Webb v. Herne Bay, 19, 414, 422.  
 Webster v. Peck, 362.  
 Webster v. Webster, 523.  
 Weeks v. Palmer Bank, 139.  
 Wegner v. Second Ward, 461.  
 Weidman v. Symes, 60.  
 Weinstein v. National Bank, 187.  
 Weir v. Bell, 237, 498.  
 Welland v. Hathaway, 8, 196.  
 Werrich v. Mahoning Co. Bank, 407.  
 West v. Jones, 19, 24, 94, 103, 157, 231.  
 West v. MacInnes, 424.  
 West Chicago v. Morrison, 272.  
 Westbrooke v. Gurdereau, 158.  
 Western v. Addie, 127.  
 Western v. Page, 489.  
 Western v. Wagner, 324, 337.  
 Wheal Unity Co., Re, 209.  
 Wheeler v. Benton, 476.  
 Wheeler v. Guild, 466.  
 Wheeler v. McGuire, 489.  
 Wheeler v. Smith, 78.  
 White v. Ashton, 68.  
 White v. Continental Nat. Bank, 149.  
 White v. Grunish, 195.  
 White v. Sage, 84.  
 White v. Southend Hotel Co., 201.  
 White v. Vermont, 412.  
 White v. Walker, 69, 70.  
 Whitehead v. Tuckett, 474.  
 Whitmore v. Nickerson, 442.  
 Whiteside v. First Nat. Bank, 380,  
 397, 412.  
 Whitney v. Snyder, 440.  
 Whyte v. Heyman, 882.  
 Wichita v. Atchison, 317, 511.  
 Wiechers v. Central Trust Co., 189.  
 Wigle v. Williams, 519.  
 Wilding v. Sanderson, 78.  
 Wilkinson v. Johnson, 143.  
 Wilkinson v. King, 511.  
 Willoughby v. Willoughby, 253.  
 Williams v. Barton, 336.  
 Williams v. Carwardine, 377.  
 Williams v. Colonial Bank (and sub  
 nom. Colonial Bank v. Cady), 116,  
 238, 272, 342, 343, 344, 345, 373,  
 404, 412, 418, 420, 440, 454.  
 Williams v. Donnelly, 425.  
 Williams v. Given, 311, 434.  
 Williams v. Keats, 521.  
 Williams v. Lambe, 151.  
 Williams v. Stern, 71.  
 Williams v. Wilmington, 511.  
 Willmott v. Barber, 83, 89, 90, 92, 111,  
 137.  
 Win v. Bell, 261.  
 Winch v. Keesley, 389.  
 Winslow v. Leonard, 362.  
 Winter v. Belmont, 347, 468.  
 Witzler v. Collins, 511.  
 Wood v. Argyll, 514, 516.  
 Wood v. Seely, 221.  
 Wood v. Rowcliffe, 355.  
 Woodhull v. Rosenthal, 26.  
 Woodworth v. Bank, 374.  
 Wookey v. Pole, 347, 385, 396.  
 Worrall v. Gheen, 43, 48.  
 Wortham v. Curley, 221.  
 Worthington v. Morgan, 261, 270.  
 Wortley v. Birkhead, 258.  
 Waters' Appeal, 142, 209, 211.  
 Wright's Appeal, 146.  
 Wright v. Campbell, 354.  
 Wright v. Fonda, 525.  
 Wright v. Hazen, 198.  
 Wright v. Solomon, 369.  
 Wright v. Snow, 97.  
 Wynne v. Mason, 188.
- Y.
- Yocum v. Smith, 60.  
 Young v. Brewster, 347, 461, 468.  
 Young v. Grote, 34, 42, 43, 44, 45, 107,  
 117, 118, 457, 468.  
 Young v. Hope, 142, 301.  
 Young v. MacNider, 241, 398, 407, 424.  
 Young v. Ward, 212.
- Z.
- Zimmerman v. Rote, 50, 60, 107, 460.  
 Zuchtman v. Roberts, 4, 86, 159, 298.



## ABBREVIATIONS USED IN THIS VOLUME.

A. C. (1891, A. C.)...	Law Reports, Appeal Cases of 1801.
A. & E.....	Adolphus & Ellis—Reports.
Ala.....	Alabama—Reports.
Amb.....	Ambler—Reports.
Anst.....	Anstruther—Reports.
App. Cas.....	Law Reports, Appeal Cases.
Ark.....	Arkansas—Reports.
Atk.....	Atkyns—Reports.
Atl. R.....	Atlantic Reporter.
B. & Ald.....	Barnewall & Alderson—Reports.
B. & Ad.....	Barnewall & Adolphus—Reports.
B. & C.....	Barnewall & Cresswell—Reports.
B. & S.....	Best & Smith—Reports.
Bac. Abr.....	Bacon's Abridgment.
Ball & B.....	Ball & Beatty—Reports.
Barb.....	Barbour (New York)—Reports.
Beav.....	Beavan—Reports.
Bing.....	Bingham—Reports.
Bing. N. C.....	Bingham's New Cases—Reports.
Bl. H.....	Blackstone (Henry)—Reports.
Bli.....	Bligh—Reports.
Bli, N. S.....	Bligh, New Series—Reports.
Bos. & Pul.....	Bosanquet & Pullen—Reports.
Bro. Ch.....	Brown's Chancery—Reports.
Brod. & B.....	Broderip & Bingham—Reports.
C. B.....	Common Bench—Reports.
C. B, N. S.....	Common Bench, New Series—Reports.
C. C. A.....	Circuit Court Appeals—Reports.
C. & J.....	Crompton & Jervis—Reports.
C. P. D.....	Law Reports, Common Pleas Division.
C. & M.....	Crompton & Meeson—Reports.
C, M. & R.....	Crompton, Meeson & Roscoe—Reports.
Cab. & E.....	Cababé & Ellis—Reports.
Cal.....	California—Reports.
Cent. Dig.....	Century Digest.
Ch. (1891, Ch.).....	Law Reports, Chancery Division of 1891.
Ch. D.....	Law Reports, Chancery Division—Reports.
Cl. & F.....	Clark & Finnelly—Reports.
Co. Lit.....	Ccke on Littleton.



Co. Rep.....	Coke — Reports.
Cold.....	Coldwell (Tennessee) — Reports.
Colo.....	Colorado — Reports.
Colo. App.....	Colorado Appeal — Reports.
Com. Dig.....	Comyn's Digest.
Conn.....	Connecticut — Reports.
Cr. & St.....	Craigie & Stewart — Reports.
D. & Ry.....	Dowling & Ryland — Reports.
Dall.....	Dallas (Pennsylvania) — Reports.
De G., F. & J.....	De Gex, Fisher & Jones — Reports.
De G. & J.....	De Gex & Jones — Reports.
De G., J. & S.....	De Gex, Jones & Smith — Reports.
De G., M. & G.....	De Gex, Macnaghten & Gordon — Reports.
De G. & Sm.....	De Gex & Smale — Reports.
Dra.....	Draper (Upper Canada) — Reports.
Dr. & War.....	Drury & Warren — Reports.
Drew.....	Drewry — Reports.
E. & E.....	Ellis & Ellis — Reports.
El., B. & S.....	Ellis, Best & Smith — Reports.
El. & Bl.....	Ellis & Blackburn — Reports.
E., B. & E.....	Ellis, Blackburn & Ellis — Reports.
Esp.....	Espinasse — Reports.
Ex.....	Exchequer — Welsby, Hurlstone & Gordon — Reports.
Ex. Div.....	Law Reports — Exchequer Division.
Fed. R.....	Federal Reporter.
Ga.....	Georgia — Reports.
Gr.....	Grant (Ontario) — Reports.
Grat.....	Grattan (Virginia) — Reports.
H. & C.....	Hurlstone & Coltman — Reports.
H. & N.....	Hurlstone & Norman — Reports.
H. L. C.....	House of Lords Cases.
Head.....	Head (Tennessee) — Reports.
Hem. & M.....	Hemming & Miller — Reports.
Hill.....	Hill (New York) — Reports.
How.....	Howard (United States) — Reports.
Humph.....	Humphrey (Tennessee) — Reports.
Hun.....	Hun (New York) — Reports.
Ill.....	Illinois — Reports.
Ill. App.....	Illinois Appeal — Reports.
Imp. St.....	Imperial Statute.
Ind.....	Indiana — Reports.
Ind. App.....	Indiana Appeal — Reports.
J. & H.....	Johnson & Hemming — Reports.
J. & W.....	Jacob & Walker — Reports.
Jac.....	Jacob — Reports.
John.....	Johnson — Reports.
Johns.....	Johnson (New York) — Reports.
Johns. Ch.....	Johnson Chancery (New York) — Reports.
Kan.....	Kansas — Reports.

Kay & J.....	Kay & Johnson — Reports.
Ky.....	Kentucky — Reports.
L. C. J.....	Lower Canada Journal.
L. J.....	Law Journal.
L. J. Bk.....	Law Journal, Bankruptcy — Reports.
L. J. C. P.....	Law Journal, Common Pleas — Reports.
L. J. M. C.....	Law Journal, Magistrates' Cases — Reports.
L. J. N. S.....	Law Journal, New Series.
L. J. O. S.....	Law Journal, Old Series.
L. J. P. C.....	Law Journal, Privy Council — Reports.
L. J. Q. B.....	Law Journal, Queen's Bench — Reports.
L. R.....	Law Reports.
L. R. Ir.....	Law Reports, Ireland.
L. T.....	Law Times.
L. T. N. S.....	Law Times, New Series.
La. Ann.....	Louisiana Annual — Reports.
Ld. Ray.....	Lord Raymond — Reports.
M. & S.....	Maule & Selwyn — Reports.
M. & W.....	Meeson & Welsby — Reports.
Mac. & G.....	Macnaghten & Gordon — Reports.
Macq. H. L.....	Macqueen's Appeal Cases.
Madd.....	Maddock — Reports.
Man.....	Manitoba — Reports.
Man. & G.....	Manning & Granger — Reports.
Man. & R.....	Manning & Ryland — Reports.
Mass.....	Massachusetts — Reports.
Md.....	Maryland — Reports.
Me.....	Maine — Reports.
Mer.....	Merivale — Reports.
Met.....	Metcalf (Massachusetts) — Reports.
Mich.....	Michigan — Reports.
Minn.....	Minnesota — Reports.
Misc. R.....	Miscellaneous (New York) — Reports.
Miss.....	Mississippi — Reports.
Mo.....	Missouri — Reports.
Mo. App.....	Missouri Appeal — Reports.
Mo. App. R.....	Missouri Appeal Reporter.
Moo. & M.....	Moody & Malkin — Reports.
Moo. P. C.....	Moore's Privy Council Cases — Reports.
Moo. Ind. App.....	Moore's India Appeals — Reports.
Moo. & R.....	Moody & Robinson — Reports.
Moo. J. B.....	Moore, J. B. — Reports.
Moo. & P.....	Moore & Payne — Reports.
Moo. & S.....	Moore & Scott — Reports.
Mos.....	Moseley — Reports.
My. & C.....	Mylne & Craig — Reports.
My. & K.....	Mylne & Keena — Reports.
N. & P.....	Neville & Perry — Reports.
N. C.....	North Carolina — Reports.

N. D. ....	North Dakota — Reports
N. E. R. ....	North Eastern Reporter.
N. H. ....	New Hampshire — Reports
N. Y. ....	New York — Reports
N. Y. St. ....	New York State — Reports
N. Y. Sup. Ct. ....	New York Supreme Court — Reports.
N. Y. Supp. ....	New York Supplement — Reports.
N. W. R. ....	North Western Reporter.
Neb. ....	Nebraska — Reports
Ohio C. C. ....	Ohio Circuit Court — Reports.
Ohio C. D. ....	Ohio Condensed Cases — Reports.
Ont. ....	Ontario — Reports.
Ont. App. ....	Ontario Appeal — Reports.
Oreg. ....	Oregon — Reports.
P. C. ....	Privy Council.
P. D. ....	Law Reports, Probate Division.
P. Wms. ....	Peere Williams — Reports.
Pa. ....	Pennsylvania — Reports.
Pac. R. ....	Pacific Reporter.
Paige ....	Paige (New York) — Reports.
Q. B. ....	Adolphus & Ellis, New Series — Reports.
Q. B. (1891, Q. B.) ...	Law Reports, Queen's Bench Division, 1891.
Q. B. D. ....	Law Reports, Queen's Bench Division.
Que. L. R. ....	Quebec Law Reports.
R. I. ....	Rhode Island — Reports.
Raym. ....	Lord Raymond — Reports.
Russ. ....	Russell — Reports.
Russ. & M. ....	Russell & Mylne — Reports.
Ry. & M. ....	Ryan & Moody — Reports.
S. C. ....	Supreme Court
S. C. Can. ....	Supreme Court, Canada — Reports.
S. C. R. ....	Supreme Court Reporter.
S. D. ....	South Dakota — Reports.
S. E. R. ....	South Eastern Reporter.
S. R. ....	Southern Reporter.
S. W. R. ....	South Western Reporter.
Saund. ....	Saunders — Reports.
Sc. ....	Scott — Reports.
Sc. N. R. ....	Scott's New Reports.
Sch. & L. ....	Scholes & Lefroy — Reports.
Serg. & R. ....	Sergeant & Rawle (Pennsylvania) — Reports.
Show. ....	Showers — Reports.
Sim. ....	Simmons — Reports.
Sim. & St. ....	Simons & Stuart — Reports.
Sm. L. C. ....	Smith's Leading Cases.
Sw. & Tr. ....	Swabey & Tristram — Reports.
Sw. ....	Swanston — Reports.
T. R. ....	Term Reports (Durnford & East) — Reports.
Taml. ....	Tamlyn — Reports.

Taunt.....	Taunton—Reports.
Tex.....	Texas—Reports.
Tex. Civ. App.....	Texas Civil Appeals—Reports.
Tied. R. P.....	Tiedeman's Real Property.
T. & R.....	Turner & Russell—Reports.
Tyrw.....	Tyrwhitt—Reports.
U. C. C. P.....	Upper Canada, Common Pleas—Reports.
U. C. Q. B.....	Upper Canada, Queen's Bench—Reports.
U. S.....	United States—Reports.
V. & B.....	Vesey & Beames—Reports.
Va.....	Virginia—Reports.
Vent.....	Ventris—Reports.
Vern.....	Vernon—Reports.
Ves.....	Vesey—Reports.
Vin. Ab.....	Viner's Abridgment.
Vt.....	Vermont—Reports.
W. N.....	Weekly Notes.
W. R.....	Weekly Reporter.
W. Va.....	West Virginia—Reports.
Wall.....	Wallace (United States)—Reports.
Wash. R. P.....	Washburn's Real Property.
Wend.....	Wendell (New York)—Reports.
Wheat.....	Wheaton (United States)—Reports.
Wis.....	Wisconsin—Reports.
Y. & C.....	Younge & Collyer—Reports.
Y. & C. C.....	Younge & Collyer's Chancery Cases.
Y. & J.....	Younge & Jervis—Reports.
You.....	Younge—Reports.

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# THE LAW OF ESTOPPEL

BY

## MISREPRESENTATION.

### CHAPTER I.

#### INTRODUCTION.

Lord Coke divides estoppel into (1) Estoppel by record; (2) Estoppel by writing (or deed); and (3) Estoppel *in pais* (Estoppel by matter in the country). We have the same subdivisions to-day, but the third class has very largely changed its character and ought to change its name.<sup>1</sup> Of it Lord Coke said:<sup>2</sup>

"By matter *in pais*, as by liverie, by entry, by acceptance of rent, and by acceptance of an estate, as here in the case that Littleton putteth; whereof Littleton maketh a speciall observation, that a man shall be estopped by matter in the countrey without any writing."

Such estoppels are now said to be obsolete,<sup>3</sup> but that is not quite the fact. It may be that livery of seizin is out of date; that estoppel will now but seldom arise "by entry;" and that "acceptance of an estate" will more frequently operate as an election or a waiver than as an estoppel. Nevertheless it may not only be said that "acceptance of rent" as an estoppel is still familiar to us, but that the principle of estoppel which underlies all of Lord Coke's instances is of ever-growing importance.

For they may all be included under Mr. Bigelow's title "Estoppel by Contract," which embraces

"All cases in which there is an actual, or virtual, undertaking to treat a fact as settled, so that it must stand specifically as agreed."<sup>4</sup>

<sup>1</sup> The phrase "estoppel *in pais*" has yet the value of marking off estoppel by record and estoppel by deed, from all the heterogeneous cases which are not these. It was never intended to cover cases of estoppel by misrepresentations; and such cases have only been assigned to it

because they were less allied to either of the other two categories.

<sup>2</sup> Upon Litt. 352 (a). And see Lyon v. Reed (1844), 13 M. & W. 309; 13 L. J. Ex. 377.

<sup>3</sup> Cababé on Estoppel, p. 4.

<sup>4</sup> Bigelow on Estoppel (5th ed.), 455.

At the present day a vendor, if by his deed he have assumed to convey an estate in fee, is estopped from asserting otherwise. In Lord Coke's time the deed would have had the same effect; and, if the conveyance had been by parol, accompanied by livery of seizin, there would have been the same estoppel. Estoppel "by livery," therefore, is clearly within the class estoppel by contract, as described by Mr. Bigelow. The other three instances mentioned by Lord Coke proceed upon identical principles.

Estoppel *in pais*, then, or rather the principle connoted by that expression, is far from obsolete. The estoppel of a bailee to deny the bailor's title; the estoppel of an acceptor of a bill to deny the signature of the drawer; the estoppel of a tenant to deny the estate of the landlord; and scores of other cases depend upon it.

There has been a still more remarkable inclusion under the title estoppel *in pais*; one wholly unknown in Lord Coke's time, namely, estoppel by misrepresentation. Estoppel of this sort does not in any way depend upon contract, and cannot claim sufficient kinship with Lord Coke's four instances to merit inclusion with them in his class "Estoppel *in Pais*." Nevertheless, *faute de mieux*, there it has gone.

#### SUBDIVISIONS OF ESTOPPEL IN PAIS.

Mr. Bigelow, the principal text writer upon the subject of estoppel, retaining the phrase "estoppel *in pais*," subdivides it into (1) estoppel by contract; and (2) estoppel by conduct.<sup>1</sup> Estoppel by conduct he subdivides into: (1) estoppel by misrepresentation;<sup>2</sup> (2) estoppel by negligence;<sup>3</sup> and (3) estoppel by waiver.<sup>4</sup>

The present work does not treat of estoppel by record; nor of estoppel by deed; nor yet of estoppel by contract. Of estoppel by negligence, apart from misrepresentation and as an instance of it, it denies the existence.<sup>5</sup> And estoppels by waiver are dismissed with Mr. Bigelow's remark that

"It appears to be little, if anything, more than giving a new name to call them estoppels."<sup>6</sup>

<sup>1</sup> Bigelow on Estoppel (5th ed.), 20, 453, 459, 556.

<sup>2</sup> *Id.*, p. 556.

<sup>3</sup> *Id.*, p. 633.

<sup>4</sup> *Id.*, p. 660.

<sup>5</sup> See ch. IX.

<sup>6</sup> Bigelow on Estoppel (5th ed.), p. 660.

The volume, then, is limited to estoppel by misrepresentation. Mr. Bigelow's classification makes estoppel of this sort a subdivision of estoppel by conduct. But in such a division of the subject, the class (estoppel by conduct) is narrower than the sub-class (estoppel by misrepresentation);<sup>1</sup> and necessitates the re-subdivision of the sub-class (estoppel by misrepresentation) into misrepresentation by language, and misrepresentation by conduct; thus reproducing estoppel by conduct in the second analysis of itself. It would be better to divide estoppel *in pais* into estoppel by contract, and estoppel by misrepresentation. Both of these, then, may be respectively subdivided (if thought advisable) into contract and misrepresentation (1) by language, and (2) by conduct.

The classification of estoppels *in pais* suggested in Smith's Leading Cases<sup>2</sup> — estoppels by statement, by conduct, and by negligence — is defective (1) because it fails to recognize this main division into contract and misrepresentation, in both of which "statement" is but the expression of that which "by conduct" is implied; and (2) because, concurring with Mr. Bigelow, the author regards estoppel by negligence as something which may exist apart from misrepresentation. He is, however, as unable as Mr. Bigelow to give an instance of it — indeed does not try to do so.

Another subdivision (not heretofore distinctly made) is arrived at by distinguishing between cases in which the misrepresentation is made by the estoppel-denier himself (personal misrepresentation); and those in which the misrepresentation has been made by some third person, the estoppel-denier having but furnished the occasion, or opportunity, for it — having done that which was necessary to make it credible. This latter class may be termed assisted misrepresentation. The present writer believes that the phrase will be found to be of much service.

#### DEFINITION.

Lord Coke tells us that

"'Estoppel' cometh of the French word *estoupe*, from whence the English word *stopped*; and it is called an estoppel, or conclusion, because a man's own act, or acceptance, stoppeth or closeth up his mouth to allege or plead the truth."

<sup>1</sup>For misrepresentation may be by conduct, or by direct assertion.

<sup>2</sup>10th ed. 834.



Estoppel *in pais* has been well defined to be:<sup>1</sup>

"An impediment or bar, by which a man is precluded from alleging, or denying, a fact, in consequence of his own previous act, allegation or denial to the contrary."

Mr. Bigelow describes estoppel as follows:<sup>2</sup>

"Estoppel *in pais* arises (1) from contract; (2) independently of contract, from act or conduct, which, has induced a change of position, in accordance with the real or apparent intention of the party against whom the estoppel is alleged; and it designates some present or past fact, fixed by or in virtue of the contract, or of the act or conduct in question."

Of this it may, respectfully, be said that it hovers between a definition and a statement of conditions: that as the latter it is inadequate; and that for a definition the one above quoted is sufficient.

Mr. Cababé's definition is as follows:<sup>3</sup>

"An admission of a state of facts, or of fact irrespective of its truth, which, for the purpose of determining their rights and obligations arising out of a given transaction, the parties thereto are entitled to exact from one another, or one of them is entitled to exact as against the others, or other."

And in Smith's Leading Cases<sup>4</sup> estoppel is said to be

"An admission, or something which the law treats as an admission of an extremely high and conclusive nature."

The present writer sees no good reason for describing an estoppel as an "admission." An impediment (which prevents denial of an alleged fact) may be equivalent in effect to an admission; but it is not an admission. Inability for any reason to prove a fact may be equivalent, for practical purposes, to an admission that it is not a fact; but it would be altogether misleading so to describe it. The word, moreover, will not fit. A *misrepresented* fact and is estopped cannot well be translated into A. *admitted* a fact in a highly conclusive fashion. Mr. Cababé met with much embarrassment in his endeavor to effect the change; and Mr. Bigelow, who introduced it, has abandoned it.<sup>5</sup>

<sup>1</sup> Jacob. And see Bouvier; also Stephen on Pleading (7th ed.), 181.

<sup>2</sup> On Estoppel (5th ed.), 463.

<sup>3</sup> On Estoppel, 108. And see Everest & Strode on Estoppel (p. 2) to the same effect.

<sup>4</sup> 10th ed., vol. 2, 726.

<sup>5</sup> Mr. Bigelow in the third edition of his work defined estoppel "as an express or implied admission," etc., and this was adopted by some of the American judges. See Zuchtman v. Roberts (1871), 109 Mass. 53, and

cases referred to in Bigelow on Estoppel (5th ed.), 453, note 1. See also the language of Bramwell, L. J., in *Simm v. Anglo-American Co.* (1879), 5 Q. B. D. 202, otherwise and probably more accurately reported in 49 L. J. Q. B. 396, and of Bayley, J., in *Heane v. Rogers* (1820), 9 B. & C. 577, quoted in *Richards v. Johnston* (1859), 4 H. & N. 603; 28 L. J. Ex. 322. In his later editions Mr. Bigelow has discarded the language.

## JUSTIFICATION OF ESTOPPEL.

Adopting then the definition of estoppel as "an impediment or bar," which has the effect of precluding a man from "alleging or denying a fact," the question naturally arises: Why should any one ever be so precluded? Surely the facts ought to be known, and should govern the rights of the parties.

Suppose, however, that goods are delivered to a warehouseman for storage; and when the bailor requires delivery the warehouseman refuses, upon the ground that the bailor cannot prove a clear title to the goods. One sees at a glance that the warehouseman should not be permitted to take such a position; and the reason really is that, for the purposes of the bailment, the title of the bailor has been assumed, and impliedly agreed to. This is estoppel by contract; and it is based upon the soundest equity, which says that not only, or indeed mainly are the facts as they exist those which govern the relations of the parties, but those chiefly which the parties have assumed and agreed upon.

Again, suppose that the owner of property stands by and allows it to be sold by another person to one unaware of the real state of the title; the owner is and ought to be estopped from asserting his position. He has misrepresented, or rather contributed to the misrepresentation of the facts, and is estopped, therefore, from asserting them. This is estoppel by misrepresentation. It is the sort of estoppel treated of in the present volume.

In the earlier years of the development of the law of estoppel by misrepresentation (not so long ago), all this was little understood, and the phrase "estoppels are odious" represented the disinclination of the courts to prevent the assertion of the real facts. The language persists in even some of the more recent cases. In 1853 Lord Campbell, speaking of estoppel by misrepresentation, said:<sup>1</sup>

"Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out."

<sup>1</sup> Howard v. Hudson (1853), 2 E. & B. 10; 22 L. J. Q. B. 844, quoted by Colt, J., in Andrews v. Lyons (1865), 93 Mass. 350. In Franklin v. Merida (1868), 35 Cal. 558, it was said that "the doctrine is a harsh one, and is never to be applied except when to allow the truth to be told would consummate a wrong to the one party or enable the other to secure an unfair advantage."

In the same case Crompton, J., more cautiously said:

"I do not think that an estoppel of this kind is always odious; in many cases I think it extremely equitable to act upon that doctrine."

In 1878 Bramwell, L. J., said:<sup>1</sup>

"Estoppels are odious, and the doctrine should never be applied without a necessity for it."

But in the following year he said:<sup>2</sup>

"I do not wish to speak against estoppels; for I do not know how the business of life could go on unless the law recognized their existence."

The true justification for estoppel by personal misrepresentation is clearly put in a note in the eleventh edition of Coke upon Littleton:

"No man ought to allege anything but the truth for his defense; and what he has alleged once is to be presumed to be true, and therefore he ought not to contradict it; for as it is said in the 2 Inst. 272, *Allegans contraria non est audiendus.*"<sup>3</sup>

Blackburn, J., well states the matter:<sup>4</sup>

"Now sometimes there is a degree of odium thrown upon the doctrine of estoppel, because the same word is used occasionally in a very technical sense; and the doctrine of estoppel *in pais* has been thought to deserve some of the odium of the more technical classes of homologation. But the moment the doctrine is looked at in its true light it will be found to be a most equitable one, and one without which in fact the law of the country could not be satisfactorily administered. When a person makes to another a representation, 'I take it upon myself to say such and such things do exist,' and the other man does really act upon that basis, it seems to me that it is of the very essence of justice that, between these two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais* or homologation."

The rationale of estoppel by misrepresentation is put in epigrammatic form by Mr. Justice Swayne of the Supreme Court of the United States, as follows:<sup>5</sup>

"It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."

And little can be added in justification of estoppel to what was said by Perley, C. J., in distinguishing the "legal" estoppels *in pais* of Lord Coke's time from the more modern "equitable estoppel:"<sup>6</sup>

<sup>1</sup> Baxendale v. Bennett (1878), 3 Q. B. D. 529; 47 L. J. Q. B. 624.

<sup>2</sup> Simm v. Anglo-American (1879), 5 Q. B. D. 202; 49 L. J. Q. B. 392.

<sup>3</sup> Coke, Lit., L. 3, c. 12, § 667, note 1.

<sup>4</sup> Burkinshaw v. Nicolls (1878), 3 App. Cas. 1020; 48 L. J. Ch. 179, approved in Re London Celluloid Co. (1889), 39 Ch. D. 202; 57 L. J. Ch. 843; Tomkinson v. Baikis (1891), 2 Q. B. 623; 60 L. J. Q. B. 558. And see

Blackburn on Sales, 162. Distinction should be made between estoppel by deed and estoppel by misrepresentation, the latter of "which is founded upon reason:" Per Jessel, M. R., in General Finances Co. v. Liberator (1878), 10 Ch. D. 20. And see Everest & Strode on Estoppel, 11-15.

<sup>5</sup> Morgan v. Railroad (1877), 96 U. S. 720.

<sup>6</sup> Horn v. Cole (1869), 51 N. H. 200,

"The legal estoppel shuts out the truth and also the equity and justice of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy a record is held to import incontrovertible verity; and for the same reason a party is not permitted to contradict his solemn admission by deed. And the same is equally true of legal estoppels by matter *in pais*. . . . For this reason because legal estoppels, whether by record, deed, or matter *in pais*, shut out proof of the truth and justice of individual cases, they have been called *odious* and have been construed with much strictness against parties that set them up. . . . Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case, by preventing the party from asserting his rights under a general technical rule of law when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth."

The learned author of Smith's Leading Cases, not perceiving the distinction of Perley, C. J., limits the application of the word *odious* in this way:<sup>1</sup>

"The truth is, that the courts have been for some time favorable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position; such estoppels are still as formerly considered odious."

But this is equivalent to saying that estoppels are odious only in cases in which there is no estoppel; for if "no one ever was deceived or induced to alter his position," one of the essential conditions of the existence of estoppel is absent.<sup>2</sup>

#### HISTORY OF ESTOPPEL BY MISREPRESENTATION.

In equity it could be said as early as the year 1801 that it was

"a very old head . . . that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false."<sup>3</sup>

Still earlier (in 1787) Mr. Justice Ashhurst, in a case at law,<sup>4</sup> said:

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

291, 292. See also *Stevens v. Dennett* (1872), 51 N. H. 333; *Am. & Eng. Ency.* (2d ed.), vol. II, 355, n. 3.

<sup>1</sup> 10th ed., vol. II, 840. See also *Am. & Eng. Ency.* (3d ed.), vol. II, 388, n. 2.

<sup>2</sup> See *post*, ch. II.

<sup>3</sup> Per Lord Eldon, *Evans v. Bicknell* (1801), 6 Ves. 183.

<sup>4</sup> *Lickbarrow v. Mason* (1787), 2 T. R. 70.

Although not then so recognized, these doctrines were based upon principles which in scientific classification must be referred to estoppel. The equity doctrine of restitution has indeed quite faded away, leaving estoppel in almost undisputed possession of the field. Mr. Justice Ashhurst's dictum is still much quoted, and perusal of a subsequent chapter<sup>1</sup> will demonstrate that it was a very notable effort to formulate the principles of the law of estoppel by assisted misrepresentation.

It is very remarkable that although these principles were blocked out in 1787, yet it was not until fifty years afterwards (until Chief Justice Denman's famous sentence in *Pickard v. Sears*<sup>2</sup>) that courts of law first became thoroughly aware that there was a principle of decision, consonant with their system, which enabled them to apply that equity which was essential to the proper administration of justice. It is not asserted that *Pickard v. Sears* was the first case of its kind,<sup>3</sup> but it is indubitable that that decision marks an epoch in the history of the development of the law, and gave to the idea of estoppel by misrepresentation marked vitality and impetus. It formulated a principle which has spread into almost every department of the law. The principle was this:

"The rule is clear that where one by his words or conduct wilfully<sup>4</sup> causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."<sup>5</sup>

Of this common-law rule Vice-Chancellor Bacon, in 1881, said:<sup>6</sup>

"The common-law doctrine of estoppel was, as I have said, a device which the common-law courts resorted to at a very early period to strengthen and lengthen their arm; and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could obtain an end, which the court of chancery without any foreign assistance did at all times, and I hope, will at all times put into force in order to do justice."

<sup>1</sup> See ch. XIV.

<sup>2</sup> (1837) 6 A. & E. 469.

<sup>3</sup> On the contrary, that case avowedly proceeds upon the earlier cases of *Heane v. Rogers* (1829), 9 B. & C. 586, and *Graves v. Key* (1832), 3 B. & Ad. 318, note (a). The present writer would also point to *Pickering v. Busk*, in 1812 (15 East), as a case in some respects more important and deserving of distinction than

*Pickard v. Sears*. See also the American cases prior to *Pickard v. Sears*, of *Stephens v. Baird* (1828), 9 Cowen, 274 (N. Y.); *Welland v. Hathaway* (1832), 8 Wend. 480 (N. Y.).

<sup>4</sup> This word "wilfully" will be discussed hereafter.

<sup>5</sup> *Pickard v. Sears* (1837), 6 A. & E. 474.

<sup>6</sup> *Keate v. Phillips* (1881), 18 Ch. D. 577; 50 L. J. Ch. 604.

To the present-day student it would appear that both courts were slowly evolving and disengaging the principles of estoppel. The court of equity no doubt was less trammelled than its sister courts by traditions and "cakes of custom;" but it may fairly be said that the dicta of Mr. Justice Ashhurst and Chief Justice Denman and Lord Ellenborough<sup>1</sup> are the most notable contributions to the law of estoppel that are to be found in any of the English courts.

<sup>1</sup> In *Pickering v. Busk* (1812), 15 East, 45.

## CHAPTER II.

### CONDITIONS OF ESTOPPEL BY MISREPRESENTATION.

The essentials of estoppel by misrepresentation will be considered under the following headings:

1. There must be a misrepresentation.
2. Either (1) by the estoppel-denier (personal misrepresentation); or (2) by some person whose representation he has made credible (assisted misrepresentation).
3. There must be a disregard of some duty.
4. The misrepresentation must be as to fact or law — not merely of intention or opinion.
5. The misrepresentation must be of something material.
6. Fraud or bad faith in the estoppel-denier is not essential — an innocent misrepresentation will estop.
7. Negligence (carelessness) is sometimes essential.
8. The estoppel-asserter must be a person to whom immediately or mediately the misrepresentation was made.
9. The estoppel-asserter must, on the faith of the misrepresentation, change his position prejudicially.
10. The estoppel-denier must have reasonable grounds for anticipating some change of position upon the faith of the misrepresentation.
11. The change of position must be reasonably consequent upon the misrepresentation or the assistance.

A discussion of each of these will supply a comprehensive view of the subject. Afterwards will follow some applications of them to various branches of the law.

The Supreme Court of the United States has lately summed up the points which a plaintiff in an action for the rescission of a contract must establish:<sup>1</sup>

1. That the defendant has made a representation in regard to a material fact.
2. That such representation is false.

<sup>1</sup> *Southern Development Co. v. Silva* (1888), 123 U. S. 247, 250. See *Pollock on Contracts* (6th ed.), 542.

3. That such representation was not actually believed by the defendant on reasonable grounds to be true.
4. That it was made with intent that it should be acted upon.
5. That it was acted on by complainant to his damage.
6. That in so acting on it the complainant was ignorant of its falsity and reasonably believed it to be true.

Comparing these with the foregoing conditions we find the following:

- 1, 2, 4 and 5 in estoppel equal 1 and 2 in rescission.
- 3, 8 and 11 in estoppel are probably implied in rescission.
- 9 in estoppel equals 5 and 6 in rescission.
- 10 in estoppel equals 4 in rescission.
- 7 in estoppel is inapplicable in rescission.

This leaves 6 in estoppel to compare, or rather to contrast, with 3 in rescission. In England, Canada, and many of the American states there is more of harmony than contrast,<sup>1</sup> for 3 in rescission is found to be untenable.

<sup>1</sup>See *post*, ch. VIII.



## CHAPTER III.

### CONDITION NO. 1.

#### *There Must be a Misrepresentation.*

The subject of this work being "Estoppel by Misrepresentation," we are clearly open to criticism in positing misrepresentation as an element in that kind of estoppel. Justification might be obtained by changing the title of the book, but that, for other reasons, is inadvisable.

It may, however, be urged in extenuation that we are dealing with several very large classes of cases; that these cases are not within any of Lord Coke's categories (Estoppel by Record, Estoppel by Deed, or Estoppel *in Pais*); that they are of modern recognition, and of recent and portentous growth; that they all present a common feature, namely, misrepresentation; and that for a place in this new category we may say that "there must be a misrepresentation."

#### DEFINITION OF MISREPRESENTATION.

Mr. Bigelow's definition of misrepresentation is sufficient:<sup>1</sup>

"By misrepresentation is meant a false impression of some fact, or set of facts, created upon the mind of one person by another, by language, or by language and conduct together, or by conduct alone equivalent to language, where there appears to be no intention to warrant the same."

#### NECESSITY FOR MISREPRESENTATION.

There can be no reason to doubt the correctness of Lord Justice Bramwell's statement<sup>2</sup> that this modern doctrine of estoppel "never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct, in what he had said or done, or failed to say or do."

In other words, no one is to be estopped from asserting a fact unless there has been some prior misrepresentation of that

<sup>1</sup> On Estoppel (5th ed.), 556.

see Ex parte Adamson (1878), 8 Ch.

<sup>2</sup> Baxendale v. Bennett (1878), 3 Q. B. 817; 47 L. J. Bk. 103.  
B. D. 525; 47 L. J. Q. B. 634. And

fact, upon the faith of which some person has changed his position.

A single case<sup>1</sup> will suffice to illustrate the point. A plaintiff got a verdict for £50, to be reduced to one shilling if the dog in question was returned to him by the defendant within a certain time. The defendant not having the dog borrowed him from the owner, and handed him over to the plaintiff, at the same time telling the plaintiff that the dog had been borrowed, and that the owner would demand him on a certain day. The plaintiff accepted the dog. In a new contest over him it was held that the owner was not estopped as against the former plaintiff by what had happened from asserting his title. There had been no misrepresentation as to the owner's title, and there was no estoppel, therefore, against its assertion.

#### CLASSIFICATION OF MISREPRESENTATION.

It is absolutely essential to the clear understanding of the law of estoppel — at all events to an appreciation of the exposition of that law as attempted in this volume — that the following classification should constantly be borne in mind.

Misrepresentation may be

1. Personal, or
2. Assisted.

And may be

1. Direct, or
2. Indirect.

And may be

1. Active, or
2. Passive.

And may be

1. Expressed, or
2. Implied.

#### PERSONAL AND ASSISTED MISREPRESENTATION.

This very important distinction will be dealt with in the next succeeding chapter.

#### DIRECT AND INDIRECT MISREPRESENTATION.

And this one in chapters X and XIII.

<sup>1</sup> Sandys v. Hodgson (1889), 10 A. & E. 472; 8 L. J. Q. B. 344.

## ACTIVE AND PASSIVE MISREPRESENTATION.

Passivity can be penalized only where a duty to be active can be predicated. Chapter V discusses that subject.

Chapter VIII makes use of the distinction in hand in order to harmonize the cases relating to the necessity for bad faith as an element in misrepresentations which estop.

And chapter IX will indicate that passivity, as the result of carelessness rather than design, may work an estoppel.

## EXPRESSED AND IMPLIED MISREPRESENTATION.

This classification is by no means the same as that just dealt with (although frequently confounded with it), as will at once be seen when it is observed that an active misrepresentation may be either expressed or implied in the words or conduct in which it is embodied. In fact, an implied as distinguished from a passive misrepresentation may be said to be an inference properly drawn from some activity. And the question arises whether such inferences may freely be drawn, or whether we are to say with Coke upon Littleton:<sup>1</sup>

"Every estoppel, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference;"

and with Kay, L. J.:<sup>2</sup>

"In order to create an estoppel, the statement by which the defendant is held bound must be clear and unambiguous;"

and with Mr. Bigelow:<sup>3</sup>

"The representation, further, to justify a prudent man in acting upon it must be plain, not doubtful or matter of questionable inference. Certainty is essential to all estoppels. The courts will not readily suffer a man to be deprived of his property where he had no intention to part with it."

Some palliation of "the rigor of the "legal" estoppel, fittingly denominated "odious,"<sup>4</sup> is obtained by the prescription of perfect identity between the misstatement alleged to have been made and the fact as the estoppel-denier desires to show it; but the justice of the requirement is less obvious when applied to those "equitable estoppels" which promote "the equity

<sup>1</sup> L. 3, c. 12, § 567. And see Am. C. P. 49; *Onward v. Smithson* (1893), & Eng. Ency. (2d ed.), vol. 11, p. 388, 1 Ch. 14, 15; 62 L. J. Ch. 138, n. 5.

<sup>2</sup> *Low v. Bouverie* (1891), 3 Ch. 113; see cases there cited, and *Keating v. 60 L. J. Ch. 594*. And see *Kepp v. Orme* (1874), 77 Pa. 69.

*Wiggett* (1850), 10 C. B. 53; 20 L. J. <sup>4</sup> *Ante*, ch. I.

and justice of the individual case."<sup>1</sup> In the interpretation of statutes we are familiar with the distinction between penalizing and enabling statutes; and for the modern estoppel by misrepresentation we need have little hesitation in making application of the language of Pollock, C. B.:

"If any person by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."<sup>2</sup>

A few examples will be useful:

A representation by a company that its debentures are legally transferable may be implied from the fact that their form so indicates.<sup>3</sup>

If a company represents that its shares are paid up, it must be taken as a representation "that they are paid up in the way in which they are to be paid up"—for example, in cash.<sup>4</sup>

A merchant being about to furnish defendant's sons with goods on credit inquired of defendant whether his son had, as he asserted, £300 of his own property; defendant answered that he had; the fact was that the defendant had lent his son the £300; held that a loan was inconsistent with the representation.<sup>5</sup>

A railway company may agree to carry goods, and yet not be estopped from asserting that it was, as to those goods, a common carrier. By agreeing to carry the goods there is not an implied representation that it is bound to carry them.<sup>6</sup>

A trustee of a fund who receives notice of a charge upon it is under no obligation to volunteer information as to prior charges; and there is therefore no implied representation as to the state of the fund.<sup>7</sup>

<sup>1</sup> *Ante*, ch. I.

<sup>2</sup> *Cornish v. Abington* (1859), 4 H. & N. 556; 28 L. J. Ex. 262. Approved in *Thomas v. Brown* (1876), 1 Q. B. D. 722; 45 L. J. Q. B. 811. And see per Lord Cairns in *Peek v. Gurney* (1873), L. R. 6 H. L. 377; 43 L. J. Ch. 19; *Bigelow on Estoppel* (5th ed.), 634; and *post*, ch. XII.

<sup>3</sup> *Goodwin v. Roberts* (1876), 1 App. Cas. 476; 45 L. J. Q. B. 748; *Re Romford* (1883), 24 Ch. D. 93; 53 L. J. Ch.

729; *Easton v. London* (1886), 34 Ch. D. 95; 56 L. J. Ch. 569.

<sup>4</sup> *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1021; 48 L. J. Ch. 179.

<sup>5</sup> *Corbett v. Brown* (1831), 8 Bing. 33. And see *Tapp v. Lee* (1803), 3 Bos. & P. 367.

<sup>6</sup> *Phelps v. Illinois Ry.* (1880), 94 Ill. 548.

<sup>7</sup> *Low v. Bouverie* (1891), 3 Ch. 32; 60 L. J. Ch. 594.

A trustee replied to certain interrogations as to incumbrances upon the trust property. Afterwards it was sought to make the trustee liable in respect of certain incumbrances of which he had made no mention. Lindley, J., said:

"But the difficulty of affording the plaintiff relief on this ground arises from the ambiguity of the defendant's letters. They are quite consistent with the view that the incumbrances mentioned by the defendant were all he knew of or remembered. A statement, however, to that effect would not estop him from stating that there were others which he did not know of or remember. . . . Knowledge, and means of knowledge, are very different things; and if a person truly says he only knows or remembers so and so, is it right to treat him as saying that he knows more, even if it is his duty to inform himself accurately before he speaks."<sup>1</sup>

Where the holder of a chattel mortgage, on payment of a portion of the note secured by it, surrenders the note to the maker after allowing it to be marked "paid," he is estopped as against a *bona fide* purchaser of the mortgaged property, who purchases in reliance on the evidence of payment shown by the note in the mortgagor's hands, to claim that there is a balance due on the mortgage.<sup>2</sup>

But the result would be different if the note was not marked paid, but merely given up in exchange for a renewal of it.

"I would not think that any reasonable man would take possession of the note by Robinson to be equivalent to a representation by the plaintiffs that the price of the piano was paid. The practice of renewing notes is so common that the defendants, as business men, can scarcely have excluded it from their contemplation."<sup>3</sup>

A patentee, in urging a customer to give his machine the preference over another that was offered in sale, said in substance: "Now, do give mine a trial; you will find it a very much better machine." But this was not a representation that the other machine might safely be purchased—that it was not an infringement upon the patent. The statement was not equivalent to "now, just try, and see which is the best machine, and then you may take whichever you think to be the best." It was putting forward "one strong commercial reason why he desired the defendants to purchase his machine;" but it was not a suggestion that he intended to abandon any legal rights; nor was it a representation that the other machines were no infringement upon his patent.<sup>4</sup>

<sup>1</sup> Re Lewer (1876), 4 Ch. D. 101; 5 Ch. D. 61; 46 L. J. Bk. 70.

<sup>2</sup> Finks v. Buck (1894), 27 S. W. R. 1094 (Tex.).

<sup>3</sup> Mason v. Bickle (1878), 2 Ont. App. 291, 299.

<sup>4</sup> Proctor v. Bennis (1887), 36 Ch. D. 740; 57 L. J. Ch. 11.

Where it is alleged that some person has been held out as a partner (although not really such) it is not necessary that the person said to be a partner should, in the holding out, have been identified by his christian and surname. It is enough that there should be such a description as will be tantamount to naming him. Thus, the estoppel-asserter may have known merely that there was "a gentleman down from London, a man of capital;" and if he relied upon this individual the "capital" would have to be forthcoming.<sup>1</sup>

As to the proper implication from a certificate by a company of a transfer of shares; and as to the difference between it and a certificate of ownership of shares, see cases in the note.<sup>2</sup>

*Distinction where Fraud.*—Lord Justice Kay has suggested an important distinction which is not elsewhere to be met with. He said:<sup>3</sup>

"If there was fraud, and the statement was intended to mislead, its ambiguity would not be a defense; but where no fraud is alleged it is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it."

The distinction appears to be well founded. In the first case a fraud is intended and is successful; the defrauder then urges that if his dupe had acted as a reasonable man he would not have been misled by the arts which proved to have been well adapted to his deceiving. It is a poor argument. In the second case no fraud was intended; an ambiguous phrase was honestly made use of; a different meaning from that intended was taken out of it; a reasonable man would not have taken that meaning and would not have been misled. Such a case is easily distinguishable from the other.

<sup>1</sup> *Martyn v. Gray*, 14 C. B. (N. S.) 822.

<sup>2</sup> *Bishop v. Balkis* (1890), 25 Q. B. D. 77, 512; 59 L. J. Ch. 505; *Tompkinson v. Balkis* (1891), 2 Q. B. D. 614; 60 L. J. Q. B. 558; (1893) A. C. 396; 63 L. J. Q. B. 134; *Re Concession's Trust* (1890), 2 Ch. 757; 65 L. J. Ch. 939.

<sup>3</sup> *Low v. Bouverie* (1891), 3 Ch. 113; 60 L. J. Ch. 594. See analogy supplied by *Bloomenthal v. Ford* (1897), A. C. 156; 66 L. J. Ch. 253; *Hughes v. Twisden* (1896), 55 L. J. Ch. 431.

## CHAPTER IV.

### CONDITION NO. 2.

*The misrepresentation must be made either (1) by the estoppel-denier (personal misrepresentation); or (2) by some person whose misrepresentation the estoppel-denier has made credible (assisted misrepresentation).*

#### PERSONAL MISREPRESENTATION.

"In all cases of the kind of estoppel we are called upon now to consider, the party has, I conceive, either himself made, or authorized to be made, a statement of fact untrue, or he has conducted himself so as to give rise to the belief of a fact untrue."<sup>1</sup>

The first of these alternatives needs little enforcement. It means merely that a man is not to be damaged by a misrepresentation which he has neither made nor authorized,<sup>2</sup> unless indeed he comes within the second class of cases. For example, if a man be held out as a member of a firm, he cannot be liable if he was ignorant and innocent of all that was done.

"The holding one's self out to the world as a partner . . . imports at least the voluntary act of the party so holding himself out . . . and is altogether incompatible with the want of knowledge that his name has been so used."<sup>3</sup>

And so where the estoppel-denier's name appeared in a list of shareholders, which without his knowledge had been shown to the estoppel-asserter by the secretary of the company, and the secretary had no authority to disclose the list, it was held that there was no estoppel.<sup>4</sup>

#### ASSISTED MISREPRESENTATION.

The second alternative of the condition confronts us with problems altogether peculiar to the law of estoppel. It will be observed that it implies, notwithstanding what has already

<sup>1</sup>For Channell, B., in *Swan v. N. B. A.* (1862), 7 H. & N. 657; 81 L. J. Ex. 425; *First Nat. Bank v. Cody* (1894), 93 Ga. 127; 19 S. E. R. 831.

sentation by the estoppel-denier himself and by his agent. *Qui facit per alium, facit per se.*

<sup>2</sup>No distinction is necessary for present purposes between misrepre-

<sup>3</sup>*Fox v. Clifton* (1830), 9 L. J. C. P.

261.

<sup>4</sup>*Id.*

been said, that a man may under certain circumstances be estopped, not merely by his own misrepresentations, but by the misrepresentation of another person. It implies further, as we shall see, that he may be estopped by such a misrepresentation if he has assisted it, although he has been perfectly innocent of any intention to do so, and although unaware of the misrepresentation until after the mischief has been accomplished. This class of cases the writer ventures to denominate "Assisted Misrepresentation;" for the estoppel arises from the assistance rendered by the estoppel-denier to the misrepresentation.

An example will be the best introduction to the problems involved: Suppose that I execute a mortgage for £250; afterwards I pay £200 upon it; and afterwards the mortgagee, by representing that £250 is still owing, sells the mortgage for that amount. I am not estopped from asserting that there is only £50 due. I have not in any way contributed to the misrepresentation of the mortgagee. Varying the case: Suppose that the mortgage purports to secure £250 (and acknowledges the receipt of that amount); that only £100 was in reality advanced; and that, concealing this fact, the mortgagee sells the mortgage for £250. I am now estopped because of the assistance which I have given to the misrepresentation; my acknowledgment has made credible the misrepresentation of the mortgagee.<sup>1</sup>

<sup>1</sup>Bickerton v. Walker (1883), 31 Ch. D. 151; 55 L. J. Ch. 227; and see West v. Jones (1851), 1 Sim. (N. S.) 205; Parker v. Clarke (1861), 30 Beav. 51; Webb v. Herne Bay (1870), L. R. 5 Q. B. 642; 39 L. J. Q. B. 221; Manly v. London (1896), 23 Ont. App. 139; 26 S. C. Can. 448. But see Ryckman v. Canada Life (1870), 17 Gr. 550. In the United States distinction must be made between three classes of mortgages: (1) Where the mortgage secures payment of a promissory note the law is as stated in the text, except in Illinois (Hostetter v. Alexander (1876), 22 Minn. 559). New Jersey (by statute: R. S. 1877, p. 768, § 81), Ohio, Oregon (Jones on Mortgages (5th ed.), § 834 ff.), and Kansas. (2) Where the mortgage secures payment of a bond the law is said to be otherwise (Id.). But if the bond be of ambulatory sort there should be no distinction, for the principles of estoppel apply equally to both cases: First Nat. Bank v. First Nat. Bank (1880), 22 Hun, 339. (3) Where the mortgage secures payment of money only, it is said in Jones, § 841 (a), that an assignee takes subject to the mortgagee's equities; but the only case cited is Castle v. Castle, 78 Mich. 298; 44 N. W. R. 378, where the question was not whether the assignee took subject to original equities (contradicted by the instrument), but whether he was bound by subsequent



*Under What Circumstances.*—The question, then, for solution is this: Under what circumstances shall one person be estopped by reason of assistance given to the misrepresentation of another?

The present writer, aware of its dangers, is unwilling to advance any well-defined rule; but perhaps he may be permitted to suggest a phrase which may prove to be of some service. A perusal of the cases leaves upon the mind this impression: that one man may be estopped by a misrepresentation made by another, when the former, in breach of some duty to the deceived person, has supplied the defrauder with *that which was necessary to make the representation credible*. If the fraud was accomplished without assistance, there can, of course, be no estoppel (of any one but the defrauder). If, although there

accountings. The reasoning in *First Nat. Bank v. First Nat. Bank* (1880), 22 Hun, 339 (N. Y.), strongly supports the contrary view.

Mr. Pomeroy, criticising the United States Supreme Court case of *Carpenter v. Longan* (1872), 16 Wall. 271, in which it was held that the assignee of a mortgage securing a promissory note takes free from equities, says that the argument which supports it is "that the debt is the principal thing and the mortgage is the mere adjunct of the debt;" that the answer to the argument is that "the note and the mortgage do not together constitute a promissory note;" that the rule as to notes "was first adopted by the courts and has ever since been maintained solely with a view to promote the interests of merchants, and to secure the success and freedom of mercantile and commercial dealings. A promissory note accompanied by a mortgage is not in any sense a mercantile or commercial security." There are two answers to this:

(1) The underlying argument of the court is inadequately stated. It is as follows: "To let in such a defense against such a holder would

be clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently in good faith became a party. . . . If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.'" This principle is that of estoppel (see *post*, ch. XIV) as applied to ambulatory choses in action. See ch. XXIV. It covers the case of a mortgage to secure payment of money as well as one to secure payment of a note.

(2) It is not correct to say that the rule as to the assignee of notes taking free from equities has been confined to "mercantile and commercial dealings." It has been much more widely extended, and now covers all ambulatory transactions. See ch. XXIV.

Some recent cases are *State Bank v. Flathers* (1892), 45 La. Ann. 78; 13 S. R. 244; *Pertuit v. Damaro* (1898), 50 La. Ann. 893; 24 S. R. 681; *Ferris v. Briscoe* (1898), 78 Ill. App. 242; *Jones v. Dulick* (1898), 55 Pac. R. 522 (Kan.); *Mack v. Frang* (1899), 70 N. W. R. 770 (Wis.).

was assistance, yet the assistance was an immaterial factor in the accomplishment of the fraud, there ought, likewise, to be no estoppel — the assistance did not furnish the occasion or the opportunity for the fraud. But if the assistance was in some way essential to the success of the fraud — furnished the occasion or opportunity for it; *made credible a representation which, without it, could not have been successfully made,* — then, if there has been a breach of some duty in rendering that assistance, estoppel will ensue.<sup>1</sup>

It is not intended at this place to deal at length with the cases illustrative of the subject. It will be sufficient for the general view which the first part of the work is intended to present that a few representative examples, taken from different branches of the law, should be shortly noted. At the same time, as the doctrine of estoppel by assisted misrepresentation has a somewhat novel appearance, it must justify its existence and be made familiar.

*Principal and Agent.* — I employ an agent to sell my horse and tell him not to warrant. By representing that he has sufficient authority, he sells the horse, giving a warranty. In this case there is no reason why I should be estopped from denying my agent's authority to warrant. My agent has made a misrepresentation, but he had no authority from me to do so; and

<sup>1</sup>Happily not much originality can be claimed for the phraseology. The term "assisted misrepresentation," and the other language employed, were suggested by happy conjunction, during study, of several judicial utterances. Lord Denman, in one of the early leading cases (*Gregg v. Wells* (1839), 70 A. & E. 97; 17 L. J. Q. B. 103), said: "A party who negligently or culpably stands by and allows another to contract, on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he himself has assisted in deceiving." Fry, J., in *Northern Counties v. Whipp* (1894), 26 Ch. D. 494; 53 L. J. Ch. 629, said: "That the court will postpone the prior legal estate to a subsequent equitable estate, where the owner has assisted in, or connived at, the fraud which has led," etc. Bayley, J., in another case (*Boyson v. Coles* (1817), 6 M. & S. 24), said: "But this rule will certainly not apply where the owner of goods has lent himself to accredit the title to another person." And Grose, J., in still another case (*Lickbarrow v. Mason* (1787), 2 T. R. 63), in which the owner of goods, by indorsing over a bill of lading, was held to be precluded from the right to stop *in transitu*, said: "A bill of lading carries credit with it; the consignee, by his indorsement, gives credit to the bill of lading; and on the faith of that, money is advanced."

I have in no way made his representation credible. Supposing, however, that in selecting the agent I had chosen a horse dealer — that is, one whose usual powers are understood to include a power to warrant. In this case I ought to be estopped, because I have by the selection of my agent made the misrepresentation as to authority credible.<sup>1</sup>

Again varying the case: Suppose that I sent my agent with the horse to a fair (where it is usual to give a warranty), with instructions to sell but not to warrant, and he sold and warranted. I am in this case also precluded from denying my agent's authority to warrant, because, by allowing my agent to operate at a fair where warranties are usually given, I have made credible his misrepresentation of his authority.<sup>2</sup>

*Bills and Notes.*— I draw a note and leave it in my desk unsigned. It is stolen. My name is forged, and the note passed to an innocent holder. I am not estopped. I have not made credible the representation that the note was my real obligation.<sup>3</sup> Varying the case: I give a friend an accommodation acceptance which he afterwards returns 'unused.' I tear it in two (but so neatly that the severance might well be taken to have been for safer transmission through the mails) and throw it on the ground. He picks up the pieces, pastes them together, and passes the bill. I am liable; for I have by insufficient cancellation made credible the representation that the acceptance was genuine.<sup>4</sup>

Varying the case again: Suppose that the forged note is presented to me for payment, and that I forbear denouncing the forgery until after the holder's position has been damaged by the flight or change of circumstances of the forger; I am estopped by the assistance which I have rendered to the success of the fraud.<sup>5</sup> Seeing "the mistake into which he had fallen, it was my duty to be active."<sup>6</sup>

*Partnership.*— Members of a firm, for the purpose of obtaining credit, falsely represent that I also am a member of it. I

<sup>1</sup> See ch. XXV.

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

<sup>3</sup> See ch. XXV.

<sup>4</sup> *Ingham v. Primrose* (1859), 29 L. J. C. P. 294. The case has been much suspected. See ch. XXV.

<sup>5</sup> *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82. And see cases cited with this one in ch. XI.

<sup>6</sup> *Ramsden v. Dyson* (1866), L. R. 1 H. L. 140.

am not bound.<sup>1</sup> I have not assisted the misrepresentation. Varying the case: I was at one time a member of the firm, but have ceased to be so; no notice of my withdrawal was given to persons with whom the firm used to deal; these persons continued to give credit to the firm upon the representation of the remaining parties that I was still a member; and I am liable, because my previous connection with the firm and the absence of the usual notice of dissolution have made the misrepresentation credible.<sup>2</sup>

*Certificates of Shares.*— Falsely claiming to be the owner of shares in a certain company I execute a transfer of them to one who believes my representation to be true. No reason is here apparent why the company should be in any way affected by my action. Varying the case: Suppose that the company had, through inadvertence, issued to me a certificate of ownership of the shares, and that my purchaser relied upon it as evidence of my ownership; the company would now be estopped, because by its certificate it had assisted my misrepresentation and made it credible.<sup>3</sup>

*Priorities.*— The owner of an equity of redemption, representing that he is an unincumbered owner, mortgages the estate to another person who has no notice of the first incumbrance; no ground exists for holding the first mortgagee responsible for this misrepresentation, and he is not estopped from asserting his true position. The mischief arose from the folly of the second mortgagee in taking the unsupported assertion of the mortgagor. Vary the case: Suppose that prior to the misrepresentation the mortgagor had, upon some pretext, obtained from the first mortgagee possession of the title deeds, and that he had, in support of his representation of unincumbered ownership, produced the deeds to the second mortgagee. The first mortgagee may now be estopped (it depends upon circumstances), for he has assisted the misrepresentation by handing over the title deeds.<sup>4</sup>

*Trustees.*— Two trustees agreed to make a loan upon mortgage, and one of them (call him No. 2) was induced by the

<sup>1</sup> *Marshall v. Aiken* (1897), 170 Mass. 37 L. J. Q. B. 176. And see reference to this case in ch. XXII.

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

<sup>3</sup> *Re Bahía* (1868), L. R. 3 Q. B. 594;

<sup>4</sup> See *post*, ch. XIX.

other with the money; No. 2 procured the mortgage to be executed by the mortgagor, who signed the usual receipt for the money; the mortgage was sent to the other trustee (No. 1), and executed by him; some of the money was kept by trustee No. 2, and was therefore never received by the mortgagor; No. 2 afterwards died; and the question arose between the surviving trustee (No. 1) and the mortgagor as to whether the latter owed the sum retained by No. 2. It was held that the mortgagor was estopped by the acknowledgment upon the mortgage. He had enabled No. 2 to represent to No. 1 that he (the mortgagor) had received the whole amount, and had thus prevented discovery of the fraud.<sup>1</sup>

*Ostensible Ownership.*—There are very many cases in which estoppel is due to assisted misrepresentation by ostensible ownership. That is to say, the true owner of property may be estopped from asserting his title by enabling some other person to successfully represent himself as the owner, and thus to deceive an innocent purchaser.

Where the true owner has *really* transferred the title, and it has fraudulently been passed on to an innocent transferee, the true owner may also be said to be estopped. But that case can be viewed as one in which the purchaser, having actually got the estate in the property, is entitled to hold it without reference to estoppel, as against a merely equitable claimant. Whichever ground may be thought to be the true one, the result, at all events, is unquestioned.<sup>2</sup>

Estoppel must clearly be invoked, however, where not the title itself, but the appearance of it only, has been conferred upon the fraudulent grantor—for example, by transferring to him for particular purpose a bill of lading. In such case it is impossible for the innocent purchaser to say that he has any title at all; and his position must be maintained by estoppel, grounded upon the misrepresentation of the custodian of the bill and the assistance rendered by its real owner. Many such cases will be found in subsequent chapters.<sup>3</sup>

And estoppel must be appealed to where, although the title

<sup>1</sup> West v. Jones (1851), 1 Sim. (N. S.) 205. And see London v. Suffield (1897), 2 Ch. 608; 66 L. J. Ch. 790.

of solution when the purchaser takes (that which is still called) an equitable estate. See ch. XVI.

<sup>2</sup> The case becomes more difficult

<sup>3</sup> Post, chs. XXII to XXVI.

itself has been vested in a trustee, the person misled by the appearance of beneficial ownership is not a sub-purchaser, but a creditor of the trustee. Usually a creditor can seize such estates only as his debtor in reality owns; and if the debtor be a trustee, his creditors are not commonly entitled to levy upon the trust estate.<sup>1</sup> It has been held, however, in a great many cases that if the property has been transferred to the debtor in order that by his appearance of financial strength he may obtain credit, the true owner may be estopped from setting up his beneficial title against creditors.<sup>2</sup> For estoppel in such cases it is not sufficient that the title to the property has been vested in the name of the debtor;<sup>3</sup> so to hold would be to add a new terror to trusteeship.<sup>4</sup> Intent to mislead creditors must more or less clearly appear.<sup>5</sup>

Concealment of an incumbrance<sup>6</sup> upon the debtor's own property, or concealment of a debt due by him,<sup>7</sup> may, upon similar grounds, have the effect of estopping the incumbrancer or creditor from asserting his claim. The reputed ownership clause of the English bankruptcy act has given statutory approbation to this principle.<sup>8</sup>

<sup>1</sup> *Re General Horticultural Co.* (1886), 32 Ch. D. 512; 55 L. J. Ch. 608; *Badeley v. Consolidated* (1898), 38 Ch. D. 238; 57 L. J. Ch. 468; *Campbell v. Gemmell* (1890), 6 Man. 353; *Case v. Bartlett* (1898), 19 Man. 290; *Root v. French* (1895), 13 Wend. 570 (N. Y.); *Bryant v. Whitcheer* (1872), 53 N. H. 158. See as to creditors of a shareholder in a company, after he has executed a transfer, but before it is registered, ch. II.

<sup>2</sup> *Tapp v. Lee* (1893), 3 Bos. & P. 367; *Corbett v. Brown* (1831), 8 Blug. 33; *Graham v. Thompson* (1892), 55 Ark. 296; 18 S. W. R. 58.

<sup>3</sup> *Breeze v. Brooks* (1886), 71 Cal. 169; 9 Pac. R. 670; 11 id. 885; *Roberts v. Trammel* (1896), 15 Ind. App. 445; 44 N. E. R. 321.

<sup>4</sup> *Kern v. Day* (1893), 45 La. Ann. 71; 13 S. R. 6; *Girault v. A. P. Hotaling Co.* (1893), 7 Wash. 90; 34 Pac. R. 471; *Hill v. Van Sandt* (1895), 1 Kan. App. 367; 40 Pac. R. 670.

<sup>5</sup> *Trenton v. Duncan* (1881), 86 N. Y. 221; *Kingman v. Graham* (1831), 51 Wis. 232; *Leete v. State Bank* (1893), 115 Mo. 184; 21 S. W. R. 788, 793; *Ingals v. Ferguson* (1894), 59 Mo. App. 299; *Warner v. Watson* (1895), 35 Fla. 402; 17 S. R. 654; *McClain v. Abshire* (1895), 1 Mo. App. R. 754; 63 Mo. App. 833; *Iseminger v. Criswell* (1896), 98 Iowa, 382; 67 N. W. R. 289.

<sup>6</sup> *Trenton Bank v. Duncan* (1881), 86 N. Y. 221; *Curtis v. Wilcox* (1892), 91 Mich. 229; 51 N. W. R. 992; *Brayton v. Harding* (1894), 56 Ill. App. 363; *Wachusett v. Sioux City* (1894), 63 Fed. R. 366; *Bacon v. Harris* (1894), 62 Fed. R. 99; *Baker v. Seavey* (1895), 163 Mass. 523; 40 N. E. R. 863; *Sylvester v. Henrich* (1895), 93 Iowa, 489; 61 N. W. R. 942.

<sup>7</sup> *Powers v. Large* (1880), 75 Wis. 494; 43 N. W. R. 1112.

<sup>8</sup> See reference to this statute in ch. XI.

*Standing by*.—Perhaps the most familiar form of assisted misrepresentation is that in which an owner of property stands by while it is sold by another person to an innocent purchaser. Since *Pickard v. Sears*<sup>1</sup> it might well be thought to be clear that an owner of property would be estopped, as against an innocent purchaser of it, were he to stand by and allow it to be sold without disclosing his title. Ritchie, C. J., of the Canadian Supreme Court, however, in a case involving the validity of a tax sale, said:<sup>2</sup>

"As to the estoppel claimed, I do not think that the mere fact of . . . knowing of the sale and not forbidding it or protesting against it would estop them from contesting its validity; nor the mere fact of . . . requesting D. to attend the sale and bid the property in. . . All the admission amounts to is that the plaintiffs knew of the sale, and did not forbid or protest against it. This in my opinion they were not bound to do; there was no duty to speak."

The learned judge was of opinion that there was no estoppel because the defendant (the purchaser) did not know that the plaintiffs (the owners) were represented at the sale, and that, therefore,

"the defendant was (not) at all influenced by what the . . . plaintiffs did or omitted. So far as the defendant is concerned there is no representation made to her at all, and certainly none made with the intent that it should be acted upon by her. . . In other words, the defendants were never deceived, or induced to alter their position, by any statement or act of the plaintiffs. . . Therefore in this case the two great ingredients . . . are wanting, namely, that the plaintiff intended that the defendant should act on the faith of his act or representation, nor that the defendant did so act."

<sup>1</sup>(1837) 6 A. & E. 469. See the following cases: *Proctor v. Bennis* (1837), 36 Ch. D. 740; 57 L. J. Ch. 11; *Ogilvie v. West Australia* (1896), A. C. 257; *Davis v. Snyder* (1850), 1 Gr. 134; *Robinson v. Cook* (1884), 6 Ont. 590; *McDiarmid v. Hughes* (1888), 16 Ont. 570; *Cady v. Owen* (1861), 34 Vt. 598; *Woodhull v. Rosenthal* (1875), 61 N. Y. 382; *International v. Bowen* (1875), 80 Ill. 541; *Studdard v. Lemon* (1873), 48 Ga. 100; *Chapman v. Pingree* (1877), 67 Me. 198; *Morgan v. Railroad Co.* (1877), 96 U. S. 716, 720; *Wagner's Appeal* (1881), 98 Pa. St. 77; *Trenton Banking Co. v. Duncan* (1881), 86 N. Y. 221; *Bradley v. Luce* (1881), 99 Ill. 294; *Griffin v. Nichols* (1893), 51 Mich. 575; 17 N. W. R. 68; *Miller v. Ross* (1895), 107 Mich. 593; 65 N. W. R. 562; *Moreland v. H. C. Fricke & Co.* (1895), 170 Pa. St. 33; 33 Atl. R. 634; *Bates v. Swiger* (1895), 40 W. Va. 420; 21 S. E. R. 874; *Camp v. St. Louis* (1895), 63 Mo. App. 83; *Stephens v. Head* (Ala., 1898), 24 S. R. 738; *Ashurst v. Ashurst* (Ala., 1898), 24 S. R. 700; *Nodle v. Hawthorne* (1899), 107 Iowa, 380; 77 N. W. R. 1062; *Rastrup v. Prendergast* (1899), 179 Ill. 553; 53 N. E. R. 995.

"The term 'standing-by' . . . does not mean actual presence or actual participation in the transaction, but it means a silence where there is knowledge and a duty to make a disclosure." *Anderson v. Hubble* (1893), 93 Ind. 573; approved in *Kuriger v. Joest* (1899), 52 N. E. R. 768.

<sup>2</sup>*Flanagan v. Elliott* (1886), 12 S. C. Can. 443.

With deference it is submitted that cases of personal and assisted misrepresentation are here confounded together, and the conditions of the former applied to a case of the latter. When I stand by and allow another to sell my property as his, the purchaser may truly say that he did not act upon my misrepresentation, for he acted upon the misrepresentation of his vendor. But that is only to say that the case is not one of personal misrepresentation. That there may be estoppel by the misrepresentation of another, in which the estoppel-denier has assisted, is beyond dispute; and the only question can be, does an owner assist in such a misrepresentation by standing by, and giving no hint of his title? The decision, it is respectfully submitted, must be supported, if at all, by the argument that the sale was one for taxes; one in which its validity depended upon its regularity; and that there was no representation of *regularity* (as to which the owner might be, and indeed was, quite as uninformed as the purchaser) by not objecting at the time of the sale.<sup>1</sup>

*Hoig v. Gordon*<sup>2</sup> is a suggestive case upon the line under consideration. It would have been otherwise decided were the judgment just cited to be taken as the law.

"Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife under an assumed name — the real wife living in the neighborhood, and receiving from them her support, — it was held that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name, and afterwards sold by him and his supposed wife to a purchaser who bought in good faith and without any notice of the real relationship of the parties."

<sup>1</sup> As to irregularities see *Claxton v. Shibley*, 9 Ont. 451; *Stone v. Engstran* (R. I.), 32 Atl. R. 916; *Neal v. Robinson* (Ky.), 28 S. W. R. 335. your position and objection be first clearly stated. *Lines v. Grange* (1854), 12 U. C. Q. B. 209.

<sup>2</sup> (1870) 17 Gr. 599. And see *Watson v. Threlkeld* (1798), 2 Esp. 637.



## CHAPTER V.

### CONFLICT NO. 3.

#### *There Must be a Disregard of Some Duty.*

##### INTRODUCTORY.

Everyone is familiar with the maxim *Sic utere tuo ut alienum non laedas*, in its application to property of physical character. It is not dissimilar from Mr. Herbert Spencer's definition of the compromise which the social state imposes between "that positive element implied by each man's recognition of his claims to unimpeded activities and the benefits they bring," on the one hand, and "that negative element implied by the consequences of limits which the presence of other men, having like claims, necessitates," on the other.<sup>1</sup> His formula is this: "Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man."<sup>2</sup> What is the relation of such rules and maxims to the realm of business and commerce?

Man in the whirl and complexity of modern conditions and engagements is far less an individual than a member of a society owing duties to his fellow members. He is a unit, no doubt, but one having relations and associations productive of responsibilities. As in the physical domain he owes a duty of carefulness and circumspection and behavior, regulated by the peculiarities of his personal environment; and as in the region of morals he is debtor (although sometimes without legal enforcement) to his fellow men; so also in the affairs of commerce and business he is obliged to observe and have some degree of regard for the interests of others. He cannot always safely "do with his own as he pleases."

That the duties thus imposed are not absolute but relative to the conditions which may obtain from time to time<sup>3</sup> is but to

<sup>1</sup> Justice, 37.

<sup>2</sup> *Id.* 40.

<sup>3</sup> See *Degg v. Midland* (1857), 1 H. 800; 31 L. J. Q. B. 80.

& N. 781; 26 L. J. Ex. 171, approved  
in *Potter v. Faulkner* (1861), 1 B. & S.

say that social rules are not yet finally codified; that advancement and progress and improvement have not yet ceased. Indeed, as we observe the rapid development of the law of estoppel, and the increasing list of duties which is ever being lengthened by the necessities of later activities, we see that not only are the relations of life still widening out into greater complexities, but that the laws of altruism and mutual aid are making rapid head as against those of mere individualism.<sup>1</sup>

<sup>1</sup>In the same sense, Mr. Herbert Spencer, in his *Data of Ethics* (pp. 238, 239), says: "Social evolution has been bringing about a state in which the claims of the individual to the proceeds of his activities and to such satisfactions as they bring are more and more positively asserted; at the same time that *insistence on others' claims, and habitual respect for them, have been increasing*. . . . Regard for the well-being is increasing *pari passu* with the taking of means to secure personal well-being." Again (p. 207): "And here as before each is personally interested in securing good treatment of his fellows by one another. *For in countless ways evils are entailed on each one by the prevalence of fraudulent transactions.*" In his "Ecclesiastical Institutions" (p. 825) in speaking of the future of the priest (had he been thinking of estoppel he would have said "judge") he says: "At the same time *insistence on duty, which has formed an increasing element in religious ministrations, may be expected to assume a marked predominance and a wider range.* . . . All matters concerning individual and social welfare will come to be dealt with, and a chief function of one who stands in the place of a minister (judge) will be not so much that of emphasizing precepts already accepted, as that of developing men's judgments and sentiments

in relation to those more difficult questions of conduct, arising from the ever-increasing complexity of social life."

In "Justice" the same writer says: "For let us remember that there is now recognized, by law and by public conscience, the truth that not only actual physical mischief to others, but also potential physical mischief to others, are flagitious" (p. 70). "With the progress of civilization the administration of justice continues to extend and to become more efficient" (p. 208). "Thus while in uncivilized societies, and in early stages of civilized societies, the individual is left to defend his own life, liberty and property as best he may, in later stages the community through its government more and more undertakes to defend them for him" (p. 153).

And the process has been recently well described by Alexander Sutherland (The Origin and Growth of the Moral Instinct, vol. II, p. 22): "We know, as a matter of fact, that in the development of human society it is not law which gives rise to duty, nor duty which is the foundation of morality; but that morality originates in sympathy; crystallizes vaguely into duty; and duty, thus formed, finds a voice and a definite scope in law. Then law by reactive force gives new strength to duty, and duty adds continuity to sympathy."

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"AN APPROPRIATE MEASURE OF PRUDENCE."

Sir Frederick Pollock in his work on Torts says:<sup>1</sup>

"The whole modern law of negligence, with its many developments, enforces the duty of fellow-citizens to observe, in varying circumstances, an appropriate measure of prudence to avoid causing harm to one another. The situations in which we are under no such duty appear at this day not as normal but as exceptional. A man cannot keep shop, or walk into the street, without being entitled to expect, and bound to practice observance of this kind, as we shall more fully see hereafter. If there exists then a positive duty to avoid harm, much more must there exist, whether it be so expressed in the books or not, the negative duty of not doing wilful harm, subject, as all general duties must be subject, to the necessary exceptions. The three main heads of duty with which the law of torts is concerned, namely, to abstain from wilful injury; to respect the property of others; and to use due diligence to avoid causing harm to others, are all alike of a comprehensive nature. As our law of contract has been generalized by the doctrine of consideration and the action of *assumpsit*, so has our law of civil wrongs, by the wide and various applications of actions on the case."

Widely comprehensive rules of such character find multitudinous illustration: You may construct reservoirs or fish-ponds, but — You may burn rubbish-heaps or enjoy bonfires, but — You may build a factory or play a piano, but —<sup>2</sup>

What is "an appropriate measure of prudence," the same

<sup>1</sup> Pollock on Torts (5th ed.), 22.

<sup>2</sup> To remind readers of the general law, the following quotations are given from Underhill on Torts (4th ed., 166 and 66):

"Negligence consists in the omission to do something which a reasonable man would do, or in doing something which a reasonable man would not do. *Blyth v. Birmingham Water Co.* (1856), 25 L. J. Ex. 212.

"It is a public duty incumbent upon every one to exercise due care in his daily life; and any damage resulting from his negligence is a tort.

"Thus where the plaintiff was in the occupation of certain farm buildings, and of corn standing in a field adjoining the field of defendant, and the defendant stacked his hay on the latter, knowing that it was in a highly dangerous state and likely to catch fire, and it subsequently did ignite, and set fire to the plaintiff's property, it was held that the defend-

ant was liable. *Vaughan v. Menlove* (1837), 3 Bing. N. C. 468."

"So where the defendant intrusted a loaded gun to an inexperienced servant girl with directions to take the priming out, and she pointed and fired at the plaintiff's son, wounding and injuring him, the defendant was held liable. *Dixon v. Bell*, 5 M. & S. 198.

"A master is bound to take reasonable precautions to insure his servant's safety; and if, through the absence of such reasonable precautions, or through the breach of some duty incumbent on the master, or through the personal negligence of the master, the servant is injured, the master will be responsible. *Ormond v. Holland* (1858), E. B. & E. 102; *Ashwix v. Stanwix* (1861), 30 L. J. Q. B. 193." See also *Black v. Christchurch*, etc. (1894), A. C. 48, 63 L. J. P. C. 32.

learned author discusses in a passage to which the present writer desires to subscribe:<sup>1</sup>

"The doctrine of 'natural and probable consequence' is most clearly illustrated, however, in the law of negligence. For these the substance of the wrong itself is failure to act with due foresight; it has been defined as 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do.' Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man then to whose behavior we are to look as the standard of duty will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place would have foreseen as likely to happen, there is no wrong and no liability. And the statement proposed though not positively laid down in *Greenland v. Chaplin*, per Pollock, C. B. (1850), 5 Ex. at p. 248, 10 L. J. Ex. 293, namely, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur, appears to contain the only rule tenable on principle where the liability is founded solely on negligence. 'Mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated,' may be the ground of legal compensation under some rule of exceptional severity, and such rules for various reasons exist; but under an intelligible rule of due care and caution it cannot be taken into account."

Mr. Cooley defines negligence as

"the failure to observe for the protection of the interests of another that degree of care, precaution and vigilance which the circumstances justly demand."<sup>2</sup>

#### APPLICATION OF THE PRINCIPLE TO ESTOPPEL.

The present writer believes that this principle — "Observe an appropriate measure of prudence to avoid causing harm to others" — is the chief corner-stone not only of the law of torts but of the law of estoppel by assisted misrepresentation; and that the confusion we are to meet with in the present chapter is largely due to lack of recognition of that fact.

Two main stumbling blocks are encountered. First, although in various departments of the law to which estoppel is applicable the principle in hand is in reality the efficient and dominating factor, yet other reasons for the decisions than the true one are put forward and accepted as satisfactory. Secondly, there are many cases in which all possible application of the princi-

<sup>1</sup> Pollock on Torts (5th ed.), 37.

<sup>2</sup> On Torts, 630. This definition has met with very general approba-

tion in the United States. Jaggard on Torts, 810, n.

ple is completely denied. An effort will be made to show that the principle has been in some branches of the law of estoppel in reality accepted; to uphold the principle as one necessary to the condition of commercial nations; and to urge its adoption in certain lines of cases from which it is at present excluded.

But first observe the relation and application of the principle in hand to estoppel by assisted misrepresentation. In other words: How can the duty of observing "an appropriate measure of prudence to avoid causing harm to others" have any bearing upon the law of estoppel?

Suppose that a mortgagee hands over the title deeds to the mortgagor, and that the mortgagor fraudulently deposits them with a banker as security for a loan. The mortgagee may now be estopped from setting up his title against the banker; and the reason is that he has assisted the misrepresentation of unincumbered ownership made by the mortgagor—he has made that representation credible.<sup>1</sup> But we cannot arrive at this result without bringing our principle into operation as a major premise. We must say that there is a duty to "observe an appropriate measure of prudence to avoid causing harm to others;" that the mortgagee in handing over the deeds committed a breach of that duty (for he knew that he was equipping the mortgagor with a simple method of defrauding other people); and that for such breach of duty he is estopped—for

"The common-law duty to exercise care to avoid doing harm to others may be derived from the ownership, custody, control or use of instrumentalities which may of necessity, or in reasonable probability, inflict damage."<sup>2</sup>

The rule applies that

"When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business, neglects that duty; and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud of which such neglect is, in the natural course of things, the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act."<sup>3</sup>

#### APPLICATION OF THE PRINCIPLE TO ESTOPPEL DENIED.

It is of the greatest importance that this relationship between duty and estoppel should be clearly appreciated. From

<sup>1</sup> See many similar cases referred to in chapter IV.

<sup>2</sup> Stephen's Dig. Law of Evidence (2d ed.), 124.

<sup>3</sup> Jaggard on Torts, 865.

it all else is derived. Nevertheless its existence is not merely often ignored, but is sometimes expressly denied. In a very important case<sup>1</sup> Wilde, B., said:

"It is I think always difficult and sometimes illusory to compare two principles which emanate from different sources, and proceed in different directions. The action for negligence proceeds from the idea of an obligation towards the plaintiffs to use care, and a breach of the obligation to the plaintiff's injury. The doctrine of estoppel as applied to these cases of negligence is based on the injustice of allowing a plaintiff to be the author of his own misfortune, and then charging the consequences on others. . . . It would be very fallacious to test any set of circumstances as raising an estoppel or not, by asking whether, reversing the parties, an action for negligence would lie."

A crucial question is here raised: Does estoppel by misrepresentation depend upon breach of duty? The learned baron (just quoted) would answer in the negative; and would emphasize it by saying that estoppel has nothing whatever to do with duty — with "obligation."

Take the simplest case of estoppel, namely, standing by while some one sells your property to an innocent purchaser. You are estopped. But why? The learned baron would say that you were the author of your own misfortune, and must not charge the consequence of it upon others. But this is not correct, for you were not the author of your own misfortune, but of that of the purchaser. Apart from estoppel you still have your property; and the purchaser, although he has paid his money, has received nothing for it. We must then say that the bystander is estopped (if at all), not because he was the author of his own misfortune, but because he was the author or part author of damage to another. But if damage be caused to another there is no legal responsibility for it in the absence of the breach of some duty owed to that other; there must therefore have been some duty; and thus we arrive at the necessity for the existence of duty as a requisite of estoppel. In accordance with this view it was said in the House of Lords:<sup>2</sup>

"When I saw the mistake into which he had fallen it was my *duty* to be active and to state my adverse title."

<sup>1</sup>Swan v. N. B. A. (1862), 7 H. & N. 685; 31 L. J. Ex. 437. Much can be said in favor of the alternative test here suggested. It would be very anomalous if certain negligence could be penalized by estoppel; but that the negligent person would go free were the circumstances not such that estoppel would hurt him.

See the discussion in chapter XVI; and Evans v. Bicknell (1801), 6 Ves. 173; Lynch v. Murdin (1841), 1 Q. B. 29, 35.

<sup>2</sup>Ramsden v. Dyson (1866), L. R. 1 H. L. 140. And see Viele v. Judson (1880), 89 N. Y. 32; New York v. Rothery (1887), 107 N. Y. 310; 14 N. E. R. 209.

Try the alternative: that there is not, in a case of estoppel by standing by, the element of duty. We must then say that the bystander did perfectly right in silently permitting the fraud to be committed (for there was no duty incumbent upon him to reveal his title), and for doing that which was perfectly right he must lose his property — must be estopped. That is not very satisfactory.

"Before any person can complain of negligence he must make out a duty to take care: and that duty can only arise in one of two ways, namely, either by contract, or by the law imposing it."<sup>1</sup>

"A person cannot be said to be culpable in not doing a particular thing, unless it is his duty to do it."<sup>2</sup>

It is equally clear that in all other cases of estoppel there must be the element of breach of duty. In all of them it is not that the estoppel-denier has been the author of his own misfortunes, but that he has got some other person into trouble. In all of them he, upon the facts, is unhurt; and what we have to do is to find some reason for saying to him: "You must not assert these facts." The only reason we can give is that upon the faith of his misrepresentation or assisted misrepresentation of the facts some other person has changed his position. But if he was perfectly right in misrepresenting — that is, if the law did not impose upon him any duty not to misrepresent, or to aid in misrepresentation, there is no reason (known to the law at least) why he should not assert the facts. If he has done something (legally) wrong, then penalize him. If he has been silent when he *ought* to have spoken, then, and not otherwise, compel silence when he wishes to speak.

#### THE PRINCIPLE ALREADY IN OPERATION.

It has been said that the duty of "an appropriate measure of prudence" has been allowed (although frequently unconsciously) to govern the decision of cases in various departments of the law (besides that of tort). For example, it is your duty in drawing a check not to leave tempting spaces in it; for thereby your banker may be defrauded.<sup>3</sup> It is your duty not to allow your mortgagor (except under special circumstances) to have the custody of the title deeds; for thereby some money lender

<sup>1</sup> Per Bramwell, J., in *Dickson v. Cooke* (1848), 2 Ex. 654; 18 L. J. Ex. Reuters (1877), 3 C. P. D. 5; 46 L. J. 114.  
C. P. 197.

<sup>2</sup> *Young v. Grote* (1827), 4 Bing. 253;

<sup>3</sup> Per Alderson, B., in *Freeman v. 12 Moo. 434; 5 L. J. C. P. 163.*

may be defrauded.<sup>1</sup> It is your duty not to permit others to have possession of your "negotiable" securities; for thereby purchasers of them may be deceived.<sup>2</sup> It is your duty not to furnish your trustee with evidence that he is the beneficial owner; for therewith he may cheat some innocent purchaser.<sup>3</sup> It is your duty not to permit your agent to have an apparent authority larger than his real authority; for thereby others may be tricked.<sup>4</sup> It is your duty, when retiring from partnership, to give notice of that fact; for otherwise credit may be given upon the faith of your continued membership.<sup>5</sup> It is your duty in executing a document to see that it is that which you believe it to be; for otherwise some third person may be led to believe that you have agreed to that which in reality you have not even considered.<sup>6</sup> It is sometimes by usage your duty to examine an account delivered to you, and to give timely notice of your objections thereto; otherwise the other party may fail to take steps for his protection which he could and would have taken.<sup>7</sup> It is your duty to exercise care with reference to documents which "have a certain mercantile meaning attached to them;" for otherwise "persons likely to deal with the documents" may suffer damage.<sup>8</sup>

The law of estoppel is the legal sanction for all such duties; and provides for their disregard the penalty of silence in respect to all rights and claims which, at the proper time, ought to have been put forward.

#### BUT OTHER REASONS GIVEN.

The application of the law of estoppel to many of these cases has not, however, been sufficiently observed; and in its absence, or even sometimes in declared opposition to it, other reasons have been offered for the results arrived at. If, for example, blank spaces have been left in your check, it has been said that you thereby authorized the payee to fill them

<sup>1</sup> See ch. XIX.

<sup>2</sup> See ch. XXIV. "Ambulatory" ought to be substituted for "negotiable."

<sup>3</sup> See ch. XVII to XXVI.

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

<sup>5</sup> See ch. XXVII.

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

<sup>7</sup> *Devaynes v. Noble* (1815), 1 Mer. 530; *Leather v. Morgan* (1880), 117 U. S. 93. See references to these cases in ch. XI.

<sup>8</sup> *Coventry v. Great Eastern* (1883), 11 Q. B. D. 776; 53 Lr. J. Q. B. 693.



up<sup>1</sup>—a plea that would not save the payee from a charge of forgery, for it is not true. If you allow your mortgagor to have the deeds and thus to pose as unincumbered owner, the reason given for your postponement is that “a second mortgagee who has the title deeds without notice of any prior incumbrance shall be preferred;”<sup>2</sup> a proposition which, as we shall see,<sup>3</sup> holds good only where, according to the principles of estoppel, it ought to do so, and in other cases is falsified. If you intrust your negotiable securities to a broker who transfers them in defiance of your instructions, it is said that you lose because “the law merchant validates in the interest of commerce a transaction which the common law would declare void;”<sup>4</sup> and that “the ordinary rules of the common law are made to bend;”<sup>5</sup> whereas the ordinary rules of estoppel are quite sufficient for the case.<sup>6</sup> If you permit your agent to have an apparent authority larger than the real, it is said that you are responsible for the agent's acts because “the authority of the agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him;”<sup>7</sup> whereas the truth is that you can limit him as much as you like, but that if, notwithstanding such limitation, you allow him to act as though there were none, you are estopped from setting it up. And if you execute a document which does not reflect your true agreement, it is said that one sort of fraud upon you will render the document void, whereas another will render it voidable only—a bit of lochomachy that will not stand investigation.<sup>8</sup>

#### COMMON CHARACTERISTICS — ESTOPPEL.

Gathering all such cases together, we find that they have this strong common characteristic, that there has always been

<sup>1</sup> Montagu v. Perkins (1853), 22 L. J. C. P. 187.

<sup>2</sup> Goodtitle v. Morgan (1787), 1 T. R. 793; Layard v. Maud (1867), L. R. 4 Eq. 397, 406; 36 L. J. Ch. 669; Hunter v. Walters (1871), L. R. 11 Eq. 316; 41 L. J. Ch. 175; Spencer v. Clark (1879), 9 Ch. D. 142; 47 L. J. Ch. 692; Lloyd v. Jones (1885), 29 Ch. D. 229; 54 L. J. Ch. 981.

<sup>3</sup> See post, ch. XIX.

<sup>4</sup> Swan v. N. B. A. (1862), 7 H. & N. 634; 31 L. J. Ex. 436.

<sup>5</sup> Per Byles, J., in Swan v. N. B. A. (1862), 2 H. & C. 185; 32 L. J. Ex. 273.

<sup>6</sup> See post, ch. XXIV.

<sup>7</sup> Smith's Mer. Law (8th ed.), p. 575; and see post, ch. XXVI.

<sup>8</sup> See ch. XXV.

some fraud perpetrated by which one of two innocent persons has to suffer (the property of one innocent person has been fraudulently transferred to another; the obligation of one innocent person has been fraudulently passed on to, or created in favor of, another), and the question is, Who is to suffer? To this, in all such cases, the law of estoppel replies: There is a duty to observe "an appropriate measure of prudence to avoid causing harm to others;" and if, in breach of this duty, one person has assisted the misrepresentation of another—supplied that which has made it credible—he ought to be estopped as against the person to whom the harm has been caused.

#### EGOISM AND ALTRUISM.

Coming now to the departments of the law in which the application of the principle in hand has been denied, let it be observed that there are two views which may be taken with reference to the conduct of affairs: the egoistic and the altruistic. According to the former I may do as I please with my own, and others may look after themselves. Acting upon this view I shall draw my checks as I please; leave my title deeds and negotiable instruments with whom I choose; allow my agent to misrepresent his authority as he thinks fit; stand by as an indifferent spectator while other people assume to sell my property; and if any one is injured I shall tell him to pursue the one who defrauded him with such civil or criminal process as is appropriate.

Following the other view—the altruistic—I shall have a care that I am not made an accomplice, or even an unwitting instrument, in frauds upon others; I shall refuse to give opportunity or occasion for misrepresentation; and, profiting by experience of recurring rascalities, I shall so use my own liberties as not unnecessarily to expose others to the machinations of the defrauder.

This altruistic view as cognizable by law is necessarily the outcome of a highly developed state of society. In earlier stages the idea would not only be unfamiliar, but would be opposed to all the analogies of the time.<sup>1</sup> It has emerged (as have

<sup>1</sup>It is hard to realize the total absence, in earlier periods, of ideas which now seem to be obvious. To the question, Why did not Augustus introduce the representative system when the Roman state became too

other ideas) from observation of the injuries worked by its disregard. But the induction is not yet complete, and although in the future some finished and detailed code of conduct as applied to the transactions and affairs of business and commerce may be formulated, the authorities as yet provide none such. For the present we must be content when (as is not always the case) the broad law of reasonable care for the interests of others is held to be incumbent upon us.

#### THE ALTRUISTIC VIEW ADVOCATED.

Speaking generally, the view advocated in this work is the altruistic. The principles which obtain with reference to physical relations ought, it is believed, to regulate business intercourse; and the language of Sir Frederick Pollock above quoted<sup>1</sup> should be imported into the law of estoppel:

"The whole modern law of negligence, with its many developments, enforces the duty of fellow-citizens to observe, in varying circumstances, an appropriate measure of prudence to avoid causing harm to one another."

In the realm of torts it is plainly seen that if the owner of hay (in a highly combustible condition) will unnecessarily stack it against a neighbor's barn (although on his own land), he ought to be liable if it cause the barn to burn.<sup>2</sup> But it is by no means so clearly recognized that if the maker of a blank note (a highly "negotiable" document) will so carelessly deal with it that it is fraudulently made use of to filch money from a third person's pocket, the maker ought to stand the loss. It is an accepted principle in torts that

"One who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against the risk."<sup>3</sup>

large for direct participation in government? Prof. Seeley makes answer: "You might as well ask, Why did not Augustus discover America?" "Introduction to Political Science," p. 164.

<sup>1</sup> *Ante*, p. 30.

<sup>2</sup> *Vaughan v. Menlove* (1837), 3 Bing. N. C. 468. And see the principles laid down by Cockburn, C. J., in *Vaughan v. Taff Vale Ry. Co.* (1860), 5 H. & N. 685; 29 L. J. Ex. 247; and by Bramwell, L. J., in *Powell*

*v. Fall* (1880), 5 Q. B. D. 600; 49 L. J. Q. B. 428.

<sup>3</sup> *Dean v. McCarty* (1846), 2 U. C. Q. B. 448; *Buchanan v. Young* (1873), 23 U. C. C. P. 101; *Gilson v. North Grey Ry. Co.* (1872), 33 U. C. Q. B. 128; *Furlong v. Carroll* (1882), 7 Ont. App. 145; *Booth v. Moffatt* (1896), 11 Man. 25; *Owen v. Burgess* (1836), *id.* 75; *Citizens v. Lepitre* (1898), 29 S. C. Can. 1; *Makins v. Piggott* (1899), 22 S. C. Can. 188.

But it is alleged that a company owes no duty to anybody to take care of its seal, so as to prevent the fraudulent execution of documents which may ruin other people.<sup>1</sup>

#### VARIOUS CASES OF DUTY.

A complete list of cases in which it has been held that there is a duty of carefulness not to offer obvious opportunities for the commission of fraud will not be attempted here. Representatives of the various classes may be met with in their appropriate places throughout the work. A somewhat comprehensive summary, however, will be instructive, and will much assist the argument in favor of the altruistic view of business conduct:

1. *Ostensible Ownership*.—Such view has been widely accepted in cases which the present writer classes under the title "Ostensible Ownership."

(a) An owner of property may not stand by and permit an innocent person to be deluded into purchasing property to which the vendor has no title.

"When I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title."<sup>2</sup>

"To create an estoppel by silence there must be not only the opportunity but the apparent duty to speak. The party keeping silent must know that someone is relying thereon, and is either acting or about to act, as he would not if the truth were known to him."<sup>3</sup>

"In *Pickard v. Sears* it was held that he who stands by and sees another alter his position, on the faith of a fact which he can contradict, cannot afterwards take advantage of that alteration; but the rule was corrected in *Freeman v. Cooke*, when it was said that if a man stands by and allows another to act without objecting, *when from the usage of trade or otherwise there is a duty to speak*, his silence would preclude him as much as if he proposed the act himself."<sup>4</sup>

(b) A railway company issued, by mistake, two delivery orders for the same goods, and then refused delivery to an innocent transferee of the second of them. It was a mistake, and they owed no duty of infallibility to the purchaser, they said, but Brett, M. R., told them,

"It is true that there can be no negligence unless there be a duty, but here the documents have a certain mercantile meaning attached to them,

<sup>1</sup> See *infra*.

<sup>2</sup> *Ramsden v. Dyson* (1866), L. R. 1 H. L. 141.

<sup>3</sup> *Allen v. Shaw* (1881), 61 N. H. 97, citing *Viele v. Judson*, 83 N. Y. 32; *Taylor v. Ely*, 25 Conn. 250; *Marshall v. Pierce*, 12 N. H. 127; *Batchelder*

*v. Sanborn*, 24 N. H. 499; *George v. Cutting*, 46 N. H. 465; *Norris v. Morrison*, 45 N. H. 499; *Stevens v. Dermott*, 51 N. H. 324; *Big. Estop.* 497-503.

<sup>4</sup> *Polak v. Everett* (1876), 1 Q. B. D. 673; 45 L. J. Q. B. 369.

and therefore the defendants owed a duty to merchants and persons likely to deal with the documents."<sup>1</sup>

(c) For the same reason, a company owes a duty of carefulness in issuing certificates as to the ownership of shares, and will be estopped if they are made use of to support misrepresentation.<sup>2</sup> They are intended "to be acted upon by purchasers of shares in the market."<sup>3</sup>

(d) So also with reference to bills of lading; representations in them are to be taken as having been "made to any one who, in the course of business, might think fit to make advances on the faith of them."<sup>4</sup>

And there is therefore a duty of carefulness with regard to the assertions which they contain towards persons to whom they may be offered in support of representations of ownership of goods.<sup>5</sup>

(e) So also with reference to warehouse receipts,<sup>6</sup> and other such documents.<sup>7</sup>

2. *Ostensible Agency*.—The remarks just made with reference to *indicia* of ownership are equally applicable to *indicia* of agency. Every one must observe such reasonable precautions as will prevent his complicity in misrepresentation as to the authority of his ostensible agents.<sup>8</sup> It is upon this ground that the reasonableness of the Factors Acts can be upheld; and that the appearance of larger powers than those really conferred will often work estoppel.<sup>9</sup>

3. *Lulling into Security*.—It will be observed that of the instances above referred to, some are cases in which active misrepresentation is forbidden, but some also are cases in which activity is imposed as a requisite of reasonable social conduct. It is in such instances, of course, that the altruistic theory finds its highest development; calling as it does, upon every one to throw off his cynicism and indifference, and to exercise (actively if need be) "an appropriate measure of prudence to avoid caus-

<sup>1</sup>Coventry v. Great. Eastern Ry. Co. (1883), 11 Q. B. D. 776; 52 L. J. Q. B. 694.

<sup>2</sup>Re Bahia (1868), L. R. 3 Q. B. 584; 37 L. J. Q. B. 166; and see cases cited with this one in ch. XXII.

<sup>3</sup>Per Lord Herschell in Balkis v. Tomkinson (1893), A. C. 403; 63 L. J. Q. B. 154.

<sup>4</sup>Armour v. Michigan (1875), 63 N. Y. 111, 122.

<sup>5</sup>See ch. XXII.

<sup>6</sup>Holton v. Sanson (1862), 11 U. C. C. P. 606. And see ch. XXII.

<sup>7</sup>Prospectuses and company reports, for example. See ch. X.

<sup>8</sup>See ch. XXVI.

<sup>9</sup>See ch. XXIII.

ing harm" to others. A good example of this duty is to be found in cases in which a man, finding that his name has been forged, neglects to notify the victim until after his position (by the death, escape or bankruptcy of the forger) has been changed. Why, it may be asked, should the good man trouble himself; he has done nothing wrong, nor has he connived at it? But fortunately the law has declared otherwise;<sup>1</sup> although, inconsistently as the writer thinks, it holds that a man may accept a bill in which the drawer has left spaces which offer the most obvious temptation to fraudulent increase of the amount, and may tell the victim that

"it is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate."

In a later part of the present chapter some reasons will be offered as against this holding; for (with deference) it is itself out of harmony with the principles of the law of estoppel, and that altruism which is an essential and indispensable feature of modern affairs.

4. Another class of cases in which there is a duty to be active is to be found in the law of partnership. When a member of a firm retires from it, he is under "a duty"<sup>2</sup> to give notice of that fact to those accustomed to deal with the firm. But why? May he not say, "Let the dealers take care of themselves; I have retired; I am not liable for the goods, for I did not buy them." And the courts might say (as in other departments of the law they sometimes do),<sup>3</sup> "The dealers knew that a partner might have retired since the last transaction; they should have inquired." No doubt this could very properly be said if the egoistic view were the correct one. That it is not said is to be attributed to the underlying, but usually unexpressed, feeling that "an appropriate measure of prudence to avoid causing harm to others" must be exercised — actively if need be.

<sup>1</sup>McKenzie v. British Linen Co. (1881), 6 App. Cas. 82. And see cases cited with this one in ch. XI.

<sup>2</sup>Scarf v. Jardine (1882), 7 App. Cas. 357; 65 L. J. Ch. 915.

<sup>3</sup>Where a master signs a bill of lading for goods not put on board, it is held that the owners of the ship

are not liable to an innocent transferee of the bill. It is said that the transferee knew that the master had authority to give bills for goods shipped only, and that he should have inquired. See the subject discussed in ch. XXVI.

5. The following general statements of the law are not too comprehensive:

"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."<sup>1</sup>

"When a person perceives that, in a matter of interest to himself, another person is acting, or about to act, or likely to act, in a mode in which as a reasonable man he would not act or be likely to act if he knew the real facts, a duty arises on the part of the former to inform the latter of such real facts, if he is aware of them, and if the relative position in which the two parties stand towards one another is such that the latter might reasonably expect the former to tell him the real facts if the former were aware of them."<sup>2</sup>

#### SPACES CARELESSLY LEFT IN DOCUMENTS.

These opposing views (egoism and altruism) have come into very notable conflict with regard to the question whether a party to a negotiable instrument may safely leave in it spaces which may easily be made available for increasing its amount. The subject has been elaborately discussed in the very recent case of *Scholfield v. Londesborough*,<sup>3</sup> and in it the old case of *Young v. Grote*<sup>4</sup> was once more dissected, explained, supported and condemned. Let us consider these cases somewhat closely, and more especially the later of the two, for by it the principle of egoism has received a predominance which is not only opposed to the decisions in many other analogous cases, but which the present writer believes to be highly injurious to commercial intercourse.

(1827) *Young v. Grote*—"that fount of bad argument."<sup>5</sup> A depositor in a bank signed a blank check, and left it with his wife to fill up as required. The wife directed a clerk to fill it up for £52.2. He did so and showed it to her. She then instructed him to get it cashed. He increased the amount of the check by £400 (inserting the necessary figure and words in spaces which he had left for that purpose), and drew the larger sum from the bank. It was held that the customer and not the bank should suffer the loss.

<sup>1</sup> *Heaven v. Pender* (1883), 11 Q. B. D. 509; 52 L. J. Q. B. 702.

<sup>2</sup> *Cababé on Estoppel*, 81.

<sup>3</sup> (1894) 2 Q. B. 660; 63 L. J. Q. B. 449; (1895) 1 Q. B. 536; 64 L. J. Q. B. 293; (1896) A. C. 514; 65 L. J. Q. B. 593.

<sup>4</sup> (1827) 4 Bing. 253; 5 L. J. C. P. 165; 12 Moo. 484.

<sup>5</sup> So *Esher, M. R.*, in *Scholfield v. Londesborough* (1895), 1 Q. B. 543; 64 L. J. Q. B. 293.

The judgments, short and pithy as they are, have given rise to much discussion: (1) There is the greatest difference of opinion as to the ground upon which they proceed; (2) various suggestions have been made as to the grounds upon which they should have proceeded; and (3) several judges plainly declare that the right grounds would have led to an opposite conclusion.<sup>1</sup> The decision, although somewhat shaken, still stands;<sup>2</sup> but only on condition that it is confined to checks.<sup>3</sup>

(1896) *Scholfield v. Londesborough*.<sup>4</sup> After much conflict of opinion the decision in the House of Lords in this case has authoritatively declared the law to be out of harmony with *Young v. Grote*; or, at all events, that *Young v. Grote* must be confined to checks, and does not apply to bills of exchange. The case was one in which a drawer of a bill availed himself of spaces (which he had purposely left) to raise the amount of an acceptance from £500 to £3,500, and the acceptor was held not to be liable to a holder in due course. The drawer of a check is

<sup>1</sup> See the discussions in *Swan v. Parke, B.*, and adopted by the House of Lords, it will, I think, be found that *Young v. Grote* was not in any way disapproved, and it has been recognized in many subsequent cases." In fact, Lord Cranworth said: "Therefore, taking that view of the facts, the case may be well sustained, and appears to have been well decided." It was expressly followed in *Halifax v. Wheelwright* (1875), L. R. 10 Ex. 183; 44 L. J. Ex. 121. And in *Mayor v. Bank of England* (1887), 21 Q. B. D. 103; 53 L. J. Q. B. 27; 23 Q. B. D. 243; 58 L. J. Q. B. 257; (1891) A. C. 107; 60 L. J. Q. B. 145.

<sup>2</sup> See *Scholfield v. Londesborough* (1894), 2 Q. B. 660; 63 L. J. Q. B. 649; (1895) 1 Q. B. 536; 64 L. J. Q. B. 293; (1896) A. C. 514; 65 L. J. Q. B. 593. But see *Dorwin v. Thompson* (1869), 13 L. C. Jurist, 262.

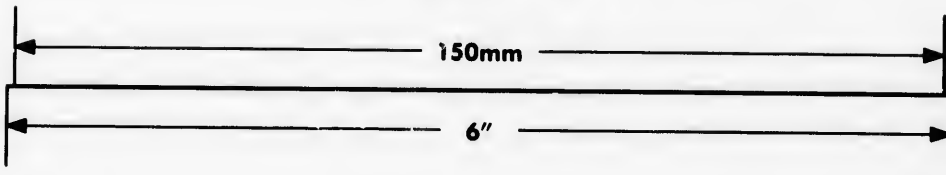
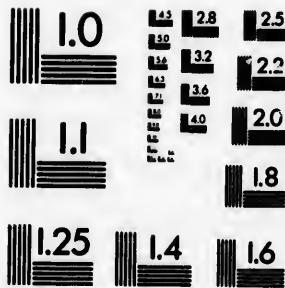
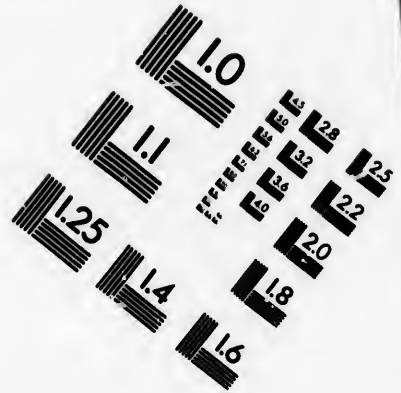
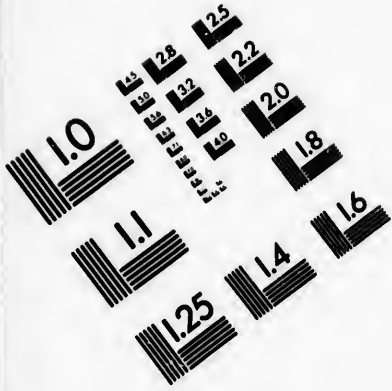
<sup>3</sup> *Supra*. Followed in *Bank of Hamilton v. Imperial Bank* (1899), 31 Ont. 100.

<sup>4</sup> In *Baxendale v. Bennett* (1878), 3 Q. B. D. 533; 47 L. J. Q. B. 624, Brett, L. J., said that "the observations made by the Lords in *Bank of Ireland v. Evans* have shaken *Young v. Grote*." But this is a mistake, as was pointed out by Charles, J., in *Scholfield v. Londesborough* (1894), 2 Q. B. 663; 63 L. J. Q. B. 649: "Upon reference, however, to the opinion of the judges in that case declared by





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liable (according to *Young v. Grote*) if he leaves spaces which are fraudulently filled up; but the acceptor of a bill is not.

#### YOUNG V. GROTE.

Examining *Young v. Grote* (the check case) with a view of ascertaining the ground of decision, we have to admit that those who desire to suggest estoppel as its foundation are fairly met with the statement that estoppel is not once referred to either by counsel or judges; that the decision was in 1827, while the doctrine of estoppel was not familiar to common-law courts until *Pickard v. Sears*<sup>1</sup> in 1837; and that if estoppel had been the ground, it would, therefore, naturally have so appeared. Upon the other hand, inasmuch as principles are never first thought out and afterwards applied, but arise experimentally and empirically, it is quite possible that the decision in *Young v. Grote* may be referable to doctrines which were but subsequently formulated — to the principle of estoppel by assisted misrepresentation, which is even yet largely undeveloped. And this view would account for the absence of the word “estoppel” in the case.<sup>2</sup>

Every judge in *Young v. Grote* refers to the drawer's negligence as being the cause of the loss. But how can negligence be material? In this way: The check was not that of the customer; it was a forgery; the banker ought not to have paid a forged check; therefore he ought to lose. But although the check was forged, yet if the customer was estopped from so saying, the result will be otherwise. And he ought to have been estopped. The check was represented to be the genuine order of the customer, and the customer having through negligence assisted the misrepresentation (provided an opportunity

<sup>1</sup> 6 Ad. & E. 400.

<sup>2</sup> That estoppel is the true *ratio decidendi* is affirmed by Lord Cranworth in *Bank of Ireland v. Evans* (1855), 5 H. L. C. 413; and Erle, C. J., in *Re Swan* (1859), 7 C. B. N. S. 432; 30 L. J. C. P. 113; distinctly denied by Cockburn, C. J., in *Swan v. N. B. A.* (1863), 2 H. & C. 189; 32 L. J. Ex. 279 (but put upon a ground quite consistent with estoppel. See chapter XIV); and doubted and debated

by many other judges. See per Keating and Williams, J.J., in *Re Swan*, 7 C. B. N. S. 441, 446; 30 L. J. C. P. 117, 121; per Cleasby, B., in *Halifax v. Wheelwright* (1875), L. R. 10 Ex. 192; 44 L. J. Ex. 186; per Lopes, J., in *Scholfield v. Londesborough* (1895), 1 Q. B. 546; 64 L. J. Q. B. 303; per Coleridge, C. J., in *Arnold v. Cheque Bank* (1870), 1 C. P. D. 596; 45 L. J. C. P. 553.

for it) ought to be estopped. All the judges (as has been said) refer to negligence, and two of them particularize it as follows:

Best, C. J.: "Too much opportunity was thus given to the clerk to effect the alteration of the check."

Burroughs, J.: "She saw the check in question filled up in an unusual manner, both as to the figures and in the body; and she gave it in that state to her husband's clerk to get changed, thus affording him an opportunity to effect the fraud."

It is useless, however, to say that "too much opportunity" for fraud was given unless there is some duty not to give "too much opportunity."<sup>1</sup> And we may, therefore, say that neglect of duty, by affording opportunity for fraud, was the ground of the decision. If so, it is but the work of translation to couch the same idea in the language of estoppel: The clerk represented the check to be genuine; the banker, upon the faith of that representation, changed his position (paid the money); the misrepresenter and those who assisted him are estopped from denying the truth of the representation; the drawer having given "too much opportunity . . . to the clerk to effect the alteration of the check" assisted the fraud; and he is, therefore, estopped.

If we are wrong in so saying we may at least quote the testimony of Baron Parke, who was one of the judges engaged in the case, and who afterwards sitting in the House of Lords said:<sup>2</sup>

"It was held to have been the fault of the drawer of the check that he misled the banker . . . by want of proper caution in the mode of drawing the check, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay a forged check, by his own neglect in the mode of drawing the check itself, could not complain of the payment."

Preclusion from assertion of rights is estoppel.

#### SCHOLFIELD v. LONDESBOROUGH.

The reasons which, in *Scholfield v. Londesborough*, led to a contrary conclusion in the case of an acceptance may be summarized as follows:

(1) *Young v. Grote* was the case of a check, not of a bill.

<sup>1</sup> The last English case on the subject declares that *Young v. Grote* cannot be supported upon the ground of negligence. *Union Credit Bank v. Mersey Docks* (1899), 2 Q. B. 205; 68 L. J. Q. B. 842. The court, however, distinguishes between estoppel

by negligence and estoppel by misrepresentation, not observing that negligence can be a factor in estoppel only where there is representation. See ch. IX.

<sup>2</sup> *Bank of Ireland v. Evans* (1855), 5 H. L. C. 389.

(2) Bills are drawn not by an acceptor but by the drawer. The acceptor is, therefore, not responsible for the form of the bill; and it "might lead to many complications" were duty as to its form to be placed upon him.

(3) "Protection against forgery is not the vigilance of parties . . . but the law of the land." The general spirit of the law is opposed to individual responsibility for the crimes of others—egoism is the rule, not altruism.

(4) It is impossible to posit a duty not "to facilitate fraud."

(5) The cause of the mishap was not the carelessness of the acceptor but the forgery of the drawer.

The first and second of these reasons would almost certainly not have been thought by themselves to have been sufficient for the decision. The first is rather a ground for distinguishing *Young v. Grote* than for supporting the case in hand; and the second has, palpably, not sufficient strength to overcome the effect of a contrary view upon the remaining points. They may therefore be passed with a few words. The fifth ground will be discussed in a subsequent chapter.<sup>1</sup>

#### I. DISTINCTION BETWEEN CHECKS AND BILLS.

Distinguishing between a check and a bill<sup>2</sup> Lord Watson said:<sup>3</sup>

"The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandator. There is no such connection between the drawer or acceptor, and possible future indorsees, of a bill of exchange."

And Lord Shand said:<sup>4</sup>

"The case of *Young v. Grote*, between a banker and his customer, was one in which there was the relation of parties contracting with each other."

In other words, the contract between a banker and his customer may imply a promise on the part of the latter to use reasonable care not to give opportunity for fraudulent manipulation of his checks; whereas there is no contract (and cannot very well be) between an acceptor and a future indorsee to the effect that he has already taken such precaution.

<sup>1</sup> Ch. IX.

<sup>2</sup> "A check is a bill of exchange drawn on a banker, payable on demand." The Bills of Exchange Act, 45 and 46 Vic. (Imp.), ch. 61, § 73; 53 Vic. (Can.), ch. 38, § 72.

<sup>3</sup> *Scholfield v. Londesborough* (1896), A. C. 537; 65 L. J. Q. B. 604.

<sup>4</sup> (1896) A. C. 548; 65 L. J. Q. B. 609. And see also Lord Macnaghten (1896), A. C. 545; 65 L. J. Q. B. 608.

But if estoppel by assisted misrepresentation be the true *ratio decidendi* of the check case, all questions of contract are irrelevant. If an owner of property stand by and see it sold to another he is estopped, not because of any contract between him and the true purchaser, but because,

"When I saw the mistake into which he had fallen it was my duty to speak."<sup>1</sup>

"He has conducted himself so as to give rise to the belief of a fact untrue."<sup>2</sup>

The question, then, is whether there can be any duty, apart from contract, not to afford "too much opportunity" to commit a fraud. If there is, it is immaterial that there was no contract. The point then is included in the large question of existence of duty.

## II. ACCEPTOR NOT RESPONSIBLE FOR FORM OF BILL.

Upon the second point Lord Watson said:<sup>3</sup>

"In many, if not most, cases which occur in the course of business, the bill is written out by the drawer and sent by him to the acceptor who is under an obligation to sign it. Assuming the appellant's argument to be well founded, it would be within the right of the acceptor to return the bill unsigned, if it were not drawn so as to exclude all reasonable possibilities of fraud or forgery. The exercise of that right might lead to very great complications in commercial transactions."

Lord Shand said:<sup>4</sup>

"An acceptor scrutinizing a bill might think it left room for a fraudulent addition and might refuse acceptance, to the serious injury of the drawer residing at a distance or abroad, or of a drawer who might have indorsed the bill for value given before acceptance."

With deference, it may be replied that the obligation of a drawee cannot include that of accepting an improperly drawn bill.<sup>5</sup> But waiving that point, all that has to be insisted upon is that an acceptor, when he sees invitation to fraud in the form of spaces upon the face of the bill, should draw a pen-mark through them. He need not return the bill, or decline acceptance; he can, without altering the bill, remedy its defect.

It will be observed, too, that the point in hand would raise a distinction between a bill and a note with regard to liability in case of alteration; for if the acceptor of a bill be not responsible for its form, at all events the maker of a note cannot

<sup>1</sup>Ramsden v. Dyson (1866), L. R. 1 H. L. 140.

<sup>2</sup>Swan v. N. B. A. (1892), 7 H. & N. 557; 81 L. J. Ex. 425.

<sup>3</sup>Scholfield v. Londesborough, (1896) A. C. 537; 65 L. J. Q. B. 604.

<sup>4</sup>(1896) A. C. 549; 65 L. J. Q. B. 610.

And see also per Lord Macnaghten, (1896) A. C. 546; 65 L. J. Q. B. 608.

<sup>5</sup>American Water Works Co. v.

Venner (1892), 18 N. Y. Sup. 379.

shelter himself in that way. It may probably be assumed that the argument in hand would not be a sufficient or satisfactory ground for upholding such a distinction. And it may well be asked, too, whether there is a difference between a bill written by the acceptor himself and one prepared by the drawer?

### III. NO DUTY TO GUARD AGAINST CRIME.

This may be said to be the principal ground of decision in the *Scholfield v. Londesborough* case. Lord Halsbury said:<sup>1</sup>

"I certainly concur with . . . the wide proposition of Bovill, C. J., . . . that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery but the law of the land."

Lord Watson said:<sup>2</sup>

"It is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate."

And Lord Macnaghten said:<sup>3</sup>

"The prevention of crime is, perhaps, better left to the operation of the criminal law."

These dicta are quite in line with some previous judicial utterances. For example Brett, J., said:<sup>4</sup>

"There is no duty on any one to suppose that those against whose character there is no imputation will commit forgery. To say that there is such a duty is to enunciate a startling proposition which cannot be maintained."

Fry, L. J., said:<sup>5</sup>

"I do not know of any general rule which obliges you to assume that every person with whom you are dealing is likely to be a knave."

And Bramwell, L. J., said:<sup>6</sup>

"Is it not a rule that every one has a right to suppose that a crime will not be committed and to act on that belief?" The intervention of a crime, "undoubtedly is a distinction and a real distinction."

Some dissenting opinions in *Scholfield v. Londesborough* are as follows:

Per Charles, J.:<sup>7</sup>

"It appears clear from these cases that a person who signs a negotiable instrument with the intention that it shall be delivered to a series of

<sup>1</sup> (1896) A. C. 532; 65 L. J. Q. B. 601. And see *Scollans v. Rollins* (1899), 53 N. E. R. 863 (Mass.).

<sup>2</sup> (1890) A. C. 537; 65 L. J. Q. B. 604.

<sup>3</sup> (1890) A. C. 544; 65 L. J. Q. B. 607.

<sup>4</sup> *Société v. Metropolitan* (1873), 27 L. T. N. S. 838. And see *Union v.*

*Mersey Docks* (1899), 2 Q. B. 203; 68

L. J. Q. B. 842; *Goodman v. Eastman* (1828), 4 N. H. 455; *Worrall v. Gheen* (1861), 39 Pa. St. 398; *Collier v. Miller* (1893), 137 N. Y. 332; 33 N. E. R. 874.

<sup>5</sup> *Union Bank v. Kent* (1888), 39 Ch. D. 248; 57 L. J. Ch. 1027.

<sup>6</sup> *Baxendale v. Bennet* (1878), 3 Q. B. D. 530; 47 L. J. Q. B. 626.

<sup>7</sup> (1894) 2 Q. B. 604; 63 L. J. Q. B.



holders does incur a duty to those who take the bill, note or check not to be guilty of negligence with reference to the form of the instrument."

Per Lopes, L. J.:<sup>1</sup>

"It would be passing strange if a person who accepts a negotiable instrument, such as a bill of exchange, and who thus permits it to go forth on the credit of his name, he being the person primarily liable to all subsequent holders, should not owe to those subsequent holders the duty of taking reasonable care that the document should be so framed when accepted as not to offer obvious opportunities for the commission of crime."

And in support of these opinions strong previous authority may be quoted:

Per Blackburn, J.:<sup>2</sup>

"The person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precaution against the possibility of fraudulent alterations in it."

Per Bovill, C. J.:<sup>3</sup>

"Parties cannot prevent forgery being committed; they must use reasonable care not to afford opportunity for it."

Per Cockburn, C. J.:<sup>4</sup>

"The mercantile community are as a body honorable men; but experience, unfortunately, tells us that frauds occasionally happen when they might least be expected. In the majority of instances this occurs, as in this case, from the carelessness of those concerned and the omission to take the precautionary measures which the regular course of business would prescribe."

Per Day, J.:<sup>5</sup>

"Now it has been said there can be no negligence attributable to the incorporators of this body, because it is not to be assumed that any man will commit the grave offense of availing himself of opportunities which are placed in his way—that no man ought to be assumed to yield to a temptation with which he is surrounded. That sort of reasoning does not commend itself to me, nor to my experience of the world; nor, I should think, to the common sense of men in general."

Per Wills, J.:<sup>6</sup>

"A person whose negligent act has directly contributed to the forgery must, as between himself and the person who has taken the forged instrument, and acted upon it to his own detriment as a genuine one, bear the loss."

652. See also Putnam v. Sullivan (1880), 4 Mass. 45; State v. Matthews (1890), 44 Kan. 596; 25 Pac. R. 36; Atchison v. Brassfield (1893), 51 Kan. 167; 32 Pac. R. 814. The Code Napoleon has the following: "1882. Tout fait quelconque de l'homme qui cause a autrui un dommage, oblige celui, par la faute duquel il est arrivé, a le reparer. 1883. Chacun est responsable du dommage qu'il a causé, non seulement par son fait, mais encore par sa negligence, ou par son imprudence."

<sup>1</sup>(1805) 1 Q. B. 546; 64 L. J. Q. B. 302.

<sup>2</sup>Swan v. North British (1803), 2 H. & C. 183; 32 L. J. Ex. 277.

<sup>3</sup>Société v. Metropolitan (1873), 27 L. T. N. S. 838.

<sup>4</sup>Johnson v. Credit Lyonnais Co. (1877), 3 C. P. D. 41; 47 L. J. C. P. 241.

<sup>5</sup>Merchants v. Bank of England (1887), 21 Q. B. D. 162; 57 L. J. Q. B. 420.

<sup>6</sup>Id. 107, 422.

Per Pennsylvania court:<sup>1</sup>

"It is the duty of the maker of the note to guard not only himself but the public against fraud and alteration, by refusing to sign negotiable paper made in such form as to admit of fraudulent practice upon them with ease and without ready detection."

*Crimes and Any Other Fraud.*—The first step towards correct appreciation of the point in controversy is to ascertain whether it is correct to say that there is no difference "between a fraud carried out by means of a forgery (by means of a crime) and any other fraud"<sup>2</sup>—

to ascertain whether it can be said (with Baron Bramwell)

"that every one has a right to suppose that a crime will not be committed, and to act on that belief;"<sup>3</sup>

and at the same time admit that like security cannot be indulged with reference to frauds which have not been declared to be criminal.

In the first place it is quite clear that no one deems it prudent "to act on the belief that a crime will not be committed" when the risk is his own. Houses are locked at night purely because one's right to trust everybody and to act upon that trust would probably induce theft. Portable valuables are carefully guarded for the same reason; and the notion is general that money is safest in a tightly-buttoned pocket.

Every one protects himself by appropriate measures of prudence against crimes as well as against frauds. Can there be any distinction between them with reference to our duty to our neighbors? The effect of an affirmative answer is that although every one must exercise "an appropriate measure of prudence" not to afford an opportunity for fraud at the expense of third persons, yet that no prudence at all is necessary where the fraud can only be accomplished through crime. In other words, "while every one has a right to suppose that a crime will not be committed, and to act upon that belief," no one has a right to assume that a *fraud* will not be committed, and to act upon that belief.

Were the distinction well founded there would be this somewhat curious result, that alterations in the criminal law would entail changes in the duty of carefulness as to the interests of others. As against certain frauds we must take reasonable

<sup>1</sup>Zimmerman v. Rote (1874), 75 Pa. St. 191. And see Brown v. Reed (1875), 79 Pa. St. 370.

<sup>2</sup>Shaw v. Port Philip (1884), 13 Q. B. D. 109; 53 L. J. Q. B. 373.

<sup>3</sup>Ante, p. 48.

precautions in the interests of our neighbors; but should parliament attach penalties to such frauds then we may altogether cease to take care! We would escape not because we had not been negligent, and the cause of the mischief; and not even because another remedy is supplied; but because the defrauder, if caught, must go to gaol.

*Test Cases.*—Perhaps the best way to deal with this question is to put a few cases, observing whether the presence or absence of "an appropriate measure of prudence" ought to depend upon the presence or absence of crime.

*Young v. Grote*, as has already been said,<sup>1</sup> is allowed to stand as law if its doctrine be confined to checks. In other words, the drawer of a check must not (at his own peril) leave tempting spaces in it which may be criminally made use of to increase its amount. But to so say is to reverse the dictum that "every one has a right to suppose that a crime will not be committed, and to act on that belief."

A clerk stole an acceptance inclosed in an envelope from the office letter-box of his employer, in which it had been placed for mailing; forged an indorsement, and passed the bill. The acceptor was not estopped.<sup>2</sup> Suppose that the acceptance before it was stolen had been indorsed in blank, the result would have been otherwise. Here again the dictum is falsified, and this time with reference to a bill of exchange. Coleridge, C. J., in the case just referred to said:

"There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post."<sup>3</sup>

But as we have seen, had the acceptance been transferable without forgery, and the fraud accomplished by mere larceny, the negligence would have been very apparent and the acceptor would have been liable. In such case "an appropriate measure of prudence" (namely, a special indorsement) would have been omitted; and the decision would have been reversed.

This case is a good example of the point in hand, and well

<sup>1</sup> *Ante*, p. 43.

<sup>2</sup> *Arnold v. The Cheque Bank* (1876), 1 C. P. D. 578, 45 L. J. C. P. 562. And see *Coates v. London* (1871), 41 L. T. 558.

<sup>3</sup> Much the same remark was made

by Fry, L. J., in *The Fine Art Society v. Union Bank* (1886), 17 Q. B. D. 713, 56 L. J. Q. B. 79; and perhaps with less justification than in the case in the text, for the document was much more readily transferable.

illustrates the dictum of the same learned judge in the same case:

"A man may be more careless with regard to the custody of a thing that can be made available only by means of a forgery than if by mere larceny."

But observe that the distinction here made is between crimes of different classes, and not between crime and fraud. Larceny is more common, more easily accomplished, than forgery; therefore (the learned judge would argue) more care must be taken to guard against the one than against the other. There must be "an appropriate measure of prudence."

The reasonableness of this may at once be seen if we note the difference between filling out a note but not signing it, on the one hand, and signing a blank note but not filling it out, on the other. Neither document can be used without forgery.<sup>1</sup> In the latter case, however, the maker may very well be liable;<sup>2</sup> while in the former he cannot. The distinction here is not between crime and fraud, nor yet between crimes of different degree, but proceeds upon the duty to "order his precaution by the measure of what appears likely in the known course of things."

There are many other cases in which a man may suffer, if he act upon his "right to suppose that a crime will not be committed." For example, believing in another's honesty he may lend him a horse, and find that the animal has been sold in market overt; believing in a broker's honesty he may intrust him with blank transfers of shares to be used only upon instructions, and find that the trust has been violated and the shares appropriated; believing in a solicitor's honesty he may execute a document which has an effect quite different from that represented to him, and nevertheless he is bound by it in favor of a third person to whom it has been transferred; a company believing in its secretary's honesty may give him authority to issue certificates of shares and guarantee the genuineness of the signatures to the certificates, and find that he has forged the necessary names and issued a certificate for his own benefit;<sup>3</sup> in short, a man believing in another's honesty may permit the

<sup>1</sup> For it is not only forgery to sign a name to a document, but also to write a document over a name. Reg. v. Wilson (1848), 17 L. J. M. C. 83; Byles on Bills (15th ed.), 342, ff.

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

<sup>3</sup> Shaw v. Port Phillip (1834), 13 Q. B. D. 108; 53 L. J. Q. B. 269.

appearance of ownership or agency in him, and be estopped by transactions carried out upon the faith of such appearance, no matter how assuredly the rascal must go to gaol.<sup>1</sup>

Parliament in prohibiting the manufacture of paper similar to that used for Bank of England notes acted not upon the ground that every one has a right to suppose that crime will not be committed, but upon the ground that paper manufacturers would do well not to afford opportunity for crime.<sup>2</sup> And it is hard to answer Mr. Justice Denio's remark:

"It would seem incongruous to hold that any recovery could be had upon an instrument which was in itself a forgery. The positions of the two classes can only be reconciled by holding the author of the blank signatures estopped from setting up . . . that the paper was not his genuine act. A fiction of nearly the same kind must be resorted to, to sustain an action in favor of the *bona fide* holder of negotiable paper which has been stolen and put in circulation by the thief. Such holder must make title through a felony, and yet nothing is clearer than that an action may be maintained upon paper thus circumstanced."<sup>3</sup>

A novel distinction has very recently been made by Bigham, J., between forgery by an agent and forgery by other people; holding that in the former case the person whose name is forged may be bound, but in the latter he will not. In the case in question<sup>4</sup> a mortgagee of warehoused goods gave to the mortgagor two delivery orders. Each of them was intended to direct the delivery of but certain of the goods. But they differed in that one of them fully described the parcels to be delivered, but left a space (in the form used) above the signature, in which the mortgagor inserted the rest of the goods; while in the other the description of the goods to be delivered was incomplete, the mortgagor was expected to perfect it, and he bettered his authority by making it answer for all the goods. In both cases there was forgery; but in one the mortgagee won, and in the other he lost. The learned judge held that where there was some authority from a principal to an agent to fill up a document, the principal was bound even if the agent exceeded his authority; but where there was no authority at all the mortgagee could not be bound.

With deference it may be submitted that when an agent exceeds his authority he ceases to act as agent and binds himself

<sup>1</sup> For ample authority for these statements see *passim*, ch. XVII to XXVI inclusive.

<sup>2</sup> See 24 and 25 Vic. (Imp.), ch. 98, § 14; *Atkyns v. Kinnier* (1850), 4 Ex. 782; 19 L. J. Ex. 183.

<sup>3</sup> *Van Duzen v. Howe* (1860), 21 N. Y. 581.

<sup>4</sup> *Union v. Mersey Docks* (1899), 2 Q. B. 205; 68 L. J. Q. B. 842.

alone. Both cases are therefore the same in this, that the unauthorized act was the act of a stranger. They are also alike in this, that being unauthorized the mortgagee could not possibly be bound by the act done in his name. The question therefore is simply whether, although the mortgagee is not bound, yet he is for some reason estopped from so saying.

Now observe that ostensible agency is out of the question in both cases, for there was no appearance of agency of any kind in either of them. When the orders were taken to the dock company they were complete, and appeared to have been executed in their perfected form. The company could not say that they relied upon the appearance of authority to fill up the blanks — they knew nothing of blanks, and nothing of agency.

The appearance to the dock company, in both cases, was that of ownership and not agency; and the only question therefore is whether the mortgagee can be said to have been responsible for such appearance — whether he exercised “an appropriate measure of prudence.” This brings us sharply to the point: Has “every one a right to suppose that a crime will not be committed, and to act on that belief?” If so the decision with reference to both delivery orders ought to have been the same — that is, in favor of the mortgagee. And if such a right cannot be predicated in all cases, are we to distinguish upon the ground that the forger in one of them had power to do something other than what he did; and in the other had power to do nothing? Or are we not rather to say that forgery, when made easy and tempting, is not a wild improbability; that the rule of “an appropriate measure of prudence” requires that “a person whose negligent act has directly contributed to the forgery must bear the loss;” and that there was the same imprudence in the one case as in the other; for in both a space was left in which the description of the unreleased goods could easily be filled in. If a vendor of land were to execute a conveyance in which a blank half-page followed the parcels, it would hardly be fair of him to attempt to throw upon an innocent purchaser of added property the burden of a loss mainly attributable to the opportunity he had afforded for fraud.

*Degrees of Probability.*— There are degrees of probability as to the commission of crime. Were I to leave money upon the desk of a publicly frequented office, I might safely say that it

would be stolen within five minutes; were notes or bonds so displayed, they might remain for half an hour; but a hat-rack would probably stand for five years in an adjoining lobby and not be carried away.

There are degrees of probability also among frauds known and unknown. But it cannot be said that there is always more chance of a fraud than a crime. Some frauds for their accomplishment demand a boldness and an ingenuity that might well be thought to make them much less probable of attempt than larceny of money or bills within luring reach, or than forgery by the simple expedient of filling up a blank space.

It seems, then, to be impossible to say that there is any distinction between crimes and frauds as classes, with regard to the degree of prudence which one must exercise to prevent injury to other people. The requisite of "an appropriate measure of prudence" provides for all distinctions between and among them, and has regard to the availability, portability and other characteristics of property as well as to all other circumstances of each particular case. It exacts the conduct of a reasonable man guided "by a reasonable estimate of probabilities."<sup>1</sup> It is better to leave each case to be measured by the standard of "an appropriate measure of prudence" than to endeavor *a priori* to establish some order of requisite circumspection.

*The Frauds or Crimes of Another.*—The only question, then, seems to be whether there is incumbent upon us, in business affairs, any duty of care for the interests of others? And the answer to this cannot be doubted. Not only in the various departments of the law already indicated is this duty exacted under the penalty of estoppel, but it may be said that the whole law of estoppel by assisted misrepresentation is founded upon it, and that nine-tenths of the cases dealt with in this work are unsupportable without it.

*Above Views Supported.*—Some support for the views here advocated may be found even in the judgments under criticism. For example, Lord Halsbury, in referring to the check case (*Young v. Grote*), said:<sup>2</sup>

"If, to use Lord Cranworth's phraseology, the customer by any act of his has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them, it is quite intel-

<sup>1</sup> *Union v. Mersey Docks* (1899), 2 Q. B. 203; 68 L. J. Q. B. 842.

<sup>2</sup> *Scholfield v. Londesborough* (1896), A. C. 523; 65 L. J. Q. B. 597.

ligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has misled or by neglect permitted to be misled."

And may it not be said that if an acceptor "by any act of his has induced" a transferee in due course "to act upon the document by his act or neglect of some act usual in the course of dealing between" merchants, "it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the" transferee, "whom he has thus misled or by neglect permitted to be misled?" The principle is the same. In both cases a party to a negotiable instrument is guilty of the neglect of "some act usual in the course of dealing"<sup>1</sup> (whether "between them" as individuals or as members of the public is immaterial);<sup>2</sup> in both that neglect has been taken advantage of by another person who "has induced the banker (or transferee) to act upon the document;" in both, therefore, there ought to be estoppel.

Further support may also be obtained from the law with reference to blanks wilfully left in a negotiable instrument, as distinguished from spaces carelessly left there. In the chapter on "Execution of Documents"<sup>3</sup> it is shown that if an acceptance be intrusted to another, with authority to fill it up for £100, and he fraudulently insert £500, and the bill come to the hands of a transferee in due course in complete form, the ground of the acceptor's liability is estoppel. The estoppel results from the representation made by the negotiator to the transferee that the bill was the real, completed obligation of the acceptor, and the acceptor is estopped by such misrepresentation (although not his) because he assisted it, provided an opportunity for it, did that which was necessary to make it credible.

The acceptor's liability in such a case is undisputed; and the only possibility of distinction between it and the case under discussion is that in the one (when blanks left) opportunity for fraud was wilfully given, whereas in the other (when spaces left) it was carelessly supplied. In both there was crime; in both opportunity was given for the crime; in both "the cause of the mishap was" (or was not, as one may choose to say)

<sup>1</sup> It may safely be affirmed that negotiable instruments are not usually drawn as was the one in question.

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

<sup>3</sup> Ch. XXV.



the forgery, and not the blanks or spaces; in both there ought<sup>1</sup> or ought not to be estoppel.

An acceptor may then be liable although a forgery has intervened; and the only question is: Should he be liable if he have, with careless indifference to the interests of others, supplied "too much opportunity" for the fraud — if he have not used "reasonable care not to afford opportunity for it." Bearing in mind the general principle of social life, that every one "is required to use due diligence to avoid causing harm to others," it is submitted that the answer ought to be in the affirmative.

#### IV. IMPOSSIBILITY OF A RULE NOT TO FACILITATE FRAUD.

Lord Justice Rigby, as to the possibility of framing a rule as to facilities for fraud, said:<sup>2</sup>

"I pass from the question of negligence to consider the duty that is set up. The duty as formulated is one *not, in accepting the bill, to facilitate fraud*. This is a difficult proposition to deal with. What is a duty not to facilitate fraud? If such a duty exists it must, of necessity, be limited to a duty not to facilitate a particular kind of fraud. To illustrate my meaning, I may point out that any one who accepts a bill payable to order does, in one sense, an act which facilitates fraud; for any one into whose hands the bill may get can commit a forgery in regard to indorsements. There is no great difficulty in so doing, and I do not see, if the duty as formulated exists to its full extent, why it should not apply to the case I have suggested."

And Lord Halsbury added:<sup>3</sup>

"I cannot myself understand why the particular form of fraud adopted in this case should have any different operation in giving validity to a forged instrument, rather than other forms of fraud to which instruments are subject."

A good rule may easily be spoiled by stating it too broadly. It is a good rule that a driver of horses must use reasonable care to avoid killing people. But changing it to a declaration that no one shall endanger life would be to invite the criticisms that that would be "a difficult proposition to deal with," and that, if any one drove a horse at all, he did, "in one sense, an act which" endangered life. And in much the same way a rule that an acceptor of a negotiable instrument must "take reasonable care that the document should be so framed . . . as not to offer *obvious opportunities* for the commission of crime" will undoubtedly become much more vulnerable if expressed as "a duty not to facilitate fraud." Such a form of it

<sup>1</sup> Van Duzen v. Howe (1860), 21 N. Y. 331.

<sup>2</sup> Scholfield v. Londesborough (1895), 1 Q. B. 538; 64 L. J. Q. B. 293.

<sup>3</sup> Id. (1806), A. C. 521; 65 L. J. Q. B. 503.

almost forces the remark that, if so, no one must accept a bill at all; an observation which is quite inapplicable to the rule as more carefully framed.

Because the law does not prohibit the use of the streets, or the making and circulation of negotiable instruments, it does not necessarily follow that it must altogether refrain from propounding regulations for the conduct of persons using or making them. It is true, no doubt, that

"It is impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss or inconvenience to others, or even which obviously tend that way; and this in such a manner that their tendency cannot be remedied by any means short of not acting at all."<sup>1</sup>

But although true, it is not a very convincing argument against the validity of a declaration that

"The law of negligence enforces the duty of fellow-citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to another."<sup>2</sup>

Nor is it a satisfactory reply to the remark of Lopes, L. J., in an earlier stage of the *Scholfield v. Londesborough* case:<sup>3</sup>

"It would be passing strange if a person who accepts a negotiable instrument, such as a bill of exchange, and who thus permits it to go forth on the credit of his name, he being the person primarily liable to all subsequent holders, should not owe to those subsequent holders the duty of taking reasonable care that the document should be so framed when accepted as not to offer obvious opportunities for the commission of a crime."

As to highways, the rule is that

"For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect or put up with such mischief as reasonable care on the part of others cannot avoid."<sup>4</sup>

And in the ways of commerce may it not be said with Bovill, C. J., in a case of the class in hand:<sup>5</sup>

"Parties cannot prevent forgery being committed; they must use reasonable care not to afford opportunities for it."

Again in the law of torts the rule is undoubted that

"A man who orders a work to be executed, from which in the natural course of things injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief."<sup>6</sup>

And was not Cockburn, C. J., undoubtedly right when he said:

"The mercantile community are as a body honorable men; but experience unfortunately tells us that frauds occasionally happen when they

<sup>1</sup> Pollock on Torts (5th ed.), 141.

<sup>2</sup> Id. 22.

<sup>3</sup> (1805) 1 Q. B. 546; 64 L. J. Q. B. 293.

<sup>4</sup> Per Bramwell, B., in *Holmes v.*

Mather (1875), L. R. 10 Ex. 267; 44 L. J. Ex. 176.

<sup>5</sup> *Société v. Metropolitan* (1872), 27 L. T. N. S. 854.

<sup>6</sup> Per Cockburn, C. J., in *Bower v.*

might least be expected. In the majority of instances this occurs, as in this case, from carelessness of those concerned, and the omission to take the precautionary measures which the regular course of business would prescribe."<sup>1</sup>

There is, surely, no more difficulty in applying this rule of reasonable care to the form of negotiable instruments than to the execution of them,<sup>2</sup> or to the multitudinous incidents of every-day physical life.

*Test Cases.*—Those who support the view that "every one has a right to suppose that a crime will not be committed, and to act on that belief,"<sup>3</sup> require some courage to maintain it under all circumstances. For example, suppose that to a bill for £5,000 written in ink, some material condition is added as a foot-note in light lead pencil; the acceptor is struck with the facility offered to fraud, but nevertheless accepts; and the drawer at once rubs out the foot-note and passes the bill. Or suppose that the condition is written in ink, but upon a wide margin which may be readily cut off without affording the slightest appearance of alteration.

Such cases are of frequent occurrence in the United States. Unfortunately, however, there is much disagreement as to the law, and judges and text-writers can be cited upon both sides of the question. Mr. Bigelow affirms that

"It may be safely stated that in principle, and by the weight of authority, a material alteration . . . in a note, bill or check, delivered as a complete instrument, by writing or printing words in a blank space destroys the instrument, so that no action can be maintained against the maker or drawer or other non-consenting parties, even by a *bona fide* holder for value."<sup>4</sup>

"Marginal terms which are intended to be part of the written contract are treated by the better authorities as inseparable from the main writing to which the signature is given. . . . Accordingly to remove such terms by cutting them off, or in any other way, without consent, will be fatal."<sup>5</sup>

Mr. Daniel, on the other hand (more reasonably, as the present writer thinks), declares the law in this way:

"There is a general principle which pervades the universal law merchant respecting alterations (which when they are material will, as we have seen, vitiate the bill or note even in the hands of a *bona fide* holder without notice); a principle necessary to the protection of the innocent and prudent from the negligence and fraud of others. That is, that when the drawer of the bill or maker of the note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it or exciting the suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice,

Peate (1876), 1 Q. B. D. 326; 45 L. J. Q. B. 446. See *Hughes v. Perceval* (1889), 9 App. Cas. 443; 53 L. J. Q. B. 719; *Black v. Christchurch* (1894), A. C. 48; 83 L. J. P. C. 33.

<sup>1</sup> *Ante*, p. 49.

<sup>2</sup> As to which see ch. XXIV.

<sup>3</sup> *Ante*, p. 48.

<sup>4</sup> On Bills and Notes, 193.

<sup>5</sup> *Id.* 194.

when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it."

"The true principle applicable to such cases is that the party who puts the paper in circulation invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which through his act ostensibly has none."

"It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them with ease and without ready detection."

"The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when the inspection reveals nothing to arouse the suspicions of a prudent man he will not be permitted to suffer when there has been an actual alteration."<sup>1</sup>

Some cases no doubt may be very close to the line which separates the prudent from the imprudent act. For example, leaving a very small space after the word "eight," which is made use of to insert the letter "y," may to some appear in one light, and to some in another.<sup>2</sup> Such border cases, however, embarrassing as they may be, are never thought in other branches of the law to vitiate the rule which requires "an appropriate measure of prudence to avoid causing harm to one another." Nor do such difficulties render impossible the assertion of a duty "to take reasonable care that a document should be so framed . . . as not to offer obvious opportunities for the commission of crime,"<sup>3</sup> or of a duty to keep your signature under your own control.

<sup>1</sup>In favor of Mr. Bigelow's view are: *Swaisland v. Davidson* (1882), 3 Ont. 320; *Holmes v. Trumper* (1871), 23 Mich. 427; *Benedict v. Cowder* (1872), 49 N. Y. 306; *Greenfield v. Stowell* (1877), 128 Mass. 196; *Knoxville Bank v. Clark* (1879), 51 Iowa, 269, 1 N. W. R. 491; *Fordyce v. Kosminski* (1887), 49 Ark. 40, 3 S. W. R. 892; *Columbia v. Cornell* (1888), 180 U. S. 855; *Burrows v. Klunk* (1889), 70 Md. 451, 17 Atl. R. 378; *Simmons v. Atkinson* (1892), 69 Miss. 862, 12 S. R. 263; *Exchange Bank v. Bank* (1893), 7 C. C. A. 111, 58 Fed. R. 140; *Scarles v. Seipp* (1895), 6 S. D. 472; 61 N. W. R. 804; *Walsh v. Hunt* (1898), 120 Cal. 46, 52 Pac. R. 115. Upon the other hand Mr. Daniel's language: "It is the duty of the maker of the note to guard not only himself but the public against fraud

and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them with ease and without ready detection," is to be found in *Goodman v. Eastman* (1828), 4 N. H. 455; *Isnard v. Torres* (1855), 10 La. Ann. 103; *Yocum v. Smith* (1872), 63 Ill. 321; *Zimmerman v. Rote* (1874), 75 Pa. St. 190; *Brown v. Reed* (1875), 79 Pa. St. 370; *Blaky v. Johnson* (1877), 13 Bush, 197 (Ky.); *Leas v. Walls* (1882), 101 Pa. St. 57; *Scotland v. O'Connell* (1886), 23 Mo. App. 165; *Lowden v. National Bank* (1888), 38 Kan. 533, 16 Pac. R. 748; *Weidman v. Symes* (1890), 79 N. W. R. 894.

<sup>2</sup>*Société v. Metropolitan* (1878), 27 L. T. N. S. 854; *Leas v. Walls* (1882), 101 Pa. St. 57.

<sup>3</sup>*Ante*, p. 42.

*Summary.*—Summarizing the result of the argument relating to *Scholfield v. Londesborough* we may say:

1. "There is no difference," with reference to estoppel, "between a fraud carried out by means of a crime and any other fraud."
2. Admittedly there is a duty to guard against fraud.
3. There are degrees of probability of fraud, and sometimes more likelihood of its perpetration by crime than by acts which are not criminal.
4. And the rules for all such cases ought to be the requirement of "an appropriate measure of prudence to avoid causing harm to one another."
5. "When one person is by circumstances placed in such position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."<sup>1</sup>
6. If an acceptor "by any act of his has induced" a transferee in due course "to act upon the document, by his act or neglect of some act usual in the course of dealing between" merchants, "it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the transferee whom he has thus misled, or by neglect permitted to be misled."
7. There is a duty to "take reasonable care that a document should be so framed . . . as not to offer obvious opportunities for the commission of crime."

#### CUSTODY OF NEGOTIABLE INSTRUMENTS.<sup>2</sup>

Is there any duty of circumspection as to the custody of signed but unissued negotiable instruments, or of signed slips of paper which may readily be converted into documents of that character? Much reason will be found in another chapter<sup>3</sup> for an affirmative reply. A few considerations at this place will be useful.

If a land-owner create a magnificent fish pond which eventually bursts its bounds and devastates neighboring territory, he will be liable if he have failed to exercise that measure of prudence which "a discreet and cautious person would or ought

<sup>1</sup> *Ante*, p. 42.

<sup>2</sup> Until chapter XXIV we must, in deference to current phraseology,

continue to use the word "negotiable."

<sup>3</sup> Ch. XXIV.

to use if the whole risk and loss were to be his own."<sup>1</sup> And may it not very well be said with reference to a signed bill left in a drawer or upon a desk that the signer has brought into existence an article of dangerous and elusive character, easily picked up, and readily made the instrument of injury to others; and that if damage ensues it is not sufficient for him to urge that, usually, people are honest; even as in the dam cases he would not escape because, usually, there were no floods. Would he leave signed notes lying about "if the whole risk were his own?" In that case probably he would tear up the notes and write others when he wanted to use them. The principles underlying the following excerpts from the law of torts ought to be applied to negotiable instruments:

"If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be brought about, I presume that the sufferer might have redress by action against both, or either of the two, but unquestionably against the first."<sup>2</sup>

"The risk incident to dealing with fire, fire-arms, explosives, or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and (it is apprehended) poisons, is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required; but it is doubtful whether even this be strong enough."<sup>3</sup>

"The risk incident to dealing with" negotiable instruments would seem to require the same standard of "consummate care," and ought not to be shouldered off upon those who innocently suffer because such care is disregarded.

Distinction may well be made, in the dam case, between water accumulated for merely ornamental purposes and water in a mill dam; and a higher degree of care may be exacted in

<sup>1</sup> Per Chancellor Walworth in *New York v. Bailey* (1845), 2 Denio, 433. And see *Rylands v. Fletcher* (1868), L. R. 3 H. L. 341; 37 L. J. Ex. 161; *Lapham v. Curtis* (1838), 5 Vt. 271; *Shrewsbury v. Smith* (1853), 66 Mass. 177; *Hoffman v. Tuolumne Co.* (1858), 10 Cal. 413; *Todd v. Cochell* (1860), 17 Cal. 97; *Everett v. Hydraulic* (1863), 28 Cal. 225; *Gray v. Harris* (1871), 107 Mass. 492; *Losee v. Buchanan* (1873), 51 N. Y. 476; *Garland v. Towne* (1874), 55 N. H. 55; *Marshall v. Welwood* (1876), 38 N. J. L. 339; *Gorham v. Gross* (1878), 125 Mass. 282.

<sup>2</sup> Per Lord Denman in *Lynch v. Nurdin* (1841), 1 Q. B. 35; 19 L. J. Q. B. 73. See *Lygo v. Newbold* (1854), 9 Ex. 302; 23 L. J. Ex. 108; *Great Northern v. Harrison* (1854), 10 Ex. 376; 23 L. J. Ex. 308; *Caswell v. Worth* (1856), 5 E. & B. 349; 25 L. J. Q. B. 121; *Mangan v. Atterton* (1866), L. R. 1 Ex. 239; 35 L. J. Ex. 161; *Austin v. Great Western* (1867), L. R. 2 Q. B. 442; 36 L. J. Q. B. 201; *Citizens v. Lepitre* (1898), 29 S. C. Can. 1; *Makins v. Piggott* (1898), 29 S. C. Can. 188.

<sup>3</sup> Pollock on Torts (5th ed.), 470.

the former instance than in the latter. This would be quite in accord with the distinction between useful fires, such as for domestic<sup>1</sup> or mechanical or farming purposes<sup>2</sup> on the one hand, and mere bonfires on the other. For the same reason if it be held that a man is not always liable upon a note signed by him but stolen from him, distinction might at least be made between cases in which the signer had no immediate purpose to serve in retaining the note uncanceled, or in which he took little precaution with reference to its custody on the one hand, and, on the other, cases in which during an occupied moment he allowed a document which he was about to use to escape his personal vigilance.

#### CUSTODY OF SEAL OF COMPANY.

Closely associated with the subject just considered are questions relating to the duty of circumspection in the custody of corporation seals. If it be permissible to leave signed but unissued notes within easy reach of persons whose principles may be overcome by enticing temptation, so also, no doubt, may a company be careless and indifferent as to the custody of its seal, and may require persons who have given hard money in exchange for that which appeared to be a properly executed document to look to the criminal law for their satisfaction.

And such seems, unfortunately, to be the law. It was justified in the House of Lords by Baron Parke in this way:<sup>3</sup>

"Now we all concur in opinion that the evidence given, which was only of a supposed negligent custody of their corporation seal by the trustees, leaving it in the hands of Mr. Grace, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void. We concur . . . in thinking that the neglect which would deprive the plaintiff of his right to insist that the transfer was invalid *must be neglect in or immediately connects with the transfer itself*. . . . If there was neglect in the custody of the seal it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary, or likely result of that neglect."

"Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal."

" . . . If such neglect could disentitle the plaintiffs, to what extent is it to go? If a man lose his check-book, or neglect to lock the desk in

<sup>1</sup> See 14 Geo. 3 (Imp.), ch. 76, § 86. *Owens v. Burgess*, *id.* 75; *Dean v. McCarty* (1855), 2 U. C. Q. B. 448.

<sup>2</sup> See *Thomas on Negligence*, 640 ff; *Booth v. Moffatt* (1896), 11 Man. 25;

<sup>3</sup> *Bank of Ireland v. Evans* (1855), 5 H. L. C. 389.

which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying his forged check would be entitled to charge his customer with that payment."

The question, "To what extent is it to go?" has been frequently re-echoed in later cases;<sup>1</sup> but the answer is not difficult, and is to be found in the phrase "an appropriate measure of prudence." Such a principle supplies also a ready reply to the learned Baron's other questions: (1) It would not be contended that an owner of goods would be estopped were they stolen by a servant and sold, for possession of the goods by the servant in no way misleads the purchaser. The master, therefore, has in no way accredited the title of the servant; he has in no way assisted the servant's misrepresentation of ownership; he has not omitted to observe an appropriate measure of prudence.<sup>2</sup> Nor (2) would the owner of a check-book be estopped were it stolen and his signature forged. Ownership of a check-book cannot be said to be the disregard of "an appropriate measure of prudence." Vary this last case a little: suppose that the check-book owner signed a lot of checks in blank and left them so as "to offer obvious opportunity" for their theft, and that they were stolen and cashed by the banker; should not the signer be estopped from denying the making of the checks? There would be crime in both cases.

The case was followed with some misgiving in *Mayor, etc. v. Bank of England*,<sup>3</sup> Willis, J., saying:

"But for that case I should have thought that the mode of keeping the seal was eminently calculated to facilitate if not to invite the commission of forgery."

But the law is as stated by Baron Parke. The present writer trusts, however, that the method of avoiding it adopted in *Shaw v. Port Philip*<sup>4</sup> (although unavailing in a subsequent case<sup>5</sup>) may end in its overthrow. In that case the company was held bound by its seal, although fraudulently affixed by the secretary, because the secretary had been "held out by the company as their agent to warrant the genuineness of the certificate."

<sup>1</sup> Development of the law has frequently been impeded by such a question. A good example of the argument is to be found in the judgment of Grose, J., in *Pasley v. Freeman* (1759), 3 T. R. 52.

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

<sup>3</sup> (1887) 21 Q. B. D. 160; 57 L. J. Q. B. 418.

<sup>4</sup> (1884) 13 Q. B. D. 103; 53 L. J. Q. B. 389.

<sup>5</sup> *Mayor v. Bank of England* (1887), 21 Q. B. D. 160; 57 L. J. Q. B. 418.



It is worth noting, too, that the *Bank of Ireland v. Evans* case does not expressly deny the existence of duty with reference to the custody of a company's seal. It proceeds upon the ground that any negligence in the custody was not sufficiently closely associated with the application which was made of it; which is another point, and is elsewhere dealt with.<sup>1</sup>

In the meanwhile it is worth noticing that trusting your secretary with the key of your safe is sufficiently connected with his theft of your debentures as to cut out your title to them as against a purchaser from the thief<sup>2</sup>—upon the ground of “negotiability,” it is said; but we shall see.<sup>3</sup>

#### RUBBER STAMPS.

The introduction of rubber stamps as a method of facilitating signature of documents has added a new terror to commercial life, if the dictum of Baron Parke is to be applied to them also. In olden days when seals were used instead of signatures, there was obligation of carefulness as to their custody imposed upon the owners of them.<sup>4</sup> Is it now the law that a man may leave his stamp wherever he pleases, and plead to instruments to which it may be applied (1) that “every one has a right to suppose that a crime will not be committed, and to act on that belief;” (2) that, “if there was neglect in the custody of the seal (stamp), it was very remotely connected with the act;” and (3) that the neglect “must be in, or immediately connected with, the transfer (instrument) itself?” A Pennsylvania gentleman has already escaped liability upon a check to which his stamp had been fraudulently applied, because “it is lawful to have a stamp,” and because the fraudulent affixing of it to a check is not “the natural and probable result” of any negligence in its custody.<sup>5</sup>

#### MISCELLANEOUS CASES IN WHICH NO ESTOPPEL.

Throughout this volume, in their appropriate places, will be found numerous cases in which the existence of a duty of carefulness or disclosure has been affirmed. There are a few de-

<sup>1</sup> See ch. IX.

<sup>2</sup> *Bechuanaland v. London* (1899), 21 Q. B. D. 166, 167; 57 L. J. Q. B. 418; Pollock on Contracts (6th ed.), p. 185. And see *post*, ch. XXIV.

<sup>3</sup> Ch. XXIV.

<sup>4</sup> See *Mayor v. Bank of England* (1898), 186 Pa. St. 436; 40 Atl. R. 969.

tached authorities in which the existence of duty has been denied that may be conveniently collected here. The attempts in them to impose obligation to action are instructive as showing the length to which it has been thought possible to carry the doctrine of an appropriate measure of prudence.

(1851) *Mangles v. Dixon*.<sup>1</sup> A ship owner assigned "the amount due" upon a charter-party to a third person; the assignee gave notice of the assignment to the charterer, who did not volunteer the information that the charter-party was somewhat misleading, and that "the amount due" was in reality not as much as that shown by the document. No estoppel; for the charterer was not bound to assume that the assignee was unaware of the true situation. There was no duty to volunteer information to one who probably already had it.

(1857) *Simpson v. Accidental, etc.*<sup>2</sup> After the death of an insured person, the insurance company refrained from informing the executors that a premium was overdue, and that non-payment for a few more days would vitiate the policy. *Held*, that there was no duty upon the part of the company to proffer the information.

(1871) *Smith v. Hughes*.<sup>3</sup> Defendant agreed to buy some new oats believing that they were old oats. He bought by sample, and the seller said nothing to mislead the purchaser. *Held*, that

"The passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract." "Whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."

(1876) *Polak v. Everett*.<sup>4</sup> A surety stood by while the creditor, by dealing with the debtor, released him. No duty to warn the creditor:

"To say that a person who, being a surety, becomes aware that the creditor is going to give time or do something else which if done without his assent may discharge him, is bound to warn the creditor against doing it, is a thing for which no authority whatever has been cited."

(1886) *Clark v. Eckroyd*.<sup>5</sup> Vendors shipped the goods sold, but the purchasers never received them owing to their being

<sup>1</sup> 8 H. L. C. 702. And see reference to this case in ch. XI.

<sup>2</sup> 2 C. B. N. S. 257; 26 L. J. C. P. 289.

<sup>3</sup> (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221. And see *Potts v. Temperance* (1892), 23 Ont. 73. See, however, ch. VI.

<sup>4</sup> (1876) 1 Q. B. D. 669; 45 L. J. Q. B. 305.

<sup>5</sup> 13 Ont. App. 425. And see *Durant v. Ecclesiastical, etc.* (1880), 6 Q. B. D. 234; 50 L. J. Q. B. 39; *Confederation v. Merchants* (1894), 10 Man. 69.

misdirected. Purchasers, however, believing that they had been received paid for them. In reality they had been sold by the carriers for unpaid charges. It was contended by the vendor that the purchaser had by payment represented that the goods had been received, and that thus the vendors had been lulled into security and deprived of an opportunity of recovering the goods. *Held*, that the purchasers were not estopped from denying receipt of the goods:

"That it was not discovered sooner may have been negligence, but it was negligence in relation to something which would have been prudent in respect to the plaintiffs themselves, but not of any duty they owed to the defendants."

## SUMMARY.

Summing up what has been said it appears that —

1. The duty of "an appropriate measure of prudence to avoid causing harm to others" ought to be enforced as well by estoppel as by an action in tort.
2. Such duty has already in various departments of the law been admitted as a governing principle of decision.
3. But in many of them other reasons have been given, and these are now current and believed to be satisfactory.
4. The existence of the duty has been altogether denied in cases in which the criminal law penalizes the resulting "harm to others." "The prevention of crime is, perhaps, better left to the operation of the criminal law."
5. But there can be no difference in this respect "between a fraud carried out by means of a forgery (a crime) and any other fraud."
6. And there are numerous cases in which the intervention of neither fraud nor crime has been allowed to save the negligent party from the burden of the loss which his disregard of duty has brought about.
7. While it is impossible to formulate a rule "not to facilitate fraud," there is no difficulty in the application of a rule requiring the exercise of "an appropriate measure of prudence."
8. A large number of well-decided cases can be supported only by the acceptance, expressed or implied, of such a rule.
9. Without such a rule in the realm of torts, social life would be impossible. Without it as the working principle in the law of estoppel, financial and commercial affairs would be much impeded and distracted.

## CHAPTER VI.

### CONDITION NO. 4.

#### *The Misrepresentation Must be as to Fact or Law, Not as to Intention or Opinion.*

##### FACT AND INTENTION.

Lord Selborne in *Maddison v. Alderson*<sup>1</sup> said:

"The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which if binding at all must be binding as contracts."

*Jorden v. Money*<sup>2</sup> is the leading authority:

"When a person possesses a legal right, a court of equity will not interfere to restrain him from enforcing it, though between the time of its creation and that of his attempt to enforce it he has made representations of his intention to abandon it. Nor will equity interfere even though the parties to whom these representations were made have acted on them, and have in full belief in them entered into irrevocable engagements. To raise an equity in such a case there must be a misrepresentation of existing facts, and not of mere intention."

In that case Lord Cranworth said:

"I think that that doctrine (the doctrine of estoppel) does not apply to a case where the representation is not a representation of fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not."

*Intention May Involve Fact.*—A representation as to intention may, however, under certain circumstances be a representation of fact. For example, in *Edgington v. Fitzmaurice*<sup>3</sup> a prospectus stated that "the objects of the present issue are" to make certain purchases and alterations; whereas the real in-

<sup>1</sup>(1833) 8 App. Cas. 473; 53 L. J. Ch. 365; approved in *Citizens v. First Nat. Bank* (1873), L. R. 6 H. L. 352; 43 (1857), 2 Giff. 1; *Piggott v. Stratton* (1853), 1 De G., F. & J. 83; 29 L. J. Ch. 8; *Orr v. Orr* (1874), 21 Gr. 397; *Merchants' Bank v. Lucas* (1888), 15 Ont. App. 586; 18 S. C. Can. 705; *Langdon v. Doud* (1865), 92 Mass. 493; *White v. Ashton* (1873), 51 N. Y. 260.

<sup>2</sup>(1854) 5 H. L. Cas. 185; 33 L. J.

<sup>3</sup>(1885) 29 Ch. D. 459; 55 L. J. Ch. 650; *Old Colony v. Dubuque* (1898), 89 Fed. R. 794.

tion was to pay off liabilities. In an action of deceit, Cotton, L. J., said:

"It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact; and if it could not be fairly said that the objects of the issue of the debentures were those which were stated in the prospectus, the defendants were stating a fact which was not true; and if they knew that it was not true, or made it recklessly not caring whether it was true or not, they would be liable.

Bowen, L. J., in another case<sup>1</sup> said:

"The state of a man's mind is as much a fact as the state of his digestion."

Under other circumstances also an expression of intention may involve a representation of fact. For example, if a note be shown to me by one who, to my knowledge, contemplates purchasing it, and I say that "I intend to pay it at maturity," I ought to be estopped as against my interlocutor from denying my signature to the note;<sup>2</sup> for the expression of intention to pay involved a representation that the note was a real obligation.

*Intention as Ground of Estoppel.*—There are some cases in which it is said that a representation as to intention not amounting to a representation of fact will estop from afterwards changing the intention. For example, in one case<sup>3</sup> it is said:

"The rule we believe is that a promise to forgive a debt or to forbear its collection, either temporarily or for an indefinite period, unsupported by any consideration, though ineffectual as a defense viewed merely as an agreement, yet, if the surety has been induced by such an assurance to neglect any of the means which might have been used for his indemnity, the promise may have that effect as an estoppel which it wants as a contract, and amount to a defense against any subsequent action brought by the creditor."

But the answer to this is apparent. If the surety has been induced by such an assurance "to change his position for the worse," then there is a consideration and a contract; for consideration includes "any detriment sustained by the plaintiff," if it be "suffered by the plaintiff with the consent, express or implied, of the defendant."<sup>4</sup> On the other hand, if there is no contract, it is impossible to say that the surety has been in-

<sup>1</sup> Edgington v. Fitzmaurice (1865), 29 Ch. D. 483; 55 L. J. Ch. 650.

<sup>2</sup> Preston v. Mann, 25 Conn. 118. See Krothwohl v. Dawson (1894), 140 Ind. 1; 38 N. E. R. 467; Austin v. Bahn (1894), 87 Tex. 592; 27 S. W. R. 1047; Perry v. Lawless (1849), 5 U. C. Q. B. 514.

<sup>3</sup> White v. Walker (1863), 31 Ill. 422.

<sup>4</sup> Per Tindal, C. J., Laythorp v. Bryant (1836), 3 Sc. 230; 5 L. J. C. P. 217. And see Gerhard v. Bates (1853), 2 E. & B. 437; 23 L. J. Q. B. 369; Moss v. Hall (1850), 5 Ex. 49; 19 L. J. Ex. 205.

duced to change his position, for he knew perfectly well that the creditor was not bound by the assurance and was at liberty to change his mind at any time. Stephen, J., in *Alderson v. Maddison*,<sup>1</sup> said:

"The difference between the classes of misrepresentation which do and do not bind seems to me plain. To say, 'I have cancelled this bond,' when you have not, is to tell an untruth. To say, 'I intend to cancel this bond,' is to make a statement as to a present movable intention. If a person chooses to act on such a representation without having it reduced to the form of a binding contract, he knows, or ought to know, that he takes his chance of the promisor changing his mind."

An assurance which may be withdrawn the next or any succeeding minute cannot be alleged as a ground for change of action. If it be urged that the creditor may have observed that the surety was refraining from enforcing his remedies, the reply is that the case (if thus altered) may have become one of contract—one in which there is a consideration because of the detriment sustained "with the consent, express or implied, of the defendant."

In another case<sup>2</sup> it is said:

"If one having a right to redeem real estate under mortgage assures a proposed purchaser of the fee that he will not redeem, and this assurance is given for the purpose of inducing such purchaser to buy, and he is thereby induced to buy, the owner of the right will be estopped afterward to enforce it against the purchaser or his assignees."

But this is not estoppel at all, but contract pure and simple. "In consideration of your assurance that you would not redeem. I became the purchaser." If there be no contract, the language cannot form the ground of estoppel, for it was known to be an expression of intention merely and so not binding—known to be nothing. It could not therefore be put forward as a reason for a change of position; and a change of position upon the faith of another's assertion is necessary to estoppel.<sup>3</sup>

Distinction must be made between the representation, "I

<sup>1</sup>(1880) 5 Ex. D. 803; 49 L. J. Ex. 801.

<sup>2</sup>*Southard v. Sutton* (1878), 68 Me. 575. There are many other cases. Some of them almost avowedly proceed upon contract, and are not quite open to the criticism of the text. Others directly support the doctrine under consideration. See *Harris v. Brooks* (1888), 38 Mass. 195; *White v. Walker* (1863), 31 Ill. 422; *Reimensnyder v. Gans* (1885), 110 Pa.

St. 17; 2 Atl. R. 425; *College v. Tuttle* (1887), 71 Iowa, 596; 33 N. W. R. 74; *Moore v. Trimmer* (1890), 35 S. C. 606; 11 S. E. R. 548; *Shroeder v. Young* (1896), 161 U. S. 334; 16 S. C. R. 512; *Ricketts v. Scothorn* (1898), 57 Neb. 5; 77 N. W. R. 365; *Gilbert v. Richardson* (1898), 51 S. W. R. 134 (Tenn.). Some of these are clear cases of contract.

<sup>3</sup>See ch. XI.

have no interest in the land," and "I have an interest, but do not intend to assert it." In the former there is estoppel because there is misrepresentation; but in the latter there may be no misrepresentation, for the truth may be in accordance with the assertion. "I do not intend to assert it" may mean one of two things: (1) "In my present frame of mind and at the present time I have no intention to enforce my claim;" or (2) "I promise you that I will not enforce my claim." If the former language were used no one would suggest estoppel; and if the latter every one would recognize contract. Each case will be found to be either in one category or the other.<sup>1</sup>

There are several cases in which an assurance has been given by the owner of property that he will make certain disposition of it, if another person will reside with him.<sup>2</sup> The point as to consideration is clearly stated in one of them:<sup>3</sup>

"But there may be other kinds of consideration, and if the conduct of one person induces another to alter his or her conduct that will make a binding contract; and if the plaintiff, at an age when she was capable of gaining her livelihood either by going into domestic service or into business, was induced by Sarah Coles, who was rich enough to confer the benefit, to alter her conduct by the gift of a house in which she should live for the whole of her life with a view to gaining her livelihood by letting out lodgings, the very circumstance of her having induced the plaintiff to alter her conduct and refrain from going into business, in which she might have done well and got friends to assist her and realized independence, would be enough to make the agreement binding. And although the donor received no actual consideration, the case is one to which the cited passage by Sir John Stuart, in *Loffus v. Maw*, 3 Giff. 603; 32 L. J. Ex. 49, from Lord Cottenham's judgment in *Hammersley v. De Biel*, 12 Cl. & F. 62, n., is applicable. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation. This then is a case in which the representation made by Sarah Coles must be held to be sufficient to raise a consideration in favor of the plaintiff, there being a good gift, that is an intention on the part of Sarah Coles to give the house and a possession in accordance with that intention."<sup>4</sup>

Were we to get away from the solid ground that a representation to be binding must be either as to present fact, or else amount to a contract, it would be difficult to formulate any

<sup>1</sup> See Pollock on Contracts (6th ed.), 507.

<sup>2</sup> *Loffus v. Maw* (1862), 3 Giff. 592; 32 L. J. Ch. 49; *Coles v. Pilkington* (1874), L. R. 19 Eq. 174; 44 L. J. Ch. 381; *Alderson v. Maddison* (1880), 5 Ex. D. 293; 8 App. Cas. 487; 53 L. J. Q. B. 737; *Smith v. Smith* (1896), 29 Ont. 309.

<sup>3</sup> *Coles v. Pilkington*, *ante*.

<sup>4</sup> See also *Bracewell v. Williams* (1866), L. R. 2 C. P. 196; *Williams v. Stern* (1879), 5 Q. B. D. 409; 49 L. J. Q. B. 663. Note that the change of conduct must be referable to the promise. *Alderson v. Maddison* (1880), 5 Ex. D. 293; 49 L. J. Ex. 801; 8 App. Cas. 487; 53 L. J. Q. B. 737.

principle of action. For example, if a surety may rely upon a creditor's expressed intention not to sue the debtor, although there is no contract to that effect, why may not a policy-holder rely upon the insurance company's expressed intention to notify him of the due-date of the premiums, although there is no contract to that effect? Ought the company to be estopped from saying that any premiums ever fell due if its intention is not carried out, and for years no premiums are paid?<sup>1</sup>

#### FACT AND OPINION.

All that need be said as to the distinction between fact and opinion is to be found in a judgment of Garbert, J. :<sup>2</sup>

"The general rule is that a representation cannot form the basis of an action for falsity unless it relates to a matter of fact as distinguished from opinion. The difficulty arises in making the distinction. The true rule appears to be that a fraudulent misrepresentation cannot itself be the mere expression of an opinion entertained by the party making it; but where such party makes a statement which might otherwise be only an opinion, and does not state it as the mere expression of his opinion, but affirms it as a fact material to the transaction to which it relates, so that the person to whom it is addressed may reasonably treat it as a fact, and rely and act upon it accordingly, then such statement becomes an affirmation of a fact, within the meaning of the general rule, and may be a fraudulent misrepresentation. (3 Pom. Eq. Jur., 2d ed., § 878.) If the representations are of such a character that they will bear either the construction that they were expressions of opinion or statements of fact, the question which they were must be decided by the jury (3 Suth. Dam., 2d ed., § 1167; Teague v. Irwin, 127 Mass. 217; Sterne v. Shaw, 124 Mass. 59); but in order to justify a finding that they were representations of fact, they must be statements susceptible of knowledge, as distinguished from opinion. (3 Suth. Dam., *supra*; Sterne v. Shaw, *supra*; Nounnan v. Land Co., 8 Cal. 1; 22 Pac. R. 515; Williams v. McFadden, 23 Fla. 147; 1 S. R. 618; Parker v. Moulton, 114 Mass. 99.)"

#### FACT AND LAW.

Two reasons have been put forward in support of the assertion that no relief can be grounded upon misrepresentation of law: (1) that everybody is assumed to know the law, and therefore there can be no effective misrepresentation of it; and (2) that nobody should depend or act upon what another person asserts to be the law, for it is a matter of opinion only.

<sup>1</sup> See *Insurance Co. v. Mowry* (1877), 96 U. S. 544. Something in such cases may be said in favor of waiver of punctual payment as a ground of forfeiture. *Chicago v. Werner* (1875), 80 Ill. 410; *Insurance Co. v. Eggleston* (1877), 96 U. S. 572; *Lyon v. Travel-*

*lers* (1884), 55 Mich. 141; 20 N. W. R. 829.

<sup>2</sup> *American Nat. Bank v. Hammond* (1898), 55 Pac. R. 1000 (Colo.). And see *Akin v. Kellogg* (1890), 110 N. Y. 442. Incidentally the subject is recurred to in a later part of the present chapter.



I. *Law Well Known*.—Perhaps no presumption that was ever proposed is in more flagrant opposition to indubitable fact than that propounded by Lord Ellenborough in the oft-quoted case of *Bilbie v. Lumley*.<sup>1</sup>

"Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried," and together with all false assumptions, it must be got well rid of before the law can be said to be scientifically arranged.

The fiction is supposed to be specially requisite in the department of crimes. No doubt when a felon urges that he was ignorant of the law, we must have something wherewith to answer him. But we need not tell him that the judge is so absurd as to presume to be true that which both of them know to be false. It is quite sufficient and much more reasonable to remind him that he is a member of society, and that he must inform himself of the rules prescribed for social conduct or take the consequences.

In the department of civil law, although Lord Ellenborough's assumption is constantly repeated,<sup>2</sup> yet the books are full of its modification and contradiction; and the cases are numerous in which the plain fact that this man did not know the law has been allowed to assert itself. If it were to be taken to be absolutely true, then of course there could be no effective misrepresentation as to a matter of law, for the person addressed would always know that the statement made to him was false:

"A misrepresentation of a matter of law does not constitute a fraud, because the law is presumed to be equally within the knowledge of all parties."<sup>3</sup>

"Now every man is supposed to know the legal effect of an instrument which he signs; and therefore this must be taken to be a representation as to a fact within the knowledge of the creditor; and such misrepresentation will not have the effect of avoiding this instrument, because it was not calculated to mislead the creditor."<sup>4</sup>

<sup>1</sup>(1802) 2 East, 472.

<sup>2</sup>Pullen v. Ready (1748), 2 Atk. 591; Lewis v. Jones (1825), 4 B. & C. 512; Midland Ry. v. Johnson (1858), 6 H. L. C. 811; Rashdall v. Ford (1860), L. R. 2 Eq. 754; 35 L. J. Ch. 769; Powell v. Smith (1872), L. R. 14 Eq. 91; 41 L. J. Ch. 784; Pollock on Contracts, 405; Kerr on Fraud (2d ed.), 52; Chand on Consent, 90, 91; Grant v. McKee (1856), 11 Man. 145;

Keyes v. Merrill (1896), 93 Wis. 32; 65 N. W. R. 735.

<sup>3</sup>Powell v. Smith (1872), L. R. 14 Eq. 91; 41 L. J. Ch. 785. And see Campbell v. Edwards (1876), 24 Gr. 175.

<sup>4</sup>Lewis v. Jones (1825), 4 B. & C. 506; 3 L. J. K. B. O. S. 27. And see per Lord Chelmsford in Midland v. Johnson (1858), 6 H. L. C. 811; and per Gwynne, J., in Laing v. Taylor (1876), 26 U. C. C. P. 429; Cole v. Pope (1898), 29 S. C. Can. 291.

But surely this is trifling with the truth, and treating as incontrovertible that which is frequently said in satire or jest. The law may be open to disparaging remark because of its proverbial uncertainty, but it is worse than unfortunate if our only reply is that the charge is untrue — unless indeed we do verily believe that everybody is so perfectly familiar with every point which can possibly arise that it is inconceivable that, even under pressure of weightiest assertion, any one can ever make a mistake about it.

Consider too whether it would not be more reasonable to hold that every man must be taken to be cognizant of the facts with reference to which he is dealing than that "every man must be taken to be cognizant of the law." And yet that is never an answer to a man who complains that the facts have been misrepresented to him; nor is he told that he could with "ordinary vigilance and attention" have tested the matter for himself.<sup>1</sup>

II. *Law a Matter of Opinion.*—This becomes apparent when we turn to the other reason for denying relief in cases of misrepresentation of law, namely, that law is a matter of opinion only, and that therefore no one ought to depend or act upon another person's representation of it. In other words (and with much greater truth than in the former case), the law is very uncertain; if anybody makes an assertion as to it, he may be right or he may be wrong; he is merely giving you his opinion; and you must not act upon that — you should go and inquire as best you can.

"A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."<sup>2</sup>

If a representation of law was always accompanied, expressly or impliedly, by the remark that it was given as a matter of opinion only, much could be said for this view; but the authorities supply us with many cases in which precisely the opposite remark is made or implied — cases in which, by purposely and strenuously misstating the law, a fraud is accomplished.

<sup>1</sup> *Bloomenthal v. Ford* (1897), A. C. 168; 66 L. J. Ch. 258; *David v. Park* (1870), 103 Mass. 501. And see ch. XI, sub-tit. "Means of knowledge."

<sup>2</sup> *Fish v. Clelland* (1864), 33 Ill. 248. And see *Starr v. Bennett* (1845), 9 Hill (N. Y.), 303; *Upton v. Tribilcock* (1875), 91 U. S. 45.

One can easily understand that if a question arises upon the construction of a document as to the right of a woman to dower, and she should say that she was not entitled to it, her remark would not justify action by those hearing her.<sup>1</sup> And yet if a company should represent that its debentures were legally transferable,

"there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures, to restrain the company from pleading their invalidity."<sup>2</sup>

*Law and Fact.*—There is this difficulty, if we are to have one rule as to misrepresentations of law and another as to misrepresentations of fact, that we shall have to come to some clear understanding as to the difference between them. For example, in one House of Lords case it was said that "the construction of a contract is clearly a matter of law;"<sup>3</sup> in a second it was thought that "private right of ownership is a matter of fact," even if you have to argue it from the construction of documents; for although it is a matter of fact "it may be the result also of matter of law;"<sup>4</sup> while in a third relief was given because of mistake as to the meaning of a document, Lord Chelmsford declaring that "a matter of law arising upon the doubtful construction of a grant" is "very different from the ignorance of a well-known principle of law."<sup>5</sup>

And what must be thought of a representation by a company that its shares are unassessable? Is that a statement of law, or of fact as the result of a matter of law? If the company had represented that there was a clause in its charter rendering the shares unassessable, is that a matter of fact? And will it become one of law if there is some provision there but of doubtful interpretation.<sup>6</sup> Again, if directors should represent that their company has power to issue debentures, is

<sup>1</sup> Fairweather v. Archbald (1868), 15 Gr. 255. And see Bigelow on Estoppel (5th ed.), 573.

<sup>2</sup> Per Kay, L. J., in Re Romford (1833), 24 Ch. D. 93; 52 L. J. Ch. 723. And see ch. XXIV, sub-tit. "Negotiability by estoppel," citing Goodwin v. Roberts, and other cases.

<sup>3</sup> Midland v. Johnson (1858), 6 H. L. C. 811. And see Powell v. Smith (1872), L. R. 14 Eq. 85; 41 L. J. Ch. 734.

<sup>4</sup> Cooper v. Phibbs (1867), L. R. 2 H. L. 170. See to same effect, Jones

v. Clifford (1876), 3 Ch. D. 792; 45 L. J. Ch. 809. See also Barber v. Clark (1890), 20 Ont. 522; 18 Ont. App. 435; Baldwin v. Kingstone (1890), 18 Ont. App. 108; King v. Doolittle (1858), 1 Head (Tenn.), 86; Chand. on Consent, 104; Pomeroy, Eq. Jur. 1176.

<sup>5</sup> Beauchamp v. Winn (1873), L. R. 6 H. L. 234.

<sup>6</sup> In Upton v. Tribilcock (1875), 91 U. S. 45, it was held that a representation that shares are unassessable is a representation of law.

that a representation as to law or fact? Possibly either or both. For it is said that if the reason why the company had not such power was that sufficient stock (a pre-requisite of debentures) had not been subscribed, the representation was one of law; but if the right to issue had accrued and, "having exhausted that power, the directors had stated that they still had power to issue debentures," the representation would have been one of fact.<sup>1</sup> And what is to be said of a representation that a patent is valid when the point is whether it is for a "new and useful" invention;<sup>2</sup> or a representation that a man is a shareholder in a company;<sup>3</sup> or a representation that a writ has been "returned in due form of law";<sup>4</sup> or a representation that A. is the wife of B.? Perhaps this is the best that can be said:

*"There is not a single fact connected with personal status that does not more or less involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or in some countries before. Therefore, to state that it is not a representation of fact seems to arise from a confusion of ideas. It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of ten thousand pounds a year, the notion of possession is a legal notion and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to ten thousand pounds consols involves all sorts of law."*<sup>5</sup>

We see now sufficiently the difficulties which confront those who assert that relief will be given as against mistakes of fact but not as against mistakes of law. Categories have to be made; for we have not got them, but only the promise of immense difficulty in their construction.

There are moreover two very important points to be noticed in connection with the maxim *Ignorantia juris haud excusatur*, if "the word '*jus*' is used in the sense of denoting general law," as Lord Westbury declares is the correct sense of it;<sup>6</sup> or if, as Lord Chelmsford has it, the maxim applies only to "ignorance of a well-known rule of law."<sup>7</sup>

<sup>1</sup> *Rashdall v. Ford* (1866), L. R. 2 Eq. 750; 85 L. J. Ch. 769.

<sup>2</sup> *Vermilyea v. Canniff* (1886), 12 Ont. 164; *Huber v. Guggenheimer* (1898), 89 Fed. R. 598.

<sup>3</sup> *Broughton v. Hutt* (1858), 3 De G. & J. 529; 28 L. J. Ch. 167.

<sup>4</sup> *Starr v. Bennett* (1848), 5 Hill (N. Y.), 308.

<sup>5</sup> *Eaglesfield v. Londonderry* (1876), 4 Ch. D. 702.

<sup>6</sup> *Cooper v. Phibbs* (1867), L. R. 2 H. L. 170; 45 L. J. Ch. 809.

<sup>7</sup> *Midland v. Johnson* (1853), 6 H. L. C. 811.

## (1) There is the criticism in Story's Equity:

"The distinction between cases of mistake of a plain and settled principle of law, and cases of mistake of a principle of law not plain to persons generally, but which is yet constructively certain as a foundation of title, is not of itself very intelligible, or practically speaking very easy of application, considered as an independent element of decision."<sup>1</sup>

(2) And further there is the very important consideration that it is precisely in cases in which there has been a display of "ignorance of a well-known rule of law" that relief is often granted (as we shall see) because

"the ignorance of a plain and established doctrine so generally known and of such constant occurrence as a common canon of descent may well give rise to a presumption that there had been some undue influence, imposition, mental imbecility, or confidence abused."<sup>2</sup>

We thus seem to arrive at the conclusions that the maxim *Ignorantia juris haud excusat* applies only to cases of "ignorance of well-known rules of law;" that it is probably impossible to distinguish (for practical purposes) between a plain principle of law and one "not plain to persons generally;" but that the distinction is, after all, not very important, for if ignorance of plain law will not excuse, yet advantage must not be taken of such ignorance. That is to say, people are presumed to be familiar with the plain principles, but when they are not courts must recognize that fact and will relieve upon the ground of fraud.

*Advantage Taken of Ignorance.*— It sometimes happens that a venerable statement of the law is allowed to persist while the cases which it ought to regulate are being decided in opposition to it. This presumption that "every man must be taken to be cognizant of the law" still has authoritative sound; and arguing from it, in the manner above suggested, the conclusion is inevitable that nobody can be misled by a misrepresentation of law; but as we have already said, "the cases are numerous in which the plain fact that this man did not know the law has been allowed to assert itself," and it is now "well settled that where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair and deceptive conduct which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief."<sup>3</sup>

This is made sufficiently clear by *Lansdown v. Lansdown*

<sup>1</sup> 18th ed. 128.

<sup>2</sup> Snell's Eq. (11th ed.), 457. And *Haviland v. Willets* (1894), 141 N. Y. 35; 85 N. E. R. 958.

see *Frigg v. Read* (1845), 5 Humph. (Tenn.) 535.

in 1750, a case of misrepresentation as to right of succession;<sup>1</sup> *Legge v. Croker* in 1811, a case of misrepresentation as to a right of way;<sup>2</sup> *Champlain v. Laytin* in 1836, a case of misrepresentation as to dedication;<sup>3</sup> *Wheeler v. Smith* in 1850, a case of misrepresentation as to the effect of a will;<sup>4</sup> *Southall v. Rigg* in 1851, a case of misrepresentation of the liability of an apprentice to make up deficiency in his master's fee;<sup>5</sup> *Coward v. Hughes* in 1855, a case of permitting a woman to believe in her liability;<sup>6</sup> *Jordan v. Stevens* in 1863, a case of misrepresentation as to the validity of a lease commencing *in futuro*;<sup>7</sup> *Earl Beauchamp v. Winn* in 1873,<sup>8</sup> and *Cooper v. Phipps* in 1867,<sup>9</sup> cases of purchasers buying their own property; *Hirschfeld v. London* in 1876, a case of misrepresentation as to effect of a release of damages;<sup>10</sup> *Hart v. Swaine* in 1877, a case of misrepresentation as to tenure of land sold;<sup>11</sup> *Snell v. Insurance Co.* in 1878, a case of misrepresentation as to a policy in the name of one partner covering the firm's interest;<sup>12</sup> *Stewart v. Kennedy* in 1890, a case of misrepresentation as to necessity for "ratification of the court;"<sup>13</sup> and in *Wilding v. Sanderson* in 1897, a case of misrepresentation as to the effect of a document;<sup>14</sup> and many other cases.<sup>15</sup>

*Estoppel.*—The cases relating to misrepresentation of law have not so far involved the peculiar remedy of estoppel. They have been those in which relief by rescission and restitution principally have been awarded. There can be no doubt, however, that the principles involved in both classes of cases are so far similar that we are safe in applying (with some little circumspection) the authorities of the one when treating of the other.

<sup>1</sup> Mosely, 364; 2 J. & W. 205. See reference in *Stewart v. Stewart* (1838), 6 Cl. & F. 966.

<sup>2</sup> 1 Ball & B. 506.

<sup>3</sup> 6 Paige (N. Y.), 195.

<sup>4</sup> 9 How. (U. S.) 55.

<sup>5</sup> 11 C. B. 481.

<sup>6</sup> 1 K. & J. 443.

<sup>7</sup> 51 Me. 79.

<sup>8</sup> L. R. 6 H. L. 283.

<sup>9</sup> L. R. 2 H. L. 149. See p. 164.

<sup>10</sup> 2 Q. B. D. 1; 46 L. J. Q. B. 94.

<sup>11</sup> 7 Ch. Div. 42; 47 L. J. Ch. 5.

<sup>12</sup> 98 U. S. 85.

<sup>13</sup> 15 App. Cas. 108.

<sup>14</sup> (1897) 2 Ch. 534; 66 L. J. Ch. 467, 634.

<sup>15</sup> *Laing v. Taylor* (1876), 26 U. C. C. P. 430; approved in *Brown v. Holland* (1885), 9 Ont. 57; *Champlin v. Laytin* (1836), 6 Paige (N. Y.), 195, in which it is suggested that the ground of relief is fraud rather than ignorance of the law; *Goodenow v. Ewer* (1860), 16 Cal. 401; *Boggs v. Hargrave*, *id.* 560.

*Innocent Misrepresentation.*— Before leaving the subject it should be noted that it is not at all necessary for relief that the misrepresentation should be fraudulent. An innocent misrepresentation is just as disastrous to the person deceived as one tainted with falsehood; and it is equally a ground for estoppel.<sup>1</sup>

<sup>1</sup> *Snell v. Insurance Co.* (1878), 98 U. S. 85. And see ch. VIII.

## CHAPTER VII.

### CONDITION NO. 5.

#### *The Misrepresentation Must be of Something Material.*

It is not necessary to quote much authority for the proposition that a misrepresentation to have any effect upon the relations of parties must be as to something which might have affected those relations.

"A matter alleged, which is neither traversable nor material, shall not estop."<sup>1</sup>

The test of materiality may be stated as follows:

"It must be a representation '*dans locum contractui*,' that is a representation giving occasion to the contract: the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into it; or the suppression of a fact the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether."<sup>2</sup>

Or, in the language of Pollock on Contracts:<sup>3</sup>

"Anything which would affect the judgment of a reasonable man, governing himself by the principles on which men in practice act in the kind of business in hand."

The following is from a United States case and represents a more rigid view of the matter:

"Still, this important question is not left to the arbitrary or accidental decision of each court in each case, for all courts are governed or at least directed by certain precedents and rules, among which it is sufficient to state at present that the fraud must be material to the contract or transaction which is to be avoided; for if it relate to another matter, or to this only in a trivial and unimportant way, it affords no ground for the action of the court. It must, therefore, relate distinctly and directly to the contract and affect its very essence and substance. But there is no positive standard by which to determine whether the fraud be thus material or not. No better rule can be given for deciding the question than this: If the fraud be such that, had it not been practiced, the contract could not have been made or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done in the same way if the fraud had not been practiced, it cannot be deemed material. Whether the fraud be material or otherwise seems to be, on the decided weight of authority, a question for the jury and not a question of law; but it is obvious that in many cases the jury cannot answer this question without instructions from the court."<sup>4</sup>

<sup>1</sup> Vin. Ab., vol. X, p. 432.

<sup>2</sup> Per Romilly, M. R., in *Pulsford v. Richards* (1853), 17 Beav., 96; 23 L. J. Ch. 559.

<sup>3</sup> 6th ed., p. 550. For examples as

to materiality, see Leake on Contracts (18th ed.), 813 sq., and *Royal Ins. Co. v. Byers* (1885), 9 Ont. 120.

<sup>4</sup> Per Miller, J., in *McAleer v. Horsey* (1871), 35 Md. 452. And see



In view of a useful distinction recently made it is probably going too far to say that the misrepresentation must "relate distinctly and directly to the contract, and affect its very essence and substance." A rapacious money-lender concealed his identity (by means of an assumed name) in order to induce a borrower to deal with him; and it was held that the fraud was sufficiently material to warrant a rescission of the contract.<sup>1</sup> A. L. Smith, L. J., said:

"In my opinion the first point which arises is not whether the fraud was material to the contract entered into, but whether the fraud was material to the inducement which brought about the contract."

A Manitoba case is much to the same effect. A man having a contract for the purchase of lands resold them at a much higher price, pretending that he was agent merely for his vendor, and procured his vendor to convey direct to the sub-purchaser. The sub-purchaser would have made more careful inquiries had he been aware of the facts, and was held entitled to rescind his agreement.<sup>2</sup>

It is always very difficult, when a misrepresentation has been followed by action, for the misrepresenter to contend that his misstatement was immaterial. The *onus* lies heavily upon him to disprove the *propter hoc*.<sup>3</sup>

*Several Representations, and One of Them Untrue.*—

"When certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular line of conduct, it is impossible to say of any one of such representations so made that even if it had not been made the same resolution would have been taken or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue, the whole contract is in this court considered as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?"<sup>4</sup>

The subject is closely associated with that treated of in a later chapter,<sup>5</sup> to which reference may be made. There is, no doubt, distinction between questions as to the materiality of

Huber v. Guggenheim (1898), 89 Fed. R. 598.

<sup>1</sup> Gordon v. Street (1899), 2 Q. B. 646; 69 L. J. Q. B. 45.

<sup>2</sup> Hutchinson v. Calder (1888), 1 Man. 17. The judgment was reversed on appeal, but not upon the ground that such a misrepresentation would not be material. Id. 46.

<sup>3</sup> See post, ch. XI.

<sup>4</sup> Smith v. Kay (1859), 21 Beav. 522;

7 H. L. 750; Traill v. Baring (1864),

4 De G., J. & S. 818; 42 L. J. Ch. 521;

Bailey v. Seymour (1894), 43 S. C. 322;

20 S. E. R. 62. And see ch. XI.

<sup>5</sup> Per Lord Cranworth, in Raynell

v. Sprye (1852), 1 D. M. & G. 707; 21

L. J. Ch. 633.

<sup>6</sup> See post, ch. XI.

misrepresentations and questions as to whether a change of position took place upon the faith of such misrepresentations. But it may be said that a change of position upon the faith of a misrepresentation proves its materiality. And, given a material misrepresentation, followed by a change, and the *propter* will be easily inferred. There are cases, too, in which neither factor is palpably existent, and presumptions have to be resorted to.

*Assisted Misrepresentation.*—It is obvious that in cases of assisted misrepresentation, not only must the misrepresentation have been material, but the assistance also must have been of such character as to have influenced the result. The formula adopted in this work to express the requisite relation between the assistance rendered by the estoppel-denier and the action of the estoppel-asserter is that the change of position must be reasonably consequent upon the assistance. This subject is treated in a subsequent chapter.<sup>1</sup>

<sup>1</sup> Ch. XIII.

## CHAPTER VIII.

### CONDITION NO. 6.

#### *Fraud or Bad Faith is Not Essential.*

The question now to be considered relates to the moral quality of the misrepresentation. Must there be fraud or bad faith in it? or may it be of perfectly innocent character? Indeed, there is a much deeper question (usually not thought of) directing our ethical inquiry, sometimes not to the misrepresentation at all, but to the assistance rendered to it by some third person — by the person said to be estoppel.

Misrepresentation may be found in three departments of the law: (1) Deceit, (2) Rescission, and (3) Estoppel. The wider our survey of it the better we shall understand it.

#### I. MISREPRESENTATION AND DECEIT.

Mr. Bigelow's list of requisites of an estoppel contains the following:

"The representation must have been made with knowledge, actual or virtual, of the facts."<sup>1</sup>

And in exposition of that proposition he says:<sup>2</sup>

"Estoppel arising in virtue of a misrepresentation is the converse of an action of deceit. The property or interest claimed by reason of the estoppel corresponds to the damages sought in the action of deceit; and in order to make good the claim of estoppel the same things, it should seem, are requisite that are necessary to the maintenance of the action mentioned. Now by the clear weight of authority in which courts of equity, in recent times at least, agree with the courts of law, it is necessary to the recovery of damages in an action for misrepresentation, by the current of authority, to show that the defendant made the representation (1) with actual knowledge of its falsity, or (2) recklessly, without knowing whether it was true or false, or (3) under circumstances in which, from his peculiar relation to the facts, he was bound to know the true state of things."

Passing over for a moment the stated requisite of fraud, let it be observed:

1. That in Mr. Bigelow's classification there is no room for his third sort of case. The first two classes exhaust the pos-

<sup>1</sup>On Estoppel (5th ed.), p. 570. And see Willmott v. Barber (1880), 15 Ch. D. 96; 42 L. J. Ch. 792, a case, however, having more relation to acquiescence than to estoppel.

<sup>2</sup>Id., p. 609.

sible cases, for they include cases where a representation has been made which is known to be false, and those in which it is made "without knowing whether it was true or false." It is useless then to inquire whether the asserter "was bound to know the true state of things;" for whether he was or was not so bound he is estopped (1) if he make a representation which he knows to be false, and (2) which may be false.<sup>1</sup>

2. The present writer cannot agree either that an action of deceit will lie merely because the misrepresenter "was bound to know the true state of things" in the absence of that fraud which would place the instance in one of the other categories. In the leading case of *Derry v. Peek*,<sup>2</sup> Lord Herschell said:

"I think the authorities establish the following propositions: First, in order to establish an action of deceit, *there must be proof of fraud, and nothing short of that will suffice.* Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief<sup>3</sup> in the truth of what he states."

And although the learned judge refers to cases in which "a person within whose province it lay to know a particular fact," it is "only for the purpose of putting them aside" as being "in an altogether different category from actions to recover damages for false representations, such as we are dealing with."

3. Nor can the present writer agree that for "estoppel the same things are requisite" as in the action of deceit. The lat-

<sup>1</sup>In *Watson v. Jones*, 25 S. R. 693 (Fla.), it is said: "We are therefore of opinion that proof of scienter in the third phase does not give another or different right or ground of action from that given by proof under the first phase, but that it simply establishes the same ultimate fact, viz. knowledge, by a different class of evidence; and consequently that an allegation that defendant 'knew' his representation to be false is provable by evidence embraced in the third phase. In other words, an averment that defendant's situation or means of knowledge were such as made it his duty to know whether his statement was true or false, and an averment that defendant well

knew his statements to be untrue, are but different methods of stating the same ultimate fact, viz. knowledge. *McBeth v. Craddock*, 28 Mo. App. 380; *De Lay v. Carney Bros.*, 100 Iowa, 687; 60 N. W. R. 1052."

<sup>2</sup>(1889) 14 A. C. 337; 58 L. J. Ch. 864. See the *Derry v. Peek scholia* cited with it in ch. XVI.

<sup>3</sup>As to this point of reality of belief see *Allcroft v. Bishop of London* (1889), 23 Q. B. D. 414; 58 L. J. Q. B. 385; 24 Q. B. D. 213; 59 L. J. Q. B. 169; (1891) A. C. 666; 61 L. J. Q. B. 62; *Angus v. Clifford* (1891), 2 Ch. 449; 60 L. J. Ch. 443; *White v. Sage* (1892), 19 Ont. App. 155; *Turner v. Francis* (1894), 10 Man. 340; 25 S. C. Can. 110.

ter, as we have just seen, must be based upon "fraud, and nothing short of that will suffice."<sup>1</sup> In estoppel, on the other hand, as we shall abundantly see, a perfectly innocent misrepresentation, or even innocent assistance rendered to a misrepresentation of another person, may be quite sufficient for estoppel.<sup>2</sup>

## II. MISREPRESENTATION AND RESCISSION.

In some cases of misrepresentation rescission of the contract is sought, and not damages in deceit, nor yet estoppel. The law as to *mala fides*, in such cases, is explained by Lord Herschell:<sup>3</sup>

"I think it important that it should be borne in mind that such an action (i. e., an action for deceit) differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions are widely different. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract having been obtained by misrepresentation cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite."

## III. MISREPRESENTATION AND ESTOPPEL.

Misrepresentation as a basis for an action of deceit then must, according to the present state of the law, be fraudulent. On the other hand, misrepresentation as a ground for rescission

<sup>1</sup> Reference, of course, is made to the present state of the law. See, however, the chapter on Deceit, ch. XVI.

<sup>2</sup> Mr. Bigelow at page 629, note 1, himself says: "As there need not be any actual design that the representation should be acted upon, there need be no design to defraud."

<sup>3</sup> Derry v. Peek (1889), 14 App. Cas. 359; 58 L. J. Ch. 864; Reese v. Smith (1869), L. R. 4 H. L. 81; 39 L. J. Ch. 855 (per Lord Cairns); Petrie v. Guelph, 11 S. C. Can. 450; Jordan v. Provincial (1898), 28 S. C. Can. 554; Budd v. McLaughlin (1896), 10 Man. 75. A very capable jurist (Strong, C. J.) has suggested a distinction between executed and executory contracts, holding that for rescission of the former the misrepresentation

must be fraudulent (as in deceit), but otherwise where the contract remains executory. Bell v. Macklin (1880), 15 S. C. Can. 581. This may at all events be said: That rescission ought to include restoration to the *status quo ante*; that where the contract has been executed, complete restoration is frequently impossible; and that if there has been bad faith the court might be less careful upon that point than if the misrepresentation had been made innocently. If the point is well taken it will involve the consideration of contracts partly executed; and perhaps a distinction as to the heinousness of the fraud as compared with the complexities of the change of position — perhaps to the exercise of judicial discretion in such cases.

of a contract may be innocent. What is the law with reference to misrepresentation as a ground of estoppel?

*Diverse Views.*— Upon such a fundamental point as the necessity for fraud as an element of estoppel we would expect to find the authorities agreed. For plainly little can be done towards a philosophy of estoppel without settlement of this main question, Is moral culpability essential to estoppel?

In Smith's Leading Cases it is said:

"But if the representation was made under a mistake, and in ignorance of the facts, there will be no estoppel."<sup>1</sup>

Story's Equity has the following:

"This doctrine of estoppel *in pais* in ordinary cases grows out of a fraudulent purpose and a fraudulent result."<sup>2</sup>

In a Canadian case it is said:

"The general rule is that fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived; the party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been made with knowledge of the facts."<sup>3</sup>

And in the United States Supreme Court it is said that:

"For the application of that doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud by which another has been misled to his injury."<sup>4</sup>

Upon the other hand there is in many cases the flattest contradiction of this doctrine. For example Lord Cranworth said:<sup>5</sup>

"It is not necessary that the party making the representation should know that it was false; no fraud need have been intended."

<sup>1</sup>19th Am. ed., III, 2116. And see *Holcomb v. Boynton* (1894), 151 Ill. 294; 87 N. E. R. 1031.

<sup>2</sup>13th ed. 1544. The cases in the United States are conflicting. In favor of the above quotation may be found: *Hill v. Epley* (1838), 31 Pa. St. 331; *Biddle Boggs v. Merced* (1850), 14 Cal. 367; *Zuchtman v. Roberts* (1871), 109 Mass. 53; *Stephens v. Dennett* (1872), 51 N. H. 324; *Brant v. Virginia* (1876), 93 U. S. 335; *Staton v. Bryant* (1877), 55 Miss. 261; *Kingman v. Graham* (1881), 51 Wis. 232; 8 N. W. R. 181; *Powell v. Rogers* (1883), 105 Ill. 322; *De Berry v. Wheeler* (1895), 128 Mo. 34; 30 S. W. R. 398; *Brigham Young v. Wagner* (1895), 12 Utah, 1; 40 Pac. R. 704. It is sometimes thought that negli-

gence as evidence of fraud will suffice. *Sullivan v. Colly* (1896), 18 C. C. A. 193; 71 Fed. R. 460. For the contrary opinion: *Pitcher v. Dove* (1884), 99 Ind. 175, 178; *Trustees v. Smith* (1890), 118 N. Y. 640; 23 N. E. R. 1102; *Stiff v. Ashton* (1891), 155 Mass. 130; 29 N. E. R. 203; *Moore v. Brownfield* (1894), 10 Wash. 439; 39 Pac. R. 113. And see cases cited with *Brant v. Virginia*, *post*, ch. XII.

<sup>3</sup>Per *Ferguson, J.*, in *McGee v. Kane* (1887), 14 Ont. 234. And see *Howard v. Hudson* (1853), 2 E. & B. 11; 23 L. J. Q. B. 341.

<sup>4</sup>*Brant v. Virginia* (1876), 93 U. S. 335.

<sup>5</sup>*Jorden v. Money* (1854), 5 H. L. C. 213; 23 L. J. Ch. 863.

And Lord Cairns said:

"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>1</sup>

*Attempted Reconciliation.*— Attempts have been made to reconcile these conflicting views by retaining the word "fraud," and dispensing with its reality — in this ingenious fashion:

"All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon; the door is shut against asserting a right that would result in doing an injury by the party asserting it to some other person, or when in good conscience and honest dealing he ought not to be permitted to gainsay his previous conduct. This is sufficient to work an estoppel and bring in the element of moral wrong, and there need be no precedent, corrupt motive or evil design."<sup>2</sup>

It will be observed that the reconciliation is effected by removing the so-called fraud from one end of the transaction to the other — from the misrepresentation, which may now be innocent, to the harvest of its fruits, which, if permitted, would be fraudulent — from the original purpose to the final result. But it would be just as accurate to say that there must be an "element of moral wrong" in a debtor before he can be compelled to pay his debts — "the case must be one (it would be said) in which the circumstances and conduct would render it a fraud for the party to deny (payment of) what he had previously induced or suffered another to" lend him. This word "fraud," after being emptied of all meaning, is often used in explanation of that which is imperfectly understood, but which would be clear enough were it completely omitted.<sup>3</sup> We can dispense with it here. A little care in distinction and classification is all that is necessary.

*Reconciliation.*— Readers will remember that misrepresentation may be either personal or assisted, and that the assistance may be either active or passive.<sup>4</sup> Leaving the proof to

<sup>1</sup> Reese v. Smith (1869), L. R. 4 H. L. 79; 39 L. J. Ch. 849. And see per Jessel, M. R., in Eaglesfield v. Londonderry (1876), 4 Ch. D. 704.

<sup>2</sup> Herman on Estoppel and Res Judicata, sec. 775. And see Patterson v. Lytle (1849), 1 Jones, 53; Dezell v. Odell (1842), 8 Hill, 215; Hill v. Epley (1858), 31 Pa. St. 334.

<sup>3</sup> See chs. XVIII and XIX.

<sup>4</sup> *Ante*, p. 13. Assisted misrepresentation occurs where the misrepresentation has been made by some third person, but it has been made credible by some act or omission — by some assistance, of the estoppel-denier. This assistance may be active, as where a mortgagee hands to

follow let it be at once said: (1) that where the misrepresentation is that of the estoppel-denier (personal misrepresentation), a misrepresentation will not the less work an estoppel because it is honest and innocent; (2) that where the misrepresentation is that of a third party (assisted misrepresentation), the assistance, if active, will not the less work an estoppel because it was rendered honestly and innocently; (3) and that the dicta which require culpability or bad faith as a pre-requisite of estoppel must be confined to cases of assisted misrepresentation where the assistance is of passive sort.

If with this classification in view the authorities are again consulted the conflict among them will almost entirely disappear. Where, as in *Story* or the United States Supreme Court, it is asserted that fraud is requisite to estoppel, it will be found that the kind of estoppel in view was that usually referred to as estoppel by standing-by, that is to say, cases of misrepresentation by passive assistance. And when Lord Cranworth and many others deny the essentiality of fraud, it will be found that they are speaking with reference to cases of personal misrepresentation, or those when the assistance is active.

Applying then the dicta to their particular cases merely, we might be led to say generally with Lord Cranworth, that "no fraud need have been intended," but that cases of standing-by seem to be an exception to the rule.

#### MISREPRESENTATION BY PASSIVE ASSISTANCE.

When, however, we examine more closely this exception we shall see that it is such in appearance merely. We shall find indeed that there must be culpability in all cases of standing-by, but, carefully distinguishing, we shall discover that it is a requisite of existence of the misrepresentation, and not at all an essential element in the estoppel. In other words, there is culpability in such cases because they are a category of culpable actions, and not because fraud or evil intent is necessary to estoppel.

Whether estoppel will ensue when an owner of land stands

the mortgagor the title deeds, and, where the owner of property stands thus equipped, the mortgagor represents himself as unincumbered owner. Or it may be passive, as by while it is sold to another to an innocent purchaser.



by while it is sold to an innocent purchaser depends, no doubt, upon whether the by-stander intended to mislead; and too hastily it may be said that the case shows therefore that fraud is essential to the estoppel. But it must be observed that fraud (in the case in hand) is necessary to the existence of the misrepresentation on the part of the by-stander; and all that can be said as to the estoppel is that there must be a misrepresentation — moral quality of it unessential.

The point is important. Observe what it is that I allege when I silently stand by. Do I assert that I have no interest in the property? If so, I would of course be estopped. But that is not the proper interpretation to put upon silence. In America, at least, where land is designated almost exclusively by figures, few property owners can bear in mind the description of their holdings. If one of such persons witnessing a sale of land were asked whether he had an interest in it, his answer would probably be: "I do not know; if you wish I will look it up and tell you." By such a statement he would not be estopped. Innocent silence means nothing further, if indeed it even goes as far as that.<sup>1</sup> In innocent silence, therefore, there is no misrepresentation or assistance to misrepresentation. It therefore cannot estop.

Consider two of the leading dicta as to estoppel by standing-by. In one important case Lord Cranworth said:<sup>2</sup>

"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money, on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

And Chancellor Kent is to the same effect:<sup>3</sup>

"If a man knowingly, though passively by looking on, suffer another to purchase land for valuable consideration under an erroneous impression of title without making known his claim, he will not be permitted thereafter to exercise his legal right against such person."

<sup>1</sup> Willmott v. Barber (1880), 15 Ch. D. 90; 43 L. J. Ch. 792; Low v. Bouverie (1891), 3 Ch. 82; 60 L. J. Ch. 654.

<sup>2</sup> Ramsden v. Dyson (1866), L. R. 1 H. L. 149. And see East India, etc. Co. v. Vincent (1740), 2 Atk. 82; Pickard v. Sears (1837), 6 A. & E. 469; De Bussche v. Alt (1878), 3 Ch. D. 314;

47 L. J. Ch. 881; Gray v. McLennan (1886), 3 Man. 337; Hill v. Epley (1859), 31 Pa. St. 334.

<sup>3</sup> This statement of the law has been widely adopted in the United States. Bigelow on Estoppel (5th ed.), p. 386, and note.

Observe the condition for estoppel: "When I saw the mistake into which he had fallen," or when I "suffer another" to act "under an erroneous impression of title." Standing-by merely will not estop, for although near-by I may not see that there is any mistake or any erroneous impression — will not estop, therefore, because there is no misrepresentation.

In order to see "the mistake" three things seem to be requisite:

1. I must be aware of my own right.
2. The other party must be unaware of my right.
3. I must have reasonable ground for assuming the other party's ignorance.<sup>1</sup>

A few cases will help to an appreciation of these points:

*Willmott v. Barber.*<sup>2</sup> A lease contained a clause prohibitive of sub-leasing; a sub-lease was made; the sub-lessee entered and expended money to the knowledge of the head landlord; both the head landlord and the sub-lessee were unaware of the prohibitory clause: *held*, that the head landlord was not estopped. Observe that the head landlord had made no representation of any kind. The utmost that was charged against him was that he stood by and allowed his tenant's misrepresentation of a right to sub-let to take effect.

This case illustrates two of the points in hand: (1) The estoppel-denier was unaware of his own right; and (2) he had no reason for assuming that the other party was ignorant of that which a prudent man would have ascertained. As to the first of these, Fry, L. J., said:

"The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff."

And as to the second he added:

"He might well have supposed that the plaintiff was a prudent man, and that he had made inquiries as to the provisions of Barber's lease. . . . I cannot therefore conclude that the mistaken belief of the plaintiff was brought home to Bouyer's (the owner's) mind, and that being so I cannot restrain Bouyer from exercising his legal right."

*Mangles v. Dixon.*<sup>3</sup> A ship-owner assigned "the amount due" to him under a certain charter-party; according to the charter-party the amount due was \$1,000; the assignee notified the charterer of the assignment, and the charterer said nothing

<sup>1</sup> See reference to Bigelow on Estoppel in ch. XI, sub tit. "Means of Knowledge."

<sup>2</sup> (1880) 15 Ch. D. 96; 43 L. J. Ch. 793.

<sup>3</sup> (1852) 3 H. L. C. 702.

ing. The assignee might well now think that he had an assignment of \$1,000. The facts, however, were that the owner and charterer were jointly interested in the venture, although the charter was otherwise drawn; \$500 therefore, and not \$1,000, was the amount due from the charterer to the owner. The assignee, having relied on the charter-party, claimed that the charterer was estopped from denying liability for the whole \$1,000. He urged that he was misled by a document executed by the charterer, and by the fact that when he gave notice of his assignment the charterer continued the misrepresentation by his silence.

Separate the grounds: First, the charter-party was misleading. Yes, but that was a contract between two persons who perfectly understood one another. It was a chose in action, and a transfer of the debt evidenced by it would carry with it all the equities;<sup>1</sup> the assignee knew this, and knew that there might be equities; he made no inquiries; no estoppel, therefore, thus far. Secondly, when notice of the assignment was given to the charterer, was he bound to state, without question put to him, that there were equities? The House of Lords replied in the negative — the charterer was not bound to assume or imagine that a fraud had been practiced upon the assignee; he might well have taken it that he had satisfied himself as to the true position of the matter; he was not aware of the assignee's ignorance.<sup>2</sup>

*Proctor v. Bennis.*<sup>3</sup> This was also a case of standing-by. It was claimed that a patentee was estopped from setting up his patent as against persons who had purchased an infringing machine. And it was suggested by Cotton, L. J., as a reason against estoppel, that the patentee had no reason to suppose that the purchaser was unaware of the patentee's rights. Not distinguishing between estoppel by passive assistance and estoppel by personal misrepresentation, Mr. Bigelow says of this point:<sup>4</sup>

"Can it be necessary to an estoppel under the law of the scienter that the party to be estopped should also know that the other party is acting

<sup>1</sup> Unless it was intended to be of L. J. Q. B. 221; *Potts v. Temperance* ambulatory character. See ch. (1892), 23 Ont. 78. XXIV.

<sup>2</sup> See upon the same line, *Smith v.* (1887) 36 Ch. D. 740; 57 L. J. Ch. 11.

<sup>3</sup> *Hughes* (1871), L. R. 6 Q. B. 597; 40

<sup>4</sup> On Estoppel (5th ed.), p. 610, n. 2.

in ignorance? So it appears to have been supposed by Lord Justice Cotton in *Proctor v. Bennis*. . . . An auctioneer makes a false representation; must a buyer show that the auctioneer knew that the buyer was ignorant of the facts?"

The auctioneer case is totally different; it is one of personal misrepresentation; the auctioneer himself makes the representation; and the only requisite for estoppel is that position should have been charged upon the faith of the representation. In the patent case there was no misrepresentation by the estoppel-denier, and the question involved is, Under what circumstances is it "my duty to be active?" And the answer is, When I see another person falling into mistake; and I see no mistake unless I have reason to believe that the other party does not understand his situation.

It must be observed, too, that Lord Justice Cotton did not suggest that an estoppel-denier must "know that the other party is acting in ignorance." He said:

"In my opinion it must be taken that they (the purchasers of the machine) did know it; but if they did not I cannot find anything from which we ought to draw the conclusion that the plaintiff had reason to suppose that they did not."<sup>1</sup>

The case involves two of the three points under consideration, namely: (1) That the estoppel-asserter must be unaware of the estoppel-denier's right; and (2) That the estoppel-denier must have had reasonable ground for believing in the other party's ignorance.

Summarizing, let it be observed that fraud or bad faith is not essential to estoppel, although it is a necessary ingredient in misrepresentation by passivity. There is not in such cases a real exception to the general rule that for estoppel "no fraud need have been intended." Upon the other hand, however, it would be quite correct to say (in such cases) that there "must have been knowledge actual or virtual of the facts," and that the estoppel "grows out of a fraudulent purpose and a fraudulent result." Reconciliation of the conflicting dicta is accomplished by classification.

<sup>1</sup> Mr. Justice Fry, in another case (*Willmott v. Barber* (1880), 15 Ch. D. 96; 42 L. J. Ch. 792), puts the point more strongly: "Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own right." Were this language to be taken absolutely, it would be only in the very rarest of cases that a by-stander could be estopped. He could always urge that he attributed the purchaser's action to rash stupidity or reckless aggression, and not to ignorance.

## PERSONAL MISREPRESENTATION.

It was unfortunate that the leading case of estoppel *in pais* (*Pickard v. Sears*)<sup>1</sup> was a case of misrepresentation assisted by passivity; for, that fact being overlooked, the rule there laid down has been taken to be of general application.<sup>2</sup> It is this:

"The rule of law is clear that where one by his words or conduct *wilfully* causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The word "wilfully," or some other word indicative of a desire to mislead — indicative of fraud, was there necessary; for the case, as we say, was one of passivity (in which fraud is necessary to the fact of misrepresentation, although not to the law of estoppel); but that the word was out of place in cases of personal misrepresentation became apparent upon the first occasion in which the rule was applied to an instance of that kind. Unfortunately, however, in that case the word itself was qualified, or rather almost eliminated from the general definition, instead of being left to its operation in the class of cases to which it had been applied and to which it properly belonged. This was said:

"By the term 'wilfully,' however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly."<sup>3</sup>

<sup>1</sup> (1897) 6 A. & E. 469.

<sup>2</sup> It is not here asserted that the rule was not intended to be of general application. No doubt its language ("by his words or conduct") covers cases of both active and passive misrepresentation. Two years afterwards, however, the same court had to deal with another case of passive misrepresentation (*Gregg v. Wells* (1899), 10 A. & E. 97; 8 L. J. Q. B. 199), and the language there used was carefully confined to that class of cases, and was intended to supersede the expression in *Pickard v. Sears*. Lord Denman (the same judge whose language is quoted from in the earlier case) said in the later: "*Pickard v. Sears* was in my mind at the time of the trial and the

principle of that case may be stated even more broadly" — also more narrowly — "than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith of an understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." Estoppel by passive assistance must be based on culpability. Nothing is predicated of other sorts of estoppel.

<sup>3</sup> *Freeman v. Cooke* (1848), 2 Ex. 654; 18 L. J. Ex. 114. And see *Howard v. Hudson* (1859), 2 El. & B. 1; 29 L. J. Q. B. 841; *Continental Bank v. National Bank* (1872), 50 N. Y. 575.

This language perfectly fits the case in which it was used (one of personal misrepresentation); and the only objection to it is that it assumes to alter a rule which had been formulated in view of another class of cases (misrepresentation assisted by passivity) in order to make it suitable for the one in hand. For, as the writer sees it, both rules were correct. In the case of misrepresentation assisted by passivity, the misrepresentation must from its nature (but for no other reason) be wilful; whereas, in cases of personal misrepresentation (which may be either honest or dishonest), it is sufficient that it was intended to be acted upon.

In these cases of personal misrepresentation, then, we get away altogether from any question of fraudulent intent in the misrepresentation. And the question is merely, Did he intend what he said or did to be acted upon? or, as we shall hereafter more accurately put it, Had he reasonable ground for anticipating a change of position in consequence of what he said or did?<sup>1</sup>

"Even where a representation is made in the most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted upon, then *prima facie* the party making the representation is bound by it, as between himself and those whom he has misled."<sup>2</sup>

#### ACTIVELY ASSISTED MISREPRESENTATION.

Cases of passive misrepresentation have already been dealt with; and it has been shown that the bad faith which appears in them is a requisite of the existence of the alleged misrepresentation and not of any rule of estoppel. Personal misrepresentation has just been disposed of. There remains to be dealt with those cases in which estoppel is claimed because of active-assistance rendered by the estoppel-denier.

For example, cases in which a railway company or a warehouseman has issued delivery orders for goods which were never received, and some third person has advanced money

<sup>1</sup> *Post*, ch. XII.

<sup>2</sup> *Per* Shadwell, V. C., in *West v. Jones* (1851), 1 Sim. N. S. 207; 20 L. J. Ch. 362. And see *per* Parke B., in *Freeman v. Cooke* (1848), 2 Ex. 662; 18 L. J. Ex. 114; *Mangles v. Dixon* (1852), 3 H. L. C. 734; *Low v. Bou-*

*verie* (1891), 3 Ch. 111; 60 L. J. Ch. 654; *Horn v. Cole* (1868), 51 N. H. 297; *Blair v. Wait* (1877), 69 N. Y. 113; *Anderson v. Hubbles* (1863), 93 Ind. 576; *Clark v. Dillman* (1896), 103 Mich. 625; 66 N. W. R. 570.

upon the representation of the holder of the orders (assisted by the documents) that he was the owner of the goods.<sup>1</sup> Or a company has issued a certificate that A. was the owner of certain shares, although he was not; and upon the representation of A., assisted by the certificate, he has sold the shares to an innocent purchaser.<sup>2</sup> Or a mortgagee has given up the deeds to the mortgagor, who, thus equipped, has mortgaged the land as though he were the unincumbered owner of it.<sup>3</sup> In all such it is clear that for estoppel "no fraud need have been intended" on the part of the person to be estopped. He is frequently not even aware that a misrepresentation has been made.

Indeed the law may with confidence be said to be that if the assistance has been rendered, not only is the question of fraud immaterial, but that such excuses as oversight, or mistake, or even that the assistance was the result of deception practiced upon him, will not avail the estoppel-denier. A few cases from various departments of the law will be useful here.

*Mortgages.*—A mortgagor will be estopped as against an assignee of the mortgage from alleging that the whole consideration expressed in it has not been advanced to him, if in the deed and by indorsement upon it he has acknowledged receipt of the money. In such a case Fry, L. J., said:

"That the plaintiffs (the mortgagees) were in a moral point of view excusable for these acts is beyond doubt; and that they were deceived by those whom they trusted, and as such are objects of sympathy, is equally clear. But they were inexact and careless, and placed in the hands of Bates, or Astley, the means of deceiving other persons, and these are in the view of a court of equity demerits."<sup>4</sup>

*Certificate of Shares.*—So also a company will be estopped by its certificate of ownership of shares, although the seal may have been fraudulently affixed by the secretary of the company, and the signature of a director forged. The company has sufficiently, although innocently, assisted in the misrepresentation.<sup>5</sup>

<sup>1</sup> *Coventry v. Great Eastern* (1883), 11 Q. B. D. 776; 53 L. J. Q. B. 694; *Henderson v. Williams* (1895), 1 Q. B. 521; 64 L. J. Q. B. 308; *Saderquist v. Ontario* (1887), 14 Ont. 596; *Fourth National v. Compress* (1882), 11 Mo. App. 333. But see *Second National v. Wallbridge* (1869), 19 Ohio St. 419.

<sup>2</sup> *Infra.*

<sup>3</sup> *Infra.*

<sup>4</sup> *Bickerton v. Walker* (1885), 31 Ch. D. 151; 55 L. J. Ch. 227. See cases cited with this one in ch. IV.

<sup>5</sup> *Shaw v. Port Phillip* (1884), 13 Q. B. D. 103; 53 L. J. Q. B. 869. Distinguish *Evans v. Bank of Ireland* (1855), 5 H. L. C. 383, and *Merchants v. Bank of England* (1887), 21 Q. B. D. 160; 57 L. J. Q. B. 418, as pointed out in the latter case.

*Ostensible Ownership.*—

"It is familiar law that if the owner, although induced thereto by fraud, invests another with the apparent legal title to chattels, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good-faith purchaser. We are unable to discover any good reason for a distinction in that regard between chattels and such instruments as may be assigned by indorsement so as to give the assignee a complete legal title."

"The rule is, that if a man so conduct himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."<sup>2</sup>

*Partnership.*— A person who is induced by fraud to hold himself out as a partner cannot escape estoppel merely because he was misled by the fraud.<sup>3</sup>

*Trustee.*— A trustee of a fund was asked as to its condition, and replied erroneously, having forgotten that he had been formerly advised of a charge upon it. His forgetfulness was not allowed to avail him. He was estopped by his answer.<sup>4</sup>

*"Negotiable" Instruments.*— An acceptor of a forged bill, who by his conduct had intimated to his banker that it was genuine and would be presented for payment, was estopped as against the banker (who had paid it) from denying his liability upon it.<sup>5</sup> Lord Selborne said:

"If the plaintiffs misled the bank upon a material point, however innocently, and although they were themselves deceived by the fraud which had been committed, I think that they, and not the bank, ought to bear the loss which has been the consequence."<sup>6</sup>

*Infancy.*—

"Where a person represents to another that he is of age, and executes a release upon which the latter acts, held, that he could not afterwards

<sup>1</sup>Moore v. Moore (1887), 112 Ind. 152; & N. 556; 28 L. J. Ex. 203; Sheppard v. Union Bank (1862), 31 L. J. Ex. 154; 13 N. E. R. 673. And see Sheppard v. Union Bank (1862), 31 L. J. Ex. 154; Baines v. Swainson (1863), 32 L. J. Q. B. 281; Babcock v. Lawson (1880), 5 Q. B. D. 284; 49 L. J. Q. B. 408; Kingsford v. Merry (1856), 11 Ex. 577; 1 H. & N. 508; 25 L. J. Ex. 166; Pease v. Gloaheo (1866), L. R. 1 P. C. 229, 230; 25 L. J. P. C. 166; Root v. French (1835), 13 Wend. 570, approved in Henderson v. Williams (1895), 1 Q. B. 529; 64 L. J. Q. B. 308; Trustees v. Smith (1890), 118 N. Y. 640, 23 N. E. R. 1002; Brant v. Virginia (1876), 93 U. S. 327. And see the discussion in ch. XXI.

<sup>2</sup>Cornish v. Abington (1859), 4 H. 145.

<sup>3</sup>Ellis v. Schmoeck (1829), 5 Bing. 521; 7 L. J. C. P. 231; Collingwood v. Berkeley (1863), 15 C. B. N. S. 145; Maddick v. Marshall (1864), 16 C. B. N. S. 387; 17 id. 829.

<sup>4</sup>Burrowes v. Lock (1805), 10 Ves. 470.

<sup>5</sup>Vagliano v. Bank of England (1883), 22 Q. B. D. 103; 53 L. J. Q. B. 27; 23 Q. B. D. 243; 53 L. J. Q. B. 357; (1891) A. C. 107; 60 L. J. Q. B. 145.

<sup>6</sup>Id. (1891), A. C. 123; 60 L. J. Q. B.



impeach the validity of the release on the ground of his minority, and that it was immaterial whether he was aware or not of the incorrectness of the representation."<sup>1</sup>

MR. POMEROY'S POINT.

Mr. Pomeroy distinguishes between lands and goods:

"Fraudulent conduct is essential in cases in which an owner of land is precluded from asserting his legal title by reason of intentionally false representations or concealment by which another has been induced to deal with the land. These cases are at the present day treated as examples of equitable estoppel;"<sup>2</sup>

but he thinks wrongly so, for the case is one which belongs to earlier equitable doctrine, and "is confined to estates in land."<sup>3</sup>

In reply it may be said: (1) It seems to be hardly worth while making a category of cases in which "fraudulent conduct is essential" merely to fill it with cases "of intentionally false representations or concealment." (2) It would be difficult to support a distinction between goods and lands with reference to the application to them of the principles of estoppel, or the necessity for fraud in misrepresentation. (3) Mr. Pomeroy himself says that standing by in silence may estop an owner of "property;" that this is "a true estoppel in equity;" and that in such cases "a fraudulent intention to deceive or mislead is not essential."<sup>4</sup> The result would thus be that standing by in silence without intent to defraud would estop; but that a fraudulent assertion to help the deception would not — at all events if land were the subject of the transaction. Such a case would belong to "earlier equitable doctrine."

CONCLUSION.

Summarizing it may be said:

1. That fraud or bad faith is not a requisite of estoppel;
2. Although it is often found in misrepresentation, and is a necessary element in cases of misrepresentation by passivity; and misrepresentation is of course essential to estoppel.

<sup>1</sup> Wright v. Snow (1849), 2 De G. & Sm. 321.

<sup>2</sup> Id., sec. 807.

<sup>3</sup> On Eq. Jur., sec. 805.

<sup>4</sup> Id., sec. 818.

## CHAPTER IX.

### CONDITION NO. 7.

#### *Negligence (Carelessness) is Sometimes Essential.*

The subject of "Estoppel by Negligence" is in a most confused and peculiar condition. Rules and amendments of rules have been devised and elaborated by the judges; the authors have been quoting, applying and illustrating those rules;<sup>1</sup> and yet the principal writers on estoppel are far from sure whether cases of estoppel by negligence can exist. If possible, at least they "must be uncommon;"<sup>2</sup> and "it may be going too far to say that in the nature of things there can be no such case."<sup>3</sup> The present writer believes that with the help of some short preliminary investigations the subject can be made intelligible.

*Negligence.*— Before entering upon an exposition of the subject, it is essentially necessary that we should arrive at an understanding of the sense in which the word "negligence" is being used.

It is to be regretted that the connotations of the term lead off in two different directions. On the one hand, all neglect of duty is negligence, and embraces, therefore, intended wrong. Upon the other hand the action of negligence is usually considered as being limited to that class of cases in which the act complained of has been due rather to carelessness than to intention.

Confusion has arisen from this double signification of the word. In one case,<sup>4</sup> for example, Lord Eldon spoke of "that gross negligence that amounts to evidence of a fraudulent intention."

Of which Fry, L. J., said<sup>5</sup> that the expression was "certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent in-

<sup>1</sup> Bigelow on Estoppel (5th ed.), 653-659; Cababé on Estoppel, 93-104; Everest & Strode on Estoppel, 353-370; Smith's Leading Cases (8th ed.), 907-911; Beven on Negligence (3d ed.), 1568-1649; Addison on Torts (6th ed.), 745; Lindley on Companies (5th ed.), 486.

<sup>2</sup> Bigelow (5th ed.), 653.

<sup>3</sup> Cababé on Estoppel, 10.

<sup>4</sup> Evans v. Bicknell (1801), 6 Ves. 190.

<sup>5</sup> Northern Counties v. Whipp (1884), 26 Ch. D. 499; 53 L. J. Ch. 620.

tion is a design to commit some fraud, and leads men to do or omit doing something, not carelessly but for a purpose."

*Lack of care* is the more frequent signification of the word "negligence;" and the action of negligence is based upon that meaning of the term. Sir Frederick Pollock says:<sup>1</sup>

"If a man will set about actions attended with risk to others, the law casts on him the duty of care and competence. . . . From this root we have, as a direct growth, the whole modern doctrine of negligence."

We see, therefore, that when we speak of an action of negligence the word "negligence" is not used as synonymous with all breach of duty, but in the sense of carelessness in the discharge of some duty. If it meant all breach of duty, the action of negligence would embrace the whole field of torts, and historically, of contracts also; whereas in reality it is an action for carelessness in the discharge of some duty merely. Our ideas would be clarified were we to use the terms "negligence" and "carelessness" to express respectively the two ideas; for at present we either risk misconception, or we have to explain, when using the word "negligence," in what sense it is employed. For example, Sir Frederick Pollock, affirming that

"*Culpa* is exactly what we mean by "negligence," the falling short of the care and circumspection which is due from one man to another."<sup>2</sup>

"Thus we arrive at the general rule that every one is bound to exercise due care towards his neighbors in his acts and conduct, or rather omits or falls short of it at his peril"<sup>3</sup> — places "negligence," in his classification of torts, as a subdivision of "Group C."<sup>4</sup> But negligence, in the wider sense of the breach of duty, would embrace all torts and not constitute merely a subdivision of them. Perhaps it would be better to confine negligence to the generic use of the word, and adopt carelessness for the specific subdivision.

Mr. Beven's book on "Negligence," too, is not a survey of all the cases in which there is a breach of duty, as from its title one might expect, but is

"primarily occupied with considering *defaults in conduct*, and only secondarily with the adequate discharge of obligations. It deals with an aspect, not with a division, of law. A complete treatise on negligence in law

<sup>1</sup> On Torts, 433.

<sup>2</sup> On Torts, 17.

<sup>3</sup> Page 353. "Negligence is the absence of care, according to the circumstances." Willes, J., in *Vaughan v. Taff Vale Ry. Co.* (1860), 5 H. & N. 638; 20 L. J. Ex. 248.

<sup>4</sup> Pollock on Torts, 7. The cases

treated of under that title are those which are embraced within the rule that "One who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against that risk." Id. 353.

would be a commentary on the whole law of England from the standpoint of a non-fulfilment of legal duties, excluding only intentional wrongdoing."<sup>1</sup>

Having thus determined that the action of negligence (or better, carelessness) is, in reality, but one of various classes of actions for neglect of duty (that is of negligence), we may define carelessness, when it arises in connection with duty, as

"the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do."<sup>2</sup>

Or, as put by Mr. Cooley:

"The failure to observe for the protection of the interests of another that degree of care, precaution and vigilance which the circumstances justly demand."<sup>3</sup>

*Estoppel by Carelessness.*— We are now ready for the statement that estoppel by negligence means estoppel by carelessness — that is by

"the omission to do something which a reasonable man . . . would do, or doing something which a prudent and reasonable man would not do;" it being understood, of course, that such carelessness is in breach of some duty arising out of contract, relationship or otherwise.

Following the lead of Mr. Justice Lindley,<sup>4</sup> then, and actuated by the considerations just referred to, estoppel by negligence will hereafter be referred to as estoppel by carelessness. The change will enable us to get rid of the idea that we are speaking of estoppel with reference to all breaches of duty. We are dealing with "an aspect, not with a division, of the law."<sup>5</sup>

*Misrepresentation.*— Note next that in estoppel, carelessness is only important when it is associated with misrepresentation. Carelessness without misrepresentation may indeed give rise to an action for negligence. But for estoppel you must say that you were misled by some falsity, and that your opponent ought

<sup>1</sup>2d ed. 3. Consider Austin's division into negligence, recklessness, and heedlessness. Lecture 20, § 632.

<sup>2</sup>Per Alderson, B., in *Blyth v. Birmingham* (1856), 11 Ex. 788; 25 L. J. Ex. 218. And see per Brett, J., in *Smith v. London, etc. Ry. Co.* (1870), L. R. 5 C. P. 102; 39 L. J. C. P. 63. "There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place or person." Per Bramwell, B., in *Degg*

*v. Midland Ry. Co.* (1857), 1 H. & N. 781; 26 L. J. Ex. 151.

<sup>3</sup>Cooley on Torts, 630. See *Jaggard on Torts*, 810, n., 820, 826.

<sup>4</sup>On *Companies* (5th ed.), 486.

<sup>5</sup>Using "negligence" in its wider signification, every case of estoppel would be one of "estoppel by negligence," for there could in no case be the penalty of estoppel unless there had been some breach of duty — something *wrong* done.

to be precluded from asserting the facts, because of his action or inaction — that is, by the carelessness of which you complain.

*Personal and Assisted Misrepresentation.*—The only other preliminary necessary to consideration of the main question is the observation of the distinction between personal and assisted misrepresentation. I hold myself out as a partner and am estopped from denying membership in the firm — that is personal misrepresentation. A mortgagee hands over the title-deeds to the mortgagor, who uses them as evidence of the truth of *his* (the mortgagor's) representation of unincumbered ownership, and so misleads an innocent purchaser; and the mortgagee is estopped. But not, observe, because of any misrepresentation made by him, but because merely of the assistance which he has rendered to the misrepresentation of the mortgagor — he has furnished an opportunity for fraud, he has done that which has made the misrepresentation of another person credible.<sup>1</sup>

*Personal Misrepresentation.*—Perusal of a previous chapter<sup>2</sup> will leave little room for doubting that it is not in cases of this class that we are to look for instances of estoppel by carelessness.<sup>3</sup> The assertion is not intended that every case of personal misrepresentation is the result of evil intent, and that there are no instances in which misrepresentation is not due to carelessness rather than to dishonesty. What is meant rather is that personal misrepresentation will estop, whether it is due to one cause or the other, and that consideration of "how the representation came to be made" — whether through carelessness or intention — is therefore immaterial.

For example, a trustee of a fund, with a view to deceive, rep-

<sup>1</sup> *Waldron v. Sloper* (1852), 1 Dr. 193; *Farrand v. Yorkshire, etc.* (1888), 40 Ch. D. 192; 58 L. J. Ch. 238.

<sup>2</sup> Ch. VIII.

<sup>3</sup> *Manufacturers v. Hazard* (1864), 30 N. Y. 226, may appear to contradict this statement. An indorser of a note wrote his name so badly that the initial "M." looked like "A. C.," and he was held to be estopped by his carelessness from denying notice of default, which miscarried because of the defective autograph. It

may be said that the sender of the notice was misled by carelessness, and that the estoppel was rightly adjudged. The case would be the same if the misleading was due to carelessness in oral communication; but it is preferable to relegate such cases to the principle (*ante*, p. 15) that reasonableness of inference from statements or conduct justifies action according to such inference, and will carry estoppel with it.

resents that the fund is uncharged, and he is estopped from asserting otherwise. But if he had made the same representation in perfect good faith but carelessly (having for the moment forgotten), he would have been likewise estopped.<sup>1</sup> Again, were there both the presence of good faith and the absence of carelessness (which might happen in some cases by the misrepresenter being himself fraudulently misled), yet even in that case there would be estoppel.<sup>2</sup> The element of carelessness, therefore, is immaterial where the misrepresentation is personal.

"The man who has made the misrepresentation, under whatever circumstances, must bear the consequences of those representations, and not the man who has trusted to the representations so made."<sup>3</sup>

*Assisted Misrepresentation.*— It is in this class of cases then, if at all, that instances of estoppel by carelessness are to be found. But hitherto the existence of the class itself has not been sufficiently recognized, nor has it till now received a distinguishing name; and it is therefore not matter for much surprise that that of which we are in search has not been with precision disentangled, nor its true affinities observed.

As in cases of personal misrepresentation, so also in those of assisted misrepresentation, the general rule regards merely the act done, and is entirely indifferent to the motive or reason for it, or the carelessness or diligence that may be in it.

"The rule is that if a man so conducts himself, *whether intentionally or not*, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."<sup>4</sup>

For example, if a company were to issue a false certificate as to ownership of shares, upon the faith of which a third person changed his position, it would be estopped whether wrongful intent or good faith, carelessness or diligence underlay the act.<sup>5</sup>

<sup>1</sup> *Burrowes v. Lock* (1805), 10 Ves. 470. (1869), L. R. 4 H. L. 64; 39 L. J. Ch. 849; and per Jessel, M. R., in *Eaglesfeld v. Londonderry* (1876), 4 Ch. D. 704.

<sup>2</sup> Per Lord Selborne in *Bank of England v. Vagliano* (1891), A. C. 123; 68 L. J. Q. B. 145; *Ellis v. Schmoeck* (1829), 5 Bing. 521; 7 L. J. Q. B. 281; *Collingwood v. Berkeley* (1868), 15 C. B. N. S. 145; *Maddick v. Marshall* (1864), 16 C. B. N. S. 387; 17 id. 820.

<sup>3</sup> Per James, L. J., in *Hunter v. Walters* (1871), L. R. 7 Ch. 85. And see per Lord Cairns in *Reese v. Smith*

<sup>4</sup> This chapter in somewhat modified form was first published in *The Law Quarterly Review*, October, 1899.

<sup>5</sup> *Cornish v. Abington* (1859), 4 H. & N. 556; 28 L. J. Ex. 263; *West v. Jones* (1851), 1 Sim. N. S. 207.

<sup>6</sup> *Re Bahia*, etc. (1868), L. R. 3 Q. B.

Close inspection, however, of the category of assisted misrepresentation will discover various lines of cases in which the operation of estoppel by carelessness may be observed. Not that the principles by which most of the cases have been decided have any relation to estoppel — indeed quite other principles and rules have been invoked. Nevertheless the present writer believes that his *ratio decidendi* will be readily accepted, can he but clearly present it to the profession.

Acceptance unfortunately involves something of a *bouleversement*: to what extent it may be as well frankly at once to indicate:

1. Although no case of estoppel by carelessness has been discovered, yet there are many classes of them; some passing at present under other designations and at least one existing in England by statute.

2. And there are others (one very notably), from which many courts have excluded all questions of carelessness; but which the present writer would leave in almost sole possession of the field.

1. *Execution of Documents*.— Opening the first class of cases in which estoppel by carelessness may be found, suppose that a man is tricked into executing a document which is afterwards by the knave passed on to an innocent transferee; who is to lose, and why?

The present law dividing the cases into void and voidable documents (so much fraud — amount very uncertain — and the document is voidable, more fraud and the document is altogether void) declares that if the document be voidable only its creator must suffer; if it be void the loss falls on the innocent transferee.<sup>1</sup> And the discussion for the most part expends itself upon distinctions between cases in which the dupe was deceived as to the actual contents of the document, and in others as to its legal effect;<sup>2</sup> between cases in which the deception was as to the land affected by the document, and in others as

584; 37 L. J. Q. B. 176. And see cases cited with this one, chapter XXII.

<sup>1</sup> Kennedy v. Green (1834), 3 M. & K. 713; Vorley v. Cooke (1857), 1 Giff. 230; 17 L. J. Ch. 185; Ogilvie v. Jeaffreson (1860), 2 Giff. 353; 20 L.

J. Ch. 905; Foster v. McKinnon (1869), L. R. 4 C. P. 704; 38 L. J. C. P. 810; Hunter v. Walters (1871), L. R. 7 Ch. 82; 41 L. J. Ch. 175.

<sup>2</sup> Vorley v. Cooke (1857), 1 Giff. 230; 27 L. J. Ch. 185; Herchmer v. Elliott (1887), 14 Ont. 714.

to the disposition made of it,<sup>1</sup> and so on. The character of the dupe, whether he is "layman or lettered;"<sup>2</sup> the character of the occasion, whether it was one "in which no extraordinary caution was necessary;"<sup>3</sup> and similar points are also referred to, but in order for the most part to ascertain whether the document is void or voidable.

Here and there, indeed, the applicability of estoppel is to be noted. For example, Mellish, J., in 1871 declared it to be "a doubtful question of law" whether the dupe "may not by executing it negligently be estopped;"<sup>4</sup> and Erle, C. J., in a case in which blank but executed transfers of shares were improperly filled up, said that although they were originally "null and void, yet as between Swan and a purchaser . . . they may be valid to pass the property, if not directly yet indirectly by estopping Swan from setting up his right."<sup>5</sup>

To the present writer the matter assumes the following form: No document obtained by misrepresentation (whether it be the vilest, the most complex, the most simple, or the most innocent) is binding upon the dupe; its character remains constant (it cannot change), accompanying it into whatsoever remotest hands it may come; nevertheless, as against persons who have been led by the document to change their position, the dupe ought to be estopped from denying its validity. The authorities declare that negligence on the part of the dupe is an essential part of the case against him. If so, then the estoppel occurs where carelessness exists, and we thus have an instance of estoppel by carelessness.<sup>6</sup>

2. *Priorities.*—Another class of cases may be typified by the mortgage case already referred to: A mortgagee hands over the title-deeds to the mortgagor upon some trumped-up excuse; and the mortgagor, fraudulently using them as evidence of his assertion of unincumbered ownership of the property, conveys it to an innocent purchaser. The present writer would say that in all such cases the mortgagee ought to be estopped from setting up his title to the property. The decisions, however, distinguish between cases in which his conduct was

<sup>1</sup> *National v. Jackson* (1886), 33 Ch. D. 1.

<sup>2</sup> *Thoroughgood's Case* (1582), 2 Coke, 2a.

<sup>3</sup> *Ogilvie v. Jeaffreson* (1860), 2 Giff. 358; 29 L. J. Ch. 903.

<sup>4</sup> *Hunter v. Walters* (1871), L. R. 7 Ch. 82; 41 L. J. Ch. 175.

<sup>5</sup> *Swan v. N. B. A.* (1859), 7 C. B. N. S. 481; 30 L. J. C. P. 113.

<sup>6</sup> See the subject treated at length in chapter XXV.



reasonable and those in which it was negligent.<sup>1</sup> And thus again is there estoppel by carelessness.

But the principles usually applied in such cases are not those of estoppel. The rule that "possession of the deeds gives the better equity" is that most usually invoked.<sup>2</sup> Giffard, V. C., however, properly protests that mere possession of the deeds will not give priority.

"There must be some act or default on the part of the first mortgagee to have this effect."<sup>3</sup>

And Fry, L. J., has declared the law to be:

"That the court will postpone the prior legal estate to a subsequent equitable estate when the owner has *assisted in* or connived at the fraud which has led to the creation of a subsequent equitable estate."<sup>4</sup>

Estoppel is at the foundation of such language: the owner of the first estate is first; but he is estopped from so saying.

3. It is no doubt the duty of every person — at the peril of estoppel — not to render assistance to the misrepresentation of authority to act for him which may be made by other persons. But what are we to say when a man does not intend to aid the misrepresentation, but nevertheless through carelessness does so? In a recent case<sup>5</sup> it is said that

"ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency."

This is not couched in the language of estoppel, which would not say that "ostensible authority . . . may be conferred;" but that, there being ostensible authority, the ostensible principal is estopped by his carelessness from denying its real existence.

4. Maryland supplies us with the suggestion of another example. We shall see that there is some substantial ground for the opinion that bank customers are under obligation to examine their pass-books at the usual monthly balancing, and

<sup>1</sup>Evans v. Bicknell (1801), 6 Ves. 174; Waldron v. Sloper (1852), 1 Dr. 198; Clarke v. Palmer (1892), 21 Ch. D. 124; 51 L. J. Ch. 634; Newman v. Newman (1885), 28 Ch. D. 674; 54 L. J. Ch. 598.

<sup>2</sup>Gordtittle v. Morgan (1787), 1 T. R. 749; Layard v. Maud (1857), L. R. 4 Eq. 397, 406; 36 L. J. Ch. 669; Spencer v. Clark (1878), 9 Ch. D. 142; 47 L. J. Ch. 692; Lloyd v. Jones (1885), 20 Ch. D. 229; 54 L. J. Ch. 931.

<sup>3</sup>Thorpe v. Houldsworth (1868), L. R. 7 Eq. 147; 38 L. J. Ch. 194.

<sup>4</sup>Northern Counties v. Whipp (1884), 26 Ch. D. 494; 53 L. J. Ch. 629.

<sup>5</sup>Thompson v. Skelton (1896), 49 Neb. 644; 68 N. W. R. 1055. See also Holt v. Schneider (1899), 77 N. W. R. 1055 (Neb.); Lester v. Snyder (1898), 55 Pac. R. 615 (Colo.); Colo. Civil Code, § 2300; Heald v. Henley (1891), 89 Cal. 632; 27 Pac. R. 67.

then to make known their objections.<sup>1</sup> Sometimes forged checks are paid by bankers, and the customers to whom they are charged, after permitting their accounts to be balanced from time to time without troubling themselves with their verification, finally refuse to be debited with the forgeries. In such a case<sup>2</sup> it was held that it should have been left to the jury

"to find either that the appellants had knowledge in fact that the forgeries had been committed, or that from carelessness and indifference to the rights of others they failed to inform themselves from sources of information readily accessible to them, and which by the exercise of ordinary diligence as business men would have disclosed to them the fact that the forgeries had been committed."

5. Vermont suggests still another case. The owner of land stood by while a house was built on his property by the adjoining proprietor, but he did not know that it was upon his side of the boundary. *Held*, that he had been guilty of

"such gross carelessness and indifference to the rights of others that would estop him from setting up title in himself."<sup>3</sup>

The court does not seem to have been so much impressed as is the present writer with the gross carelessness of the builder of the house. Had the holding been essential to the decision of the case the point might have received closer consideration.

6. For a further class of cases we are indebted to legislation. Suppose that a shipowner issues a bill of lading for goods not shipped, and that the bill is transferred for value to a *bona fide* purchaser; who should lose, the signer of the bill or the purchaser of the goods? Our general rule<sup>4</sup> would condemn the signer "whether intentionally or not" he led the purchaser to infer the existence of the goods. By statute, however, "the master or other person signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fault of the shipper, or of the holder, or some person under whom the holder claims."<sup>5</sup>

In the United States authorities differ, but probably the weight of them is in favor of the proposition that the shipowner will be estopped by signing a false bill of lading whether he was careful or negligent.<sup>6</sup> In England the estoppel is founded upon carelessness.

<sup>1</sup> *Devaynes v. Noble* (1815), 1 Mer. 536. And see cases cited with this one in ch. XI.

<sup>2</sup> *Hardy v. Chesapeake* (1879), 51 Md. 553.

<sup>3</sup> *Greene v. Smith* (1884), 57 Vt. 263.

<sup>4</sup> *Ante*, p. 102.

<sup>5</sup> 18 and 19 Vic. (Imp.), ch. 111, § 3; 52 Vic. (Can.), ch. 30, § 3.

<sup>6</sup> Porter on Bills of Lading, §§ 432-435.

7. *Bills and Notes*.—The English authorities<sup>1</sup> have excluded all questions of carelessness from a class of cases in which there is strong minority opinion for asserting that it ought to play a most important part. According to the decisions the acceptor of a bill may leave spaces in it which would tempt the virtue of many an one who would shrink from bolder feats of forgery;<sup>2</sup> he may attach conditions in lead pencil, or upon marginal spaces, and if they are rubbed out or cut off throw the ensuing loss upon the shoulders of the innocent purchasers of them;<sup>3</sup> and he may leave signed notes or executed blanks where they may easily be picked up, and swear that he did not think that anybody would avail himself of them;

"and that, too, though the acceptor or maker may have made the theft or fraud easy by putting the paper in an unlocked drawer in a desk to which clerks and servants and others had access."<sup>4</sup>

There is, no doubt, the case of *Young v. Grote*,<sup>5</sup> in which the duty of carefulness as to tempting spaces is imposed upon the drawer of a check; and the case of *Ingham v. Primrose*,<sup>6</sup> according to which if you wish to destroy your acceptance you ought to do it effectively, and not merely by tearing it in half, which would give it the appearance of separation for safe transmission merely; but these cases are far from having that subsequent sanction which the present writer could wish them. There are also some comforting cases in the Pennsylvania courts.<sup>7</sup> The majority opinion, however, is that of Lord Halsbury:<sup>8</sup>

"People are not supposed to commit forgery . . . the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery but the law of the land."

The present writer, bearing in mind the general rules relating

<sup>1</sup> See all the cases discussed in chapters V and XXV.

<sup>2</sup> *Scholfield v. Londesborough* (1894), 2 Q. B. 660; (1895) 1 Q. B. 536; (1896) A. C. 514; 63 L. J. Q. B. 649; 64 id. 293; 65 id. 593.

<sup>3</sup> *Harvey v. Smith* (1870), 55 Ill. 224; *Zimmerman v. Rote* (1874), 75 Pa. St. 189; *Cochrane v. Nebeker*, 48 Ind. 459; *Walsh v. Hunt* (1896), 120 Cal. 46; 52 Pac. R. 115; *Swaishland v. Davidson* (1888), 8 Ont. 320.

<sup>4</sup> *Bigelow on Bills and Notes*, 177.

<sup>5</sup> (1827) 4 Bing. 253; 5 L. J. C. P. 165; 12 Moo. 484.

<sup>6</sup> (1859) 7 C. B. N. S. 82; 28 L. J. C. P. 294.

<sup>7</sup> *Brown v. Reed* (1875), 79 Pa. St. 370; *Leas v. Walls* (1882), 101 Pa. St. 57; *Robb v. Pennsylvania*, etc. (1898), 40 Atl. R. 969.

<sup>8</sup> *Scholfield v. Londesborough* (1896), A. C. 532; 65 L. J. Q. B. 601. See the matter fully discussed in ch. V.

to social relations, would rather agree with Mr. Justice Blackburn and others who hold that

"The person putting in circulation a bill of exchange does by the law merchant owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations of it."<sup>1</sup>

Were this the law, then breach of it would furnish a clear case of estoppel by carelessness. For we would have to say, not that the forged acceptance was that of the defendant, but that by his carelessness he was estopped from denying it.

#### THE LEADING CASES.

Passing on to consider the rules framed for estoppel by negligence, a short statement of the facts in the two leading cases and a citation of the rules in judicial language will be of advantage.

1. (1855) *Bank of Ireland v. Evans*.<sup>2</sup> The secretary of a company having been allowed the custody of the seal fraudulently affixed it to powers of attorney for the transfer of bank shares owned by the company. In an action between the company and the bank, which had acted upon the transfers, Parke, B., said:

"It is clear, we think, that the negligence in the present case, if there be any, is *much too remote* to affect the transfer itself and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney . . . We concur with Mr. Justice Jackson and Justices Ball, Compton and Towns, and the Chief Justice Leroy, in thinking that the negligence which would deprive the plaintiffs of their right to insist that the transfer was invalid must be *negligence in or immediately connected with the transfer itself*."<sup>3</sup>

2. (1859) *Ex parte Swan*; <sup>4</sup> (1862) *Swan v. North British A. Co.*<sup>5</sup> The owner of shares in two companies, A. and B., employed a broker to sell those in A. and gave him ten executed transfer forms in blank. The broker fraudulently used two of

<sup>1</sup> *Swan v. North British* (1863), 2 H. & C. 183; 32 L. J. Ex. 277. The present writer would not, however, invoke the law merchant. See *post*, ch. XXIV.

<sup>2</sup> H. L. C. 389. See a similar case, *Merchants, etc. v. Bank of England* (1837), 21 Q. B. D. 160; 57 L. J. Q. B. 418. But see *Shaw v. Port Phillip* (1884), 13 Q. B. D. 103; 53 L. J. Q. B. 369.

<sup>3</sup> Lord Esher thought that Parke, B.,

meant by "immediately connected with the transfer itself" something almost equivalent to "in the transfer itself," and he said "that the way to construe it is that the negligence must be proximately connected with the transfer itself." *Merchants, etc. v. Bank of England* (1837), 21 Q. B. D. 172.

<sup>4</sup> 7 C. B. N. S. 400; 30 L. J. C. P. 118.

<sup>5</sup> H. & N. 603; 2 H. & C. 175; 31 L. J. Ex. 425; 32 L. J. Ex. 273.

them to transfer the B. company shares, stealing the certificates to enable him to accomplish his purpose. "Company B. acted upon these transfers, and in the action between it and the original owner of the shares it was held that the owner was not estopped from denying the execution of the transfer. Baron Wilde, in the Exchequer, formulated a rule as follows:

"That if he has led others into the belief of a certain state of facts by conduct of culpable neglect, calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that that state of facts did not exist."

Upon appeal<sup>1</sup> Blackburn, J., referring to Baron Wilde's language, said as follows:

"This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one,<sup>2</sup> and not merely neglect of what would be prudent in respect to the party himself or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy."

*Rules.*— Summarized from the principal cases, then,<sup>3</sup> the rules may be stated as follows:

1. There "must be the neglect of some duty that is owing to the person led into that belief."
2. "The neglect must be in the transaction itself."
3. "The omission must be the proximate cause of the leading of the person into the mistake."<sup>4</sup>

Let us now look at the criticisms of these rules by the principal text-writers:

*Mr. Bigelow's Criticism.*— Referring to these rules, Mr. Bigelow says:<sup>5</sup>

"It is clear, however, that cases of estoppel arising out of negligence without a representation must be uncommon. They cannot fall within the propositions of Mr. Justice Brett,<sup>6</sup> . . . for the proposition itself shows that a representation (by conduct) has been made."

<sup>1</sup> 2 H. & C. 181; 32 L. J. Ex. 278.

<sup>2</sup> The learned judge illustrates this point by reference to the case of the maker of a blank note which he intends to be filled up "and delivered to a series of holders."

<sup>3</sup> Bank of Ireland v. Evans (1855), 5 H. L. C. 931; Ex parte Swan (1859), 7 C. B. N. S. 400; 30 L. J. C. P. 113; Swan v. N. B. A. Co. (1862), 7 H. & N. 603; 31 L. J. Ex. 425; 3 H. & C.

175; 32 L. J. Ex. 278; Carr v. London (1875), L. R. 10 C. P. 307; 44 L. J. C. P. 109; Scholfield v. Londesborough (1894), 2 Q. B. 660; (1895) 1 Q. B. 596; (1896) A. C. 514; 63 L. J. Q. B. 649; 64 id. 293; 65 id. 593.

<sup>4</sup> See Scollans v. Rollins (1899), 53 N. E. R. 863 (Mass.).

<sup>5</sup> On Estoppel (5th ed.), 653, 654.

<sup>6</sup> In Carr v. London, *supra*.

Mr. Bigelow seems to be in search of some instance "of estoppel arising out of negligence *without a representation*," and he appears to assume that the rules were formulated for cases of that sort.<sup>1</sup> This is the more remarkable because he observes that the cases in which the rules were formulated "cannot fall within the proposition of Mr. Justice Brett, . . . for the proposition itself shows that a *representation* (by conduct) *has been made*." Inasmuch, then, as the cases themselves involved a representation, it would be extremely improbable that the rules framed by them should have been intended for cases in which there was no representation; more particularly when, as is asserted, it is extremely difficult to find such a case.

The solution of Mr. Bigelow's difficulty lies in the difference between personal and assisted misrepresentation, without regard to which it may be said with equal truth that there may or may not be estoppel by carelessness without misrepresentation. We may say first that there can be no estoppel of any kind unless there has been some misrepresentation — that is, unless the estoppel-asserter has by somebody been deceived. Some fact must be misrepresented before there can be estoppel against the assertion of that fact. But we may also say that there *may* be estoppel by carelessness without misrepresentation — *by the estoppel-denier*. In other words, there may be estoppel by carelessness where the misrepresentation is that of a third person; that is, in cases of assisted misrepresentation.

Not being able to find a case of "Estoppel by Negligence," Mr. Bigelow imagines one:<sup>2</sup>

"Let it be supposed that a man has been fixed with constructive notice, which by reason of his negligence has not become knowledge to him, of the existence of some right in his favor; that this right is, to his knowledge, about being disposed of by another as that other's property; and that it is so disposed of to a purchaser for value, without notice of the right, and in the absence of the negligent party. Here would be a case of negligence which could hardly be treated upon the footing of a representation; but would not an estoppel arise, supposing all the other elements of it present?"

But the case is clearly one of misrepresentation — misrepresentation by a third party. The vendor is posing as owner of property in which the estoppel-denier has some interest; that

<sup>1</sup> See the whole context, 653, 654. Bigham, J., too, thought with Mr. Bigelow. He said that *Swan v. North British* was a case "in which estoppel by negligence was at- tempted to be set up. . . . The present case is one of estoppel by representation." *Union v. Mersey* (1899), 2 Q. B. 210; 68 L. J. Q. B. 842.

<sup>2</sup> 5th ed. 654.

is to say, the vendor is representing that he is the absolute owner, whereas he is not. And the question is, Whether the bystander is, or is not, estopped by the assistance rendered to that misrepresentation by his silence? The very foundation of the complaint is that the purchaser was misled.

Moreover it is far from clear that the case is one of estoppel at all. Strengthening the case for estoppel, let us assume that the bystander's conduct is to be taken as an actual representation by him (in addition to the misrepresentation of the vendor); the question will then be, What was the representation that he made? Was it a representation that he had no right; or merely that he did not, at the moment, know of any? If the latter, then all he would be estopped from asserting would be that at that time he did know of his right. If he had in words asserted that he did not *at that time* know of any rights, he would not have been estopped from asserting that he had subsequently discovered them. His conduct cannot be taken to mean more than that.<sup>1</sup>

*Mr. Cababé's Criticism.*—Mr. Cababé's criticism of the rules<sup>2</sup> follows that of Mr. Bigelow, but improves upon it:

"It appears to have been hardly sufficiently noted that the conditions to be complied with before conduct can be made the foundation of the estoppel, by reason of its being negligent, are of such a character as to well-nigh eliminate 'estoppel by negligence' as a separate head; or in other words, that negligent conduct is only allowed to give rise to an estoppel in cases in which the conduct would give rise to the estoppel, even though it were not negligent. Yet this is clearly the case if it be true that for conduct to be the proximate cause of leading a party to believe in the existence of a state of facts, such conduct must amount to a representation of those facts. It may be going too far to say that, in the nature of things, there can be no such cases; if so it will suffice to say that negligence can only have any specific efficacy in giving rise to an estoppel, in those rare cases in which it proximately causes another to believe in the existence of facts, although it (the negligence) does not amount to a representation of those facts."

Mr. Cababé describes the situation necessary for estoppel by carelessness with very considerable accuracy in his last sentence, and considering that he had no concrete case in view the language is singularly fortunate. Observe how completely it fits the case of assisted misrepresentation (already suggested), in which the mortgagee allowed the mortgagor to have the deeds with the aid of which he posed as unincumbered owner of the property. Here the delivery of the deeds "proximately causes

<sup>1</sup> *Wilmott v. Barber* (1880), 15 Ch. D. 96; 49 L. J. Ch. 792; *Low v. Bouverie* (1891), 3 Ch. 82; 60 L. J. Ch. 594; *Robinson v. Nail* (1899), 52 S. W. R. 49.  
<sup>2</sup> On Estoppel, 100, 101. And see 97.

another to believe in the existence of facts (namely, unincumbered ownership), although it (handing over the deeds) does not amount to a representation of these facts." Such cases are by no means rare: they are legion.

But Mr. Cababé's language is somewhat too inclusive, as another of his sentences suggests. For there are many cases within his description (wide enough for all cases of assisted misrepresentation) which could not be said to be cases of estoppel by carelessness; because in them the conduct would have given rise to estoppel, "even though it were not negligent" — cases therefore in which the presence or absence of negligence is altogether immaterial; cases within the general rule which "regards the act done, and is entirely indifferent to the motive or reason for it, or the carelessness or diligence that may be in it."<sup>1</sup> Estoppel by carelessness is not coextensive with estoppel by assisted misrepresentation, although included in it.

We are now prepared for an examination of the rules.

#### RULE No. 1.

*"There must be the neglect of some duty that is owing to the person misled."*

This rule is undoubtedly valid, but it cannot be limited to any class of cases — to cases of personal, or assisted, misrepresentation, or to cases of estoppel by carelessness. For it is impossible that there can be estoppel of any kind unless there be a breach of some duty to the person misled. To say otherwise would be to affirm that the penalty of estoppel should be inflicted upon a person who had acted quite properly. The rule itself is indisputable; but it is not one applicable to estoppel by carelessness only.

#### RULE No. 2.

*"The neglect must be in the transaction itself."*<sup>2</sup>

It is in cases of assisted misrepresentation alone, as we have seen,<sup>3</sup> that we are to look for instances of estoppel by carelessness.

<sup>1</sup> *Ante*, p. 102.

<sup>2</sup> This rule having been so frequently approved, it requires the courage of strong conviction to criti-

cise it. See *Agricultural v. Federal* (1881), 6 Ont. App. 200.

<sup>3</sup> *Ante*, pp. 101, 102. For cases of personal misrepresentation the rule



ness; and yet it is not too much to say that it is impossible to find a case of assisted misrepresentation in which the carelessness can, with any accuracy, be said to be "in the transaction itself."<sup>1</sup>

Various cases have already been noted in which carelessness is a ground of estoppel, but in all of them, as if to despite the rule, the carelessness was not and could not be "in the transaction itself:" (1) A man, owing to his carelessness, is tricked into executing some document, or (2) a mortgagee without reasonable excuse hands over to the mortgagor the title-deeds; afterwards the document or the deeds are fraudulently passed on to an innocent purchaser; and the signer of the document or the mortgagee is estopped. Now "the transaction itself" took place between the knave and the purchaser, while the carelessness was prior to that, namely, in the execution of the document, or the delivery over of the deeds by the estoppel-denier.

And the same remark is true of all cases of assisted misrepresentation (the only class in which there ever is estoppel by carelessness); for in them it is always impossible that the carelessness can be in the transaction itself. Observe that in that class of cases the estoppel-denier (the person charged with the carelessness) is never even a party to "the transaction itself." He is estopped because he has afforded opportunity or occasion for the transaction, which is brought about by the misrepresentation of some other person — estopped because he has done that which was necessary to make the misrepresentation credible; not because he has made the misrepresentation himself, or indeed knew anything about it.

The carelessness may possibly be subsequent to the transaction, even as it may be prior to it, although it cannot be in it. For example, were a forged note discounted by a banker, and were the person whose name was forged carelessly to remain

which most nearly approaches the one in hand is that the estoppel-denier must have had reasonable ground for supposing that the representation would be acted upon.

<sup>1</sup> This statement would justify Mr. Cababé's remark "that the conditions to be complied with before

conduct can be made the foundation of the estoppel, by reason of its being negligent, are of such a character as to well-nigh eliminate 'Estoppel by Negligence' as a separate head;" but not for the reason which he gives (see *ante*, p. 111).

quiescent, not advising the banker of the forgery until after the banker's position had been changed, he would be estopped.<sup>1</sup> In such cases it is, of course, impossible to say that the carelessness was in the transaction itself.

*Conclusions.*— We have thus reached the following conclusions: that there are no cases of estoppel by carelessness under the heading personal misrepresentation (in that department the question is not as to the state of mind of the estoppel-denier, but whether he had reasonable ground for supposing that his representation would be acted upon); that among cases of assisted misrepresentation there are instances of estoppel by carelessness; that in none of them, however, is the carelessness in the transaction itself; nor is it possible for it to be so; it always either precedes the transaction or is subsequent to it. The only alternative to this assertion is to say that, in the instances given, the carelessness was "in the transaction itself." But to so say is to affirm that which our leading cases<sup>2</sup> deny; for in them (parallel cases of assisted misrepresentation) the alleged carelessness was said not to be "in the transaction itself," and for that reason it was held that there was no estoppel.<sup>3</sup>

<sup>1</sup> *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82; *Cairncross v. Lorimer*, 3 Macq. 827, 830; *Merchants' Bank v. Lucas* (1897), 18 Ont. 520; 15 Ont. App. 573; 18 S. C. Can. 703. Distinguish between ratification and estoppel in such cases: *Scott v. Bank of N. B.* (1894), 23 S. C. Can. 287; *Porsyth v. Day* (1858), 40 Me. 196. See *ante*, p. 106.

<sup>2</sup> *Ante*, p. 103.

<sup>3</sup> There is a certain ambiguity in the phrase "in the transaction itself" which in *Coventry v. Great Eastern Ry. Co.* (1883, 11 Q. B. D. 776; 52 L. J. Q. B. 694) was made use of to overcome the application of the rule. A railway company (through carelessness) issued two delivery orders for the same goods and the plaintiffs advanced money upon the faith of the second of them to its holder. Brett, M. R., said: "Then was the negligence of the defendant the 'proximate' cause of the loss sustained by the plaintiffs? I use the expression

'proximate cause as meaning the 'direct and immediate cause.' Here the production of the document was the direct and immediate cause of the advance of the money." And the learned judge held the case to be within the rule—that the negligence was in the transaction itself. But distinction is here overlooked between the negligence in issuing the certificate, which was the act of the company, and "the production of the document," which was the act of its holder. The learned judge says that "the production of the document" was the direct and immediate cause, etc. Granted. Then the negligence was not. The negligence was not "in the transaction itself," but in a document executed prior to the transaction, which another person made fraudulent use of, and yet the company was estopped. The same reasoning applied to the *Swan* case would vary its result.

Let us look again at these cases, and see what, with their help, we can make of the rule in hand.

In the *Bank of Ireland v. Evans* case,<sup>1</sup> the secretary of the company fraudulently affixed its seal to a transfer of shares, and sold them to an innocent purchaser. The company was not estopped because its carelessness in trusting the secretary with the seal was "not in the transfer itself." Very well. Now recall the mortgage case, in which a mortgagee, who allowed the mortgagor to have possession of the title-deeds, was estopped as against an innocent deposittee — was estopped although his carelessness in trusting the mortgagor with the deeds was not "in the transaction itself, but prior to it."

In the one case the company intrusts its seal to its secretary; the secretary makes fraudulent use of it; and the company is not estopped. In the other a mortgagee intrusts his title-deeds to his mortgagor; the mortgagor makes fraudulent use of them; and the mortgagee is estopped. It seems to be sufficiently clear that any distinction between these cases is not to be found in the fact that in one of them the carelessness was in the transaction itself and in the other that it was not; and that the point of difference (if there be any) must arise from a comparison of the conduct of the estoppel-deniers — by the conclusion that the company in intrusting its seal to its secretary was not guilty of carelessness at all (for the seal must be intrusted to somebody); but that a mortgagee cannot quite so easily justify his unnecessary and unusual confidence in his mortgagor. In other words, that there is not in the one case, but there is in the other, something done "which a prudent and reasonable man would not do" — that is, some carelessness.

Turning now to Swan's case, note that he was not estopped for the reason that his carelessness in executing the blank transfers and giving them to the broker was not negligence "in the transaction" between the broker and the innocent purchaser. Vary the case a very little. Suppose that Swan, when giving to the broker the blank transfers, with instructions to sell the A. Company shares, had also given him, not only the A. Company certificates, but also (as custodian merely) the B. Company certificates. There is very little doubt that

<sup>1</sup> *Ante*, p. 108.

Swan would now be estopped, for he has perfectly equipped his broker for fraud.<sup>1</sup> But his negligence can no more be said to be "in the transaction itself" now than it was before. In this case also, then, it cannot be said that the absence of estoppel was due to the carelessness not being "in the transaction itself." The question again would be one of reasonable care—reasonable to hand over blank transfers if you retain the certificates, but unreasonable to hand over both. The question of in, or out of, the transaction seems to be quite irrelevant.

The present writer by no means agrees that there was no carelessness in the *Bank of Ireland v. Evans* case. Upon the contrary, he adopts the language of Day, J., in a subsequent case:<sup>2</sup>

"The grossest negligence seems to have accompanied this confidence, because, notwithstanding all the warnings which most men experienced in the affairs of the world have had, that no man is to be trusted without the exercise of reasonable care by those who have to look after the affairs of other people, it seems to have been thought that the common seal and the affairs of the company might be intrusted to their clerk without any check or superintendence of any sort or kind being exercised over him by the corporators or any of the officials of the company. One can scarcely imagine a case of grosser negligence than the negligence of all connected with the affairs of this company in their dealings with their clerk. It is not for me to suggest that every clerk, or any clerk, is to be suspected of evil doing, but it is idle to talk of the absence of necessity for exercising due and reasonable care over the officers of any corporate or other body. A person who was looking after his own affairs would take very good care to see that his seal, if it had any value, was looked after; but here a corporate body, who can only speak and act by its common seal, are content, one and all, to intrust the common seal to an officer over whom they exercise not the slightest superintendence."

If this criticism be just, and if for estoppel it be not necessary that carelessness should be in the transaction itself, then the *Bank of Ireland v. Evans* case should have been otherwise decided.

Swan in his cases seems to have been freed from the charge of carelessness because of his retention of the certificates, without which it was thought the blank transfers would be useless. With that reasoning no fault is at present found.

*Result and its Explanation.*—Our reasoning has produced the extraordinary result that a rule so well established, de-

<sup>1</sup> The judgments largely turn upon the fact that the broker had to steal the certificates in order to perpetrate the fraud, and that therefore Swan had a string to his blank transfers. And see *Colonial Bank v. Cady* (1890), 15 A. C. 297; 60 L. J. Ch. 181; Marsh-

all v. National (1892), 61 L. J. Ch. 465; *Pennsylvania Railway Co.'s Appeal* (1878), 86 Pa. St. 80.

<sup>2</sup> *Mayor, etc. v. Bank of England* (1887), 21 Q. B. D. 162; 57 L. J. Q. B. 418.

defined and explained as the one in hand is quite impossible of application. An investigation of its origin will unravel the mystery, and reveal the fact that inattention to a somewhat palpable distinction was responsible for the confusion.

*Young v. Grote*,<sup>1</sup> "that fount of bad law,"<sup>2</sup> was at the bottom of the trouble. A drawer of a check left spaces in it, which were fraudulently made use of to raise the amount of it, and it was held that the drawer, because of his carelessness, and not the banker, must lose. The carelessness was *in the drawing of the check* — in the document itself.

Then came *Bank of Ireland v. Evans*,<sup>3</sup> in which the secretary of the company fraudulently applied its seal to certain transfers of shares. The company was not estopped because (per Parke, B.)

"the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the *transfer* itself. Such was the case of *Young v. Grote*."

Note that the learned Baron does not say "in the *transaction* itself," but in "the *transfer* itself," that is, in the document of transfer. In other words, the negligence must not be merely in leaving a seal in the hands of a secretary — that is too remote — but in the transfer itself. He distinguishes between *Young v. Grote*, in which the neglect was in the *check* itself, and the case in hand, in which it was not "in the *transfer* itself," but in leaving the seal with the secretary.

Shortly afterwards came *Swan v. N. B. A.*,<sup>4</sup> in which the broker used the executed but blank transfers to assign shares which he had no authority to deal with. Here now was a case in which, if there was any negligence at all, it was "in the *transfer* itself," that is, in leaving blanks in the transfer. The court held, however, that there was no estoppel notwithstanding the blanks; that is, notwithstanding that the neglect was "in the transfer itself." The previous rule, therefore, had to be changed, and it was said "that the neglect must be in the *transaction* itself."<sup>5</sup>

<sup>1</sup> (1827) 4 Bing. 253, 13 Moore, 484; 5 L. J. C. P. 165.

<sup>2</sup> So Esher, M. R., in *Scholfield v. Londesborough* (1855), 1 Q. B. 586; 64 L. J. Q. B. 293.

<sup>3</sup> (1855) 5 H. L. C. 389.

<sup>4</sup> (1859) 7 C. B. N. S. 400; 80 L. J. C. P. 113; (1862) 7 H. & N. 603; 31 L. J. Ex. 425; (1863) 2 H. & C. 175; 52 L. J. Ex. 273.

<sup>5</sup> It was made still more definite afterwards in *Carr v. London* (1875).

But so to say was entirely to alter the rule and create one that would apply in cases to which Baron Parke had no idea of extending it. It is clearly one thing to say that where a fraud has by some knave been perpetrated by the help of some document, the ostensible signer of the paper is not estopped unless he has been careless with regard to it (which was the ground of distinction between *Young v. Grote* and *Bank of Ireland v. Evans*); and quite another thing to say that for estoppel by carelessness the neglect must be in the transaction between the knave and the innocent purchaser. It is completely to change the period and place at which the carelessness is required to appear, and to transfer it from the document and its execution (if there be a document in the case) to some fraudulent transaction in which it was subsequently used by some other person.

The change was unconsciously made. The ambiguity of the word "transfer" was not observed. Baron Parke intended by it the *document of transfer*, but he has been taken to have used it in the sense of the *transaction* by which the *transfer* of the shares had been accomplished.<sup>1</sup>

Observe the effect of the amendment of the rule upon some of the cases of estoppel by carelessness. We have seen that a man who, through his own negligence, is tricked into signing a document, may be estopped by it as against an innocent purchaser. This is quite in harmony with Baron Parke's rule—the negligence is in the document itself. But according to the amendment there could be no estoppel because the negligence was not "in the transaction itself," that is, in the subsequent transaction between the knave and the innocent purchaser.

The effect is still more marked in the mortgage case. To it Baron Parke's rule has no application whatever, for it is not a case in which there is a document with which to connect negligence. And again, the amendment would reverse well-settled decisions; for the mortgagee's carelessness in handing over the deeds to the mortgagor cannot possibly be said to be in the

L. R. 10 C. P. 307; 44 L. J. C. P. 109), and act and is denied to extend to it which it is said that the negligence must be "in the transaction itself which is in dispute."

<sup>1</sup> See how the phrase "in the transaction itself" is held down to the

the negligence which prepared the way for that act, and made it possible: *Soderquist v. Federal Bank* (1889), 15 Ont. App. 615; *Agricultural v. Federal* (1881), 6 Ont. App. 200.

subsequent transaction by which the mortgagor pledges the deeds to an innocent deposittee.

*Analogy from Law of Torts.*—If the point that the rule in hand cannot apply to cases of estoppel by assisted misrepresentation has not been made sufficiently clear, a reference by way of analogy to the law of torts will supply the defect. Suppose that in carelessly handling some explosive I discharge it and wound a neighbor; I am liable; the carelessness was in the transaction itself, and the case is one in which I have personally inflicted the injury. Suppose again that I had so carelessly packed and labeled an explosive that a carrier in handling it with accustomed care discharged it and injured some people; I should again be liable,<sup>1</sup> although I did not personally inflict the injury, and although the carelessness was not in the transaction itself. The negligence was in the previous packing and labeling (as in the Swan case it was in the previously prepared document); it was not in the explosion, although the explosion was reasonably consequent upon the carelessness (just as in the Swan case it was not in the broker's transaction, although that, in order to estop, would have to be reasonably consequent upon leaving blanks in the transfer).

That negligence must be in the transaction itself will not answer as a rule in torts, nor will it in estoppel, which in many of its aspects is very closely allied to tort.

### RULE No. 3.

*"The neglect must be the proximate cause of the leading of the person into the mistake."*

We have arrived at the conclusions (1) that it is among cases of assisted misrepresentation only that we can find instances of estoppel by carelessness, and (2) that in such cases it is impossible that the carelessness can be "in the transaction itself." And we are now to see that the present rule is also an impossible one, for "the neglect" in cases of assisted misrepresentation never can "be the proximate cause of the leading of the person into the mistake." There is always interposed the misrepresentation of some third person. In fact the word "prox-

<sup>1</sup>Farrant v. Barnes (1862), 11 C. B. N. S. 558; 31 L. J. C. P. 137.

imate" has been felt to be altogether inappropriate, and proposal has been made to change it. Said Lord Esher:<sup>1</sup>

"I think I should prefer to insert in the proposition the word 'real' instead of the word 'proximate.'"

And Lopes, L. J., agreed with him. But Fry, L. J., said:

"I do not feel sure that the term 'real' is any more free from difficulty than the term 'proximate.'"

With this last the present writer agrees. Neither word is applicable for the reason already given. "Proximate," the carelessness and the result can never be (in the line of cases in hand).<sup>2</sup> And there is no single "real" cause, but always two causes. In the mortgage case the innocent purchaser was deceived by (1) the misrepresentation of the mortgagor that he was the unincumbered owner; and (2) by the mortgagee's assistance in handing over the deeds. In Swan's case (as amended for purposes of illustration) the innocent purchaser was deceived by (1) the misrepresentation of the broker, and (2) the assistance of Swan, who executed the blank transfers and handed over the certificates. In both of these, and in all other such cases, there are two efficient or real causes, and the negligence is not the proximate one.

If the word "proximate" is to be retained at all, it must be in some such sentence as that of Keating, J., in the Swan case.<sup>3</sup> We must not say, as above, that

"the neglect must be the proximate cause of the leading of the person into the mistake;"

but with Keating, J.:

"The negligence directly and proximately enabled the broker to effect the transfers;"

although the sentence is not a fascinating one.

But for the fact that it is difficult to think in such cases as those in hand of two *proximate* causes,<sup>4</sup> there would be less objection to the following:

"Where two efficient proximate causes contribute to an injury, one who,

<sup>1</sup>Seton v. Lafone (1887), 19 Q. B. D. 71; 56 L. J. Q. B. 415; 19 Q. B. D. 74. But see the L. J. report, p. 417.

<sup>2</sup>The writer is not unmindful of a criticism of Lopes, J., in Schofield v. Londesborough (1895), 1 Q. B. 552: "It might as well be said that . . . when a sack fell from a house and injured a passenger in the street, through the negligence of the de-

fendant's servants, that the sack was the proximate cause of the injury, and not the negligence." In the cases referred to in the text there is an intervening and independent act, of a new actor.

<sup>3</sup>Swan v. N. B. A. (1868), 2 H. & C. 175; 32 L. J. Ex. 273.

<sup>4</sup>Cold and humidity may be two proximate causes of rain; but it is



by his own negligent act, brought about one of such causes, is liable for the injurious consequences resulting therefrom."<sup>1</sup>

Upon the whole the present writer suggests that the word "proximate" should be discarded, and offers as a substitute for the rule under consideration the requisite that

"the estoppel-asserter's change of position must have been reasonably consequent upon the carelessness;"

to the elucidation of which a chapter will be devoted.<sup>2</sup>

Observe the distinctions between the two rules—the one under discussion and that suggested. Orthodoxy requires that the neglect should be the proximate cause of the mistake; but such close association is, as we have seen, impossible. Innovation demands merely that one thing should have been reasonably consequent upon the other. Another alteration is perhaps more verbal, although not without substantiality. It suggests that it is the change of position, and not merely the change of thought (some mistake), that has to be reasonably consequent upon the carelessness.

#### SUMMARY.

The result of the foregoing considerations is as follows:

(1) There can be no estoppel without misrepresentation; there can be no such thing as estoppel by carelessness unless some one has been deceived.

(2) It is not, however, at all necessary that the person said to be estopped by the carelessness should have himself made the representation, or should have been in any way a party to it.

(3) Upon the contrary, estoppel by carelessness never arises where the misrepresentation is chargeable to the careless party. That would be a case of personal misrepresentation; and in such cases estoppel would ensue whether there was carelessness or not.

(4) It only arises where the carelessness is by one person and the misrepresentation by another; that is, in cases of assisted misrepresentation.

(5) *Rule No. 1*: "That there must be neglect of some duty

not quite so clear that in Swan's case it would be correct to say that the broker's fraud and Swan's negligence were both proximate causes of the injury done to the purchaser.

<sup>1</sup> Waller v. Missouri, etc. Ry. Co., 59 Mo. App. 410; 1 Mo. App. 56.

<sup>2</sup> Ch. XIII.

that is owing to the person misled," is of general application, and is not confined to cases of estoppel by carelessness.

(6) *Rule No. 2:* "That the neglect must be in the transaction itself," is not a rule possible in estoppel by carelessness — the neglect is necessarily always either prior or subsequent to "the transaction itself."

(7) *Rule No. 3:* "That the neglect must be the proximate cause of the leading of the person into the mistake," is impossible of application in cases of estoppel by carelessness. The proper rule is that "the estoppel-asserter's change of position must have been reasonably consequent upon the carelessness."

(8) Cases of estoppel by carelessness are not at present uncommon. They should be determined upon the ground well known in actions of tort that people ought to be punished for "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do" —

punished sometimes by damages, and sometimes by estoppel

## CHAPTER X.

### CONDITION NO. 8.

#### *The Estoppel-asserter Must be a Person to Whom, Immediately or Mediate, the Misrepresentation was Made.*

*Immediately.*— The mere fact that there has been a misrepresentation, and that somebody has acted on it, will not be sufficient to work an estoppel. As was said by Lord Cranworth:<sup>1</sup>

"It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good."

And as was said by Cleasby, B., in *Hosegood v. Bull*:<sup>2</sup>

"When A. asks B. his opinion in confidence, respecting the solvency of C., and the question is answered by B., without any intimation having been given to him that the information was sought for the purpose of its being communicated by A. to any particular individual, I cannot help thinking that the case does not come within any class of cases in which relief on the ground of misrepresentation can be obtained against B. by the individual to whom the information has been communicated to A."

In *Le Lievre v. Gould*<sup>3</sup> a surveyor gave to his employer certificates as to the progress made in building two houses, which certificates were untrue. Upon the faith of these certificates another person (the mortgagee of the employer) advanced certain moneys. It was held that the surveyor was not liable to the mortgagee. It had not been intended that the certificate should be acted upon by any person other than the person to whom it was given. The mortgagee was a stranger to the misrepresentation. The decision would be the same, no doubt, were a subsequent purchaser of land to act upon a certificate as to the title given by a solicitor to a previous purchaser. The solicitor would be liable to his client, but not to others.<sup>4</sup>

<sup>1</sup> *Jorden v. Money* (1854), 5 H. L. C. 212; 33 L. J. Ch. 865. And see *Kinney v. Whiton* (1877), 44 Conn. 232; *Maguire v. Selden* (1886), 103 N. Y. 642; 9 N. E. R. 517; *Starr v. Newman* (1899), 33 S. E. R. 427 (Ga.).

<sup>2</sup> (1877) 86 L. T. N. S. 630.

<sup>3</sup> (1893) 1 Q. B. 491; 62 L. J. Q. B. 353. To same effect is *Atkins v. Payne* (1899), 190 Pa. St. 5; 42 Atl. R. 378.

<sup>4</sup> But an abstractor of titles would be under obligation to a third person if he knew that the abstract was

*Mediately; Intended to be Passed on.*— Upon the other hand, it would be a grievous mistake to assume that there will be estoppel only as against the particular person to whom the misrepresentation is immediately made. As there are ambulatory promises,<sup>1</sup> that is to say, promises intended to be redeemed to persons other than the immediate contractor, so also are there ambulatory representations; that is to say, representations that are intended to be passed on, intended to influence the action of third persons.

"It is now well established that in order to enable a person injured by a false representation to sue for damages it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damages thereby."<sup>2</sup>

Current methods of explanation would suggest the phrase "estoppels bind parties and privies" as a sufficient solution of the law as to ambulatory representations. That phrase, however, was not originally intended to apply to estoppel by misrepresentation, and a portion of a subsequent chapter<sup>3</sup> will be devoted to proving its inapplicability to that subject. For the present it will suffice to point out that "privity" assumes the existence of some property to which the estoppel is, as it were, annexed, and with which it runs. The ideas of an estoppel in gross and of its being transferred in unattached form to some third person are, of course, quite foreign to the usual use of the phrase under consideration. Such phenomena are, however, by no means uncommon in the law of estoppel. Take a few cases:

*Misrepresentation as to Solvency.*— For example, let us vary a little the *Hosegood v. Bull* case. Let us suppose that when A. asked B. as to C.'s solvency it had appeared to B. that the information was being obtained in order to be passed on to some one else. This variation would change the result, and B. would now be estopped as against this other person. Some-

required for his purposes and was to be used by him. *Brown v. Sims* (1899), 53 N. E. R. 779 (Ind.).

<sup>1</sup> See ch. XXIV.

<sup>2</sup> Per Quain, J., in *Swift v. Winter-*

botham (1873), L. R. 8 Q. B. 253; 43 L. J. Q. B. 111; approved in *Richardson v. Silvester* (1873), L. R. 9 Q. B. 36; 43 L. J. Q. B. 1.

<sup>3</sup> Ch. XV.

times usage alone would suffice to indicate to B. the purpose of the inquiry:

"It must be intended that the answers to such inquiries would be sent not merely for the use or benefit of the bank making the inquiry, but for the use and benefit of the customer on whose behalf the inquiry is made. . . . In the present case it has been proved to be the usage amongst bankers to make inquiries of this kind on behalf of their customers."<sup>1</sup>

*Partnership.*—In earlier times the application of estoppel to partnership (*i. e.*, a person not in fact a partner being liable nevertheless as such, because of his having been so represented) was not clearly comprehended; and it was laid down that if the alleged partner had been held out "to the world" as a member of the firm, he would be liable to everybody upon its obligations.<sup>2</sup> But this is not the modern doctrine; and if a creditor of a firm now assert that a person was a member of the partnership when in fact he was not, it must be upon the ground that the latter misled him, and not that everybody else was misled. But the holding out need not be directly to the person deceived.

"The defendant would be bound by an indirect representation to the plaintiff arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement."<sup>3</sup>

*Commercial Instruments, etc.*—Another class of documents intended to be passed on embraces delivery orders, warehouse receipts, bills of lading, and other instruments known to commerce.

*Delivery Orders.*—For example,<sup>4</sup> a railway company, by mistake, issued two delivery orders for the same goods. Upon

<sup>1</sup> *Swift v. Winterbotham* (1873), L. R. 8 Q. B. 244; 43 L. J. Q. B. 111; L. R. 9 Q. B. 301; 43 L. J. Q. B. 56. Compare *First Nat. Bank v. Marshall* (1895), 109 Mich. 114; 65 N. W. R. 604. The cases cited are not the most satisfactory examples of the point in hand, as they may be referred to the law of principal and agent—the inquiring bank was the agent for the real inquirer. It is just as well, however, to note that estoppel by misrepresentation may exist in favor of an undisclosed principal.

<sup>2</sup> *Waugh v. Carver* (1793), 2 H. Bl. 235; *De Berkom v. Smith* (1793), 1 Esp. 30. And see ch. XXVII.

<sup>3</sup> *Dickenson v. Valpy* (1829), 10 B. & C. 140; 8 L. J. K. B. 51. And see *Vice v. Anson* (1827), 7 B. & C. 409; 6 L. J. K. B. 24; *Martyn v. Gray* (1863), 14 C. B. N. S. 839; *Re Fraser* (1893), 2 Q. B. 637; *McLean v. Clark* (1893), 20 Ont. App. 671; *Hannah v. Baylor* (1887), 27 Mo. App. 302; *Denishorne v. Hock* (1886), 112 Pa. St. 240; 3 Atl. R. 777; *Burrows v. Grover* (1897), 41 S. W. R. 823 (Tex.); *Nofsinger v. Goldman* (1893), 53 Pac. R. 425. And see ch. XXVII.

<sup>4</sup> *Coventry v. Great Eastern Ry.* (1883), 11 Q. B. D. 776; 53 L. J. Q. B. 694.

the faith of the second of them a third person advanced money, and the railway company was estopped as against him from denying the representation contained in the order. "There was evidence of custom to sell or pledge goods upon the faith of a document of this kind"—evidence that it was intended to be passed on. Brett, M. R., said:

"It is true that there can be no negligence unless there be a duty; but here the documents have a certain mercantile meaning attached to them, and therefore the defendants owed a duty to merchants and persons likely to deal with the documents."

*Warehouse Receipts.*—Where a warehouse receipt is given for goods not actually received, knowing that the receiver would produce it to

"intending purchasers; or, in other words, take it into the market and, on the faith of the truth of the representation therein contained, . . . sell that quantity so stored to any person desirous of purchasing it,"

the warehouseman is estopped, as against any person purchasing on the faith of the receipt, from denying its truthfulness.<sup>1</sup>

*Letters of Credit.*—It has been well held that, whatever may be the effect of a letter of credit at law, it constitutes a contract to the benefit of which all persons taking and paying for bills on the faith of it are entitled in equity, without regard to the equities between the bank and the holder of the letter.<sup>2</sup>

*Bills of Lading.*—Representations in bills of lading are to be taken as having been

"made to any one who, in the course of business, might think fit to make advances on the faith of them."<sup>3</sup>

*Certificates of Shares.*—Company's certificates of shares are intended "to be acted upon by the purchasers of shares in the market,"<sup>4</sup> and consequently the company is estopped by them, as against persons who purchase upon the faith of them. A share certificate issued

"to give the shareholder the opportunity of more easily dealing with his shares is a declaration by the company to all the world that the person in whose name the certificate is made out and to whom it is given is a shareholder."<sup>5</sup>

<sup>1</sup> *Holton v. Sanson* (1862), 11 U. C. (1875), 65 N. Y. 111, 122. See ch. C. P. 606. See ch. XXII. XXIV.

<sup>2</sup> *Re Agra & Masterman's Bank* (1867), L. R. 2 Ch. 391; 36 L. J. Ch. 222. See also *Re Blakely* (1867), L. R. 3 Ch. 160; 36 L. J. Ch. 665; *Quebec Bank v. Taggart* (1890), 27 Ont. 162.

<sup>3</sup> *Armour v. Michigan, etc. Ry.*

<sup>4</sup> *Per Lord Herschell in Balkis, etc. Co. v. Tomkinson* (1893), A. C. 403; 63 L. J. Q. B. 184.

<sup>5</sup> *Per Cockburn, C. J., in Re Bahia, etc.* (1868), L. R. 3 Q. B. 534; 37 L. J. Q. B. 166. See cases cited with this in ch. XXII.

*Prospectuses.*—The law upon this subject will appear from the following cases:

(1855) *Scott v. Dixon*.<sup>1</sup> Plaintiff bought some shares in a company upon the faith of statements contained in a report made by the directors to the shareholders. Copies of it were left at the bank and were to be had by share brokers or anybody applying for them who was desirous of information with regard to the affairs of the bank with a view to the purchase of shares. Plaintiff had obtained a copy of the report before purchasing his shares. The directors were, upon evidence given of the intention to circulate the report, held to be liable; but the case would probably have been decided in the same way in the absence of such evidence upon the ground that (per Campbell, C. J.)

"Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company."<sup>2</sup>

This was a case of a report. But distinguish between a report and a prospectus:

(1873) *Peek v. Gurney*.<sup>3</sup> The promoters of a company issued to the public a prospectus for the purpose of obtaining subscriptions for shares. After the shares had been allotted the plaintiff purchased some shares in the market. *Held*, that he was not one of the persons to whom the prospectus was addressed. Lord Colonsay said:

"The proper office of a prospectus is to invite persons to become original partners in a company, that is to say, allottees of shares; and I do not think that the responsibility towards these allottees, which attached to the directors who issued the prospectus, followed the shares when they were transferred to any number of persons, however distant from the allottees, persons who ultimately purchased those shares."<sup>4</sup>

(1896) *Andrews v. Mockford*.<sup>5</sup>

"It is, however, a totally different matter when the conclusion is arrived at that the prospectus was not intended solely, or even primarily, for the purpose of getting the public to subscribe to the shares."

In such case the directors would be liable to subsequent purchasers of the shares.

<sup>1</sup> 29 L. J. Ex. 62.

<sup>2</sup> See also *New Brunswick, etc. v. Conybeare* (1862), 9 H. L. C. 711; 31 L. J. Ch. 297; *Western Bank v. Addie* (1867), L. R. 1 Sc. & D. 145.

<sup>3</sup> L. R. 13 Eq. 70; 41 L. J. Ch. 436; L. R. 6 H. L. 377; 43 L. J. Ch. 19.

<sup>4</sup> The allottee himself, no doubt, could have sued. *Gerhard v. Bates* (1852), 2 El. & B. 473; 23 L. J. Q. B. 364; *Henderson v. Lacon* (1867), L. R. 5 Eq. 245.

<sup>5</sup> Per Rigby, L. J. (1896), 1 Q. B. 872; 65 L. J. Q. B. 302.

*Commercial Agencies.*—Representations made to a commercial agency are intended to be acted upon by the patrons of the agency, and will operate as estoppels in favor of such of the patrons as may, upon the faith of them, change their position.<sup>1</sup>

*Stock Exchange.*—In the same way representations to a stock exchange are intended for the members of it. In one case<sup>2</sup> Bramwell, B., said:

"It would be a strange thing to hold that if a man makes a verbal untrue statement to any person, as for instance that the shares in a particular company are a valuable security, if that person buys and recommends his friends to buy, that he is to be liable to any one who buys on the faith of such representations. But it is not a bad rule that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequences may be."

And Pollock, C. B., said:

"All persons buying shares on the stock exchange must be considered as persons to whom it was contemplated that the representations would be made. I am not prepared to lay down, as a general rule, that if a person makes a false representation, every one to whom it is repeated and also acts upon it may sue him. . . . Generally, if a false and fraudulent statement is made with a view to deceive the party who is injured by it, that affords a ground of action. But I think that there must always be this evidence against the person to be charged, viz.: that the plaintiff was one of the persons to whom he contemplated that the representation should be made, or a person whom the defendant ought to have been aware he was injuring or might injure."

Of this and a similar case Lord Chelmsford said:

"The decisions, and the grounds on which they proceeded, appear to me to be extraordinary, and I cannot bring my mind to agree with them;"<sup>3</sup> but it is apprehended, nevertheless, that the law is well founded.

*Title Deeds.*—Title deeds are clearly documents which are intended to be passed on; and a duty of carefulness, therefore, exists in regard to persons who may subsequently acquire an interest in the land. The subject is discussed in a subsequent chapter.<sup>4</sup>

"*No Defenses.*"—Frequently, in the United States, an obligor indorses upon his obligation a certificate to the effect that he has "no defenses, equities or set-offs of any kind." The plain intent of such certificates is that they shall be acted upon by transferees of the obligation; and such transferees are entitled to take advantage of them by way of estoppel.<sup>5</sup>

<sup>1</sup> *Stevens v. Ludlum* (1891), 46 Minn. 160; 48 N. W. R. 771; *Irish, etc. Bank v. Ludlum* (1892), 49 Minn. 255; 51 N. W. R. 1046.

<sup>2</sup> *Bedford v. Bagshawe* (1859), 4 H. & N. 538; 29 L. J. Ex. 59.

<sup>3</sup> *Peek v. Gurney* (1873), L. R. 6 H. L. 397; 43 L. J. Ch. 19.

<sup>4</sup> Ch. XIX.

<sup>5</sup> *Gray v. Bank of Kentucky* (1857), 29 Pa. St. 365; *Penn. R. R. Co.'s Appeal* (1878), id. 80; *Robertson v. Hay*



"*Negotiable Instruments.*"<sup>1</sup> — Bills and notes are instruments which, in an especial manner, are intended to be passed on; and a remote holder is frequently a person who, within the rule, is one to whom a misrepresentation (in connection with the instrument) may be said to have been made. The authorities upon this subject are treated of in the chapter upon choses in action.<sup>2</sup> At this place a single indicative reference must suffice.

"It is sufficient to point out that a party signing in blank a check or bill, or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders, and therefore he stands to all these holders in the position indicated in the first branch of the judgment of *Freeman v. Cooke*. He means the holder to be induced to take the instrument as if it had been filled up from the first."<sup>3</sup>

*Choses in Action.* — The legal recognition of the assignability of choses in action is rapidly increasing the classes of documents which are made with the intention of being passed on to others. The assignees of such documents take them free from equities existing between the parties to them.<sup>4</sup> And the tendency is to hold the parties to them estopped by the representations contained in them. Consider under this heading the case of *Bickerton v. Walker*.<sup>5</sup> A mortgage debt is no doubt a chose in action, but it is one which the mortgagor may well believe will be assigned to other holders, and if he execute a mortgage for a sum greater than that actually advanced, he may be estopped as against an assignee from denying that the security is for the larger amount. The case is a distinct advance upon, perhaps departure from, the older doctrine; but it is in line with the prevailing tendency to impose a duty of carefulness for the interest of people who may be misled by your action.

*Misrepresentation to Person Who Will Probably be Applied to for Information.* — A lessee of a public house owned certain fittings in it. He leased his interest, and procured the landlord

(1879), id. 244; *Hutchinson v. Gill*, id. 253; *Riggs v. Pursell* (1878), 87 N. Y. 370. North British (1863), 2 H. & C. 133; 22 L. J. Ex. 273.

<sup>1</sup> Until we reach chapter XXIV, the word "negotiable" and its derivatives must be used.

<sup>2</sup> Ch. XXIV.

<sup>3</sup> Per Blackburn, J., in *Swan v. North British* (1863), 2 H. & C. 133; 22 L. J. Ex. 273.

<sup>4</sup> Re *Agra & Masterman's Bank* (1867), L. R. 2 Ch. 301; 36 L. J. Ch. 222. And see the whole matter discussed in chapter XXIV.

<sup>5</sup> (1835) 31 Ch. D. 151; 55 L. J. Ch. 227. And see the cases referred to with this one in chapter IV.

to accept the purchaser as tenant. By the agreement between the landlord and the new tenant the former was to be entitled, at the end of the term, to deduct any arrears due from the tenant from a valuation of the fittings. The original lessee was aware of this agreement and made no objection to it. Clearly then, as between him and the landlord, he would have been estopped from setting up his ownership. But the question did not arise between them. The new tenant afterwards sold the good-will of the business and the fittings upon the misrepresentation that he was the owner thereof; and he referred his purchaser to the landlord, who informed him that the person assuming to sell was in fact the tenant. It was held that the owner of the goods was estopped.<sup>1</sup>

In this case it is not, at first sight, quite clear why the owner of the goods should be estopped by what the landlord said; but when it is considered that the owner misled the landlord, and that he knew that any persons desirous of dealing with the tenant would, in the usual course, go to the landlord for information as to the ownership of the goods, the soundness of the decision becomes more apparent.

*Misrepresentation by Appearing to Subscribe for Shares.*—Where shares are subscribed in order to induce others to invest and the scheme is successful, the decoy is estopped as against the dupes from asserting a secret arrangement with the company.<sup>2</sup>

*Ambulatory and Non-ambulatory.*—That there are ambulatory as well as non-ambulatory representations may now be taken as having been sufficiently established.

<sup>1</sup>Gregg v. Wells (1839), 10 A. & E. 90; 8 L. J. Q. B. 193.      <sup>2</sup>(1858) 31 Pa. St. 430.

## CHAPTER XI.

### CONDITION NO. 9.

#### *The Estoppel-asserter Must, on the Faith of the Misrepresentation, Have Changed His Position Prejudicially.*

"To create an estoppel *in pais*, the party in whose favor it operates must have altered his position through reliance on the words or conduct of the party estopped."<sup>1</sup>

"Nobody ought to be estopped from averring the truth or asserting a just demand unless by his acts, or words, or neglect, his now averring the truth, or asserting the demand, would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he has said or done, or omitted to say or do."<sup>2</sup>

Let us consider the matter under the following headings:

- I. Change of position.
- II. On the faith, etc.
- III. Prejudicially.
- IV. Purchaser for value without notice.

#### I. CHANGE OF POSITION.

Change of position to misrepresentation bears somewhat the same relation as consideration to contract. A misrepresentation without consequences must surely remain without consequences. But the point must be noted, and even dwelt upon, for it sometimes in practice escapes observation. Note its application in the following case. Defendant, having the plaintiff in custody, gave to him a statement of the causes of detention, in which he admitted having a warrant for plaintiff's discharge on a certain date. Plaintiff, believing this warrant to be insufficient (not acting upon the admission), applied for

<sup>1</sup> *Lingonner v. Ambler* (1895), 44 Neb. 316; 62 N. W. R. 486. And see *Tower v. Hoslam* (1891), 84 Me. 86; 24 Atl. R. 587; *Stanton v. Estey* (1892), 90 Mich. 12; 51 N. W. R. 101; *Pearson v. Brown* (1898), 105 Ga. 802; 31 S. E. R. 746; *Shields v. McClure* (1898), 75 Mo. App. 33; *Jamison v. Miller* (1884), 64 Iowa, 402; 20 N. W. R. 401.

<sup>2</sup> Per James, L. J., in *Ex parte Adamson* (1878), 3 Ch. D. 817; 47 L. J. Bk. 193. And see *Low v. Bouverie* (1891), 3 Ch. 111; 60 L. J. Ch. 594; *Conrad v. Fisher* (1889), 87 Mo. App. 352; *Dean v. Crall* (1894), 98 Mich. 591; 57 N. W. R. 812; *Barry v. Kirkland* (1893), 52 Pac. R. 771 (Ariz.); *Watts v. Ritter* (1899), 180 Ill. 616; 54 N. E. R. 595; *Oak Creek v. Helmer* (1899, Neb.), 80 N. W. R. 891.

an order for his discharge when the date should arrive, which order was refused. Having been detained three days beyond the date mentioned in the warrant, he sued for damages. In this action the defendant denied having the warrant, and it appeared that he had a copy of it only. *Held*, that he was not estopped by his previous admission or representation, for the plaintiff had in no way acted upon it.<sup>1</sup>

There can of course be no such change of position as will result in estoppel if it chronologically precedes the misrepresentation complained of.<sup>2</sup> It is impossible, too, that any representation can be acted upon if its existence be unknown to the estoppel-asserter. In a case,<sup>3</sup> therefore, in which it was said that a principal was estopped from denying that his agent had certain powers, because he, the agent, had been intrusted with certain general authority, from which the existence of these powers would naturally be inferred, it was held that the principal was not estopped as against a person who was not aware of the general authority, and who, therefore, could not have drawn the inference.

It has been held in jurisdictions in which registration of a transfer of shares is necessary to the passing of the property in them, that creditors of the transferrer can attach the shares prior to registration. If the creditors had advanced their money—changed their position—upon the faith of their debtor's ownership of the shares, something could be said for them; but the cases often ignore the necessity for change of position of any sort.<sup>4</sup>

<sup>1</sup> Howard v. Hudson (1853), 2 El. & B. 1; 22 L. J. Q. B. 341.

<sup>2</sup> Barnard v. Campbell (1874), 55 N. Y. 456; Ehrler v. Braun (1887), 120 Ill. 503; 22 Ill. App. 319; 12 N. E. R. 503; McManus v. Watkins (1893), 55 Mo. App. 92.

<sup>3</sup> Miles v. McIlwraith (1883), 8 App. Cas. 120; 52 L. J. P. C. 17. And see Stewart v. Rounds (1882), 7 Ont. App. 515; Murphy v. Barnard (1894), 162 Mass. 72; 38 N. E. R. 29. But see Hanover Nat. Bank v. American (1896), 148 N. Y. 72; 43 N. E. R. 612.

<sup>4</sup> Skowhegan v. Cutter (1860), 49 Me. 315; People's Bank v. Gridley

(1879), 91 Ill. 459; Union Bank v. Laird (1887), 2 Wheat. 390; Hirsch v. Norton (1888), 115 Ind. 341; 17 N. E. R. 612; Pierce v. Horner (1895), 142 Ind. 626; 42 N. E. R. 223. See, however, Lightner's Appeal (1876), 82 Pa. St. 301; Moore v. Albro (1880), 129 Mass. 9; Sibley v. Quinsigamon (1882), 133 Mass. 515; Burgess v. Seligman (1882), 107 U. S. 20; Masury v. Arkansas (1890), 35 C. C. App. 476; 93 Fed. Rep. 603; Colebrook on Col. Sec. 252. In Massachusetts legislation was passed to correct the departure of the cases from principle. Newell v. Williston (1885), 132 Mass. 240.

"*Lulled into Security.*"—It is frequently said that a misrepresentation must have been "acted upon" in order that it may produce estoppel. That is not quite accurate; for, if the misrepresentation arrested action, it would have the same effect. A change of position—relative position—is the requisite.

"It is not necessary that a party should act affirmatively upon a declaration to claim an estoppel. If he has not acted in reliance upon it, but has means in his power to retrieve his position, and, relying upon the statement and in consequence of it, he refrains from using these means, his claim will be upheld."<sup>1</sup>

There are many cases of estoppel in which a person has been "lulled into security" and has "rested satisfied"—cases in which he has not parted with money or property on the faith of the representation, but in which he has lost some chance of recovering it. A careful examination of one of these<sup>2</sup> will enable us to pass the others more hurriedly. Some solicitors had a client (No. 1) possessed of a mortgage; they agreed for the sale of it to another client (No. 2) and received the purchase-money from him; they then procured No. 1 to execute an assignment of the mortgage to No. 2 by fraudulently misrepresenting its nature; the assignment was afterwards handed to No. 2. Both clients now thought that they owned the mortgage, and they remained for five years afterwards of that opinion, the mortgagor paying interest to one of them and the solicitors to the other.

Then the question arose, Who is to lose? No. 1 took the ground that although he might be bound by the assignment, yet that No. 2 had not paid the purchase-money; he (No. 1) had not received it, and the solicitors had no authority from him to do so. No. 2 had to admit that that position was valid; but he contended that No. 1 was estopped from asserting that the money had not gone to him, because, in the assignment of the mortgage, he had acknowledged the receipt of it. No. 1 replied that that also was true, but that No. 2 had not changed his position upon the faith of that misrepresentation, for he had paid over his money to the solicitor before the assignment

<sup>1</sup>Continental Bank v. National Bank (1872), 50 N. Y. 575. And see London v. Suffield (1897), 2 Ch. 608; 66 L. J. Ch. 790; Tobin v. Allen (1874), 53 Miss. 563; Bank of U. S. v. Bank of Georgia (1825), 10 Wheat. 333; Farmers v. Orr (1899, Ind.), 55 N. E. R. 35.

<sup>2</sup>Gordon v. James (1885), 30 Ch. D. 249. See also Herchmer v. Elliott (1887), 14 Ont. 714; Re Swinbanks (1879), 11 Ch. D. 525; 46 L. J. Bk. 120; Re Bellamy (1888), 24 Ch. D. 387; 53 L. J. Ch. 870; Re Hetling & Merton (1899), 3 Ch. 275; 63 L. J. Ch. 783.

was executed. Once more No. 2 had to admit the fact alleged, but he urged that after he parted with his money he received the deed; that it then appeared to him that the money had reached No. 1, and that he (No. 2) was, by such appearance, lulled into inactivity. The question then was narrowed to this: Had No. 2 acted upon the misrepresentation contained in the assignment? If he had, No. 1 would be estopped. The judges said as follows:

Cotton, L. J.:

"By putting that deed into the hands of their agent (the solicitors) they (No. 1) enabled him to represent to James (No. 2) that that money . . . was really paid to them on the transfer of this security."

Lindley, L. J.:

"The plaintiffs, by their carelessness you may say, but I should rather say by their act, enabled Dodge (the solicitor) to deceive James (No. 2) and lull him into security, and prevent him having recourse to those who got his money from him by a trick."

Fry, L. J.:

"I think the result of that would naturally be that James (No. 2) would not make that inquiry and search after the money which he would have made if he had found that after paying it to Dodge & Phipps (the solicitors) it had not been invested. I think, therefore, that the defendant James (No. 2) has an equity which he may rightly set up in this case against the equal equity of the plaintiffs as unpaid vendors."

This reasoning is worth examination. It was admitted in the case that if No. 2 had paid his purchase-money to the solicitors at the time that he received the assignment he would have had no case. He would have had none, because he would have known that the misrepresentation contained in the assignment could not be true, and he could not, therefore, have acted upon it; he would have known that although the assignment represented that the money had been paid, it had not in fact been paid, for he had not then paid it; he would not have been misled, and so there could have been no estoppel. The only question in such case would have been whether the solicitors had authority to receive the purchase-money; and by hypothesis they had not. In such case, therefore, the purchase-money not having been paid and No. 1 not being estopped from denying that it had, his right to payment would have been indisputable.

Putting the case more shortly: A purchaser receives through the vendor's solicitor a conveyance containing an acknowledgment of receipt of the purchase-money, and simultaneously or subsequently pays the purchase-money to the solicitor; the solic-

itor had no authority to receive the money and the vendor is entitled afterwards to enforce payment. On the other hand, a purchaser pays his purchase-money to the solicitor and *afterwards* receives a conveyance containing an acknowledgment of payment, and the vendor is not entitled to enforce payment.

What is the distinction? It is this: In the former case the purchaser was not misled.<sup>1</sup> In the latter he was. In both cases the deed represented that the vendor had received the purchase-money at the time of its execution. So far they are alike. But in the former case the purchaser was not deceived, for he knew the fact to be otherwise; whereas in the latter, having previously paid his money, he believed, when he received the deed, that the representation which it contained (that the vendor had received the money) was true. He was misled; he acted upon the misrepresentation to his disadvantage (by remaining quiescent), and the vendor was estopped.

Note the character of the disadvantage which the purchaser in the case just dealt with sustained. He did not lose property or money, but he lost an opportunity to recover his money — he abstained from making “that inquiry and search after the money which he would have made” — that was enough.

Note, secondly, that the action of the man estopped was, in the two supposed cases, precisely similar; and yet in the one he is estopped and in the other he is not. In both cases he executed the assignment without receiving the money; in both the assignment, contrary to the fact, represented that he had received the money; in both he acted honestly; in both there is long delay; in both, therefore, there is the same degree of carelessness; and in both the same innocence of intentional misrepresentation. The difference in the cases lies in this: that misrepresentation does not necessarily result in estoppel; that it so results *only* when it is the cause of misleading another person to his disadvantage; and where that has happened the question of fraud or bad faith is immaterial.

*Not Advising of Forgery.*—The cases will now be easily understood which determine that if a man's name be forged, and after himself becoming aware of the fact he refrain from advising the holder of the document, and by reason of such in-

<sup>1</sup> He may have miscalculated as to point here. He ought to have made the solicitor's authority to receive inquiries. There is no ground of estoppel in that connection.

action the holder's position is changed (by the death, escape or bankruptcy of the forger, or otherwise), there will be estoppel of the man whose name was forged.

"It would be a most unreasonable thing to permit a man, who knew the bank was relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if, when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information."<sup>1</sup>

*Not Objecting to Accounts.*— Suppose that a man whose forged checks have been paid by his banker had no actual notice of the forgeries, but that had he examined his bank pass-book he would have found them charged against him; is he estopped by reason of his inactivity? It has been said that

"a depositor owes no duty to a bank to examine his pass-book or canceled checks with a view to the detection of forgeries."<sup>2</sup>

And even if the depositor should execute from time to time, at the instance of the bank, the usual certificate that the balance shown by the pass-book is correct, it may well be said that such transaction is nothing but an account stated, which may be rectified if it be erroneous.

Custom, however, must be reckoned with here as elsewhere. As early as 1815 it was reported by the master in chancery<sup>3</sup> that

"for the purpose of having the pass-books made up by the bankers from their own books of account, the customer returns it to them from time to

<sup>1</sup> *McKenzie v. British Linen Co. Bank of N. B.* (1894), 23 S. C. Can. (1881), 6 App. Cas. 82; *Cairnross v. 287; Forsyth v. Day* (1858), 46 Me. Lorimer. (1860), 3 Macq. 830; *London 196; Wiechers v. Central Trust Co.* (1894), 80 Hun, 576; 30 N. Y. Supp. *v. Suffield* (1897), 2 Ch. 608; 66 L. J. 595. *Distinguish Mangles v. Dixon* (1852), 3 H. L. C. 702.

<sup>2</sup> *Wachsman v. Columbia Bank* (1893), 56 N. Y. 601; 26 N. Y. Supp. 885; 28-*id.* 711. And see *Devaynes v. Noble* (1815), 1 Mer. 530; *Manitoba v. Bank* (1889), 17 S. C. Can. 692; *Agricultural v. Federal* (1881), 6 Ont. App. 192; *Merchants v. Lucas* (1887), 13 Ont. 520; 15 Ont. App. 573; 18 S. C. Can. 705; *People v. Bank* (1879), 75 N. Y. 548; *Viele v. Judson* (1860), 82 N. Y. 32; *Leather v. Morgan* (1886), 117 U. S. 96; 6 S. C. R. 637; *Janin v. London* (1891), 92 Cal. 14; 27 Pac. R. 1100.

<sup>3</sup> *Devaynes v. Noble* (1815), 1 Mer.

*287; Forsyth v. Day* (1858), 46 Me. 196; *Wiechers v. Central Trust Co.* (1894), 80 Hun, 576; 30 N. Y. Supp. 595. *Distinguish Mangles v. Dixon* (1852), 3 H. L. C. 702.

<sup>2</sup> *Wachsman v. Columbia Bank* (1893), 56 N. Y. 601; 26 N. Y. Supp. 885; 28-*id.* 711. And see *Devaynes v. Noble* (1815), 1 Mer. 530; *Manitoba v. Bank* (1889), 17 S. C. Can. 692; *Agricultural v. Federal* (1881), 6 Ont. App. 192; *Merchants v. Lucas* (1887), 13 Ont. 520; 15 Ont. App. 573; 18 S. C. Can. 705; *People v. Bank* (1879), 75 N. Y. 548; *Viele v. Judson* (1860), 82 N. Y. 32; *Leather v. Morgan* (1886), 117 U. S. 96; 6 S. C. R. 637; *Janin v. London* (1891), 92 Cal. 14; 27 Pac. R. 1100.

<sup>3</sup> *Devaynes v. Noble* (1815), 1 Mer.



time as he thinks fit; and the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it, and, if there appear any error or omission, brings or sends it back to be rectified; or if not, his silence is regarded as an admission that the entries are correct."

This being the custom, there may well be argued from it as follows:

"Without impugning the general rule that an account rendered which has become an account is open to correction for mistake or fraud, . . . other principles come into operation where a party to a stated account who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself, or to have it made in good faith by another for him; by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection, which he could and would have taken had notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness."<sup>1</sup>

*Means of Knowledge.*—It is sometimes said that change of position will not work an estoppel if the estoppel-asserter could reasonably have ascertained the falsity of the misrepresentation made to him. On the other hand, it is broadly laid down that a misrepresentation, acted upon by the estoppel-asserter, "is not the less a ground for relief because he had the means of knowledge."<sup>2</sup>

"My lords, I cannot myself think that, where an unequivocal statement is made by one party to another of a particular fact, the party who made that statement can get rid of the estoppel which arises from another man acting upon it, by saying that if the person to whom he made the statement had reflected and thought all about it he would have come to see that it could not be true."<sup>3</sup>

"The very representation relied on may have caused the party to desist from inquiry and neglect his means of information, and it does not rest with him who made them to say that their falsity might have been ascertained, and it was wrong to credit them."<sup>4</sup>

536. In *Leather, etc. Bank v. Morgan* (1886), 117 U. S. 96; 6 S. C. R. 657, it was said that "This report is quite as applicable to the existing usages of this country as it was to the usages of business in London at the time it was made."

<sup>1</sup> *Leather, etc. Bank v. Morgan* (1886), 117 U. S. 107; 6 S. C. R. 657. And see *Weinstein v. National Bank* (1877), 69 Tex. 39; *Hardy v. Chesapeake* (1879), 51 Md. 562; *Dane v. Bank of the Republic* (1881), 132 Mass. 156; *Frank v. Chemical, etc. Bank* (1881), 84 N. Y. 209; *First National Bank v. Allen* (1898), 100 Ala. 476; 14 S. R. 335; *Clark v. National Bank* (1898), 52 N. Y. Supp. 1004.

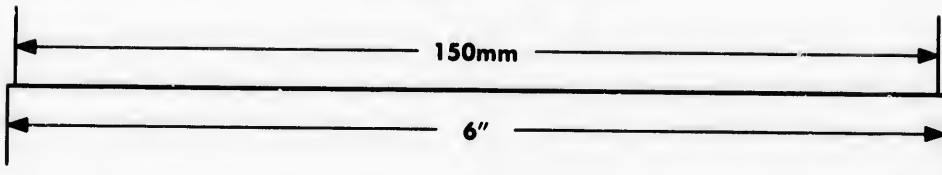
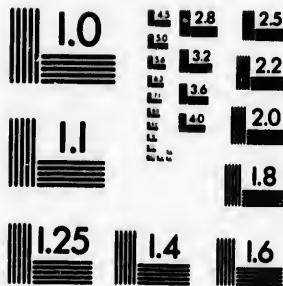
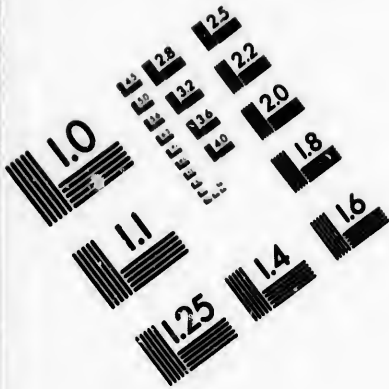
<sup>2</sup> *Willmott v. Barber* (1880), 15 Ch. D. 106; 49 L. J. Ch. 792. And see *Dyer v. Hargrave* (1805), 10 Ves. 505; *Dobell v. Stevens* (1825), 3 B. & C. 623; *Directors of Central Ry. Co. v. Kisch* (1867), L. R. 2 H. L. 120; 36 L. J. Ch. 849; *Redgrave v. Hurd* (1881), 20 Ch. D. 1; 51 L. J. Ch. 113; *Smith v. Chadwick* (1882), 20 Ch. D. 27; 9 App. Cas. 187; 51 L. J. Ch. 597. But see *McLean v. Clark* (1891), 21 Ont. 633; 20 Ont. App. 660.

<sup>3</sup> Per Lord Herschell in *Bloomenthal v. Ford* (1897), A. C. 158; 66 L. J. Ch. 253; *David v. Park* (1870), 103 Mass. 501; *Strand v. Griffith* (1899), 97 Fed. R. 854.

<sup>4</sup> *Graham v. Thomp* 392, 55.



# IMAGE EVALUATION TEST TARGET (MT-3)



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Observe, however, that these quotations refer to cases of active misrepresentation only — you must not turn a man away from his means of information. As to cases of passivity, Mr. Bigelow says:

"It is settled law that standing-by in silence will not bar a man from asserting a title of record in the public registry, or other like office, so long as no act is done to mislead the other party; there is no duty to speak in such case."<sup>1</sup>

But probably it would be more correct to limit the statement to cases in which there was no "reasonable ground for anticipating some change of position," without reference to the record.<sup>2</sup> For example, if the owner was not only aware that no search of the records had been made or was intended, but, on the contrary, stood by while the transaction was actually completed and the money paid over, without any search, he ought to be estopped.

"When I saw the mistake into which he had fallen, it was my duty to be active."<sup>3</sup>

And there seems to be no good reason for distinguishing, in this respect, between information in a registry office and information anywhere else<sup>4</sup> when the "silence is treacherously expressive."<sup>5</sup>

Registration does not interfere with the operation of that statutory estoppel founded upon the doctrine of reputed ownership in bankruptcy cases.<sup>6</sup> The fact, too, that a partnership has been registered is no answer to a creditor who has sold his goods upon the faith of a representation as to its constitution.<sup>7</sup>

Ark. 299; 18 S. W. R. 53. The court referred to *Gammill v. Johnson*, 47 Ark. 335; *Bigelow* on Est. 627; *Dodge v. Pope*, 93 Ind. 480; *David v. Park*, 103 Mass. 501; *Holland v. Anderson*, 39 Mo. 55; *Evans v. Farstall*, 58 Miss. 80; *Kiefer v. Rogars*, 19 Minn. 32.

<sup>1</sup> On Estoppel (5th ed.), 594.

<sup>2</sup> *Kingman v. Graham* (1831), 51 Wis. 232; 8 N. W. R. 181; *Markham v. O'Connor* (1874), 52 Ga. 183.

<sup>3</sup> *Ramsden v. Dyson* (1836), L. R. 1 H. L. 141. And see cases cited with this one, *ante*, p. 89.

<sup>4</sup> The cases to which Mr. Bigelow refers are admittedly contradictory. The suggestion in the text will help to reconcile those of them which are

not referable to other principles. See also *Knouff v. Thompson* (1851), 16 Pa. St. 357; *Fisher v. Mossman* (1860), 11 Ohio St. 42; *Graham v. Thompson* (1892), 55 Ark. 296; 18 S. W. R. 53; *Wynne v. Mason* (1895), 72 Miss. 424; 18 S. R. 422; *Two Rivers Co. v. Day* (1899), 103 Wis. 323; 78 N. W. R. 440.

<sup>5</sup> Per *Thompson, J.*, in *Niven v. Belknap* (1807), 2 Johns. 589 (N. Y.). And see *Guffey v. O'Reilly* (1835), 68 Mo. 418, 425.

<sup>6</sup> *Stansfeld v. Cubitt* (1858), 2 De G. & J. 222; 27 L. J. Ch. 266; *Ex parte Harding* (1873), L. R. 15 Eq. 223; 42 L. J. Eq. 39.

<sup>7</sup> *McLean v. Clark* (1891), 21 Ont.

Probably each case must rest upon its own circumstances. The fact that my claim is upon public record may be some ground for assuming that it is known, and therefore for believing that it is unnecessary that I should say anything about it. But there will often be circumstances which will rebut that assumption and require activity at my hands.<sup>1</sup>

*What is a Change of Position?*—Let us now note two cases as to the character of the change of position necessary to estoppel—not recommending, however, implicit confidence in them.

*Change of Style of Living.*—The paymaster of a military corps erroneously gave credit to an officer for moneys which had not been received on his account; and not only did not advise him that the moneys had not been received, but did not notify him that that part of his allowance had been expressly stopped. It was held that the paymaster was estopped from denying his receipt of the money, although the only change of position was that probably the officer had accommodated his living to his supposed income.

"It therefore works a great prejudice to any man, if, after having had credit given him in question for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back."<sup>2</sup>

*Change by Bringing an Action.*—A man who had been bitten by a dog asked a woman who owned it and she said it belonged to her. He accordingly sued her. *Held*, that she was estopped from denying ownership, if she knew that the inquiry was made for the purpose of finding out who was liable for the injury.<sup>3</sup>

683; 20 Ont. App. 660. Legislation may, of course, otherwise declare. *Caldwell v. Accident, etc.* (1894), 24 S. C. Can. 203. See also *Bissell's Ex'rs v. Warde* (1895), 129 Mo. 439, 31 S. W. R. 923; *Weeks v. Palmer Bank* (1895), 44 Neb. 684; 62 N. W. R. 874; *Armstrong v. Potter* (1894), 103 Mich. 409; 61 N. W. R. 657.

<sup>1</sup>See the subject discussed in ch. VIII.

<sup>2</sup>*Skyring v. Greenwood* (1825), 4 B. & C. 222. And see *Shaw v. Fiction* (1825), *id.* 715; 4 L. J. Q. B. 29; *Daniel v. Sinclair* (1861), 6 App. Cas. 190; 50 L. J. P. C. 50; *Cave v. Mills* (1862), 7 H. & N. 913; 31 L. J. Ex. 265; *Van Hasselt v. Sack* (1859), 18 Moo. P. C. 185. But see *Hume v. Bolland* (1832), 1 C. & M. 180, and *Reg. v. Blenkinsop* (1802), 1 Q. B. 43; 61 L. J. Q. B. 311, in which it is said that the case had gone to the full extent of the law.

<sup>3</sup>*Robb v. Sheppard* (1883), 50 Mich. 189. The misrepresentation might well have affected the question of the disposition of the costs of the action.

*A Possible Change of Position.*—It is clearly not sufficient that there *might* have been a change of position, if in reality there was none. For example, if a company upon the faith of a forged document transfers some shares, and the true owner, although aware of the transaction, does not advertise the company until after the declaration of dividends which *might* have been, but were not, paid to the transferee, there will be no estoppel.<sup>1</sup>

## II. ON THE FAITH, ETC.

Change of position will not estop unless it can be attributed to faith in the misrepresentation complained of. It is clear, therefore, that there will be no estoppel if, notwithstanding the existence of misrepresentation, the estoppel-asserter had knowledge of the truth;<sup>2</sup> or if the misrepresentation were withdrawn before it was acted on;<sup>3</sup> or if it were not believed, but on the contrary investigated and tested.<sup>4</sup> And the fact that one person changed his position upon the faith of the representation will not enable another to set up estoppel.<sup>5</sup>

Observe this case closely: Safe-makers transferred possession of a safe to a bargainee under a contract of hire and sale, and, at his request, painted his name upon it. The bargainee afterwards sold the safe to a purchaser who relied upon the painted name as evidence of title. He was nevertheless defeated because he could not show that he was aware that it had been painted there *by the safe-makers*:

"The painting of the name on the safe was a perfectly innocent act in itself, and obtained significance only from the circumstances of its being done by the plaintiffs; if not known to the defendant it was no representation, which is the gist of the defense."<sup>6</sup>

<sup>1</sup> *Davis v. Bank of England* (1824), 2 Bing. 393; 5 B. & C. 185. See also *Cook* (1897), 169 Ill. 184; 48 N. E. R. Barton v. London, etc. Co. (1889), 24 Q. B. D. 77; 59 L. J. Q. B. 33.

<sup>2</sup> *Proctor v. Bennis* (1887), 36 Ch. D. 740; 57 L. J. Ch. 11; *Cooke v. Eshelby* (1887), 12 App. Cas. 271; 56 L. J. Q. B. 505; *Re African Gold Co.* (1899), 1 Ch. 414; 68 L. J. Ch. 215; *Cooper v. Great Falls* (1895), 94 Tenn. 588; 30 S. W. R. 353. As to means of knowledge see *supra*.

<sup>3</sup> *Freeman v. Cooke* (1848), 2 Ex. 654; 18 L. J. Ex. 114; *Sanitary v. Cook* (1897), 169 Ill. 184; 48 N. E. R. 461.

<sup>4</sup> *Small v. Attwood* (1832), 1 Younge, 407; 6 Cl. & F. 232; *Royal Ins. Co. v. Byers* (1835), 9 Ont. 120. But there is no obligation to investigate, *supra*.

<sup>5</sup> *Heane v. Rogers* (1829), 9 B. & C. 577; 7 L. J. K. B. 285.

<sup>6</sup> *Walker v. Hyman* (1877), 1 Ont. App. 345.

'He had not acted upon the misrepresentation of the manufacturers, for he did not know that they had made it.

In another class of cases the rule receives confirmation. I buy goods from a man who sometimes sells for himself and sometimes as agent for others. Upon the occasion in question I make no inquiry as to ownership or agency. It turns out that my vendor was an agent merely; and when the true owner sues for the price the question arises whether I can set off a debt due to me by my vendor, the agent. I plead that the plaintiff allowed the agent to appear to be the owner, and that he (the plaintiff) is therefore estopped from asserting otherwise. But the sufficient reply is that I did not act upon the faith of any representation of ownership—no one said that the agent was the owner, and the facts did not imply it.<sup>1</sup>

A common sort of case is that in which a company issues (usually by mistake) a false certificate of shares. Upon the faith of the certificate an innocent transferee purchases the shares. The company is estopped from denying the truthfulness of its certificate.<sup>2</sup> The point will be appreciated by observing a case in which a share transfer to a *bona fide* purchaser is forged; the purchaser registers the transfer, obtains a certificate of ownership, and afterwards with the help of the certificate resells the shares. Here the company is not estopped as to the first purchaser, for he did not act upon the certificate; in fact it was he who by means of a forged transfer procured the company to issue the certificate; but the company is estopped as against the second purchaser, for he changed his position upon the faith of the certificate.<sup>3</sup>

"It will thus be seen that in all cases where such a question arose the liability of the corporation was not made dependent on the fact whether the person in whose favor the registry of the shares was changed was a transferee or a subtransferee, but on the question whether he parted with value on the faith of the new registry, under circumstances which gave rise to an estoppel on the part of the corporation."<sup>4</sup>

*Seeming Exceptions.*—Some cases, in which not an individual but a class of persons claims the estoppel, seem to depart from the rule. For example, where one person took shares

<sup>1</sup> *Cooke v. Eshelby* (1887), 13 App. Cas. 271; 56 L. J. Q. B. 505. And see the matter discussed in ch. XXVI.

<sup>2</sup> *Re Bahia* (1868), L. R. 3 Q. B. 584; 37 L. J. Ch. 176. And see cases cited with this one in ch. XXII.

<sup>3</sup> See *Thompson on Corporations*, §§ 2555-2567; *Telegraph Co. v. Daventport* (1878), 97 U. S. 369.

<sup>4</sup> *Trimble v. Bank* (1897), 71 Mo. App. 480; approved in *Humbleton v. Central* (1876), 44 Md. 551.



in a company in order to induce others to subscribe, upon a secret agreement that he was to pay for the shares by commissions to be allowed him, he was estopped in winding-up proceedings from setting up his contract as against other shareholders, although it did not appear that any shareholder had changed his position upon the faith of the action.<sup>1</sup>

And so where a judgment creditor conveyed some property to his debtor by a deed which appeared to release the debt, he was estopped as against subsequent judgment creditors from asserting otherwise, although it did not appear that the deed had affected their action.<sup>2</sup> It was said that

"it is not an unreasonable presumption that the judgment creditors acted on it."

The "reputed ownership" clauses of the "Bankruptcy Act, 1883" (Imp.) form another instance of the same kind.<sup>3</sup> Section 111 of that statute declares that

"all goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof,"

shall form part of the estate. The goods may have come into the possession of the bankrupt after every debt had been incurred, and it may therefore be impossible to say that any creditor had been misled or had acted upon the appearance of ownership; but that consideration is immaterial.<sup>4</sup>

Departure in these cases from the rule under consideration can be justified, if at all, only because of the necessity of placing a number of persons in a class, and of examining the relation of that class to the estoppel-denier. Were the relation of each individual creditor to the true owner of goods (in reputed possession cases) to be investigated, very possibly it would be found that some had acted upon the appearance of ownership in the debtor and some had not. Those who had acted upon it would alone be entitled to set up estoppel; and they would

<sup>1</sup> *Re General Provident* (1869), L. R. 9 Eq. 74; 38 L. J. Ch. 583.

<sup>2</sup> *Water's Appeal* (1860), 35 Pa. St. 527.

<sup>3</sup> See the subject discussed in chapter XXI.

<sup>4</sup> Upon the other hand the true owner may, so far as the statute is concerned, subtract his goods from

the estate (although credit may have been obtained upon the faith of them) after an act of bankruptcy has been committed, provided he does so before the date of the receiving order. *Young v. Hope* (1848), 2 Ex. 105; *Graham v. Furber* (1858), 14 C. B. 184; 25 L. J. C. P. 10; *Ex parte Montagu* (1876), 1 Ch. D. 554.

alone, then, obtain the benefit to be derived from a sale of the goods. But that superiority over other creditors they never expected to get. They thought that the goods were the debtor's; and in case of bankruptcy would be shared in by all creditors alike. If then the goods are to be taken away from the true owner because he is estopped as against some creditors, fairness seems to require that they should be shared in by all the creditors; and this may be no detriment to the true owner — the only other person interested.

There are many cases in which a creditor having actually been deceived by the appearance of ownership, estoppel as against the true owner has been declared. To them there can be no objection; but there are some in which the presence of that factor has not been thought to be essential and the statute makes no such requirement.

The law upon the subject is in much confusion owing principally to the cross-currents of legislation and estoppel. Safe ground for commencement may be found (as so often happens) in an early decision.<sup>1</sup> A bankrupt bought his estate from his assignees, but did not get his discharge; he continued to trade for four years when he again failed; *held*, that the creditors under the second bankruptcy were to be preferred to those under the first. Lord Camden said

"they knew that the bankrupt continued to trade and that the effects were delivered over to him and that he was trading with a multitude of persons, and in order to do that it was necessary he should take as well as give credit. . . . It falls within the principle that if a man having a lien stands by and lets another make a new security he shall be postponed." In other words, the first creditors were estopped to set up their title to goods which they might have seized (being covered by the first assignment) as against subsequent creditors who had dealt with the debtor upon the faith of his ownership of the goods; the subsequent creditors had changed their position upon the faith of that appearance; and those who might have prevented the misleading appearance were estopped.

For estoppel of this kind it is sometimes said that it is necessary that the first creditors should know that the debtor was deceiving other persons.<sup>2</sup> But that holding is not in harmony

<sup>1</sup> *Troughton v. Gitley* (1766), *Amb.* 45 L. J. Bk. 96; *Re Clark* (1894), 2 Q. B. 409; 63 L. J. Ch. 806; *Slaney v. City* (1894), 63 Fed. R. 366. *Davis* (1898), 11 Col. App. 490; 53 Pac. R. 686; *Moore v. Albro* (1880), 129

<sup>2</sup> *Ex parte Ford* (1876), 1 Ch. D. 531;

with the principles of estoppel as applied in other departments of the law.<sup>1</sup> According to these it would be quite sufficient that the debtor should have been permitted to occupy such a position as enabled him to obtain credit upon the faith of his appearance of ownership. It is quite clear that if an owner of property permit some other person to appear to be the owner, he will be estopped from asserting his title as against a purchaser who has changed his position upon the faith of such appearance.<sup>2</sup> And it would be no answer to say that the true owner was not aware that a fraud was being committed.

For example, if the debtor (in the case above under consideration), instead of incurring new debts, had sold the goods, the purchaser would be secure and the old creditors would be estopped. It would not be suggested that the case would be different if they did not know of the sale.<sup>3</sup> They are estopped because of the ostensible ownership — of the opportunity to defraud which they have supplied.

Perhaps the true line is to be drawn, not between cases in which the first creditors knew that fresh debts were being incurred, and those in which they were ignorant of that fact; but that the point for observation is whether or not they were aware that the debtor had acquired property which they might take, and upon the ostensible ownership of which he might obtain credit.

*The Actuating Motive.*—It is frequently a nice question whether the action was or was not taken “on the faith of the misrepresentation.” For questions of fact it is impossible to lay down exhaustive rules; but a few points may advantageously be noted. It was held in *Redgrave v. Hurd*<sup>4</sup> that

“If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it.”

But the later authorities hold that the inference is one of fact, and not of law.<sup>5</sup>

Mass. 13; *Breeze v. Brooks* (1886), 71 B. N. S. 669; 83 L. J. C. P. 168; Cohen  
Cal. 169; 9 Pac. R. 670; 11 id. 885. v. Mitchell (1890), 25 Q. B. D. 262; 59  
But see *Pierce v. Horner* (1895), 143 L. J. Q. B. 409; *Re Clark* (1894), 2 Q.  
Ind. 626; 42 N. E. R. 228; *McAdow v.* B. 409; 63 L. J. Q. B. 806.  
*Hassard* (1897), 58 Kan. 171; 48 Pac. <sup>4</sup>(1881) 20 Ch. D. 21; 51 L. J. Ch.  
E. 846. 118.

<sup>1</sup>*Anie*, p. 90 et seq.

<sup>2</sup>See chs. XXI, XXII.

<sup>3</sup>*Re Morgan v. Knight* (1864), 15 C.

<sup>5</sup>*Smith v. Chadwick* (1884), 9 App.  
Cas. 196; 58 L. J. Ch. 873; *Smith v.*  
*Land & House Corp.* (1884), 28 Ch. D.

In a great many cases it is exceedingly difficult to ascertain whether, had the truth been known, the action of the person deceived would have been altered. In such cases this at least may be said: that the position of the estoppel-asserter was necessarily affected to the extent that he was deprived of his right of consideration. This itself, in a doubtful instance, may be thought to be a sufficient change of position within the rule. In one case Turner, L. J., said:<sup>1</sup>

"Had this representation of what had occurred, and of the change of intention on the part of the defendants, been communicated to the plaintiffs, it is impossible to say what course the plaintiffs would have pursued—whether they would, or would not, have accepted the policy. They might have done so; but it is equally clear they might not; and we cannot say whether they would or would not; but it was to them that the communication should have been made, in order that they might exercise their option upon the subject."

*Onus of Proof.*—An interesting point arises in connection with the *onus* of proof. Suppose a misrepresentation to be followed by a change of position; must the estoppel-asserter prove that it was the misrepresentation which induced the change of position? or must that be assumed until the contrary is shown? Probably much depends upon the facts of each case, but a glance at *Smith v. Kay*<sup>2</sup> may aid in their consideration. An infant of extravagant habits arranged with an intimate friend to borrow £53,000. He gave to this friend several acceptances for various sums, which, unknown to the infant, were discounted by the friend and two associates. As the infant's majority approached, the three persons (still holders of the bills) became anxious; the friend represented to the infant that the bills were in many hands; that they would be presented at his banker's, where there was no money; that it would be advisable to get some one to buy them up, upon a promise of security after majority, and that this somebody should be another of the three. The infant agreed, and was informed of the attempts said to be made to get in the bills. The day after he came of age he gave security for the amount, believing that the bills had in fact been bought up. In his action to set aside the securities it was contended that the misrepresentations were immaterial; and that had the infant known that the bills were always

<sup>1</sup> 16; Hughes v. Twisden (1886), 84 W. R. 500; 55 L. J. Ch. 481. <sup>2</sup> (1856) 21 Beav. 522; 7 H. L. C. 750. And see Bailey v. Seymour (1894), 42 S. C. 322; 20 S. E. R. 63.

<sup>1</sup> Traill v. Baring (1894), 4 De G., J. & S. 380; 83 L. J. Ch. 521.

held, rather than recently bought up, he would have given the security all the same. The Master of the Rolls agreed that "it is highly probable" that the infant would have done so. But it was held in the House of Lords (per Lord Cranworth) that

"the issue is not whether the plaintiff has shown that he would not have executed the securities but for the representation of Smith; but whether Smith has satisfied us, or can satisfy us, that the plaintiff would have executed them without. The *onus probandi* is on Smith in this case."

"But the question is, would he have given the securities if the whole truth had been told to him? I think even this young man, when called upon to execute the bond, would have started if he had known all that was going on. But at the same time it is quite unimportant. It does not lie in the mouth of these persons to say what he would have done if they had not concocted the fraud, and if there had never been any deception at all practiced."

Per Lord Chelmsford:

"How is it possible to say in what manner the disclosure would have operated upon Kay's mind, that he had been the dupe of a scheme of deception, which up to that moment had been successful in inducing him to believe that Adams had befriended him in taking up the bills, and that Smith had kindly co-operated with him."

*Several Reasons for Changing Position.*—Although the estoppel-denier in changing his position may have relied not only upon the misstatement complained of, but also upon some mistake of his own,

"his loss none the less resulted from that misstatement. It is not necessary to show that the misstatement was the sole cause of his acting as he did."<sup>1</sup>

In another place it is said that:

"If, however, the plaintiff mainly and substantially relied upon the fraudulent representation, he will have his action for damages, though he was in part influenced by other causes."<sup>2</sup>

### III. "PREJUDICIALLY."

The change of position, to effectuate estoppel, must have been prejudicial to the estoppel-asserter. If he really benefited by the change or was in no way hurt by it, he has nothing to complain of. This is plain enough, but is not always remembered. For example, it seems to be reasonably clear, as above noted, that a company will not be estopped by an erroneous certificate of shares unless some person has, upon the faith of it, come to some damage. But in the last English case upon the subject<sup>3</sup> the point is overlooked. In it the certificate

<sup>1</sup> Edgington v. Fitzmaurice (1865), 29 Ch. D. 481; 55 L. J. Ch. 650.

<sup>2</sup> McAleer v. Horsey (1871), 35 Md. 453. And see Thomas v. Grise (1896), 41 Atl. R. 893 (Del.).

<sup>3</sup> Parbury's Case (1896), 1 Ch. 100; 65 L. J. Ch. 104. See an opposite conclusion in Hambleton v. Central (1876), 44 Md. 551, and in Wright's Appeal (1882), 90 Pa. St. 425.

issued to a purchaser of the shares after the purchase-money for them had been paid. It may be said that, upon the faith of the certificate, the purchaser accepted the shares; but there was nothing to show that that was "a change for the worse." That he was "lulled into security," and so lost some chance of recovery of his money from the fraudulent grantor, was not argued.

*Damage, Real or Assumed.*— Difference of opinion exists as to the necessity for proof of actual damage in cases of estoppel by "lulling to rest." It would, in many cases, be absolutely impossible to prove that, had the estoppel-asserter been active, he would eventually have been any better off than if he had done nothing, although the result might have actually been so. The question is, again, one of speculation rather than of fact. A bank-depositor's name is forged to a check; the bank pays the money; the depositor becomes aware of the forgery, but allows some time to elapse before notifying the bank; and meanwhile, it is said, a chance of some civil remedy or an opportunity to arrest the forger is lost. Is the depositor estopped?

In one case<sup>1</sup> it was said:

"If the plaintiff had been met by a refusal on the part of the defendant, he could have gone to Marals (his vendor) and have demanded back his money; very likely he might not have derived much benefit if he had done so; but he had a right to do it."

On the other hand it has been held that it is not sufficient evidence of damage to prove that the forger was within the jurisdiction, and had exigible property there, at the time when notice should have been given to the bank, without proof of "how long the payee and the property remained within reach."<sup>2</sup> Probably the true view lies between these two extremes. As to the former case, Brett, L. J., would say:<sup>3</sup>

"Possibly they have been put to rest, but it seems to me that is not sufficient: it must be clearly shown not only that they have been put to rest, but also that they have been damaged by being put to rest."

The mere postponement of the civil remedy by delay in disclosure does not necessarily and of itself constitute a change

<sup>1</sup>Knights v. Wiffen (1870), L. R. 5 Q. B. 665; 40 L. R. Q. B. 51. And see Merchants' Bank v. Lucas (1887), 13 Ont. 528.

<sup>2</sup>Indiana, etc. v. First Nat. Bank (1894), 9 Ind. App. 185; 36 N. E. R. 382.

<sup>3</sup>Simm v. Anglo-American Co. (1879), 5 Q. B. D. 211; 49 L. J. Q. B. 400. And see Ex parte Adamson (1878), 8 Ch. D. 817; 47 L. J. Bk. 103.

of position.<sup>1</sup> The contrary indeed was held in a court of first instance,<sup>2</sup> where the chief justice said:

"They might have sued for money had and received before the maturity of the note, and this earlier right of action might have been greatly to their benefit. The defendants who, by their conduct, deprived the plaintiffs of the opportunity of resorting to that remedy, are not to be permitted to require the plaintiffs to prove that resort to that remedy would have been productive of gain or advantage to them."

And in the court of appeal the chief justice, in a dissenting judgment, approved this language;<sup>3</sup> but by the majority of the judges it was thought to be

"a suggestion too speculative to be the foundation of a legal right."<sup>4</sup>

The case of *London, etc. v. Bank of Liverpool*<sup>5</sup> is not quite consistent with the broadest statement of the law. There a bill was paid although the indorsements were forgeries, and the action, which was for repayment, failed, Mathew, J., saying:

"It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover, on the same day, that the bill is a forgery, and so inform the holder of it, so that the holder would have time to give notice of dishonor to the other parties to the bill; but even in such a case it is manifest that the position of a man in business may be most seriously compromised even by the delay of a day."

A distinction, no doubt, must be made in cases relating to "negotiable" instruments upon the ground that the lapse of a day may mean the expiry of the period within which to give notice of dishonor;<sup>6</sup> but is there distinction upon any other ground? Must there not always be damage in order that there may be estoppel?<sup>7</sup>

Although in many jurisdictions it is illegal to compound a criminal charge, yet it must be admitted that, aside from that point,

"the arrest and detention of a swindler are powerful means in coercing restoration of property he has unlawfully obtained, and the loss of these

<sup>1</sup> Merchants' Bank v. Lucas (1881), 3 B. & C. 428; Mather v. Maidstone 13 Ont. 520; 15 Ont. App. 578; 18 S. C. Can. 704.

<sup>2</sup> 18 Ont. 532.

<sup>3</sup> 15 Ont. App. 576.

<sup>4</sup> Id. 537.

<sup>5</sup> (1896) 1 Q. B. 11; 65 L. J. Q. B. 84. See also Smith v. Mercer (1815), 1 Taunt. 76; Cocks v. Masterman (1829), 9 B. & C. 905; Clark v. Eckroyd (1886), 13 Ont. App. 429; Bank of United States v. Bank of Georgia (1825), 23 U. S. 333.

<sup>6</sup> See Wilkinson v. Johnson (1824), 3 B. & C. 428; Mather v. Maidstone (1856), 18 C. B. 273; 25 L. J. C. P. 810; London v. Bank of Liverpool (1896), 1 Q. B. 7; 65 L. J. Q. B. 80; Ryan v. Bank of Montreal (1887), 14 Ont. App. 580; Irving v. Wetherald (1861), 34 Barb. 323; (1867) 36 N. Y. 335; Merchants' Bank v. National Bank (1869), 101 Mass. 281.

<sup>7</sup> Salem v. Gloucester (1820), 17 Mass. 1; Corser v. Paul (1860), 41 N. H. 24; Bank v. Wentzel (1892), 151 Pa. St. 142; 24 Atl. R. 1087; Kuriger v. Joest (1899), 52 N. E. R. 764 (Ind.).

means in consequence of a reliance upon the declarations of another estoppel that other from denying the truth of the declarations."<sup>1</sup>

And so it is thought that the escape of the swindler is a sufficient change of position.<sup>2</sup> But the following is worthy of consideration:

"In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant or those from whom it received the bill could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects."<sup>3</sup>

In general it may be said that there must have been some change of position; and perhaps it can be said that that requisite will be satisfied if the estoppel-asserter has "lost a fair chance to retrieve his position."<sup>4</sup>

#### IV. PURCHASER FOR VALUE WITHOUT NOTICE, AND FALSÂVERT.

The phrase "purchaser for value without notice" has been used in two connections. In one of these it may be said to have described an effective legal situation; and in the other, to describe a person merely who may or may not be entitled to succeed in his litigation. We must shortly distinguish these and get rid of the former, in order that we may deal clearly with the latter. Observe then the difference between—

1. The defense of purchaser for value without notice, when pleaded to a bill appealing to the old auxiliary jurisdiction of the court of chancery; and
2. The position of purchase for value without notice, when it arises in a suit in which relief (not discovery merely) is sought.

The now useless subtleties which belonged to the former class of cases have, in most jurisdictions, been sent to limbo by the provisions of judicature and other acts; and it seems to the present writer that the learning as to the latter class ought to be merged in, for it forms part of, the law of estoppel. It may

<sup>1</sup> *Continental Bank v. National Bank* (1872), 50 N. Y. 576; *Bank v. Keene* (1865), 53 Me. 103.

<sup>2</sup> *Third Nat. Bank v. Merchants* (1834), 76 Hun. 475; 27 N. Y. Supp. 1070; *Harlem v. Mercantile* (1895), 31 N. Y. Supp. 790. But see *Van*

*West v. First Nat. Bank* (1891), 6 Ohio C. C. 180; *Grabill v. Bearden* (1895), 62 Mo. App. 459.

<sup>3</sup> *White v. Continental Nat. Bank* (1876), 64 N. Y. 322.

<sup>4</sup> *Ante*, p. 133.



survive for a time because of its association with the legal estate; but that is an unhealthy conjunction, from which longevity, luckily, cannot be expected.<sup>1</sup>

*Auxiliary Jurisdiction.*— A defendant at law often found it necessary, for the proper conduct of his case, to obtain discovery from the plaintiff. As (in the earlier days) the practice at law made no provision for such discovery, the defendant was driven to the court of chancery, where he filed his bill in aid of his defense at law. To such a bill the plea of purchaser for value without notice was, of itself, a sufficient defense. The court held that it would do nothing that might affect the prospects in another forum of a man who was a purchaser for value without notice.<sup>2</sup> The court made no investigation into the merits of the case or the rights of the parties. It was not called upon, and in fact held that it had no jurisdiction, to do so. It found its defendant in a complete legal situation and it merely left him there.

The union of the courts has abolished this auxiliary jurisdiction of the chancery, and has thus ended the necessity for considering purchaser for value without notice from that point of view.

*Concurrent Jurisdiction.*— It will readily be seen that the court of chancery could not maintain the attitude just referred to when it was asked not to assist in the conduct of a suit in another forum, but itself to decide the dispute, and for that purpose to adjudicate upon the rights of the litigants.

For example, two mortgagees are claiming priority over one another. No. 1 brings ejectment at law against No. 2; and No. 2, in aid of his defense, files a bill against No. 1 for discovery. The bill will be dismissed if the defendant in it (No. 1) be a purchaser for value without notice. Nothing is decided

<sup>1</sup> See ch. XVIII.

<sup>2</sup> There was some doubt as to whether the plea was effectual if the plaintiff had the legal estate and the defendant only the equitable. In the fourteenth edition of Sugden's Vendors and Purchasers (vol. II, 584 et seq.) will be found a strong argument in favor of the proposition that equity "regards not the quality of the estate, but the character of the

person," by which is of course meant his merits. See also per Lord Cranworth, in *Colyer v. Finch* (1856), 5 H. L. C. 920; 26 L. J. Ch. 65. If the plaintiff had not the legal title it seems to have been immaterial whether or not the defendant had it. *Bowen v. Evans* (1844), 1 J. & L. 263, 264; *Hunter v. Walters* (1870), L. R. 11 Eq. 314; 41 L. J. Ch. 175.

except that equity will not help No. 2's defense in the ejectment suit. But if No. 2's bill had sought relief, and not merely discovery—had asserted priority and prayed for foreclosure, for example,—the court would have had to pass upon the merits of the case; and it would not have been prevented from so doing by proof that the defendant was a purchaser for value without notice. The fact would not be ignored. It would be taken into account and given its proper effect in considering the right of priority. It did not of itself oust jurisdiction.<sup>1</sup>

In other words, it was not and is not a complete legal situation (as when discovery merely was sought), but half of one only. For example, a second purchaser cannot say to the first: "I purchased without notice of your conveyance, and therefore I am entitled to priority over you"—that is but one-half of a legal situation, and may be called the subjective half as describing the mental attitude of the claimant. To succeed he must also say that his opponent was in some way to blame for his having been misled, which is the other, or objective, half of his position.

A very common case is one in which a first mortgagee has intrusted the title-deeds to the mortgagor; and the mortgagor has fraudulently deposited them with some innocent third person as security for a loan. In such case the depositee's position is, (1) subjectively, I had no notice of your claim; and, (2) objectively, you were to blame for that.

Another class of instances is that in which the owner of property stands by while a third person sells it to an innocent purchaser; and the latter says (1) I had no notice of your title, and (2) the fault was yours.

*Estoppel.*—But we are already clearly within the lines of estoppel. The latter case is always so recognized, and the former is an instance of estoppel by assisted misrepresentation;<sup>2</sup> for

<sup>1</sup> Some of the cases are: Williams ton, L. R. 4 Ch. 144; 38 L. J. Ch. 145; v. Lambe (1791), 8 Bro. C. C. 264; Frazer v. Jones (1849), 17 L. J. Ch. 853; Heath v. Crealock (1878), L. R. 10 Ch. 22; 44 L. J. Ch. 157; Ind v. Collins v. Archer (1830), 1 R. & M. 284; Phillips v. Phillips (1861) 4 De G., F. & J. 208; 34 L. J. Ch. 896; Stackhouse v. Countess of Jersey (1861), 1 J. & H. 721; 30 L. J. Ch. 421; Colyer v. Finch (1854), 19 Beav. 500; 5 H. L. Ch. 505. ton, L. R. 4 Ch. 144; 38 L. J. Ch. 145; Frazer v. Jones (1849), 17 L. J. Ch. 853; Heath v. Crealock (1878), L. R. 10 Ch. 22; 44 L. J. Ch. 157; Ind v. Collins v. Archer (1830), 1 R. & M. 284; Phillips v. Phillips (1861) 4 De G., F. & J. 208; 34 L. J. Ch. 896; Stackhouse v. Countess of Jersey (1861), 1 J. & H. 721; 30 L. J. Ch. 421; Colyer v. Finch (1854), 19 Beav. 500; 5 H. L. Ch. 505.

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

when the mortgagee handed over the deeds to his mortgagor he did that which made credible the representation of the mortgagor (that he, the mortgagor, was the unincumbered owner of the property), and he (the mortgagee) is estopped by the assistance thus rendered to that misrepresentation.

Observe the association of purchaser for value without notice with estoppel: There are two factors necessary to an estoppel by misrepresentation: (1) The estoppel-asserter must (subjectively) be one who has changed his position upon the faith of something, and (2) (objectively) that something must be the misrepresentation or assistance to misrepresentation of another person. And this is but a more comprehensive, and therefore better, way of saying (1) that the estoppel-asserter must (subjectively) be a purchaser for value without notice; and (2) that (objectively) the estoppel-denier must be responsible for the mishap. A word as to each of these two points.

The first is probably clear enough. A "purchaser" in its wider sense includes, of course, a mortgagee, a lessee, and so on. But we must still extend its signification and make it embrace "one who changes his position," even if the change be nothing but a forbearance to act. For, as we have abundantly seen, a man may be estopped if under certain circumstances he has been "lulled into security" — into inactivity — by the estoppel-asserter.<sup>1</sup>

The second point will become obvious when it is noticed that purchaser for value without notice never arises except in cases in which the purchaser says that he has been misled by somebody's misrepresentation. His case always is, "I bought from a man who pretended to be the owner;" "the person with whom I dealt appeared to be entitled to bargain with me," etc. In other words, misrepresentation is always the prime factor in the "purchaser's" position.

And so it is in estoppel.

Note next that the misrepresentation complained of in such cases is not that of the estoppel-denier, but of some third person. For example, in the mortgage case (in which the mortgagee loaned the deeds to the mortgagor, who fraudulently deposited them with a banker) the misrepresentation is that of the mortgagor, and the banker wins because (in the older phraseology)

<sup>1</sup> *Ante*, p. 133.

(1) he was a purchaser for value without notice, and (2) the mortgagee was blamable; or (in the language of estoppel) (1) he had changed his position upon the faith of the misrepresentation of the mortgagor, and (2) the mortgagee had assisted the misrepresentation — had done that which had made it credible.

*Legal Estate.*— Purchaser for value without notice is, according to the present state of the law, one-half of another legal situation. For a second purchaser may say not only (as we have seen) "I bought the property relying upon a misrepresentation of ownership, for which the first purchaser was responsible;" but he may say "I bought it upon a misrepresentation for which the first purchaser was *not* responsible; nevertheless I have got hold of the legal estate; and I am for that reason entitled to priority."

This subject is fully dealt with in another chapter;<sup>1</sup> and all that need be here said is to point out that again "purchaser for value without notice" is but one-half of the legal situation which is alleged;<sup>2</sup> and that pending the disappearance of that situation (as indicated in the chapter referred to), purchaser for value without notice must continue to be a legal factor, and one not to be superseded by the larger phrase, "one who changes his position upon the faith of a misrepresentation."

## SUMMARY.

We now see:

(1) That purchaser for value without notice is not of itself a legal situation, and never was, except when pleaded to the auxiliary jurisdiction of the court of chancery. It is one-half merely of a legal situation.

<sup>1</sup> Ch. XVIII.

<sup>2</sup> It is again the subjective half, requiring for its complement the possession of the legal estate. Or, to put it the other way, "Being purchasers for value without notice, they cannot succeed unless they can make out that, having an inferior equity, they have clothed it with legal estate" (The man is no use without the clothes; nor are the clothes without the man. Each is

one-half of the situation): Per Kay, L. J., in *Powell v. London* (1803), L. R. 2 Ch. 564; 63 L. J. Ch. 795. See also *Phillips v. Phillips* (1861), 4 De G., F. & J. 208; 84 L. J. Ch. 896; *Cave v. Cave* (1850), 15 Ch. D. 639; 49 L. J. Ch. 503; *Harpham v. Chacklock* (1881), 19 Ch. D. 207; *Roots v. Williamson* (1889), 38 Ch. D. 495; 57 L. J. Ch. 295; *Forse v. Sovereign* (1887), 14 Ont. App. 482; *Utterson v. Rennie* (1892), 21 S. C. Can. 218.

(2) It was only effective when conjoined with (a) legal estate, or (b) misrepresentation.

(3) The doctrine of legal estate, owing its existence to the former defective administration of justice in England,<sup>1</sup> must needs wither and die now that the defects are gone. Purchaser for value may be allowed to live meanwhile.

(4) But no longer; for the alliance between the purchaser for value and misrepresentation has been superseded by estoppel; and his identity has been lost in the larger phrase, "one who changes his position prejudicially upon the faith of the misrepresentation"—that is, as suggested in the preface, a falsávert.

<sup>1</sup> See ch. XVIII.

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## CHAPTER XII

### CONDITION NO. 10.

#### *The Estoppel-denier Must Have Reasonable Ground for Anticipating Some Change of Position Upon the Faith of the Representation.*

##### DISTINCTION.

The previous chapters have made familiar the propositions that estoppel may occur (1) because of some personal misrepresentation, or (2) because of some assistance rendered to the misrepresentation of another person; and we have now to inquire as to the character of the relation which must exist between the change of position of the estoppel-asserter on the one hand, and the misrepresentation or the assistance of the estoppel-denier on the other.

Manifestly such relation will have one of two aspects: First, it may be regarded from the standpoint of the estoppel-denier, and for him the rule will be that he must have had reasonable ground for anticipating some change of position upon the faith of the misrepresentation. And secondly, it may be regarded from the standpoint of the estoppel-asserter, for whom the rule will be that the change of position must be reasonably consequent upon the misrepresentation or assistance.

Confining ourselves in this chapter to the first of these aspects, observe that there are two sorts of cases which may arise:

1. Inquiries may be made of the estoppel-denier, but the purpose of them not being known to him he may make a careless and inaccurate reply — he had no reason to anticipate action of any kind. The case is one of personal misrepresentation.
2. The estoppel-denier observes action or preparation for action; but he is unaware that certain facts known to him are unknown to the actor, and he is silent and thus misleading — he had no reason for assuming that the action was because of faith in his passivity. The case belongs to the class of estoppel by passive assistance.

In the first of these cases the estoppel-denier is aware that he has made a misrepresentation, but he has no reason for thinking that it is to be followed by action. In the second he is aware of intended action, and by his silence he has misled the actor, but he has no reason for believing that the action is being taken upon the faith of his silence.

### 1. PERSONAL MISREPRESENTATION.

Suppose that a stranger asks me as to the ownership of a horse that I am riding, and I tell him that it belongs to my brother. Afterwards the stranger, who turns out to be a bailiff, seizes the horse under an execution against my brother, and claims that I am estopped from denying the truth of my assertion. I am not estopped.<sup>1</sup> I had no ground for anticipating any change of position. Had I known that the stranger had a purpose in making his inquiry, my answer might have been different.

"Certainly no one can be estopped by a deceptive answer to a question which he may rightly deem impertinent and propounded by a meddling intruder."<sup>2</sup>

And so it was held<sup>3</sup> that

"a bank which received a letter from another bank asking in regard to the character and financial standing of a certain person, without any intimation as to the making of a loan, is not estopped as against a loan subsequently made by the inquiring bank to claim a chattel-mortgage lien on the man's property."

It will be seen that the inquiring bank's object might as well have been with a view to collecting a debt as of making a loan. The answering bank had no reason for anticipating a change of position.

For a similar reason, if the maker of a note is asked if it is all right and he says it is, he will not necessarily be estopped from denying liability. It may be that the inquirer, after the conversation and upon the faith of, bought the note; but for

<sup>1</sup> *Allum v. Perry* (1878), 68 Me. 232; 44 S. W. R. 10; *Nicols v. Peck* (1893), 70 Conn. 439; 39 Atl. R. 803; *Shields v. McClure* (1898), 75 Mo. App. 631.

<sup>2</sup> *Per Metcalf, J.*, in *Pierce v. Andrews* (1850), 60 Mass. 6. And see *New Brunswick v. Conybeare* (1862), 9 H. L. C. 726; 31 L. J. Ch. 297; *Florida v. Hope* (1898), 18 Tex. Civ. App. 161; <sup>3</sup> *First Nat. Bank v. Marshall* (1895), 108 Mich. 114; 65 N. W. R. 604. Compare *Swift v. Winterbotham* (1878), L. R. 3 Q. B. 244; 42 L. J. Q. B. 110; L. R. 3 Q. B. 301; 43 L. J. Q. B. 56, in which usage had some effect.

all the maker knew the question might have been one of idle curiosity.<sup>1</sup>

This doctrine may easily be carried to excess. For example, the statement that

"merely holding out a person as agent does not estop the alleged principal from denying such person's authority to contract in his behalf, unless the representations were made under such circumstances that the principal should have expected that they would be relied upon in good faith, to the injury of an innocent party."<sup>2</sup>

can be agreed to only if qualified by saying that most usually when one holds out another as his agent he ought to assume that he will be taken seriously, and as intending to produce a real impression which may be acted upon by the person to whom the representation is made. And so where a person who was about to purchase some property wrote to another asking the amount of his claim against it and was told \$50, the court said:<sup>3</sup>

"But the transaction itself was sufficient to advise libelant that the letter was not a 'mere busybody' inquiry. Here was a business firm in a near-by city writing a letter which upon its face is apparently about a business matter. Is the court to assume that business men write, or that business men receive, such inquiring letters as a matter of mere curiosity without a desire to use, or a reasonable expectation that use will be made of the responses as a basis for action in business matters? Libelant, while not required to respond, did respond."

Considerations such as these amply justify the *dictum* of Lord Cranworth (upon which the condition in hand is modeled):

"I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying."<sup>4</sup>

This is but put in another form when Baron Parke said:

"If, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe

<sup>1</sup> Andrews v. Lyons (1865), 11 Allen (Mass.), 349; Ehrler v. Braun (1887), 22 Ill. App. 391; 120 Ill. 503; 13 N. E. R. 996; Smith v. Roach (1894), 59 Mo. App. 115. It would be otherwise if the maker knew that the inquirer contemplated purchasing: Freer v. Hall (1894), 98 Ga. 706; 21 S. E. R. 163; or if he knew that the inquirer was the holder, and the inquirer was "lulled to rest" or inactivity by the answer. See Plumer v. Lord (1864, 91 Mass. 455), in which there had been representations as to the exist-

ence of a partnership before credit given, and with no intent to procure it—no estoppel. See also cases in ch. XI, under sub-title "Lulled into Security."

<sup>2</sup> Clarke v. Dillman (1896), 108 Mich. 625; 66 N. W. R. 570.

<sup>3</sup> Mississippi v. Ottumwa Belle (1897), 78 Fed. R. 643.

<sup>4</sup> Jorden v. Money (1854), 5 H. L. C. 212; 38 L. J. Ch. 863. And see West v. Jones (1851), 1 Sim. N. S. 205; 20 L. J. Ch. 362; Mangles v. Dixon (1852), 3 H. L. C. 702; Manufacturers' Bank



that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."<sup>1</sup>

To the same effect an American case has it, that  
 "if the circumstances are such that a reasonable man under the circumstances would anticipate that it was to be acted upon, that will be sufficient."<sup>2</sup>

*Horn v. Cole*<sup>3</sup> is an important case upon the subject in hand because of the valuable judgment of Perley, C. J., which it contains, whatever one may think of the justness of the conclusion arrived at. The owner of certain goods represented to Cole that they were the property of A.; he did so in order to avoid their attachment by his own creditors, of whom Cole was not one; thereupon Cole sued A. (who happened to be his debtor), and attached the goods; the owner of the goods was not aware that Cole was a creditor of A., and had no intention of misleading Cole — it was his own creditors that he was contriving to deceive. *Held*, that the owner was estopped, for "whatever the motive may be, if one so acts or speaks that the natural consequence of his words or conduct will be to influence," etc.

The case is out of harmony with those already referred to. The deflection is probably due to the too sweeping assumption that all natural consequences are to be debited to any one who makes a misrepresentation, whether the person deceived had or had not reasonable ground for believing that the representation was intended to produce action upon his part. The circumstances of the case (for which see the report) make it perfectly clear that the misrepresentation was made by the owner of the goods, not for the purpose of producing action by A.'s creditors, but in order to insure inaction upon the part of his own; and that Cole, to whom the misrepresentation was made, had no

v. Hazard (1864), 30 N. Y. 226; Wal-  
 lerich v. Smith (1896), 97 Iowa, 308;  
 66 N. W. R. 184; Moore v. Spiegel  
 (1887), 143 Mass. 413; 9 N. E. R. 827.

<sup>1</sup>Freeman v. Cooke (1848), 2 Ex.  
 654; 18 L. J. Ex. 114. To the same  
 effect: Preston v. Mann (1856), 25  
 Conn. 128, 129. And see the third  
 proposition in Carr v. London (1875),  
 L. R. 10 C. P. 316; 44 L. J. C. P. 109.  
 Consult Bigelow on Estoppel (5th ed.),  
 pp. 628, 629, and the cases there  
 cited; and the later cases of Ford v.  
 Fellows (1889), 34 Mo. App. 630; 8 S.

W. R. 791; Westbrooke v. Gurdereau  
 (1893), 3 Tex. Civ. App. 406; 22 S. W.  
 R. 59; Kiersky v. Nichols (1895), 29  
 S. W. R. 71 (Tex.); Daugherty v.  
 Yates (1896), 18 Tex. Civ. App. 646; 35  
 S. W. R. 937; Sessions v. Rice (1886),  
 70 Iowa, 306; 30 N. W. R. 735.

<sup>2</sup>Two Rivers Co. v. Day (1899), 102  
 Wis. 328; 78 N. W. R. 442. And see  
 Kingsman v. Graham (1881), 51 Wis.  
 282; 8 N. W. R. 181; Tracy v. Lincoln  
 (1897), 145 Mass. 357; 14 N. E. R. 122.

<sup>3</sup>(1868) 51 N. H. 297.

reason to suppose that there was any intention that he should act upon it.

*Zuchtman v. Roberts*<sup>1</sup> errs in contrary fashion. A vendor (by hire and sale agreement) gave to the purchaser a receipted bill for the goods, which was exhibited to a sub-purchaser as evidence of ownership; and it was held that the original vendor was not estopped, because there was no design to mislead and no intention that anybody should act upon the faith of the document. The point that "a reasonable man under the circumstances would anticipate that it was to be acted upon" was overlooked.

*Mr. Markby's View.*—There is some curious confusion with reference to this subject in Markby's *Elements of Law*:<sup>2</sup>

"It has been said to be the law in England that wherever A. so conducts himself towards B. that B. may reasonably infer the existence of an intention on the part of A. to do something, the legal result is the same as if that intention existed, whether it really exists or not. And these cases are always put as cases of estoppel; that is, the intention to do this thing is assumed to exist, whether it exists or not. It would be much simpler to attribute the legal result to the act without any reference to the intention of consequences, but no one has ever thought of this, so wedded are we to the view that the legal result of an act must depend on the mental condition of the doer of it as regards these consequences."

The most obvious comments upon this passage are:

1. The view that "the legal result is the same" (namely, estoppel) whether the intention really exists, or from the estoppel-denier's conduct it may reasonably be inferred to exist, cannot fairly be translated into, "that is, the intention to do this thing is assumed to exist whether it exists or not."

2. Nor can such translation be debited to estoppel; which indeed is constantly pointing out its inaccuracy, and insisting that the reason for attributing legal consequences to the conduct in question is precisely not because intention existed, or is assumed to exist, but because the estoppel-denier is estopped from denying that it did exist — having misled another person into the belief of a certain state of facts, he is precluded from denying their existence.<sup>3</sup>

3. The proposed alternative is "to attribute the legal result to the act without any reference to the intention of consequences." But the only "act" which is attended by legal results is the conduct from which "B. may reasonably infer the

<sup>1</sup>(1871) 109 Mass. 53. And see cases cited with this one in ch. XXI.

<sup>2</sup>4th ed., § 293.

<sup>3</sup>See *ante*, ch. I.

existence of an intention (of consequences) on the part of A." The "act" therefore is inseparable from "the intention of consequences," and can only be spoken of with reference to it.

4. Mr. Markby replies to himself (although somewhat defectively), when, after referring to an example, he says:<sup>1</sup>

"Such cases might seem to suggest that the reference of an act to the mental attitude of the doer of it in relation to the consequences is but a pretense after all. This, however, would be an *erroneous conclusion*. If an act produced a legal result merely because a particular person did it, and not at all because of the mental attitude of that person as regards the consequences when he did it, then the existence of circumstances affecting that attitude would have no effect."

*Intention or Negligence.*—It is frequently said that "there must generally be some intended deception . . . or such negligence . . . as to amount to constructive fraud."<sup>2</sup>

But the word "fraud" is here, as very frequently elsewhere,<sup>3</sup> used in wholly artificial fashion, and as a cloak merely to the lack of clearness of perception; for in some of the instances in which it occurs, as well as in many of those already referred to in this chapter, there was not the slightest tinge of bad faith. Those in which real fraud is put forward as the ground of decision are, for the most part, cases of passively assisted misrepresentation, in which, as we have seen, fraud is a necessary ingredient in the misrepresentation, although sometimes upon that account thought to be an essential requisite of estoppel.<sup>4</sup>

## 2. ASSISTED MISREPRESENTATION (PASSIVE).

In this class of cases the estoppel-denier observes action or preparation for action, but he is unaware that certain facts known to him are unknown to the actor, and he is silent and so misleading. In such case there is no estoppel because he had no reason for assuming that the action is being taken upon the faith of his passivity.

This subject has already been sufficiently treated.<sup>5</sup> It is there-

<sup>1</sup> Elements of Law, § 238.

<sup>2</sup> Brant v. Virginia (1876), 93 U. S. 335. And see Evans v. Bioknell (1801), 6 Ves. 190, commented on in Northern Counties v. Whipp (1884), 26 Ch. D. 489; 58 L. J. Ch. 620; Patterson v. Hitchcock (1877), 3 Colo. 533; Hardy v. Chesapeake (1879), 51 Md. 563; Griffith v. Wright (1883), 6 Colo. 248; Greene v. Smith (1884), 57 Vt. 269;

Birch v. Stepler (1888), 11 Colo. 400; Griffith v. Brown (1888), 76 Cal. 260; Montgomery v. Keppel (1888), 75 Cal. 123; Sullivan v. Colby (1896), 18 C. C. A. 193; 71 Fed. R. 460; Am. & Eng. Ency. (2d ed.), vol. 11, p. 432.

<sup>3</sup> See ch. XVIII, sub-title "Nothing but Fraud," and ch. XIX.

<sup>4</sup> See *ante*, ch. VIII.

<sup>5</sup> *Ante*, p. 133.

fore unnecessary here to do more than to remind readers that there is no duty to be active and communicative unless "I perceive his mistake;"<sup>1</sup> and that I cannot be said to "perceive his mistake" unless I have some reasonable ground for assuming that he is ignorant of his situation — that is, unless I "have reasonable ground<sup>1</sup> for anticipating some change of position upon the faith of "my silence."

### 3. ASSISTED MISREPRESENTATION (ACTIVE).

There is a third class of cases, namely, of those in which there is estoppel because of some active assistance rendered to the misrepresentation. In such cases the estoppel-denier is usually quite as innocent as the estoppel-asserter; he has been guilty of no misrepresentation; he was unaware probably that it was being made; and he was ignorant of any action being taken in derogation of his own rights.

For example, a mortgagee permits the mortgagor to have possession of the title-deeds; and the mortgagor, in fraud of the mortgagee, deposits them with a banker as security for a loan. Here the mortgagee knows nothing of either misrepresentation or action upon the faith of it, and yet he is sometimes estopped.

Such cases must be dealt with from the standpoint of the estoppel-asserter, and will thus fall to be treated of in the next succeeding chapter. If we cannot say in such cases that the estoppel-denier must have had reasonable ground for anticipating a change of position upon the faith of the misrepresentation (he in fact not intending any misrepresentation at all), we can nevertheless require for estoppel that the change of position of the estoppel-asserter must have been reasonably consequent upon the assistance which has been rendered by the estoppel-denier.

#### SUMMARY.

Conclusions from the foregoing are as follows:

1. "No one can be estopped by a deceptive answer to a question which he may rightly deem impertinent." He must have had reasonable ground for supposing that the person whom he

<sup>1</sup> *Ante*, p. 89.

was misleading *was going to act upon what he was saying*; that is to say, reasonable ground for anticipating some change of position. This is a rule for personal misrepresentation.

2. In cases of estoppel by passive assistance there is no duty to speak unless "I perceive his mistake;" that is to say, unless I have reasonable ground for anticipating some change of position upon the faith of my silence.

3. The requisite under consideration is not applicable to cases of estoppel by active assistance. A rule for them will be found in the succeeding chapter.

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## CHAPTER XIII.

### CONDITION NO. 11.

#### *The Change of Position Must be Reasonably Consequent Upon the Misrepresentation or the Assistance.*

We have seen that, in order to effect an estoppel, the estoppel-asserter must have changed his position upon the faith of the misrepresentation. We have also seen that in two classes of cases the estoppel-denier must have had reasonable ground for anticipating that *some* change of position would take place. But suppose that the change which ensues is not only not that expected, but that which could not reasonably have been anticipated. For example, a railway company inadvertently and untruly informs an expectant consignee that his goods have arrived, and he, instead of acting upon that notice by sending for them as the company intended, acts upon it by making a sale of them; would the railway company be estopped by such a change of position? Or supposing that a warehouseman, believing that he had in store certain goods, demands payment of rent for them from a person who did not own them; and that such person, instead of paying the rent as the warehouseman intended, purchases the goods from the real owner; is the warehouseman estopped by such change of position?<sup>1</sup>

#### THE BARRY v. CROSKY RULES.

In 1861, Wood, V. C., said that the regulating principles were as follows:<sup>2</sup>

*"First. Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting is injured or damaged."*

<sup>1</sup> Mr. Bigelow's language is too general. He says (on Estoppel, 5th ed., p. 639): "And it matters not, if the party acting upon the representation was justified in so doing, how he has changed his position." The circumstances in *Moore v. Spiegel* (1837), 143 Mass. 413; 9 N. E. R. 827. would form a fair test of the statement.

<sup>2</sup> *Barry v. Croskey* (1861), 2 J. & H. 1; 31 L. J. Ch. 121.

"Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified — provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss."

"Thirdly. But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made."

This language was quoted by Lord Cairns in 1873<sup>1</sup> with the remark that the principles

"appear to me to be consistent with what is stated by all the authorities that might be referred to."

It was also quoted with approval by Lord Esher in 1896.<sup>2</sup> According to *Barry v. Croskey*, then, the law is as follows:

1. Where the misrepresentation is made directly to the estoppel-asserter, it is immaterial whether the change of position was or was not that which was intended; provided that it be the immediate and not the remote consequence of the misrepresentation.

2. But where the misrepresentation is made indirectly to the estoppel-asserter, then the change of position must be not only the immediate and not the remote consequence of the misrepresentation, but it must also be that which was intended by the person who made the misrepresentation.

In other words, if the misrepresentation be made directly, there will be estoppel, whether the action was that which was intended or not; but if the misrepresentation be made indirectly (made to some one else but passed on), then the action must be that which was intended.

#### THE CARR V. LONDON RULES.

The text-writers almost unanimously omit reference to the *Barry v. Croskey* rules. They all quote the better known and more frequently cited rules formulated by Brett, L. J., in *Carr v. London*,<sup>3</sup> which are as follows:

1. "One such proposition is, if a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false; and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist."

<sup>1</sup> *Peek v. Gurney* (1873), L. R. 6 H. L. 413; 43 L. J. Ch. 19.      <sup>2</sup> (1875) L. R. 10 C. P. 316; 44 L. J. C. P. 199.

<sup>3</sup> *Andrews v. Mockford* (1896), 1 Q. B. 373; 65 L. J. Q. B. 302.

2. "Another recognized proposition seems to be that if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts, which *he intends to be acted upon in a certain way*, and if it be acted upon *in that way* in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

3. "And another proposition is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it *in a particular way*, and he with such belief does act *in that way* to his damage, the first is estopped from denying that the facts were as represented."

It will be observed that these *Carr v. London* rules were formulated in 1875. The *Barry v. Croskey* rules had been enunciated fourteen years earlier (in 1861); and twenty-one years later (in 1896) they were approved by the same judge who formulated the *Carr v. London* rules. Lord Cairns too, as we have noted, in that last named year said that the *Barry v. Croskey* rules were "consistent with what is stated by all the authorities."

#### THE RULES COMPARED.

A comparison, however, of these rules shows that they proceed upon widely different principles. The *Barry v. Croskey* set distinguish between cases of direct and indirect misrepresentation, and assert that where the misrepresentation is direct there will be estoppel, whether the action taken is that intended or not; but that where it is indirect the action must be that which was intended. In the *Carr v. London* propositions there is no trace of this distinction. The second of them indeed does leave room for the introduction of the idea, but that it is not there is shown by the application made of it to the case under consideration, and by comparison of it with the third rule.

The distinction made by the *Carr v. London* rules is one of wholly dissimilar sort, namely, between cases in which the estoppel-denier "wilfully" represents that which he "knows to be false" (Rule 1), and those in which there is no moral culpability (Rules 2 and 3). Where there is wilful misrepresentation (Rule 1) there will be estoppel, whether the action taken is that intended or not; but where the misrepresentation is honest (Rules 2 and 3) the action must be that which was intended, or at all events that which to a reasonable man would seem to have been intended. In the *Barry v. Croskey* rules there is no trace of such a distinction.



Now it is quite apparent that these two sets of rules cannot subsist together. For if we apply them to a case (of frequent sort) in which there is a direct and honest misrepresentation, but no intention or seeming intention to produce the particular action which ensued, then, according to the *Barry v. Croskey* rules, there would be estoppel; but according to the *Carr v. London* rules there would not. And contrariwise, if we assume a case in which the misrepresentation is indirect and dishonest, and the action not that intended, then according to *Barry v. Croskey* there would be no estoppel, but according to *Carr v. London* there would.

#### CLASSIFICATION NECESSARY.

A review of the cases will show that neither set of rules has been consistently acted upon; and this further, that they are not, in their form, even adapted to a large number of the cases to which they have been applied. The confusion has arisen from an insufficient classification of the subject. It has been assumed that in all cases of estoppel by misrepresentation the estoppel-denier must have communicated with the estoppel-asserter, either directly or indirectly, and in so doing must have been either honest or dishonest. But this is not true, for in the largest class of cases the misrepresentation is not made by the estoppel-denier at all, and therefore neither directly nor indirectly, neither honestly nor dishonestly.

The class of cases just referred to is that spoken of in this work as that of actively-assisted misrepresentation. It embraces those multitudinous instances in which the misrepresentation has been made by some third person who has through some action or inaction of the estoppel-denier been enabled to make his misrepresentation credible. For example, a mortgagee hands the title-deeds to the mortgagor, who, in fraud of the mortgagee, deposits them as security for a loan. In this case the misrepresentation is that of the mortgagor in asserting that he was the unincumbered owner of the land; and the deposittee can obtain priority only if it be held that the mortgagee, by having parted with the deeds (by having assisted the misrepresentation), is estopped from asserting his title. In other words, if the deposittee's action was reasonably consequent upon the assistance rendered by the mortgagee to the misrepresentation of the mortgagor.

In such cases, as will be seen, there is no misrepresentation, either direct or indirect, either honest or dishonest, so far as the estoppel-denier is concerned. Neither of the two sets of rules contemplates such a case; and yet the class to which it belongs is of much greater importance than the simple cases of personal misrepresentation, for which alone they are possible.

#### PERSONAL MISREPRESENTATION.

And it may therefore be that for such cases one set or other of the rules is valid. To ascertain this, and also to evolve, if possible, some principle for the cases not provided for (those of actively-assisted misrepresentation), let us review a few of the cases, commencing with the two which contain the rules under discussion.

*Barry v. Croskey*.<sup>1</sup> In this case a company by misrepresentation persuaded the Stock Exchange to quote its shares and to fix a settling day. The directors, preparing for such action, "cornered" the shares; and made various contracts for future purchases which they knew the vendors would be unable, because of the "corner," to carry out. One of the vendors sued the company for his losses, alleging that but for its misrepresentation to the Stock Exchange the settling day could not have been fixed; and that his contracts (which were dependent upon the fixing of a day) could not therefore have been enforced.

Here it will be observed the misrepresentation was by the company to the Stock Exchange, and only indirectly to the plaintiff; and the company was held not to be responsible to him upon the ground that the misrepresentation was not made with the intent (by the company) that it should be acted upon in the manner in which the plaintiff had acted upon it. The company's purpose (as distinguished from that of the directors) "was that they might be a company of sufficient repute to have their shares "quoted," as it is called, on the Stock Exchange, and there bought and sold and dealt with; and not that time bargains, such as have been entered into by the plaintiff in this case, should be made for their benefit — still less that such bargains should be enforced by a given day to the injury of the parties who have entered into them."

The misrepresentation was indirect; it had not been acted upon by the plaintiff in the manner intended by the company; the company, therefore, was not estopped.

<sup>1</sup>(1861) 2 J. & H. 28; 31 L. J. Ch. 131.

Were we to apply the principles of *Carr v. London* to this case we should have to arrive at a conclusion contrary to that of the court. We should have to say that the company would have been estopped; for the misrepresentation was dishonest, and in such case, according to that authority, it is immaterial that the action was not that intended.

*Carr v. London.*<sup>1</sup> A railway company by mistake sent to plaintiff an advice note indicating the arrival of certain goods for him. Upon the faith of this advice note the plaintiff sold the goods. *Held*, that the company was not estopped from showing that the goods had never reached their hands. Brett, L. J., said:

"It cannot, as it seems to us, be truly affirmed that the defendants intended any representation of theirs to be acted upon by the plaintiff in the way of reselling the goods. . . . The only intention on the part of the defendants which can be properly inferred from the sending of an advice note is that the consignee should send for the goods."

In this case the representation is made honestly; and there is no estoppel because it was not acted upon in "the particular way" intended. But under the *Barry v. Croskey* rules there would have been estoppel; for, the misrepresentation being direct, the character of the action taken is immaterial.

#### THE RULES CRITICISED.

Here then we have two cases, both of them decided, as one would think, properly; and yet the rule upon which each proceeded would reverse the decision in the other case. This rather suggests that both the rules must be defective.

*Barry v. Croskey.* *A priori* it is not easy to see why the nature of the change of position of the estoppel-asserter (that intended or not intended) should be dependent upon whether the misrepresentation was made to him directly by the estoppel-denier, or made to someone else with the intention that it should be passed on to him.<sup>2</sup> In both cases the misrepresentation is the same; in both it is made by the person held responsible for it; and in both it is acted upon by the person whom the estoppel-denier intended should act upon it. In both cases then there should be estoppel if (may we not add?) the change

<sup>1</sup>(1875) L. R. 10 C. P. 17; 44 L. J. on he cannot (for that reason) complain. See ch. X.

<sup>2</sup>If it is not intended to be passed

of position is reasonably consequent upon the action of the estoppel-denier.

*Carr v. London.* The other proposition, that the character of the change should be dependent upon whether the misrepresentation was honest or dishonest, is not more reasonable. It asserts that if the misrepresentation be honest there is estoppel only where it is acted upon in the manner intended (or in the manner which a reasonable man might assume was intended); but that if it is dishonest there is estoppel anyway.

As a moral and punitive rule this may be unobjectionable; but apart from that view is it reasonable that a man is to be held responsible for *everything* done upon the faith of his misrepresentation (even if dishonest), no matter how remote or extraordinary or inconsequent the act may be? — for example, for that which followed upon the misrepresentation in *Barry v. Croskey*. There must be some limit even in cases of dishonest misrepresentation; and if so, must it not be to those actions which are *reasonably consequent* upon the misrepresentation?<sup>1</sup>

Again, in the case of honest misrepresentation, supposing it to be true (Rule 3) that there will be estoppel where the action is that which "a reasonable man would take" it was that intended, is this not another way of saying that the action must have been *reasonably consequent* upon the misrepresentation?

For both honest and dishonest representation then may we not say, in cases of personal misrepresentation, that the change of position must be reasonably consequent upon the misrepresentation?

#### ASSISTED MISREPRESENTATION (PASSIVE).

To affirm, in cases of standing-by, that the change of position must be reasonably consequent upon the passivity, is but

<sup>1</sup>In *Bedford v. Bagshaw* (1859), 4 H. & N. 548; 29 L. J. Ex. 59, Baron Bramwell said: "But it is not a bad rule that a person who makes a fraudulent representation which is intended to be generally circulated shall be liable to any person injured by acting upon it, however remote the consequences may be." Observe that the learned Baron does not say however remote the action may be

from the misrepresentation, but this: that if the representation be acted upon, then there is liability for the remotest consequence of that action. Possibly this distinction was not present to the mind of Wood, V. C., when he said of the *dictum*: "That may be sound doctrine in measuring the limits of moral responsibility." *Barry v. Croskey* (1861), 2 J. & H. 19; 31 L. J. Ch. 121.

insisting upon one of the data of the case. For the case is that the true owner stood by and witnessed a disposition by another person of his interest in the property to one who purchased upon the faith of the misrepresentation of ownership. In a preceding chapter<sup>1</sup> we saw that in such a case there is estoppel where (1) the estoppel-denier was aware of his own rights; (2) the estoppel-asserter was unaware of these rights, and (3) the estoppel-denier had reasonable ground for assuming the existence of such ignorance. Where these facts co-exist the estoppel-denier has "reasonable ground for anticipating some change of position," and the particular change plainly is "reasonably consequent upon the assistance" rendered by the silence of the estoppel-denier, for it was the change which he anticipated.

#### ASSISTED MISREPRESENTATION (ACTIVE).

As has already been suggested, neither of the two sets of rules (above quoted) is adapted to cases of actively-assisted misrepresentation, for in these it is impossible to make the distinction between direct and indirect, honest and dishonest, misrepresentation. The question in such cases involves primarily the conduct, not of the person making the misrepresentation at all, but of a third person — the person rendering the assistance — who sometimes has no cognizance of the misrepresentation.

Recurring to the case of the deeds handed over by the mortgagee to the mortgagor, and the mortgagor pledging them, it will at once be seen that we cannot determine the question of the mortgagee's estoppel (1) by considering the moral quality of the misrepresentation (for the misrepresentation was that of the mortgagor); nor (2) by asking whether the depositor would, as "a reasonable man," have taken it that the mortgagee intended him to advance money upon the deeds (for the depositor knew nothing of any mortgagee, and indulged, therefore, and could indulge, no speculations as to his intentions).<sup>2</sup> Conceiv-

<sup>1</sup> *Ante*, ch. VIII.

<sup>2</sup> A partner who has retired is estopped from denying that he is a party to a contract made with a customer in the partnership name unless the customer has notice of his retirement; yet it cannot be sup-

posed that he intended that the continuing partners should pledge his credit in fraud of him. See per Parke, B., in *Freeman v. Cooke* (1848), 2 Ex. 664; 18 L. J. Ex. 114. See also *Hoig v. Gordon* (1870), 17 Gr. 599.

ably, the good or bad faith of the mortgagee might be a factor in the problem, but we shall presently see that that also is sometimes immaterial.<sup>1</sup>

That there must be some relation between the act of the estoppel-denier and the change of position of the estoppel-asserter is evident; and as it is quite impossible to apply either of the orthodox sets of rules, it is here submitted that the change must be reasonably consequent upon the assistance rendered to the misrepresentation.

#### APPLICATION TO THE CASES.

Applying retrospectively this suggested rule to the two principal cases, we find it sufficient for them. In *Barry v. Croskey* the action taken was held not to work an estoppel, because it was not the action contemplated; but it was clearly also that not reasonably consequent upon the misrepresentation. And the validity of the competing rules may be tested by asking: Whether, if the action had been reasonably consequent but not that intended, there should not have been estoppel? The rule suffices also for *Carr v. London*, because if sending for goods and not selling them was that which was intended, it was also that which was reasonably consequent upon the misrepresentation. We pass on to a few other cases:

*Seton v. Lafone*.<sup>2</sup> Wharfingers who (mistakenly) believed that they had on hand certain goods, wrote to the plaintiffs who they (mistakenly) thought owned them, intimating that the goods were on hand and demanding rent. On the faith of this demand the plaintiffs bought the goods from the real owner. *Held*, that the wharfingers were estopped from denying that they had the goods.

This is a case of direct and honest misrepresentation. According to *Barry v. Croskey*, therefore, the wharfingers will be estopped, although the misrepresentation was not acted upon in the manner intended; but according to *Carr v. London* there will be no estoppel, for although the misrepresentation was honest it was not acted upon in the manner intended, nor probably as "a reasonable man would have taken it," that he was intended to act upon it.

<sup>1</sup> Ch. XIX.

<sup>2</sup> (1887) 18 Q. B. D. 189; 19 Q. B. D. 68; 56 L. J. Q. B. 415.

Compare this case with *Carr v. London*, in which it was said that the railway company was not estopped by sending inadvertently an advice-note of the arrival of goods, although the supposed consignee acted upon the note by selling them, because such action was not that intended by the railway company — the intention was “that the consignee should send for them, not that he should sell them.” In both these cases the misrepresentation was direct and honest, and in neither was the act done that which was intended. How comes it then that in the one there was estoppel and in the other not?

The result can be justified only by attending to a feature of the *Seton v. Lafone* case, which in the decision of it was overlooked, namely, that the wharfingers had issued warrants for the goods which were held by the person from whom the plaintiffs purchased. Now suppose that the wharfingers had not demanded the rent at all, had had no communication of any sort with the plaintiffs, and that the plaintiffs upon the faith of the warrants alone had purchased the goods, the wharfingers would still be estopped from denying their custody of the goods.<sup>1</sup> We may say then that the letter demanding rent had nothing to do with the true *ratio decidendi*; and that the true ground of decision is that the wharfingers having issued warrants for the goods, and the purchase of the goods being a reasonable consequence of such warrants, the wharfingers are estopped.

*Carr v. London* was right then, because making a sale of goods is not reasonably consequent upon the reception of an advice-note from a railway company announcing their arrival — the only reasonable consequence is that he should send for them. And *Seton v. Lafone* is right because the purchase of goods is reasonably consequent upon the existence of warrants for them in the hands of a person claiming to own them. The judgment in this latter case indeed may be cited against the *Carr v. London* rule as to the necessity for the action being that intended — although that is now probably unimportant. Lord Esher said that it

“was reasonable as a matter of business for the plaintiff to do what he did as a result of his belief in the defendant’s statement.”<sup>2</sup> “I do not think

<sup>1</sup>*Coventry v. G. E. Ry. Co.* (1883),  
11 Q. B. D. 776; 52 L. J. Q. B. 694.  
And see ch. XXIII.

<sup>2</sup>The present writer does not here  
affirm that the plaintiff’s act was  
reasonably consequent upon the mis-

it is necessary that the person making the statement should have intended the person to whom he made the statement to act in any particular way upon it."<sup>1</sup>

*Coventry v. G. E. Ry. Co.*<sup>2</sup> A railway company, by mistake, accepted a delivery order in respect of goods which it had not received; the plaintiff advanced money upon it and the company was estopped. This case is somewhat similar to the *Carr v. London* case, in which an advice-note was sent by a railway company in respect of goods which it had not received. It will be remembered that in this latter case the railway company was not estopped. Now, however, in the *Coventry* case the defendant is estopped.

The reason sometimes given is that in the *Coventry* case there was negligence, and in the *Carr* case no negligence;<sup>3</sup> but in that respect the cases are identical. The distinction really lies elsewhere, as, from what has just been said, will readily be seen. In the *Coventry* case "there was some evidence of a custom to sell or pledge goods upon the faith of a document of this kind." That is to say, the railway company was aware when accepting the delivery order that the acceptance might be used as evidence of the truth of the representation that they held certain goods on account of the person offering them for sale. (It is the case of the wharfinger's warrants over again.) The action of the purchaser therefore was reasonably consequent upon the misrepresentation of the railway company (it could not be said that the company intended any action to be taken), and it was therefore estopped.

*Waldron v. Sloper.*<sup>4</sup> A mortgagor upon pretended excuse obtained from the mortgagee possession of the deeds; the mortgagee neglected to get them back again, and the mortgagor representation. What is suggested is that reasonable consequence was thought to be sufficient for the declaration of an estoppel in a case (of direct and honest misrepresentation) in which it was impossible to say that the act was intended by the estoppel-denier. The case is thus made use of to assist the writer's formula, and not because he is of opinion that (in cases of direct misrepresentation) there is any real distinction between it and that other phrase that "a reasonable man would take it"

that he was "intended to act upon it in a particular way."

<sup>1</sup> (1887) 19 Q. B. D. 72; 56 L. J. Q. B. 417.

<sup>2</sup> (1883) 11 Q. B. D. 776; 53 L. J. Q. B. 694.

<sup>3</sup> Everest & Strode on Estoppel, p. 335, note.

<sup>4</sup> (1852) 1 Dr. 193. See also *Kettlewell v. Watson* (1882), 21 Ch. D. 635; 51 L. J. Ch. 281; 26 Ch. D. 501; 52 L. J. Ch. 818, and other cases in chapter XIX.



fraudulently deposited them with a third party as security for a loan. Here the first mortgagee is estopped because (the other conditions being present) the action of the second mortgagee is reasonably consequent upon the assistance given to the misrepresentation. It would be impossible to say that the action taken by the second mortgagee was that which he, "a reasonable man, would take it" was intended by the first mortgagee, for the second knew nothing of any first, and could not possibly, therefore, have speculated as to his intention.

*Smith v. Grouette*.<sup>1</sup> The real owner of a business permits it to be so carried on that another person appears to be the proprietor of it; and he is estopped from asserting his ownership as against persons dealing with this ostensible owner, for their action is reasonably consequent upon the appearance of ownership. Here again it would be impossible to say that the action of persons dealing with the ostensible proprietor was that which they (as reasonable men) would take it was intended by the real owner; for again they knew nothing of any owner other than the ostensible one. At the furthest such a person might have reasoned thus: If the ostensible owner of this business is not the real owner (and I have no reason to suspect anything of the sort), then I, as a reasonable man, may take it that the real owner, whoever he may be, intends that I should sell to this ostensible owner as though he were the real owner, and if I do so the real owner will be estopped from asserting his ownership." Needless to say no such process takes place.

#### PROXIMATE CAUSE:

This chapter to be complete should deal with the phrase "proximate cause" and the cases in which it is employed. It has been thought, however, to be more advisable to treat of that subject in the chapter on "Estoppel by Negligence,"<sup>2</sup> for it is in connection with "the negligent act or omission," rather than with the misrepresentation, that the phrase has been

<sup>1</sup>(1895) 2 Man. 314; *Vineberg v. L. J. Bk. 20*; *Howland v. Woodruff Anderson* (1890), 6 Man. 355. And see (1875), 60 N. Y. 78; *Rogers v. Robinson* (1895), 104 Mich. 329; 62 N. W. R. 402.  
<sup>2</sup>See ch. IX.

600; *Ramazatti v. Bowring* (1860), 7 C. B. N. S. 851; 29 L. J. C. P. 50; *Ex parte Dixon* (1876), 4 Ch. D. 133; 46

usually employed. It will be profitable, however, quoting from the law of torts, between which and estoppel there is much analogy, to say that changes of position which are "reasonably consequent" are those

"which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was "indirect" or not does not matter. That which a man actually foresees is to him at all events natural and probable."<sup>1</sup>

Or as put in the United States:

"The injury must be the natural and probable consequence of the negligence—such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrong-doer as likely to flow from his act."<sup>2</sup>

"Whatever the motive may be, if one so acts or speaks that the natural consequence of his words and conduct will be to influence another to change his condition, he is legally chargeable with an intent, a wilful design, to induce the other to believe him, and to act upon that belief, if such proves to be the actual result."<sup>3</sup>

#### SUMMARY.

From what has been said it may be affirmed that:

1. The *Barry v. Croskey* and *Carr v. London* rules are incompatible the one with the other.
2. The requisite as to the character of the change of position should not in any way be affected by the directness or indirectness of the misrepresentation, as held in *Barry v. Croskey*.
3. Nor by its honesty or dishonesty, as affirmed in *Carr v. London*.
4. Neither set of rules is applicable to the large number of cases classed under actively-assisted misrepresentation; for in these the estoppel-denier makes no representation either direct or indirect, either honest or dishonest.
5. In the preceding chapter we saw that for cases of personal misrepresentation, and passively-assisted misrepresentation, a condition of estoppel is that "the estoppel-denier must have reasonable ground for anticipating some change of position upon the faith of the representation."
6. In the present chapter we have seen that in cases of per-

<sup>1</sup> Pollock on Torts, 28.

<sup>2</sup> Preston v. Mann (1856), 25 Conn.

<sup>3</sup> Robb v. Pennsylvania (1893), 186 Pa. St. 456; 40 Atl. R. 969.

sonal misrepresentation the change of position must have been that "reasonably consequent upon the misrepresentation."

7. In cases of assisted misrepresentation by passivity the rule is *ex necessitate rei* that the change must have been reasonably consequent upon the assistance rendered to the misrepresentation.

8. And in cases of actively-assisted misrepresentation the same rule must apply.

9. The rule therefore for all classes of cases is that "the change of position must be reasonably consequent upon the misrepresentation or assistance."

10. If the "particular consequence" has been "intended or foreseen by the" estoppel-denier, that "is to him at all events natural and probable."

## CHAPTER XIV.

### THE LICKBARROW v. MASON, AND HALIFAX v. WHEELWRIGHT RULES.

#### *The Lickbarrow v. Mason Rule.*

There are few rules which have been so frequently quoted and so widely applied as that formulated by Ashhurst, J., in 1787, in the case of *Lickbarrow v. Mason*:<sup>1</sup>

"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."

Those who have read the preceding pages, more particularly chapter IV, will at once see that the rule is intended to apply to the class of cases which the author has styled "Estoppel by Assisted Misrepresentation." These are cases in which the misrepresentation is not that of the estoppel-denier but that of some third person, and in which estoppel is declared because of some assistance rendered by the estoppel-denier — something by him said, done or furnished which has made the misrepresentation credible. The language of the rule, "enables such third person to occasion the loss," or, as it is sometimes put, "gave the aggressor the means of doing the wrong,"<sup>2</sup> may be taken to express this idea of assistance given to the misrepresentation of some other person.

We find nothing, however, in the rule (explicitly at least) with reference to various conditions which we have seen to

<sup>1</sup> 2 T. R. 63; 1 H. Bl. 357; 6 East, (1874), 61 N. Y. 111; Friedlander v. Texas (1888), 130 U. S. 425; 9 S. C. R. 570; Bangor v. Robinson (1892), 52 Fed. R. 520; Miller v. Parker (1893), 155 Pa. St. 208; 26 Atl. R. 303; Timpson v. Allen (1896), 149 N. Y. 513; 44 N. E. R. 171; Robb v. Pennsylvania (1898), 186 Pa. St. 456; 40 Atl. R. 969. The rule is to be found in the California Civil Code, sec. 5543.

<sup>2</sup> Pennsylvania R. Co.'s Appeal (1878), 86 Pa. St. 103.

be essentially requisite in estoppel — that there must have been a change of position on the part of the estoppel-asserter; that such change must have been reasonably consequent upon the misrepresentation; that the misrepresentation must have been, as to some matter of fact; that the fact must have been a material one; that the assistance rendered must have been in breach of duty, etc. But most of these are sufficiently implied by the language of the rule. That there has been a "loss" implies that there was a prejudicial change of position; and that the third person was enabled "to occasion the loss" implies that the assistance rendered was material and that the loss was consequent upon it. We find, indeed, nothing about the misrepresentation being one of fact as contradistinguished from intention, nor about breach of duty; but the rule is to be taken as a short statement of "a broad general principle," and may well be excused for omitting that which may have been deemed to be obvious. It must be remembered, too, that it was formulated in 1787, or just fifty years before the case to which, more to than any other, we are indebted for the conscious introduction of the modern law of estoppel by misrepresentation.<sup>1</sup>

The rule then appears to be but a short and pregnant statement of the essential principles of estoppel by assisted misrepresentation. But this has been stoutly denied. Two assertions have been made with reference to it: (1) That it is a rule quite disparate from and independent of the law of estoppel;<sup>2</sup> and (2) that either it is "not to be understood" at all in its generality" or else that it "cannot be supported."<sup>3</sup>

#### I. THAT THE RULE IS DISPARATE FROM ESTOPPEL.

Lack of sufficient classification has produced the impression that for estoppel the misrepresentation complained of must have been that of the estoppel-denier himself. It is overlooked

<sup>1</sup> Pickard v. Sears (1837), 6 A. & E. 469.

<sup>2</sup> London v. Wentworth (1880), 5 Ex. D. 96; 49 L. J. Q. B. 657. And see Swan v. N. B. A. (1859), 7 C. B. N. S. 446; 30 L. J. C. P. 113.

<sup>3</sup> Per Lord Field in Bank of England v. Vagliano (1891), A. C. 169; 60 L. J. Q. B. 177. And see per Lord Coleridge in Arnold v. Cheque Bank (1876), 1 C. P. D. 537; 45 L. J. C. P. 565.

that much more frequently estoppel arises because of the misrepresentation of some third person, which has been assisted (usually unwittingly) by the estoppel-denier; and when cases of that sort do occur, other principles than those of estoppel are applied to them. Look at some of them:

*Priorities.*— A legal mortgagee hands the title-deeds to the mortgagor, who (using them as evidence of his assertion of unincumbered ownership) deposits them with a banker as security for advances; and the legal mortgagee is postponed to the banker. Justice indicated the result, but in the absence of estoppel by assisted misrepresentation the principle assigned, or rather the rule formulated, was that "the possession of the deeds gives the better equity."<sup>1</sup> A better ground — one following the lines of estoppel, but still not acknowledging its presence — was afterwards (1884) put forward, namely:

"That the court will postpone the prior legal estate to a subsequent equitable estate, where the owner has *assisted* in, or connived at, the fraud which has led to the creation of the subsequent equitable estate."<sup>2</sup>

And this is estoppel by assisted misrepresentation. For if we ask why it is "that the court will postpone the prior" to the subsequent, the only reply is that just as direct personal misrepresentation would estop the first mortgagee, so also assistance rendered by him to the misrepresentation of the mortgagor will estop him.

And observe that this is also within the Lickbarrow rule; for when we say "that the court will postpone . . . where the owner has assisted in . . . the fraud," we are but giving an example of the Lickbarrow general rule that

"Whenever one of two innocent persons must suffer by the acts of a third, he who enables such person to occasion the loss must sustain it."

In other words, the mortgagee enabled the mortgagor to occasion the loss, and he (the mortgagee) must sustain it.

*Bills of Exchange.*— Cases arise in which an acceptance, handed to the drawer in blank, is fraudulently filled up for too large an amount. In such a case Pollock, B., excludes the

<sup>1</sup> *Layard v. Maud* (1867), L. R. 4 Eq. 397, 406; 36 L. J. Ch. 669; *Hunter v. Walters* (1870), L. R. 11 Eq. 316; 41 L. J. Ch. 175; *Spencer v. Clarke* (1878), 9 Ch. D. 142; 47 L. J. Ch. 692; *Lloyds v. Jones* (1885), 29 Ch. D. 220; 54 L. J. Ch. 931. And see oh. XIX.

<sup>2</sup> *Northern Counties v. Whipp* (1884), 26 Ch. D. 494; 53 L. J. Ch. 620. And see *Powell v. London* (1893), 1 Ch. 615; 53 L. J. Ch. 620.

operation of estoppel, and declares in favor of the Lickbarrow rule.<sup>1</sup>

"In many of the cases and text-books in which the liability of the acceptor of a bill of exchange, under circumstances similar to those which occurred in the present case, has been discussed, it has been rested upon the ground of estoppel; and with reference to this Bramwell, L. J., has recently said with great force in the case of *Baxendale v. Bennett*,<sup>2</sup> 'Estoppels are odious, and the doctrine should never be applied without a necessity for it.' It never can be applied except in cases where the person against whom it is used has so conducted himself either in what he has said or done, or failed to say or do, that he would unless estopped be saying something contrary to his former conduct in what he had said or done or failed to say or do. This language might be, not improperly, applied to the present case; but for our own part we should prefer not to use the word *estoppel*, which seems to imply that a person by his conduct is excluded from showing what are the true facts; but rather to say that the question is whether, when all the facts are admitted, the acceptor is not liable upon the well known principle that *where one of two innocent persons must suffer for the fraud of a third, the loss should be borne by him who enables the third person to commit the fraud.*"

But, with deference, estoppel does not exclude facts.<sup>3</sup> Its action is to preclude some one, "when all the facts are admitted" or proved, from availing himself of them: A man is sued upon an acceptance which is not his; he so pleads; a verdict goes for plaintiff (that plaintiff did accept); but this is contrary to the fact, and can only be upheld because the defendant upon the evidence (not by exclusion of it, for it is all given) is estopped from relying upon the truth of his plea. Moreover the Lickbarrow rule, upon which the learned judge relies, cannot make the defendant liable *upon the acceptance*, unless it is to be taken as saying to the acceptor, "You assisted in the fraud; therefore, although the acceptance is not yours, you are precluded from so saying." But that is clearly estoppel. If the acceptor had *himself* represented that the instrument was obligatory upon him, there would be no hesitation in applying the word "estoppel" to his conduct. It is equally appropriate when he assists the misrepresentation—when he "enables the third person to commit the fraud."

*Principal and Agent.*—There are many cases in which an agent may bind his principal although instructions are exceeded. This is, as the writer sees it,<sup>4</sup> clearly upon the ground of estoppel by assisted misrepresentation. The agent has mis-

<sup>1</sup> *London v. Wentworth* (1880), 5 Ex. D. 104; 49 L. J. Q. B. 661.

<sup>2</sup> See ch. XV, sub-title "Estoppel as a rule of evidence."

<sup>3</sup> *Baxendale v. Bennett* (1878), 8 Q. B. D. 529; 47 L. J. C. P. 625-6.

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

represented the extent of his authority; the principal has, in some way, made credible the misrepresentation; and he is estopped for that reason from denying that the agent had not the authority alleged. Mr. Justice Story<sup>1</sup> nevertheless, and some of the other judges,<sup>2</sup> refer it to the Lickbarrow rule; and Mr. Bigelow refers it to the law of principal and agent.<sup>3</sup>

The reader will perceive that the principal is liable because he enabled the agent to appear as having authority to do the act in question. Suppose that he had personally made the misrepresentation — had said in so many words that the agent had a power of attorney which gave the requisite authority; that upon production of the document no such authority was to be found in it; and that the principal thereupon repudiated liability. There can be no question that in such case estoppel would be the ground of his condemnation. And it is not the less so because his conduct, instead of his language, has misled the estoppel-asserter — he has enabled the agent to occasion a loss, and he must sustain it, that is, be estopped.

*Sales of Goods.* — Although in the lines of cases above referred to as well as in others the application of estoppel is denied, it is nowhere suggested that the results to be arrived at would be affected by pursuing the principles of estoppel. Nevertheless occasions frequently arise in which the benefit of a clear view of the specific application of correct principle becomes very apparent. For example, in a case in which a man tricked the owner of goods into a sale of them, and afterwards sold them to a *bona fide* sub-purchaser, Cockburn, C. J., in deciding against the original owner, said:<sup>4</sup>

"If the matter rested on abstract principle, it might be open to be contended that, inasmuch as to make a valid contract both parties must intend to be bound by it, consequently when in an apparent contract of sale the buyer intends to get the goods but not to pay for them but to defraud the seller the contract fails to take effect, and *though the seller intended*

<sup>1</sup> Story on Agency (9th ed.), § 127.

<sup>2</sup> Gordon v. James (1885), 30 Ch. D. 258; Erb v. Great Western Ry. (1881), 5 S. C. Can. 200.

<sup>3</sup> On Estoppel (5th ed.), pp. 457, 503, n., 565, 566. See the point discussed in ch. XXVI.

<sup>4</sup> Moyce v. Newington (1878), 4 Q. B. D. 32; 49 L. J. Q. B. 125. The case was overruled in *Vilmon v.*

*Bently* (1880), 18 Q. B. D. 322; 12 App. Cas. 471; 57 L. J. Q. B. 18, because of the statute 24 & 25 Vic., c. 96, § 100; but the reasoning of Cockburn, C. J., remains unaffected. See Benjamin on Sales (4th Eng. ed.), 425, n. It was followed in *Babcock v. Lawson* (1879), 4 Q. B. D. 394; 5 Q. B. D. 284; 49 L. J. Q. B. 408.



*the property to pass, yet that, the contract failing to take effect, the property still remains unaltered; yet the question is now so concluded by authority as to be no longer open to discussion. We must now take it to be settled . . . that though a seller is induced to sell by the fraud of the buyer, and although it is competent to the seller by reason of such fraud to void the contract, yet till he does some act to avoid it the property remains in the buyer;<sup>1</sup> and that if he, in the meantime, has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller. The reasoning on which this conclusion is based may not appear altogether consistent with principle, and agreeing in the result we should prefer to adopt the view of the American courts as stated in the case of Root v. French,<sup>2</sup> a case decided in the Supreme Court of Judicature of the State of New York, according to which the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the principle of equity that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enables such third party to commit the fraud."*

With great respect for so learned a judge it must be said that if the Lickbarrow rule which he invokes had been seen to be but the law of estoppel, not only would the reasoning to which he refers appear to have been quite consistent with principle, but the case would not have to be put in the unsatisfactory position of "an exception to the general law." No doubt the reasoning would show that, there being in fact no contract, "the property still remains unaltered," and therefore that the sub-purchaser could take nothing; but the case is one of assisted misrepresentation, and the law of estoppel provides that under such circumstances, although the property is in the original owner, yet he is estopped from so asserting. This is the general law, and not an exception to it.

The case is this: "The contract failing to take effect, the property still remains unaltered" in the first owner; nevertheless he has "intended the property to pass" — has intended that his purchaser should appear to be the owner; and has thus enabled the purchaser to hold himself out as having the right to sell. This is, then, a case of estoppel, not indeed by the misrepresentation of the estoppel-denier himself, but by reason of the assistance rendered by him to the misrepresentation of ownership made by his vendee.

*Mr. Pomeroy's Concurrence.*—The present writer is glad to have the concurrence in the above conclusions of so able a writer as Mr. Pomeroy. In his Equity Jurisprudence he says:

"When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general princi-

<sup>1</sup>But how can it remain there when, by hypothesis, it has never got there?

<sup>2</sup>(1835) 13 Wend. 370.

ple: When one of two innocent persons, that is, persons each guiltless of an intentional moral wrong, must suffer a loss, it must be borne by that one of them who by his conduct, acts or omissions has rendered the injury possible. This is confessedly the foundation of the rules concerning the implied authority of agents, which are declared by judges of the highest ability to be applications of the doctrine of equitable estoppel. This most righteous principle is sufficient, and alone sufficient, to explain all instances of such estoppel."<sup>1</sup>

## II. THAT THE RULE CANNOT BE SUPPORTED, AT ALL EVENTS IN ITS GENERALITY.

In 1876, Coleridge, C. J., referring to the Lickbarrow rule, said:<sup>2</sup>

"It has received illustration and explanation in subsequent cases on the subject which show that the words 'enabling a person to occasion the loss' must be understood to mean by some act, conduct or default in the very transaction itself. See *Freeman v. Cook*, 2 Ex. 654; 18 L. J. Eq. 117. The correct rule seems to us to be that which is thus stated by Blackburn, J., in his judgment in *Swan v. N. B. A. Co.*, 2 H. & C. 181; 32 L. J. Ex. 277, where, referring to the judgment of Wilde, B., below, he says that he omits to qualify the rule (he had stated) by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person led into the belief, or, what comes to the same thing, with the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are privy."<sup>3</sup>

And in 1891, Lord Field, in the House of Lords, said as follows:

"No doubt in one case (*Lickbarrow v. Mason*, 2 T. R. 70) Ashhurst, J., stated, as a broad general principle, that whenever one of two innocent parties must suffer by the act of a third person, 'he who has enabled such person to occasion the loss must sustain it.' But more recent decisions, and one of this House of great importance, have either shown that this proposition is not to be understood in all its generality or cannot be supported; and this was very clearly pointed out in two cases which were not, I think, cited in argument (*Arnold v. Cheque Bank* and *Arnold v. City Bank*, 1 C. P. D. 578)."

<sup>1</sup>2d ed., § 808. Mr. Markby exhibits little appreciation of the Lickbarrow rule, and none of estoppel by assisted misrepresentation. He says (*Elements of Law*, 4th ed.; § 716): "The liability is not placed upon the ground of misconduct, but of causation. If this principle were once acknowledged the door would be open to a very large extension of legal liability." And in the note referring to *Babcock v. Lawson* (1879), 4 Q. B. D. 394; 5 Q. B. D. 284; 49 L. J. Q. B. 408, he says that the chief justice "seems to have thought that the right of an innocent purchaser to retain goods

which he had bought and of which he had obtained possession, from a person who had himself obtained them by fraud, also rested upon the principle that the original owner had enabled the seller to commit the fraud. I should doubt the correctness of this view; at any rate it is quite a modern view." For a discussion of the point see ch. XXI and XXII.

<sup>2</sup>*Arnold v. Cheque Bank* (1876), 1 C. P. D. 597; 45 L. J. C. P. 552.

<sup>3</sup>*Bank of England v. Vagliano*, (1891), A. C. 169; 60 L. J. Q. B. 177.

All that will be said at present with reference to the cases from which these extracts are taken is that the former of them very specifically treats the Lickbarrow rule as being a part of the law of estoppel. The qualifications of the rule said to be necessary are fully discussed in another part of this work.<sup>1</sup>

#### THE LICKBARROW CASE.

The above references to the ubiquity of the Lickbarrow rule will justify the assertion that it "has admitted of very general application."<sup>2</sup> It was, as the writer views it, a very remarkable attempt to formulate that doctrine of estoppel by assisted misrepresentation which still stands in need of much clear explanation. For it was not the simple case of personal misrepresentation, but the more complicated application of estoppel as against not the person who made the misrepresentation, but against the one who furnished the opportunity for it and made it credible.

The facts of the case were that an unpaid vendor of goods shipped them to the purchaser and indorsed to him the bill of lading; the purchaser transferred the bill to a sub-purchaser; pending the transit the first purchaser became insolvent and the original vendor asserted a right to stop *in transitu*. He argued that he had the right to stop as against his purchaser, and that the purchaser could not deprive him of it — in other words, that no one claiming through the purchaser could be in a better position than the purchaser himself. He was, however, unsuccessful, because the original vendor had, by indorsing over the bill of lading, enabled his purchaser to represent that he had a clear title to the goods. Grose, J., said:

"A bill of lading carries credit with it; the consignor, by his indorsement, gives credit to the bill of lading, and on the faith of that money is advanced."<sup>3</sup>

The case itself, then, is an excellent example of estoppel by actively assisted misrepresentation, and is decided in accordance with the rules applicable to that branch of the law.

<sup>1</sup> Ch. IX.

<sup>2</sup> Per Channell, B., in *Swan v. North* B. A. (1862), 7 H. & N. 658; 31 L. J. Ex. 425.

<sup>3</sup> *Lickbarrow v. Mason* (1787), 2 T. R. 76. *Kemp v. Falk* (1882), 7 App. Cas.

573; 52 L. J. Ch. 167) decides that there is a right to stop notwithstanding an assignment of the bill of lading, but not to the prejudice of the assignee — only as against other persons interested.

*Summary.*— We may then say:

1. That the Lickbarrow rule was a first attempt at formulation of the principle of estoppel by actively assisted misrepresentation.
2. That it is not in conflict with, nor is it a competitor of, the law of estoppel. It is not suggested that they lead to divergent conclusions.
3. Whether the rule can be supported in all its generality, or must be subjected to the modifications suggested, is discussed elsewhere.

### *The Halifax v. Wheelwright Rule.*

*Halifax v. Wheelwright*<sup>1</sup> was a case in which spaces carelessly left in a check were fraudulently filled up and the increased amount drawn from the bank. The drawer was made to suffer the loss. The applicability of the law of estoppel was questioned, and the following general principle held to be that which governed the case:

“A man cannot take advantage of his own wrong; a man cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own.”

Although this rule was approved of by Lopes, J., in *Scholfeld v. Londesborough*,<sup>2</sup> yet, with deference, it is submitted that it has no validity. If the words “wrong” and “default” imply the disregard of some legal duty, and the “consequences” referred to are the reasonable consequences of that disregard of duty, then indeed it may be said that the rule, although insufficiently expressed, is not altogether wrong, for the principal elements of estoppel are now present in it. But it would rather seem, from the explicit exclusion of estoppel, that some less stringent signification of these words was intended — that although there was no estoppel, yet that the drawer should suffer. But it would be difficult to say which one of the requisites of estoppel could be dispensed with.

In any event the rule is insufficient for its purposes; for its language is inapplicable to the case to which it is applied. When the drawer of a check, the careless spaces in which have been filled up, is sued upon it, and he pleads forgery, the case

<sup>1</sup>(1875) L. R. 10 Ex. 183; 44 L. J. Ex. 121.

<sup>2</sup>(1895) 1 Q. B. 552; 64 L. J. Q. B. 293.

is not one in which he seeks to "take advantage of his own wrong," or indeed to obtain an advantage of any kind. He is rather contending against his opponent's claim to advantage. His plea is, "I did not draw that check," which is perfectly true; and the only reply to him is that he is estopped by his carelessness from so saying. He has not himself represented the check to be genuine; but he has given opportunity for the misrepresentation — has assisted it, and is therefore estopped.

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## CHAPTER XV.

### NATURE AND EFFECT OF ESTOPPEL

Lord Justice Brett in 1879 said:<sup>1</sup>

"In my view estoppel has no effect upon the real nature of the transaction; it only *creates a cause of action* between the person in whose favor the estoppel exists and the person who is estopped."

But in 1887 the same learned Judge (then Lord Esher) said:<sup>2</sup>

"An estoppel *does not in itself give a cause of action*; it prevents a person from denying a certain state of facts."

Lord Justice Lindley in 1891 said:<sup>3</sup>

"Estoppel is not a cause of action — it is a rule of evidence, which precludes a person from denying the truth of some statement previously made by himself."

### ESTOPPEL AS A CAUSE OF ACTION.

Whether an estoppel does, or does not, "create a cause of action" is, to the writer, largely a matter of words. In one sense it does, and in another it does not.

Take a concrete case: A company inadvertently issues a certificate which untruthfully declares that A. is the owner of certain shares. Upon the faith of this certificate some one purchases the shares. The company is now estopped from denying the purchaser's title. For remedy the purchaser cannot sue the company directly upon the misrepresentation in deceit, for there was no fraud.<sup>4</sup> Nor can he insist upon the company giving him shares, for (as we may assume) all the authorized shares have been issued to others. His action is for damages for refusal to register him as a shareholder.<sup>5</sup> To this the company's only possible defense would be that he was not

<sup>1</sup> *Simm v. Anglo-American* (1879), 5 Q. B. D. 207; 49 L. J. Q. B. 392.

<sup>2</sup> *Seton v. Lafone* (1887), 19 Q. B. D. 70; 56 L. J. Q. B. 415.

<sup>3</sup> *Low v. Bouverie* (1891), 8 Ch. 101; 60 L. J. Ch. 594. See also per Bowen,

L. J. (1891), 8 Ch. 105; 60 L. J. Ch. 601;

*Howard v. Hudson* (1858), 2 El. & B. 9; 23 L. J. Q. B. 341; *Langdon v.*

*Dowd* (1865), 93 Mass. 433; *Andrews v. Lyons* (1865), 93 Mass. 349.

<sup>4</sup> *Derry v. Peek* (1889), 14 App. Cas. 837; 58 L. J. Ch. 864.

<sup>5</sup> *Re Bahia* (1868), L. R. 3 Q. B. 584; 37 L. J. Q. B. 176; *Balkis v. Thompson* (1891), 2 Q. B. 691; (1893) A. C.

485; 63 L. J. Q. B. 184; *Re Otto*, etc.

(1893), 11 Ch. 618; 62 L. J. Ch. 164.

entitled to be registered; and, as the company is estopped from so saying, the purchaser succeeds.

Nominally, the cause of action in the case is the refusal to register the shares. In reality the cause of action is based upon the misrepresentation, for it was impossible for the company to register the shares. Technically, no action could be brought upon the misrepresentation because there was no fraud. Really, the action was brought upon the misrepresentation; but that fact was well concealed and only brought in by way of reply. The method was this: The purchaser alleged (knowing it to be false) that he owned the shares; the company pleaded that the purchaser was not the owner; and the purchaser succeeded because the company was estopped from so saying.

If now we are to ask whether or not the estoppel created the cause of action, we may answer as we please. It may be said that the estoppel created the cause of action, in the sense, at all events, that it was the principal feature of the case. But just as reasonably we may say that it was the refusal to register which created the cause of action (although registration was impossible), and the estoppel merely the reason for its success.

Further consideration of the point, however, is unnecessary, for if the subject be well understood it is a matter of comparative indifference what view we take of the quoted propositions.

#### ESTOPPEL AS A RULE OF EVIDENCE.

We have seen that Lindley, L. J., declared that

"Estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself."<sup>1</sup>

Estoppel, in this view, is a rule as to the admissibility of evidence—one in preclusion of certain testimony. In this sense it has been asserted that

"Where the doctrine of estoppel applies to a case, any testimony at variance with its full application thereto becomes incompetent."<sup>2</sup>

And Bigelow, C. J., said:

"Such a representation is sometimes, though not very accurately, said to operate as an estoppel; but its effect is rather to shut out a party from offering evidence in a court of justice contrary to his previous statements."<sup>3</sup>

<sup>1</sup>And see *Onward v. Smithson* 80 Ill. (1893), 1 Ch. 14; 62 L. J. Ch. 138; *Hermann on Estoppel*, § 596.

<sup>2</sup>*Langdon v. Doud* (1865), 93 Mass. 541.

<sup>3</sup>*Gaston v. Brandenburg* (1894), 42 S. C. 348; 20 S. E. R. 158. And see

With proper respect, the present writer submits that this view is untenable, for the following amongst other reasons:

I. As a matter of practice the question does not usually arise by way of objection to evidence, and most frequently cannot so arise. Take the concrete case above referred to (where a company issued an untruthful certificate as to shares) and observe its course: The purchaser (from the certificate-holder) sues the company for damages for refusal to register. In opening his case he proves his title to the shares by producing the company's certificate and the transfer to himself, and he proves demand and refusal; the company disproves the plaintiff's title by showing that the certificate was erroneous, and that the original holder of it had in reality no shares; the purchaser, in reply, proves that he acted upon the faith of the certificate — proves estoppel. Mark that the purchaser could not preclude the company's proof of the untruthfulness of the certificate, for it had not then appeared that he had acted upon the faith of it, and that feature was necessary to the estoppel. Of course the purchaser might have proved this in opening, but it would have not only been unnecessary but impolitic for him to do so. The estoppel then, in this case, does not arise as a question of evidence. It is a deduction from, or legal consequence of, the evidence.<sup>1</sup>

II. If estoppel be a rule in preclusion of evidence, how is it to be applied? There can be no estoppel unless there has been a misrepresentation; unless the misrepresentation has been acted upon; unless all the other various requisites are present. Clearly it is for the jury to find the existence of the facts necessary to the estoppel;<sup>2</sup> and it cannot be thought that it would be proper for them, pending the trial, to interpose a verdict upon that point. But the evidence could not otherwise be precluded.

<sup>1</sup>The law as to waiver, as to election, as to "blowing hot and cold," are clearly not part of the law of evidence, although in this connection we use the phrase, familiar in estoppel, that a man will not be allowed to assume or assert two inconsistent positions.

<sup>2</sup>In Pennsylvania it is said that "whether an estoppel results from established facts is a question for

the determination of the court." *Lewis v. Carstairs* (1843), 5 Watts & S. 209; *Keating v. Orme* (1874), 77 Pa. St. 93. And see *Gunn v. Bates* (1856), 6 Cal. 263; *Odlin v. Gove* (1860), 41 N. H. 465. In this view the evidence would all go to the jury; the jury would find as to misrepresentation, action upon the faith of it, etc., and the court would apply the law of estoppel.



III. Nor is estoppel a rule of evidence, in the sense of being a test or aid in the weighing of evidence when admitted. The question is not one of weight of evidence. It is rather this, that although the evidence proves indubitably that the fact is so and so, other evidence requires the court to act contrary to the fact. For example: An infant defendant pleads his non-age as against his conveyance; he is allowed to prove it (the evidence is admissible); the plaintiff proves representation of full age, acted upon; and the infant is estopped from denying it. Here is no question of admissibility or weight of evidence, but a mere question of law — who upon these facts is to succeed?

IV. The testimony which would be shut out by the rule under examination is sometimes necessary in the consideration of (1) the nature of the relief to be granted; and (2) the amount of damages to be awarded. In such cases it would be impossible to exclude the evidence.

(1) *The Nature of the Relief.*— The nature of the relief sometimes depends upon whether or not success is attributable to estoppel. Take the case of a warehouseman giving, by mistake, a certificate that he holds goods for one man, whereas in reality he holds them for another; upon the faith of the certificate a third party buys the goods from the certificate-holder, and the warehouseman is estopped from denying that the purchaser has obtained a good title. Consider now the warehouseman's position. On the one hand he holds the goods for the true owner; and on the other he is estopped from denying that he holds them for the purchaser. Plainly he cannot give them to both; and just as plainly, no court will wittingly order him to do so. Now, if estoppel be a mere rule of evidence — if it does not affect the nature of the relief to be granted — the purchaser, in the case supposed, will be entitled to specific delivery of goods, which do not belong to him, and which the defendant ought not to deliver to him; and the court must so award.

But this is precisely that which the courts decline to do. It was in a case of this sort that Lord Justice Brett said:

“In a similar manner a person may be estopped from denying that certain goods belong to another; he may be compelled by a suit in the nature of an action of trover to deliver them up if he has them in his possession and under his control; but if the goods in respect of which he has estopped himself really belong to somebody else, it seems impossible to suppose that by any process of law he can be compelled to deliver over-

another's goods to the person in whose favor the estoppel exists against him; that person is entitled to maintain a suit in the nature of an action of trover against him; but that person cannot recover the goods, because no property has really passed to him; *he can recover only damages*. In my view, estoppel has no effect upon the real nature of the transaction; *it only creates a cause of action between the person in whose favor the estoppel exists and the person who is estopped.*<sup>1</sup>

We are here very close to something like fiction, a sure indication of undeveloped law. The plaintiff cannot directly sue for damages for the misrepresentation (absence of fraud is insuperable), but he may sue in trover for the goods in the sure and certain hope that the court will deny him the restitution which he claims, and give him the damages which he dare say nothing about. The damages which he asks are based upon his right to the goods, and are alternative for their detention; but the damages which he gets are based upon the fact that he has no right to the goods; that his only right is to damages because he was misled by the warehouseman. If this be not a very thinly veiled action in deceit, it is something very nearly akin to it.<sup>2</sup>

(2) *Amount of Damages*.—It has been said that estoppel cannot be merely a rule of evidence because, in some cases, it is a necessary factor in the consideration of the amount of damages to be awarded. It seems to be somewhat extraordinary that in the discussion of estoppel we are led into a consideration of measure of damages, but that is unavoidable in the present state of the law. An action of deceit lies for misrepresentation and the damages are so and so. Is there also an action in estoppel for misrepresentation resulting in damages? If not, there is something that bears that appearance. It differs from deceit in this: that fraud is not a necessary ingredient in it. It resembles deceit in this: that it is based upon misrepresentation and sounds in damages. We are perilously close to contradiction here: No action for misrepresentation in the absence of fraud; some such action although no fraud.<sup>3</sup> As to the amount of damages consider the following cases:

(1870) *Hart v. Frontino*.<sup>4</sup> Plaintiff bought and paid for shares; in doing so he did not rely upon any representation of the company; he did not at once register his transfer; afterwards

<sup>1</sup> *Simm v. Anglo-American* (1870), 5 Q. B. D. 207; 46 L. J. Q. B. 898. And see *Reg. v. Charnwood* (1884), 1 Cab. & E. 419.

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

<sup>3</sup> For further discussion of this anomaly see ch. XVI.

<sup>4</sup> L. R. 5 Ex. 111; 39 L. J. Ex. 98.

a call was made and the vendor (still appearing upon the register) paid it; the purchaser now registered and obtained a certificate of ownership of the shares; on the faith of the certificate he paid the amount of the call to the vendor; afterwards the company ascertained that it had made a mistake (another person in reality owned the shares) and it removed the purchaser's name from the register. The purchaser sued the company for the wrongful removal of his name; the company's defense was that he did not own the shares; the purchaser replied that upon the faith of the certificate he had changed his position. Now observe that the extent of the change was not the purchase of the shares and payment for them (that had taken place prior to the issue of the certificate), but payment of the calls only. Nevertheless the purchaser recovered the full value of the shares. Having changed his position, although slightly, the company was estopped from denying his title to the shares, and being estopped the company had no defense to the action for the wrongful removal of the name from the register.

*Grissler v. Powers*<sup>1</sup> is to the same effect: A mortgage for \$20,000 was purchased for \$16,000, and an assignment taken upon the faith of a representation by the mortgagor that the expressed consideration was the amount really due upon the mortgage. The assignee sold the mortgage to a sub-purchaser for its face value, and the mortgagor sold his equity of redemption. In reality nothing had been advanced upon the mortgage. Creditors of the mortgagor then claimed that although the mortgagor was estopped by his representation, it was only to the extent to which the representation had caused damage; that the assignee had only paid out \$16,000 upon the faith of the representation; that to that extent alone was there estoppel; and that their debtor (the mortgagor) was therefore entitled to the difference between that amount and the amount for which the assignee sold the mortgage, namely, \$4,000; which money they demanded from the assignee. It was held that the mortgagor was altogether estopped, and not merely to the extent to which money had been paid out. In this case it was said that

"the estoppel created by a false representation, acted upon, is commensurate with the thing represented, and operates to put the party entitled

<sup>1</sup>(1880) 81 N. Y. 87.

to the benefit of the estoppel in the same position as if the thing represented was true; and that when the representation is made on the sale of a chattel, or security, the remedy of the purchaser is not limited to a recovery, simply, of the money advanced, if the purchaser would receive a benefit beyond that, if the fact had been as represented."

The true way to look at this case is not to fix attention upon the amount of money paid out, but to ask, What did the assignee do upon the faith of the representation? The answer is that he bought the mortgage. If, then, you cut the mortgage down from \$20,000 to \$16,000 you damage him to that extent.<sup>1</sup>

In connection with this case Mr. Bigelow says:

"The fact should be remembered that this estoppel by conduct, when fully made out, operates by nature (that is whenever it can so operate) like all other estoppels, specifically; it gives to the party entitled the rights he would have against the one estopped supposing the representation true."<sup>2</sup>

Sir Frederick Pollock in his work on Torts<sup>3</sup> expressed the opinion that, with reference to "certain cases of fraud, . . . the Court of Chancery . . . would award pecuniary compensation, not in the name of damages, indeed, but by way of restitution or 'making the representation good,'" and adds:

"Since the Judicature Acts it does not appear to be material whether the relief administered, in such a case, be called damages or restitution, unless indeed it were contended in such a case that (according to the rule of damages as regards injuries to property) the plaintiff was entitled, not to be restored to his former position, or to have his just expectation fulfilled, but only to recover the amount by which he is actually the worse for the defendant's wrong doing. Any contention of that kind would, no doubt, be effectually excluded by the authorities in equity; but even without them it would scarcely be a hopeful one."

Notwithstanding these opinions there seem to be various reasons for believing that the principle proceeded upon is open to discussion, and, at the least, to qualification. Observe that the action is really founded upon misrepresentation; and that the verdict is really in damages for that misrepresentation—although well hidden under other appearance. Why, then, should the damages be assessed upon a principle different from that acted upon in deceit, where also the foundation is misrepresentation? The following authorities, moreover, are not consistent with those just cited.

(1886) *Seton v. Lafone*.<sup>4</sup> A wharfinger, believing that he held certain goods, wrote a letter to a broker whose name had been connected with them, for storage rent; upon the faith of

<sup>1</sup> And see *Fall River v. Buffinton* (1867), 97 Mass. 498.

<sup>2</sup> Pollock on Torts (5th ed.), 187.

<sup>3</sup> 18 Q. B. D. 139; 19 Q. B. D. 63; 56

<sup>4</sup> On Estoppel (5th ed.), 651.

L. J. Q. B. 415.

this letter the broker purchased, for a trifle, the warrants which the wharfinger had issued; the wharfinger then ascertained that he had not the goods; and the broker sued for them. The parties had fixed the damages, but the court intimated that those recoverable were probably not the value of the goods, but the amount disbursed by the broker.

Lord Lyndhurst, in *Hume v. Bolland*,<sup>1</sup> said:

"If your situation is not altered you cannot maintain an action. If it is altered, must not the amount of damages to be recovered depend upon the extent to which it is altered?"

In Smith's Leading Cases is the following:<sup>2</sup>

"It is suggested that the truly equitable mode of dealing with such cases would be to ascertain, where practicable, the amount of actual damnification sustained in consequence of the representation relied on, and to this extent only to give relief."

In some cases other doctrine would work injustice. For example, in *Re Romford*<sup>3</sup> upon the faith of certain representations of a company as to the validity of its debentures, money was loaned upon a deposit of some of them. The lender, in suing upon the debentures, contended that, the company being estopped, he was entitled to recover their face value; but he was awarded the amount of his advances only. Observe that if the lender had recovered more than his debt, the excess would have gone into the borrower's pocket. But that would have been inequitable, for the company, upon the facts, was not estopped as against the borrower. If estoppel were a mere rule of evidence, and had been applied in this case to the exclusion of the facts, the borrower would have unjustly got the advantage of the estoppel.

Consider the following case: Shares in a company are transferred by forgery; the shareholder, after becoming aware of the forgery, omits to notify the company; the company pays dividends to the transferee, but is not otherwise damnified; afterwards the shareholder notifies the company of the forgery. The legal situation, now, is this: The true owner is entitled to have the shares restored to his name in the shareholders' register;<sup>4</sup> he is entitled to future dividends; but he cannot require the company to pay a second time the dividends already paid

<sup>1</sup> (1833) 1 Cr. & M. 138.

<sup>2</sup> 8th ed. 912. Omitted from 10th ed.

<sup>3</sup> (1838) 24 Ch. D. 85; 52 L. J. Ch. 729. And see *Smith v. Slavin* (1893), 69 Hun, 811; 23 N. Y. Supp. 568.

<sup>4</sup> Unless, indeed, by his inactivity the company has lost an opportunity to indemnify itself by proceedings against the forger. See ch. XI, sub-title "Lulling to rest."

to the assignee, for as to these he is estopped by his inaction from asserting title to them.<sup>1</sup> If, however, estoppel were a matter of evidence merely, the true owner would lose not only the past dividends, but the shares themselves; for his inactivity, while dividends were being paid, would constitute an estoppel as against his title, and thus exclude all evidence of it.

There is another class of cases which illustrates the necessity for admission of the evidence as to the estoppel; namely, that class of cases in which, although there has been a misrepresentation and consequent estoppel, yet the misrepresentation has, as it were, been withdrawn before all the damage has occurred. Evidence therefore must be given not only of the misrepresentation, but of its withdrawal. The law is clearly stated by Williams, J.:

"I think there is nothing to prevent the party who made the representation from afterwards saying, 'I was mistaken in the representation I made to you, and so far as you have not acted upon the faith of it, I retract it, and require you so to act as if the representation had never been made.'"<sup>2</sup>

For example, a landlord represents that the rent is payable to another person; the landlord would be bound to the extent to which the tenant had paid, or become bound to pay, rent to the other person, but not in respect of rent as to which the tenant had not changed his position.<sup>3</sup> So if a person represent to a sheriff that he is the defendant against whom the sheriff has a warrant, and is consequently arrested, he may be estopped from suing for the arrest; but the sheriff could not justify the detention of such person after notice that he was not in reality the defendant.<sup>4</sup> So, too, it is said that if a patentee sells certain of his patent rights he may be estopped to deny the validity of the patent in an action against him for breach of agreement, but, upon the assessment of his vendee's damages, he may show that, notwithstanding the patent, other persons have the right to manufacture and sell.<sup>5</sup>

#### PARTIES AND PRIVIES.

Further complication of the subject in hand arises from the statement (above quoted) that "estoppel has no effect upon the

<sup>1</sup> *Davis v. Bank of England* (1824),

<sup>2</sup> *Bing*, 398.

<sup>3</sup> *White v. Greenish* (1861), 11 C. B.

N. S. 302.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Dunston v. Paterson* (1857), 2 C. B. N. S. 495; 26 L. J. C. P. 267.

<sup>6</sup> *Jackson v. Allen* (1870), 120 Mass.

64.

real nature of the transaction." Suppose that I purchase a horse from a man who has no title while the true owner stands by. In such case, as is well known, the true owner is estopped from setting up his title as against me.

I. Suppose, however, that the true owner subsequently sells the horse to a third person, is that person estopped as against me?

II. Or suppose that subsequently a creditor of the true owner obtains a judgment against him, and the sheriff seizes and sells the horse under that judgment, is the purchaser estopped as against me?

III. Or suppose that after my purchase I resell, is the true owner estopped as against my vendee?

#### I. DOES ESTOPPEL BIND PURCHASERS FROM THE ESTOPPEL-DENIER?

In considering the first two of these cases a distinction must, at the outset, be made. The conduct of the true owner may be such as to justify the inference that he was a party to the sale. In such case no question of estoppel arises—the purchaser, of course, takes a good title. The cases we have to deal with are those in which no such inference can be made—cases in which the purchaser has no title, and can defend his possession upon the estoppel only.

*Parties and Privies.*—The rule usually accepted for the cases in hand is that "estoppels are binding upon parties and privies."<sup>1</sup> If this be a sufficient rule we have only to inquire, Who are privies? and the answer to this question being (as one would think) simple enough, there ought to be no difficulty in solving all such questions. Let us see.

Lord Mansfield, in the leading case of *Taylor v. Needham*,<sup>2</sup> said:

"He who takes an estate under a deed is privy in estate, and therefore never can be in a better situation than he from whom he takes it."

And in later times Mr. Tiedeman declares that estoppel "can only operate upon, and be claimed by, parties to the transaction in which the misrepresentation or concealment was made and their privies, whether by blood, by estate or by contract."<sup>3</sup>

<sup>1</sup> See *Richards v. Johnston* (1859), 4 H. & N. 603; 29 L. J. Ex. 322; *Richards v. Jenkins* (1887), 13 Q. B. D. 451; 56 L. J. Q. B. 293; *Welland v. Hathaway* (1832), 3 Wend. (N. Y.) 480; *Union v. Wilmot* (1883), 94 N. Y. 228.

The text-writers proceed in the same way. *Bigelow on Estoppel* (5th ed.), ch. 8, 512, 597; *Everest & Strode on Estoppel*, 52.

<sup>2</sup> (1810) 2 Taunt. 283.

<sup>3</sup> On Equity Jurisp., § 114.

Mr. Bigelow, however, in his work on Estoppel says that "it does not in modern times constitute a case of privity, for the purposes of estoppel, to show that one man holds a conveyance from another."<sup>1</sup>

And again he says:<sup>2</sup>

"By analogy to the position heretofore taken concerning the relation of grantor and grantee in conveyances of real estate, it would seem that a purchaser of goods is not a privy in estoppel, or otherwise, with his vendor, so as to be affected by an estoppel *in pais* resting on the vendor in respect of the goods. Thus if a man stand by and allow his goods to be sold as the goods of another to one who does not take possession, and the actual owner afterwards sells the same to another person for value without notice of the previous transaction, the latter would be entitled to the goods as against the first purchaser."

The careful wording of Mr. Bigelow's illustration implies that if the second purchaser had notice, or had not given value, he would not "be entitled to the goods as against the first purchaser." But this result is contrary to the principle illustrated, which puts all cases (notice or value or none) in the same category, and says, generally, that "a purchaser of goods is not a privy in estate or otherwise with his vendor."

Mr. Hermann exhibits the same incongruity — persons who claim under an estoppel-denier are privies, and therefore estopped, but not if they had no notice. At section 793 of his work on Estoppel he says:

"An estoppel embraces in its conclusive effect parties and privies, and estops all who claim under the person originally barred. Thus, the buyer of a chattel was held to be within the bar of an estoppel *in pais* growing out of the acts and declarations of the vendor. And the rule is the same in regard to an estate in land; but as the interest conferred by an estoppel of this description is, where real estate is involved, essentially equitable, subsequent purchasers will not be bound without notice."

The contradiction is here shaded by the interposition of an alleged difference between personalty and realty. But it is surely impossible to say that "an estoppel of this description is, where real estate is involved, essentially equitable," and that it has some other character when personalty is in question. To the same effect as these text-writers are some of the cases in which it is boldly said that estoppels bind "those in privity with him, unless purchasers for value without notice."<sup>3</sup>

<sup>1</sup>5th ed. 345; and see p. 422. Everest & Strode on Estoppel, p. 53, do not agree with Mr. Bigelow. They say: "Lord Coke classes privies under the three heads: 1. Privies in blood; 2. Privies in law; and 3. Privies by estate. But as regards estoppel, the same doctrine applies to each class, viz, that one who

claims through another is, to the extent of his claim, subject, and able to take advantage of all estoppels affecting the person through whom he claims."

<sup>2</sup>Id., p. 609.

<sup>3</sup>Thistle v. Buford (1872), 50 Mo. 278.



These quotations leave the investigator in much perplexity. Estoppels bind parties and privies; a privy formerly was one who took an estate from another; but in modern times, and with reference to estoppel, one who takes an estate from another is or is not in privity according as he is or is not a purchaser for value without notice. This has not a very satisfactory or convincing appearance. It seems to indicate that any question of privity may be dispensed with; and that attention should be directed to "purchaser for value without notice."

The familiar attempt to make old rules fit new lines of cases is here very apparent. Estoppel by misrepresentation was not thought of when the rule as to parties and privies was formulated, and it does not suit such sort of estoppel. For confirmation of this statement one has not vainly to endeavor to apply it to estoppel by misrepresentation, but merely to read it. It was as follows:<sup>1</sup>

"Every estoppel ought to be *reciprocal*, that is, to bind both parties; and *this is the reason* that regularly a stranger shall neither take advantage of or be bound by the estoppel; privies in blood, as the heir; privies in estate, as the feoffee, lessee, etc.; privies in law . . . shall be bound and take advantage of estoppels."

But estoppel by misrepresentation is essentially and necessarily unilateral (cannot be reciprocal);<sup>2</sup> and we thus see that the reason why estoppels should bind parties and privies does not and cannot apply to estoppel by misrepresentation.<sup>3</sup>

If for any reason, then, we are to apply the rule, that estoppels bind parties and privies, to estoppel by misrepresentation, it will be to solve the useless question "Who are privies?" rather than, by knowing the answer to that question, therefrom to argue the existence of estoppel. For no one would guess that while a purchaser without value, or with notice, is in privity with his vendor, yet a purchaser for value and without

<sup>1</sup> Coke on Lit., L. 3, c. 12, § 667. And see Com. Dig., Estop. B.; 10 Vin. Ab. 422.

<sup>2</sup>The old language, however,—"*estoppels must ordinarily be mutual*"—is still sometimes employed with reference to estoppel by misrepresentation. See Hermann on Estoppel, § 793; Wright v. Hazen (1852), 24 Vt. 143.

<sup>3</sup>The rule as to parties and privies

has, with reference to estoppel by judgment, been held to include, not merely the actual parties to the suit and their representatives, but other persons in the same interest who have stood by while the fight proceeded, ready to take advantage of the result had it been favorable to them. Re Lart Wilkinson v. Blades (1896), 2 Ch. 788; 65 L. J. Ch. 846.

notice is not, did we not see that in the former he ought to be estopped, and in the latter he should not. In fact we are arguing not from a rule *ubi privity, ibi estoppel*; but from *ubi estoppel, ibi privity*; which leaves us very much in the predicament of the proverbial searcher for the hoe and the shovel.<sup>1</sup>

*Method of Solution.*—The only alternative seems to be the abandonment of the rule of privity as an aid to the solution of the question. And in truth nothing is lost by its abandonment. Start from this, that only one of the competing parties can, as a matter of fact and law, have the title; then ask, Is there any reason why it should be taken away from him? and the solution will come without reference to privity.

An owner stands by while I purchase his property; he has the title yet (I have not got it); but he is estopped as against me from setting it up; the true owner sells to another; is this second purchaser "bound by the estoppel?" To this question the answer may appear to be uncertain. Change the form of it; ask, Which purchaser is entitled to the property? and the difficulty disappears; for the mind at once reverts to a well-known rule which is sufficient for the solution of the problem.

*Rule for Priority.*—That rule is that the holder of a prior equitable right has priority over the purchaser of a subsequent estate (whether legal or equitable) without value, or with notice of the equitable right, but not as against a subsequent purchaser for value and without notice.<sup>2</sup>

*Equitable Right.*—The first question then must be whether an estoppel-asserter can be said to have an equitable right. If

<sup>1</sup> Mr. Bigelow makes this very clear (on Estoppel, 5th ed., 423): "Privity in estoppel, it cannot be too strongly laid down, is a different thing from privity in contract. The position of privity in contract is one of mutual relation, as between contractor and contractee, and cannot be supported without a consideration, actual or (as in deed) implied. . . . Privity in estoppel, on the other hand, is purely a relation of succession or subordination of rights, and is inconsistent with consideration, or at least independent of it. The heir is the type of a privity in the law of

estoppel. He is bound because he takes without value. It is right that he should be bound; no injustice is done him." With respect to the present writer suggests that first ascertaining upon general principles whether a third person "should be bound" by the estoppel, and then declaring that such third person is for that reason a privity, is an inverted and valueless proceeding.

<sup>2</sup> See chs. XVIII, XIX, XX; and *Peavy v. Seigler* (1897), 48 S. C. 496; 26 S. E. R. 865; *Stone v. Georgia* (1899), 38 S. E. R. 861 (Ga).

he has, then the rule just mentioned applies to his case, and questions of privity are superfluous.

And first let us understand the distinction between the terms "equitable right" and "equitable estate." Omitting the adjectives I may say that I have a "right" to an "estate," which implies that I have not the estate, but only a right to get it. An "equitable right" then means a right to get an estate, enforceable in equity merely; while an "equitable estate" is something already in possession, although formerly recognized only by the court of chancery. For example, a mortgagee was induced by fraud to release his mortgage; the mortgagor afterwards made equitable mortgages of the estate, and the first mortgagee upon discovery of the fraud claimed priority over the subsequent incumbrancers. In this case the first mortgagee had an equitable right, as against the mortgagor, to set aside the release, but, having no equitable estate or interest, he was postponed to the other mortgagees.<sup>1</sup>

*Estoppel an Equitable Right.*— There are many reasons which support the assertion that an estoppel-asserter has, at the least, an equity or equitable right.

1. Perusal of a subsequent chapter<sup>2</sup> will show that that which is in reality estoppel has heretofore been well hidden under the term "the equities." Not only can there be no objection to saying that a purchaser (claiming an estoppel) has "an equity" against an owner who stands by and allows his property to be sold by a third party, but the term has much propriety. It is a loose term, no doubt; but what we mean is that estoppel is sufficiently of the nature of "an equity" to be so classed when considering a question of priorities. In other words, if one were formulating a law of priorities, he would not distinguish between a right by estoppel and other rights known as "equities," and say that while "an equity" under certain circumstances might give priority, yet that a right by estoppel was not sufficiently of "an equity" to have that effect.

2. The words "an equity" are frequently used to express the right to an estoppel. For example, in the House of Lords there is the following:

"To raise an equity in such a case there must be a misrepresentation of existing facts, and not mere intention."<sup>3</sup>

<sup>1</sup> *Eyre v. Burmester* (1864), 4 D., J. & S. 495. 10 H. L. C. 90.

<sup>2</sup> Ch. XVIII.

<sup>3</sup> *Jorden v. Money* (1854), 5 H. L. C.

It is not surprising that the word should be so used, for, as is said in Bigelow on Estoppel:<sup>1</sup>

"The origin of the estoppel is to be found in the doctrine of equity that if a representation be made to another, who deals upon the faith of it, the former must make the representation good, if he knew or was bound to know it to be false."

And Lord Eldon speaks of estoppel as "a very old head of equity."<sup>2</sup>

3. There can be no question that if I contract to sell land to A. he has "an equity" against me. It might even be asserted that he has acquired an equitable estate—at all events *sub modo*, and as between the parties:

"When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract."<sup>3</sup>

"It was argued at the bar that the plaintiff was, in equity, invested with all the rights of Mrs. Small, upon the principle that, by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance. Before the contract is carried into effect the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property."<sup>4</sup>

Suppose, then, that instead of myself contracting to sell, I stand by while a third person (pretending to be the owner) sells and conveys the property. Has the purchaser "an equity" against me, or is the only fit language "I am estopped?" Observe the principle upon which the court of equity would originally have proceeded against me:

"The person making those representations shall, so far as the powers of a court of equity extend, be treated as if the representation were true, and shall be compelled to make them good."<sup>5</sup>

185; 23 L. J. Ch. 865. See also Higgs v. Northern (1869), L. R. 4 Ex. 387; 38 L. J. Ex. 233; Citizens v. First National (1873), L. R. 6 H. L. 352, 43 L. J. Ch. 269; Re Romford (1883), 24 Ch. D. 85; 53 L. J. Ch. 729; Chadwick v. Manning (1896), A. C. 231; 65 L. J. P. C. 42.

<sup>1</sup> 5th ed., p. 557.

<sup>2</sup> Evans v. Bicknell (1801), 6 Ves. 183. And see Keate v. Phillips (1881), 18 Ch. D. 560; 50 L. J. Ch. 664.

<sup>3</sup> Per Lord Westbury in Rose v. Watson (1864), 10 H. L. C. 678; 33 L. J. Ch. 395. And see Lysaght v. Edwards (1876), 2 Ch. D. 499; 43 L. J. Ch. 554; Tailby v. Official Receiver (1888), 13 App. Cas. 523; 58 L. J. Q.

B. 75; White v. Southend Hotel Co. (1897), 1 Ch. 767; 66 L. J. Ch. 387.

<sup>4</sup> Per Lord Cottenham in Tasker v. Small (1837), 3 My. & Cr. 70; 7 L. J. Ch. 19. And see Re Carpenter (1854), Kay, 418; Re Cuming (1869), L. R. 5 Ch. 72; Re Colling (1886), 32 Ch. D. 333; 55 L. J. Ch. 486; Canadian P. Ry. v. Burnett (1889), 5 Man. 426; Hill v. Cumberland (1868), 59 Pa. St. 474.

<sup>5</sup> Per Lord Selborne in Citizens' Bank v. First Nat. Bank (1873), L. R. 6 H. L. 390; 43 L. J. Ch. 269. And see Favill v. Roberts (1855), 50 N. Y. 222; and the discussion of the subject in ch. XVI.

Note now the very close parallel between contract and estoppel. In contract, equity regards the estate as "transferred by that contract." In estoppel, the representation is treated as if it were true—that is, as if the estate had been transferred. In both cases the doctrines are peculiar to courts of equity. In contract, the estate passes—*sub modo* no doubt, and only as between the parties. In estoppel, the same thing may be said. In contract, a conveyance in accordance with its terms may be enforced. In estoppel, the by-stander shall be compelled to make the misrepresentation good—that is, to execute a conveyance. In neither is there an actual transfer. In both a transfer will be directed. In view of all this, is it possible to say that contract will give rise to "an equity," but that estoppel will not? or that the rights acquired by estoppel are less complete than those acquired by contract?

If there is to be a distinction between contract and estoppel in this respect, the results should be reversed. In contract, there is no pretense that the estate has passed,—there is a mere agreement to pass it; and it is the court, and not the parties, that proclaims that it has already passed. In estoppel, on the other hand, the parties to the transaction intend and stipulate for the passing of the estate—the purchaser believes that the transaction is completed and closed, that he has in fact and in reality got the estate; and the by-stander is to be "treated as if the representation were true." There is, therefore, in estoppel stronger reason than there is in contract why the court should declare the existence of an equity to the thing purchased.

*The Question Answered.*—We may take it, then, that the effect of an estoppel is to give the estoppel-asserter "an equity," and further, that it passes the estate, but *sub modo* only and merely between the parties. And we are now in a position to make reply to our question: "An owner stands by while I purchase his property; he has the title yet (I have not got it); but he is estopped as against me from setting it up; the true owner sells to another; is this second purchaser bound by the estoppel?"

We reply that the data are insufficient and that the question is erroneous. For explanation we add: The first purchaser has an equity against the vendor capable of enforcement against

him. Whether that equity is enforceable against the second purchaser (who has the title) depends not upon any question of estoppel binding parties and privies, but upon this merely (and according to familiar rule): Was the second a purchaser for value without notice of the prior equity?

"The result, therefore, in solid sense and justice, is this: the value of an equity, while it subsists as an equity, can only be fixed by the accident of notice."<sup>1</sup>

Mr. Bigelow's statement, then, that "a purchaser of goods is not a privy in estoppel or otherwise with his vendor, so as to be affected by an estoppel *in pais* resting upon the vendor in respect of the goods," is not correct — that is, if "privy" is to determine priority. Nor is the affirmative of that proposition correct. For the truth is that the purchaser is, or is not, affected by his vendor's estoppel according to circumstances.

"The rule being that the privies of a grantor who is estopped are not estopped if they are subsequent purchasers for value, and have no notice that he is estopped."<sup>2</sup>

*Applications.*— Let us now apply our principles and method to the case of *Keate v. Phillips*.<sup>3</sup> Its somewhat complicated facts may be (sufficiently for our purposes) summarized as follows: The owner of an equity of redemption stood by while a confederate, claiming as tenant under a fictitious lease, mortgaged his apparent estate to one who made no inquiry into the title; the confederate afterwards got in the legal title (he is now estopped as against the mortgagee, or in other words the mortgagee has an equity against him), and subsequently he (the confederate) deposited the deeds with a banker (who had no notice of the prior mortgage) as security for a loan. Observe that the competing claims (of the mortgagee and banker) are both equitable; that if the equities (*i. e.*, the merits) are equal, the first in time should prevail; that the mortgage was only created, if at all, by estoppel of the owner of the land;

<sup>1</sup> Per Lord Henley in *Stanhope v. Verney* (1761), 2 Eden, 85. And see *MacKreth v. Symmons* (1808), 15 Ves. 328; *International v. Bowen* (1875), 80 Ill. 541.

<sup>2</sup> *Rutz v. Kehr* (1890), 143 Ill. 538; 25 N. E. R. 958; 29 id. 558; *McCravey v. Remson* (1851), 19 Ala. 430; *Short-hard v. Sutton* (1878), 68 Me. 575. See also *Tied. Real Prop.*, § 731; 3 Wash. Real Prop. 91. *Clark v. Kirby* (1898), 18 Utah, 258; 55 Pac. R. 372, may be cited for the proposition that purchasers from an estoppel-denier will be bound even without notice of the estoppel. Possession of the estoppel-asserter may, however, in that case, have been thought to constitute notice; but the judgment is not put upon that ground.

<sup>3</sup> (1831) 18 Ch. D. 560; 50 L. J. Ch. 664.

and that something may be said in depreciation of the mortgagee's merits, for he made no inquiry as to the title. How, then, are the rival claims of the mortgagee and banker to be settled?

Observe that the mortgagee (the first in time) has an equity merely as against the true owner (he has no estate, for he claims through one who had none); and that the banker has an equitable estate. We say then that the banker *has* the estate in dispute; and (following our method) we ask, Is there any reason for taking it from him? And none can be assigned, for his merits are at least equal to those of the mortgagee (probably superior, for the mortgagee took no precaution and made no inquiry as to title) — he is a purchaser of an estate for value without notice of an equity. He is therefore entitled to priority.

This seems to be simple enough. But when the word “estoppel” instead of “an equity” is used, and when the other question is put: Whether the second purchaser or the estate is “bound by the estoppel?” confusion ensues. For example, in the case in hand we have the following in the judgment of Bacon, V. C.:

“It cannot be said that because a man commits a misdemeanor with relation to a certain estate that the estate is thereby forever bound. No case has been quoted that goes anything like that length. The equitable right and the equitable estate are distinguished in some of the cases which have been mentioned. *Stanhope v. Earl Verney* (2 Eden, 81), an old case, but a case decided by one of the most eminent judges that this jurisdiction has possessed (Lord Chancellor Northington, in June, 1781), clearly makes a distinction between an equitable right, a personal obligation, and a right which attaches itself to the land, or to the substance of the thing which is the subject of the contract or transaction. I have heard no such case mentioned.”

“Admitting, as I have no reason to doubt, that Dimsdale was a malefactor, and that he had committed a gross fraud and made use of Tait as an instrument, and that he had imposed upon the plaintiff and upon Phillips, what of that? *How does that touch the estate?* It would be misconduct for which he could be punished, and a wrong which could be redressed against him personally; but I am at a loss to see how it touches the estate. This brings it close to the doctrine of estoppel which has been argued at such length and with great ability.”

“There are many observations in the cases that have been cited to me, some of them little better than commonplaces, others highly interesting, most of them curious and entitled to great attention; but *I have never heard that, because a man commits a personal wrong, that he therefore deprives himself of all right of dealing with property which is his in favor of a subsequent purchaser.* Now that is the whole case before me. . . . It cannot be said that there is a representation which so deprives the owner of the equity of redemption, that is all that Dimsdale had, as he cannot afterwards deal with that for value to a person who pays him or lends him money on the security of it.”<sup>1</sup>

<sup>1</sup> *Keate v. Phillips* (1881), 18 Ch. D. 578; 50 L. J. Ch. 669.

The last few words are significant. They partially reveal the real point of the case, and qualify all that has been said. If a man "commits a personal wrong" (such as that in hand), does he "deprive himself of all right of dealing with the property . . . in favor of a subsequent purchaser?" And the answer is not a categorical negative, as the judgment assumes, but this: that it depends upon circumstances—depends upon whether the purchaser is or is not one for value without notice. Suppose that the subsequent purchaser, in the case in hand, had known all the facts—had known that the true owner, through a confederate, had induced the first mortgagee to lend money upon a fictitious lease of the property, and knew therefore that the first mortgagee had an equity against the true owner—it would have been impossible for him (the subsequent purchaser) to obtain priority. In such case it might be said (in opposition to the conclusion arrived at in the judgment) that the true owner *had* deprived "himself of all right of dealing with the property;" but it would, of course, be better to say that the purchaser of a subsequent estate has no priority over a prior equity of which he has notice.

Reference to another case, in which it was said that estoppel did operate as against those claiming under the estoppel-denier, will be useful. A land-owner handed to a lady, as security for a loan, a package which he untruly represented to contain the title-deeds; afterwards he deposited the deeds with another person who had no notice of the first transaction. In such a case Lord Selborne said:<sup>1</sup>

"As between Edward Mucklestone [the land-owner], who signed that letter, and the representative of Mrs. Shaw [the package holder], to whom it was addressed, I have no hesitation whatever in holding that, whatever were the deeds in Mrs. Shaw's hands, a good equitable security on the Pennybank estate was created as between those persons, which Edward Mucklestone and those claiming under him would be estopped from at any time whatever disputing. I will even go to the length of saying that if the deeds had not been truly deeds relating to the Pennybank estate at all, but stated by him in writing to be so, still the same security would have been effected."

The contest here (as Lord Selborne puts it) is between two equitable estates. Applying the ordinary principles of prior-

<sup>1</sup> *Dixon v. Mucklestone* (1872), L. R. 8 Ch. 159; 42 L. J. Ch. 210. See also *De G. & J. 1*; 27 L. J. Ch. 220; *Hunt v. Elmes* (1860), 3 D., F. & J. 578; 20 L. J. Ch. 255; *Re Ingham* (1893), 1 Ch. 352; 62 L. J. Ch. 100; *Colyer v. Finch* (1856), 5 H. L. C. 905; 26 L. J. Ch. 65. *Sharp v. Foy* (1868), L. R. 4 Ch. 85. The facts cannot be understood without reference to 19 L. T. N. S. 541. Compare *Roberts v. Croft* (1857), 2



ity, we would say that the case was simple — the first in time has of course priority. Introducing estoppel, we have to say that the depositor of the deeds was estopped in favor of the first purchaser, and (in opposition to other *dicta*) that “those claiming under him” are likewise estopped.

Comparing the two cases, then, we see that it is impossible to affirm, generally, that estoppel does or does not deprive the estoppel-denier of “the right of dealing with the property;” or that “those claiming under him” are bound by his estoppel. Everything depends upon (1) whether the competitors are equal in position with reference to the estate, and (2) whether the second purchaser gave value or had notice. In fact it becomes apparent that under the word “estoppel” we are concealing “an equity;” and that when we use that term, and apply the ordinary principles, all difficulty disappears.

*An Equity or an Equitable Estate.*—For the sake of clearness in the preceding exposition, estoppel has been treated as equivalent to “an equity,” merely; but there is much to be said in favor of the view that estoppel by misrepresentation may frequently pass an estate. The point is somewhat outside the scope of the present work and can be touched upon but slightly. The main objection to such view is that some sort of conveyance is essentially necessary for the transfer of land. But there are several answers to that:

1. Estoppel by deed is usually thought to pass an estate, although the very point is that the deed itself does not convey it.<sup>1</sup> “Inurement” is the word which seems to help us over the difficulty — the title will inure

“by direct operation of law with the same effect to all intents and purposes as if such estate had originally passed by the deed.”<sup>2</sup>

2. In Smith's Leading Cases it is strongly maintained that covenants in a deed run with the land, although the title passes not by the deed but by estoppel.<sup>3</sup>

<sup>1</sup> “Estoppels which run with the land, or work thereon, are no mere conclusions; they pass estates and constitute title; they are muniments of title, assuring it to the purchaser.” *Favil v. Roberts* (1855), 50 N. Y. 222.

<sup>2</sup> *Rawle on Covenants for Title* (5th ed.), § 248 (citing a cloud of cases); *Kerr on Real Property*, § 2275; *Maupin on Marketable Titles*, § 213;

*Am. & Eng. Ency.* (2d ed.), vol. 11, p. 418, n. 1; *Boulton v. Hamilton* (1864), 15 U. C. C. P. 125. There is legislation in some of the states upon the subject. See *Am. & Eng. Ency.* (2d ed.), vol. 11, p. 419.

<sup>3</sup> See notes to *Spencer's Case* (10th ed.), vol. 1, p. 52. And see *Trust & Loan Co. v. Ruttan* (1877), 1 S. C. Can. 584.

3. Rights in land may be acquired by dedication, and so without conveyance.

4. A "parliamentary title" is obtained by protracted adverse possession without conveyance.

5. A deposit of title deeds creates an equitable estate, and not a right merely.<sup>1</sup>

6. Recovery in trover and satisfaction of the judgment passes title to goods without conveyance.

7. The United States Supreme Court has held that a title resting upon estoppel by misrepresentation is sufficient to support an action of ejectment.<sup>2</sup> And in a later case the same court, after referring to the effect of estoppel by deed as a transfer of the estate, said:

"Why may not a like transfer be held to have been made in this case? The reason given for the rule of inurement and estoppel by virtue of conveyances is that it avoids circuitry of action. Does not the same consideration apply with equal force in case of estoppel *in pais*? Why is it necessary to go into equity in one case, and not in the other? It has never been held that the statute of frauds applies to cases of inurement, and it has been conceded that it does not affect cases of dedication. Where is the difference in principle in this respect between those cases and the one before us?"<sup>3</sup>

Whatever difference there may be as to the usual effect of estoppel by deed passing a subsequently acquired estate,<sup>4</sup> it appears to be conceded that in the case of leases estoppel does pass the estate.<sup>5</sup> The explanation of this is said to be the fact of the possession of the lessee; possession being "notice of an interest, the nature or extent of which a purchaser is bound to ascertain."<sup>6</sup> But this reasoning is inverted, for it is this: Because possession gives notice, therefore a lease passes an estate by estoppel; and it is a rule, therefore, for finding out, upon consideration of the rights of the parties, when the estate

<sup>1</sup> *Keys v. Williams* (1838), 3 Y. & C. Ex. 55; *Hockley v. Bantock* (1826), 1 Russ. 141. Such a mortgage may be foreclosed. *James v. James* (1873), L. R. 16 Eq. 153; 43 L. J. Ch. 386; *Backhouse v. Charlton* (1878), 8 Ch. D. 444; *Lees v. Fisher* (1882), 22 Ch. D. 283.

<sup>2</sup> *Stoddard v. Chambers* (1844), 43 U. S. 316.

<sup>3</sup> *Diokerson v. Colgrove* (1879), 100 U. S. 533. And see *Kirk v. Hamilton* (1880), 103 U. S. 68; *Cleveland v. Cleveland* (1899), 93 Fed. R. 123.

<sup>4</sup> See discussion in *Bigelow on Estoppel* (5th ed.), 384 ff.; *Rawle on Covenants for Title* (4th ed.), 404 ff.; *Boulter v. Hamilton* (1864), 15 U. C. C. P. 125; *Featherstone v. McDonnell* (1865), id. 162; *Baxter v. Bradbury* (1841), 20 Me. 260; *Bank of Utica v. Mersereau* (1848), 3 Barb. (N. Y.) 523.

<sup>5</sup> *Bigelow on Estoppel* (5th ed.), 420; *Trevivian v. Lawrence* (1706), 1 Salk. 276.

<sup>6</sup> *Bigelow on Estoppel* (5th ed.), 421.

passes; instead of one by which to ascertain the rights of the parties.

Probably upon close investigation it will be found that the difference between estoppel by misrepresentation and estoppel by deed is to be found merely in the fact that in the latter the subsequent purchasers have more frequently notice of the estoppel than in the former; and it has become usual, therefore, to say in the one case that the purchasers are bound, and in the other that they are not.

It may be found too that in some cases "an equity" may arise by estoppel and sometimes "an equitable estate." And it is hardly necessary to add that where estoppel has the effect of passing an estate, the same rules will apply to contracts for priority as in other cases in which estates are by other means transferred.

*Effect Under the Factors and Sale of Goods Acts.*—These statutes do not proceed upon any of the lines which have been discussed. They provide that under certain circumstances of ostensible ownership and ostensible agency an unauthorized disposition of goods is to have the same effect "as if such person were the owner of the goods," or "as if he were expressly authorized by the owner of the goods to make the same."<sup>1</sup> The effect of these provisions is not only to estop the true owner from setting up his title as against an innocent purchaser, but to pass the legal title to the purchaser. In such cases a subsequent purchaser from the true owner, even if he had no notice of the prior disposition, would have no claim to the goods; for he has not, as in cases outside the statute, the legal or in fact any title to them.

## II. DOES ESTOPPEL BIND CREDITORS OF THE ESTOPPEL-DENIER ?

The solution above offered cannot, unfortunately, be said to be quite in harmony with the cases with which we have now to deal involving the following question: Suppose that the owner has become estopped (by standing by while his property is sold by another) from setting up his title as against the pur-

<sup>1</sup> Factors Act, 52 & 53 Vic. (Imp.), 57 Vic. (Imp.), ch. 71, § 25 (1); 59 Vic. ch. 45, §§ 2 (1), 7, 8; Rev. St. Ont., ch. (Man.), ch. 25, § 24 (1).  
150, §§ 5, 11; Sale of Goods Act, 56 &

chaser; that a creditor obtains judgment against the owner; and that the sheriff sells the property under execution against him,— is the sheriff's purchaser of the owner's interest likewise estopped as against the first purchaser?

*Privty.*— Working along the line of privty we would find it hard to give an answer, and might possibly proceed as in the cases already considered; that is, ascertain upon general principles who ought to have priority, and then, in accordance with the conclusion so arrived at, declare that the sheriff's purchaser was, or was not, in privty with the vendor, and so bound by the estoppel.

For the existence of privty in such a case (if we were to investigate this first) one might say that a purchaser at a sheriff's sale gets that which the debtor had, subject to all equities of every sort; that he can be in no better position than the debtor; that privty of estate exists, not only when the grantor himself conveys the estate, but also when under legal authority it is conveyed by some one else for him; <sup>1</sup> that therefore the sheriff's purchaser is in privty with the debtor; and that he is for that reason bound by the estoppel which affected him whose estate he has acquired. Plainly, if we are going to come to the conclusion that the sheriff's purchaser is estopped, and argue that he is so because of his privty, we can make something of a case.<sup>2</sup>

*No Privty.*— Against the existence of privty in such a case (if we are going to say that the sheriff's purchaser is not in privty with the vendor, and consequently is not estopped), we may reason somewhat in this fashion:

"The legal relation between debtor and creditor is one of antagonism rather than of confidence or mutual dependence."<sup>3</sup> "The *fl. fa.* directs the sheriff to seize the goods of the debtor. The sheriff is a stranger to the debtor, and the only question for him is, Are these the goods of the debtor or not?"<sup>4</sup> "If the execution creditor could for this purpose be said

<sup>1</sup> "He would have been estopped from setting up his own fraud; and as he would have been estopped, his trustee in bankruptcy, who is suing upon the relation between him and the defendant, is just as much estopped as he was." Per Brett, L. J., in *Harris v. Truman* (1882), 9 Q. B. D. 374; 51 L. J. Q. B. 333. And see *Re South Essex Estuary Co.* (1871), L. R. 11 Eq. 137; 40 L. J. Ch. 153; *Re Wheal Unity Co.* (1830), 15 Ch. D. 13; *Bloom-*

*enthal v. Ford* (1897), A. C. 156; 66 L. J. Ch. 253; *Wachusett, etc. v. Sioux City, etc.* (1894), 63 Fed. R. 366, 371.

<sup>2</sup> *Parker v. Crittenden* (1870), 37 Conn. 143; *International Bank v. Bowen* (1875), 80 Ill. 541.

<sup>3</sup> Per Woodward, J., *Water's Appeal* (1860), 35 Pa. St. 526.

<sup>4</sup> Per Martin, B., *Richards v. Johnston* (1859), 4 H. & N. 664; 28 L. J. Ex. 322.

to claim through, and under, the execution debtor, so as to be in privity with him, he might be estopped. But I do not think that he can be said so to claim; he claims through, and by, the law, as against the execution debtor, and not through, and under, him."<sup>1</sup>

Solution of the question in hand, by a discussion of the existence of privity, does not appear to promise great success.

*The Cases.*—Distinguishing among the authorities which proceed largely upon that line, we find that in England it is thought that there is no privity and no estoppel. In the former of the cases cited in the notes,<sup>2</sup> Martin, B., said:

"No authority has been cited to show that a judgment creditor is party, or privy, to the act of the judgment debtor."

The latter of the cases was one in which a bailee, being estopped to deny the title of his bailor, was held not to be upon that account estopped as against an execution creditor of the bailor. Lord Esher said:

"But even then there would be merely an estoppel between those parties, and such an estoppel would give the claimant no real title to, or interest in, the goods. Such an estoppel merely prevents the party who is estopped from saying, as against some other party, that the goods do not belong to such other party, though in fact they do belong to him; and it clearly takes effect as between parties and privies."

So also in Nebraska<sup>3</sup> the owner of a business, by representing that it belonged to his wife, induced persons to sell goods to the wife and to take a mortgage as security. Other persons (having no knowledge of the misrepresentation) sold goods to the husband, and afterwards issued attachments against him. *Held*, that the attaching creditors were not bound by the estoppel, and consequently took priority over the mortgage.

And in New York<sup>4</sup> an owner stood by while another mortgaged his estate; afterwards the owner's interest was sold under execution against him; and the purchaser under execution was held to be entitled. O'Brien, J., said:

"The rule that estoppel binds parties and their privies in estate and blood applies only when subsequent parties represent the rights and estate of the party who created the estoppel, and nothing more. It does not apply to a party who, in the process of transferring real estate, has acquired a better title than his predecessor had."

With respect, it may be said that this is reverting to the hoe-and-shovel process. For the question is whether the sheriff's purchaser did acquire "a better title than his predecessor

<sup>1</sup> Per Lord Esher, *Richards v. Jenkins* (1886), 18 Q. B. D. 451; 56 Q. B. 293.

<sup>2</sup> *Richards v. Johnston* (1839), 4 H. & N. 664; 28 L. J. Ex. 322; *Richards v. Jenkins* (1886), 18 Q. B. D. 451; 56 L. J. Q. B. 293.

<sup>3</sup> *Oberfelder v. Kavanagh* (1890), 29 Neb. 427; 45 N. W. R. 471.

<sup>4</sup> *Lyon v. Morgan* (1894), 143 N. Y. 509; 38 N. E. R. 901.

had." To ascertain that we must (following the method in *vogne*) first ascertain whether there was privity between these two persons. But the learned judge says that there was no privity because a better title did pass. The answer to the question in judgment is assumed in order to ascertain whether there is privity, instead of ascertaining whether there is privity in order to answer the question in judgment. Perhaps both methods are wrong.

Upon the other hand, in Connecticut, where the owner of a chattel was estopped by standing by while it was so sold, the purchaser was held to be entitled to maintain replevin for it as against attaching creditors of the owner.<sup>1</sup> The ground taken was the existence of privity of estate between the creditors and their debtor, the owner.

In Kentucky it is held

"that when the firm or the partners have done any act which precludes each and all its members from asserting their lien, or when from any other cause they are in a position in which they cannot assert it, that firm's creditors are equally unable to do so."<sup>2</sup>

A Pennsylvania case<sup>3</sup> has been cited for the proposition "that no privity exists between creditor and debtor."<sup>4</sup> That is strictly accurate, but must be carefully interpreted. In the case in question a vendor conveyed to a purchaser by a deed with general warranty and containing a receipt for the purchase-money. The money in reality was not paid, and the vendor took judgment against the purchaser for the amount. Other judgment creditors of the purchaser contended that the vendor was estopped by his deed from asserting that the money was not paid, and sought priority over his judgment. It was held that they could not set up the estoppel which their debtor might have set up. That seems to be clear enough.<sup>5</sup> The purchaser (possibly) might have defended the action of the vendor upon the technical ground that although he had not paid the money, yet that he held a receipt for it. But not having done so, it is hard to see how his other creditors, after the judgment had been obtained, could get any benefit from such a point.<sup>6</sup>

<sup>1</sup> *Parker v. Crittenden* (1870), 37 Conn. 148. And see *Kern v. Day* (1893), 45 La. Ann. 71; 12 S. R. 4.

<sup>2</sup> *Couchman v. Maupin* (1879), 78 Ky. 37.

<sup>3</sup> *Water's Appeal* (1860), 35 Pa. St. 523.

<sup>4</sup> *Bigelow on Estoppel* (5th ed.), 343.

<sup>5</sup> See also *Sunderlin v. Struthers* (1864), 47 Pa. St. 411.

<sup>6</sup> The case is one of a class to which *Heane v. Rogers* (1829), 9 B. & C. 577; 7 L. J. K. B. 283, belongs, although that is not always quite recognized.

*Ground of Error.*—To the present writer it has always appeared that much of the error encountered in the development of the law is attributable to an excess of deductive reasoning. That method is right enough, provided that by induction your major premise has been made perfectly secure. The certainties of yesterday; however, are the dubieties of to-day; and it behooves the lawyer (perhaps of all others), by frequent scrutiny, to keep himself free from formulas that have ceased to be true.

Had we never heard that estoppels bind parties and privies, there would, one would think, be little doubt that a sheriff's purchaser could occupy no better position than that of the execution debtor. But the old rule, formulated for totally different lines of cases, is appealed to as though it were a statute, and other principles are overridden that it may have full sway. The result, as one may imagine, has been unsatisfactory.

*True Position.*—The position is this: The owner who stands by continues (after his estoppel) to have the legal title in the property; but he has no equitable interest in it, or at all events no equitable right to it; upon the contrary, as between him and the other party, he can claim neither property nor possession. Subsequently, all his interest in the chattel is sold by the sheriff; and now it is said that the sheriff's purchaser has acquired not only the legal title which the debtor had, but also the beneficial, which he had not.

It is trite law that the sheriff can sell nothing but that which the debtor has. But it is argued that the debtor had, as a matter of fact, both the legal and the beneficial title; and was merely under a disability, personal to himself, to set it up—that, by virtue of an estoppel as against him, he was precluded from asserting his rights. Translate, however, "estoppel as

See *Richards v. Johnston* (1859), 4 H. & N. 668; 28 L. J. Ex. 322. Suppose that a defendant is sued upon a contract entered into upon his behalf by one who had no authority to make it, but who was held out by the defendant as having such authority. The defendant is now liable by estoppel. But it could hardly be contended that his other creditors could exclude the plaintiff from the debtor's estate upon the ground that there was in fact no agency, and that by the estoppel they, at all events, were not bound. Such cases are entirely distinct from those with which we have been dealing, viz., those which involve ownership of property. See also *Allan v. McTavish* (1883), 8 Ont. App. 440; *Young v. Ward* (1896), 24 Ont. App. 147.

against him" into "an equity in favor of the other party,"<sup>1</sup> and the reasoning disappears. For the position then in this: The debtor has the legal title to the property, but in equity he has no right whatever to it. So stated the difficulty is gone.

Suppose that instead of standing by while the chattel was being sold (as in the case under assumption) the owner had contracted that he would never question the validity of the sale. Here also the title would have remained in him, but he would be bound by his contract not to set it up, and the purchaser would have an equitable right to the property. If, afterwards, the sheriff sold the property under execution against the former owner, no beneficial interest would pass. And would the law be reasonable which provided that if the owner had induced the first purchaser to take the title by contracting that he would never question it, the result would be entirely different from what it would be if he had induced him to take the same property by misrepresentation, the legal effect of which is to preclude him from questioning it.

*Joint and Separate Creditors of Partners.*—A further difficulty is presented by such a case as this: R. is the proprietor of a business, and has certain creditors as such; to other creditors C. has been held out as a partner of R.; R.'s creditors claim that the assets are separate assets of R., and the other creditors claim that they are partnership assets of R. and C.

Upon the principle of parties and privies being bound by estoppel, and creditors not being in privity with their debtors, R.'s creditors have clearly the best of it, for the fact is that the assets are separate. In *Re Rowland & Crankshaw*,<sup>2</sup> however, Lord Cranworth arrived at a contrary conclusion. But the judgment is uninstructional, for the learned judge rested his decision on the argument that

"as C. suffered R. to trade in the name of the firm, any persons trading with him are entitled to say that R. and C. are the persons with whom they dealt, and the goods are joint goods."

They are so entitled, no doubt; but can they so say, as against persons who traded with R. alone upon a different representation (one according to the very fact), and who knew nothing of the misrepresentation upon which the joint creditors say that

<sup>1</sup> See, however, the Scotch law: *Ingils v. Robertson* (1898), A. C. 616; 67 L. J. P. C. 108.      <sup>2</sup> (1860) L. R. 1 Ch. 424.



they traded? If the joint creditors are entitled to say that they acted upon a representation of partnership and that the assets are therefore joint, why may not the separate creditor say that he acted upon the contrary representation and that therefore the assets are separate? The doctrine of "reputed ownership" would go far to settle the difficulty in cases of bankruptcy: The question then would be one of general repute, and would bind everybody. But Lord Cranworth distinctly said that "the question of reputed ownership has nothing to do with the case."

In a subsequent instance of somewhat similar character, *Ex parte Hayman*,<sup>1</sup> a business which really belonged to a father was so carried on that nine creditors out of eighty-two "deposed that they had . . . always treated the son . . . as being in partnership with the father." A separate creditor of the father desired to prove against the assets of the business as being the separate estate of the father, but he was unsuccessful. Bagallay, L. J., rested his judgment upon the principle of *Re Rowland & Crankshaw*. James, L. J., also approved of that case, but said that the principle of reputed ownership seemed to underlie it.<sup>2</sup> Thesiger, L. J., alone met the real question when he said:

"If the consequence that the stock-in-trade is to be held to be joint property, where there is an ostensible partnership, is merely an offshoot of the doctrine of reputed ownership, then I can well understand that, in such a case, the rights of the separate creditors should be debarred, and that they should not be entitled to prove in competition with the joint creditors. But if this result is supposed to flow from the doctrine of ostensible partnership *per se*, then I must say, for myself, that I cannot see why, in such a case, the rights of the separate creditors should be any less than the joint creditors. The law relating to ostensible partnership is founded on the doctrine of estoppel; and although the doctrine of estoppel might be perfectly good as between those who contract with the joint creditors themselves, I do not see why, in the event of bankruptcy, that estoppel should apply to the separate creditors, whose rights before bankruptcy stand very much in the same position as those of the joint creditors. On the one hand you have a joint creditor who had, before the bankruptcy, a right of action against his particular debtor; and a right, upon obtaining judgment in that action, to seize the property which was in fact separate estate. On the other hand you have joint creditors who are entitled to sue the two partners on the ground of the ostensible partnership, and who, in the event of their obtaining a judgment, would be entitled to seize the same property although separate estate. But when the bankruptcy arises, and there is to be an administration of the estate, it would seem to be just that the separate creditors should have a right against the estate which was in fact separate estate, and the joint creditors should have a right against the estate which was held out to them as joint estate."

This would no doubt be just, but it is unobtainable. For there is but one estate; and if the separate creditors are to

<sup>1</sup> (1878) 8 Ch. D. 25; 47 L. J. Bk. 54.

<sup>2</sup> It will be remembered, however, that Lord Cranworth said otherwise.

take it because it is "in fact separate estate," and the joint creditors are to take it because it "was held out to them as joint estate," there will not be as much left as usual for the assignee. The present writer suggests that it is impossible to exclude the separate creditors, for the estate is in fact separate,<sup>1</sup> and they have done nothing to preclude them from so saying. Upon the other hand, the joint creditors cannot be excluded. As a matter of fact they are not joint, but separate, creditors; having, in addition, a right by estoppel to hold some other person also liable if they so desire. They cannot be compelled to assert that they are joint creditors in order to oust them from participation in the assets.

In some instructive cases<sup>2</sup> in the United States the matter is put in this way: The right which partnership creditors have to priority over separate creditors in respect of partnership assets is founded upon the right of each partner to require partnership assets to be applied to partnership debts before any partner can participate; partnership creditors are subrogated to this partnership right, and so exclude the separate creditors from partnership assets; but this reasoning cannot, of course, apply where there is in reality only one partner, for in such case there is no partnership right to which creditors may be subrogated; therefore creditors of a partnership by estoppel only can have no right to exclude separate creditors. For example, if A. represents that B. is his partner, and thus misleads creditor No. 1, A. is of course estopped to deny the partnership; but creditor No. 2 (of A. alone) would of course be in no way estopped to deny it; and No. 2 would take the assets as separate, because, there being no real partnership, No. 1 can have no right by way of subrogation to exclude him.

No objection to this reasoning or its result can be made so far as it indicates that No. 1 cannot exclude No. 2. But the inference must not be drawn that No. 2 can therefore exclude No. 1; for, as has just been said, he is in fact a separate creditor also, and only by an estoppel, which he may or may not (as he pleases) set up, can he be said to be a partnership creditor.

*Reputed Ownership Clauses.*—Observe the effect of the reputed ownership clauses in relation to the parties and privies

<sup>1</sup> See *Meridian Nat. Bank v. McCon-* *Grabenheimer v. Rindskoff* (1885), 64  
*ica* (1894), 8 Ohio C. C. 442. *Tex.* 43.

<sup>2</sup> *Glenn v. Gill* (1852), 2 Md. 1;

rule. The act declares<sup>1</sup> that all goods "in the possession, order or disposition of the bankrupt in his trade, or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof," shall form part of "the property of the bankrupt, divisible amongst his creditors." This law proceeds upon a rough application of the principles of estoppel. The true owner of the goods has allowed the bankrupt to represent himself as the owner of the goods; upon the faith of this apparent ownership, credit has been given; and the true owner having assisted in the misrepresentation is estopped.<sup>2</sup> Upon the principles of estoppel, then, the true owner ought to be estopped.<sup>3</sup> But if estoppels bind only parties and privies, and if creditors are not in privity with their debtor, then any creditors of the true owner ought not to be estopped. The effect of the statute, nevertheless, is to estop such creditors equally with their debtor -- the true owner. Here then is a most important inroad upon the doctrine that estoppels bind only parties and privies; or else upon the holding that creditors are not in privity with their debtors; and will be some help, it is hoped, to the reconsideration of the decisions which enable a sheriff's purchaser to take property as to which the execution debtor had not a shade of equitable title that he himself could enforce.

In the absence of legislation it has been held in Massachusetts<sup>4</sup> that

"an assignment under the insolvent laws does not vest in the assignees property which has been put into the hands of the debtor for the fraudulent purpose of giving him a false credit, although some of the creditors may have been defrauded thereby:"

<sup>1</sup> 46 & 47 Vic. (Imp.), ch. 52, § 44 (3).

<sup>2</sup> See Robson on Bankruptcy (7th ed.), 513. In *Ex parte Hayman* (1876), 8 Ch. D. 23, 47 L. J. Bk. 54, James, L. J., said: "The doctrine of reputed ownership is only an application of the common principle that people must make good their representations." In the text it is said that the statement "proceeds upon a rough application of the principles of estoppel." It is not always true that credit has been given upon the faith of the apparent ownership. For es-

toppel, strictly, there must be action by the estoppel-asserter upon the faith of the apparent ownership. There could be no estoppel without such action but for the statute.

<sup>3</sup> *Ex parte Ford* (1876), 1 Ch. D. 521; 45 L. J. Bk. 96. The case shows that the determining factor, here as elsewhere, is whether the true owner had notice of what was being done. And see *Re Clark* (1894), 2 Q. B. 393; 63 L. J. Q. B. 806.

<sup>4</sup> *Audenried v. Betteley* (1863), 81 Mass. 392.

and that that is the case even where the local law provided that

"the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could lawfully have sold, assigned or conveyed, or which might have been taken on execution upon a judgment against him, at the time of the first publication."<sup>1</sup>

*Bona Fide and Fraudulent Debentures.*—The subject under consideration has arisen in still another form. Suppose that a company, having executed certain debentures, so deals with them that one of the directors is enabled fraudulently to dispose of them for his own use, under such circumstances as would estop the company from disputing their validity in the hands of a *bona fide* assignee; and suppose that there are other debenture holders of the company whose holdings are good without estoppel; are, or are not, these other debenture holders "bound by the estoppel" of the company? In other words, will the holders of the fraudulent debentures rank with the holders of the valid ones? In *Mowatt v. Castle*<sup>2</sup> it is said:

"If, after issuing debentures" (valid ones), "the company issued others" (good only by estoppel), "they could not by estoppel bind those who had previously acquired rights against them. The company might bind themselves by an admission; but a man cannot bind by his admission those who do not claim under him, but who before the admission had acquired a right."

The judgment leaves undecided the point whether holders of subsequently issued (honest) debentures would be estopped to deny the validity of a prior fraudulent issue, with an indication that probably they would. This would lead to the confusion that, of three classes of holders, those prior to the fraudulent issue would take priority over that issue; those subsequent to that issue would rank equally with the fraudulent issue; while of necessity those issued both prior and subsequent to the fraudulent issue (being both regular) would rank equally; that is to say, A. would be prior to B. and equal to C.; but B. and C. would be equal, which is something of a tangle.

What would be the law had the debtor been an individual instead of a company? Suppose that a bankrupt's liability to one claimant depends upon estoppel; is the claimant any the less a creditor? A warehouseman, for example, has given a certificate that he holds goods for one man, whereas in reality he holds them for another. On the faith of the certificate X.

<sup>1</sup>General Statutes, ch. 118, § 44.

<sup>2</sup>(1886) 34 Ch. D. 63. See *Columbia v. Cornell* (1875), 91 U. S. 404.

purchases the goods and sues the warehouseman in trover for refusal to deliver. X's case depends upon the warehouseman being estopped from denying the representation of ownership contained in the certificate. Is he any the less a creditor because of the nature of his case?

Again, suppose that an agent is permitted to represent himself as having certain authority, which in reality he has not; the principal, being sued upon the contract of the agent, denies the agency, but is held to be estopped by his conduct; is the plaintiff any the less a creditor because of the character of the arguments which lead up to his judgment?<sup>1</sup>

And so in the case of a company: It has not issued debentures, but it has done that which, so far as it is concerned, is the exact equivalent — debentures have been issued under such circumstances that the company cannot deny that it has issued them. This clearly appears when we consider that if the company were sued upon the debentures judgment would certainly be given against it, and the decision would be that it had issued them. The argument of the other debenture holders would be that by their agreement with the company their debentures were to rank with all other debentures which the company might issue, and that in very truth the company did not issue any others. But is not that a question between the company and these other claimants; and if as a matter not of consent, or of arrangement, or of compromise, but of strict law, as evidenced by the judgment of the court, the company did issue them, can a third party say that it did not?

Suppose that some prerequisite of internal arrangement of the company had been omitted in making the issue, but that the purchaser was unaware of the omission and gave full value for the debentures; could other debenture holders insist that the debentures were not really issued?<sup>2</sup> Strictly, of course, they were not, but under the cases<sup>3</sup> the company could not set up the omission. In both of these cases the company is liable

<sup>1</sup> See *Heane v. Rogers* (1829), 9 B. & C. 577; 7 L. J. K. B. 283, and other cases cited *ante*, p. 212, note.

<sup>2</sup> It was thought that the company being estopped, its creditors were also estopped in *Sioux City v. Trust Co.* (1897), 82 Fed. R. 124. And see

*Robinson v. Montgomery* (1896), 2 Ch. 841, 849, 850; 65 L. J. Ch. 85; *Re South Essex* (1870), L. R. 11 Eq. 157; 40 L. J. Ch. 153.

<sup>3</sup> Of which *Royal v. Turquand* (1856), 6 EL. & B. 327; 25 L. J. Q. B. 317, is the leading example.

because of estoppel,<sup>1</sup> and the fact that in one case it did not get the money, and in the other that it did, cannot make any difference in the application of the principle under discussion.

*Shares Not Fully Paid Except by Company's Estoppel.*— Strong support for the above view is afforded by the decisions<sup>2</sup> which determine that if a company is estopped from denying that certain shares are fully paid up the holder of them cannot be put upon the contributory list in winding-up proceedings. Not only, therefore, is the company estopped, but other shareholders and creditors suffer because of it. Nothing may have been paid to the company upon the shares; nevertheless, if the company is estopped from so saying, the other shareholders and creditors cannot interpose a defense not available to the company.

*Another Case.*— A noteworthy and curious case is *Merchants' Bank v. Monteith*.<sup>3</sup> The owner of a cellar and of some goods in it procured a friend to issue a warehouse receipt for the goods as though that friend was really the proprietor of the cellar. Upon the security of the receipt a bank advanced money. Both the owner and the friend were then estopped from denying that the goods were validly pledged. Afterwards the owner absconded (and was subsequently found dead); the friend took possession of the goods and handed them to a bank, and the bank sold them. Other creditors subsequently obtained judgments against the owner, and required the bank to account for the proceeds of the goods. Their case looked well (if the law be that a man's creditors can occupy a better position than himself), for the goods never were, in fact, pledged to the bank, and when the owner died the goods must, therefore, have passed to his administrator and have become assets for the payment of all creditors alike. But the court held otherwise.

"The receipts were good between the parties, and, by the result of the subsequent dealings, they were rehabilitated so as to be valid against creditors, by the act of intervention on his (the friend's) part during the life of M. (the owner); but in any event, there being no creditor who had any *locus standi* when the bank sold under the receipts, they had the right to apply the proceeds to reduce their claim against M.'s estate."

<sup>1</sup>In the latter case, by selling the debentures it has represented that all necessary preliminaries have been observed and is bound by the representation.

<sup>2</sup>See *Re London, etc.* (1888), 39 Ch. D. 295; 57 L. J. Ch. 848; *Bloomenthal v. Ford* (1897), A. C. 156; 62 L. J. Ch. 253.

<sup>3</sup>(1883) 10 Ont. 529.

The second ground of decision is probably unassailable. The creditors might possibly have followed the goods into the hands of the bank's purchaser, but the bank itself could only be liable for conversion, and at that time (the time of its sale of the goods) the creditors had no judgment, and so no *locus standi* for complaint.

To the first part of the decision it may well be replied that nothing which the friend did could affect the situation. He had given the receipt, which (save by estoppel) amounted to nothing. Afterwards taking possession of the goods and handing them over could add nothing more.

The case thus illustrates an inclination to uphold a title against the creditors of the owner which is good against the owner himself; and a disinclination to permit creditors to occupy a better position than their debtor. But the supporting principle is overlooked; the principle, namely, that would treat estoppel as an equity, and so relegate the case to the ordinary rule that a creditor can take nothing but that to which his debtor is in equity, as well as at law, entitled.

And the decision suggests this further: Whether, in many of such cases, it could not fairly be held that the title really passed. The owner intended that the goods should be pledged to the bank; the bank intended the same thing; the owner indorsed and handed to the bank a document which the owner represented and the bank believed to have that effect; is there not here, in reality, a pledge of the goods? In a somewhat similar case *Martin, B.*, "would have been better pleased if the jury had found that there had been in reality a passage of the title."<sup>1</sup>

### III. DOES ESTOPPEL BIND IN FAVOR OF AN ASSIGNEE OF THE ESTOPPEL-ASSERTER?

So far we have been considering the right of the estoppel-asserter to urge the estoppel, not only against the estoppel-denier, but against his assigns and other persons. We have now to deal with the converse case, namely, the right of an assignee of the estoppel-asserter as against the estoppel-denier.

For example, the true owner stands by while I purchase his

<sup>1</sup> *Richards v. Johnston* (1859), 4 H. 469; *Pickard v. Sears* (1837), 6 A. & E. & N. 665; 28 L. J. Ex. 323. Consider 469.

horse from another; I resell the horse; is the true owner estopped as against my purchase?

Upon this subject the following commends itself to one's judgment:

"The rule is elementary that when the principle of estoppel relied on exists in favor of the holder of a note, against the defense of the maker to the payment thereof, it is available in favor of the person to whom the holder assigns it. The reason of this rule is obvious; for, if the estoppel did not operate in favor of the assignee, the value of the note, in the hands of the assignor or holder, would be materially decreased, and the right to sell and transfer all his title thereto would be impaired. This principle of the law is fully supported by the authorities cited in the original opinion."<sup>1</sup>

So also it has been held that if the true owner stand by and allow his property to be sold to an innocent purchaser, the true owner is estopped not only as against such purchaser, but as against any other persons to whom he may convey it.<sup>2</sup> Getting away from the uncertain question of privies, and applying everyday principles to the case, a similar conclusion is reached: We would say that although the title remained in the true owner, yet that his purchaser was in equity entitled to the property; that an equity is capable of transmission; that the purchaser in selling to a sub-purchaser placed him therefore in the same position as he himself was; and that, for this reason, the owner could not claim the property against the sub-purchaser. When estoppel is viewed as an equity many things become clear.

<sup>1</sup> *Krothwohl v. Dawson* (1895), 140 Ind. 1; 38 N. E. R. 467; 39 N. E. R. 497.

<sup>2</sup> In *Wood v. Seely* (1865), 32 N. Y. 116, Denio, C. J., said: "Estoppels by record and by deed, as is well known, run in favor of and against the privies in estate of the immediate parties to the estoppel, as well as for, and against, the parties personally; and I see no reason why estoppels *in pais* should not be within the rule as they clearly are within the principle." In

*Richards v. Johnston* (1859), 4 H. & N. 664; 28 L. J. Ex. 323, Martin, B., said: "In such a case the party is estopped from disputing their truth with respect to that person, and those claiming under him, and in that transaction." See also *Kinnear v. Markey* (1877), 85 Ill. 96; *Wortham v. Curley* (1883), 75 Ala. 356. Distinguish *The John Shillito Co. v. McClung* (1892), 2 C. C. App. 526; 6 U. S. App. 123; 51 Fed. R. 863.

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## CHAPTER XVI.

### DECEIT AND ESTOPPEL.

Misrepresentation may, with regard to its civil punishment, be considered as (1) giving rise to an action of deceit; (2) as giving rise to a bill in equity for restitution; and (3) as giving rise to an estoppel.

1. *Actions of Deceit.*—Ever since *Pasley v. Freeman*,<sup>1</sup> courts of law have been familiar with actions of deceit based upon misrepresentation; for example, a misrepresentation as to the financial ability of a third person, whereby the plaintiff is induced to give credit, and thus suffers damage.

2. *Restitution.*—Courts of equity always exercised jurisdiction in cases of fraud. And two years after *Pasley v. Freeman* (above referred to) had been decided, it was said that that case, "and all others of that class, were more fit for a court of equity than a court of law."

*Pasley v. Freeman* was, nevertheless, a case in which the remedy seemed to be peculiarly in damages: "You misrepresented the financial ability of my debtor; on the faith of your misrepresentation I gave him credit; pay me the damages which I have sustained." Courts of equity were not accustomed to award "damages." The word implied legal, rather than equitable, jurisdiction. But the word could be changed and the reality veiled; so, instead of "damages," the court of equity decreed "restitution;" and "breach of duty" gave way to a sort of performance of the representation: "Because of your misrepresentation I have lost so much money; I have an equity (not an action) against you, to make the representation good—not to pay me damages for my loss, but, by making the representation good, to keep me free from damage." Thus, referring to *Pasley v. Freeman*, Lord Eldon said:<sup>2</sup>

"It has occurred to me that that case, upon the principles of many decisions in this court, might have been maintained here; for it is a very

<sup>1</sup>(1789) 3 T. R. 51.

(1805), 10 Ves. 475. And see *Pulsford*

<sup>2</sup>*Evans v. Bicknell* (1801), 6 Ves. v. *Richards* (1853), 17 Beav. 87; 22 L. 182; approved in *Burrowes v. Lock* J. Ch. 559.

old head of equity, that if a representation is made to another person, going to deal, in a matter of interest, upon the faith of that representation, the former shall make that representation good if he knows it to be false."

In later years the subtlety of this excuse for equitable jurisdiction was, to some extent, lost sight of. For example, in a case<sup>1</sup> in which directors of a company were being sued in equity for a misrepresentation, upon the faith of which the plaintiff had taken certain shares, Lord Chelmsford said:

"This case is entirely different from suits either to be relieved from, or for the enforcement of, contracts induced by the fraudulent concealment of facts, which ought to have been disclosed; nor does it resemble such cases as *Burrowes v. Lock*,<sup>2</sup> and *Slim v. Croucher*,<sup>3</sup> where a person making an untrue representation to another, about to deal, in a matter of interest, upon the faith of that representation, has been compelled to make good his representation, whether he knew it to be false, or made it through forgetfulness of the fact. It is a suit instituted to recover damages from the respondents for the injury the appellant has sustained by having been deceived, and misled, by their misrepresentation and suppression of facts, to become a shareholder in the proposed company, of which they were the promoters. It is precisely analogous to the common-law action for deceit. There can be no doubt that equity exercised a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail, both at law and in equity."

3. *Estoppel*.—Misrepresentation, acted upon, may also give rise to an estoppel, as is sufficiently well known; and estoppel is so nearly allied to deceit that Baron Parke in one of the leading cases<sup>4</sup> said:

"I think you will find that the person who makes a statement on which another alters his position is not estopped unless he so induces the latter to alter his position that the former would be responsible to him in an action for it."

Estoppel will be declared then under circumstances similar to those requisite for an action of deceit; and restitution is a remedy which may very well supplant deceit altogether. This seems simple enough. But let us see.

*Various Remedies in Same Case*.—Let it then be observed that the same misrepresentation may give rise to an action in deceit, to a claim for restitution, and to an estoppel. For example, an intending mortgagee of a fund inquires of the trustee of it as to incumbrances, and is fraudulently told that there are none; whereas in fact the fund has already been charged. The mortgagee may now sue the trustee for damages or for

<sup>1</sup> *Peek v. Gurney* (1873), L. R. 8 H. L. 390; 43 L. J. Ch. 33.

<sup>2</sup> (1805) 10 Ves. 470.

<sup>3</sup> (1860) 1 De G., F. & J. 518; 20 L. J. Ch. 273.

<sup>4</sup> *Freeman v. Cooke* (1848), 2 Ex. 659; 18 L. J. Ex. 117. And see *Evans v. Bicknell* (1861), 6 Ves. 191; *Lee v. Taylor* (1890), 32 N. Y. 165; 11 N. Y. Supp. 131.

restitution, or, aided by estoppel, he may require the trustee to hand over the fund. In the last alternative the trustee's only possible defense is that the fund has already been charged; and this defense he is precluded from setting up because of the misrepresentation.<sup>1</sup>

*But Conditions Diverse.*— There being, then, these various remedies for misrepresentation, one would naturally be led to think that the conditions or requisites of the misrepresentation would, for the application of each of them, be identical. But such is not, unfortunately, the present state of the law. On the contrary, the authorities seem to leave no room for escape from the embarrassing conclusion that for deceit there must be, but for estoppel there need not be, *mala fides*; while for restitution — well, we shall see.

1. *Deceit.*— According to the leading case of *Derry v. Peek*,<sup>2</sup>

"In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice."

It has been said that deceit will lie in cases in which fraud may be imputed, although it does not actually exist: namely, in cases where the party making the representation was "a person within whose special province it lay to know a particular fact."<sup>3</sup> But *Derry v. Peek* lends no countenance to that view.<sup>4</sup> It does, indeed, deal with such cases, but only to put

<sup>1</sup> *Burrowes v. Lock* (1805), 10 Ves. 470.

<sup>2</sup> (1887) 14 App. Cas. 374; 58 L. J. Ch. 886.

<sup>3</sup> See Bigelow on Estoppel (5th ed.), 610; *Gerner v. Mosher* (1899), 78 N. W. R. 384 (Neb.).

<sup>4</sup> Nor do any of the English or Canadian *Derry v. Peek* *scholia*: *Glacier v. Rolls* (1889), 42 Ch. D. 486; 58 L. J. Ch. 325, 320; *Tomkinson v. Balkis* (1891), 2 Q. B. 614; (1893) A. C. 405; 60 L. J. Q. B. 558; 63 id. 134; *Angus v. Clifford* (1891), 2 Ch. 475; 60 L. J. Ch. 443; *Low v. Bouverie* (1891), 3 Ch. 32; 60 L. J. Ch. 594; *Le Lievre v. Gould* (1893), 1 Q. B. 491; 62 L. J. Q. B. 353; *Onward v. Smithson* (1892), 1 Ch. 1; 62 L. J. Ch. 138; *Garland v. Thompson* (1893), 2 Ont. 373; *Gold Medal v. Lumbers* (1899), 26 Ont. App. 78.

In the United States some of the cases exact the presence of real fraud; in others, fraud of very diluted character suffices; and in others it is dispensed with altogether. A good deal to the following effect may be found: "An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. . . . But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know." *Haddock v. Osmer* (1897), 153 N. Y. 603; 47 N. E. R. 923; *Chatham v. Moffatt* (1893), 147 Mass. 403; 18 N. E. R. 168. The following extract from a judgment in Florida of Carter, J. (*Watson v. Jones*, 1899, 25 S. R. 683), is

them aside as being "in an altogether different category from actions to recover damages for false representations such as we are dealing with." The general statement that for deceit "there must be proof of fraud, and nothing short of that will suffice," is left unqualified.

2. *Restitution*.—One of the leading cases as to restitution is *Burrowes v. Lock*,<sup>1</sup> in which the trustee of a fund, upon being applied to by an intending chargee, falsely answered that there were no incumbrances upon it. The answer, although false, was given in good faith, for the trustee had forgotten the fact of a previous charge. Restitution was decreed, but whether upon the ground that there was "gross negligence" in the representation or not is far from clear.<sup>2</sup> An action of deceit would not lie under such circumstances.<sup>3</sup>

Sir Frederick Pollock limits the cases in which the court of equity, prior to the Judicature Acts, decreed restitution to

well worth its length: "In Alabama, Colorado, Nebraska and some other states the courts do not seem to require proof of *scienter* in cases where the party making a false representation professes to speak from his own knowledge. *Munroe v. Pritchett*, 16 Ala. 735; *Jordan v. Pickett*, 78 Ala. 331; *Goodale v. Middaugh*, 8 Colo. App. 223; 46 Pac. R. 11; *Johnson v. Gulick*, 46 Neb. 817; 65 N. W. R. 883. In other states the charge of fraudulent intent in actions for deceit may be maintained by proof of a statement made as of a party's own knowledge which is false, provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge, in which case it is deemed that the fraud consists in stating that the party knows the thing to exist when he does not know it to exist, and in such cases a belief in its existence will not warrant or excuse a statement of actual knowledge. *Fisher v. Mellen*, 103 Mass. 503; *Furnace Co. v. Moffatt*, 147 Mass. 403; 18 N. E. R. 169; *Haddock v. Osmer*, 153 N. Y. 604; 47 N. E. R. 923; *Bullitt v. Farrar*,

42 Minn. 8; 43 N. W. R. 566. It is also held in these states that if the representations were not made as of the party's own knowledge, then the evidence must show that the party knew them to be untrue, and evidence that he had reasonable cause to believe that they were untrue will not constitute sufficient proof of *scienter*. *Pearson v. Howe*, 1 Allen, 207; *Stone v. Denny*, 4 Met. (Mass.) 151; *Tryon v. Whitmarsh*, 1 Met. (Mass.) 1; *Marsh v. Falker*, 40 N. Y. 562; *Marshall v. Fowler*, 7 Hun, 237; *McKown v. Furgason*, 47 Iowa, 638." And see *Brale v. Powers* (1898), 92 Me. 208; 42 Atl. R. 362; *Pieratt v. Young* (1890), 49 S. W. R. 964 (Ky.); *McFord v. Levi* (1899), 50 S. W. R. 607 (Tex.); *Krause v. Busacker* (1900), 61 N. W. R. 406 (Wis.); *Grinnell on Deceit*, 23, 198.

<sup>1</sup> (1805) 10 Ves. 470.

<sup>2</sup> The earlier case of *Evans v. Bicknell*, above quoted from, seems to show that the ground of relief would be that "he knows it to be false."

<sup>3</sup> *Low v. Bouverie* (1891), L. R. 3 Ch. 82; 60 L. J. Ch. 594. But see *Pollock on Torts*, 244-248.

- “certain cases of fraud (that is, wilfully or recklessly false representation of fact).”<sup>1</sup> But the equity doctrine of constructive fraud enabled the court to find guilty a man as against whose moral purity of action not a word could be said. And “conduct fraudulent in the eye of this court,” varied so frequently with the eye which the court happened for the moment to be employing,<sup>2</sup> that it is impossible to say that for restitution there must be *mala fides*, as in deceit;<sup>3</sup> or, as in estoppel, that “no fraud need have been intended.”

3. *Estoppel*.— For estoppel it is reasonably clear that “it is not necessary that the party making the representation should know that it was false; no fraud need have been intended.”<sup>4</sup>

*Comparison*.— We thus see that for deceit there must be fraud; that for estoppel there is no necessity for fraud; and that for restitution there must be fraud, but that it may be fraud of constructive character— fraud “in the eye of this court.”<sup>5</sup>

*Peculiarity in Application of Remedies*.— These anomalies in the requisites for relief find some parallel in those discovered in the application of the various remedies. For, observe that, very frequently, the remedy by estoppel may not be applicable to the particular case, although estoppel may actually exist. That is to say, although the misrepresenter may be estopped from denying the truth of the misrepresentation, yet sometimes such inhibition will not hurt him nor help the other party.

For example, suppose that a man agrees to lend money upon mortgage of a house in course of erection, and to advance the money, as the building progresses, upon the architect’s certificates of the amount expended; that the architect is aware of the arrangement; and that he, inadvertently, issues false certificates, upon which the mortgagee advances so much money that he loses some of it. Under these circumstances the architect will not be liable in deceit,<sup>6</sup> for there was no fraud;<sup>7</sup> and

<sup>1</sup> On Torts, 167.

<sup>2</sup> See the subject discussed in ch. XVIII.

<sup>3</sup> Since the Judicature Acts, Derry v. Peek, 37 Ch. D. 347; 14 App. Cas. 347; 58 L. J. Ch. 304 is, no doubt, the governing authority. Restitution can no longer be looked upon as a distinct remedy.

<sup>4</sup> Per Lord Cranworth, in Jordan

v. Money (1854), 5 H. L. C. 212; 23 L. J. Ch. 868. And see *ante*, ch. VIII.

<sup>5</sup> As to the analogous methods of employing the word *fraud*, see ch. XVIII.

<sup>6</sup> Le Lievre v. Gould (1893), L. R. 1 Q. B. 491; 62 L. J. Q. B. 353. And see Atkins v. Payne (1899), 100 Pa. St. 5; 42 Atl. R. 373.

<sup>7</sup> The reason stated in the judg-

although he will be estopped from denying the truth of his certificates, the estoppel will not hurt him nor benefit the mortgagee.

Again, suppose that a warehouseman, through inadvertence, represents to you that he is holding certain goods for A., whereas he is really holding them for B.; and that upon the faith of this representation you buy the goods from A. Under these circumstances you cannot sue the warehouseman for damages in deceit, for there was no fraud. But in this case estoppel will help you to relief. Your course is to bring trover against him for the goods; to allege (quite contrary to the fact) that the goods are yours; and, when the trial comes on, estop him from denying your ownership, by showing that you acted upon his misrepresentation.<sup>1</sup>

Observe that in the case of the architect you were unable to turn to practical account the estoppel which you could undoubtedly fix upon him. He was estopped, but you could make no use of the estoppel. You could not sue him for anything, and succeed by preventing assertion of some fact. You had to sue him in deceit or not at all. The wrongs in the two cases are identical; yet in the one case there is a remedy and in the other there is none.

*The Anomalous Result.*—The anomalous result then ensues that an innocent misrepresentation will or will not be attended by punitive consequences, according as the chance circumstances will or will not permit use to be made of the peculiar principles of estoppel. If fraud be absent you cannot sue in deceit; you cannot, therefore, base your action upon the allegation that a representation was made to you, and that it was false. But if by alleging certain truths and adding to them *as a further truth* the representation made to you (which is in reality false), you can frame a cause of action, you will succeed; because the defendant will be estopped from denying the truth of the only false statement in your claim. In other words, you cannot succeed by alleging that the defendant made a representation

ment is that there was no duty as architect knew that his certificates were to be relied upon, and he fraudulently falsified them, he would have been liable.

between the architect and the mortgagee. That remark is appropriate to the suggestion of the existence of a contract, but not altogether as a reply to a demand in deceit. If the

<sup>1</sup> *Simm v. Anglo-American* (1879), 5 Q. B. D. 188; 49 L. J. Q. B. 392.

which was false; but may (sometimes) succeed by alleging the false to be true. In the former case, could you succeed, you would have to prove that the representation was false; while in the latter you win by preventing the defendant from showing the same thing!

The present tangle may well be illustrated by three cases:

*Burrows v. Lock* (already cited). The beneficiary of a fund wanted to borrow on it. The intending lender applied to the trustee of the fund for information as to charges; and the trustee, through forgetfulness, wrongly stated that there were none. The trustee had to make good the loss. Observe that, under *Derry v. Peek*, the trustee could not be sued in deceit, for there was no fraud. In estoppel, however, the lender could say to him: "Pay me over the fund;" and the trustee could not defend himself (by setting up the prior charge), because of his misrepresentation (that there was none), which estops him.

*Slim v. Croucher*.<sup>1</sup> An intending borrower offered, as security, a lease which he said he was about to get. The lender required a written intimation from the landlord that he would grant the lease; and this the landlord signed. Afterwards it turned out that the landlord had previously leased the land to the borrower, and that the borrower had already assigned the lease to another person. The landlord had forgotten about the previous lease when signing the intimation that he would grant one. The landlord was held to be liable in damages.

These two cases seem to be very much alike. In both a man within "whose province it lay to know the particular fact" (if that has anything to do with it) had forgotten it, and by misrepresentation had induced an innocent person to change his position for the worse. But it seems now to be clear that while the decision in the former case was right, that in the latter was wrong.<sup>2</sup> The explanation is this: In the case of the trustee of the fund, the misled mortgagee could sue for the money; and the trustee, being estopped from setting up the earlier charge, would have no defense; while in the case of the landlord the action was (necessarily) purely for damages for the deceit, and it ought to have failed for want of fraud. If Slim (the mort-

<sup>1</sup>(1860) 1 De G., F. & J. 517; 29 L. J. Ch. 278.

<sup>2</sup>See *Low v. Bouverie* (1891), L. R. 3 Ch. 82; 60 L. J. Ch. 594.

gagee of the lease) could have framed his action against the landlord so as to get the benefit of the estoppel, he would have been all right. But he could not.

*Another Illustration.*— Suppose that I have a mortgage, and that upon being applied to, by a proposed subsequent incumbrancer, I erroneously tell him (believing such to be the fact) that my debt has been paid. In such case I would not be liable in deceit (for there was no fraud); but I would be estopped from setting up my mortgage as against the subsequent incumbrancer; and this would be the exact equivalent of damages, in deceit, for the misrepresentation. Suppose, however, in the same case, that my mistake arose from the fact that I had assigned my mortgage to a purchaser of it — the debt had not (as I represented) been paid, but had been transferred to a third person, to whom it was still due. In such case I would not be liable in deceit (because of no fraud); and there is no way to get at me through estoppel. I am estopped, no doubt, from ever saying that the debt is not paid, but that (under the circumstances) cannot injure me nor benefit the person to whom I made the misrepresentation.

*A Third Illustration.*— A warehouseman issues a warehouse certificate in which, by mistake, he acknowledges the receipt of more grain than he actually received; a third party buys the larger quantity upon the faith of the certificate; he sues the warehouseman in deceit, and is beaten because of the absence of fraud.<sup>1</sup> Better advised, another purchaser in a precisely similar situation demands the grain and sues for its delivery; the warehouseman says that he never had the grain; but the purchaser estops the assertion with the certificate, and recovers (not the grain, for there was none, but) damages.<sup>2</sup> It is not permissible, however, to suggest that he got damages for the misrepresentation in the receipt, for the other case shows, of course, that that could not be done.

*Anomaly Induces Harmony.*— Law of this sort, which declares for relief, not upon the basis of the wrong, but upon the chance of the situation, is unsatisfactory in all but this: that ingenuity and judicial inclination are thereby directed to the

<sup>1</sup> *McLean v. Buffalo* (1864), 23 U. C. Q. B. 448; 24 id. 270.

<sup>2</sup> *Holton v. Sanson* (1863), 11 U. C. C. P. 606.



expansion of the law in one direction or another, and thus to the establishment of harmony.

For example, what is to be done with this case?<sup>1</sup> A corporation (by mistake) gives to A. a certificate that he is the owner of certain shares; so armed, A. sells the shares to X.; and the corporation, having discovered its mistake, refuses to recognize X. as a shareholder. Now, what can X. do? He cannot sue the corporation for deceit (for there was no fraud). Can he force the corporation to put him on the register? The only defense the corporation could make to such an application would be that the applicant is not entitled to be a shareholder; and from this the corporation is (in the supposed case) estopped by its representation. This seems, then, to be a likely remedy. But if, as may be the case, the company's register is already full — all its authorized shares have been issued — such remedy is impossible.<sup>2</sup> What then? Why this: that ingenuity and inclination will discover that X. can sue the company for damages for refusing to put him on the register; and (the company being estopped from saying that he ought not to be there) that X. will recover exactly the same damages as if he had sued in deceit. The company is not liable for damages in deceit for the innocent misrepresentation; but it is liable for damages because of the deceit — although in round-about fashion. Lord Macnaghten said:

“The company are not asked to make good their representation by transferring shares to Tomkinson. They are called upon to pay damages in order to compensate Tomkinson for loss to which he has been put by reason of their misrepresentation.”<sup>3</sup>

And that is precisely what *Derry v. Peek* declares cannot be done in the absence of fraud.

Observe closely the *modus operandi* in this last case. The purchaser of the shares cannot say: “The company represented to me that A. was the owner of the shares; I acted upon that representation; that representation was *false*; I am entitled, therefore, to damages.” But he can say: “The company represented to me that A. was the owner of the shares; I acted upon that representation; that representation was *true* (at least the company cannot say that it is not); the company will not

<sup>1</sup> *Re Bahia* (1868), L. R. 3 Q. B. 594; 87 L. J. Q. B. 176. And see cases cited with this one in ch. XXII.

<sup>2</sup> *Reg. v. Charnwood* (1884), 1 Cab. & E. 419.

<sup>3</sup> *Balkis v. Tomkinson* (1898), A. C. 410; 68 L. J. Q. B. 141.

register me; I am entitled, therefore, to damages." The former would be an action of deceit, and will not lie; because, although the plaintiff asserts misrepresentation, he cannot prove fraud. The latter is an action for refusing to register the plaintiff as owner of the shares, and will lie, because the plaintiff refrains from asserting misrepresentation (which is his real ground of complaint), and the company is estopped from avowing it. Although the damages in both cases are the same, they can be recovered, not by alleging the real grievance, but only by a careful and enforced suppression of it. An innocent misrepresentation in this way results in damages in spite of *Derry v. Peek*, and circuitry is once more the road to harmony.

*The Present Situation.*—The result, then, seems to be that a misrepresentation

- (1) May be sufficient for, and available in, both deceit and estoppel; or,
- (2) May be sufficient for both, but unavailable in estoppel; or,
- (3) May be insufficient for deceit, and yet sufficient for, and available in, estoppel.

It seems that one factor in each case is the presence, or absence, of fraud; that the other factor is chance; that where there is fraud there is always an action of deceit, but only sometimes effective estoppel; and that where there is no fraud there is no action of deceit, but, according to merest chance, there may or may not be estoppel accompanied by damages identical with those which would be recovered could an action of deceit be brought.

These are considerations which may lead to a revision of the principle laid down in *Derry v. Peek*,<sup>1</sup> and to the establishment of the action of deceit upon the same ground as estoppel, namely:

"Even where a representation is made in the most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on, then *prima facie* the party making the representation is bound by it, as between himself and those whom he has misled."<sup>2</sup>

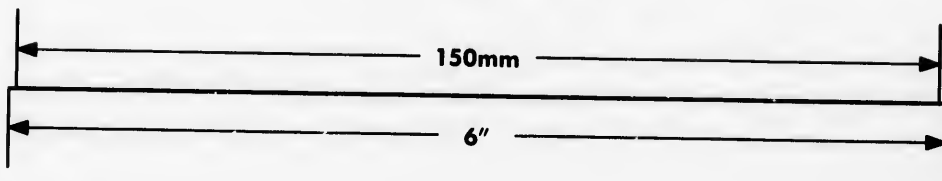
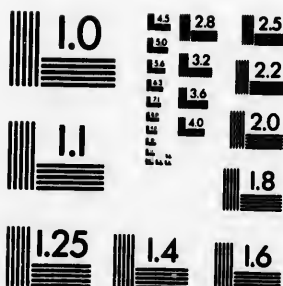
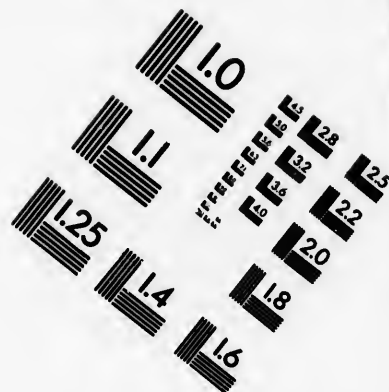
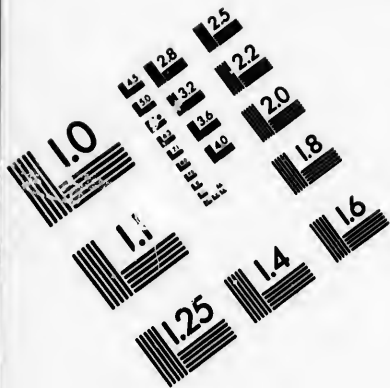
Otherwise the anomalies above presented must remain. At present fraud is necessary to an action of deceit, but is unnece-

<sup>1</sup> The fact that the case itself was at once partially revised by Parliament may help to get rid of its principle. See 53 & 54 Vic. (Imp.), ch. 64, § 3.

<sup>2</sup> Per Lord Cranworth in *West v. Jones* (1851), 1 Sim. N. S. 207; 20 L. J. Ch. 363.



# IMAGE EVALUATION TEST TARGET (MT-3)



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essary in estoppel. It is, as the writer thinks, impossible to introduce the element of fraud into estoppel as a prerequisite. And if deceit will not lie without fraud, then we must be content to say that

"an innocent misrepresentation will, or will not, be attended by punitive consequences, according as the chance circumstances will, or will not, permit use to be made of the peculiar principles of estoppel."

This is not the best conceivable example of stable equilibrium. Some judge some day will breathe upon it.

So also with the equitable doctrine of restitution. If the word "fraud," tempered and qualified by construction, may be applied to cases in which there is no element of fraud (in the sense of bad faith), the breach between the requisites of restitution and estoppel may be bridged. Not the lawyer, in this case, but the etymologist only, will be required to make the situation comprehensible.

*A Suggestion.*—The following line of thought has much engaged the writer's mind in pondering the anomalies above referred to:

Can it be said that the idea of duty has nothing to do with estoppel? Follow this: For breach of duty the law provides punishment (awards damages); but in estoppel there is no breach of duty, and there is no punishment, but merely sequence, or consequence. For example: When I stand by while another sells my property to an innocent purchaser, I am guilty of no breach of duty. I have a right to stand by if I like. I may, if I choose, allow another to sell my property. I can do as I please with my own; and permit another, if I wish, to do as he likes with it. I am guilty of no breach of duty in allowing him to sell my property, and therefore cannot be punished as for a breach of duty. But if I allow another person to sell my property a consequence ensues, namely, that I cannot afterwards assert my title; that is, that I am estopped.

Further observe that this view seems to obviate inquiry into the question of punishment in damages: I have permitted another to sell my property; I cannot afterwards set up my title; no injury then has been done to the purchaser; he thought that his vendor had the title; I am precluded from asserting otherwise; the title then is as the purchaser understood; and he has not been injured; there is no question of damages.

Consideration of estoppel by contract, too, furnishes analogy.

For example, a bailee is estopped from denying the title of his bailor. That is because, in the contract of bailment, the title of the bailor is taken, as between the parties, to be a fact. The bailor may have misrepresented his title; but that is immaterial; no question of duty not to misrepresent is involved; the point is, that that which between the parties was taken to be a fact is, and remains, a fact.

And so in estoppel, not by contract but by misrepresentation, may it not be said that in this also the question of duty is not involved. I misrepresent if I choose, and the consequence is merely this: that that which I have represented to be a fact is, and remains, a fact, so far as I am concerned.

Take an example:<sup>1</sup> A mortgage purports to secure \$250, and the receipt of the amount is acknowledged upon the document by the mortgagor; but \$100 only was advanced; the mortgagee assigns the mortgage, representing that \$250 is due upon it, and the mortgagor is estopped from asserting otherwise. What is the rationale of the decision? Is it that the mortgagor, in executing the mortgage and the receipt, owed a duty of carefulness to those into whose hands the mortgage might come? Or is it that the mortgagor, having assisted in the misrepresentation (having made it credible), is really a party to it, and is visited with the usual consequence, namely, that that which he has represented to be a fact is, and remains, as to him, a fact?

Test the case in this way: If there was a duty of carefulness, and a breach of that duty, then an action of negligence will lie; for such an action is based upon breach of duty. But (assuming that there was no fraudulent intent in the mortgagor) no such action could be maintained (while *Derry v. Peek* stands). And, if not, it would seem that there can have been no duty of carefulness such as suggested. The estoppel, then, must have arisen as a consequence, and not as a punishment for breach of duty.

Again, recurring to the architect's case in which a mortgagee advanced money to the owner of buildings upon the faith of the architect's certificates of amounts expended upon them, observe that the reason given for the absence of liability

<sup>1</sup> *Bickerton v. Walker* (1885), 81 Ch. D. 151; 53 L. J. Ch. 237. See cases cited with this one in ch. IV.

on the part of the architect was that he owed no duty to the mortgagee. Yet there can be little doubt that the architect would have been estopped by his certificate had the case been one in which his estoppel would have been of any benefit to the mortgagee. There was no breach of duty; but there was the usual consequence attending the misrepresentation.

Finally, returning to the mortgage case: Suppose the mortgagor had executed the mortgage, and given the receipt, for the purpose of enabling the mortgagee to represent that \$250 was advanced upon it; he would be liable in an action of deceit<sup>1</sup> because he was a party to the misrepresentation. This involves, as we have seen, the idea of a breach of duty towards the assignee. If the mortgage and receipt had been given without intention to defraud, the mortgagor would clearly not be liable in deceit. Those propositions involve these: that if the mortgagor was, knowingly, a party to the misrepresentation he was guilty of some breach of duty; and if he was innocent, then he was not so guilty. But this is equivalent to saying that (for the purposes of an action of deceit), although there is no duty not to misrepresent, there is a duty not, wittingly, to do so.

The idea of duty, then, is linked to some extent with misrepresentation. And is the solution of our difficulties this: that there is a duty not fraudulently to misrepresent; for a breach of this duty action will lie; that apart from fraud there is no duty of carefulness not to represent; but that all representation as to fact carries with it the obligation of consistency and the consequence of estoppel.

*Suggested Solution Unsatisfactory.*—Such solution is unsatisfactory, for while it may apparently have the merit of symmetry yet it in reality leaves all the anomalies above referred to in full operation. In fact it takes no cognizance of the most striking of them.

In the Bahia case the company was estopped by its certificate; and the result was, not the mere "consequence" that it had to register the purchaser of the shares (for it could not do so, the register being full), but the result was damages—damages for the loss occasioned by the misrepresentation. An innocent misrepresentation thus resulted in damages; while

<sup>1</sup> Evans v. Bicknell (1801), 6 Ves. 191.



*Derry v. Peek* has authoritatively determined that only in cases of fraud can there be damages for misrepresentation.

If, in the *Bahia* case, the frame of the action had been, "The company represented to me that A. was the owner of the shares; I acted upon that representation; that representation was *false*; I am entitled, therefore, to damages," the company would have won, because there was no fraud. Put, however, in another form, and the company loses: "The company represented to me that A. was the owner of the shares; I acted upon that representation; the representation was *true*; the company nevertheless refuses to register me; I am entitled, therefore, to damages." State the case naturally, and you lose. State it artificially, and you win!

Were *Re Bahia* but a solitary case we might, for the time, shut our eyes to it, upon the ground that "questions dangerous to all theology ought not to be raised." But *Simn v. Anglo-American*<sup>1</sup> (typical of many cases) must also be reckoned with. Not a company this time, but a warehouseman, innocently issued an erroneous certificate of ownership, upon the faith of which a purchaser of the goods referred to in it changed his position. The purchaser demanded the goods, and the warehouseman replied that, since issuing the certificate, he had ascertained that the goods really belonged to some one else. The warehouseman now is not liable in deceit, there having been no fraud. And it is impossible that he can be ordered to deliver up the goods, for they belong to a person who is in no way implicated in the misrepresentation. The purchaser seems to be remediless. He cannot complain of the deceit, for it was innocent; and he cannot have the goods, for they belong to a stranger. Nevertheless his course (although tortuous) is clear; and his goal (although not the one he may strive for) is well assured. He cannot have the goods, and will not get them, but he must sue for them as though he could. On the other hand, the damages which will finally be awarded to him because of the misrepresentation must meanwhile remain unclaimed. With artful indirection he sues for delivery of the goods; the warehouseman answers that the goods are not the plaintiff's, which is the fact; the plaintiff replies estoppel. Log-

<sup>1</sup>(1879) 5 Q. B. D. 189; 40 L. J. Q. B. 392. And see *Reg. v. Charnwood* (1884), 1 Cab. & E. 419.

ically, now, the plaintiff ought to be awarded the goods. But Lord Justice Brett gives judgment as follows:<sup>1</sup>

"In a similar manner a person may be estopped from denying that certain goods belong to another; he may be compelled by a suit in the nature of an action of trover to deliver them up, if he has them in his possession and under his control; but if the goods in respect of which he has estopped himself really belong to somebody else, it seems impossible to suppose that, by any process of law, he can be compelled to deliver over another's goods to the person in whose favor the estoppel exists against him; that person is entitled to maintain a suit in the nature of an action of trover against him; but that person cannot recover the goods, because no property has really passed to him; he can recover only damages. In my view estoppel has no effect upon the real nature of the transaction; it only creates a cause of action between the person in whose favor the estoppel exists and the person who is estopped."

The warehouseman is not liable for damages *in* deceit for the innocent misrepresentation; but he is liable for damages *because of* the deceit — in round-about and artificial fashion.

In such cases as the two just dealt with, there seems to be no escape from the conclusion (while *Derry v. Peek* stands) that if the facts are stated naturally and in support of the real ground of complaint the plaintiff will be beaten; whereas he will succeed if he state the case artificially — asserting as his grievance that of which he cannot complain. His grievance is the misrepresentation. Of misrepresentation he must say nothing. To the shares, or to the goods, he has no right. These he must assert to be his. Damages for the deceit (if anything) are what he is entitled to. Of such claim he must not say a word. Damages for not giving him the shares or goods he ought not to get (because such damages are given in lieu of specific delivery, and to delivery he is not entitled). Such damages are awarded him.

#### PRINCIPAL AND AGENT.

There is another point at which the orbits of deceit and estoppel intersect, and there too a third factor must be taken into account. The ensuing problems will be merely stated here. Their solution will be suggested in a later chapter.<sup>2</sup>

The law of principal and agent supplies many cases in which the act of the agent, being admittedly unauthorized, the question is whether or not the principal is bound by it. Answer of general sort is sometimes made to the effect that the prin-

<sup>1</sup>*Simm v. Anglo-American* (1879), 5 Q. B. D. 207; 49 L. J. Q. B. 392.      <sup>2</sup>Ch. XXVI.

principal is bound if the act was "for the master's benefit." But this statement is of course much too loose; for according to it liability would depend upon the mere intent of the agent, apart altogether from the nature of his authority. More narrowly it is said that if the agent is employed to perform "a class of acts," liability for an act within the class is to be determined by a consideration of master's benefit or agent's benefit.

But we must distinguish. The case may arise in three ways: (1) In an action of pure tort; (2) in an action of deceit; (3) in estoppel.

(1) *Pure Tort*.—An omnibus driver, in defiance of instructions, upsets a rival omnibus, or runs over a pedestrian; the master is liable

"provided that what was done, was done not from any caprice of the servant, but in the course of his employment."<sup>1</sup>

(2) *Deceit*.—A secretary of a company made a false reply to questions relating to certain debenture stock of the company; he had been authorized by the company to answer such questions, and the company was held not to be liable because he "did not make the statements for the defendant but for himself"—that is, for his own fraudulent purposes.<sup>2</sup>

(3) A secretary of a company, not having been intrusted with the seal, got possession of it and affixed it to a certificate of shares, forging also the signatures of the necessary directors. He was acting entirely for his own benefit; but the company was held to be estopped by his action.<sup>3</sup>

The form of the remedy ought not to require such anomalous conclusions.

<sup>1</sup> *Limpus v. London* (1863), 1 H. & B. D. 714; 56 L. J. Q. B. 449. And see C. 536; 33 L. J. Ex. 35; *Bayley v. Manchester* (1872), L. R. 7 C. P. 420; 43 L. J. C. P. 78; *Weir v. Bell* (1878), 8 Ex. D. 245; 47 L. J. Ex. 709; *Barwick v. English* (1867), L. R. 2 Ex. 259.

<sup>2</sup> *Shaw v. Port Phillip* (1884), 13 Q. B. D. 108; 53 L. J. Q. B. 372. And see cases cited with this one in ch. XXVI.

<sup>3</sup> *Reg. v. Charnwood* (1887), 18 Q.

## CHAPTER XVII.

### OSTENSIBLE OWNERSHIP AND AGENCY.

Having now some clear understanding of the principles of estoppel by misrepresentation, let us carry them into the various departments of the law to which they are applicable.

Observe first that it is (1) title to property, and (2) liability upon contract, with which we have to deal; or rather the preclusion of the assertion of (1) rights to property, and (2) non-liability upon contract. And next, that all the cases arise in one of two ways; either

1. Some person has appeared to be the owner of property, when in reality he was not. This class may be referred to the title "Ostensible Ownership;" or

(2) Some person has appeared to have authority to do something, when in reality he had not. Such cases will be dealt with under "Ostensible Agency."

Application of estoppel to such cases might be thought to involve little difficulty. Twenty years prior to the leading case upon estoppel by misrepresentation,<sup>1</sup> Bayley, J., in *Boyson v. Coles*<sup>2</sup> had said with reference to ostensible ownership:<sup>3</sup>

"It is laid down as a general rule that the pawnee cannot have a better title than the pawner. And so it is of vendor and vendee, except in the case of a sale in market overt. But this rule will certainly not apply where the owner of goods has lent himself to accredit the title of another person by placing in his power those symbols of property which have enabled him to hold himself out as the purchaser of the goods."

Lord Herschell, in a recent case,<sup>4</sup> uses similar language:

"If the owner of a chose in action clothes a third party with the apparent ownership, and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it and who received it in good faith and for value."

The law of ostensible agency, too, has upon many occasions been more or less accurately laid down:

"If a man by his conduct holds out another as his agent, by permitting

<sup>1</sup> *Pickard v. Sears* (1837), 6 A. & E. (1890), 27 Ont. 166; *Moore v. Metropolitan* (1873), 55 N. Y. 47; *Mott v.*

<sup>2</sup> (1817) 6 M. & S. 23, 33.

<sup>3</sup> *Colonial Bank v. Cady* (1890), 15 App. Cas. 267; 60 L. J. Ch. 131. See also *Ontario Bank v. McTaggart*

*Clark* (1848), 9 Pa. St. 399.

<sup>4</sup> *Colonial Bank v. Cady* (1890), 15 App. Cas. 285; 60 L. J. Ch. 141.

him to act in that character<sup>1</sup> and deal with the world as a general agent, he must be taken to be the general agent of the person for whom he so acts, and the latter is bound though in a particular instance the agent may have exceeded his authority. It is even so in the case of a special agent."<sup>2</sup>

"The general rule of law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given and the property be taken in the belief that an unquestionable title thereto is being obtained; unless the person taking it can show that *the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner.*"<sup>3</sup>

### CONFUSION.

Although these doctrines seem to be sufficiently clear and manifestly just, yet much confusion exists concerning them, due largely to the following considerations: (1) Ostensible ownership and ostensible agency are frequently confounded the one with the other; (2) other principles, to the exclusion of those of estoppel, are in vogue in various branches of the law, notably in the law of real property and choses in action; (3) instead of ostensible agency, unfounded distinctions between general and special agents and various other considerations are frequently invoked.

*Ostensible Ownership and Ostensible Agency.*—That the distinction between ostensible ownership and ostensible agency is sometimes overlooked may be noted in a judicially indorsed<sup>4</sup> paragraph from such a substantial work as Chitty on Contracts:<sup>5</sup>

"It is said that if the real owner of goods suffers another to have possession thereof, or of those documents which are the *indicia* of property therein, thereby enabling him to hold himself forth to the world as having not the possession only, but the property, a sale by such a person without notice will bind the true owner. *But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who, from the nature of his employment, might be taken prima facie to have had the right to sell.*"

But, with submission, it is difficult to see that the nature of the employment of an ostensible owner has anything more to do with the case than has the style of his clothes. If the owner of goods represents (or assists some other person to represent) that a clergyman owns them, and thereby induces an innocent

<sup>1</sup> Or in any other way.

<sup>2</sup> *Smith v. McGuire* (1858), 3 H. & N. 562; 27 L. J. Ex. 465.

<sup>3</sup> *Simmons v. London* (1892), A. C. 215; 61 L. J. Ch. 728.

<sup>4</sup> *Higgins v. Burton* (1857), 26 L. J. Ex. 342; *Johnson v. Credit* (1877), 2 C. P. D. 224; 3 C. P. D. 41; 47 L. J. C. P. 24.

<sup>5</sup> See 10th ed. 355, and 12th ed. 442.

purchaser to pay over his money, can the result be different from a case in which the ostensible owner was a lawyer, a broker, a judge, or a footman?

Probably the learned writer never intended to say that it would; and the explanation of his use of the language quoted is to be found in inattention to the distinction between ostensible ownership and ostensible agency. The two things are in the passage confused together. If an owner represents that somebody else is the owner, the nature of the employment of that other person is clearly immaterial. Estoppel by ostensible ownership, therefore, has nothing to do with nature of employment.

But it may have something to do with ostensible agency. Suppose that I hand over a bill of lading of my goods to a factor with instructions not to sell the goods, and he does sell them; I am estopped from setting up my title against the purchaser. But why? Not because the factor appeared to be the owner of the goods, for being a factor he did not so appear (every one knew him to be an agent merely); but because being a factor and having possession of *indicia* of title to my goods with my assent, he appeared to have authority to sell. Note that if the person who had the bill was not "one who from the nature of his employment might be taken *prima facie* to have the right to sell," there would have been no appearance or authority to sell, and no estoppel. There might of course be ostensible ownership.<sup>1</sup>

"Nature of his employment" may therefore be a factor in cases of ostensible agency, but can have nothing to do with ostensible ownership — with a case in which the owner has enabled another "to hold himself forth to the world as having not the possession only but the property."

*Confusion in Factors Act.*—Some of the provisions of the English Factors Act proceed upon the principle of ostensible ownership, and others upon the principle of ostensible agency. Some of the clauses provide that sales and other dispositions of goods, made under certain circumstances by persons intrusted with goods or documents of title to goods, shall be as valid "as if such person were the owner of the goods;" while others declare that sales shall be "as valid as if he (the person selling)

<sup>1</sup> See the point referred to in ch. XXII.

were expressly *authorized* by the owner of the goods to make the same."<sup>1</sup>

To some extent the distinction between cases in which the vendor appears to be acting as agent and those in which he appears to be acting as owner is in the acts properly observed. In clause 2, for example, which provides for cases of sales, etc., by persons whose business is that of an agent, the language is appropriate — the transaction is to "be as valid as if he was expressly *authorized* by the owner of the goods to make the same." But there is not the same consistency in the clauses providing for sale by persons who may appear to be the owner of goods. Here one of the clauses, 7 (1), proceeds upon ostensible ownership, while two others, 8 and 9, proceed upon ostensible agency.<sup>2</sup>

*Confusion in "The Sale of Goods Act."*— In "The Sale of Goods Act" (England and Manitoba) there is the following:<sup>3</sup>

"Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

The draftsman of this provision had in view the case of an agent with ostensible authority to sell, and he provided that the owner is to be precluded from denying the existence of real "authority to sell." He overlooked the fact that an owner may be estopped by ostensible ownership as well as by ostensible agency, and made no provision for the case.

*Confusion Elsewhere.*— The following is a fair example of many passages in which the same confusion is apparent:

"The owner of negotiable securities payable to bearer and transferable by mere delivery, who intrusts the *agent* with the possession thereof, gives him *ipso facto* in law towards third parties in good faith the right to effectually sell or pledge them. In constituting his agent the *apparent absolute owner* of these securities and conferring on him all the *indicia* of ownership, he precludes himself from disputing the title of any subsequent *bona fide* transferee. Or to put it in another way, the agent stands in the same position *as if he had a power of attorney* from the owner authorizing him to deal with the securities in his own name as he might think fit."<sup>4</sup>

<sup>1</sup> 53 Vic. (Imp.), ch. 45, § 2 (1). And see §§ 8, 9.

<sup>2</sup> Similar confusion is to be found in the Ontario statute (R. S., ch. 150), by which it is declared that an agent intrusted with possession "shall be deemed the owner . . . notwithstanding the purchaser has notice

that he is contracting only with an agent." In such case the assumption ought to be of authority to sell, and not of ownership.

<sup>3</sup> 56 & 57 Vic. (Imp.), ch. 71, § 21; 59 Vic. (Man.), ch. 25, § 21.

<sup>4</sup> Young v. MacNider (1895), 25 S. C. Can. 379.

Observe that "the *agent*" is said to become "the apparent absolute owner," wherefore the owner is estopped "from disputing the title;" and this is put "in another way" by saying that "the agent stands in the same position as if he had a power of attorney from the owner." This is not another way of putting the same case, but is a remark with reference to a totally different case.

Another example occurs in the third quotation at the commencement of this chapter. It is said that "if the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped."

If the third party has the "apparent ownership" he would of course necessarily have the apparent "right of disposition of it." The word *or* substituted for "and" would probably more accurately express the idea grasped at. The sentence would then apply to the two cases of ostensible ownership and ostensible agency, instead of redundantly to one of them only.

*Confusion — A Further Point.*— In distinguishing between ostensible ownership and ostensible agency, special care must be taken in cases in which (as is possible) the ostensible owner may be in reality an agent—confusion is more probable in such cases. An example will illustrate: An agent of a policy-holder instructed a broker to collect from the insurance company; the broker thought that the agent was the real owner of the policy; the broker collected and set off against the agent; *held*, that the principal could not compel him to do otherwise.<sup>1</sup> The agent here, although an agent, was the ostensible owner; the broker dealt with him upon the faith of such appearance; the real owner having permitted the appearance, was estopped. Bowen, L. J., said:

"If A. has allowed his agent B. to appear in the character of a principal he must take the consequences."

#### BENEFIT OF DISTINCTION.

This then is the first point to which to direct attention and indeed to insist upon, namely, the difference between ostensible ownership and ostensible agency. For the distinction, although

<sup>1</sup> *Montagu v. Forwood* (1893), 2 Q. B. 350. For other cases of this nature see *Ex parte Dixon* (1876), 4 Ch. D. 183; 46 L. J. Bk. 20; *Ramazotti v. Bowring* (1860), 7 C. B. N. S. 851; 29 L. J. C. P. 80; *Smith v. Grouette* (1885), 2 Man. 314.



sufficiently obvious, is, as we have seen, very frequently disregarded, and its oversight involves much confusion. Observation of it would relieve several departments of the law of some difficulty. Take a few examples:

*Negotiable Instruments.*— A note is signed in blank; authority is given to "Galley"<sup>1</sup> to fill it up for £100 and negotiate it; Galley fills it up for £500 and passes it on; and the signer is (we shall say) liable for the £500. The reason given for this is that

"a person who gives another possession of his signature on a bill stamp *prima facie* authorizes the latter as his agent to fill it up, and give to the world the bill as accepted by him. He enables his agent to represent himself to the world as acting with a general authority; and he cannot say to a *bona fide* holder for value who has no notice of any secret stipulations that there were secret stipulations between himself and the agent, any more than can a principal in the case already put, where he enables his agent buying or selling on his behalf to represent himself as acting under a general authority."<sup>2</sup>

But the reason is not always this. Everything depends upon the circumstances of the case. Did the transferee know that the bill had been given to Galley in blank? Then he knew that Galley was an agent; the case is one of ostensible agency; possession of the bill is evidence of authority to fill it up; Galley therefore appears to have the requisite authority, and the principal is estopped from asserting otherwise. But if Galley had filled up the bill before offering it in negotiation, then the transferee knew nothing of agency; he believed that the bill was issued in completed form; he believed Galley to be the owner of the note; and the law of ostensible agency has nothing to do with the case; the question becomes one of ostensible ownership. This distinction has often been disregarded. The subject will be dealt with in a subsequent chapter.<sup>3</sup>

*Priorities.*— In another department of the law we meet with the two following cases:

*Perry-Herrick v. Attwood.*<sup>4</sup>— A legal mortgagee of real estate handed over the deeds to the mortgagor, with the intention of enabling him to raise £15,000 upon them. The mortgagor borrowed £50,000 upon them from one who knew nothing of the mortgage. *Held*, that the true owner of the deeds (the legal

<sup>1</sup> Russell v. Langstaffe (1780), Doug. 514.

<sup>2</sup> Ch. XXIV.

<sup>3</sup> (1857) 25 Beav. 203; 2 De G. & J.

<sup>4</sup> Montague v. Perkins (1853), 22 L. J. C. P. 187.

mortgagee) was the one to suffer. The case is one of ostensible ownership.

*Brooklesby v. Temperance*.<sup>1</sup> — The owner of certain title-deeds employed an agent to raise money upon them; and at the same time directed him not to borrow more than a specified sum. The agent went into the market and, upon the deposit of the deeds, obtained a loan in excess of the amount prescribed from a *bona fide* lender who knew of the agency, but who had neither notice nor knowledge of its limitation as to amount. The agent pocketed the excess. *Held*, again, that the owner of the deeds, and not the lender of the money, was the one to suffer. But is that right? The case is one of agency, not of ostensible ownership as was the previous case, but the distinction is not observed. Indeed, Lord Herschell said:

"I confess I am quite unable to see any distinction in principle between the two cases which would render it right, proper or reasonable that in the former case a lender should not be bound by a limitation of authority of which he was unaware, but that in the latter case he should be so bound."

With great respect for the opinion of so eminent a judge, the present writer cannot but think that the distinction is very apparent. In the one case the lender of the money believed that he was dealing with an owner. In the other case he believed that he was dealing with an agent. To the latter of these the ordinary law of principal and agent applies; but to the former it has no application, for the case is one of ostensible ownership. In the agency case the law says to the lender: "You are aware that you are dealing with an agent. You must, as in other cases of agency, ascertain, at your peril, the extent of the agent's authority." In the ownership case such language is altogether inapplicable; for the lender knows nothing of a principal or of an agent. He believed in ownership, and had no suspicion of agency.

But what is the effect of such a distinction? Observe that in both cases the real owner of the deeds has not personally pledged them, and that no one having his authority has done so. If, then, the real owner is to be bound by the pledge of the deeds, it must be because he is estopped from denying that the person pledging had power to do so. Now he can be estopped only if he is in some way responsible for the fraud of

<sup>1</sup> (1895) A. C. 181; 64 L. J. Ch. 437.

the person pledging — if he has assisted the misrepresentation of power or right to pledge. In Lord Herschell's case (in which the pledgee knew that the person he was dealing with was an agent) the reasoning then would have to follow this course: "The real owner authorized his agent to borrow a certain sum; the agent improperly represented that his authority was more extensive than it really was; the lender, upon the faith of this misrepresentation, changed his position; the real owner was in some way responsible for the misrepresentation — had done something to assist it, to make it credible, and is therefore estopped from denying its truth." But what did he do? (1) He gave authority to borrow a certain sum of money, and the question then is, Does that in any way assist the misrepresentation that the agent had power to borrow a larger amount? Suppose that the principal had authorized the agent to sign a promissory note for £100, and the agent, misrepresenting his authority, signed his principal's name to a note for £500; the principal would clearly not be liable. And the reason is that giving authority to sign for the smaller amount in no way assists a misrepresentation of any greater authority. (2) Nor does the agent's possession of the deeds render any assistance to the misrepresentation as to the amount to be borrowed. Possession by one person of the deeds of another may imply that the possessor has advanced money upon them, but not that he has authority from the owner to pledge them for unlimited amounts.

The case is, in fact, one of simple agency, and the reasoning ought to be as follows: "The owner did not himself borrow the money, nor did any one having his authority borrow it; nevertheless, if he has represented or assisted the misrepresentation that the agent had such authority, he is estopped; but he did neither the one nor the other, and he is therefore not responsible for nor bound by the act."<sup>1</sup>

The other case (*Perry-Herrick v. Attwood*) is entirely different. In it the mortgagor represented himself to be the unincumbered owner of the property and the title-deeds. Upon this representation the lender changed his position; the first mortgagee assisted the misrepresentation and made it credible

<sup>1</sup>This line of reasoning was overlooked in *Robinson v. Montgomery* (1896), 2 Ch. 841; 35 L. J. Ch. 915.

to all men by handing over to the mortgagor all the title-deeds. He was therefore rightly estopped. The case is one of ostensible ownership.

*Sale of Goods.*—In still another department an erroneous decision was given because of the confusion of ostensible ownership and agency.<sup>1</sup> The owner of a table-top sent it to a dealer in such things, to be sold upon certain specified conditions. The dealer disregarded his limitations, and the owner was held not to be bound by the sale. The case was one of ostensible ownership, and the owner ought to have been estopped by the assistance rendered to the dealer's misrepresentation of ownership. If I permit my goods to appear upon a bargain counter, I am surely estopped by a sale, whatever my instructions may be. The judgment, however, proceeds upon ostensible agency, and results in favor of the owner. Willis, J., said:

"The true test is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all. . . . The foundation, however, of the whole thing is that the agent should be authorized to enter into some transaction;"

and inasmuch as there was no authority at all to sell (the conditions not having arisen), the learned judge decided that the owner was not bound by the sale.

But the test and foundation of ostensible ownership is not this. Nor is it true even of ostensible agency that the agent must "be authorized to enter into some transaction." Ostensible agency proceeds upon misrepresentation, and there may be misrepresentation as to the existence as well as to the extent of agency.<sup>2</sup> Lord Ellenborough's *dictum* is good and reasonable law:

"If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity was sent thither for the purpose of sale. . . . When the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."<sup>3</sup>

The necessity for a clear understanding of the principles under discussion was very apparent in the recent case of *Watteau v. Fenwick*.<sup>4</sup> One would think that nothing could be clearer than the following propositions:

"Where there is neither agency in fact, nor any holding out as agent,

<sup>1</sup> *Biggs v. Evans* (1894), 1 Q. B. 89.

See also the reference to *Watteau v. Fenwick*, ch. XI.

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

<sup>3</sup> *Pickering v. Busk* (1821), 15 East, 43. And see cases cited with this one in ch. XXI.

<sup>4</sup> (1893) 1 Q. B. 343.

and the dealing is with the party as principal, there can be neither undisclosed principal nor principal by estoppel."<sup>1</sup>

In other words, a man cannot be liable upon contract unless (1) he himself makes the contract; or (2) some one with his authority, or (3) some one who appears to have his authority, makes it for him.

But these propositions are practically denied in the case in hand, the court being misled by a false analogy. The facts were that a brewer allowed his manager to appear as *owner* of the business, but forbid him to buy goods from third persons; the manager did buy from a person who believed the manager to be the owner; and it was held that the brewer was liable to the vendor for the price of the goods.

Now the only misrepresentation (the only false appearance) was as to the manager's ownership. The brewer, therefore, might well be estopped from denying such ownership; and if judgment had been obtained for the price of the goods against the manager, the vendor might very well have seized under his execution the goods in the shop as belonging to the debtor. But there could be no *liability* on the part of the brewer for the money; for (1) he did not contract, nor (2) did any one having his authority contract, nor (3) did any one having the appearance of his authority contract. Willis, J., however, said:<sup>2</sup>

"The principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations as between the principal and the agent the principal puts upon that authority. It is said that it is only so where there has been a holding out of authority, which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitations would prevail and defeat the action of the person dealing with the agent, and then discovering that he was an agent and had a principal. But in the case of a dormant partner it is quite clear law that no limitations of authority as between the dormant and the active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is on such a question nothing but a branch of the general law of principal and agent; and it appears to me to be undisputed and conclusive on the point now under discussion."

But the distinction between the two cases is clear: A partner, although dormant, is a member of the firm, and when a contract is made by an active partner the dormant member is as much a party to it as if specially named in it. If, there-

<sup>1</sup> Per Osler, J., in *Becherer v. Asher* 348. See also *Edmunds v. Bushell* (1896), 23 Ont. App. 210. And see (1865), L. R. 1 Q. B. 97; 35 L. J. Q. B. note in 9 Law Quarterly Rev. 111. 20; *Hubbard v. Tenbrook* (1889), 124

<sup>2</sup> *Watteau v. Fenwick* (1893), 1 Q. B. Pa. St. 291; 16 Atl. R. 817.

fore, the contract be within the ostensible purposes of the firm, the dormant partner is estopped to set up secret arrangements. The appearance of real authority in the active partner is the determining factor; and the case is not outside the three requisites of liability above referred to — it is an example of the third of them. The language of the learned judge indeed so indicates when he says that the dormant partner will be liable “as to things with respect to which there was appearance of authority to contract.”

The brewer's case is entirely different. In it the brewer was not a party to the contract — as was the dormant partner. It was not therefore a case in which a certain person, being admittedly and as a mere matter of fact a party to the contract, the question is whether there had been the appearance of authority to put him in that position; but a case in which he was *not* a party to the contract at all, and the question is whether he ought to be liable upon it. He was not a party, because (1) he had not made the contract; and (2) no one with his authority had made it for him; and (3) no one having any appearance of his authority had pretended to make him a party to it — how then could he be liable?

#### OSTENSIBLE OWNERSHIP.

Before proceeding to practical exposition let us have a clear idea of estoppel by ostensible ownership. Why is it that the real owner of property is sometimes bound by a sale of it made by another person — by a person who had no authority from the real owner to sell and who did not pretend that he had any such authority?

The reason is not, as is sometimes said, that the true owner has by his conduct really assented to the sale; that he is in some sense a party to it; and that therefore he is as much bound by it as if he were the sole vendor. No doubt the circumstances may in some cases warrant the implication of the true owner's concurrence in the sale. It may even be that such concurrence ought to be inferred in very many cases in which it is not. But so long as there is a case in which the assumption cannot be made, we must find some scientific ground upon which we are entitled to say that, although the true owner was not a party to the sale, yet he is bound by it.

Nor is the reason that the true owner has by his conduct in effect authorized the sale: that the ostensible owner has, in this view, acted under the authority of the true owner. There are indeed cases in which the principle of ostensible agency has to be invoked; but for cases (1) in which there is no relation between true owner and vendor, and (2) in which the purchaser has no reason to believe in the existence of any such relation, this explanation is insufficient.

The real facts point to the true conclusion. They are: (1) The vendor represented that he was the owner (not that he had authority to sell); (2) the purchaser believed that representation to be true; (3) upon the faith of that representation the purchaser changed his position; (4) the true owner in some way assisted the misrepresentation of ownership; and (5) he is estopped by reason of this assistance.

#### UNIVERSAL APPLICABILITY.

There is nothing in the statement of this principle that would indicate its applicability to one kind of property rather than another; and it will be one of the chief objects of the succeeding chapters consistently to carry it through the various departments of the law, and to apply it to every sort of property.

The difficulties in the way, however, are almost overwhelming. Although the justice that underlies the law of estoppel has always in some degree actuated the judicial mind, yet time and multiplicity of cases were essential for the development of its true principles; and it is not surprising that that development should in various departments have taken somewhat different courses, and sometimes gone awry.

For example, when estoppel is mentioned in connection with the law of real property, the mind at once reverts to the one case of a true owner standing by while another person purchases an interest or erects buildings upon the by-stander's land.<sup>1</sup> And when questions of priorities arise we think not of

<sup>1</sup> *Ramsden v. Dyson* (1866), L. R. 1 H. L. 129, rises automatically to the tongue. The idea of estoppel is so often associated with this particular phase of it that it sometimes excludes other aspects from view. A decision of Lord Cottenham was reversed in the House of Lords (*Mangles v. Dixon* (1848), 1 MoN. & G. 487; 8 H. L. C. 709), because the point of estoppel upon which he decided the case was taken to be estoppel by standing by.

estoppel, but of the old maxims, "When the equities are equal," etc., "*Prior est tempore*," etc., and we make inquiry as to the locality of the deeds. An effort will be made to supersede these maxims by the law of estoppel.

From the subject of bills and notes, estoppel is almost unanimously excluded. "Negotiability," in sharp antagonism to the general law, is said to rule this department. It is the author's view, however, that the "law merchant" must give place to estoppel by ostensible ownership and agency, and that thereupon harmony will replace antagonism.

Questions of title to goods obtained by means of bills of lading or other documents of title are now decided (1) by analogy to the law of goods themselves; (2) by considerations of semi-negotiability; and (3) by Factors and other Acts. The view will be advanced that the law as to goods acquired by means of paper title ought not to be different (for the purposes in hand) from the law as to real estate, title to which is always documentary. In other words, that the principles of estoppel by ostensible ownership and agency apply to both alike, as well as to all other sorts of property.



## CHAPTER XVIII.

### OSTENSIBLE OWNERSHIP AND AGENCY—LAND—THE LEGAL ESTATE.

Few rules are better known, and thought to be more firmly established, than that which prescribes that where the equities are equal the law will prevail. Yet we shall see that it is open to at least four objections: (1) that it owes its origin to imperfect administration of justice; (2) that all reason for its existence ceased with the recent removal of that imperfection; (3) that it is an irrational, incongruous, and disturbing factor in our system of jurisprudence; and (4) that it is inconsistent with the modern principles of estoppel by ostensible ownership, by which it ought to be supplanted.

From the standpoint of estoppel (which heretofore, however, has had little place in the discussion of the subject) we would say that, as between two competing grantees of an estate (legal or equitable is wholly immaterial), one of them, namely, the first alone, can have it; and that, if the second is to be preferred, it must be not because the second has the estate (for he has it not), but because, for some reason, the first is estopped from setting up his priority.

The rule above quoted, however, proceeds in wholly different fashion. Note three points:

(1) It inquires into the equities of the competitors (that is, into their respective merits<sup>1</sup>); and, finding them to be equal, awards priority, not to the man who really has the estate in question (having first got it), but to the one who, through chance, luck, or otherwise, has or can grab the legal estate—whether he be first, second, or fortieth.

(2) Nor is this the full offense of the rule; for in examining into the merits of the contestants it is held that "nothing but fraud, or gross and voluntary negligence, will oust the priority

<sup>1</sup> *Rice v. Rice* (1858), 2 Dr. 73; 23 L. J. Ch. 289; *Bailey v. Barnes* (1894), 1 Ch. 25; 68 L. J. Ch. 73.

of the legal claimant."<sup>1</sup> There are therefore different balances wherein to weigh the merits of legal and equitable claimants. The merits may be far from really equal; the legal claimant may, as we shall see, be negligent in very high degree; the equitable claimant as diligent and as careful as possible, and first in point of time; and yet a happy clutch of the legal estate will discomfit the one who has not only the greater merit, but also the natural priority.

(3) The phrase just used ("a happy clutch") is not inappropriate; for the doctrine that the legal estate carries priority with it has led to this singular and anomalous result, that it resembles the greasy pig which being, in general scramble, seized by some lucky competitor, gains for its captor the prize, provided that he has seized it according to rule, and has not too soon let it slip.

#### THE SCRAMBLE.

This third point may be dealt with first. *Rooper v. Harrison*<sup>2</sup> gives a good view of the sport. A first mortgagee had the legal estate, and a power of sale with the usual declaration of trust as to surplus moneys. He devised the estate to the third mortgagee, who now having the pig (and for that reason only) became entitled to priority over the second mortgagee. In ignorance of the rules of the game (as he afterwards learned) this third mortgagee sold the property under the power in the first mortgage. The second mortgagee then contended that he was back again in second place, for the contest now was over the purchase-money, and not over the land — the pig having foolishly been let slip. If it were over the land, of course the third mortgagee was prior, for he had had the legal estate. But if over the money, and the pig gone, —? Sir W. Page Wood said:

"Harrison (the third mortgagee) might have advanced the money (to pay off the first mortgagee) out of his own pocket, and have held the

<sup>1</sup> *Plumb v. Fluitt* (1791), 3 Anstr. 440. And see *Evans v. Bicknell* (1801), 6 Vea. 174, 190; *Martinez v. Cooper* (1826), 3 Russ. 198; *Farrow v. Rees* (1840), 4 Beav. 18; *Hewit v. Loosemore* (1851), 9 Ha. 458; 21 L. J. Ch. 69; *Colyer v. Finch* (1856), 5 H. L. C. 905; 26 L. J. Ch. 65; *Dixon v. Muckleston* (1872), L. R. 8 Ch. App. 155; 43 L. J. Ch. 210; *Northern v. Whipp* (1884), 26 Ch. D. 494; 53 L. J. Ch. 629.  
<sup>2</sup> (1855) 3 K. & J. 107. And see *Bailey v. Barnes* (1894), 1 Ch. 25, 63; 63 L. J. Ch. 73.

whole legal estate for the two debts. . . . Or he might have raised the money by transfer of the mortgage, and have procured the person who took the legal estate to execute a declaration that he would hold it on trust to secure himself his mortgage debt, and secondly, to secure that of Harrison; and had he taken this course Harrison would now be the person having the best right to call for it. . . . It is said that this would render it a mere matter of machinery: but that in truth is the result of the whole doctrine of this court about the legal estate, and a very singular machinery it sometimes is. It is merely a question of how far a person, who has dexterously managed to lay hold of this tabula in naufragio,<sup>1</sup> is allowed to seize it. Even after bill filed by a second incumbrancer he is allowed to seize it, but it is on that he rests. It would seem to militate very much against the views which this court entertains of not allowing rights to be disturbed by third persons; and there was some legal hesitation and doubt as to allowing a person holding the legal estate to hand it over to the one or the other, as he thinks fit. All that is a very peculiar part of this doctrine; but the court has never gone beyond this; and if it does not find the legal estate interposed it deals with the money according to priorities."

The pig had been let slip, priority had gone with it; the court did "not find the legal estate interposed;" and Harrison was relegated to the third place, from which, indeed, nothing but the pig theory had ever removed him.<sup>2</sup>

The rules which govern the scramble for the legal estate; under what circumstances it is fair to seize it;<sup>3</sup> at what time it may be seized;<sup>4</sup> what persons may, or may not, help you to seize it;<sup>5</sup> whether or not you must give value for it; to what extent it must be complete when you get it;<sup>6</sup> and what per-

<sup>1</sup> Freely translated in this connection—pig.

<sup>2</sup> "Being purchasers for value without notice they cannot succeed unless they can make out that, having an inferior equity, they have clothed it with a legal interest." This was said with reference to the purchase of shares. Per Kay, L. J., in *Powell v. London* (1898), 2 Ch. 564; 62 L. J. Ch. 802.

<sup>3</sup> *Saunders v. Dehew* (1892), 2 Vern. 271; *Willoughby v. Willoughby* (1787), 1 T. R. 763; *Allen v. Knight* (1846), 5 Ha. 272; 15 L. J. Ch. 490; 16 L. J. Ch. 370; *Baillie v. McKewan* (1865), 35 Beav. 177; *Dodds v. Hills* (1865), 2 H. & M. 424; *Pease v. Jackson* (1868), L. R. 3 Ch. 576; 37 L. J. Ch. 725; *Pilcher v. Rawlins* (1870), L. R. 11 Eq. 53; L. R. 7 Ch. 25; *Colonial Bank v. Hepworth* (1887), 36

Ch. D. 36; 56 L. J. Ch. 1089; *Taylor v. Russell* (1891), 1 Ch. 8; (1892) A. C. 244; 60 L. J. Ch. 1; 61 L. J. Ch. 657; *London v. Goddard* (1897), 1 Ch. 642; 68 L. J. Ch. 261; *Merchants' Bank v. Morrison* (1872), 19 Gr. 1.

<sup>4</sup> *Dodds v. Hills* (1865), 2 H. & M. 424; *Baillie v. McKewan* (1865), 35 Beav. 177; *Reg. v. Shropshire* (1873), L. R. 8 Q. B. 420; L. R. 7 H. E. 496; 45 L. J. Q. B. 31; *Blackwood v. London* (1874), L. R. 5 P. C. 92; 43 L. J. P. C. 23; *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556; 43 L. J. Ch. 694; *Harpham v. Shacklock* (1881), 19 Ch. D. 207.

<sup>5</sup> *Sharples v. Adams* (1863), 32 Beav. 218; *Maxfield v. Burton* (1873), L. R. 17 Eq. 15; 43 L. J. Ch. 46; *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556; 43 L. J. Ch. 694; *Garnham v. Skipper* (1885), 55 L. J. Ch. 263.

<sup>6</sup> *Roots v. Williamson* (1888), 38 Ch.

sons have the best right to seize it,<sup>1</sup> do not interest us here. They may in all their subtle refinement be found in the cases noted below as well as in countless others.

#### A GENERAL VIEW.

A more general view of the operation of the rule under consideration is furnished by the case of *Cave v. Cave*.<sup>2</sup> Trust property was, in fraud of the beneficiaries, mortgaged by the trustee to several innocent persons in succession. The first of these, of course, alone had the pig; that is, the legal estate. His mortgage was good against the beneficiaries. The others had no pig, but equitable estates only. Their mortgages were bad as against the beneficiaries.<sup>3</sup> Why should the law not be the same in both cases? In both the trustee did the same wrong. In both the beneficiary had to bear the same (if any) blame, namely, that he had a fraudulent trustee. In both cases the mortgagee was innocent, paid his money and completed his transaction. But in the one case the courts decide for him, and in the others against him. And if the man with the pig had chosen to hand it over to a third, fourth or fifth incumbrancer the courts would have declared in favor of the one so selected. *Ubi pig, ibi priority*.

Contrast with this the result to be arrived at by the application of the manifestly reasonable principles of the law of estoppel by ostensible ownership:

"Where the owner . . . has lent himself to accredit the title of another person by placing in his hands those symbols of property which have enabled him to hold himself out as the purchaser,"<sup>4</sup>

he is estopped as against any person who upon the faith of the ostensible ownership has changed his position. Applying this principle to *Cave v. Cave* we should say that the beneficiaries were estopped as against all the mortgagees from setting up their title. They had permitted their trustee to pose as the owner of the land; upon the faith of his ostensible ownership

D. 485; 57 L. J. Ch. 995; Powell v. <sup>2</sup>(1880) 15 Ch. D. 639; 49 L. J. Ch. London (1893), 1 Ch. 610; (1898) 2 503.

Ch. 555; 62 L. J. Ch. 803.

<sup>1</sup> Moore v. Northwestern (1891), 2 Ch. 599; 40 L. J. Ch. 627; Newman v. Newman (1883), 28 Ch. D. 674; 54 L. J. Ch. 598.

<sup>3</sup> And see Re Morgan (1881), 18 Ch. D. 93; 50 L. J. Ch. 651, 834.

<sup>4</sup> Boyson v. Coles (1817), 6 M. & S. 24. The language refers to goods, but the principle is the same as to all property.

innocent persons had been induced to change their position; therefore estoppel; pig consideration — zero.

The present law, however, declares that the beneficiaries and the mortgagees have equal merits; it takes no notice of the doctrine of estoppel by ostensible ownership which would hold them to be most unequal; and everybody's merits being thus said to be equal, it adjusts the rights of the parties according to the *ubi pig ibi* priority notion, and not with the slightest regard to any principles of justice or fair play.

It is with reference to difficulties and anomalies such as these that the language of Lord Selborne in *Dixon v. Muckleston*<sup>1</sup> is peculiarly applicable:

"It is impossible to reflect on this injustice without finding very cogent arguments in favor of some attempt to improve the state of the law as to title to real estate, and to get rid of the difficulty which arises from the distinction between a legal and an equitable estate;"

as also the language of Lindley, L. J.:

"The reasoning is technical and not satisfactory; but as long ago as 1728 the law was judicially declared to be well settled and only alterable by act of Parliament. See *Brace v. Duchess of Marlborough*."

The Imperial Parliament at one time did enact that<sup>4</sup>

"After the commencement of this act, no priority, or protection, shall be given, or allowed, to any estate, right, or interest, in land, by reason of such estate, right, or interest, being protected by, or tacked to, any legal or other estate, or interest, in such land; and full effect shall be given in every court to this provision, although the person claiming such priority, or protection, as aforesaid, shall claim as a purchaser for valuable consideration and without notice."

But the statute was short-lived. It was repealed at the ensuing session.<sup>5</sup> The scramble still goes on.

#### ORIGIN OF THE DOCTRINE.

As has been already said, the priority accorded to the legal estate originated because of the defective administration of justice. Equitable estates and interests were those

"which were enforceable under the separate jurisdiction of the courts of equity, and which in the courts of common law were either not enforceable, or if enforced were enforced only as contracts giving a right to damages for a breach, not as giving any specific claim to or over the lands or hereditaments affected by them."<sup>6</sup>

An equitable claimant, therefore, was compelled to seek his remedy in a court of equity. There he asserted that the holder

<sup>1</sup>(1872) L. R. 8 Ch. App. 158; 43

L. J. Ch. 212.

<sup>2</sup>*Bailey v. Barnes* (1894), 1 Ch. 36;

68 L. J. Ch. 78.

<sup>3</sup>(1728) 2 P. Wms. 491.

<sup>4</sup>37 & 38 Vic., ch. 78, § 7.

<sup>5</sup>39 & 40 Vic., ch. 37, § 129.

<sup>6</sup>Ency. of Laws of Eng., vol. 39.

And see Goodeve's *Real Property* (3d ed.), 258 et seq.

of the legal title ought to be compelled to convey it to him. But the holder of the legal title might also have merits — he might also be an innocent purchaser, although subsequent in point of time. And the question was whether the court of equity, as between two innocent persons, would exercise its extraordinary jurisdiction and compel a conveyance of the legal estate. It held that it would not. It left the parties to such skimp justice as the law afforded. It felt "itself checked . . . and an obstacle thrown in its way" by this legal view of the case.

If neither contestant had the legal estate, the court, relieved of all embarrassments, administered unfettered justice, and decreed as between two innocent holders that he had the estate who had first acquired it. What else could it declare?<sup>1</sup>

The situation is well described by Sir W. Page Wood:<sup>2</sup>

"The whole doctrine of this court about the protection afforded by means of the legal estate is simply this: A party getting the legal estate acquires no new right in equity in any way. But equity regarding all the persons who have incumbrances according to their priorities, considering that the equitable interests pass just as the legal interest does<sup>3</sup> by the effect of the deeds, finds itself checked at times and an obstacle thrown in its way by an incumbrancer's saying: 'I have got the legal estate interposed; I insist it is mine at law, and there must be a superior equity shown in order to deprive me of my legal estate.' It is merely staying the hands of the court by resting on that legal estate which this court will not deal with unless a superior equity can be shown; and although the court holds that priority will give equity, yet it does not hold that it gives so superior an equity as between several incumbrancers as to enable a person who has an anterior charge to wrest the legal estate from the person who has obtained it without notice of the anterior charge, and who has not parted with it. This is the whole effect of the doctrine, and none other."

The defect then in the administration of justice out of which grew the doctrine of the priority of the legal estate was that courts of law refused to recognize equitable interests. The court of equity, on the other hand, doing what it could in this and other ways to improve and rationalize the law, did recognize such interests. In contests for priority between adverse claimants of equities, inasmuch as the law regarded neither of them, the court of equity was unhampered, and was able to say that the first was first, unless his conduct had deprived

<sup>1</sup> It took a peculiar idea, however, of innocents. See *ob. XX*.

<sup>2</sup> *Rooper v. Harrison* (1855), 2 K. & J. 108.

<sup>3</sup> See as to this, *Hockley v. Bantock* (1826), 1 Russ. 141; *Keys v. Williams* (1838), 8 Y. & C. Ex. 53, 462; 7 L. J.

Ex. Eq. 59; *Pryce v. Bury* (1854), L. R. 16 Eq. 153, n.; 23 L. J. Ch. 676;

*James v. James* (1878), L. R. 16 Eq. 153; 42 L. J. Ch. 896; *Backhouse v.*

*Chariton* (1878), 8 Ch. D. 444; *Lees v. Fisher* (1882), 23 Ch. D. 238; *Snell's* *Equity* (11th ed.), 843.

him of that position. But where the second in point of time of the contestants had the legal estate, what was to be done? Courts of law held not merely that the legal claimant was first, but that he was the only one that had any title at all. The court of equity, on the other hand, "considering that equitable interests pass just as the legal interest does," would fain have decreed, in this case also, that the first was first. But it found "itself checked" by the opposing doctrine of the courts of law — courts having power to enforce their judgments just as had the court of equity.<sup>1</sup>

Ostensibly the court of equity submitted; but in reality it set to work one of its most potent jurisdiction-augmenting weapons, with which it cut deeply into the legal priority. The court said, "Yes, the legal estate has, of course, the priority; but not when its owner has been guilty of fraud." Courts of law could hardly dispute that position; and, once fairly established, equity under cover of the word "fraud" decreed postponement of legal estates, even when there was no fraud, or such semblance of it only as was "conduct fraudulent in the eye of this court."

The word, however, still remains as the ground of the jurisdiction — the word which was used as a mask to an attack upon imperfect administration of justice. The time has arrived when it ought to be thrown off; for the courts as now constituted are no longer checked by opposing and defective doctrines of any other court. All courts now recognize that "equitable interests pass just as the legal interest does." It was lack of that recognition by courts of law that gave the legal estate its dominating influence. *Cessat ratione legis, cessat ipsa lex*; especially when the *lex* is of such incongruous character.<sup>2</sup>

<sup>1</sup> It was not without a protest, here and there, that the failure of the law to notice and enforce equities was allowed to continue and breed anomalies. As early as 1787, Ashhurst, J., said (*Goodtitle v. Morgan* (1787), 1 T. R. at p. 762): "It is true that formerly the courts of law did not take notice of an equity or a trust, for trusts are within the original jurisdiction of a court of equity; but of late years it has been

found productive of great expense to send the parties to the other side of the Hall; whenever this court has seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this court will take notice of a trust, *why should they not take notice of an equity?*"

<sup>2</sup> Lord Hardwicke (than whom there could be no better authority)

## CESSAT RATIONE LEGIS, CESSAT IPSA LEX.

Legal estates were those cognizable by courts of law; and equitable estates, those of which courts of equity alone took notice. When, then, we ceased to have courts of law and courts of equity, it might have been anticipated that distinction between the estates would have vanished. But its annihilation was hardly even suggested. A large part of the jurisprudence of the country had grown up upon its foundation; and the courts continued to speak of legal and equitable estates just as though there still were such things, and to apply the rules developed in connection with the phrases. A recent writer, referring to the Judicature Act,<sup>1</sup> has well said:<sup>2</sup>

"Section 24 of the above-mentioned act in effect enacted that, in future, courts constituted by the act, which embraced the previously existing courts, both of law and equity, should give to all equitable estates, rights, titles and claims the same effect which would have been given thereto by the court of chancery before the passing of the act. Since the coming into operation of the act, equitable estates and interests have therefore been equally enforceable with legal estates and interests and in the same forum; and it follows that, in this sense and to this extent, being enforceable in the courts of law, they might now be styled legal estates and interests."

Another writer (whose book is highly creditable to him) thinks that

"the important thing is to get rid of this double ownership as quickly as possible; and now that the conflict of jurisdiction out of which arose this conflict of law is abolished, it ought not to be difficult to accomplish this reform."<sup>3</sup>

That which had made distinction between legal and equitable estates was thus sent down to oblivion; the distinction had always been an incongruous and disturbing factor in our jurisprudence; courts of equity had found themselves "checked . . . and obstacles thrown in their way" because of it; fraud-fictions had been invented and elaborated wherewith to minimize the evils of it; and judicial tears had been shed over it, because thereby priorities were oft-times settled not accord-

has said: "It could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts. . . . But if this had happened in any other country, it could never have made a question; for if the law and equity be administered by the same jurisdiction, the rule *qui prior est tempore, potior est jure must hold.*" (Wortley v. Birkhead

(1754), 2 Ves. Sr. 578.) Unfortunately Canada and the United States inherited the anomaly with the divided jurisdiction of the courts.

<sup>1</sup> Imp. St. 86 & 87 Vic., ch. 66.

<sup>2</sup> Ency. of Laws of Eng., vol. 80. And see *Emmerson v. Ind* (1886), 33 Ch. D. 323; 55 L. J. Ch. 903.

<sup>3</sup> Markby's *Elements of Law* (4th ed.), sec. 335.



ing to principles of justice, but according to the favor or whim of the pig-possessor — “a mere matter of machinery . . . and very singular machinery,” it was said. A chance here, one would think, for *cessat ratione legis, cessat ipsa lex*; but it was missed, and we still conjure with the ghost of the legal estate, treating him as if he were still alive and of such stout substantiality as to command our continued deference and respect. Hunters for the origin of religions might cogitate, with profit, the cult of the legal estate.

“NOTHING BUT FRAUD,” ETC.

Reference has been made to the flank movement by which courts of equity succeeded in turning, to a certain extent, the position occupied by the legal estate. “The legal estate has, of course, priority, but not when its owner has been guilty of fraud.” From this it results that the maxim “Where the equities are equal the law will prevail” is too narrow, for where they are not equal the law will still prevail. Fraud is necessary to turn the scale. The rule, then, may be better expressed in the language already quoted:

“Nothing but fraud, or such gross and voluntary negligence as is evidence of fraud, will oust the priority of the legal claimant.”

That is to say, the legal claimant, whether he be first, second or fortieth in point of time, is to be first in fact, unless he has offended against this rule. And Mr. Pomeroy has a paragraph entitled “Fraudulent intent necessary in an estoppel affecting the legal title to land.”<sup>1</sup>

But why say “fraud or evidence of fraud?” The court cannot say that there is fraud unless there is evidence of it; and surely evidence of fraud will be useless unless it be sufficient to prove fraud. The only answer to which is that we are dealing with “a mere matter of machinery, . . . and a very singular machinery it sometimes is,” about which we must be content to find some mystery. We may observe, however, that the fraud in question may be of purely fictitious character; that the word “fraud” does not necessarily imply that there was “an actual intention to commit a fraud;”<sup>2</sup> that the “gross and voluntary negligence” spoken of must indeed

<sup>1</sup> On Eq. Jur. (2d ed.), § 807.

<sup>2</sup> *Dowle v. Saunders* (1864), 2 H. & M. 251; 34 L. J. Ch. 87.

be such as will be evidence of fraud, but that the fraud of which it is evidence may be absolutely non-existent.<sup>1</sup> For example, in a very recent case,<sup>2</sup> Sir F. H. Jenne said that there was

"negligence so gross as would justify the court of chancery in concluding that there had been fraud in an artificial sense of the word. . . . I do not mean to suggest that there was any fraud in fact."

Mr. Beven has said all that can be said<sup>3</sup> in defense of this seeming confusion, but, it is thought, with scant success. The argument may be put in this way: No man can claim an estate against another person whom he has defrauded out of the estate; a purchaser acts for himself, and owes no duty of carefulness to anybody else; there are, however, certain well-known courses of procedure usually adopted by purchasers; and if they depart from those well-known courses, with the result that they come into competition with other claimants to the property, their action may be taken as evidence of an intention to defraud those other claimants, although in admitted fact there was no such intention.<sup>4</sup> The startling result of which is that, although evidence of that which does not exist is usually associated with perjury, here it becomes the foundation of judicial decision. Lord Justice Bramwell's vigorous language ought to have ended further perversion of the word "fraud," and would have done so had the road been clear without it:

"I am of the opinion, with an exception I will presently avert to, that to make a man liable for fraud moral fraud must be proved against him.

<sup>1</sup> In Pollock on Contracts (6th ed.), 504 (see also pp. 401, 402), it is said: "It must also be remembered that for a long time equity judges and text writers thought it necessary or prudent for the support of a beneficial jurisdiction to employ the term 'fraud' as *nomen generalissimum*. 'Constructive fraud' was made to include almost every class of cases in which any transaction is disallowed, not only on grounds of fair dealing between the parties, but on grounds of public policy." For judicial condemnation of "subterfuges and contrivances and evasions to which judges in England long resorted in struggling against" other rules, see the language of Lord Campbell in *Ramloll v. Soc-*

*jumnull* (1848), 6 Moo. P. C. 810, and of Parke, B., in *Egerton v. Earl Brownlow* (1853), 4 H. L. C. 124; 23 L. J. Ch. 348. And see per Williams, J., *id.*, p. 77, and per Alderson, B., *id.*, p. 109. Mr. Pomeroy agrees that courts of equity "have always treated the word 'fraud' in a very elastic manner." On Equity Jur. (2d ed.), § 803. And see per James, L. J., in *Torrance v. Bolton* (1872), L. R. 8 Ch. App. 124; 42 L. J. Ch. 179.

<sup>2</sup> *Oliver v. Hinton* (1899), 2 Ch. 264; 68 L. J. Ch. 593. In the same case Lindley, M. R., substituted "gross negligence" for fraud.

<sup>3</sup> On Negligence, 1634. And see 900 ff. 1624-1628.

<sup>4</sup> See *Agra Bank v. Barry* (1874), L. R. 7 H. L. 135.

I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shown and correlative right, and some violation of that duty and right. And where these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty.<sup>1</sup>

For example, the owner of an estate deposits the title-deeds as security for a loan (that is, makes an "equitable" mortgage of the property<sup>2</sup>), and afterwards conveys the legal estate to a subsequent mortgagee, who makes no inquiry for the deeds. Now it may be as clear as possible (indeed it may be admitted) that the subsequent mortgagee had not the slightest idea of defrauding anybody; that he was absolutely unaware of the existence of the equitable mortgage; and yet he will be refused priority, because it is said that not asking for the deeds was "evidence of an intention" to defraud a possible holder of the deeds.<sup>3</sup> It may even be that as a trustee he thought the solicitors of the estate had the deeds; nevertheless his inaction will be ascribed to fraud.<sup>4</sup> Fictitious fraud is thus postulated in order that justice may be done. There must be something more rational than this, somewhere.

And observe further, as to frauds of this sort, that had the second mortgagee asked for the deeds and been put off with some excuse, the stigma of bad faith would not have attached to him;<sup>5</sup> and if, upon asking for them, he had been given a bundle which was said to contain them, but did not, his char-

<sup>1</sup> *Win v. Bell* (1878), 3 Ex. D. 243; 47 L. J. Ex. 707.

<sup>2</sup> In *Parker v. Carolina* (1898), 53 S. C. 593; 31 S. E. R. 676, it was said that "the rule is well established in England, and has received some support in this country, that an equitable mortgage on the land is created by the deposit of title-deeds as security for debt; but the doctrine is generally rejected in the United States. The rule as administered in England grew out of the fact that there was no general system of registration, as in this country, and the system of conveyancing rendered it necessary to have possession of the muniments of title." And see *Tiedeman on Real Property* (2d ed.), §§ 289,

290. For those accustomed to the American law the supposititious case in the text may be varied by substituting a contract for a mortgage instead of a deposit of the deeds.

<sup>3</sup> *Worthington v. Morgan* (1849), 16 Sim. 547; 18 L. J. Ch. 233.

<sup>4</sup> *Lloyds Bank v. Jones* (1885), 29 Ch. D. 221; 54 L. J. Ch. 931.

<sup>5</sup> *Plumb v. Fluit* (1791), 2 Anstr. 492; *Hewitt v. Loosemore* (1851), 9 Ha. 449; 21 L. J. Ch. 69; *Espin v. Pemberton* (1859), 5 Jur. N. S. 157; 28 L. J. Ch. 808; 28 id. 311; *Agra Bank v. Barry* (1874), L. R. 7 H. L. 185; *Garnham v. Skipper* (1885), 55 L. J. Ch. 203; *Newman v. Newman* (1885), 28 Ch. D. 674; 54 L. J. Ch. 503.

acter, though he never untied the string, would have remained unstained.<sup>1</sup> Fictitious fraud is plainly of somewhat ambiguous and refractory character.

For we seem by these results to be compelled to say that it is the duty of a mortgagee to inquire for the deeds, and not his duty to look at them when he gets them; that he will lose priority if he does not ask for the deeds, but gain it if he does, though he never gets them, but only a bundle of other things; that he will be declared to have acted fraudulently if he carelessly leaves the deeds outstanding, but to have comported himself as a gentleman if he receives a parcel which he *thinks* contains them, and never bothers himself to open it.

Ingenious and elaborate as all this is, its radical defect surely is its lack of reality.<sup>2</sup> And its lack of reality is attributable to the fact that a wrong principle is being applied — fiction is employed (once more) to avoid the disastrous effect of rooted ideas. As between two claimants, one has that sort of an estate which in former days and because of defective administration of justice had a tactical but unmerited advantage; the advantage in those days could be taken away only upon the ground of fraud; in many cases, however, in which there is no fraud, justice plainly requires a decision against the legal title; fraud is therefore imagined or imputed; and with the help of fictitious fraud justice is done.

Until a recent decision of Mr. Justice Kay<sup>3</sup> a further refinement existed of most annoying and elusive sort, namely, between the character of the fraud which would postpone a prior owner if he held the legal estate, and the character of the fraud which would postpone him if he had the equitable estate only. It was thought that as the legal title was stronger than the equitable it would take more fraud to postpone it. And when it is remembered that the fraud necessary to postpone the legal estate did not necessarily imply the existence of "an actual intention to commit a fraud,"<sup>4</sup> but was itself of a most special and imaginary description, it is with a sense of great relief that we wel-

<sup>1</sup> *Ratcliffe v. Barnard* (1871), L. R. 6 Ch. 653; 40 L. J. Ch. 777; *Colyer v. Finch* (1850), 5 H. L. C. 905; 26 L. J. Ch. 65.  
<sup>2</sup> *Taylor v. Russell* (1801), 1 Ch. 8; 60 L. J. Ch. 1; (1892) A. C. 261; 61 L. J. Ch. 657.

<sup>4</sup> *Dowle v. Saunders* (1864), 2 H. &

<sup>3</sup> See the subject discussed in ch. M. 250; 34 L. J. Ch. 87.

come the decision of the learned judge that distinctions between fictitious frauds which will postpone the legal estate, and frauds still less fictitious which will postpone the equitable estate, are for the future unnecessary.<sup>1</sup>

The relief is, however, but partial; for all that we can yet say is that according to the law of priorities there must be some fraud, or legal fraud or color or evidence of fraud; but not necessarily any "fraud in fact." Further specification is impossible, which is perhaps not to be wondered at, the thing itself being not real but fictitious.

#### ESTOPPEL.

Such a state of the law may well be said to be "irrational, incongruous and disturbing." That it is inconsistent with the modern principles of estoppel is sufficiently apparent when it is remembered that, as between two competing grantees of an estate (legal or equitable is wholly immaterial), one of them, namely the first, alone can have it; and that if the second is to be preferred, it must be, not because the second has the estate (for he has it not), but because for some reason the first is estopped from setting up his priority. The substitution of estoppel would relieve the law of all difficulty with reference to imputed fraud. Its introduction would no doubt involve a good deal of change, not only in the treatment of the cases, but sometimes in their results. Nevertheless, sooner or later harmony must be established between the law of estoppel by ostensible ownership and the law of priorities. Notice a few points:

According to the law of estoppel, if the true owner of property stand by and permit another to deal with it as owner, he will be estopped as against a purchaser for value. Estoppel in no way requires for its operation that the purchaser shall have acquired the legal estate. It is sufficient that he have in some way changed his position<sup>2</sup>— he may have acquired the merest equity, or indeed acquired, in very fact, nothing at all. Estoppel acts wholly irrespective of such considerations — change of position is all that is essential.

<sup>1</sup> Lord Macnaghten, however, dissented from the view of Mr. Justice Kay. *Taylor v. Russell* (1802), A. C.

<sup>2</sup> 262. It receives support in *Beven on Negligence*, 1630-1635.

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

Observe the law with reference to "non-negotiable" choses in action. Until the statute permitting their assignment, it was impossible for a purchaser to acquire a legal estate in them, and yet a purchaser from an ostensible owner of them might estop the true owner from setting up his title. If the true owner had assisted the ostensible owner in his misrepresentation of ownership, by furnishing him with the *indicia* of title to them, he would be estopped.<sup>1</sup> Change of position, not the acquisition of the legal title, is all that is required for estoppel.

Note, too, the law of principal and agent with reference to estoppel. A principal in some way assists a misrepresentation of his agent as to the scope of his authority; a third person acts upon that misrepresentation, and the principal is bound. It is not necessary that the third person should have acquired any legal estate. In fact, frequently the question is not one of estate at all. Change of position is all that is essential.

So also in regard to the law with reference to the execution of documents. An owner is tricked into executing a deed; the deed is not binding because of the fraud; upon the faith of the deed some third person changes his position, and the owner is estopped from asserting that the deed is not his. In this department of the law it has not been thought necessary as a prerequisite of estoppel that the purchaser should have the legal estate. Change of position is sufficient.

#### APPLICATION.

Suppose the owner of property, real or personal, transfers it absolutely — title, evidence of title, and possession — to a trustee in such a way that there is no trace of a trust visible; and that the trustee afterwards fraudulently disposes of some estate in the property to an innocent purchaser for value. This, according to the law of estoppel, is a clear case; the owner is, of course, estopped, — he has accredited the title of his trustee and cannot deny it.<sup>2</sup> According to the rule under discussion, however, the case depends upon the nature of the estate which the purchaser obtains. The competing principles are here in sharp conflict. One of them must eventually give way.

<sup>1</sup> See ch. XXII.

51 N. Y. 345; *Clarke v. Roberts* (1861).

<sup>2</sup> *Dillage v. Commercial Bank* (1873), 25 Hun (N. Y.), 86.

The case of *Cave v. Cave*,<sup>1</sup> already referred to, well illustrates the situation: A trustee mortgaged the trust property successively to several persons; the first mortgagee got the legal estate; the others, of course, did not; in the general settlement the first mortgagee was held to be prior to the beneficiaries, and the other mortgagees to be subsequent to them. Estoppel would have given priority to all the mortgagees.

It is impossible by any process of reasoning to justify the conflicting results arrived at in the case just mentioned. We may, if we wish, say that every purchaser is aware that his vendor may be a trustee and may be acting in violation of his trust; therefore *caveat emptor*, for if such be the fact he gets no title to any sort of estate.<sup>2</sup> Or we may say that "where the owner has lent himself to accredit the title" of the trustee he will be estopped from setting up his title against any estate which the trustee may wrongfully convey to an innocent purchaser. But it is irrational to apply one of these principles to a case in which the trustee fraudulently transfers one estate in the property; and the other to a case in which he fraudulently transfers another estate.

Either view is logical and comprehensible. It may be said that the law of trusts is well recognized; that there is no negligence in having trustees, or even a single trustee; nor any in allowing him to act without check or oversight. *Caveat emptor*. Let all purchasers of all estates take care of themselves.

"The imprudence of the plaintiffs in having a single trustee of their settled property is not sufficient to deprive them of their property or to enable their trustee to dispose of it as his own."<sup>3</sup>

"The very first principle of trusts is that the *cestui que trust* places confidence in his trustee, and if it is to be held that a *cestui que trust* is to be postponed upon the mere ground that he did not inquire into the acts or conduct of his trustee, that principle would, as it seems to me, be in great measure, if not wholly, destroyed."<sup>4</sup>

Such reasoning is good. But it is applied only when the purchaser has taken an equitable estate — in such cases it is supposed to be unanswerable. In one instance<sup>5</sup> not only were shares absolutely transferred to a trustee, but he qualified upon

<sup>1</sup> (1880) 15 Ch. D. 639; 40 L. J. Ch. 505.

<sup>2</sup> *Reg. v. Shropshire Ry. Co.* (1873), L. R. 8 Q. B. 429; L. R. 7 H. L. 496; 45 L. J. Q. B. 31.

<sup>3</sup> Per Lord Romilly, in *Baillie v. McKewen* (1865), 35 Beav. 183. And see *Bradley v. Riches* (1873), 9 Ch. D. 189;

47 L. J. Ch. 811; *Carritt v. Real* (1889), 42 Ch. D. 263; 58 L. J. Ch. 688; *Re Richards* (1890), 45 Ch. D. 589; 59 L. J. Ch. 723; *Moore v. Kane* (1894), 24 Ont. 541.

<sup>4</sup> Per Turner, L. J., in *Cory v. Eyre* (1863), 1 De G., J. & S. 169.

<sup>5</sup> *Howard v. Sadler* (1893), 1 Q. B. 1.

them and acted as a director; yet the true owner was not estopped to deny the trustee's ownership as against an equitable interest in the shares wrongfully created by the trustee. The law permitted directors so to qualify; acting as a director was therefore no evidence of ownership; the purchaser knew that the ostensible owner might be a trustee. *Caveat emptor.*

In another case the deed by which the trust was constituted indicated that the purchase-money had been paid by the trustee. It therefore, to that extent, negatived the idea of a trust; and yet the true owner's estate was upheld as against the equitable estate of a purchaser from the trustee. The indications were misleading, but might have been suspected to be such. *Caveat emptor.*

In yet another case<sup>1</sup> a solicitor took a mortgage in the name of his clerk, and left it and the deeds in the clerk's possession; the clerk fraudulently deposited the deeds (created an equitable interest); and the solicitor was not estopped. The clerk might be a trustee. *Caveat emptor.*

All that can be said as against such reasoning is (1) that it is just as applicable to the case of a purchaser of the legal estate as to a purchaser of an equitable estate, while it is applied to the latter only; (2) that it ought, therefore, to be applied to both such cases, or else be discarded altogether; and (3) that the principles of estoppel are those properly applicable to all such cases, and would have decided the other way the cases which have just been cited.

According to the law of estoppel,

"where the owner has lent himself to accredit the title to another person, by placing in his power those symbols of property which have enabled him to hold himself out as a purchaser of the goods,"

such owner will be estopped from setting up his title; and it is quite immaterial, in the application of such law, what sort of an estate has been acquired by the purchaser — change of position upon the faith of the representation is all that is requisite.

Estoppel says that if a man selects a rascal as his trustee, and supplies him with completest cheating apparatus, he must himself bear the burden of the ensuing rascalities, and is not to be allowed to shoulder them off upon such persons as may be swindled, and that the difference in the sort of swindle cannot affect the result.

<sup>1</sup> Carritt v. Real (1889), 42 Ch. D. 203; 58 L. J. Ch. 688.



To much the same effect as the remarks just quoted is the language of Lord Cairns in *Reg. v. Shropshire*.<sup>1</sup> It was a case in which shares of a company were placed in the name of one of the directors (Holyoke), who borrowed money upon the shares, and promised to execute a transfer of them. The transferee, therefore, had but an equitable estate. The Lord Chancellor said that the purchaser

"ought to have known that although Holyoke's name appeared upon the register as the owner of these shares, and although Holyoke could present to him the certificate of this ownership, still it was perfectly possible either that these shares were the beneficial property of Holyoke himself, or that they were the property of some other person. If he dealt merely by equitable transfer or equitable assignment with Holyoke, and if it turned out that the beneficial ownership of Holyoke was coincident and co-extensive with his legal title, well and good; his right would be accordingly, so far as Holyoke was concerned, complete. But if, on the other hand, it should turn out that Holyoke's beneficial interest was either nil, or was not co-extensive with the whole of his apparent legal title, then I say any person dealing with Holyoke by way of equitable bargain or contract should have known that he could only obtain a title which was imperfect, and would not bind the real beneficial owner."

With all deference this reasoning does not touch the real question. No doubt the purchaser knew that Holyoke might be a trustee (for every ostensible owner may be a trustee); but that may as well be said when the purchaser takes the legal title as when he takes the equitable. And the question is: Why should such knowledge ruin an equitable title and have no effect upon a legal title? There is the same ostensible ownership in both cases; the same responsibility in both on the part of the true owner for such appearance of ownership; and in both a third person, on the faith of such appearance, has changed his position.

#### SUBSTITUTE FOR FRAUD OR EVIDENCE OF FRAUD.

If we are to get away from "fraud or such gross and voluntary negligence as is evidence of fraud," as a prerequisite of postponement of the legal (or any other) estate, what standard of conduct shall we set up?

The answer is not difficult. For if, as has been contended, the true principles applicable to the cases in hand are those of estoppel by assisted misrepresentation, then the conduct exacted is that prescribed by the law of estoppel in all other departments of the law. The standard is a high one. It imposes the

<sup>1</sup> (1878) L. R. 8 Q. B. 420; L. R. 7 H. L. 505; 45 L. J. Q. B. 31.

social duty of exercising "an appropriate measure of prudence to avoid causing harm to others;"<sup>1</sup> and it makes little allowance for mistakes and oversights which have resulted in damage to other people.<sup>2</sup>

The introduction of such ideas into the law of priorities will probably not be at once conceded by the profession. But eventually it will be recognized that in the application of estoppel to the various branches of the law there must be some one standard of conduct for all of them. A greater degree of prudence may be required in some departments than in others; but that will be because of some greater probability of danger to other people, and not because it is impossible to point to a general principle such as that requiring "an appropriate measure of prudence to avoid causing harm to others."

And further, we shall eventually, by comparison of cases from the different departments, arrive at some unifying understanding as to the "measure of prudence" which will be considered to be "appropriate." Here the egoistic and the altruistic views of conduct will meet in sharp conflict; but the battle will be to the latter, for man's development tends now strongly in that direction.<sup>3</sup>

#### APOLOGIES FOR THE OLD RULE.

The usual defense of the rule which favors the legal estate may be stated as follows:

"When we hear, therefore, of a purchaser for valuable consideration taking the title free of every trust, or equity, of which he had not notice, it is intended that he is a purchaser of a title perfect on its face; for every purchaser of any imperfect title takes it with all its imperfections on its head. It is his own fault if he confides in a title which appears defective to his own eyes; and he does so at his peril. Now every equitable title is incomplete on its face; it is in truth nothing more than a title to go into chancery to have the legal estate conveyed, and therefore every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he has had notice of it or not. But the purchaser of a legal title takes it discharged of every trust, or equity, which does not appear on the face of the conveyance, and of which he has not had notice either actual or constructive."<sup>4</sup>

<sup>1</sup> See ch. V.

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

<sup>3</sup> See ch. V.

<sup>4</sup> *Chew v. Barnet* (1824), 11 Serg. & R. (Pa.) 392; quoted in *Evans v. Roanoke Sav. Bank* (1897), 95 Va. 294; 28 S. E. R. 325. And see per

*Eyre, C. J., in Plumb v. Fluit* (1791), 2 Anstr. 432. "The person who takes the legal estate without the deeds, in a case like this, appears to me, unless there be fraud, to be less blamable than he who takes the deeds without the estate."

To this several answers may be made:

1. It is but a method of alleging the former imperfection of the administration of justice. If the equitable title was imperfect, it was only because the law was imperfect in refusing to recognize equitable titles — an imperfection which has now been removed.

2. The major premise of the argument is that a purchaser who takes with knowledge of one imperfection ought, for that reason, be held to have taken it subject to every other imperfection which it may have — a man takes a title imperfect in its legal aspect, therefore he "takes it subject to every clog." A purchaser of the legal estate, then, subject to a lease (one imperfection) ought to take it "subject to every other clog that may lie on it?" That would not be pretended; but it is just as rational as the contention that a purchaser subject to a legal mortgage takes the property "subject to every other clog."

3. The contention presupposes that all purchases are of the whole estate in the property: "It is his own fault if he confides in a title which appears defective in his own eyes." But if a purchaser has agreed to purchase subject to a legal mortgage, the title to the thing sold does not appear to be defective. On the contrary it appears to be perfect.

#### ACTUAL AND CONTRACTUAL ESTATES.

From what has been said it might be inferred that "legal" and "equitable" estates had become altogether solecisms and anachronisms. A legal estate was once recognized by courts of law; an equitable estate was recognized by courts of equity only; there is now but one court; therefore the distinction must be at an end.

It must be remembered, however, that although the phrases connoted much that was unreal and defective, yet that they served to separate two sorts of estates between which there was real distinction; and that such distinction still remains and must remain, although it can no longer be said that there exists a court whose jurisdiction is limited by it.

For there must always be a difference between a conveyance of land and a contract to convey it. In the former case the transferee has the land; while in the latter he has only a contract under which he is entitled to get it. And if we are con-

sent to attach misleading, or at best non-significant adjectives for the purposes of classification, we may still continue to call the one a "legal" and the other an "equitable" estate. But it would be absurd and unscientific to perpetuate phrases that have lost their meaning, and that are associated with all sorts of irrationalities. Other and more appropriate names must be found.

The present writer ventures to suggest that where the title has been transferred the purchaser has an actual estate; and where he has but a right to get the title he has a contractual estate.<sup>1</sup>

Now it must be observed that the language which we have been suggesting is not inconsistent with the statement that where the equities are equal the actual will prevail over the contractual. For the position assumed was that, as between two competing grantees, one of them has it and can lose it only by estoppel. The defects of the current rule are those pertaining to its origin, principally the failure of the courts of law to recognize in any way the existence of those estates in land which were known as equitable estates. For example, if land already under mortgage were subsequently sold to two persons, each having no notice of the other, the rule awarded priority to the one who succeeded in getting the mortgagee to convey the legal estate to him. It was said that this one had the only estate which a court of law would recognize; that the equities were equal, and that the law must prevail. To unsophisticated people it is very clear that a mortgagor has often a very substantial estate in the land, and that the law is irrational which declines to regard that fact.

Applying the proposed phraseology to the same case, we would say that the first of the purchasers from the mortgagor acquired the estate which he had to sell (had the actual estate); that if the second purchaser is to be preferred it must be because the first is in some way estopped from setting up his estate; and that nothing which the mortgagee may do can in any way affect that result.

And we do not say that the first purchaser wins because of the incapacity of any court to recognize estates in land that to

<sup>1</sup> It is a curious coincidence that might be invoked to support the fanciful etymology (*contra-actual*) tithesis here suggested.

ordinary people have solid substantiality; but merely because the possessor of an estate naturally retains it, unless somebody can present a reason for depriving him of it — *melior est conditio possidentis*.

We would say that the first purchaser *has* the estate in question and that the other has nothing, and has no means of getting it which are not open to anybody else. That a contrary conclusion is at present accepted is due to the rule under consideration, which, however necessary during the discord between courts of law and equity, has now lost all its *raison d'être*.

If we wish to keep as close to the old phraseology as possible, we may say that where the merits are equal the actual will prevail over the contractual.

#### SUPPORT FOR NEW METHODS.

The rule as to the priority of the legal estate having arisen and been most frequently applied in cases relating to real estate, its pre-eminence and dominating function in that branch of the law has rarely been attacked and never (save for a year by statute) overthrown. In other departments of the law, however, in which the principles of estoppel are frequently applied, the courts have dealt the legal-estate theory some notable blows.

For example, in cases relating to transfers of company shares, the supremacy of the legal estate, although still fairly acknowledged,<sup>1</sup> has been much shaken. Questions have arisen in this way: An executed transfer, but blank as to the purchaser's name, has been handed to a broker for a particular purpose; the broker fraudulently disposes of the shares; and the question is, "Who is to lose — the real owner or the purchaser?" In such a case Lord Watson would substitute considerations of estoppel for those relating to negotiability and legal estate:

"Even when the delivery (that is, by the persons intrusted with the transfers) has been fraudulent, as in the present case, the Supreme Court of New York has held that the registered owner cannot reclaim the document from a holder who has given valuable consideration in good faith and without notice of the fraud. But it is necessary to observe that the decision of the court did not attribute to the instrument any privilege or negotiability, in the legal sense of the term. It was based upon the circumstance that the registered owner had so dealt with the certificate as to lead the purchaser for value to believe that he was taking a good title

<sup>1</sup> Reg. v. Shropshire (1873), L. R. 8 (1887), 36 Ch. D. 86; 56 L. J. Ch. 1099; Q. B. 420; L. R. 7 H. L. 496; 45 L. J. Powell v. London (1893), 2 Ch. 564; Q. B. 31; Colonial Bank v. Hepworth 63 L. J. Ch. 802.

to it. In other words, *the foundation rests in the principle of estoppel. Thus far the principles of American cases appear to me to be in harmony with the principles of English law.*"

"Cases . . . which relate to competition between equitable and legal rights to stock or shares have really no bearing here. Whether the respondents are estopped from saying that Blakeway had not their authority to dispose of the certificates in question is in my opinion the sole question presented for decision in these appeals."<sup>1</sup>

Lord Herschell in the same case adopts estoppel as the true ground of decision:

"If the owner of a chose in action clothes a third party with the apparent ownership, and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it and who received it in good faith and for value. And this doctrine has been held by the court of appeals of the state of New York to be applicable to the case of certificates of shares with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently, or in excess of his authority, sells or pledges them. The banks, or other persons taking them for value without notice, have been entitled to hold them as against the owner. As at present advised I do not see any difference between the law of the state of New York and the law of England in this respect."

In a similar case in Illinois, Scott, C. J., said:

"The effect of what was done was to place the equitable title to the stock in the assignee, and if it was done for a valuable consideration it will surely be obligatory on the assignor, if living. In such cases it is a matter of no concern to the assignor whether the assignee ever avails himself of the power of attorney embodied in the assignment to have the stock transferred to him on the books of the corporation, so that he may become the legal as well as the equitable owner. Equity will certainly give the assignor no relief against the *bona fide* sale of stock in that way, although the assignee may never choose to have the stock transferred to him under the by-laws of the corporation."<sup>2</sup>

To the same effect is the later case in the same state:

"So far as concerned third persons dealing with him without notice of the secret agency and trust he was the absolute owner in his own right, with full power and authority to convey, lease or *otherwise contract* in regard to the property, or any part thereof, or *any interest therein*."<sup>3</sup>

This principle sometimes leads in Canada and the United States to the complete disregard of the argument derived from the position of the legal estate.<sup>4</sup> For example, in one case in which the legal title to land was outstanding in the Crown, a trustee made a fraudulent disposition of the property and the purchaser was held to be entitled as against the beneficiary. Boyd, C., said:

"Briggs v. Jones illustrates the very reasonable proposition that where the owner of land transfers it to another so as to enable him to deal with it as his own, he is guilty of such culpable imprudence that he cannot afterwards assert his title as against rights which that other may have created for value in favor of an innocent third party."<sup>5</sup>

<sup>1</sup> Colonial Bank v. Cady (1890), 15 App. Cas. 287; 60 L. J. Ch. 131.

<sup>4</sup> See Tiffany & Bullard on Trusts, 197 ff.

<sup>2</sup> Otis v. Gardner (1888), 105 Ill. 442.

<sup>5</sup> Moore v. Kane (1894), 24 Ont. 544.

<sup>3</sup> West Chicago v. Morrison (1896), 160 Ill. 288; 45 N. E. R. 397.

In England it would usually be said that the legal estate was outstanding, and that in such case the beneficiary, having equal equity and being first in time, would be preferred. But the case referred to by Boyd, C., is something of an exception, and makes use of the language of estoppel: A leasehold mortgagee lent the lease to the mortgagor for the purpose of raising money upon it, but at the same time told the mortgagor to give notice of the prior charge; the mortgagor, concealing the mortgage, borrowed from a *bona fide* deposittee; held, that the deposittee had priority, because

"a person who puts it in the power of another to deceive and to raise money must take the consequences."<sup>1</sup>

If fraud only will postpone the prior legal estate then the decision in the case should be reversed. And if it be true that "the imprudence of the plaintiffs in having a single trustee of their settled property is not sufficient to deprive them of their property, or to enable their trustee to dispose of it as his own,"<sup>2</sup> then also the decision is wrong. But the decision is right and has the sanction of the House of Lords.<sup>3</sup>

As the principles of estoppel by ostensible ownership are better understood, it will become increasingly apparent that the customary reasoning with reference to the legal estate is so very "technical and unsatisfactory" that it cannot much longer survive; and it will be more and more difficult to make answer to the following excerpt from a notable judgment of Grover, J.:<sup>4</sup>

"Where one known to be the owner of shares or chattels delivers to another the scrip or possession of the chattels together with an absolute written transfer of all his title thereto, he thereby enables him to hold himself out as owner, and as such obtain credit and make sales of the property; and if after he had so done the owner was permitted to come in and assert his title against those dealing upon the faith of these appearances, the dishonest might combine and practice the greatest frauds. Another reason is that it presents a proper case for the application of the legal maxim that, when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed. All these reasons, it is obvious, apply with all their force to choses in action. Why should the owner of a horse or of bank shares, who has given to another an absolute written transfer of all his rights thereto, for some purpose other than that of passing the title, be precluded, as against a *bona fide* purchaser from such per-

<sup>1</sup> (1870) L. R. 10 Eq. 92. See also (1857), 25 Beav. 205; 2 De G. & J. 21; Perry-Herrick v. Attwood (1857), 25 Beav. 205; 2 De G. & J. 21; 27 L. J. Ch. 121; Kettlewell v. Watson (1892), Ch. 121; 27 L. J. Ch. 121; 190; (1895) A. C. 173; 64 L. J. Ch. 433.

<sup>2</sup> *Ante*, p. 265.

<sup>3</sup> See Perry-Herrick v. Attwood (1857), 25 Beav. 205; 2 De G. & J. 21; 27 L. J. Ch. 121; Brocklesby v. Temperance (1893), 3 Ch. 190; (1895) A. C. 173; 64 L. J. Ch. 433.

<sup>4</sup> Moore v. The Metropolitan (1873), 55 N. Y. 47. And see Armour v. Michigan Ry. (1875), 65 N. Y. 123.

son, from asserting his title, while under the same state of facts he may reclaim from such purchaser a bond and mortgage, or a certificate of indebtedness like the one in question? As to the former he is estopped, while as to the latter the same state of facts, it is insisted, will work no such result. The counsel for the plaintiff insists that such distinction should be made for the reason that the purchaser of corporate shares and chattels from the apparent owner obtains a legal title which is valid and may be asserted in a court of law, while the assignee of a chose in action, not negotiable at common law, obtained an equitable title only; and that "the equity of the former owner, being prior in time to that acquired by the purchaser, is superior thereto, the rule in equity being that, where the equities are equal, the first in time shall prevail; but upon what ground the same state of facts that will estop a party from the assertion of a legal title will not estop him from the assertion of an equitable, the counsel fails to show, for the very good reason that no such ground exists. It is so obvious that the estoppel should upon principle apply to the latter equally with the former, that a distinction can only be justified upon authority."

*Factors Acts.*— It is worth noting that the Factors Acts,<sup>1</sup> proceeding as they do upon rough principles of estoppel, operate quite independently of considerations of legal estate. They provide that under varying circumstances "any sale, pledge or other disposition" of goods by an ostensible owner or agent shall be as valid "as if such person were the owner of the goods," or "were expressly authorized by the owner of the goods to make the same."

As we have seen, the present law declares that if a trustee should fraudulently create an equitable mortgage of the estate, the mortgagee and not the beneficiary would be the one to suffer; for he has not acquired the legal estate, the equities are equal, and the beneficiary is first in time. Estoppel would otherwise decide; for the mortgagee upon the faith of ostensible ownership had changed his position. The Factors Acts similarly protect, not merely where there has been an absolute sale, but where also there has been a "pledge or other disposition" of the property.

*American Law.*— With the dual system of courts it was inevitable that some of the resulting anomalies above referred to should be introduced into the United States. Registration systems with respect to transfers of real estate; the greater inclusiveness of the application to choses in action of the laws of "negotiability;"<sup>2</sup> and the complete recognition of the principles of estoppel in the same department, have, however, in later years reduced the number of cases in which appeal is made to the legal estate almost to zero; and their vanishing

<sup>1</sup> 53 & 58 Vic. (Imp.), ch. 45; Rev. St. Ont. (1897), ch. 150.

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



infrequency has been accompanied by decreasing regard for its authority.

No doubt it could, with some appearance of justness, be said in Pennsylvania in 1824 that

"the distinction between legal and equitable titles is as accurately marked and as carefully preserved here as in England;"<sup>1</sup>

and in some of the courts the distinction is still kept operative by the duplication of the methods of administration;<sup>2</sup> but upon the whole the considerations above referred to have induced the frame of mind in which it is said that

"an equitable estate may be mortgaged, and the lien of that mortgage will not be defeated by a subsequent conveyance of the naked legal title, where the rights of innocent purchasers are not involved."<sup>3</sup>

<sup>1</sup> *Chew v. Barrett*, 11 Serg. & R. 389.

<sup>2</sup> *Arlington v. Gates* (1898), 57 Neb.

<sup>3</sup> *Cleveland v. Cleveland* (1899), 93 286; 77 N. W. R. 677.

Fed. R. 118.

## CHAPTER XIX.

### OSTENSIBLE OWNERSHIP AND AGENCY—LAND—POSSESSION OF THE DEEDS.

Various rules, or various statements of the same rule, have been formulated with reference to possession of the title-deeds in contests for priority.

I. In 1787 Buller, J., said:

"It is an established rule in a court of equity that a second mortgagee who has the title-deeds, without notice of any prior incumbrancer, shall be preferred; because if a mortgagee lends money upon mortgage without taking the title-deeds, he enables the mortgagor to commit a fraud."<sup>1</sup>

II. In 1853 Kindersley, V. C., said:

"As between two persons whose equitable interests are of precisely the same nature and quality, and in that respect equal, the possession of the deeds gives the better equity."<sup>2</sup>

III. And in 1867 Malins, V. C., said:

"I have not a shadow of doubt that where there is merely an equitable mortgage unaccompanied by the legal estate in every case where the equitable mortgagee either omits to get, or, having got, gives up possession of the deeds, he must always be postponed. . . . I decide this case on the general principle that one equitable mortgagee without possession of the deeds must be postponed to another who has that possession."<sup>3</sup>

The first of these rules at once suggests estoppel by ostensible ownership. A mortgagee leaves the title-deeds in the hands of the mortgagor; he thus, as is said, "enables the mortgagor to commit a fraud,"—he enables him to pose as the unincumbered owner; upon the faith of this appearance a third person changes his position, and the mortgagee is properly estopped.

For estoppel, however, it is essentially necessary that the subsequent mortgagee should have become such upon the faith of the mortgagor's possession of the deeds—upon the faith of his

<sup>1</sup> Goodtitle v. Morgan (1787), 1 T. R. 762.

<sup>2</sup> Rice v. Rice (1853), 2 Dr. 77; 23 L. J. Ch. 291.

<sup>3</sup> Layard v. Maud (1867), L. R. 4 Eq. 397, 406; 36 L. J. Ch. 669. Dissented from in Thorpe v. Holdsmith (1868), L. R. 7 Eq. 189; 38 L. J. Ch. 194; reasserted in Hunter v. Walters (1871),

L. R. 11 Eq. 316; 41 L. J. Ch. 175; cited in Spencer v. Clark (1878), 9 Ch. D. 143; 47 L. J. Ch. 694; and considered to be too clear for proof in Lloyd v. Jones (1885), 29 Ch. D. 229; 54 L. J. Ch. 931, which, in its terms, was thought to go too far, Re Castell, Roper v. Castell (1898), 1 Ch. 315; 67 L. J. Ch. 169.

ostensible ownership of the property. All the above rules omit this factor and apply to cases in which it is absent. For example, suppose that a second mortgagee advanced his money upon the unsupported statement of the mortgagor that he was the unincumbered owner, and that afterwards the mortgagor obtained the deeds from the first mortgagee and handed them over to the second, the rules would give the second priority. But estoppel would not; for he had not, upon the faith of the deeds being in the hands of the mortgagor, changed his position. The rules associate priority mechanically with possession of the deeds. Estoppel asks: How they got there?

The second rule (in some respects the best of the three) is very difficult of application because of the requirement that the equitable interests shall be "of precisely the same nature and quality." This language might be taken to mean that in addition to the fact that both estates were equitable both of them were of identical character; for example, that they were both mortgage estates. But that was not the meaning of the learned judge, for the case he had in hand was one between an unpaid vendor claiming a lien for purchase-money, and an equitable mortgagee with whom the deeds had been deposited by the purchaser. These equitable estates the learned judge held were "of precisely the same nature and quality," and he gave priority to the mortgagee because, having the deeds, he had the better equity.

If this second rule (that of *Kindersley, V. C.*) is defective, much of the judgment in which it is found is, nevertheless, of the greatest value; and although stated by way of exception to, or modification of, the rule there laid down, it is, as the writer thinks, the best exposition anywhere to be found of the true view of the subject. The Vice-Chancellor's rule is quoted everywhere; the extracts from the judgment given below are almost never met with. The learned judge said:

"I must, however, guard against the supposition that I mean to express an opinion that the possession of title-deeds will, in all cases and under all circumstances, give the better equity. The deeds may be in the possession of a party in such a manner and under such circumstances as that such possession will confer no advantage whatever."

"In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these: the nature and condition of their respective equitable interest, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points it must apply the test, not of any technical rule or any rule of partial application, but the same broad principles of right and

justice which a court of equity applies universally in deciding upon contested rights."

"Indeed, it appears to me that in all cases of contest between persons having equitable interests, *the conduct of the parties* and all the circumstances must be taken into consideration in order to determine which has the better equity."

And after stating that the text-writers mislead,

"when an opinion is expressed that the one or the other has the better equity,"

he adds:

"If I am right in my view of the matter, neither the one nor the other has necessarily, and under all circumstances, the better equity. Their equitable interests, abstractedly considered, are of equal value in respect of their nature and quality; but whether their equities are in other respects equal, or whether the one or the other has acquired the better equity, must depend upon all the circumstances of each particular case, and especially, the conduct of the respective parties. *And among the circumstances which may give to one the better equity, the possession of the title-deeds is a very material one.*"

We have still no reference, by name, to the law of estoppel; but we have conduct (the ground upon which estoppel proceeds) as the basis of decision, and we have the conduct of the prior equitable owner put forward as a reason for postponing him to a subsequent purchaser, who was misled by that conduct and changed his position upon the faith of it. That is estoppel.

#### POSSESSION OF DEEDS A CIRCUMSTANCE.

Adopting then (provisionally, and subject to a modification to be afterwards noticed) the language of Kindersley, V. C., just quoted, the next question is as to the proper weight to be attached to possession of the deeds. If we cannot say "that the possession of title-deeds will, in all cases and under all circumstances, give the better equity," in what cases and under what circumstances will it do so?

Going back to 1801, we find Lord Eldon declaring that there is no ground for the postponement of the prior claimant, "unless there is fraud or concealment or some such purpose, or some concurrence in such purpose; or that gross negligence that amounts to evidence of a fraudulent intention."<sup>1</sup>

At the other extreme we have the rule of Malins, V. C., above quoted, that

"in every case where the equitable mortgagee either omits to get, or, having got, gives up possession of the deeds, he must be postponed."

Between these, estoppel urges that (1) if, even without fraudulent intent, the first mortgagee accredits the title of the mortgagor by allowing him the custody of the deeds; and (2) if the second mortgagee be misled to his damage by such permitted custody, then the first ought to be postponed to the second.

<sup>1</sup> Evans v. Bicknell (1801), 6 Ves. 191.

The second part of this proffered rule of estoppel (that the second mortgagee must have been misled) will be easily accepted once the applicability of estoppel to the subject is admitted; but justification of the first part (the non-essentiality of fraudulent intent) will probably have to be based upon a general survey of estoppel throughout all the departments of the law, upon a recognition of the universality of the principle.<sup>1</sup> The following tabulated result of the principal authorities will give at a glance a tolerably comprehensive view of the present state of the law:

A. LEGAL ESTATE v. EQUITABLE ESTATE.

CASES WHERE EQUITABLE MORTGAGEE FIRST AND LEGAL MORTGAGEE SECOND.	WHO HAD DEEDS.		WHO WON.		REMARKS.
	Eq. Mtg.	Legal Mtg.	Eq. Mtg.	Legal Mtg.	
(1) 1849. Worthington v. Morgan .....	×		×		Legal omitted to make all inquiry for deeds.
(2) 1791. Plumb v. Flutt	×			×	Legal made inquiry, but reasonable excuse made for non-production.
(3) 1851. Hewitt v. Loosemore.....	×			×	Ditto.
(4) 1859. Espin v. Pemberton.....	×			×	Ditto.
(5) 1874. Agra Bank v. Barry.....	×			×	Ditto.
(6) 1885. Garnham v. Skipper.....	×			×	Ditto.
(7) 1871. Ratcliffe v. Barnard .....	×			×	Legal received bundle and thought he had all the deeds.
(8) 1858. Lloyd v. Attwood.....		×		×	Mortgagor got deeds from equitable by fraud and gave them to legal.

(1) 16 Sim. 547; 18 L. J. Ch. 293.

(2) 2 Anst. 492.

(3) 9 Ha. 449; 21 L. J. Ch. 69.

(4) 5 Jur. N. S. 157.

(5) L. R. 7 H. L. 135.

(6) 34 W. R. 135; 55 L. J. Ch. 263.

(7) L. R. 6 Ch. 652; 40 L. J. Ch. 147.

(8) 3 De G. & J. 614; 29 L. J. Ch. 97.

<sup>1</sup> See ch. VIII.

A. LEGAL ESTATE *v.* EQUITABLE ESTATE—*Continued.*

CASES WHERE LEGAL MORTGAGEE FIRST AND EQUITABLE MORTGAGEE SECOND.	WHO HAD DEEDS.		WHO WON.		REMARKS.
	<i>Eq. Mtg.</i>	<i>Legal Mtg.</i>	<i>Eq. Mtg.</i>	<i>Legal Mtg.</i>	
(9) 1885. Lloyds' Bank <i>v.</i> Jones.....	×		×		Legal omitted to make all inquiries for deeds. They were trustees and thought the solicitors had them.
(10) 1885. Newman <i>v.</i> Newman.....	×			×	Legal parted with deeds on reasonable excuse and deposited with equitable.
(11) 1856. Colyer <i>v.</i> Finch.	×			×	Legal received bundle and thought he had all the deeds.

- (9) 29 Ch. D. 231. (11) 19 Beav. 500; 5 H. L. C. 905;  
 (10) 28 Ch. D. 674; 28 L. J. Ch. 674. 26 L. J. Ch. 65.

B. LEGAL ESTATE *v.* LEGAL ESTATE.

TWO MORTGAGEES CLAIM LEGAL ESTATE, SECOND HAS DEEDS.	WHO WON.		REMARKS.
	<i>1st Mtg.</i>	<i>2d Mtg.</i>	
(1) 1882. Clarke <i>v.</i> Palmer		×	First allowed mortgagor to retain deeds, and was postponed not only to second, who got the deeds, but to third, who did not. And see <i>Goodtitle v. Morgan</i> (1787), 1 T. R. 762.
(2) 1860. Hunt <i>v.</i> Elmes...	×		Solicitor mortgaged to first, his client, and gave him bundle in which client thought deeds were.

- (1) 21 Ch. D. 124; 51 L. J. Ch. 684. (2) 2 De G., F. & J. 578; 30 L. J. Ch. 255.

B. LEGAL ESTATE *v.* LEGAL ESTATE — *Continued.*

TWO MORTGAGEES CLAIM LEGAL ESTATE, SECOND HAS DEEDS.	WHO WON.		REMARKS.
	1st Mtg.	2d Mtg.	
(3) 1801. Evans <i>v.</i> Bicknell	×		First had the deeds; he loaned them to mortgagor for specific purpose; mortgagor used them to effect second mortgage.
(4) 1892. Re Ingham.....	×		One of two trustee mortgagees gave up deeds; afterwards received bundle and thought he had deeds. Conduct might have postponed him, but not the estate.
(5) 1884. Northern Counties <i>v.</i> Whipp..	×		Deeds stolen from first by mortgagor, and given to second.
(6) 1898. Re Castell; Roper <i>v.</i> Castell.....		×	Company gave mortgage to secure debentures; retained deeds and afterwards deposited them.

(3) 6 Ves. 174.

(5) 26 Ch. D. 432; 52 L. J. Ch.

(4) (1898) 1 Ch. 352; 63 L. J. Ch. 100.

629.

C. EQUITABLE ESTATE *v.* EQUITABLE ESTATE.

CONTEST BETWEEN EQUITABLE MORTGAGEES.	WHO HAD DEEDS.		WHO WON.		REMARKS.
	1st Mtg.	2d Mtg.	1st Mtg.	2d Mtg.	
(1) 1820. Frere <i>v.</i> Moore..	×		×		Where no legal estate, Qui prior est tempore, etc.
(2) 1867. Layard <i>v.</i> Maud		×		×	See <i>ante</i> , p. 276.
(3) 1846. Allan <i>v.</i> Knight		×	×		In absence of evidence that first improperly gave up deeds no such assumption.
(4) 1853. Rice <i>v.</i> Rice....		×		×	Unpaid vendor gave deeds to purchaser.

(1) 8 Price, 475.

(3) 5 Ha. 272; 15 L. J. Ch. 430.

(2) L. R. 4 Eq. 397; 36 L. J. Ch. 669.

(4) 3 Dr. 73; 23 L. J. Ch. 289.

C. EQUITABLE ESTATE v. EQUITABLE ESTATE — *Continued.*

CONTEST BETWEEN EQUITABLE MORTGAGEES.	WHO HAD DEEDS.		WHO WON.		REMARKS.
	1st. Mtg.	2d. Mtg.	1st. Mtg.	2d. Mtg.	
(5) 1857. Roberts v. Croft		×	×		First believed he had the deeds.
(6) 1872. Dixon v. Muckleston.....		×	×		Ditto.
(7) 1857. Carter v. Carter		×	×		Deeds may be left with mortgagor if he be one of several owners.
(8) 1852. Waldron v. Sloper.....		×		×	First gave up deeds on excuse and neglected to get them back.
(9) 1864. Dowle v. Saunders.....		×	×	×	Deeds given up by solicitor of first; client not postponed; but solicitor (as assignee of client) postponed.
(10) 1836. Re Vernon.....		×	×		Solicitors of first gave up mortgage, etc.
(11) 1890. Re Richards....		×	×		Ditto. And see Frith v. Cartland, 3 H. & M. 417; 34 L. J. Ch. 801.
(12) 1831. Re Morgan.....		×	×		Trustee of first deposited deed for loan to himself. See also Cave v. Cave (1890), 15 Ch. D. 639.
(13) 1888. Union Bank of London v. Kent.....		×	×		First had equitable mortgage of leaseholds prior to the execution of the lease. After its execution it was deposited with second mortgagee. First did not know when second created that lease had been executed, and so not negligent in leaving it with lessor.
(14) 1888. Farrand v. Yorkshire Banking Co.....		×		×	First stipulated to get deeds, but neglected to enforce delivery.

(5) 2 De G. &amp; J. 1; 27 L. J. Ch. 220.

(6) L. R. 8 Ch. 155; 42 L. J. Ch. 210.

(7) 3 K. &amp; J. 18; 27 L. J. Ch. 74.

(8) 1 Dr. 193. And see Hall v. West

End (1893), 1 Cab. &amp; E. 161; Ex parte

Reid (1848), 17 L. J. Bk. 19.

(9) 2 H. &amp; M. 242; 34 L. J. Ch. 87.

(10) 33 Ch. D. 165; 33 id. 402; 56 L.

J. Ch. 12.

(11) 45 Ch. D. 589; 59 L. J. Ch. 728.

(12) 18 Ch. D. 98; 50 L. J. Ch. 834.

(13) 39 Ch. D. 238; 57 L. J. Ch. 1022.

(14) 40 Ch. D. 182; 58 L. J. Ch. 238.



In studying these three tables (they will be referred to as A., B. and C.), it must be observed that the A. and B. cases are complicated by the respect paid to the legal estate. In these, although the equitable mortgage is first in point of time, yet the legal mortgage has *prima facie* priority because of the legal estate; and the question always is whether there is any reason for depriving the legal mortgagee of such priority. In other words, the legal mortgagee is in reality second; the law says he shall be first; is there anything in his conduct which relegates him to the second place?<sup>1</sup>

The C. cases, on the other hand, are free from any disturbing feature. In them priorities are declared free from any check or interposed obstacle. In them first in time is first in fact unless — as we shall see.

In investigating the effect of possession of the deeds upon priorities we must take it, then, that where the legal estate comes into play (A. and B. cases) the holder of that estate has *prima facie* priority. In the C. cases, first in time has *prima facie* priority. And the question in all the cases is, What effect upon such priority has possession of the deeds?

That possession of the deeds has no effect whatever upon priorities is not too sweeping a reply; if, at all events, it be added that conduct with reference to such possession has frequently overpowering influence. What is meant is that from the mere fact of possession of the deeds nothing can be argued; but that the circumstances under which possession has been parted with or acquired constitute the essential element. At the furthest possession unexplained may sometimes be evidence of these circumstances; but careful distinction must be made between possession as a factor in the inquiry (which it never is) and possession as some evidence of a factor (which it may be).<sup>2</sup>

<sup>1</sup> Estoppel cannot follow here. Estoppel operates when he who would otherwise have been first has misled his rival. But in the A. cases he who would otherwise have been first (the legal mortgagee) has not misled anybody, for his opponent's mortgage was taken prior to the legal mortgagee acquiring his interest. That estoppel seems to halt here is not

due to its defective powers, but to the anomalous and disturbing effect of the legal estate.

<sup>2</sup> In *Allen v. Knight* (1846), 5 Ha. 272; 15 L. J. Ch. 490, it was held that from possession of the deeds by the mortgagor it could not be assumed that the mortgagee had improperly handed them over.

In other words, as between competing grantees the first in time (or the holder of the legal estate) alone can have it; if the other is to be preferred it must be, not because such other has the estate (for he has it not), but because, for some reason, the first is estopped from setting up his priority; and such estoppel may arise from *conduct* with reference to possession of the deeds. That is the whole effect of the possession of the deeds in questions of priority.

Let us get a firm foundation:

"If a man makes a mortgage, and afterwards mortgages the same estate to another, and *the first mortgagee is in combination to induce the second mortgagee to lend his money*, this fraud will without doubt, in equity, postpone his own mortgage. So if such mortgagee *stands by*, and sees another lending money on the same estate without giving him notice of the first mortgage, this is such a misprision as shall forfeit his priority."<sup>1</sup>

This language (used in 1716) should since 1837 have given place to the phraseology of estoppel:

"Where one by his words or conduct wilfully causes (*induces*, per Pollock, C. B., in *Bill v. Richards*, 3 Jur. N. S. 522) another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."<sup>2</sup>

The next step is this: that if an owner may be estopped by standing by while another poses as entitled to deal with the property, so also he may be estopped by furnishing this other with the title-deeds under such circumstances as will enable him to represent himself as the true owner.

For example, if a mortgagee were to deliver up the deeds to the mortgagor in order to enable the mortgagor to hold himself out as the unincumbered owner,<sup>3</sup> the mortgagee ought to be estopped from setting up his mortgage as against the person duped by the mortgagor. Observe that it is not the possession of the legal estate or possession of the deeds in these cases which enables the second mortgagee to claim priority; but the fact that the first mortgagee has, by his conduct, enabled the mortgagor to hold himself out as the unincumbered owner. Giving to the mortgagor possession of the deeds is but one

<sup>1</sup> *Peter v. Russell* (1716), 1 Eq. Ca. Ab. 322; 2 Vern. 726. See also *Ibbotson v. Rhodes* (1706), 2 Vern. 554; *Berisford v. Milward* (1740), 2 Atk. 49; *Stronge v. Hawkes* (1853), 4 D., M. & G. 186; *Hooper v. Gumm* (1866), L. R. 2 Ch. 282; 36 L. J. Ch. 605.

<sup>2</sup> *Pickard v. Sears* (1837), 6 A. & E. 474.

<sup>3</sup> This qualification was made in *Re Castell* (1898), 1 Ch. 321; 67 L. J. Ch. 169.

of the ways in which the first mortgagee may assist in deceiving the second mortgagee. It is an example, merely, of the operation of the rule of estoppel, and is in no way dependent upon any magical influence attaching to title-deeds.

"The possession of the deeds does not indeed prove that a person is owner in fee, as a tenant for life has a right to the fee; but it authorizes the inference that there is no prior mortgage, as, had there been any, the mortgagor would not have had the deeds."<sup>1</sup>

And as the mortgagee, by leaving the deeds with the mortgagor, has authorized this inference, he is estopped from denying the fact. That is rational. It is the law of estoppel. All the cases must be sustained by parity of reasoning; and the rules are invalid which proceed upon possession of the deeds, and not upon conduct with reference to such possession.

Proceeding in wholly different fashion the cases above tabulated may be taken to have established the following propositions:

1. Nothing but fraud, or such gross and voluntary negligence as is evidence of fraud, will oust the priority of the first claimant: A., 2, 3, 11; B., 3, 5; C., 6.<sup>2</sup>

2. Fraud will be imputed if you do not ask for the deeds: A., 1, 9.

3. Unless indeed you are not entitled to them (as in the case of one of several owners mortgaging his share): C., 7.

4. Fraud will be imputed if you do not get the deeds, even if you believe that your solicitors have them: A., 9.

5. Fraud will not be imputed if you ask for the deeds, and, not getting them, are given some apparently reasonable but really untrue excuse: A., 2, 3, 4, 5, 6.

6. Nor if you ask for the deeds and, receiving a bundle in which you are told they are, you do not discover that they are really not there: A., 7, 11; B., 2, 4; C., 5.

7. Fraud will be imputed if you give up the deeds: B., 1; C., 4.

8. But not if the mortgagor alleges some apparently reasonable but really fictitious purpose in asking for them: A., 8, 10; B., 3.

9. Fraud will be imputed if, giving them up, you do not insist upon their return within a reasonable time: C., 8.

<sup>1</sup> 2 Dav. Con. (4th ed.), 239, 240. and (1892) A. C. 263; 61 L. J. Ch. 657,

<sup>2</sup> See also Taylor v. Russell (1891), per Lord Macnaghten.  
1 Ch. 8; 60 L. J. Ch. 1, per Kay, J.;

10. Or if for any reason you could not originally get the deeds, you neglect to obtain them within a reasonable time after it becomes possible to do so: C., 13, 14.

11. Fraud will not be imputed if you leave the deeds with your solicitor, and he gives them up to the mortgagor. The solicitor, did he afterwards take an assignment of your mortgage, would be postponed: C., 9, 10, 11.

12. Fraud will not be imputed if you leave the deeds with the trustees of your estate, who deposits them as security for a loan to himself: C., 12.

13. Nor if the deeds are stolen from you: B., 5.

14. If the mortgagor be allowed to retain the deeds the mortgagee will be postponed, not only to the second mortgagee, to whom they are delivered, but also to a third mortgagee who never got them: B., 1.

It is not necessary to repeat what was said in the preceding chapter<sup>1</sup> as to the unreality of much of this. If jurisprudence is to maintain its claim to rank as a science, its exponents must discard fictitious fraud and learn to build with more solid material.

One essential and valuable point extractable from the above cases is that, not possession of the deeds, but how they got there, is the important and determining factor.<sup>2</sup> For example, a mortgagor, in fraud of his mortgagee, deposits the deeds with a banker; does the banker acquire priority over the mortgagee? Nobody can tell without further information; and yet the rules quoted at the opening of this chapter expressly cover the case. What can be said?

1. If the mortgagor stole the deeds from the mortgagee, the mortgagee has priority: B., 5.

2. If the mortgagee never asked for the deeds, and so never had them, the banker probably has priority: A., 1, 9; but see C., 7.

And so on, and so on, throughout the illimitable variety of cases, some only of which are to be found in the foregoing tables.

Were there still room for doubt that it is conduct with

<sup>1</sup> Ch. XVIII.

<sup>2</sup> See *Thorpe v. Houldsworth* (1868), 18; *Farrand v. Yorkshire* (1888), 40 Ch. D. 189; 58 L. J. Ch. 241; *Powell v. London* (1893), 1 Ch. 615; 62 L. J. National v. Jackson (1886), 33 Ch. D. Ch. 795.

reference to the deeds and not possession itself that affects priority, a consideration of case B. 1 would certainly dispel it. In that case the first mortgagee allowed the mortgagor to retain the deeds; the mortgagor, in fraud of this mortgagee, made two subsequent mortgages; the second mortgagee got the deeds, and the third, of course, did not; but he knew where they were. Now if it be possession of the deeds that gives priority, the second mortgagee will be preferred to the first, for he (the second) has the deeds; but the third mortgagee will not be so fortunate, because he has not the deeds. The decision, however, is otherwise, and third mortgagee as well as second was given priority over the first. Estoppel would so say, for the third as well as the second mortgagee was misled by the locality of the deeds, for which the first mortgagee's carelessness or trustfulness was responsible.

#### ESTOPPEL THE APPLICABLE DOCTRINE.

But, having eliminated fictitious fraud from our philosophy, to what principle of judicial action are such cases to be referred? If a mortgagee stands by and allows the mortgagor to appear as the unincumbered owner, the mortgagee is said to be estopped. And if the mortgagee furnish the mortgagor with the deeds and so enable him to pose as the unincumbered owner; or if, by not asking for the deeds, or by conduct of any other sort, he give the mortgagor equal assistance, shall we not say that, in these cases also, the reason for his postponement is estoppel?

In the case above referred to (where the third mortgagee, who had not the deeds, as well as the second, who had them, obtained priority over the first because he had allowed the mortgagor to retain them), Hall, V. C., said:

"Having made inquiry into the matter, and having acted in the belief that the mortgagee who had got the first benefit of postponement by having obtained the deeds — he, and anybody else who *bona fide* advanced his money founded on the like belief, and arising out of the transaction in regard to the deeds, and connected with it, is entitled to the same benefit on the like principle of equity."<sup>1</sup>

The "principle of equity" to which the Vice-Chancellor referred cannot be that as between persons with equal equities he who has the deeds is to be preferred, for the third mort-

<sup>1</sup>Clark v. Palmer (1892), 21 Ch. D. 129; 51 L. J. Ch. 636.

gagee had not the deeds. It is only by fixing attention upon the locality of the deeds, instead of upon the conduct of the first mortgagee, that one misses the fact that it is such conduct that, according to the principles of equity (estoppel), determines priority; and that it must have been to such principles that the Vice-Chancellor referred.

And there is much in the language of many of the judges which may be appealed to in support of the view here advocated. Estoppel is not, indeed, directly invoked, but the language frequently not only demonstrates that it is conduct with reference to the possession of the deeds and not the mere possession of them that is important (as we have already seen), but that such conduct has the effect of inhibiting assertion of priority — which is estoppel. For example, in *National Provincial Bank of England v. Jackson*,<sup>1</sup> Cotton, L. J., said:

“As between equitable claims the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other.”

The only criticism to which this statement seems to be open is that it ought not to be confined to “equitable claims;” for with reference to legal estates as well as equitable the question must always be whether the first owner “has acted in such a way as to justify him in insisting on his ‘(estate)’ as against the other.”

In *Northern Counties Fire Ins. Co. v. Whipp*<sup>2</sup> the law is stated to be

“that the court will postpone the prior legal estate to a subsequent equitable estate, where the owner has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate; of which assistance or connivance the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been held to be, sufficient evidence, where such conduct cannot otherwise be explained. . . . But that the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.”<sup>3</sup>

And if we ask, Upon what scientific ground will the court, in such cases, decree postponement of the incumbrancer who has the legal estate? there can be no answer but that supplied by the law of estoppel:

“Where one, by his words or actions, wilfully induces another to believe the existence of a certain state of things, and induces him to act on

<sup>1</sup>(1886) 33 Ch. D. 13, approved in *Farrand v. Yorkshire* (1855), 40 Ch. D. 189; 58 L. J. Ch. 232. <sup>2</sup>See also the language in *Powell v. London* (1893), 1 Ch. 615; 63 L. J. Ch. 795; and *Re Castell* (1896), 1 Ch.

<sup>3</sup>(1884) 26 Ch. D. 494; 53 L. J. Ch. 655. 321; 67 L. J. Ch. 169.

that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."<sup>1</sup>

FRAUD AND CARELESSNESS.

For a discussion of the grounds upon which a prior ought to be postponed to a subsequent estate — whether fraud is necessary or whether carelessness ought to suffice — the reader is referred to preceding chapters.<sup>2</sup>

<sup>1</sup>Pickard v. Sears (1837), 6 A. & E. 474; Bill v. Richards (1857), 3 Jur. N. S. 522.

<sup>2</sup>Chs. VIII, IX, XVIII.

## CHAPTER XX.

### OSTENSIBLE OWNERSHIP AND AGENCY—LAND—QUI PRIOR EST TEMPORE POTIOR EST JURE

This rule seems to be so transparently just and reasonable as to require no support. Closer inspection, however, more especially as to its conventional meaning and application, may lead us to a contrary conclusion. The two foregoing chapters have made it clear that, as the law at present stands, the rule in hand is not only not of primary importance, but that it is subsidiary to two other rules. The three rules, in their accepted order of importance, may be shortly thus stated:

Rule I. Where the equities are equal, the law (the legal title) will prevail.

Rule II. Where the equities are equal, possession of the deeds gives priority.

Rule III. Where the equities are equal, the first in time has priority.

Now, supposing that the equities (the merits) being equal, A. has the legal estate, B. has the deeds, and C. is prior in point of time; then the first rule will give priority to A., the second rule to B., and the third rule to C. This conflict has been avoided by subordinating rule II to rule I, and rule III to both of them. They therefore should be understood in this way:

1. When the merits are equal, he with the legal estate will be prior.
2. If neither competitor has the legal estate, then he with the deeds will be prior.
3. If neither competitor has the legal estate or the deeds, then he who is first in time will be prior.

The preceding chapters have presented some reasons against the continuation of the dominating influence of that which is still called the legal estate; and some reasons for the contention that the possession of the title-deeds is of much less importance than the conduct which placed them there. We are



now to see whether the present rule, at all events as it is understood and applied, can be allowed to stand.

*Conventional Meaning and Application.*—*A priori* and apart altogether from the authorities, one would say that the rule in hand must be a valid one. It seems moreover to be in perfect harmony with the principles of estoppel, which (as has already been pointed out) may be taken as saying that, as between competing grantees of an estate, one of them alone, namely, the first, can have it; and that, if the second is to be preferred, it must be not because the second has the estate (for he has it not), but because for some reason the first is estopped from setting up his priority. With like meaning the rule in hand declares that where the equities are equal (*i. e.*, where there is no ground for estopping anybody) the first in time (*i. e.*, the one who has the estate) shall prevail.

The propositions being thus identical, estoppel can have no quarrel with the rule — unless indeed its interpretations and applications offer grounds for objection. And in these respects there is the widest divergence, arising principally from disagreement as to the word “equities” (or merits), which seems entirely to change its meaning as we pass from the rule in hand to the principles of estoppel. For in the law of priorities merits are often said to be equal which in the law of estoppel are thought to be widely unequal; and a first purchaser may escape moral condemnation and consequent loss of priority under the former law, while under the latter he would be said to have so conducted himself as to be estopped from setting up his title.

This divergence is traceable to discrepant underlying principles. According to one law (estoppel) misrepresentation or assistance in misrepresentation, however innocent, will estop;<sup>1</sup> while according to the other it is said that “nothing but fraud, or such gross and voluntary negligence as is evidence of fraud, will oust” the prior claimant.<sup>2</sup> And these results are derived from conflicting ideas as to the duty of a purchaser of property with reference to other people who may become interested in it and be misled by his action.

Of this duty (as is at length pointed out in a preceding chapter)<sup>3</sup> an egoistic or an altruistic view may be taken. According

<sup>1</sup> See ch. VIII.

<sup>2</sup> *Ante*, p. 259.

<sup>3</sup> Ch. V.

to the former I may do as I like with my own, allowing all other persons to look after themselves; I may take such precautions as will insure my safety and leave to others the care of their own well-being; I must not defraud others, no doubt, but I am under no obligation to protect them from fraud. According to the other view, and in harmony with the law of torts, it may be said that

"the whole modern law of negligence, with its many developments, enforces the duty of fellow-citizens to observe, in varying circumstances, an appropriate measure of prudence to avoid causing harm to one another."<sup>1</sup>

The rule under consideration (as developed by the cases) reflects the egoistic view, while estoppel strongly tends towards the altruistic. Hence the opposing deductions: (1) Fraud, or evidence of it, is necessary to postpone the prior estate; (2) Fraud is not necessary for that purpose.

*Law of Priorities.*—The origin and restricted development of the principles hitherto applied to the law of priorities are partially responsible for the view of merits adopted in its applications. As we have already seen, equity, in order to mitigate the injustice arising out of the refusal of the courts of law to recognize trusts, intervened even to the disparagement of the legal estate upon the ground of fraud, and under cover of that word declared in favor of beneficiaries where there was, in reality, no fraud at all.<sup>2</sup> Nevertheless, the ground of jurisdiction was fraud, and it was impossible for equity courts altogether to dissociate their decrees from moral obliquity, or at least the imputation of it.

This explanation does not hold good in cases of contests between merely equitable claimants. But it can well be understood that that which was necessary to jurisdiction in the one class of cases should find expression and place in the other; and that fraud, being deemed essential to displace the priority of the legal estate, should also be thought to be in some measure indispensable to the deposition of the priority of the first in point of time.

*Law of Estoppel.*—In subsequent chapters<sup>3</sup> many authorities are quoted in support of the proposition that "where the owner of goods has lent himself to accredit the title of another person by placing in his power those symbols of property which have enabled him to hold himself out as the purchaser of the goods," he is estopped from setting up his title. The same reasonable

<sup>1</sup> Pollock on Torts (5th ed.), 22.   <sup>2</sup> *Ante*, p. 259 ff.   <sup>3</sup> Chs. XXI-XXIV.

principle is applicable to land. We have in it nothing about fraud, or evidence of fraud, nor yet of negligence. The owner may have been perfectly innocent, may indeed himself have been defrauded or tricked into accrediting the title of the ostensible owner — it is immaterial; he *has* accredited the title, and he is therefore estopped.

This rule has, however, made little headway in transactions relating to real estate; and in cases involving shares and stocks sometimes the law of priorities (as above spoken of) and sometimes the law of estoppel gains the victory — usually an *ex parte* one, for the discussion goes off upon one line or the other, and seldom, or never, are the opposing principles brought face to face.<sup>1</sup>

*Opposing Conclusions.*— The divergent results arrived at by application of the present law of priorities and the law of estoppel may best be appreciated by observation of a concrete case. For that purpose *Cave v. Cave*<sup>2</sup> may be selected. It is typical of many such.

Land is conveyed to a trustee in such a way that no trace of the trust is visible; in fraud of the beneficiaries the trustee makes several successive mortgages to various people, none of whom have notice of the trust; and the courts in settling the priorities say that the first mortgagee is first, the beneficiaries are second, and the other mortgagees follow in their order.

The reason given for the first part of this peculiar result (the priority of the first mortgagee) is his possession of the legal estate. But that reason (objectionable as resting upon previous defective administration of justice) is quite unnecessary to the conclusion. The law of estoppel is amply sufficient; for it says to the beneficiaries that they had accredited the title of the trustees, had assisted his misrepresentation of ownership, and that they are therefore estopped from asserting their title.<sup>3</sup>

<sup>1</sup> See chs. XXII, XXIII, XXIV.

<sup>2</sup> (1880) 15 Ch. D. 639; 49 L. J. Ch. 505.

<sup>3</sup> In *Newall v. C. F. R. R. Co.* (1876), 51 Cal. 250, CROCKETT, J., said: "But it is further settled by these adjudications that if a bill of lading is assigned and the legal title passed to a *bona fide* purchaser for a valuable

consideration before the right of the stoppage is exercised, the lien of the vendor ceases as against the assignee on the well known principle that a secret trust will not be enforced as against a *bona fide* holder for value of the legal title. In such a case, if the equities of the vendor and assignee be considered equal (and this

The other part of the decision (the postponement of the later mortgagees to the beneficiaries) rests upon the maxim in hand (first in time, first in law). It declares that the merits of the opposing claimants are equal, and that the beneficiaries are first in time; both parties were innocent of fraud and the equity of the beneficiaries was the earlier. But estoppel denies the equality. It asserts (in the earlier language in which it was couched)

"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>

It asserts that where the owner of property "has lent himself to accredit the title of another person by placing in his power those symbols of property which have enabled him to hold himself out as the purchaser"<sup>2</sup> of the property, he is estopped from setting up his title as against persons who have changed their position upon the faith of the misrepresentation of ownership.

In other words, *Cave v. Cave*<sup>3</sup> would be decided one way under the present law of priorities, and another way under the law of estoppel by ostensible ownership. For the former law nothing can be urged but its unfortunate origin and tortuous history. The latter is solidly founded upon reason and justice.

Suppose that in *Cave v. Cave* the creator of the trust had vested the title in a trustee with a view to the commission of a fraud — with the design that the trustee should create equitable mortgages which would be invalid as against the beneficiaries, it would then be very clear that the merits would not be equal,<sup>4</sup> and that all the mortgagees ought to have priority. Are the merits equal if without such design the settler fully equips his

is certainly the light most favorable to the vendor in which the transaction can be regarded), the rule applies that where the equities are equal the legal title will prevail. But in such a case it would be difficult to maintain that the equities are equal. The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods, and a person dealing with him in the usual course of business who takes an assignment for a valuable consideration 'without notice

of such circumstances as render the bill of lading not fairly and honestly assignable' has a superior equity to that of the vendor asserting a recent lien, known perhaps only to himself and the vendee."

<sup>1</sup> See ch. XIV.

<sup>2</sup> *Ante*, p. 292.

<sup>3</sup> And very many other cases.

<sup>4</sup> *Kettlewell v. Watson* (1884), 21 Ch. D. 635; 51 L. J. Ch. 281; 26 Ch. D. 502; 53 L. J. Ch. 717. The decision well illustrates the absence of the principles of estoppel from current methods of dealing with such cases.

trustee with the completest means for commission of the fraud? Does he owe no duty of exercising "an appropriate measure of prudence to avoid causing harm to others?" An answer may be helped by perusal of a previous chapter,<sup>1</sup> and by consideration of the ensuing paragraph.

*An Involuntary Trustee.*—It is a remarkable fact that if a trustee be voluntarily constituted, a fraudulent disposition by him of an equitable interest in the property will not affect the beneficiary (as we have just seen); but that the result will be different if the trustee has become such by means of a fraud upon the settler.

In *Hunter v. Walters*<sup>2</sup> a solicitor obtained by fraud from a client a conveyance of certain lands. Afterwards the solicitor made an equitable mortgage of the lands, and this mortgage was upheld as against the true owner. Now, as we have seen, an owner may vest the title of property in a trustee without fear of any equitable mortgage which the trustee may create. But the case in hand shows that if the owner is defrauded out of the title the perpetrator of the fraud may make a good equitable mortgage as against the owner. A trustee appointed voluntarily cannot create a valid equitable incumbrance in fraud of the beneficiary; but a person who has involuntarily been constituted a trustee (or *quasi*-trustee) may do so.

Tested by the rules of estoppel (which treat of conduct) the decisions, if diverse, ought to be reversed. In both cases the owner has put it in the power of another to borrow money upon the faith of apparent ownership. In both cases then it might be said that as between the two innocent persons the owner ought to suffer. But in the second case (where the owner has involuntarily parted with the estate) he might fairly urge that he did not knowingly do so; that he did not intend to enable a fraud to be committed. In the first case the owner knew perfectly well that he was equipping his trustee for fraud.

Estoppel would, however, not so distinguish. In both cases it would declare the true owner estopped by the assistance rendered to the trustee's misrepresentation of ownership; and the fact that the owner had himself been defrauded would not enable him to escape.<sup>3</sup>

<sup>1</sup> Ch. V.

<sup>2</sup> (1872) L. R. 11 Eq. 315; 7 Ch. App. 75; 41 L. J. Ch. 175.

<sup>3</sup> See chs. VIII, XXII, XXIV.

## CHAPTER XXI.

### OSTENSIBLE OWNERSHIP AND AGENCY — GOODS — POSSESSION.

Cases involving estoppel because of ostensible ownership of goods may be divided broadly into:

1. Those in which some one other than the owner is in possession of the goods themselves.
2. Those in which some one other than the owner is in possession of documents of title to the goods.

The present chapter will be devoted to the former of these branches of the subject, leaving the latter to succeeding pages.

*Land and Goods.*— In the three preceding chapters we have been dealing with the rules at present in vogue with reference to priorities in cases relating to land. Two of these rules, however, are sometimes applied to the decision of cases involving chattels, namely, those relating to the legal estate and to priority in point of time. But it is very curious to notice that in cases concerning goods the principles of estoppel are much more frequently appealed to than in litigation relating to land. Perhaps one might have so anticipated, for the rules were evolved in real-estate cases, while the principles of estoppel by misrepresentation had their origin very largely in actions relating to personal property.

Having already said all that is necessary with reference to the rules, and having shown that even in relation to land they should be superseded by the principles of the law of estoppel, we shall in the present chapter deal with questions of ostensible ownership (by possession) of goods as determined by those principles. Indeed, the cases that we shall meet themselves usually so proceed, although here and there the old rules are brought into requisition.<sup>1</sup>

*Accrediting the Title.*— For example, we are quite familiar, in the law of personal property, with the statement that the maxim *nemo dat quod non habet* "will certainly not apply where the owner of goods has lent himself to accredit the title of another person."<sup>2</sup>

<sup>1</sup> See notably *Reg. v. Shropshire* (1873), L. R. 8 Q. B. 420; L. R. 7 H. L. 496; 45 L. J. Q. B. 31.

<sup>2</sup> *Boyson v. Coles* (1817), 6 M. & G. 14.

But such a dictum, although transparently reasonable and just, could hardly have been uttered in a real-estate case. There the courts would have distinguished between legal and equitable purchasers; and between frauds, actual, constructive and incomprehensible;<sup>1</sup> about all which, as will be observed, our dictum says nothing. Taking it, nevertheless, as sound, we have now to inquire as to the circumstances under which it may be said that possession of goods will accredit the title to them.

*Mere Possession.*— And we may commence with the broad assertion that mere possession, apart from special circumstances, does not accredit title, or in other words, is no evidence of title— usually a man cannot be said to be the ostensible owner of goods merely because he has them in possession.<sup>2</sup>

“The mere possession of chattels, by whatever means acquired, if there be no other evidence of property, or authority to sell from the true owner, will not enable the possessor to give a good title.”<sup>3</sup>

If it did, and if I loaned my horse to a friend, I might be estopped from asserting my title as against an innocent purchaser; for I would have accredited the title— I would have assisted in the fraud by giving to my friend evidence of his ownership of the horse. But that is not the law.

“If I hand my watch to a man to keep for me, though I in a sense enable him to appear to be the owner, yet if he sells or pledges it I do not lose my property.”<sup>4</sup>

It is for this reason that when chattel property is sold and possession delivered upon hire-and-sale contract, with an agree-

<sup>1</sup> *Ante*, p. 259 ff.

<sup>2</sup> *Newbold v. Wright* (1833), 4 *Rawle* (Pa.), 213; *Saltus v. Everett* (1838), 20 *Wend.* (N. Y.) 267; *Peerless, etc. v. Gates* (1895), 61 *Minn.* 124; 63 *N. W. R.* 260; *Baker v. Taylor* (1893), 54 *Minn.* 71; 55 *N. W. R.* 823; *Hedderly v. Backus* (1893), 53 *Minn.* 27; 55 *N. W. R.* 116; *Sage v. Shepherd* (1896), 39 *N. Y. Supp.* 453; 4 *App. Div.* 290; 52 *N. E. R.* 1126; *Atlanta v. Hunt* (1897), 100 *Tenn.* 89; 42 *S. W. R.* 482. Article 1599 of the French Civil Code declares that “*La Vente de la chose d’ autrui est nulle*,” but article 2279 provides that “*En fait de meubles, possession vaut titre*.” There are special provisions as to lost or stolen goods, but, with these

exceptions, an innocent purchaser from one in possession is protected. See also the German Code, 1896, §§ 931-935.

The Indian Contract Act of 1872, section 108 (2), provides that, if one joint owner of goods “has the sole possession of them by the permission of the co-owner,” a purchaser for value without notice acquires a good title.

<sup>3</sup> *Per Bronson, C. J.*, in *Covill v. Hill* (1847), 4 *Denio* (N. Y.), 337. And see *McNeil v. Tenth Nat. Bank* (1874), 46 *N. Y.* 330.

<sup>4</sup> *Per Bramwell, B.*, in *Gabarron v. Kreeft* (1875), *L. R.* 10 *Ex.* 281; 44 *L. J. Ex.* 243.

ment that the title is not to pass until the price is paid, the vendor is not estopped from setting up his title as against sub-purchasers.<sup>1</sup> Owing to the very general adoption of this method of sale, however, the legislatures have in some jurisdictions intervened and altered the law in respect to possession of goods by vendees (and also by vendors) as indicative of title.<sup>2</sup>

*Possession Implying Ownership.*—The cases in which possession may be taken as indicative of ownership usually turn upon (1) the character of the goods; or (2) the character of the place to which they are sent; or (3) the customary employment of the person to whom they were intrusted. Other cases arise, but they are usually those in which circumstances other than that of possession point to ownership.

I. *Character of the Goods.*—The reasonableness of the following is clear:

"Goods which from their nature are intended to be fixed to and become part of realty are given into possession of a bargainee under a contract of conditional sale; and if these goods are attached to the realty, the vendor may be estopped from setting up his title as against an innocent purchaser for value."<sup>3</sup>

And the distinction between allowing furniture to remain in the house of a jeweler and permitting him to expose your diamonds among his own in his shop can readily be appreciated. In *Meggy v. Imperial*,<sup>4</sup> where a trustee in bankruptcy had allowed furniture to remain in the hands of the bankrupt, who had mortgaged it, Bramwell, L. J., said:

"If a wine merchant be left in possession of wine, the fair inference is that it is his own, and a person may be justified in advancing money upon the security of it; here the goods being household furniture, no inference would be drawn that the insolvent had them in his possession for the purpose of selling them."

II. *Character of the Place.*—The character of the goods is usually important, however, only in connection with the character of the place to which they are sent. For example, in the

<sup>1</sup> *Mason v. Bickle* (1878), 2 Ont. App. 291; *Austin v. Dye* (1871), 46 N. Y. 500; *Zutchman v. Roberts* (1871), 109 Mass. 53; *Miller v. Parker* (1893), 155 Pa. St. 208; 26 Atl. R. 303; *Rodgers v. Bachman* (1895), 109 Cal. 352; 42 Pac. R. 448; *Ensley v. Lewis* (1899), 25 S. R. 729 (Ala.); *Cottrell v. Carter* (1899), 53 N. E. R. 375 (Mass.). See a distinction in *Comer v. Cunningham* (1897), 79 N. Y. 391.

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

<sup>3</sup> *McDonald v. Weeks* (1860), 8 Gr. 297. But see *Vulcan v. Rapid City* (1894), 9 Man. 577. *Distinguish Stevens v. Barfoot* (1885), 9 Ont. 692; 13 Ont. App. 366; *Polson v. Degeer* (1886), 12 Ont. 275.

<sup>4</sup> (1878) 3 Q. B. D. 717. And see 47 L. J. Q. B. 119. See *Giannone v. Fleetwood* (1893), 93 Ga. 491; 21 S. E. R. 76.



case just referred to, it was not merely because the goods were classed as furniture that the true owner escaped; for if they had been sent to the shop of a furniture dealer the result would certainly have been different from what it was. The true rule (for all sorts of goods) is that laid down by Lord Ellenborough as early as 1812:

"If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity was sent thither for the purpose of sale. . . . When the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."<sup>1</sup>

The same rule is manifestly applicable not merely to a case in which goods are intrusted to the proprietor of a business, but also where some person (in truth an agent merely) is provided with a shop and a stock, and so becomes in appearance a trader and the proprietor of the business.<sup>2</sup>

And not only by permitting a trader to present the appearance of ownership of property will the true owner be estopped as against purchasers, but he may also be estopped as against creditors of the trader who, upon the faith of such appearance, have given him credit.<sup>3</sup>

III. *Usual Employment of the Person.*—There are many cases in which possession of goods will be evidence or appearance of their ownership, because of the nature of the usual employment of the person intrusted with them. Factors are not within the scope of the present chapter. Their possession does not indicate ownership, but agency merely. Their case therefore falls under the heading of ostensible agency, and will be dealt with in another chapter.<sup>5</sup>

<sup>1</sup> It would be better to say "If the owner."

<sup>2</sup> *Pickering v. Busk* (1812), 15 East, 48. And see *Lausatt v. Lippincott* (1821), 6 Serg. & R. (Pa.) 392; *Towle v. Leavitt* 1851), 23 N. H. 358; *Taylor v. Pope* (1868), 45 Cold. (Tenn.) 416; *Quinn v. Davis* (1875), 78 Pa. St. 15; *Spooner v. Cummings* (1890), 151 Mass. 813; 23 N. E. R. 839; *Lewenberg v. Hayes* (1897), 91 Me. 499; 39 Atl. R. 469; *Atlanta v. Hunt* (1897), 100 Tenn. 89; 42 S. W. R. 483; *Heath v. Stoddard* (1898), 91 Me. 499; 40 Atl. R. 547; *Van Duzen v. Inngleblut* (1899), 77 N. W. R. 970 (Minn.).

<sup>3</sup> *Smith v. Grouette* (1895), 2 Man. 314. And see *Ramazotti v. Bowring* (1860), 7 C. B. N. S. 851; 29 L. J. C. P. 30; *Ex parte Dixon* (1876), 4 Ch. D. 135; 46 L. J. Bk. 20. Merely finding a person in charge of a shop does not warrant the conclusion that he has authority to purchase goods. *Vineberg v. Anderson* (1890), 6 Man. 335.  
<sup>4</sup> *Troughton v. Gitley* (1766), Amb. 630. See the subject discussed *ante*, ch. XI.

<sup>5</sup> Scientifically it should be dealt with in chapter XXVI, which treats of ostensible agency. The Factors Acts, however, do not accurately dis-

*Traders.*— Bankruptcy acts sometimes contain provisions known as reputed-ownership clauses. They constitute a sort of statutory estoppel peculiar to persons in trade or business, and varying in its principles from those beaten out by the courts. The English act has the following:<sup>1</sup>

"All goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof,"

shall form part of the estate. Observe the points of agreement and difference between this provision and the law of estoppel:

1. They agree in requiring the consent and permission of the owner—goods stolen or borrowed, or otherwise wrongfully placed as part of the trader's stock, will not affect the owner.
2. They agree in requiring an appearance of ownership; that is, the existence of such a state of affairs as might mislead creditors.

"The policy of the Bankrupt Act . . . never was so unjust as to take his property, unless it was left by him in such circumstances as that credit might have been obtained upon it."<sup>2</sup>

And so where it is customary to leave goods in the possession of persons in a certain line of business, possession does not indicate ownership; no one would be deceived, and the statute does not apply.<sup>3</sup>

3. Estoppel requires that the estoppel-asserter should have been actually misled by the appearance of ownership; but for the operation of the statute that condition is altogether unnecessary. For example, the statute applies although the goods may have come into the possession of the trader the day before his bankruptcy and after every debt has been incurred; and it is not only unnecessary that every ranking creditor should have given credit upon the faith of the appearance of ownership, but it is quite unimportant whether any one creditor did so.

4. Under the law of estoppel, if the owner of goods were at

tinguish between ostensible ownership and ostensible agency, and they contain, moreover, provisions applicable to persons other than factors. For these reasons the points to be noticed in connection with the acts are grouped together in chapter XXIII.

<sup>1</sup>46 & 47 Vic. (Imp.), ch. 52, § 111. See *ante*, ch. XI.

<sup>2</sup>Per Lord Blackburn in *Colonial*

*Bank v. Whitney* (1886), 11 App. Cas. 486; 56 L. J. Ch. 47.

<sup>3</sup>Re *Goetz, Jonas & Co.* (1898), 1 Q. B. 787; 67 L. J. Q. B. 577; Ex parte *Watkins* (1878), L. R. 3 Ch. 520; 42 L. J. Bk. 50. Compare the statute which declares for estoppel where a vendor remains in possession of goods "under those circumstances which create a representation of ownership" (ch. XXIII).

any time estopped by the appearance of ownership (in another person) acted upon, he would necessarily remain in that position. The statute, however, permits the owner to retake his goods at any time prior to the date of the receiving order, even after the commission of an act of bankruptcy and after creditors have been misled.<sup>1</sup>

It may be said that the statute is a rough approach to that justice which is meted out by the law of estoppel. It is difficult to offer any reason for handing over to creditors goods in which their debtor had not a shadow of an interest, which in no way affected their dealings with him, and which, as most frequently happens, they had never heard of. And it is just as hard in cases in which the debtor notoriously obtained all the credit he had upon the faith of his ostensible ownership of the goods to suggest that the true owner shall be allowed to subtract them the day before the receiving order. The best perhaps that can be urged is that for bankruptcy proceedings some arbitrary rules must be set, and that these are as good as others. It would be a rare case in which all the creditors would be found to be in the same position with reference to goods in possession of the bankrupt—that all, or that none of them, would prove their right to an estoppel. Some general standard apart altogether from considerations of individual situation therefore is formulated.<sup>2</sup>

*Vendors and Vendees.*—A purchaser may be estopped from asserting his title as against a subsequent purchaser from the same vendor if he permit the vendor to remain in possession of the goods. And similarly, a vendor having made a contract to sell goods may, by delivery of possession to the purchaser, be estopped from asserting his title or lien as against a subsequent purchaser. Such cases should properly be treated of in the present chapter, but for convenience they are relegated to another.<sup>3</sup>

#### 4. *Possession Accompanied by Other Circumstances.*—

"Mere possession alone does not invest the agent with power to give the purchaser, however innocent, the right of property against the owner. Nor is it enough so to do that the owner put the agent into the possession. Something more must be coupled with such possession to enable the agent to effect a valid sale to the purchaser against the will or instructions of

<sup>1</sup> *Young v. Hope* (1848), 3 Ex. 105; *Graham v. Furber* (1853), 14 C. B. 410; 28 L. J. C. P. 51; *Ex parte Montague* (1876), 1 Ch. D. 554.

<sup>2</sup> See *ante*, ch. XI, p. 142.

<sup>3</sup> Ch. XXIII.

the owner. That something more exists in the cases where the owner has invested his agent in possession with an *apparent power to sell, or with the title to the property, or with the customary indicia of title*, which purport that the title or right of property is in the party having the possession. The obvious justice is that if the owner has put the agent in possession and he has by acts of any kind held out the agent as having authority to sell, or has given the agent the means of holding himself out as the owner, in such cases the purchaser who has been thereby misled and been induced by reason of such apparent authority or *indicia* of title to part with his money or the property, without notice of the real fact that the agent has no authority to sell, or that the seller in possession is not the real owner, upon plain principles of natural justice is entitled to hold the property against the owner."<sup>1</sup>

*Obtained by Fraud.*—The most important line of cases which may be noted under this heading are those in which the owner of goods has been prevailed upon to hand them over upon some misrepresentation, and the swindler has disposed of them to an innocent purchaser. Who is to lose?

Some of the authorities turn upon the distinction between cases in which there is a contract for the sale of goods (although induced by fraud), and those in which there was no contract at all, although sometimes the appearance of one. For example, where a broker got possession of goods from the owner by pretending to have sold them on account of the owner to S., which was not the fact, it was said that there was no contract at all.<sup>2</sup> So also where one Blenkarn bought goods, knowing that the vendors thought that they were selling to a reputable firm known as Blenkiron & Co., it was held that there was no contract.<sup>3</sup> Following this distinction it is said that where there is a contract, the title of the goods passes; that it therefore passes also to the sub-purchaser; and that this latter, having the legal title, and as good an equity as the original vendor, is entitled to maintain his purchase. In the absence of a real contract, on the other hand, it is said that the title is still in the original vendor, and that there are no equities superior to his. It is therefore held that in order to defeat the true owner,

"he must have parted with possession of his property *with intent to pass the title* to the wrong-doer, thus giving him the apparent right of disposal."<sup>4</sup>

<sup>1</sup>Taylor v. Pope (1868), 45 Cald. (Tenn.) 416. Approved in Atlanta v. Hunt (1897), 100 Tenn. 89; 42 S. W. R. 493.

<sup>2</sup>Hollins v. Fowler (1873), L. R. 7 Q. B. 616; 41 L. J. Q. B. 277; L. R. 7 H. L. 757; 44 L. J. Q. B. 169; Soltau v. Gerdau (1890), 119 N. Y. 880; 48 Hun, 537.

<sup>3</sup>Cundy v. Lindsay (1876), 1 Q. B. D. 848; 2 Q. B. D. 96; 8 App. Cas. 459; 45 L. J. Q. B. 881; 46 L. J. Q. B. 233; 47 L. J. Q. B. 481. See Bush v. Fry (1888), 15 Ont. 122.

<sup>4</sup>Barnard v. Campbell (1874), 53 N. Y. 76. See S. C., 55 N. Y. 456; Neal v. Williams (1841), 18 Me. 391; Coombs v. Chandler (1877), 83 Ohio,

"Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done something to disaffirm the transaction."<sup>1</sup>

Some of the legislation is in line with this view:

"When the seller of goods has a voidable<sup>2</sup> title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."<sup>3</sup>

But there is another and a very important view, according to which the distinction between contract and no contract becomes, under certain circumstances, unimportant. For if the result of the transaction (whatever it may be) is that the swindler appears to have the title, then the question of estoppel by ostensible ownership arises. Here we must distinguish between cases in which the swindler obtains possession merely, and those in which the true owner hands over to him some evidence of the title. In the latter case there is no reason to doubt that a sub-purchaser would be protected by estoppel of the true owner.

"It appears to me that quite apart from any contract which might be affirmed or disaffirmed afterwards, the question here is whether the true owner of the goods has so invested the person dealing with them with the *indicia* of property as that when an innocent person enters into a negotiation with the person to whom these things have been intrusted with the *indicia* of property, the true owner cannot afterwards complain that there was no authority to make such a bargain. Where that is the case it is no longer a question of affirming or disaffirming any contract between the owner of the goods, but a question whether the owner of the goods has by his conduct allowed the person, who has either cheated him or to whom he has intrusted the goods, to hold himself out as the owner, so as to give a good title to a bona fide purchaser for value."<sup>4</sup>

But if the swindler obtained possession merely, and under such circumstances that it could not be said that there being a contract he acquired the legal title, the result is usually different. The case then may be said to become one in which the innocent sub-purchaser relied upon mere possession as evidencing title, and that he has himself to blame; for (apart from market overt) the possession, even of a merchant, is not a suffi-

178; *Holland v. Swain* (1879), 94 Ill. 154; *Tiedeman on Sales*, § 327, and the many cases there cited.

<sup>1</sup> *Kingsford v. Merry* (1856), 11 Ex. 577; 25 L. J. Ex. 166. Approved in *Pease v. Gloahec* (1866), L. R. 1 P. C. 229; 85 L. J. P. C. 66. And see *ante*, ch. VIII.

<sup>2</sup> As to the meaning of the word "voidable," see ch. XXV.

<sup>3</sup> See 56 & 57 Vic. (Imp.), ch. 71, sec. 23.

<sup>4</sup> *Henderson v. Williams* (1895), 1 Q. B. 525; 64 L. J. Q. B. 810; *Vickers v. Hertz* (1871), L. R. 2 S. & D. 113; *Quirk v. Thomas* (1858), 6 Mich. 120; *Prentice v. Page* (1895), 164 Mass. 276; 41 N. E. R. 279.

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cient foundation for title. A corollary from this is that if the swindler, after thus acquiring possession, should himself warehouse or ship the goods and so procure a document of title to them, the sub-purchaser's position would not be improved.<sup>1</sup> It will be observed that it was not with the assistance of the true owner, in this case, that the swindler became possessed of the document of title. It has been held, however, that if the goods had been warehoused by the original owner, and he assented to the transfer of them in the books of the warehouseman, he would be estopped, even although there was no other evidence of title.<sup>2</sup>

It must not be thought, however, that this line of decision at all interferes with the validity of the distinction between cases of contract and no contract. It merely reminds one that even in cases in which there is no contract the true owner may by his conduct be estopped from setting up his title.

*Other Cases.*—There are many other cases exemplifying the principle under consideration. For example, if a safe manufacturer, besides handing over possession of a safe under a hire-and-sale contract, should paint the purchaser's name upon it, he would be estopped.<sup>3</sup> A distinction is made, however, where a sub-purchaser has no reason for thinking that it was the manufacturer who had painted on the name; because, in such cases, even if there had been a misrepresentation by the manufacturer, the sub-purchaser was not aware of it—for all he knew his own vendor might have painted on the name, and he therefore did not act upon the representation as being that of the manufacturer.<sup>4</sup>

So also possession coupled with a receipt for the purchase price would accredit the title and estop the true owner, even although the money had not in fact been paid, nor had the title passed. "Settled by note" would be sufficient for such purpose.<sup>5</sup>

<sup>1</sup> *Soltau v. Gerdau* (1890), 119 N. Y. 880; 48 Hun, 537.

<sup>2</sup> *Henderson v. Williams* (1895), 1 Q. B. 525; 64 L. J. Q. B. 309.

<sup>3</sup> *O'Connor v. Clark* (1895), 170 Pa.

St. 318; 32 Atl. R. 1029. As to hire-and-sale contracts see *supra*.

<sup>4</sup> *Walker v. Hyman* (1877), 1 Ont. App. 345. And see ch. XI.

<sup>5</sup> *Quebec Bank v. Taggart* (1896), 27 Ont. 162.

## CHAPTER XXII.

### OSTENSIBLE OWNERSHIP AND AGENCY—GOODS—DOCUMENTS OF TITLE

It is somewhat surprising that nowhere is there to be found any adequate explanation of the nature and purpose of documents of title and their true relation to the transactions which they represent. There are no doubt text-books which treat with more or less completeness of title-deeds to real estate; and several that are devoted to bills of lading, dock warrants, transfers of shares, etc.; but no synthesis has been attempted, and no general principles have been established which would be of assistance in dealing with the questions which we are now to encounter.

*Classes of Documents.*—Observe first that there are three classes of documents of title: (1) those which certify as to the condition of title; (2) those which pass property or title; and (3) those which merely evidence the fact that property has already passed. Certificates of ownership of ships and shares are examples of the first class; conveyances of land and transfers of shares are instances of the second (although they may also be said to evidence the transactions); while indorsements of bills of lading, dock warrants, etc., are examples of the third.

*Estoppel by Transfers.*—Omitting for the moment the first of these categories, let it be noted that documents of the second and third classes have this in common: that whether they operate as, or are merely evidence of, a transfer of property, they authoritatively indicate to subsequent purchasers that the grantors have parted with their interest in the thing conveyed. In other words, if a grantee should represent to an innocent sub-purchaser that he (the grantee) was the absolute owner of certain property, and should, as evidence of such representation, produce a conveyance or record of a conveyance from A. to himself; and if the sub-purchaser should, upon the faith of the representation so accredited, change his position prejudicially, then A. ought to be estopped from setting up any claim incon-

sistent with the conveyance or record. It is a clear case of estoppel by assisted misrepresentation. Recognize that bills of lading, warehouse receipts, delivery orders, dock warrants, transfers of shares, etc., are documents of title in the sense above indicated, and that estoppel applies to them as just pointed out, and mountains of difficulty will disappear.

Such law (although not its method of statement) is quite familiar in its relation to real estate. It is there termed "estoppel by deed," which is said to bind "parties and privies." It has already been treated of at some length,<sup>1</sup> and it is recurred to here merely for the purpose of contrasting it with the more comprehensive ground of estoppel above suggested, which, it will be observed, applies whether the subject-matter of the transaction is real or personal estate, whether the document of title is or is not a deed, and whether the sub-purchaser does or does not acquire a "legal" or any estate.<sup>2</sup>

And probably apart from profound learning upon the subject, this estoppel view of the matter would evoke little opposition. But the accumulation of precedents involving other principles, the diversity and antagonism of those precedents and principles when applied to different sorts of documents of title, and the existence of statutes which proceed upon no principle at all, render the establishment of our suggested method of treatment impossible, or nearly so,—at all events for the present.

We have already seen that in the law of real property the guiding principles are (1) a factitious reverence paid to the "legal" estate with reasoning very "technical and not satisfactory;"<sup>3</sup> (2) mechanical rules as to the possession of the title-deeds;<sup>4</sup> and (3) astonishing juggleries with the word "fraud."<sup>5</sup> We are now to see that the law as to bills of lading hovers between a view of symbolism, and a notion of negotiability with accompanying antagonism to the general law; that in the realm of dock warrants, etc., we have confusion plus distracting statutes, while to share transfers alone has the doctrine of estoppel been at all adequately applied—helped therein by the absence, from so modern a subject, of ancient formulas and perplexing

<sup>1</sup>Ch. XV.

<sup>2</sup>As to "legal" and "equitable" estates, see ch. XVIII.

<sup>3</sup>Ante, ch. XVIII.

<sup>4</sup>Ante, ch. XIX.

<sup>5</sup>Ante, p. 250.



acts of parliament. It should be added that the American cases are, for the most part, less open to the criticisms of this paragraph than the English.

#### DIVISION OF THE SUBJECT.

Before entering upon exposition it is very necessary that we should understand exactly what kinds of documents of title we are to deal with, and to justify their inclusion in one chapter — for some of them are not usually thought to be very closely associated. Let us notice four classes:

1. Documents usually referred to as conveyances, whether of lands or goods.
2. Bills of lading.
3. Dock warrants, warehouse-keeper's certificates, warrants or orders for the delivery of goods and other such documents. These will be grouped under the phrase "dock warrants, etc."<sup>1</sup>
4. Certificates and transfers of shares.

1. *Conveyances*.— While it may very well be said that a written document is necessary to the transfer of land, yet in its original purpose a deed was rather intended to be evidence of the transfer than the transfer itself, and its evidential character is still maintained by its form.<sup>2</sup> With regard to such title-deeds we may safely say that they are regarded as evidence of the ownership of the person in whom they show title, and are intended to be representations of that fact to all persons dealing with the grantee. The reason therefore for the estoppel for the grantors, as against persons who purchase upon the faith of such deeds, is very apparent. Let us observe whether the same thing cannot be said of the other documents to which we have referred.

2. *Bills of Lading*.— A bill of lading is a receipt given by a common carrier for the goods shipped; it shortly describes

<sup>1</sup> For the purposes of the Factors Act, the phrase "document of title" includes "any bill of lading, dock warrant, warehouse-keeper's certificate and warrant or order for the delivery of goods, and any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing

or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented." 53 & 58 Vic. (Imp.), ch. 45, § 1 (4). And see Rev. St. Ont., ch. 150, § 1 (3).

<sup>2</sup> "This indenture witnesseth."

the goods; indicates the place of shipment and delivery; and usually it contains a number of conditions regulating the obligations of the parties, amongst the rest that certain freight is to be paid. The most notable part of it, for our present purpose, is some such phrase as "deliverable to A. B. or order."<sup>1</sup>

A bill of lading is sometimes said to be a contract, and legislation so treats it,<sup>2</sup> while Baron Bramwell declares that the statute is inaccurate:

"To my mind there is no contract in it. It is a receipt for the goods stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract; that has been made before the bill of lading was given."<sup>3</sup>

Whether a receipt only, or a contract, it is at all events a document that is not intended to be operative merely between the original parties to it. It is intended to be a representation to the commercial world that the goods mentioned in it have been shipped on account of the person to whom they are made deliverable.<sup>4</sup> And when the person to whom it is issued indorses it and hands it over to another person, such action is regarded as a declaration or representation that the transferee is entitled to the goods, and that the transferrer has thenceforward no interest in them. In other words, a bill of lading is a document of title,<sup>5</sup> and its indorsement ought to estop a

<sup>1</sup> Without some such words a bill of lading is not ambulatory, and no person ought to take it to be a representation intended to be passed on to others. *Henderson v. Comptoir* (1873), L. R. 5 P. C. 260; 43 L. J. P. C. 60. See as to bills of exchange and promissory notes, 45 & 46 Vic. (Imp.), ch. 61, § 8; 53 Vic. (Can.), ch. 33, § 8; 218 & 19 Vic., ch. 111, § 1.

<sup>2</sup> *Sewell v. Burdick* (1884), 10 App. Cas. 105; 53 L. J. Q. B. 399. But see per Lord Esher in *Leduc v. Ward* (1888), 20 Q. B. D. 490; 57 L. J. Q. B. 379.

<sup>3</sup> This is now perfectly clear. See 18 & 19 Vic. (Imp.), ch. 111, § 8. It is the chief postulate in the cases of which *Grant v. Norway* (1851), 10 C. B. 665; 20 L. J. C. P. 93, is the leading example. See *Hubbersty v. Ward* (1859), 8 Ex. 290; 22 L. J. Ex. 113; *Holton v. Sanson* (1862), 11 U. C.

C. P. 606; *The Schooner Freeman v. Buckingham* (1855), 18 Edw. (U. S.) 182; *Pollard v. Vinter* (1881), 105 U. S. 7; *Bank of Batavia v. New York* (1887), 106 N. Y. 195. Arkansas, California, Dakota, Kentucky, Maryland, Minnesota, Missouri, New York, Pennsylvania and Wisconsin have statutes declaring that bills of lading are negotiable. Porter on Bills of Lading, §§ 443-451. There is some judicial opinion contrary to the text. See *Erb v. Great Western Ry. Co.* (1882), 3 Ont. App. 456, 459, 463, 463; 5 S. C. Can. 193; *Gunn v. Bolckow* (1875), L. R. 10 Ch. 491; 44 L. J. Ch. 732.

<sup>4</sup> "A bill of lading is a transferable document of title." Per Lord Blackburn in *Glynn v. East & West India* (1882), 7 App. Cas. 644; *Hatfield v. Phillips* (1845), 13 Cl. & F. 361; *Colo v. North Western* (1875), L. R. 10 C.

transferrer from asserting any interest in the goods as against persons who, upon the faith of the indorsement, have changed their position, just as a conveyance of land estops its grantor.

3. *Dock Warrants, etc.*—The third class of documents (referred to as dock warrants, etc.) are sometimes in the form of receipts, but sometimes merely as follows:

"Warrant for two cases of lye. Imported in the Hartfell. Entered by Petrocochino, 24 Sept., 1875. Deliverable to Petrocochino or assigns by indorsement thereon.

"N. B.—This warrant is the only document issued by us as a legal symbol of these goods."<sup>1</sup>

Such instruments, too, are sometimes called contracts;<sup>2</sup> and although there are usually no express contractual stipulations in them, such as are to be found in bills of lading, the present writer raises no objection to their being so styled. But whether contractual or not, it is quite clear that of these documents also it may be said that they are evidences of title,<sup>3</sup> and intended to be representations of that fact to persons dealing with their holders; they are to goods at rest what bills of lading are to goods in transit.

4. *Shares in Companies.*—Certificates and transfers of shares are not usually classed with such documents of title as those of which we have been speaking; but they are for our purpose closely associated with them. Corporations issue certificates of shares in order to enable their shareholders the more easily to deal with their shares. These, too, are not merely receipts or contracts, operative only as between the company and the particular shareholder; but are intended as representations to third persons as to the ownership of the shares.<sup>4</sup> A company's certificates of shares, therefore, are documents of title in the same sense as are bills of lading, dock warrants, etc.; that is to say, they are representations by the signers of them as to the owner-

P. 363; *Merchants' Bank v. Phoenix* (1877), 5 Ch. D. 216; 45 L. J. Ch. 418; *Michigan v. Phillips* (1871), 60 Ill. 198.

<sup>1</sup> *Seton v. Lafone* (1887), 18 Q. B. D. 140; 19 Id. 38; 56 L. J. Q. B. 415. See another form in *Merchants' Bank v. Phoenix* (1877), 5 Ch. D. 205; 46 L. J. Ch. 418.

<sup>2</sup> *Blackburn on Sales* (2d ed.), 415.

<sup>3</sup> So long ago as 1817, Dallas, J., said that a dock warrant "is the title deed of the property;" and

*Park, J.*, said: "No man living would have purchased these goods unless the dock warrants had been produced. They were the key to this property." *Lucas v. Dorrien*, 7 Taunt. 290, 291. In some states warehouse receipts are by statute negotiable. *Collins v. Rosenbaum* (1897), 43 S. W. R. 706.

<sup>4</sup> *Re Bahia* (1868), L. R. 3 Q. B. 594; 37 L. J. Q. B. 181.

ship of the property referred to in them. A bill of lading indicates that the goods are being carried on behalf of A. B. or order; and a company's certificate indicates that certain shares are owned by A. B. To these extents the documents are representations as to title.

That such documents are usually transferred by different methods is not a distinguishing factor of any importance for our purpose. A bill of lading is transferable by indorsement of signature merely; and shares by a separate document (although sometimes indorsed upon the certificate) which expresses that which an indorsement implies. One form is more compendious than the other, that is all. And the effect (for our purposes) is identical. When A. B. indorses over his bill of lading to another he enables that person to pose as the owner of the goods, and he ought to be estopped as against any third person who is subsequently misled by such ostensible ownership. And when A. B. executes a transfer of his shares to another, the effect is the same so far as third persons are concerned.

*Resemblances.*—Of certificates and transfers of shares, then, we may say as well as of bills of lading, dock warrants, etc., and conveyances of lands and goods:

1. That they are documents of title.
2. That they are used in the ordinary course of business as proof of the ownership of the property they describe.
3. And that they are ambulatory—that is, intended to be passed on to other persons, and to be acted upon by strangers to them.<sup>1</sup> In fact all the documents to which reference has been made are title papers. Bills of lading, dock warrants, etc., and share transfers bear the same relation to goods and shares as do title-deeds to real estate. And the law of estoppel as to all of them ought to be the same—that is to say, the same principles of estoppel by ostensible ownership should apply equally to all such cases.

“The ground of these decisions is the same in relation to real and personal estate. It is that the delivery of the thing by the owner to one who

<sup>1</sup>Questions are mooted as to whether shares are, or are not, choses in action; it being suggested that they are choses prior to registration, and property afterwards. *Colonial Bank v. Whinney* (1886), 30 Ch. D. 261; 55 L. J. Ch. 585; 11 App. Cas.

426; 56 L. J. Ch. 43; *Robinson v. Jenkins* (1890), 24 Q. B. D. 275; 59 L. J. Q. B. 147. With such questions we have nothing to do. We are dealing with the title to shares, and for that purpose the inquiry is immaterial.

has also the evidence of ownership by the act of the party transferring, gives such an appearance of property to the party in possession that the purchaser under him shall not be disturbed by the antecedent fraud."<sup>1</sup>

The discrepancy, however, between the law as at present understood relating to real estate and that which obtains with reference to documents of title to goods and shares is so great that it would be impossible to combine the former with the latter in one method of treatment. Real estate title-deeds have already been dealt with; we shall now as far as possible unite all other documents of title in one chapter, premising merely that even amongst these we must be prepared for annoying divergencies and departures from common principle.

#### THE TRUE VIEW.

It will be well at the outset to explain more fully the author's view of the principles applicable to the subject in hand. It has already been said that the maxim *nemo dat quod non habet*

"will certainly not apply where the owner of goods has lent himself to accredit the title to another person."<sup>2</sup>

Now there are two methods of accrediting the title of another person: (1) by really, and (2) by ostensibly, vesting it in him. For example of the former: I convey certain land absolutely to a person, who is to hold it subject to my orders, and the trustee uses the deed to accredit his representation of beneficial ownership. For example of the second: A mortgagee lends the title-deeds to the mortgagor, who fraudulently presents them to a banker as evidence of unincumbered title. In both cases the result to the third person is the same: that is to say, he is deceived by the appearance of beneficial ownership, and for that appearance the true owner is responsible, and by it ought to be estopped.

There are, of course, many other ways in which the appearance of ownership may be presented; but for present purposes it is not necessary to do more than to remind the reader of the next preceding chapter, in which possession, as a prime factor in appearance of ownership, is treated of.

<sup>1</sup>Per Parker, C. J., in *Somes v. Brewer* (1824), 19 Mass. 201; and see *Williams v. Given* (1849), 6 Gratt. (Va.) 272.

<sup>2</sup>*Boyson v. Coles* (1817), 3 M. & S. 24.

We have now to apply the general principle above quoted to documents of title to goods and shares.

*Purchase of Merchandise from a Merchant.*—Commence at the beginning. Suppose that a merchant has in his warehouse certain goods belonging to a class in which he usually deals; and suppose that, seeing them there, you purchase them. What is your position as to title? Apart from considerations of estoppel one would say that you acquired exactly the same title that the merchant had — nothing more, for *nemo dat quod non habet*. But observe three things:

(1) Our leading principle that the maxim *nemo dat quod non habet*.

"will certainly not apply where the owner of goods has lent himself to accredit the title to another person."

(2) Therefore, if the real owner of the goods has permitted the merchant to present the appearance of ownership of them by having them in possession as if for sale, he (the true owner) will be estopped as against innocent purchasers.

(3) And this will be the case even if the true owner has been induced by fraud to permit the appearance of ownership.<sup>1</sup>

We may say, then, that in the case supposed you will be reasonably sure that your purchase from the merchant will give you a perfect title to the goods. For either (1) the goods really belong to the merchant; or (2) the true owner will probably be estopped from otherwise saying, either because he has voluntarily permitted the appearance of ownership, or (3) because he has been defrauded into permitting such appearance. You will run the risk, in some jurisdictions, of the merchant having stolen the goods; in others (upon considerations of market overt) you will be safe against even that possibility; and there may, in rarest cases, be some extraordinary concatenation of circumstances that will work your disappointment. On the whole, however, it may be said that your title will be unassailable — the case, remember, being that of a merchant having merchandise on hand and ostensibly for sale.

Vary a little the case just put: Suppose that the goods are not upon the merchant's own premises, but are in a public warehouse and held there for him. The merchant is now none the less in possession of the goods; they are none the less os-

<sup>1</sup> *Ante*, ch. VIII.

tensibly his; and none the less ostensibly held for sale. Your rights, therefore, will be exactly the same as in the former case. Nor, clearly, can such result be altered if, instead of the goods being in a warehouse upon land, they are in a different structure upon the water, and moving there.

But a matter of convenience interposes in the cases last supposed. When the goods were in the merchant's own custody you could see them, and be thus readily assured of their existence under circumstances as to appearance of title satisfactory to you. But when the goods are in other places, and more especially when at sea, how are you to be assured of the truth of what the merchant represents to you as to existence and custody? Observe that it is precisely for the purpose of answering your question that he has provided himself with a bill of lading, dock warrant, etc.; and he presents it to you as an instrument which accredits his representation.<sup>1</sup>

*First Conclusion.*—It is thus a document which assists the merchant's representation. It was signed by the ship-owner or dock-owner for the very purpose of being used in that way; and the first conclusion, therefore, which we arrive at is that he (the ship- or dock-owner) ought to be estopped, as against persons who change their position upon the faith of it, from denying the truthfulness of its contents. For example, if such a document has been signed in error, or has been obtained by means of false representations, purchasers from the holder of it ought not to be affected. They relied upon the document. What the signer of it relied upon is his own affair.

*Second Conclusion.*—Having purchased the goods you take a transfer of the document. Why? Not because you have bought it. Keep very clear of that idea—it has made much trouble. You bought *the goods*, upon the representation contained in the document, which was that the goods were held on

<sup>1</sup> The Factors Acts, 52 & 53 Vic. (Imp.), ch. 45, § 1 (4); Rev. St. Ont., ch. 150, § 1, are sufficiently accurate in speaking of such documents as being "used in the ordinary course of business as proof of the possession or control of goods." The word "control," however, is either redundant or meaningless. And the latter part of the same sentence is

not right. It can hardly be said that such documents are used as "authorizing or purporting to authorize, either by indorsement or delivery, the possessor of the document to transfer . . . the goods." A warehouseman (that is, a bailee) cannot grant to, or withhold from, the owner of goods the power to transfer them as he pleases.

behalf of your vendor. And you require a transfer of the document in order to be able to prove to persons dealing with you that the merchandise is now held for you, and also, if you so desire, to obtain the attornment of the dock-owner. The document is in ambulatory form (redeemable to "order" or "assigns"), and it was thus drawn so that it might answer your purpose by attending any subsequent disposition of the goods.

It has become now more clearly a document of title. Previously it might be taken to be a sort of certificate of ownership (to the extent of possession at all events, with all that is thereby implied). Now, however, it is being used as a record of an assignment of the goods. The indorsement upon the document is not in itself (as we shall shortly see) a transfer of the goods. It is a record merely of that transfer. It is a declaration by the transferrer that he has assigned the goods and that he has no claim upon them. Moreover it is a declaration which the transferrer intends that other persons shall act upon, and upon the faith of which subsequent purchasers are entitled to rely. And so we arrive at the second conclusion, that as against such subsequent purchasers the transferrer ought to be estopped from asserting any right to the goods.

Remember these two conclusions:

1. The signer or issuer of a dock warrant, etc., is estopped, as against persons dealing with the goods upon the faith of it, from denying its correctness; and

2. A transferrer of such a document is also estopped as against such persons from asserting any interest in the goods.

*Shares.*—The foregoing remarks have had relation to documents of title to goods; but much that has been said may be repeated with reference to documents relating to company's shares. We do not indeed in this case, as in the other, commence with possession by the owner of the thing itself (the goods), for shares are wholly incorporeal and intangible. We fix attention merely upon the documents—the certificate of shares and the transfer of them.

Observe that a company issues its certificate not merely nor principally for the satisfaction of the owner of the shares, but as evidence of his ownership with the intention that it shall be presented to and acted upon by other people.

"This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to



afford facilities to them of selling their shares by at once showing a marketable title."<sup>1</sup>

*First Conclusion.*— It is therefore (in higher degree than a bill of lading or dock warrant, for it relates to absolute title and not to possession as evidence of title merely) a certificate of ownership; or in other words a representation by the company upon which persons dealing with the person named in it are entitled to rely.<sup>2</sup>

"It is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company; and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares."<sup>3</sup>

We thus again arrive at our first conclusion that the signer of a certificate of ownership is estopped by it as against persons who have acted upon the faith of it.

*Second Conclusion.*— Alienation of shares, in order to be quite complete, is frequently required (by statute, charter or by-law) to be transacted at the office of the company. But, owing to the great frequency of the trading in stocks, a very general practice has sprung up of executing transfers in which a blank is left for the name of the assignee, and accompanying them with a power of attorney to fill up the blank, and do all else necessary to the completion of the transfers. In such condition the papers may pass through many hands before they reach some one who desires to have himself registered. And it will be observed that until that is done the papers are available to any bearer of them, for any bearer may fill the blank with his own name.

Possession of a certificate of shares, then, accompanied by a blank transfer, places the bearer in a position similar to that occupied by the holder of a dock warrant, etc., for they both have a certificate of ownership which will estop the signer of it; and both have a transfer of title which is intended to be acted upon by subsequent purchasers, and is therefore a rep-

<sup>1</sup> Per Cockburn, C. J., in *Re Bahia*, etc. (1868), L. R. 3 Q. B. 594, 595; 37 L. J. Q. B. 181. And see per Lord Herschell, in *Balkis v. Tomkinson* (1898), A. C. 403; 63 L. J. Q. B. 137. "A certificate is not like a promissory note; it does not transfer a chose in action; it is only a representation."

Per Bowen, L. J., in *Re Ottos*, etc. (1893), 1 Ch. 628; 62 L. J. Ch. 170.

<sup>2</sup> Because it is a certificate as to perfect title; while the bill of lading is only as to possession, from which you may draw your own inferences.

<sup>3</sup> Per Cockburn, C. J., in *Re Bahia*, etc. (1868), L. R. 3 Q. B. 595; 37 L. J. Q. B. 181.

resentation to them which will estop the transferrer's assertion of any claim which he may have. Such were our conclusions in the case of dock warrants, etc.

This all seems to be reasonably clear and satisfactory. Let us turn to the law as it is, observing (more particularly as to the second of the results just mentioned) not only the very general absence from the cases of the law of estoppel which should govern them, but the great and fundamental differences between the principles which have been applied to the respective documents.

#### ESTOPPEL OF THE SIGNER.

Not much difficulty exists with reference to the position of the signer of a document of title. Upon the whole it is fairly well recognized that he is estopped from denying the truthfulness of the statements which the document contains.<sup>1</sup> But there are some points that deserve notice.

1. What is the effect upon the liability of the signer of a document, if the document has been obtained from him by fraud and passed on to ignorant purchasers? As to bills of lading an English statute provides that they

"shall be conclusive evidence of such shipment . . ." notwithstanding that such goods or some part thereof may not have been so shipped;"

but contains a proviso,

"that the master or other person signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."<sup>2</sup>

Upon the other hand, no legislation regulates the decision of similar questions in the cases of dock warrants, etc., and certificates of shares; and the courts have arrived, as to them, at a result quite different from that declared by the statute. The authorities are clear that a company cannot escape from the representation in its certificates upon the ground of presence of fraud and absence of negligence;<sup>3</sup> and although neg-

<sup>1</sup> *Merchants Bank v. Phoenix* (1877), 5 Ch. D. 205; 46 L. J. Ch. 418; *Coventry v. Great Eastern* (1883), 11 Q. B. D. 778; 52 L. J. Q. B. 694; *Holton v. Sanson* (1862), 11 U. C. C. P. 600; *McLean v. Buffalo* (1893), 23 U. C. Q. B. 448; 24 id. 270; *St. Louis v. Larned* (1882), 103 Ill. 293. The shipper may of course protect himself by the form of the bill of lading.

For example, he may add to the description of the goods such words as "quantity and quality unknown;" *The Prosperino* (1873), 29 L. T. 622; *The Ida* (1875), 32 L. T. 541.

<sup>2</sup> 18 & 19 Vic. (Imp.), ch. 111, § 3. See 52 Vic. (Can.), ch. 30, § 3.

<sup>3</sup> *Re Ortos*, etc. (1893), 1 Ch. 618; 62 L. J. Ch. 170.

ligence is in one instance (a case of a dock warrant<sup>1</sup>) treated as a factor, the better rule is that the person issuing a document upon which others are invited to act must take the responsibility of its correctness, and will not be permitted to fulfill with excuses his undertaking to deliver goods.<sup>2</sup> Apart from legislation there can be little doubt that there is no distinction between a bill of lading and a dock warrant with reference to the estoppel of the signer of them.<sup>3</sup>

2. It is a curious instance of the tendency to associate a point of general applicability with that branch of the law only in which it has first arisen to find that when a bill of lading for goods not actually shipped is signed not by the carrier himself, but by an agent for him, the defense of no authority in the agent is at once raised;<sup>4</sup> while similar defenses are never thought of in cases of dock warrants, etc.,<sup>5</sup> or of certificates of shares<sup>6</sup> issued in error. And yet the point is of course of as much importance in these classes of cases as in that.

3. It might be assumed from *Seton v. Lafone*<sup>7</sup> that the signer

<sup>1</sup> *Seton v. Lafone* (1887), 18 Q. B. D. 139; 19 id. 68; 56 L. J. Q. B. 415.

<sup>2</sup> See chs. VIII and IX; *Wichita v. Atchison* (1878), 20 Kan. 519. It should be remembered that none of the documents can in any way estop persons who are not parties to them. They are not evidence of title as against other persons, as, for example, a bill of lading is not evidence as against persons from whom the consignee has stolen the goods. *Ogle v. Atkinson* (1814), 5 Taunt. 759; *Finlay v. Liverpool* (1870), 23 L. T. N. S. 251. The representations in them moreover are to be taken as of the date of their issue. A company by its share certificate represents that on the day of its date a certain person was entitled to certain shares. Whether such person has subsequently sold them or not is a matter for inquiry by the purchaser. And even if the certificate should intimate that no transfer would be permitted without surrender of the certificate, the purchaser may not assume that the company has not

waived that formality and permitted a transfer to be made. *Smith v. Walkerville* (1896), 23 Ont. App. 102.

<sup>3</sup> *Dean v. Driggs* (1893), 137 N. Y. 283.

<sup>4</sup> See *post*, ch. XXVI, citing *Grant v. Norway* (1851), 10 C. B. 688; 20 L. J. C. P. 98; etc.

<sup>5</sup> See *Merchants' Bank v. Phoenix* (1877), 5 Ch. D. 205; 46 L. J. Ch. 418; *Coventry v. Great Eastern* (1883), 11 Q. B. D. 776; 53 L. J. Q. B. 694; *McLean v. Buffalo* (1865), 23 U. C. Q. B. 448; 24 id. 270.

<sup>6</sup> *Re Bahia, etc.* (1868), L. R. 3 Q. B. 584; 37 L. J. Q. B. 176; *Hart v. Frontino* (1870), L. R. 5 Ex. 111; 39 L. J. Ex. 93; *Simu v. Anglo-American* (1880), 5 Q. B. D. 188; 49 L. J. Q. B. 392; *Re Ottos, etc.* (1893), 1 Ch. 618; 62 L. J. Ch. 166; *Tomkinson v. Balkis* (1891), 2 Q. B. 614; (1893) A. C. 396; 63 L. J. Q. B. 124; *Re Concessions Trust* (1896), 2 Ch. 757; 65 L. J. Ch. 303.

<sup>7</sup> (1887) 18 Q. B. D. 139; 19 id. 68; 56 L. J. Q. B. 415.

of dock warrants, etc., would not be estopped by them. In that case a warehouseman, believing that a certain broker held the warrants for certain goods, wrote to him for rent; the broker had not the warrants, but after receiving the letter he purchased the goods from the holder of the warrants; afterwards he demanded the goods from the warehouseman and was told that the letter had been written by mistake, that there were no such goods. The question debated was, Whether the warehouseman was estopped by his letter — was this letter the proximate cause of the purchase of the goods? It was held that it was; although in another case a railway company having sent to a consignee of goods an advice note of their arrival, in consequence of which the consignee sold them, it was held that the reasonable consequence of such a note was not that the consignee should sell the goods, but that he should send for them.<sup>1</sup> In the same way it might well have been said (with reference to the letter to the broker asking for rent) that the reasonable consequence was that he should pay the rent, not that he should buy the goods.

But the true point of the case was overlooked. The warehouseman could not be estopped by his letter, for the reason just given — because purchase of the goods was not the reasonable consequence of a demand for rent. But he was estopped by his outstanding warrants upon which, as well as upon the letter, the broker relied. Had the broker received no letter at all, but bought the goods upon the faith of the warrants alone, the warehouseman would have been estopped. The letter upon which the case turned was an immaterial factor. The warrant was all-important, for as was said in another case:

“If he chooses to issue it in this shape, he tells all the trade that they may safely deal on the faith of that warrant; and whether or not it becomes a negotiable instrument at common law as distinct from equity is to my mind utterly immaterial.”<sup>2</sup>

4. It should be observed that the statement that the signers of the documents under discussion are estopped to deny their truthfulness applies only to those matters of which it might be supposed that they had cognizance. No one imagines, for example, that the master of a vessel opens all the packages.

<sup>1</sup> *Carr v. London* (1875), L. R. 10 C. P. 307; 44 L. J. C. P. 109.      *Bank v. Phoenix* (1877), 5 Ch. Div. 205; 46 L. J. Ch. 418.

<sup>2</sup> Per Jessel, M. R., in *Merchants'*

shipped, or that he has any special information as to their contents. If, therefore, he should issue a bill of lading for barrels of "Portland cement," and if the barrels (although so labeled) contained something else, the ship-owner would not be liable.<sup>1</sup>

If, however, a dock warrant indicated that the goods were in "free warehouses," meaning thereby that they were not subject to duty, the dock-owner would be estopped by the assertion.<sup>2</sup>

#### ESTOPPEL OF THE TRANSFEROR — BILLS OF LADING.

In *Lickbarrow v. Mason*,<sup>3</sup> an early and most important case, this question arose: A vendor of goods sent to the purchaser a bill of lading to the latter's own order; the purchaser sold the goods and transferred the bill; and afterwards the first vendor claimed a right to stop *in transitu* for non-payment of his purchase-money. From the point of view of estoppel this is a clear case — the second vendor's representation of unincumbered ownership had been assisted by the transfer to him of the bill of lading, and the first vendor ought to be estopped because of the assistance. And it was so held; for, although the word "estoppel" is not used, the judgment of Ashhurst, J., contained that memorable sentence which was in reality the earliest formulation of the principle which in the present work is referred to as "estoppel by assisted misrepresentation:"<sup>4</sup>

"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>5</sup>

Observe that this is a principle which will apply not merely to the case of a consignor depriving himself of a right to stop *in transitu*, but that it is equally applicable to all cases in which the holder of a bill enables a third person, by transferring it to him, to pose as owner of the goods. It is noteworthy, however, that although the wide generality of the rule has been observed and made much use of in almost every other branch of the law, it has been very largely limited, in the de-

<sup>1</sup> *Dear v. Driggs* (1893), 137 N. Y. 274. See also *Warden v. Greer* (1837), 6 Watts (Pa.), 424; *Hale v. Milwaukee* (1868), 23 Wis. 276; 29 Wis. 452.

<sup>2</sup> *First Nat. Bank v. Dean* (1893), 137 N. Y. 110.

<sup>3</sup> (1787) 2 T. R. 63; 1 H. Bl. 357; 6 East, 21.

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

<sup>5</sup> (1787) 2 T. R. 63. And see ch. XIV.

partment in which it originated, to the particular case then in hand, namely, to the preclusion of the consignor's right to stop *in transitu*; other rights of the consignor are not supposed to be affected. The principal reason for this no doubt is that one ground assigned for the cessation of the right to stop *in transitu* was that bills of lading were negotiable, and that the transferee of it therefore might take a greater right than that of his transferrer (the consignee). When, however, attempts were made to affect other rights of the consignor, it was said (in opposite sense) that a bill of lading was merely a symbol of the goods, and that a person in possession of goods could give no better title than that which he himself had. Underlying both of these opposing views was the idea (still very prevalent) that the indorsement of a bill of lading passes title to the goods. We must come to some very clear understanding upon these three points.

*Passing the Property.*—In the leading case of *Lickbarrow v. Mason* it was said that "the delivery of a bill of lading is a delivery of the goods themselves."<sup>1</sup> In 1823 it was confidently stated that

"a bill of lading is exactly like a bill of exchange, and the property it refers to passes by indorsement of it, but not by delivery without indorsement."<sup>2</sup>

In a later case Alderson, B., declared that the "negotiability" of a bill of lading was something different from the "negotiability" of a bill of exchange, and affirmed that it meant merely the "passing property in the goods:"

"Because in *Lickbarrow v. Mason* a bill of lading was held to be *negotiable*, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word *negotiable* was not used in the same sense in which it is used as applicable to a bill of exchange, but as *passing the property in the goods only*."<sup>3</sup>

This language passed into many of the cases and much of the literature. For example it was (1886) said in the Privy Council:<sup>4</sup>

"A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of an unpaid vendor to stop them *in transitu*."

<sup>1</sup> *Supra*.

<sup>2</sup> *Ackerman v. Humphery* (1823), 1 C. & P. 58. And see *Jenkyns v. Usharne* (1844), 8 Sc. N. S. 534; 18 L. J. C. P. 196; *Blake v. Belfast* (1850), 5 L. R. Ir. 420.

<sup>3</sup> *Thompson v. Dominy* (1845), 14 M. & W. 408; 14 L. J. Ex. 320.

<sup>4</sup> *Pease v. Gloahoe* (1866), L. R. 1 P. C., 297; 35 L. J. P. C. 66. See also *Bank v. Henderson* (1874), L. R. 5 P. C. 512.

And the same idea found expression in some of the statutes: "A bill of lading of goods being transferable by indorsement, the property in goods may thereby pass to the indorsee."<sup>1</sup>

Similar language is current in the United States:

"Bills of lading are not negotiable instruments in the full sense that promissory notes are, yet they are justly styled negotiable. Among the reasons for this are that they are well recognized commercial instruments, that where indorsed in blank they carry title by mere delivery from hand to hand, and that the community gives credit in reliance on what appears on the face of them."<sup>2</sup>

Lord Bramwell did much to turn the current when he said:

"There is some inaccuracy in the statute.<sup>3</sup> It recites that by the custom of merchants a bill of lading, being transferable by indorsement, the property in the goods may thereby pass to the indorsee. Now the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee even though the bill of lading was not indorsed."<sup>4</sup>

Indeed as long ago as 1805 Lord Ellenborough held that

"a bill of lading indeed shall pass the property upon a *bona fide* indorsement and delivery *where it is intended so to operate*, in the same manner as a direct delivery of the goods themselves would do if so intended, *but it cannot operate further.*"<sup>5</sup>

Although the old phraseology is still very general, yet it can easily be shown that Baron Bramwell's assertion is correct. For it is clear (1) that if a bill be indorsed but without intent to pass the property, it will not pass; and (2) if the bill be not indorsed and yet the parties intended the property to pass, it

<sup>1</sup> 18 & 19 Vic. (Imp.), ch. 111, § 1. It recites that "by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in goods may *thereby* pass to the indorsee; but nevertheless all rights in respect to the contract contained in the bill of lading continue in the original shipper or owner:" and enacts that "1. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or *by reason of such consignment or indorsement*, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." And see 52 Vic. (Can.), ch. 30.

<sup>2</sup> Pollard v. Reardon (1895), 13 C. C. App. 174; 65 Fed. R. 850. See also Adams v. Folly (1856), 4 Iowa, 44; Gibson v. Bank (1860), 11 Ohio S. C. 311; Michigan v. Phillips (1871), 60 Ill. 109; American v. Henderson (1890), 26 S. R. (Ala.) 498.

<sup>3</sup> The statute above referred to.

<sup>4</sup> Sewell v. Burdick (1884), 10 App. Cas. 105; 54 L. J. Q. B. 156.

<sup>5</sup> Per Lord Ellenborough in *Newson v. Thornton*, 6 East, 17. And see per Lawrence, J., *id.* p. 42. See to the same effect, *Jenkyns v. Usborne* (1844), 8 Sc. N. S. 505; 13 L. J. C. P. 196; *Sanders v. McLean* (1883), 11 Q. B. D. 327; 52 L. J. Q. B. 481; *Sewell v. Burdick* (1884), 10 App. Cas. 74; 53 L. J. Q. B. 399; *Porter on Bills of Lading*, § 405 ff. Lord Hatherly's dictum in *Barber v. Meyerstein* (1870), L. R. 4 H. L. 325; 39 L. J. C. P. 187, is too broadly stated.

will pass.<sup>1</sup> And the correct view of the effect of an indorsement of a bill of lading is no doubt that<sup>2</sup>

"it confers upon him an authority to receive the goods, and that authority may, as a matter of evidence, go very far to show that the person who has got it has also acquired a right of property and possession<sup>3</sup> in the goods; but unless there be such a bargain as would, independently of the assignments of the bill of lading, give an interest in the goods, the assignee of the bill acquires no interest in the goods."

We may say then that the indorsement of a bill of lading has no effect whatever upon the passing of the property in the goods. If the intention was that the title should pass, it has already gone by the contract; and if it was not so intended, the title remains unchanged, even if the bill be indorsed. In other words, goods afloat or ashore, covered or uncovered by bills of lading, are transferred in the same way; that is, by agreement to that effect. The most that can be said is that an indorsement of a bill of lading evidences a transfer of the goods:

"The indorsement of the delivery order upon these evidences of his title, like the indorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson."<sup>4</sup>

*Negotiability.*—The jury in the leading case of *Lickbarrow v. Mason* is to some extent responsible for the idea that bills of lading are "negotiable," for they found that

"by the custom of merchants, bills of lading . . . to order or assigns have been and are . . . negotiable and transferable by . . . such shipper . . . indorsing such bills of lading . . . and delivering or transmitting the same so indorsed."<sup>5</sup>

Ashhurst, J., in the same case said that

"the instrument is in its nature transferable; in this respect, therefore, this is similar to the case of a bill of exchange."<sup>6</sup>

As we have already seen, Alderson, B., corrected this, saying that although

"in *Lickbarrow v. Mason* a bill of lading was held to be negotiable . . .

<sup>1</sup>For example, an indorsement to the agent of the consignor for some particular purpose will not pass the property. *Coxe v. Harden* (1803), 4 East, 211; *Brandt v. Bowlby* (1831), 2 B. & Ad. 932; *Moakes v. Nicholson* (1865), 34 L. J. C. P. 273. "Delivery of a bill of lading with intent to pass the title has that effect although the bill is drawn to order and is not indorsed." See *City Bank v. Rome* (1870), 44 N. Y. 129. And see *Bank of Green Bay v. Dearborn* (1874), 115 Mass. 219; *Holmes v. German* (1878), 87 Pa. St. 525; *Porter on Bills of Lading*, § 496 ff.

<sup>2</sup>*Blackburn on Sales* (2d ed.), 391.

<sup>3</sup>The words "and possession" should be omitted. The indorsement does not "go very far to show" a right to take possession, for it is itself "an authority to receive the goods"—that is, to take possession. It goes far to show "a right of property."

<sup>4</sup>*Gibson v. Stevens* (1850), 8 How. (U. S.) 400.

<sup>5</sup>(1787) 2 T. R., p. 63.

<sup>6</sup>*Id.*, p. 71.



the word was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only."<sup>1</sup>

So, also, it was said in the United States that

"bills of lading are not negotiable instruments in the full sense that promissory notes are, yet they are justly styled negotiable."<sup>2</sup>

In these and many other cases the word was being used to cover the inability to explain how it could be that although *nemo dat quod non habet*, yet that where there was a bill of lading the result seemed sometimes to be otherwise. The best that Tindal, C. J., could say for such a curious effect was as follows:

"The actual owner<sup>3</sup> of an indorsed bill of lading may undoubtedly by indorsement transfer a greater title than he himself has. It is at variance with the general principles of law<sup>4</sup> that a man should be allowed to transfer to another a right which he himself has not; but the exception is founded on the nature of the instrument in question, which being, like a bill of exchange, a negotiable instrument, for the general convenience of commerce has been allowed to have an effect at variance with the ordinary principles of law. But this operation of a bill of lading, being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a situation to transfer the instrument itself, which is the symbol of the property itself."<sup>5</sup>

This idea was reproduced in the Privy Council, where it was said:<sup>6</sup>

"Doubtless the holder of an indorsed bill of lading may, in the course of commercial dealing, transfer a greater right than he himself has. The exception is founded on the negotiable quality of the document."

Very little consideration, however, will make it clear that this notion of the negotiability of a bill of lading is dependent upon the view that the transfer of a bill has some effect upon the title to the goods and must fall with it. The last quotation, for example, speaks of the holder of a bill of lading transferring a greater right than he himself has, because of the negotiable quality of the document. Observe that the greater right that is transferred is not to the bill but to the goods; and that this passes because of some quality of the bill. But if transfer of the bill has nothing to do with the transfer of the goods the effect is clearly attributed to the wrong cause. More-

<sup>1</sup> *Ante*, p. 320.

<sup>2</sup> *Ante*, p. 321.

<sup>3</sup> The words "the actual owner" do not mean the owner of the goods, for if so there would no point in the reference to "variance with the general principles of the law."

<sup>4</sup> As to negotiability and its "va-

riance with the general principles of the law," see ch. XXIV.

<sup>5</sup> *Jenkins v. Osborne* (1844), 8 Sc. (N. S.) 523; 7 M. & G. 378; 13 L. J. C. P. 196.

<sup>6</sup> *Rodger v. The Comptoir* (1869), L. R. 3 P. C. 405; 38 L. J. P. C. 80; approved in *Bank v. Henderson* (1874), L. R. 5 P. C. 512.

over to speak of negotiability as a reason is merely to raise the questions, "What is negotiability?" and "How can it produce such an effect?" In another chapter<sup>1</sup> will be found sufficient ground for suspecting that the word "negotiability" merely masks that which is misunderstood, and that by itself it explains nothing.

*Symbolism.*— There remains the other view of bills of lading. It is said that they are symbols merely of goods, and must be governed by the law of that which they symbolize; and inasmuch as an unauthorized disposition of goods intrusted to another person will not affect the title of the true owner, so neither can a wrongful disposition of the symbol. Lord Campbell upheld this view in a passage often referred to:

"It is not enough that they had become *bona fide* holders of the bill of lading for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee for valuable consideration without regard to the title of the parties who made the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."<sup>2</sup>

It will readily be seen how far we are now from negotiability. We are in fact at the other extreme — title to goods can be acquired in certain ways only; a bill of lading "only represents the goods;" and "the transfer of the symbol does not operate more than a transfer of what is represented." Bills of lading in this view are no more negotiable than are the goods themselves.

But this theory leaves completely unexplained and inexplicable the undoubted and seemingly peculiar effect which the existence and transfer of a bill of lading has upon rights of parties to goods; for, as we have just seen,

"an actual owner of an indorsed bill of lading may undoubtedly, by indorsement, transfer a greater title than he himself has," which is "at variance with the general principles of the law."

To meet this difficulty, Mr. Porter, in a very good book upon Bills of Lading, endeavors to establish a *via media* between

<sup>1</sup> Ch. XXIV.

<sup>2</sup> Gurney v. Behrend (1854), 3 E. & B. 633; 23 L. J. Q. B. 203. See to same effect, Blackburn on Sales

(2d ed.), 398. And see Burton v. Curyea (1866), 40 Ill. 320; Western v. Wagner (1872), 65 Ill. 197.

negotiability on the one hand and mere goods on the other. He contends that the law relating to such instruments is

"controlled by considerations peculiar to symbols alone, and not, on the one hand, solely by the principles regulating the possession and transfer of actual goods and chattels; nor, on the other hand, solely by those regulating the possession and transfer of instruments representing pure value measured by a monetary standard."<sup>1</sup>

But Mr. Porter does not indicate in what quarter we are to look for the law "peculiar to symbols alone." Negotiability we are supposed to be familiar with; and the law relating to chattels can be ascertained; but we have no book upon "symbols," and the word is not, as a heading, in the digests.<sup>2</sup>

#### NEGOTIABILITY, SYMBOLISM, AND ESTOPPEL.

Effectively to consider these various views of a bill of lading we must recall the phenomena that they are supposed to account for. There was in the first place the decision in *Lickbarrow v. Mason*.<sup>3</sup> A vendor of goods ships them to the purchaser, and indorses to him the bill of lading; the purchaser, during the transit, resells the goods and indorses over the bill of lading to the sub-purchaser; the first purchaser fails, and the first vendor asserts a right to stop *in transitu*. Now the point to be observed is that although such right would clearly exist if there had been no bill of lading, yet that the existence and indorsement of a bill have taken that right away. Why?

The answer seems to be simple enough: Because the first vendor has accredited the title of his purchaser — by indorsing in his favor the bill of lading he has indicated to third persons

<sup>1</sup> Porter on Bills of Lading, § 417. See also Am. & Eng. Ency. (2d ed.), IV, 546; *Barnard v. Campbell* (1874), 55 N. Y. 462; *Shaw v. Railroad Co.* (1879), 101 U. S. 564; *Friedlander v. Texas Ry.* (1888), 130 U. S. 423; *Polard v. Reardon* (1895), 13 C. C. App. 171; 65 Fed. R. 848; *Raleigh v. Lowe* (1897), 101 Ga. 320; 28 S. E. R. 867.

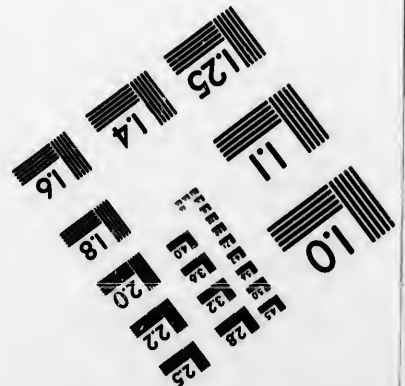
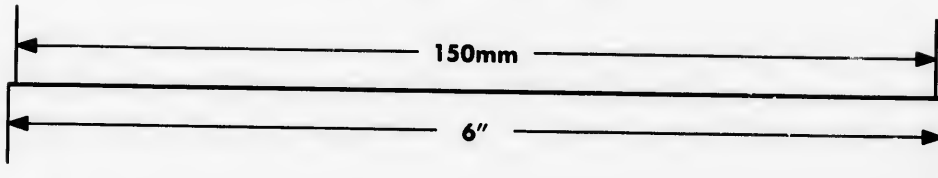
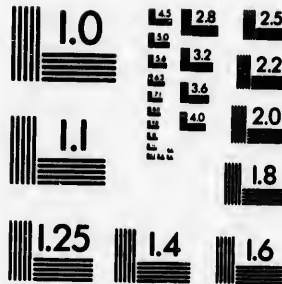
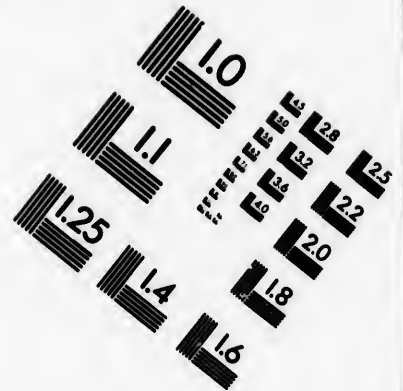
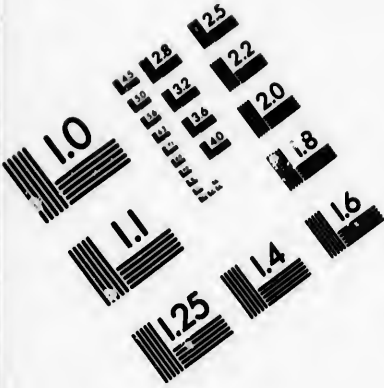
<sup>2</sup> There can be no objection to the use made of the word in *Michigan v. Phillips* (1871), 60 Ill. 198, where it is said that "the delivery of the bill of lading to the bank was a good symbolical delivery of the highwines, so as to vest the property in the bank.

It was as effective in transferring the possession as the delivery of the keys of a warehouse is of the goods contained in it, or of the store-keeper's receipt of the goods described in it." But it will readily be seen that when so used the word affords no assistance in the problem which Mr. Porter had in hand; for when we have said that symbolical delivery has the same effect as actual delivery we have deprived the word of all its mystery.

<sup>3</sup> (1787) 2 T. R. 68; 1 H. Bl. 357; 6 East, 21.



# IMAGE EVALUATION TEST TARGET (MT-3)



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that he has sold the goods and has no further interest in them. He is estopped by the ostensible ownership of his purchaser. For lack of such elucidation the idea of the "negotiability" of the bill was seized upon. The word had seemed in some way to explain why it was that a transferee might acquire a better title to bills of exchange than his transferror had. Why might it not be as effective and comforting in the case of bills of lading?

Unfortunately for such a doctrine it involved conclusions that the courts declined to admit. For example, if a bill of exchange were fraudulently transferred by its custodian to an innocent purchaser its "negotiability" provided the transferee with a good title. The courts, however, refused the same result in the case of a bill of lading; and for *such* cases it was said that a bill of lading was a symbol of goods, and that a "transfer of the symbol does not operate more than a transfer of what is represented."<sup>1</sup>

But, in its turn, this doctrine will not suit the other case; for in it the transfer of the bill of lading does "operate more than a transfer of what is represented." The two views are thus seen to be quite antagonistic; and neither of them will explain the phenomenon to which the other of them alone can be applied. They are both therefore incorrect.

Observe finally that the symbolic view rests upon two ideas: (1) The notion that the indorsement of a bill of lading has some effect upon the property in the goods—"a transfer of the symbol does not operate more than a transfer of what is represented"—(which, as we have already seen, is a mistake); and (2) the notion that inasmuch as a good title to chattels cannot be given when "transferred without his (the true owner's) authority," it cannot be transferred either where the goods are represented by some symbol.

But the assumption that title to goods themselves cannot be so passed is erroneous. It is a matter of most frequent occurrence (as we have abundantly seen<sup>2</sup>) that ostensible owners and ostensible agents confer perfectly good titles to property which they neither own nor have any authority to deal with.

<sup>1</sup> See *Pease v. Gloabec* (1866), L. R. 1 P. C. 219; 85 L. J. P. C. 66, in which the dictum is practically reversed; and also *The Argentina* (1867), L. R. 1 A. & E. 870; 59 L. J. P. C. 17.  
<sup>2</sup> Ch. XXI.

The *Lickbarrow v. Mason* case, as has been shown, was an example. Another is furnished by a very recent case.<sup>1</sup> An owner of goods at a warehouse was induced by fraud to transfer them in the books of the warehouse keeper to the name of the swindler. It was held that there was no contract between the dupe and the swindler, and that therefore the property in the goods had not passed; but nevertheless that the dupe was estopped from so saying (by reason of the ostensible ownership of the swindler) as against an innocent purchaser. In the same way the holder of an indorsed bill of lading may have no title whatever to the goods, but he has been accredited as the owner — been supplied with that which makes his assertion of his ownership credible; and the real owner is estopped by the assistance so rendered to the misrepresentation of ownership.

*The True View.*— Neither “negotiability” then nor “symbolism” affords us any help in dealing with questions involving the title to goods covered by bills of lading. And we are therefore left free to adopt that which may be termed the commercial view of the matter:

1. It is the goods that are sold and not the bill of lading.
2. The bill is a document of title which usually accompanies the ownership of the goods it refers to, and is therefore indicative of title to them.
3. Consequently it estops the signer or issuer of it from denying the representations which it contains — the first conclusion.
4. And an indorsement of it will estop the true owner from asserting any claim as against innocent purchasers by reason of the doctrine of estoppel by assisted misrepresentation — the second conclusion.

*Estoppel.*— It is the more surprising that this commercial view of the subject was overborne by the notions of negotiability and symbolism above referred to, when it is remembered that a most excellent start upon the right road was made as early as 1737, Ashhurst, J., saying with reference to the appearance of ownership created by possession of a bill of lading:<sup>2</sup>

“We may lay it down as a broad, general principle that whenever one of two innocent parties must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it.”

<sup>1</sup>*Henderson v. Williams* (1895), 1 Q. B. 521; 64 L. J. Q. B. 803.

<sup>2</sup>*Lickbarrow v. Mason* (1737), 2 T. R. 63.



Consider this case (*Lickbarrow v. Mason*), for it is the leading one with reference to indorsed bills of lading, although its chief principle has been widely departed from. The case was prior to the modern formulation of the doctrine of estoppel, but observe how closely in the quotation just given it follows lines now familiar; and although it introduces the idea of negotiability, and the passing of property by the indorsement of the bill, yet the law merchant is repudiated, and the rationale is "because it would be enabling either of the original parties to assist in a fraud." Ashhurst, J., said:<sup>1</sup>

"As between the vendor and third persons the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud. *The consignee of a bill of lading trusts to the indorsement*; the instrument is in its nature transferable in this respect, therefore this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendor only, but he has made it an indorsable instrument. So it is like a bill of exchange, as in which case between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and an indorser; and the reason is because it would be enabling either of the original parties to assist in a fraud. *The rule is founded purely on principles of law and not on the custom of merchants*. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law, which is that as between the original parties the consideration may be inquired into, though when third parties are concerned it cannot. This is also the case with respect of a bill of lading."

And Grose, J., more pertinently said:<sup>2</sup>

"A bill of lading carries credit with it; the consignor by his indorsement gives credit to the bill of lading, and on the faith of that money is advanced."

Unfortunately the "broad general principle" of estoppel so admirably embodied in these quotations was not appreciated! by succeeding judges. To them "negotiability" and antagonism to the general law was all that could be said in explanation of the fact that an owner might lose his title by the ostensible ownership of another.

*American Law.*—In the United States, although there are many cases in which the judgments proceed upon considerations of "negotiability," there are others which seek to combine "negotiability" with estoppel; and there are a few which may

<sup>1</sup> 2 T. R. 71.

<sup>2</sup> 2 T. R. 76. Buller, J., in one paragraph takes lower ground and bases the right to stop *in transitu* upon the fact that the indorsee has the legal property in the goods, whereas the vendor-shipper has an equitable

right only. 6 East, 80 (n.), 86 (n.). This is not elsewhere put forward, and is inconsistent with *Kemp v. Falk* (1881), 7 App. Cas. 577; and the Sale of Goods Act, 56 & 57 Vic. (Imp.), ch. 71, § 47.

be cited in support of the present writer's view. The following is an example of the combination referred to:

"Bill of lading in the usual form being a *negotiable instrument*, although not in the same sense as promissory notes or bills of exchange, one who voluntarily puts it out in *estopped* to claim the goods as against one who innocently advances value on it, if one of the two must suffer."<sup>1</sup>

Mr. Colebrook, with an uncommonly clear view of the application of the principles of estoppel (but still holding on to "*quasi-negotiability*"), thus summarizes some of the cases and says:

"It has become a very common transaction in the commercial world to use documents and *indicia* of title, *quasi-negotiable* under blank indorsement, as certificates of stock, bills of lading, warehouse and cotton-press receipts, and other like symbols of property, as collateral security for the payment of loans, and discounts of commercial papers. Such collateral securities are readily converted into funds, and the value thereof is easily determined by the quotations of the great exchanges. *The rules of estoppel in pais* or equitable estoppel are invoked for the protection of the pledgee for value without notice of such *quasi-negotiable* collateral securities. The representations contained in such documents of title under indorsement in blank and delivery are regarded as of equal weight as representations contained in commercial paper, and the transfer thereof carries some of the privileges enjoyed by the indorsee for value of negotiable securities. An innocent pledgee for value of certificates of stock thus indorsed in blank with an irrevocable power of attorney to transfer is vested with an unimpeachable title to the shares of stock. The presumption arises by the possession of certificates of stock indorsed in blank that the pledgor is the owner, although the certificate and indorsement are in the name of another person. The pledgee's title is protected as against the owner in cases of fraud and misappropriation where such owner through his mistaken confidence has intrusted to a third person documents or *indicia* of property indorsed in blank, so that he has the legal title and *apparent ownership*, and is thus enabled to deceive an innocent pledgee advancing his money upon the faith thereof. The rules of equitable estoppel are also applied in favor of the *bona fide* pledgee for value of bills of lading, warehouse receipts, cotton-press notes, and other *quasi-negotiable* collateral securities."<sup>2</sup>

To this may be added a paragraph from a recent American decision. It quotes from Lord Herschell<sup>3</sup> as follows:

"The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given and the property be taken in the belief that an unquestionable title thereto is being obtained; *unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner.*"

And then proceeds:

"The peculiar form and phraseology of ordinary bills of lading, and the generally known reliance placed upon them, and credit given them in commercial communities, render the principles of these expressions especially

<sup>1</sup> Pollard v. Reardon (1895), 18 C. C. See the cases there cited; and see A. 171; 65 Fed. R. 849. p. 599.

<sup>2</sup> On Collateral Securities, p. 84. <sup>3</sup> Simmons v. London (1892), A. C. 215; 61 L. J. Ch. 723.

applicable to them; and common honesty, in the light of modern business and financial methods, throws a special burden on those who put them out."<sup>1</sup>

Such and similar language is having its effect in breaking down that view of the law which is well represented both in England and America by the following quotations from Smith's Mercantile Law:

"Therefore, save in cases within the Factors Act, delivery by a person who has improperly obtained it, or without authority from the owner, of a bill of lading indorsed in blank to a *bona fide* transferee for value, confers no title to the goods which it represents."<sup>2</sup>

By the American annotators of the same work it is said:

"Nothing can in fact be a greater departure from the principles and analogies of the common law than to treat bills of lading or other documents, evidences of title to chattels personal as negotiable instruments. Instruments which represent choses in action may be negotiable because the right cannot be separated from the instrument, and has no distinct or actual physical existence. And even there negotiability only exists in the case of absolute promises for the payment of money, a thing negotiable in itself and which cannot be reclaimed by the true owner of any one who has received it *bona fide* and in exchange for valuable consideration. But chattels personal are wholly unsusceptible of negotiation<sup>3</sup> in themselves, and it is manifestly inconsistent to give the documents which represent them a different character. The result of the cases, therefore, as a whole seems to be that while on the one hand the possession of bills of lading or other documents of the same nature may be evidence of title, and equivalent for some purposes to actual possession, yet that on the other it does not constitute title nor dispense with the rule *nemo plus juris ad alium transferre potest, quam ipse habet*."<sup>4</sup>

#### SOME LATER CASES.

Although it cannot yet be said in England that there has been any substantial recognition of the principles here advocated, yet the cases are moving in the direction which these principles justify; and there is much in analogous departments of the law which can be cited in their favor. As we have already noted, the only qualification of the doctrine of "symbolism" was that indorsement of a bill of lading would deprive a consignor of his right to stop *in transitu*; any other rights which he or anybody else might have were unaffected.

But observe the entrance of the wedge in 1866: A bill of

<sup>1</sup> Pollard v. Reardon (1895), 13 C. C. A. 171; 65 Fed. R. 850.

<sup>2</sup> 10th ed., vol. I, 846.

<sup>3</sup> Observe how a change from the usual expressions "negotiable" and "negotiability" to "negotiation" at once challenges attention, and makes us wonder whether after all goods

are incapable of being the subject of negotiation — are not "negotiable." Cannot they be sold and transferred? See the phrases discussed in chapter XXIV.

<sup>4</sup> 8th Am. ed., § 1226. And see § 1750.

lading was sent to the vendor's agent with authority to transfer it to the vendee; he did transfer it, but retook it as security for the purchase-money; by means of a fraudulent pretext the purchaser again got possession of it, and with its help sold the goods. Now apparently it was admitted that if the bill had been obtained by the same sort of fraud from the shipper he could have successfully claimed the goods; but the shipper, having indorsed the bill to an agent (from whom it was taken). Lord Chelmsford told him that Lord Campbell's previous dictum ("The transfer of a symbol does not operate more than a transfer of what is represented")

"is very carefully confined in its terms to the original transfer of a bill of lading deliverable to the assigns of the shipper. In the cases which it supposes there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument. But in the present case the shipper of the goods, having obtained a bill of lading, indorsed it to order and assigns and forwarded it to S. (the agent) for the express purpose of it being indorsed by him and handed over to S. & T." (the original purchasers).<sup>1</sup>

The next step was to hold (1867) that although the agent had express instructions not to part with the bill of lading without receiving payment, yet if he did so an innocent transferee was safe.<sup>2</sup> Clearly, if an agent (apart from special circumstances) had been intrusted with goods to be handed over to some one only upon receiving certain moneys, a breach of his instructions would in no way affect the principal. This last decision can be justified upon the principles of estoppel only. It goes beyond the legislation which provides

"that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and the person transfers the document to a person who takes the document in good faith and for valuable consideration, . . . the unpaid seller's right of lien, or retention, or stoppage *in transitu*, can only be exercised subject to the rights of the transferee."<sup>3</sup>

Moving still further away from Lord Campbell's view is the case of *Bank of India v. Henderson* (1874) in the Privy Council.<sup>4</sup> Goods were sold and shipped upon the agreement that they were to be sent to the purchaser's agent, who was

<sup>1</sup> Pease v. Gloaghec (1866), L. R. 1 P. C. 219; 35 L. J. P. C. 66. See similar distinction taken as between a bill of exchange intended to be issued and one not so intended, in chapter XXIV.

<sup>2</sup> The Argentina (1867), L. R. 1 A. & E. 375; 59 L. J. P. C. 17.

<sup>3</sup> The Factors Act, 52 & 53 Vic. (Imp.), ch. 45, § 10.

<sup>4</sup> L. R. 5 P. C. 501. See similar cases, but disposed of upon other grounds: *Rodger v. Comptoir* (1869), L. R. 2 P. C. 292; 39 L. J. P. C. 50; *Henderson v. Comptoir* (1873), L. R. 5 P. C. 253; 42 L. J. P. C. 60.

to remit the proceeds for application upon the purchase-money; the purchaser having received the bill of lading for this specific purpose, fraudulently pledged the goods and indorsed the bill to a bank; held, that the bank had acquired a good title.

In further development of the same principle is the recent (1895) case of *Henderson v. Williams*.<sup>1</sup> It was a case of goods not at sea, but in a warehouse, in which the owner was tricked into a transfer of them. The court held that the transfer was not made in pursuance of any contract, and therefore that no title passed, but

"the true owner having enabled F. to hold himself out as the owner could not set up his title against that of the purchaser;"

In other words, ostensible ownership will estop even where the appearance of title is not only not with the assent of the true owner, but has been obtained by fraud upon him.

With such cases in view what ought to be done with such a point as this? A vendor sent to his purchaser a bill of lading, and also for acceptance a bill of exchange for the price; the purchaser ought to have retained the bill of lading unless he accepted and returned the draft; he did neither, but wrongfully transferred the bill of lading to an innocent purchaser. The case seems to be simple enough — the original vendor is of course estopped, for he has permitted the appearance of ownership in another person. Unfortunately, however, there is a provision in the Factors Act<sup>2</sup> which declares that

"where a person having bought or agreed to buy goods, obtains *with the consent of the seller* possession of the documents of title;"

from which it was assumed that the only question was whether the first purchaser was or was not "*with the consent of the seller* in possession of the documents of title;" it was held that he was not; that the act did not help the sub-purchaser; and that he must lose — not a word about estoppel, or the case of *Henderson v. Williams* above referred to.<sup>3</sup> Upon appeal a different reading of the statute led to an opposite conclusion.<sup>4</sup>

<sup>1</sup> (1895) 1 Q. B. 531; 64 L. J. Q. B. 808. And see the discussion in chapter XXI.

<sup>2</sup> 52 & 53 Vic., ch. 45, § 9; The Sales of Goods Act, 56 & 57 Vic. (Imp.), ch. 71, § 25 (2); 59 Vic. (Man.), ch. 25, § 24 (2).

<sup>3</sup> *Cahn v. Pockets* (1898), 2 Q. B. 61; 67 L. J. Q. B. 625. For other instances of the baneful effect of the Factors Act, in diverting attention from principle, see chapter XXIII.

<sup>4</sup> (1899) 1 Q. B. 642; 68 L. J. Q. B. 515.

*American Authorities.*— Although it cannot be said that any early exposition of the law equals in value the sentence which we have several times quoted from Mr. Justice Ashhurst's judgment in *Lickbarrow v. Mason*, yet fortune so willed that a dictum of Mr. Justice Story in 1828 should have in America a greater effect in rightly directing the law as to bills of lading than that of the English judge had in his country.<sup>1</sup> Judge Story said:

"By the well-settled principles of commercial law the assignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsement of the bill of lading to a *bona fide* purchaser for a valuable consideration without notice of any adverse interest, the latter becomes as against the world<sup>2</sup> the owner of the goods. This is the result of the principle that bills of lading are transferable by indorsement, and thus may pass the property. *It matters not whether the consignee in such case be the buyer of the goods or the factor or agent of the owner.* His transfer in such cases is equally capable of diverting the property of the owner and vesting it in the indorsee of the bill of lading."<sup>3</sup>

It will be seen that we are by this statement of the law at once away from the mere question of the effect of the transfer of a bill of lading upon the right to stop *in transitu*; and although we have wrong basic principles: (1) that the indorsement of a bill of lading passes the property in the goods; and (2) that the assignee is an agent, yet that is a defect, not in the statement of the law but in the reasons given for it.

The error nevertheless had its effect; so that even after estoppel was thought to be the true ground of decision, its principles were not at once completely grasped. For example, a bill of lading was handed to an agent to be delivered to a purchaser of the goods when a draft for the purchase-money was paid; the agent gave it up upon receiving an acceptance merely of the draft; the purchaser pledged the goods; and it was held that the pledgee could not retain the goods as against the original vendor, for the agent had no authority to transfer the bill. Estoppel would of course decide the other way.<sup>4</sup>

More in harmony with the principles of estoppel is a later case: The owner of goods, in pursuance of an arrangement with

<sup>1</sup> As to the effect upon the general law of Mr. Justice Ashhurst's dictum, see ch. XIV. 385. See *Munroe v. Philadelphia* (1896), 75 Fed. R. 546.

<sup>2</sup> This is too wide. If the goods had been shipped by a thief of them, no transfer of the bill of lading could oust the true owner. <sup>3</sup> *Stollenwerck v. Thacher* (1874), 115 Mass. 324. No objection upon the ground of estoppel can be made to *Saltus v. Everett* (186..), 20 Wend. (N. Y.) 268.

<sup>4</sup> *Conard v. Atlantic* (1828), 26 U. S.

a purchaser, delivered them to a carrier, taking a receipt indicating that "bills of lading will be issued on return of this receipt;" the owner retained the receipt; the carrier notwithstanding his receipt issued a bill of lading to the purchaser, who pledged it; held, that the pledgee was entitled as against the owner.<sup>1</sup>

To the same effect is a very recent case in the federal courts. Goods in process of shipment were transferred by bill of sale; the purchaser neglected to ask for a bill of lading; the vendor got it, and with its assistance fraudulently resold the goods; the second purchaser was preferred. Proceeding upon the principles of estoppel the court inquired

"whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having, not the possession only, but the property?" and added: "When Pollard, Pettus & Co. accepted from Mansfield a bill of sale of the hides in question, they knew that in the regular course of business a clean bill of lading for them would issue to him, clothing him with the customary *indicia* of absolute ownership. They took the chances arising from this. They must stand as though they assented to it, and they can claim no right against any one who dealt with Mansfield in good faith relying upon it. Their presumed assent to the issue of the bill of lading to Mansfield is emphasized by their laches in applying for it. Whatever may be the nature of their right it cannot prevail against Reardon's title under the bill of lading."<sup>2</sup>

Similar to the Privy Council case of *Bank of India v. Henderson* above referred to<sup>3</sup> is that of *Munroe v. Philadelphia*,<sup>4</sup> in which a transfer of goods, and indorsement of its covering bill of lading in breach of trust, was held to give a good title to the transferee.

One further American case. Its dicta relate to warehouse receipts, but the same principle governs all sorts of documents of title. Notes payable in property were by the law of the state transferable but not negotiable. They were left with an agent for collection, who fraudulently transferred them to an innocent purchaser. It was held that the true owner

"having put its agent in possession of the notes, which showed on their face that the latter was owner, was estopped from questioning the title of the transferee."

"A pledgee himself may, by his neglect or through misplaced confidence, bring himself within the rule of equitable estoppel; as where he has

<sup>1</sup>Fourth Nat. Bank v. St. Louis (1893), 11 Mo. App. 332. In England in a somewhat similar case (*Schuster v. McKellar* (1857), 7 E. & B. 704; 26 L. J. Q. B. 281), where the vendor had the mate's receipt, and a bill ought not to have been issued until receipt

had been given up, the decision was the other way — the vendor won.

<sup>2</sup>Pollard v. Reardon (1895), 13 C. C. A. 185; 65 Fed. R. 852.

<sup>3</sup>Ante, p. 331.

<sup>4</sup>75 Fed. R. 543.

permitted the pledger to take possession of the property and to obtain warehouse receipts for the same. In such cases the pledgee is estopped to set up his title as against a subsequent pledgee, receiving the receipt in good faith for value advanced on the credit of his title and possession. The like rule applies where the owner of property allows a party to take warehouse receipts in his own name, being deceived by his fraudulent conduct, and the receipts are negotiable as collateral security to a *bona fide* pledgee for value without notice of the fraud.<sup>1</sup>

Observe how easy it is to dispense with "negotiability" and "symbolism."

The extent to which we have departed both in England and America from the idea that "the transfer of a symbol does not operate more than a transfer of what is represented" will now be appreciated. It is hoped too that what has been said will sufficiently prove that such departure is to be in no way attributed to the "negotiability" of bills of lading; but that it must be set down to clearing apprehension of the principles of estoppel by ostensible ownership and ostensible agency.

#### DOCK WARRANTS, ETC.

The law as to dock warrants, etc., has pursued a course somewhat similar to that just traced in dealing with bills of lading. That is to say, it commenced with the enunciation of sound general principles; those principles were speedily lost sight of, to reappear here and there as ineffective dicta or for the mere purpose of being condemned; while nevertheless some "stream of tendency which maketh for righteousness" was accomplishing useful work — a tendency this time manifesting itself in acts of Parliament and thwarted by the courts.

*The Early Law.*—What can be better than the declaration of Lord Ellenborough in 1812:

"Strangers can only look at the acts of the parties and to the external *indicia* of property, and not to the first communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."<sup>2</sup>

Unless, indeed, it be the statement of Bayley, J., in 1817, that *nemo dat quod non habet*

"will certainly not apply where the owner of goods *has lent himself to accredit the title of another person* by placing in his power those symbols of property which have enabled him to hold himself out as the purchaser of the goods."<sup>3</sup>

<sup>1</sup> *Atlanta v. Hunt* (1897), 100 Tenn. 89; 42 S. W. R. 482. And see cases there cited.

<sup>2</sup> *Pickering v. Busk* (1812), 15 East, 88.

<sup>3</sup> *Boyson v. Coles* (1817), 6 M. & S.



To the same effect Abbott, C. J. (1824), held that the question which ought to have been left to the jury was "whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property."<sup>1</sup>

Nothing could be more satisfactory than these expositions of the law. And for the future it seemed as if the only question was to be one of fact: Did the true owner "accredit the title" of the ostensible owner (by handing over to him documents of title or otherwise)? If so he is estopped.

Unfortunately, however, the law as thus stated was almost immediately overlooked. Afterwards it was qualified and minimized, then overruled, and finally underwent partial and incongruous resuscitation by acts of Parliament, which well-nigh sent to oblivion the principles upon which it rested.

*Submergence.*— In 1825 (one year only after the decision of Abbott, C. J.) Best, C. J., had a case before him very much like those already referred to, and he decided against the innocent purchaser, deploring that the state of the law gave him no alternative:

"Had I authority to alter the law, as the mode of carrying on commerce has altered, I would say that when the owner of property conceals himself, whoever can prove a good title under the person whom the concealed owner permits to hold it should retain that property against the owner; but this is not yet the law of England."<sup>2</sup>

The decision may be taken to be the commencement of a most curious struggle (still unfinished) between Parliament and the courts, the former endeavoring (by its Factors Acts) to bring the law into harmony with mercantile usage, and the courts, with minutest criticism, declaring that Parliament has not yet effectively done it. Not principle nor commercial usage, but inclusion within literal and narrow interpretation of statutes, became the test of ownership of merchandise, with such results as we might expect. Unfortunately, too, some of the states of America and provinces of Canada became involved in the contest.

24. Compare the finding of the jury in that case with the finding in *Spear v. Travers* (1815), 4 Camp. 251: "That in practice the indorsed dock warrants and certificates are handed from seller to buyer as a complete transfer of the goods."

<sup>1</sup> *Dyer v. Pearson*, 3 B. & C. 38.

<sup>2</sup> *Williams v. Barton* (1825), 3 Bing. 189. See also per Parke, B., in *Phillips v. Huth* (1840), 6 M. & W. 506; 9 L. J. Ex. 326.

Here and there no doubt during this unsatisfactory period the old principles are cited, and even said to be still in effective service. For example a well-known judgment of Mr. Justice Blackburn in 1875 contains the following:

"If the owner of the goods had so acted as to clothe the seller or pledgee with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result was the same as if he had really given it."<sup>1</sup>

But all such declarations are in 1877 specifically and elaborately discarded, with the remark that if leaving documents of title in the hands of another might estop the owner of the goods as against an innocent purchaser of them,

"there would have been, as it seems to me [Cockburn, C. J.], no necessity for giving effect by statute to the unauthorized sale of goods by a factor."<sup>2</sup>

The chief effects then of these Factors Acts (passed for the purpose of accomplishing that which Best, C. J., declared was beyond the power of the courts) were in the first place to divert attention from principles which were in reality quite sufficient for the cases, and secondly to furnish proof that no such principles existed. The case from which the above extract is taken was indeed at once<sup>3</sup> reversed by Parliament (forming an interesting episode in the struggle); but the decision remains as a formidable obstacle should we again try to proceed upon principle.<sup>4</sup> Had the learned chief justice observed the dicta in a House of Lords case of but six years before, we might, instead of barricade, have had from him as much help as he has contributed to other departments of the law. For Lord Hatherly had declared for the old principles when he said:

"When, however, one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is misled by it;"<sup>5</sup>

and Lords Chelmsford and Colonsay had agreed with him. The case, however, went off in the Lords upon misleading analysis of the Factors Acts, and the dicta (the only parts valuable) were overlooked. They may still be of service.

<sup>1</sup> *Cole v. North Western* (1875), L. R. 10 C. P. 363; 44 L. J. C. P. 233.

<sup>2</sup> Per Cockburn, C. J., in *Johnson v. Credit* (1877), 3 C. P. D. 40; 47 L. J. C. P. 247.

<sup>3</sup> Before it was heard in appeal. 40 & 41 Vic. (Imp.), ch. 39, § 3. See now Factors Act, 53 & 58 Vic. (Imp.), ch. 45, § 8; Sale of Goods Act, 56 & 57

Vic. (Imp.), ch. 71, § 25 (1); 59 Vic. (Man.), ch. 25, § 25 (1). And see *Burton v. Curyea* (1866), 40 Ill. 320; *Western v. Wagner* (1872), 65 Ill. 197.

<sup>4</sup> *Henderson v. Williams* (1895), 1 Q. B. 531; 64 L. J. Q. B. 308, will however be of much service.

<sup>5</sup> *Vickers v. Hertz* (1871), L. R. 2 Sc. App. 115.

Let us consider for a moment the case from which Chief Justice Cockburn's words are taken. The owner of warehoused goods sold them, but retained the warrants, and the purchaser took no steps to have the appearance of title in the warehouseman's books changed in his own favor; the vendor resold the goods to an innocent purchaser; and the first purchaser, notwithstanding his assistance to the ostensible ownership of the vendor, was held to be entitled to the goods. The learned chief justice is quite satisfied as to the demands of justice; and that there was wanton inattention to the interests of other persons; but he declares that he is not satisfied that

"at common law the leaving by a vendee goods bought, with the documents of title, in the hands of a vendor . . . would on a fraudulent sale or pledge by the party so possessed divest the owner of his property, or estop him from asserting his right to it. If this had been so there would have been, as it seems to me, no necessity for giving effect by statute to the unauthorized sale of goods by a factor."

From the standpoint of estoppel the case is of course a very clear one; and as we have said, the "stream of tendency" operating through Parliament at once corrected the decision. But Parliament declared no principle. The court had said that if a *purchaser* of goods misleads people by leaving the documents of title in the possession of the *vendor* he is nevertheless safe, and the second purchaser must lose. And Parliament with categorical negative declared that if a *purchaser* leaves the documents with his *vendor* he should lose, and the second purchaser should have the goods.

The effect of the statute then is to leave the matter in very incongruous and unsatisfactory form; for a single instance of the application of a general principle is separated from all other instances, and the law as to it, being arbitrarily declared by Parliament to be so-and-so, the inference is suggested that other cases ought to be otherwise determined.

*Resemblance to Bills of Lading.*— In fact the difficulties encountered in dealing with dock warrants, etc., were threefold: (1) The law as to bills of lading had not been placed upon a proper basis; (2) the essential resemblance between bills of lading and other documents of title was not observed; and (3) the unifying principle of estoppel was not applied to them.

For example, although as we have seen a transfer of a bill of lading to an innocent purchaser would clearly cut out the right of the consignor to stop *in transitu*, yet it was said that

it was otherwise in the case of a delivery order.<sup>1</sup> This ruling in its turn was reversed by Parliament; but again no principle is enunciated, again a mere categorical contradiction:

"The last mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*."<sup>2</sup>

The result is that when some other documents (certificates, for example) are met with, which are thought not to be within the letter of the statutory provision (although in trade they are used for exactly similar purposes), the statute does not apply and injustice is again done. So capable a judge as James, L. J., argues in this way:

"The whole equity of the bill . . . is this: that it is said that such certificates, according to the custom of the iron trade in similar cases, are in fact warrants. To say that is in truth to say a thing which cannot be. No custom of the trade can make a certificate a bill of exchange or a warrant. What is evidently meant by that allegation . . . is that people deposit the certificates as if they were warrants. That is really what it comes to. Everybody knows that warrants are things warranting a wharfinger or warranting somebody else who has possession of the goods to deliver them. The owner of the goods gives an authority to the person who is the bailee of the goods to deliver them. That is what is meant by a warrant. Such warrants are constantly dealt with, and if they are negotiable they are properly and validly dealt with as a security. And what is meant by saying that such certificates, according to the custom of the iron trade in similar cases, are in fact warrants, can only be this: that persons lend money upon warrants. They may lend money as much as they like, but they cannot alter the nature of the documents. No practice of the persons who have got those certificates and money lenders as between them, would in any way affect the manufacturer unless you can show that the manufacturer has in some way authorized something to be done."<sup>3</sup>

So also in *Farmeloe v. Bain*<sup>4</sup> unpaid vendors gave to their purchaser the following document:

"We hereby undertake to deliver to your order indorsed hereon 25 tons . . . zinc, off your contract of this date."

It was admitted that the vendors signed the document, "intending that the same should operate as a representation to all persons to whom the same should be shown that the goods therein mentioned were the property of B. & Co. (the first purchasers) free from all lien or claim;" and the purchaser resold the goods and indorsed the document to his vendee. Under these circumstances estoppel ought to preclude the vendor from asserting his lien as against any one

<sup>1</sup> *Jenkyns v. Osborne* (1844), 8 So. N. S. 505; 13 L. J. C. P. 106; approved in *Barnard v. Campbell* (1874), 55 N. Y. Supp. 461, 462. And see *McEwan v. Smith* (1849), 2 H. L. C. 809.

<sup>2</sup> The present statute is 52 & 53 Vic. (Imp.), oh. 45, § 10.

<sup>3</sup> *Gunn v. Bolckow* (1875), L. R. 10 Ch. 491; 44 L. J. Ch. 732.

<sup>4</sup> (1876) 1 C. P. D. 445; 45 L. J. C. P. 264. *Merchants v. Phoenix* (1877), 5 Ch. D. 216; 46 L. J. Ch. 418, which followed in the next year, is almost identical with *Farmeloe v. Bain*, except that the document was of more familiar character; and the vendors were estopped.

changing his position upon the faith of the instrument; but the case goes off upon the ground that the instrument was not one of customary character.

The point missed in such cases is the generalization of the quotations above given, and the application of these quotations to commercial usages as they arise and develop.

Under previous headings will be found further discussion of the subject in hand, and in a later chapter the Factors Acts (without discussion of which the present chapter would be palpably defective) are treated of at length.<sup>1</sup> The reader is requested to refer to those other parts of the book for that which might very well appear here, but which is too long for repetition, and is more necessary elsewhere.

#### SHARES IN COMPANIES.

Estoppel, in its application to shares, has the same two aspects as have been noted when dealing with other documents of title, namely: (1) Estoppel of the company that issues share certificates; and (2) estoppel of the transferrors of shares.

*Estoppel of the Company.*— Upon this we need not dwell. Let it suffice at this place to say that the law now is clear that a company is estopped by its certificates from denying the fact represented by it as against persons who change their position upon the faith of it.<sup>2</sup>

*Estoppel of the Transferrer.*— Cases in which a transferrer of shares may be estopped may be divided into two classes: (1) Cases in which shares have been completely transferred to a trustee, who, in breach of his trust, makes some disposition of them; and (2) cases in which blank transfers have been entrusted to some one who misuses them.

*Shares Transferred to a Trustee.*— There ought to be no difference between lands and shares in cases of priorities arising out of breaches of trust; but yet the assertion may well be ventured that if a case involving land were put to a well-read

<sup>1</sup>Ch. XXIII.

<sup>2</sup>Re Bahia (1868), L. R. 3 Q. B. 584; 37 L. J. Q. B. 176; Bishop v. Balkis (1890), 25 Q. B. D. 77, 512; 59 L. J. Ch. 565; Tomkinson v. Balkis (1891), 2 Q. B. D. 614; 60 L. J. Q. B. 538; Re Ottos

(1893), 1 Ch. 618; 62 L. J. Ch. 166; Re Concessions (1896), 2 Ch. 757; 65 L. J. Ch. 409; Moores v. Citizens (1893), 111 U. S. 156; 4 S. C. R. 345; Trimble v. Bank (1897), 71 Mo. App. 467.

lawyer, he would at once inquire about the legal estate, and if it related to shares he would probably commence to think about estoppel.

With reference to land no doubt the law is at present firmly founded upon various "technical and unsatisfactory"<sup>1</sup> rules as to legal and equitable estates. If the purchaser from the trustee acquired the "legal" estate he is safe; and if he did not he loses. A former chapter has dealt at length with that subject.<sup>2</sup> And there are not wanting cases relating to shares in which the same rules have been applied.<sup>3</sup> But the rational principles of estoppel by ostensible ownership are superseding these "technical and unsatisfactory" rules; if indeed (as seems probable) they may not already be said to be in possession of the field.

Reserving judgment upon this point for a moment, let us pass on to the consideration of cases in which the trustee not merely misappropriates shares, but in order to do so fraudulently fills up blank transfers intrusted to him. For if in such an instance a purchaser (upon principles of estoppel) is safe irrespective of questions of legal estate, we shall have no difficulty in the simpler case which we are leaving behind.

The Swan cases in 1859-1863<sup>4</sup> with reference to shares are interesting and instructive. The owner of shares in two companies — A. and B. — employed a broker to sell the A. shares, and gave him several signed but blank transfers; the broker fraudulently filled up one of the transfers with the B. shares, and sold them to an innocent purchaser. After much doubt it was determined that the true owner of the shares was not estopped by handing over the blank transfers. But the judgments leave little room for doubt that had the true owner further equipped the broker for the fraud, by intrusting him with the B. certificates, he would have lost his shares.

<sup>1</sup> *Ante*, p. 255.

<sup>2</sup> Ch. XVIII.

<sup>3</sup> *Reg v. Shropshire* (1873), L. R. 8 Q. B. 420; L. R. 7 H. L. 496; 45 L. J. Q. B. 31; *Marshall v. National Bank*, etc. (1892), 61 L. J. Ch. 463; *Weaver v. Barden* (1872), 49 N. Y. 266. Whatever the true ground of decision there is no doubt that the purchaser

will be safe if he acquire the "legal" title. *Crocker v. Crocker* (1865), 31 N. Y. 507.

<sup>4</sup> *Ex parte Swan* (1859), 7 C. B. N. S. 400; 30 L. J. C. P. 113; *Swan v. North British* (1862), 7 H. & N. 603; 51 L. J. Ex. 425; 2 H. & C. 175; 32 L. J. Ex. 273.

A few years afterwards (1871) a New York case of much importance (*McNeil v. Tenth National Bank*<sup>1</sup>) was decided. The owner of shares pledged them with bankers, giving to them the certificate upon which was indorsed a blank assignment and power of attorney to do "all necessary acts of assignment and transfer;" the bankers fraudulently disposed of the shares; and the owner was held to be estopped upon the ground "that where the true owner holds out another or allows him to appear as the owner of or as having full power of disposition over the property, and innocent parties are thus led into dealing with such apparent owner, they will be protected."

The principle of this decision has been approved in *Pennsylvania Ry. Co.'s Appeal* (1878),<sup>2</sup> in *Otis v. Gardner* (1883),<sup>3</sup> in *Colonial Bank v. Hepworth* (1887),<sup>4</sup> and *Williams v. Colonial Bank* (1887, 1890),<sup>5</sup> in *Hone v. Boyle* (1890),<sup>6</sup> in *Waterhouse v. Bank of Ireland* (1892),<sup>7</sup> in *Robinson v. Montgomeryshire* (1896),<sup>8</sup> in *Coffey v. Coffey* (1897),<sup>9</sup> in *Boulbee v. Gzowski* (1897),<sup>10</sup> in *Gilbert v. Erie* (1898),<sup>11</sup> in *Smith v. Rogers* (1899),<sup>12</sup> in *Brown v. Equitable* (1899),<sup>13</sup> in *Masury v. Arkansas* (1899),<sup>14</sup> and may now be said to be firmly established.

The interesting question now arises, Upon what principle can such decisions rest? It seems to be impossible to stretch the word "negotiability" so as to account for a transferee of shares acquiring a better title than that of his grantor.<sup>15</sup> The doctrines associated with distinctions between legal and equitable estates too are insufficient, for in many of the cases only an equitable interest (as it is still called<sup>16</sup>) in the shares was transferred. Both of these suggestions moreover have been distinctly repudiated in the House of Lords as well as in the United States.

<sup>1</sup> (1871) 46 N. Y. 325.

<sup>2</sup> 86 Pa. St. 80. And see *Davey's Appeal* (1881), 97 Pa. St. 153.

<sup>3</sup> 105 Ill. 436.

<sup>4</sup> 86 Ch. D. 58; 56 L. J. Ch. 1097.

<sup>5</sup> 86 Ch. D. 659; 38 Ch. D. 888; 57 L. J. Ch. 826; s. c. *sub nom.* *Colonial Bank v. Cady* (1890), 15 App. Cas. 267; 60 L. J. Ch. 181.

<sup>6</sup> 27 L. R. Ir. 137.

<sup>7</sup> 29 L. R. Ir. 384.

<sup>8</sup> (1896) 2 Ch. 941; 65 L. J. Ch. 915.

<sup>9</sup> 74 Ill. App. 241.

<sup>10</sup> 24 Ont. App. 502; 29 S. C. Can. 54.

<sup>11</sup> 184 Pa. St. 554; 89 Atl. R. 291.

<sup>12</sup> 80 Ont. 256.

<sup>13</sup> 78 N. W. R. 103; 79 N. W. R. 968.

<sup>14</sup> 93 Fed. R. 603.

<sup>15</sup> See the remarks of Jessel, M. R., with reference to warehouseman's warrants in *Merchants' Phoenix* (1877), 5 Ch. D. 205; 46 L. J. Ch. 418. See ch. XXI<sup>7</sup> as to this word "negotiability."

<sup>16</sup> See the remarks in ch. XVIII.

The only remaining ground seems to be estoppel; but this in its turn was repudiated by Kekewich, J., saying that it was not applicable (to a case in which certain executors intrusted Messrs. Thomas with blank transfers) in

“the strict technical sense of the word, as it cannot be suggested that the executors are precluded from asserting the truth. On the contrary, my judgment goes on an examination of the real facts. What they are precluded from asserting, in my judgment, is that Messrs. Thomas were not by the custody of these documents, with their assent, authorized to deal with them as they from time to time considered desirable.”<sup>1</sup>

But this is precluding them from asserting the truth; for the admitted fact is that the brokers were not so authorized. They appeared to be authorized; and upon the faith of that appearance a third person changed his position — that is estoppel.

Mr. Justice Chitty admits estoppel as the governing principle, but states it in this way:

“What then is the estoppel here? Having regard to the practice proved and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me) the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the bona fide holder for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority; and to this extent and in this manner, but not further, is estopped from denying the title of such holder for the time being.”

But there is confusion here. If “each prior holder confers . . . an authority to fill in the name of the transferee,” it is incorrect and unnecessary to add that he “is estopped from denying such authority.” If he has really given authority he cannot deny it anyway. The question only arises when there is no authority in fact; and then there is estoppel, not because there is authority, but because there is the appearance of authority, and by that the true owner is estopped.

Mr. Justice Chitty's solution is open to the criticism that it imports as a fact that which is admitted to be untrue. It is said that “each prior holder . . . confers an authority to fill in the name of the transferee;” but that is precisely what he does not do — it is exactly because it was not done that the trouble arises making necessary an appeal to estoppel, which admits that there was no authority, and precludes the owner from so alleging. That is better than changing the facts.

This remark supplies the answer to Mr. Justice Lindley's suggested explanation of Mr. Chitty's language — that the per-

<sup>1</sup> Williams v. Colonial Bank (1887), 36 Ch. D. 671; 57 L. J. Ch. 892.



son upon whom authority is supposed to be conferred must not only be "the holder for value of the certificates," but also "the person entitled to the certificates."<sup>1</sup> If it be necessary to prove the existence of authority, then no doubt it is only persons rightfully entitled to the certificates that can exercise that authority, for to them alone was it given; but if the estoppel arises from the *appearance* of authority, then it may exist apart altogether from the rightfulness of the title.

One further point: The suggested solution will not apply at all under certain circumstances. If the person intrusted with the blank transfer exhibits it in its incomplete condition to a purchaser, there is no doubt appearance of (even if no real) authority to fill up. But suppose that the person intrusted has filled up the blanks with his own name before exhibiting them, there is then no appearance of authority, and no necessity for any. The document appears to have left its signer's hands in complete form. The case has now changed from one of ostensible agency to one of ostensible ownership.<sup>2</sup>

We thus arrive at the conclusion that the true rationale of the decisions in hand is ostensible agency, where the purchaser is aware of the existence of blanks; and ostensible ownership, where he has no such notice; and that "negotiability" and legal estate have nothing to do with the questions. Perhaps it is too much to hope that the mere dicta of Lords Watson and Hirschell will put a sudden termination to "negotiability" and legal estate as factors in such problems. Nevertheless they will certainly help powerfully the present trend of the law in that direction. Lord Watson has said:

"Even when the delivery (that is by the persons intrusted with the transfers) has been fraudulent, as in the present case, the Supreme Court of New York has held that the registered owner cannot reclaim the document from a holder who has given valuable consideration in good faith and without notice of the fraud. But it is necessary to observe that *the decision of the court did not attribute to the instrument any privilege or negotiability*, in the legal sense of that term. It was based . . . upon the circumstance that the registered owner has so dealt with that certificate as to lead the purchaser for value to believe that he was taking a good title to it. In other words, *the foundation rests in the principle of estoppel*. Thus far the principles of American cases appear to me to be in harmony with the principles of English law."<sup>3</sup>

Lord Watson added that cases

"which relate to *competition between equitable and legal rights* to stock or shares *have really no bearing here*. Whether the respondents are estopped from saying that Blakeway had not their authority to dispose of the cer-

<sup>1</sup> Williams v. Colonial Bank (1868),  
38 Ch. D. 407; 57 L. J. Ch. 826.

<sup>2</sup> See *ante*, ch. XVII.

<sup>3</sup> Colonial Bank v. Cady (1860), 15

tificates in question is, in my opinion, the sole question presented for decision in these appeals."

Than these quotations there are few in all the books more acceptable to the present writer.<sup>1</sup> Were they generally applied, all questions of "negotiability," and legal and equitable estate, in the determination of cases which involve the loss by one of two innocent parties on account of the fraud of a third, would soon be seen to be parts merely of obsolete systems and ideas.

*Seals.*— A very technical difficulty presents itself in the case of blank transfers of shares, which has not to be encountered in dealing with blanks in notes and bills of lading; for transfers have sometimes to be under seal, and it is said that the authority to fill up a document under seal must itself be under seal. If there be no such sealed authority (as is usually the case), and if there be no redelivery of the transfer after its completion, it is said that it is not sufficiently executed.<sup>2</sup>

Distinction must, however, again be made between cases in which the purchaser is aware of the insufficiency of the execution and those in which he is not. Suppose that I execute a transfer of shares in blank and hand it to a broker, who, before handing it over, and unknown to the purchaser, fills in the purchaser's name. My execution of the document is irregular, and it may even be said that the deed is not mine at all. But that is not the question. Estoppel is not troubled with facts. It deals with appearances. The document appears to have been properly executed; I am responsible for such appearance; and I ought to be estopped.<sup>3</sup>

Some discussion of the alternative case—where the purchaser is aware that the deed was filled up after delivery—will be found in another chapter.<sup>4</sup>

#### DOCUMENTS OF TITLE LOST OR STOLEN.

Speaking very generally, the law of England, the United States and Canada as at present received is correctly stated

App. Cas. 278; 60 L. J. Ch. 137. And see per Lord Herschell to same effect.

<sup>1</sup> *Société Generale v. Walker* (1895), 11 App. Cas. 20.

<sup>2</sup> Negotiability was eschewed also by Jessel, M. R., with reference to warehousemen's warrants in *Merchants v. Phoenix* (1877), 5 Ch. D. 205; 46 L. J. Ch. 418.

<sup>3</sup> See per Lord Herschell in *Colonial Bank v. Cady* (1890), 15 App. Cas. 232. See also the discussion as to blanks in bills and notes in ch. IV; and as to estoppel with reference to deeds in ch. XXV.

<sup>4</sup> Ch. XXV.

in the following extract from a valuable judgment of Senator Vanderplanck:

"The honest purchaser who buys for a valuable consideration in the course of trade without notice of any adverse claim or any circumstances which might lead a prudent man to suspect such adverse claim will be protected in his title against the original owner in those cases, and in those only, where such owner has by his own direct voluntary act conferred upon the person from whom the *bona fide* vendee derives title the apparent right of property as owner or of disposal as an agent."<sup>1</sup>

Mr. Justice Bayley's dictum, it will be remembered,<sup>2</sup> is not so explicit. The test there proposed is whether "the owner has lent himself to accredit the title of another person" — nothing as to the act being voluntary.

One of the clauses of the Factors Acts, too, is outside the Senator's rule; for by it if a vendor of goods "continues or is in possession of the documents of title" — whether with or without the knowledge or assent of the purchaser is immaterial — a resale by the same vendor to an innocent purchaser will cut out the first buyer.<sup>3</sup>

In the Supreme Court of the United States it has been cautiously remarked that

"it may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness;"<sup>4</sup>

and the point has been distinctly decided in accordance with this view in the state of Georgia.<sup>5</sup>

In England, too, it must be said that even where by statute an owner of goods is to be estopped by the possession by another person of the documents of title, the consent of the owner (which is sometimes made a prerequisite) may be of very qualified character, namely, one obtained by fraud.<sup>6</sup> And where it is sought to estop a company by its certificate of shares, it is not sufficient answer that the certificate was obtained by the

<sup>1</sup> *Saltus v. Everett* (1838), 20 Wend. (Imp.), ch. 71, § 25 (1); 59 Vic. (Man.), ch. 25, § 24 (1).

<sup>2</sup> See also *Gurney v. Behrend* (1854), 8 E. & B. 634; 23 L. J. Q. B. 265; *Pease v. Gloahec* (1866), L. R. 1 P. C. 219; 35 L. J. P. C. 66; *Commercial Bank v. Colt* (1833), 15 Barb. (N. Y.) 506.

<sup>3</sup> *Ante*, p. 312.

<sup>4</sup> *Shaw v. Railroad Co.* (1879), 101 U. S. 565.

<sup>5</sup> *Lowe v. Raleigh* (1897), 101 Ga. 320; 28 S. E. R. 867.

<sup>6</sup> *Sheppard v. Union Bank* (1862), 31 L. J. Ex. 154. And see *Baines v. Swainson* (1863), 22 L. J. Q. R. 221, and *ante*, ch. VIII.

<sup>5</sup> 53 & 53 Vic. (Imp.), ch. 45, § 6. And see the Sale of Goods Act, 56 & 57 Vic.

grossest fraud, or even by means of a forged transfer from the true owner.<sup>1</sup>

Upon the other hand, where a stock certificate indorsed in blank was taken from a safe by a person who usually had access to it, it was held that the thief could give no title;<sup>2</sup> although it would be otherwise were the certificate, with the assent of the true owner, made out in the name of the thief.<sup>3</sup>

Upon what principle ought we to proceed? In treating of ambulatory contracts we shall see reason for reaching the conclusion that

"the *ratio decidendi* in all cases of lost or stolen securities must be the same. The documents are transferable; they carry with them (by being redeemable to the holder) ostensible ownership of them, or (in the case of brokers) ostensible agency; the true owner has assisted in this appearance (by careless custody or by lack of restriction upon the transferability of the documents); and he is, therefore, as against an innocent purchaser for value, estopped from asserting his title."<sup>4</sup>

The same principle is applicable in the case of lost or stolen documents of title. I may keep the documentary title to my goods in my own name, in which case I am safe; or I may put it in the name of another, in which case I ought to be estopped as against any person deceived by the appearance of ownership given to that other; or I may have my documents in such form that any person having possession of them shall appear to be the owner of the goods, in which case also I ought to be estopped. One of the reasons given in our now familiar *Lickbarrow v. Mason* case for depriving the consignor of the right to stop *in transitu* was that

"if the consignor had intended to restrain the negotiability of it (the bill of lading), he should have confined the delivery of the goods to the vendee only, but he has made it an indorsable instrument."<sup>5</sup>

The language of Best, C. J., with reference to misappropriated exchequer bills is apposite:

"It is the plaintiff's own negligence in not filling up the blank" with his own name "that has rendered it impossible for the defendant to ascertain that he (the plaintiff) had any right to it."<sup>6</sup>

<sup>1</sup> *Re Ottos* (1898), 1 Ch. 618; 62 L. J. Ch. 166.

<sup>2</sup> *Bangor v. Robinson* (1892), 52 Fed. R. 520; *Young v. Brewster* (1895), 63 Mo. App. 628.

<sup>3</sup> *Winter v. Belmont* (1879), 53 Cal. 428. Compare *Re Swan* (1859), 7 C. B. N. S. 409; 50 L. J. C. P. 113; and

*Swan v. North British* (1862), 7 H. & N. 603; 31 L. J. Ex. 425; 2 H. & C. 175; 32 L. J. Ex. 273.

<sup>4</sup> Ch. XXIV.

<sup>5</sup> (1787) 2 T. R. 71. See the same reasoning applied to notes in *Grant v. Vaughan* (1726), 3 Burr. 152d.

<sup>6</sup> *Wokey v. ...* (1820), 4 B. & Ald. 1.

The contrary view is put by Fuller, C. J., of the United States Supreme Court, in this form:

"They (bills of lading) are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover; and as no sale of goods lost or stolen, though to a *bona fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect."<sup>1</sup>

But the answer to this argument is not difficult. Possession of goods is, usually, no representation of ownership of them. I may lend a friend my horse without any danger of misleading anybody by the change of possession. Were I to give my friend a bill of sale of the horse, to be used only after the happening of some contingency, the situation would be entirely different. I ought in such case to be estopped, although unauthorized use was made of the document.<sup>2</sup> And so also if my title to certain goods is evidenced by a bill of lading to me or my order, and I indorse it to my friend with a view to certain application of it, and my confidence is abused, again I ought to be estopped. The distinction, therefore, between possession of goods and possession of a document of title to the goods is the distinction between goods and evidence of title to goods — between no appearance of title to the goods and ostensible ownership of them.

The law as to mere possession is the same as to real estate. I am in possession of certain land — that is not a representation by anybody that I am the owner of it; and if some one were to purchase from me, depending upon my possession as proof of my title, he would merely disclose very unusual ignorance of our system. If, however, the documentary title stands in my name, there is a representation by the true owner that the land is mine, or at all events such strong assistance rendered to my representation of ownership that he ought to be estopped as against an innocent purchaser.<sup>3</sup>

It is quite apparent, then, that the thief or finder of a document of title deliverable to bearer is in a very different position, so far as the public is concerned, from the thief or finder of goods. In the one case he is the ostensible owner, and in

<sup>1</sup> *Friedlander v. Texas* (1886), 189 U. S. 423. See also *Shaw v. Railroad* (1879), 101 U. S. 557; *Raleigh v. Lowe* (1897), 101 Ga. 829; 28 S. E. R. 867.

<sup>2</sup> *Davis v. Bradley* (1851), 24 Vt. 55; *Nixon v. Brown* (1876), 57 N. H. 34.

<sup>3</sup> *Clarke v. Palmer* (1892), 21 Ch. D. 124; 51 L. J. Ch. 634.

the other he is not. In other words, he is in a position to mislead people in the one case, while in the other he is not. And if it be urged that at all events the true owner is not responsible for the situation, the reply is that he is — that he might have kept his documents more securely, and at all events might have rendered them, by special or restrictive indorsement, unavailable to fraudulent people, of whom, as he knew, there is no lack.<sup>1</sup>

Further light upon the subject in hand may be had by reference to the discussion of the reasons which underlie the law as to title to bills and notes when such instruments are passed by a thief or finder.<sup>2</sup> The same reasons are equally applicable to documents of title. Reference is also asked to other chapters in which the necessity for fraud or even voluntary action<sup>3</sup> on the part of the estoppel-denier is discussed and denied, and in which the duty which one member of society owes to another in the commercial as in the physical world is insisted upon.<sup>4</sup> Much will be found in these chapters to lead the mind to the conclusion that for estoppel neither fraud nor voluntary action is essential; that Mr. Justice Ashhurst's dictum —

"We may lay it down as a broad, general principle that whenever one of two innocent parties must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it"<sup>5</sup> —

ought to be taken as a "broad and general principle;" that the word "enables" should receive no narrow signification; and that the principles of the law of torts —

"The whole modern law of negligence, with its many developments, enforces the duty of fellow-citizens to observe, in varying circumstances, an appropriate measure of prudence to avoid causing harm to others."<sup>6</sup>

"He who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against the risk"<sup>7</sup> —

are not limited to physical relations, but have equal application to commercial intercourse.

<sup>1</sup> Ex parte Banner (1875), L. R. 2 Ch. 278.

<sup>2</sup> Ch. XXIV.

<sup>3</sup> Ch. VIII.

<sup>4</sup> Ch. V.

<sup>5</sup> Ante, p. 327.

<sup>6</sup> Pollock on Torts, p. 23.

<sup>7</sup> Dean v. McCarty (1846), 2 U. C. Q. B. 448.

## CHAPTER XXIII.

### OSTENSIBLE OWNERSHIP AND AGENCY—GOODS—LEGISLATION.

Development of the law has been due in very large measure to the courts rather than to the legislatures; and the names of Mansfield and Marshall remind the student that there are large departments of our jurisprudence which are luckily open to the charge of having been "judge-made." We have now in hand, however, a subject which has for many years been a battle-field upon which legislatures, struggling against the courts, have made many endeavors (although not of the happiest sort) to conform the law to the necessities of mercantile usage.

*The Questions and the Rules for Them.*—Shortly stated the questions at issue relate to the position of persons in whose favor factors and others have made unauthorized disposition of goods. In the preceding chapters we have seen that the courts, without the aid of statutes, worked out principles of estoppel which seemed to be of sufficiently general import to include factors and everybody else. Recalling them, sufficiently for present purposes, we may say that they are as follows:

1. *Nemo dat quod non habet.*

2. But that rule

"will certainly not apply where the owner of goods has lent himself to accredit the title to another person."

3. "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority."

*Rules Wide Enough for Factor Cases.*—These rules, embracing as will be observed the two principles of ostensible ownership and ostensible agency, plainly enough cover the case of factors; for factors when they deal with the goods of other people must either (1) be the ostensible owners of them; or (2) the ostensible agents of the persons who do own them; and they are therefore within the principles provided for all such

cases. That a factor is one who is usually intrusted with possession or the *indicia* of possession of the goods is not a reason for drawing a distinction between factors and other agents; for (1) proprietors of sales-stables are also usually intrusted with horses that are to be sold (Many other such cases might easily be mentioned); and (2) the fact that an agent is intrusted with possession does not in the slightest degree affect the application to his case of the general principles.

The correctness of this latter statement may require a little explanation, for which it is necessary to observe some distinctions. Let us consider the following cases:

- (1) The person intrusted with the goods or the documents of title to them usually operates as a factor, and in no other way.
- (2) Add to that case the circumstance that the owner of the goods has in some special manner accredited the title of the factor — that is, made him appear to be the *owner*.
- (3) The person intrusted is a merchant, and not a factor at all.
- (4) The person intrusted is both a factor and a merchant.

We must keep well in mind, too, the difference between ostensible ownership and ostensible agency.

1. *Case of a Factor.*— A man is well known to be a factor and not a trader; and nevertheless he is in possession of bills of lading indorsed to himself or in blank. In this case the possessor of the bills appears to be not an owner, but an agent; and the extent of his agency must, of course, be inquired into; for if he exceed his authority, or at all events his ostensible authority (of which more in a moment), his principal cannot be bound. If it be said that the factor having the bill of lading is therefore the ostensible owner, the answer is that of Lord Ellenborough:

"By the terms of the bill of lading . . . the goods were consigned to Vos (the factor), and for anything that appears to the contrary to the use of Vos; . . . but it is so usual to do this in cases where the party is only a factor, that I cannot rely on this argument."<sup>1</sup>

The case is one of known agency. The law governing such cases is general, and covers the case of factors as of all other agents.

2. *Case of a Factor Specially Accredited.*— The man is a factor, but besides holding the bill of lading he is otherwise ac-

<sup>1</sup> *Martini v. Coles* (1813), 1 M. & S. 146.



credited as *owner*. The law in this case is, or ought to be, that

"where indeed a factor, by the assent of his principal, exhibits himself to the world as owner, and by that means obtains credit as owner, the principal will be liable who furnished the means."<sup>1</sup>

The case is one of ostensible ownership. The law is clearly of general application. That is, it would apply to persons other than factors who were permitted by the owner of goods to present the appearance of having title to them.

3. *Case of a Merchant*.—The man in possession of the bills is known to be a merchant who trades in his own goods, and does not usually act as a factor. He is now an ostensible owner, although perhaps in truth a factor in the particular case. He may, indeed, happen to be known to those dealing with him as an agent, and if so he is, to them, an agent; but to persons without special information he appears to be the owner of the goods, and the true owner may be estopped as against an innocent purchaser upon that account. The case is one of ostensible ownership. The law relating to all such cases is comprehensive, and includes all cases of ostensible ownership.

4. *Case of a Factor and Merchant*.—The man is both a factor and a merchant. In such case possession of the goods cannot indicate either ownership or agency specifically, but it does indicate either one or the other alternatively—in other words, you cannot tell whether the possessor is holding the goods as a merchant or as a factor; you cannot say, therefore, whether he is an ostensible owner or an ostensible agent; but he is one or the other, and whichever he is the purchaser is safe. There is no necessity here for any special provision in the law for the case of factors. The law is quite general.

These distinctions are of prime importance, but are hardly ever alluded to,<sup>2</sup> although in other branches of the law they are to some extent familiar. In fact, it is sometimes denied that such distinctions exist. Were it but observed that intrusting a factor with possession is but giving to an agent an appearance of authority to sell; that that is but one of the many ways in which such an appearance may arise; that the law

<sup>1</sup> *Martini v. Coles* (1813), 1 M. & S. 147, 148; *Kent's Com.* (18th ed.), II, 900; *Gray v. Agnew* (1880), 95 Ill. 320.

<sup>2</sup> The second has received more notice than the others. Lord Ellenborough makes reference to the fourth in *Martini v. Coles* (1813), 1 M. & S. 140.

of estoppel applies to all cases of ostensible agency (that is, of appearance of agency to do the act done), and that the differences among the cases is not one of law but merely as to what constitutes appearance of agency (a mere question of usage), then much of the difficulty about factors and all the statutes relating to them would disappear.

#### REVIEW OF THE LEGISLATION.

For it is not too much to say that steady application of the principles of estoppel would have rendered unnecessary all the legislation which has been passed, and that it might now all be safely repealed with a recital to such effect.

The courts had (as we have seen), prior to the first of the Factors Acts in 1823,<sup>1</sup> blocked out the main lines of the principles of estoppel. *Pickering v. Busk* in 1812,<sup>2</sup> *Martini v. Coles* in 1813,<sup>3</sup> *Spear v. Travers* in 1815,<sup>4</sup> and *Boyson v. Coles* in 1817,<sup>5</sup> leave little to be added beyond the formal reference of their methods to the law of estoppel. But the courts had made one, if not two, mistakes in the application of these principles. For the purpose of rectifying these Parliament intervened; and thenceforward, with here and there a courageous outburst of principle, we have nothing but the dreariest interpretation of amending statutes.

*Factors Could Not Pledge.*—The first mistake was in declaring that a factor could not pledge goods intrusted to him. Upon principle this is the simplest question of usage: A factor (known to be such) is in possession of goods; has he power to pledge? Of course not, if no such power was given to him. How could he? But if by the custom of the place in which he operates factors usually have such power, then the principal by giving possession of his goods to such a person will be estopped from denying the existence of authority in the particular instance. It is the common case of estoppel as to extent of an agent's authority.<sup>6</sup>

In the scores of cases upon the "power to pledge," however, it is difficult to find the question approached in this way. The

<sup>1</sup> 4 Geo. IV., ch. 23.

<sup>2</sup> 15 East, 38.

<sup>3</sup> 1 M. & S. 140.

<sup>4</sup> 28

<sup>4</sup> Camp. 251.

<sup>5</sup> 6 M. & S. 24.

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

law is always arbitrarily enunciated as though it had been revealed from heaven that "a factor cannot pledge." It so commenced in a case of which the following is the whole report; and it so yet remains where statutes have not repealed it:<sup>1</sup>

"It was held by Chief Justice Lee that though a factor has power to sell and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as security for his own debt, though there is the formality of a bill of particulars and a receipt; and the jury found accordingly."

Lord Mansfield indeed seems to have ignored this decision;<sup>2</sup> but other judges, although they have regretted it, and complained of it, and even in a surreptitious way hinted that it was misreported,<sup>3</sup> have devoutly followed it and declared it to be too firmly settled for question. Said Lord Ellenborough in 1811:

"It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of *Patterson v. Tash* that doctrine has never been overturned."<sup>4</sup>

Similar complaints may be found all through the books;<sup>5</sup> and the solidity of the law is thus referred to in an Illinois case:

"In fact there can be no question of the rule. It is true that in England and some of the states of the Union the rule has been changed by legislation, but that only shows that the rule was too firmly fixed to be abrogated by decision of the courts."<sup>6</sup>

And when evidence was offered to show a custom at a particular place for a factor to pledge, it was rejected as "an attempt to set up a custom in opposition to a general principle of law, which cannot be permitted."<sup>7</sup>

Sometimes indeed reasons are offered in support of the law.

They are usually as follows:

"The reason why the factor is not permitted to pledge is that his authority is only to sell."<sup>8</sup>

"This doctrine results from the fact that the factor is but an agent, and as such can bind his principal only when his acts are within the scope of his authority."<sup>9</sup>

<sup>1</sup> *Patterson v. Tash* (1742), 2 Str. 1170.

<sup>2</sup> *Wright v. Campbell* (1767), 4 Burr. 2047; 1 H. Bl. 628.

<sup>3</sup> Gibbs, C. J., told a reporter "that this case was misreported, but that having been acted upon it could not now be shaken." *Bonzi v. Stewart* (1842), 4 M. & S. 307.

<sup>4</sup> *Pickering v. Buek*, 15 East, 44.

<sup>5</sup> See *Martini v. Coles* (1813), 1 M. & S. 145; *Horn v. Baker* (1858), 11 Cal. 393; *Story on Agency* (9th ed.), 124, n.

<sup>6</sup> *Gray v. Agnew* (1880), 95 Ill. 820.

<sup>7</sup> *Newbold v. Wright* (1833), 4 Rawle (Pa.), 213. And see *Mechem on Agency*, § 994.

<sup>8</sup> *Lausatt v. Lippincott* (1821), 6 Serg. & R. (Pa.) 392. And see *Kinder v. Shaw* (1807), 2 Mass. 397; *Rodriguez v. Hefferman* (1821), 5 Johns. Ch. (N. Y.) 417; *Newbold v. Wright* (1833), 4 Rawle (Pa.), 211; *Gray v. Agnew* (1880), 95 Ill. 819; *Allen v. St. Louis* (1886), 120 U. S. 32.

<sup>9</sup> *Mechem on Agency*, § 994.

But this reason would of course answer as well for the "doctrine" that if I employ an agent to sell my horse he cannot sell my cow; and overlooks all questions of usage and estoppel, which often lead to a conclusion contrary to that arrived at by the simple statement that an agent cannot bind his principal if he has no authority to do so.

In Story on Agency it is suggested that the true point for consideration is

"whether a party ostensibly clothed with the ownership of property by the real owner, and thus acquiring an apparent authority to dispose of the whole interest, may not dispose of an interest in such property less than the whole to another innocent party."<sup>1</sup>

But this raises one of our distinctions. No doubt if the case be one of ostensible ownership (case 2 or 3), a pledgee or a transferee of any interest ought to be protected. But that will not help us in the case of a factor who is known to be a factor — how can he pledge if he has no authority to do so?

The English courts then had made this one mistake and the American courts adopted it. But the custom for a factor to advance money on goods consigned to him and of keeping himself in funds by pledging the goods, although refused acknowledgment by the courts, was too firmly settled and too important to be indefinitely ignored, and thus it came about that the English Parliament commenced its series of Factors Acts. The statute (1823) recites that

"the law, as it now stands, relating to goods shipped in the names of persons who are not the actual proprietors thereof and to the deposit or pledge of goods, affords great facility to fraud, produces frequent litigation, and proves in its effects highly injurious to the interests of commerce in general."<sup>2</sup>

Its provisions were ineffective, and the act was amended (1825) two years afterwards.<sup>3</sup> These statutes were not limited to the matters to which they were intended specially to apply, but were of general character and related to "any person . . . intrusted with any goods . . . or the bill of lading for the delivery thereof." The unfortunate results were that the acts were taken to be a legislative declaration of the whole scope of the law relating to all such cases, and that thenceforward the general principles which had been propounded were very largely left out of view, discussion centering upon such ques-

<sup>1</sup>9th ed., 124, n.

<sup>2</sup>4 Geo. IV., ch. 83.

<sup>3</sup>6 Geo. IV., ch. 94.

tions as, Who was a "person?"<sup>1</sup> When could he be said to be "intrusted?"<sup>2</sup> For what could he pledge? etc.<sup>3</sup>

With the humiliating acknowledgment that "much litigation has arisen on the construction of the said recited act;" and while one of the extraordinary decisions upon its language was on its way to the House of Lords,<sup>4</sup> Parliament again (1842) intervened,<sup>5</sup> reciting that which the courts had declined to acknowledge, namely, that

"advances on the security of goods and merchandise have become an usual and ordinary course of business."

Again in 1877, and while another erroneous decision was being considered in appeal,<sup>6</sup> further legislation was passed;<sup>7</sup> and still more recently (1889) all the previous acts were amended and consolidated.<sup>8</sup>

Let us consider the main provisions of this last statute, observing their unprofitableness:

1. "Where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this act, be as valid as if he were expressly authorized by the owner of the goods to make the same."<sup>9</sup>

Admittedly there was no necessity for this provision so far as it related to sales. The reason was that by the custom of trade a mercantile agent intrusted with possession of goods usually had power to sell; wherefore although in a particular case there was no authority to sell, yet there was (owing to the usage) an appearance of such power; and the owner was estopped by the ostensible authority. No statute was necessary for this result, for already the law had declared that:

"If the owner of goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was, at *common law*, precluded as

<sup>1</sup> Monk v. Whittenbury (1831), 2 B. art (1842), 4 M. & G. 295; 11 L. J. C. P. & Ad. 484. It is "difficult to say 228.

precisely what is meant." Janberry v. Britten (1838), 5 Sc. 655; Wood v. Rowcliffe (1845), 6 Ha. 191; Lamb v. Attenborough (1862), 1 B. & S. 831; 31 L. J. Q. B. 41; Baines v. Swainson (1863), 4 B. & S. 270; 31 L. J. Q. B. 281; Heyman v. Flewker (1863), 13 C. B. N. S. 519; 52 L. J. C. P. 132.

<sup>2</sup> Phillips v. Huth (1840), 6 M. & W. 372; 9 L. J. Ex. 323; Hatfield v. Phillips (1842), 9 M. & W. 646; 12 Cl. & F. 343; 11 L. J. Ex. 425; Bonzi v. Stew-

<sup>3</sup> Taylor v. Truman (1830), 1 Moody & Mal. 453; Taylor v. Kymer (1832), 3 B. & Ad. 320; 1 L. J. K. B. 114.

<sup>4</sup> Hatfield v. Phillips (1842), 9 M. & W. 646; 12 Cl. & F. 343.

<sup>5</sup> 5 & 6 Vic. (Imp.), ch. 39.

<sup>6</sup> Johnson v. Credit Foncier (1877), 3 C. P. D. 41; 47 L. J. C. P. 241.

<sup>7</sup> 40 & 41 Vic. (Imp.), ch. 39.

<sup>8</sup> 52 & 53 Vic. (Imp.), ch. 45.

<sup>9</sup> The Factors Act, 52 & 53 Vic. (Imp.), ch. 45, § 2 (1). And see Rev. St. Ont., ch. 150, § 5.

against those who were induced *bona fide* to act on the faith of that apparent authority from denying that he had given such authority, and the result as to them was the same as if he had really given it."<sup>1</sup>

And the contingent "if" (at the beginning of the sentence) is satisfied by declaring that

"the ordinary course of business is for factors to sell in their own name. . . . That being so, the very fact of intrusting your goods to a man as a factor, with right to sell them, is *prima facie* authority from you to him to sell them in his own name."

The case is the simplest example of estoppel by ostensible agency. As early as 1812 Lord Ellenborough had said:

"Strangers can look at the acts of the parties and to the external *indicia* of property, and not to the first communication which may pass between a party and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.

"If the principal send his commodity to a place where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity is sent thither for the purpose of sale. . . . When the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."<sup>2</sup>

And this language has been widely approved and acted upon ever since,<sup>3</sup> except where the distracting effect of the Factors Acts has interposed.

As has been said, however, the courts held that "a factor cannot pledge;" and the fact that if usually a factor had authority to pledge there was the appearance of power and estoppel did not occur to them. The legislatures, therefore, had to intervene with a clause of which the above is the lineal descendant.

And there would be little objection to the clause if, by providing that "a mercantile agent" can give a good title under the circumstances detailed, it did not seem to indicate that nobody else could do so. For it is quite clear that the case of "a mercantile agent" is not a whit different in this respect from that of anybody else. Suppose that a trader (not a factor) is intrusted with possession of goods or the documents of title to goods, he may sell or pledge and give a good title — not this time, however, because of ostensible agency, but because of

<sup>1</sup> *Cole v. North Western* (1875), L. R. 10 C. P. 363; 44 L. J. C. P. 283. See also per Gould, J., in *Cartwright v. Wilmerding* (1862), 24 N. Y. 526.  
<sup>2</sup> *Pickering v. Busk* (1812), 15 East, 63. See cases cited with this one in ch. XXI.  
<sup>3</sup> *Lausatt v. Lippincott* (1821), 6 Serg. & R. (Pa.) 392; *Taylor v. Pope* (1868), 45 Cold. (Tenn.) 416; *Atlantic v. Hunt* (1897), 100 Tenn. 89; 42 S. W. R. 433; *Lewenberg v. Hayes* (1897), 91 Me. 104; 89 Atl. R. 469; *Heath v. Stoddard* (1896), 91 Me. 499; 40 Atl. R. 547.

ostensible ownership. Nor is the case different in principle if the person who has possession is neither a factor nor a trader, and is known (by the purchaser) to be an agent of ordinary sort. For the principle is always the same. Is this agent (whoever he may be) a person who usually has power to sell and pledge? If so, then he may sell and pledge. If he is not, he cannot. And it is merely because "a mercantile agent" is in the first of these categories, and not because of his name, that he can sell; for even he must, as the statute provides, be "acting in the ordinary course of business."

Estoppel has a further criticism of the clause, in that it makes no exception from its general provision for a case in which the purchaser is aware that the agent is violating his instructions. Possibly it may be said that he was not then "acting in the ordinary course of business." But the reply goes too far. It would apply to a case in which the purchaser was not aware of the violation of his instructions; for the factor would not then (either) be "acting in the ordinary course of business," but in quite extraordinary fashion. Yet such case is clearly one in which the purchaser ought to be protected.

The clause then (1) is useless; (2) is objectionable as suggestive of untrue distinctions; (3) is defective for the reason just mentioned.

2. "Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge or other disposition which would have been valid if the consent had continued shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined."<sup>1</sup>

Construing one of the earlier acts the courts had said that if possession of the goods or documents had, with the consent of the owner, been given to a factor, yet if the consent to hold them had been withdrawn the act did not apply, even though the owner had permitted the possession to remain as before, and the purchaser knew nothing of the withdrawal.<sup>2</sup> The merest glance outside the statute would have obviated this error. The authorities were, as we have seen, amply sufficient for the case. For the only question was whether the factor had still ostensible authority to sell; and this admitted of but one

<sup>1</sup> The Factors Act, 52 & 53 Vic. C. P. 282; 41d. 93; 37 L. J. C. P. 137; (Imp.) ch. 45, § 2 (3).

<sup>2</sup> *Fuentes v. Montis* (1868), L. R. 3

answer. The debate, however, did not touch this point, but was directed to an interpretation of the statute — to ascertain whether the factor could still be said to be "intrusted" with the possession. Hence the above clause. So great a judge as Willes, J., acknowledged himself to be absolutely helpless:

"I might desire that it was in the power of the judge to amend the law from time to time with reference to mercantile convenience. . . . But were I to do this, I should be doing an unconstitutional act. I am at all times anxious to give full effect to the intention of the legislature as expressed in the language they have used. But I do not feel myself at liberty from any notions of expediency which I may entertain to go beyond that which I find written."<sup>1</sup>

It is impossible to imagine what the result would have been had Lord Mansfield been troubled with views of unconstitutionality when he was, somewhat radically, amending "the law from time to time with reference to mercantile convenience;" and had he thrown upon Parliament, as to bills and notes, the task which it was compelled to assume with reference to factors.<sup>2</sup>

3. "Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby or of any other documents of title to the goods, his possession of the first mentioned documents shall, for the purpose of this act, be deemed to be with the consent of the owner."<sup>3</sup>

The courts had held, in construing the statutes, that if an agent had been intrusted with one document, and of his own motion got it changed for another document, he was not in possession of number two "with the consent of the owner," and therefore that the act did not apply. For example, a factor, being intrusted with a bill of lading, and the goods at the termination of the voyage having gone to a warehouse, the factor gave up the bill of lading and got a dock warrant. Upon general principle the case is simple enough; but looking minutely at the statute the courts said that the factor was not in possession of the dock warrant "with the consent of the

<sup>1</sup> *Fuentes v. Montis* (1868), L. R. 3 C. P. 283.

<sup>2</sup> The language of Willes, J., is a remarkable illustration of the truth of Mr. Markby's remark (*Elements of Law*, 4th ed., § 99): "Well established as the practice of the judges making the law has now become in

England, it is not easy to reconcile ourselves to the notion when the practice is brought under our observation."

<sup>3</sup> The Factors Act, 52 & 53 Vic. (Imp.), ch. 45, § 2 (3). And see Rev. St. Ont., ch. 150, § 4.



owner."<sup>1</sup> While one of such decisions was on its way to the House of Lords, Parliament interposed with the above clause.<sup>2</sup>

The courts had also held that if a factor had deposited certain warrants as security for an advance, and had afterwards substituted other warrants as security for the same advance, the case was not within the statutes, because no advance had been made upon the second set of warrants.<sup>3</sup> The above clause, in conjunction with another, corrected that anomaly. Attention to the principles of estoppel would have led to contrary decisions in these cases and rendered appeal to Parliament unnecessary.

4. "Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person."<sup>4</sup>

The statute is not now dealing with goods intrusted to "a mercantile agent," but with all cases of agency. The clause is badly drawn. It provides that if possession of goods be given to another person with instructions to sell, then "the consignee" shall have a lien for advances. That is to say, if I give possession of my horse to an agent to sell, and he mortgaged the horse, I would not be bound; but if my agent were to consign him to somebody and get advances on him, I would be bound. Estoppel would have nothing to say to either case, for it is one simply of no authority to pledge and no appearance of such authority. Estoppel would agree to the provisions (1) that if possession be given "for the purpose of consignment" (in the name of the person intrusted), or (2) if the owner "has shipped the goods in the name of another person," then the assignee shall have a lien for advances; for in such cases there is, with the assent of the owner, ostensible ownership in the person intrusted. But estoppel would of course draw no distinction between the case of the "consignee," and any other person being misled by the appearance of ownership; nor would

<sup>1</sup> *Close v. Holmes* (1837), 2 *Moody & R.* 22; *Phillips v. Huth* (1840), 6 *M. & W.* 572; 9 *L. J. Ex.* 323; *Hatfield v. Phillips* (1842), 9 *M. & W.* 646; 13 *Cl. & F.* 848; 11 *L. J. Ex.* 425.

<sup>2</sup> 5 & 6 *Vic.*, ch. 39, § 4.

<sup>3</sup> *Bonzi v. Stewart* (1842), 4 *M. & G.* 295; 11 *L. J. C. P.* 228.

<sup>4</sup> *The Factors Act*, 52 & 53 *Vic.* (Imp.), ch. 45, § 7. And see *Rev. St. Ont.*, ch. 150, § 11.

it say that the consignee should be protected "in respect of advances" and should not be protected did he buy the goods. The case being one of ostensible ownership, it is immaterial who the person is that acquires an interest in them or what the nature of that interest may be.

5. "Where a person *having sold* goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."<sup>1</sup>

The courts had held that if a vendor sold goods but retained the documents of title to them, a subsequent sale by the same vendor to another purchaser passed nothing;<sup>2</sup> and before the case could be heard in appeal Parliament declared otherwise by the adoption of the above clause.<sup>3</sup>

But the enactment went beyond the case, and raised further difficulty. It applies not only to a case in which a vendor retains the documents of title and so misleads a subsequent purchaser, but to one in which the vendor retains "possession of the goods."

Now distinguish: (1) A merchant sells goods but retains possession of them in his warehouse and resells them; the first purchaser ought to lose, for possession under such circumstances indicates either ownership or authority to sell.<sup>4</sup> (2) I buy from a farmer a horse, pay him and take a bill of sale of him, and the farmer agrees to send him to my house, but instead of doing so resells him. Apart from any local registry acts I am not estopped, because mere possession under such circumstances is not ostensible ownership.<sup>5</sup> (3) But suppose that the second purchaser is some one who has previously known that the farmer was the owner of the horse, and relied upon such knowledge and possession as indicative of the continuation of the title?

In the United States it has been broadly asserted that "when the same thing is sold to two different parties, by contracts equally

<sup>1</sup> The Factors Act, 52 & 53 Vic. (Imp.), ch. 45, § 8; Sale of Goods Act, 56 & 57 Vic. (Imp.), ch. 71, § 25 (1); 59 Vic. (Man.), ch. 25, § 24 (1).

<sup>2</sup> *Johnson v. Credit* (1877), 2 C. P. D. 224; 8 id. 32; 47 L. J. C. P. 224.

<sup>3</sup> 40 & 41 Vic. (Imp.), ch. 89, § 3.

<sup>4</sup> *Ante*, p. 299.

<sup>5</sup> *Ante*, p. 297.

valid, and the second vendee is without notice of the first sale, he who first obtains possession is entitled to the property."<sup>1</sup>

"It is the doctrine of *Shaw v. Levy*, 17 S. & R. 99, which remains unshaken in this state, that if a vendee allow a vendor to remain in possession, or after a formal delivery immediately restore the possession to him, and he afterwards sell and deliver the goods to a *bona fide* purchaser for value without notice of the prior sale, such purchaser is entitled to the goods as against the first vendee and all claiming under him."<sup>2</sup>

The general principle is recognized that

"allowing a person, therefore, to have actual possession of chattels, unless there is some other fact connected with it, is not an act which holds him out to the public as owner, or as authorized to sell it as his own. The doctrine of *caveat emptor*, as to any title the purchaser may acquire, applies. *Brown v. Wilmerding*, 5 Duer, 225. But when the possession remains in the original owner, or after a formal delivery it is restored without any notorious break in the continuity of it under a secret understanding or agreement with him as servant, agent or bailee, this is an element which makes a very important difference in the case. That inquiry which the party dealing with the possessor is bound to make, and which the law presumes him to make, leads him back to the original title, and thus his diligence will only avail to confirm the deception. The vendee having acquired possession under his purchase must have enjoyed it as long and in such a manner as to show that the delivery to him was not merely formal or colorable, before he can safely transfer it back to the vendor. *Breck-enridge v. Anderson*, 8 J. J. Marshall, 714; *Jarvis v. Davis*, 14 B. Monroe, 529; *Stevens v. Irwin*, 15 Cal. 503."

The law thus stated would lose something of its arbitrary appearance if it were stated in terms of estoppel. The first quoted rule, that, as between two purchasers, he who first gets possession has the better title, appears at first view to be as simply dogmatic as the rule which gives to the legal estate the determining faculty; and the objection to the last quotation is that its reasons apply as well to a case in which the second purchaser was misled by the ostensible title of the common vendor as to one in which he was not.

*A priori* one would say that as between two purchasers he has the title who alone acquired it — that is to say, the first of them; and that if any one else obtained possession (whether he be called a second purchaser or not is immaterial) he cannot have the title, but the possession merely. To this let us add that where the first purchaser "has lent himself to accredit the title" of his vendor so "as to mislead" the second purchaser "into the belief that the person dealing with the property had authority to do so," the first purchaser will be estopped from setting up the facts.

<sup>1</sup> *Winslow v. Leonard* (1854), 25 Pa. St. 18. And see *Lanfear v. Summer* (1821), 17 Mass. 118; *Brown v. Pierce* (1867), 97 Mass. 46; *People's Bank v. Cayley* (1880), 93 Pa. St. 527; *Cum-*

*mings v. Gilman* (1897), 90 Me. 524; 38 Atl. R. 538.

<sup>2</sup> *Davis v. Bigler* (1869), 63 Pa. St. 247. And see *Webster v. Peck* (1863), 81 Conn. 495. And see a note in the *Harvard Law Rev.*, vol. 11, p. 418.

The only question then is whether the first purchaser, by leaving his vendor in possession, has accredited the title of the vendor, and so misled the second purchaser.

In discussing this point it may be said, on the one hand, that possession is not evidence of the vendor's title; that he may be a thief, or a borrower, or a bailee of any description; that for this reason no faith ought to be placed upon possession as evidence of title, and that the second purchaser, therefore, cannot say that he was deceived by it.

Upon the other hand there is much in the suggestion that possession, if no evidence of title, is at all events a starting point for inquiry as to title; that ordinarily a vendor is asked as to his predecessors in title; that in this way investigation may begin; and that if the vendor has been left in possession by the first purchaser, and has thus been enabled to vouch his original title and not that through his vendee, any chance of discovering the first purchaser's interest is taken away.

Such doctrine is applicable, however, only in cases in which inquiry as to title has, in fact, been undertaken and has been vitiated by the continued possession; and not in cases in which it might have been vitiated had such inquiry been made by the second purchaser as "the law presumes him to make." Estoppel applies only in cases in which the estoppel-asserter has been injuriously affected by the act complained of, not to those in which he would have been injured if something else had occurred than that which really happened.

The clause in the Factors Act appears to ignore all such conditions as those suggested. It seems to apply to every case of a vendor being left in possession, whether the fact had any bearing upon the second purchaser's action or not. It is hardly too much to say, however, that the decisions have amended the statute.

"There is no inflexible rule of law that because a man who was once the owner of goods and has sold them remains in possession of them, he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession *with the reputation of ownership, and under those circumstances which create a representation of ownership*, then the property will pass to his assignees; but it is always a question of fact whether or not the circumstances are such as to create that representation."<sup>1</sup>

<sup>1</sup> Per Lord Selborne in *Ex parte Bk. 51. See Re Gaetz v. Jones* (1898), *Watkins* (1878), L. R. 8 Ch. 528; 42 L. J. 1 Q. B. 787; 67 L. J. Q. B. 577.

The amendment consists in adding after "continues or is in possession of the goods," the words "with the reputation of ownership and under those circumstances which create a representation of ownership."<sup>1</sup> This robs the statute of much of its purely arbitrary and mechanical character. One further amendment and it would be reduced to the reasonableness of the law of estoppel, namely, that the second purchaser should have been *mised* by the "misrepresentation of ownership."

Possibly this is implied in Lord Selborne's language. If so, then the statute merely reflects a single instance of the law of estoppel, and is misleading because by indicating that if a *vendor* be allowed by a *vendee* to mislead people by ostensible ownership, then the *vendee* ought to lose; whereas the law is general and applies to everybody — being a *vendee* does not increase or decrease a person's duty of "an appropriate measure of prudence" for the welfare of others.<sup>2</sup>

6. "Where a person *having bought or agreed to buy goods* obtains with the consent of the seller possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, . . . shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."<sup>3</sup>

This case is to some extent the converse of the last. If a purchaser may be estopped by leaving the documents of title in the hands of his vendor, so also may a vendor be estopped by handing them over prematurely to the purchaser. Again, the clause was passed to overcome a decision which the mercantile community could not understand. An owner of goods shipped them in two quantities but under one bill of lading. The owner's agent sold the goods to two different persons; gave one of them (A.) the bill of lading; and got that purchaser to give to the other (B.) a delivery order for his part of the goods. B. resold his goods to X. on time, and handed him the delivery order; X. pledged the goods, and passed on the order.

<sup>1</sup> The phrase "reputation of ownership" was borrowed no doubt from the reputed ownership clauses of the bankruptcy acts. See ch. XXI.

<sup>2</sup> See a note in *Harvard Law Rev.*, vol. 11, p. 418.

<sup>3</sup> The Factors Act, 53 & 53 Vic. (Imp.), ch. 45, § 9; The Sale of Goods Act, 56 & 57 Vic. (Imp.), ch. 71, § 25 (2); 53 Vic. (Man.), ch. 25, § 24 (2).

The pledgee would now seem to be safe; but it was held that B. could stop *in transitu* because the goods were being dealt with under a delivery order only, and not under a bill of lading.<sup>1</sup> Estoppel would of course not recognize the distinction.

The baneful effect of the legislation has recently been very forcibly illustrated. But for it a case of this kind would be free from all difficulty: A vendor sent to his purchaser a bill of lading, and also for acceptance a bill of exchange for the price of the goods; the purchaser ought to have returned the bill of lading, unless he accepted and returned the draft; he did neither, but wrongfully transferred the bill of lading to an innocent purchaser. From the standpoint of estoppel the case is perfectly clear, for the vendor has accredited the title of the purchaser. Arguing, however, from legislation, a contrary result was at first arrived at, the case not being thought to be one "where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the documents of title." Upon appeal a different view of the statute was taken.<sup>2</sup>

The clause moreover goes far beyond that which was intended, and is open to the criticisms above applied to the preceding paragraph of the statute. The principal of its unexpected results has been its effect upon hire and sale agreements — those contracts which contemplate an eventual sale, but for security for payment provide that meanwhile the property in the goods is to remain in the vendor. In such cases a *bona fide* purchaser from the purchaser (if in possession) will be secured.<sup>3</sup> If, however, the effect of the agreement is, not that the purchaser shall be bound to buy, but merely that he shall have an option to purchase, the act does not apply.<sup>4</sup>

7. "Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last mentioned transfer shall have the same effect

<sup>1</sup>Jenkyns v. Osborne (1844), 8 Sc. 63 L. J. Q. B. 591. The law would be otherwise were there no statute. N. S. 505; 13 L. J. C. P. 196. Spear v. Travers (1815), 4 Camp. 251, was not referred to. See *ante*, p. 297, 8.

<sup>2</sup>Cahn v. Pockets (1898), 2 Q. B. 272; (1895) A. C. 471; 63 L. J. Q. B. 61; 67 L. J. Q. B. 625; (1899) 1 Q. B. 577; 64 *id.* 465. And see *Fyne v. Wilson* (1895), 1 Q. B. 658; (1895) 2 Q. B. 643; 68 L. J. Q. B. 515.

<sup>3</sup>Lee v. Butler (1803), 2 Q. B. 318; 587; 64 L. J. Q. B. 328.

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for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*."<sup>1</sup>

This clause was passed because of the distinction above alluded to between a bill of lading and a delivery order. It was said that a vendor retained his lien although he had handed over a document of title (other than a bill of lading), and had thus apparently transferred the complete title. His right, it was said, remained until possession of the goods had been taken by the innocent purchaser.<sup>2</sup> The idea was that the indorsement of a bill of lading passed the title to the goods, but that the transfer of other documents of title did not, and therefore the necessity for possession in order to vest the right to stop *in transitu*. As has already been seen, however,<sup>3</sup> property in goods passes by contract, and indorsements of bills of lading and other documents have no effect upon it. Estoppel, too, as has been said, makes no distinction among those documents of title which in the mercantile world are taken as indicative of title.

*Summary.*—Reviewing all the sections above quoted, we find that the general principle of estoppel by ostensible ownership and ostensible agency is cut down to seven very sharply defined cases selected from infinity, because by merest chance they had happened to present themselves in more than usually conspicuous form—that is, in notable law-suits:

1. The case of a "mercantile agent" being in possession of goods or the documents of title to goods, with the consent of the owner.
2. Or without that consent, if it at one time existed and its cessation was unknown.
3. Or if there had been consent to the possession of previous documents, by means of which the later ones were obtained.
4. The case of goods given to "another person" (not necessarily a mercantile agent) for consignment or sale; and the case of goods shipped in the name of another person. In such cases a "consignee's" advances are protected.
5. The case of a vendor remaining in possession of the goods or of the documents of title.

<sup>1</sup>The Factors Act, 52 & 53 Vic. (Imp.), ch. 45, § 10.

<sup>2</sup>Jenkyns v. Osborne (1844), 8 Sc. N. S. 505; 13 L. J. C. P. 196.

<sup>3</sup>*Ante*, p. 332.

6. The case of a purchaser obtaining possession of the goods or the documents prematurely.

7. The case of a document of title lawfully transferred to a person as a buyer or owner of the goods, who transfers to another. In such case the right to stop *in transitu* is gone.

Next notice that the first three of these cases are instances of ostensible agency, and the last four of ostensible ownership, although the draftsman did not so observe; for in numbers 5 and 6 it is provided that the transaction is to have the same effect as if the ostensible owner were in reality an agent, instead of in reality the owner.

Lastly, note that the result of the provisions is not in all cases the same. While in numbers 1, 2, 3, 5 and 6 an innocent person who acquires any interest, whether by "sale, pledge or other disposition," is protected, yet in the fourth case the protection afforded is only "in respect of advances;" and in the seventh the interests excluded are only "any vendor's lien or right of stoppage *in transitu*."

The partial and incongruous character of the legislation is very apparent. A vendor of goods may be estopped, although another person who had misled in precisely similar fashion would not be; a purchaser may be estopped if he permit his vendor to have the documents of title, but will not be estopped if he give them to anybody else; an owner will be estopped if he ship the goods in the name of another person, as against the consignee and "in respect of advances," but he will not be estopped as to other persons, or if the consignee have *purchased* the goods; where a document of title has been transferred "to a person as a buyer or owner of the goods," the transferrer will be estopped as against an innocent purchaser in respect of his vendor's lien or right to stop *in transitu*, but not in respect of other claims to the goods.

But the principal objection to the acts is that in so far as they accord with the principles of estoppel they are not only unnecessary but injurious (for they divert attention from those principles and fix it upon interpretation of the language of statutes); and so far as they conflict with the law of estoppel they are vicious, for they are then unsupported by principle and unamenable to reason.



## AMERICAN LEGISLATION.

The early English legislation, with certain alterations, passed into the statute books of several of the states of the Union.<sup>1</sup> But the confusion wrought in England was largely obviated by (among other methods) a most fortunate, or most courageous, misinterpretation of the acts.

The New York statute of 1830 provided that "every factor or other agent intrusted with the possession . . . shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument, or other obligation in writing, given by such other person on the faith thereof."

And the words "on the faith thereof" were held to mean on the faith of the agent being the true owner, and not on the faith of the possession of the goods or document of title.<sup>2</sup> This construction was adopted by the Ohio courts.<sup>3</sup>

The effect of these decisions was to bring the statutes into complete harmony with the law of estoppel. For thus construed, they really enact that when factors and other agents are permitted by the true owner to hold themselves out as owners of the goods, purchasers and others may claim the benefit of estoppel.

The other legislatures which passed Factors Acts do not seem to have encountered the opposition from the courts which was presented by the judges in England; and upon the whole it may be said that the development of the American law has been but very slightly affected by statutory provisions. The cases touching those enactments, therefore, do not require to be separated from those relating to the general law, and are for that reason not specially noted in this chapter.

An exception perhaps should be made from this statement with reference to the "doctrine" that a factor cannot pledge, the cases upon which have been referred to in the foregoing

<sup>1</sup> See Kentucky, 1890, May 5; Maine, Rev. St. 1883, ch. 81; Maryland, Rev. Code, 1870, ch. 34; Massachusetts, Pub. St. 1882, ch. 71; New York, 1890, ch. 179; Ohio, 1880, Rev. St., § 3214, ff; Pennsylvania, Factors, 2; Rhode Island, Pub. St. 1882, ch. 186; Wisconsin, Rev. St. 1878, § 3345. See Stimson's Am. St. Law (2d ed.), §§ 4390-4398.

<sup>2</sup> Stevens v. Wilson (1844), 6 Hill, 512; 8 Denio, 472.

<sup>3</sup> Cleveland v. Shoeman (1853), 40 Ohio St. 178.

pages. The courts, however, even where unaided by statute exhibited an inclination to overturn the "doctrine."

"Numerous cases may be found where it has been held that a factor who holds a bill of lading for sale cannot pledge; but in such cases either it appeared that there were grounds for charging the pledgee with knowledge of the factorship, or the decisions were made before the modern development of the doctrine of estoppel, or without giving it full consideration."<sup>1</sup>

The Californian judges showed not a little dexterity — perhaps timely temerity — in abolishing the "doctrine" by a qualification which limited its application to impossible cases, or something very near that.<sup>2</sup>

<sup>1</sup> Pollard v. Reardon (1895), 13 C. C. App. 174; 65 Fed. R. 851.

<sup>2</sup> Wright v. Solomon (1861), 19 Cal. 64.

## CHAPTER XXIV.

### OSTENSIBLE OWNERSHIP AND AGENCY—CHOSES IN ACTION— AMBULATORY AND NON-AMBULATORY.

In the application of estoppel to negotiable instruments difficulty emanates principally from three sources:

1. The phrase "law merchant," like many another, is uncritically employed in handy explication of seeming anomalies. As objections to the Mosaic cosmogony, presented by the existence of fossils, were allayed by convenient reference to omnipotence, so perplexing questions relating to negotiable instruments are waived by unthinking allusion to the "law merchant." Omnipotence and law merchant work their arbitrary will, and are irreducible and distracting.

2. Uncertainty as to the meaning of the term "negotiable."

3. Misconception of the principles of the law of estoppel.

Such questions as these present themselves: Why is it that if a bill or note be stolen or found, the thief or finder can pass a good title to it; and that the law is otherwise as to chattel property? Why is it that if a bill be misapplied by an agent for custody of it, a good title will pass; and that the law is otherwise as to other property? Why is it that if a man write his name upon stamped paper, and a note be written over it, he is liable; although if a lease had been so written he would not be bound?

*The Law Merchant.*—To these and to other such questions the time-sanctioned reply is negotiability and the law merchant working in antagonism to the ordinary rules of law. All application of the principles of the law of estoppel, which, as the writer believes, would explain "how the fossils got there," and harmonize the law merchant with the general law, is expressly denied. The following are examples of current treatment of the subject:

Mr. Justice Byles, in *Swan v. N. B. A.*,<sup>1</sup> said:

"The object of the law merchant as to bills and notes, made or become payable to bearer, is to secure their circulation; therefore honest acquisi-

<sup>1</sup>(1863) 2 H. & C. 184. And see 32 L. J. Ex. 377.

tion confers title. *To this despotic but necessary principle the ordinary rules of the common law are made to bend.* The misapplication of a genuine signature, written across a slip of stamped paper (which transaction being a forgery would, in ordinary cases, convey no title), may give a good title to any sum fraudulently inscribed within the limits of the stamp . . . negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence, or stolen from him, still he must pay."<sup>1</sup>

Lord Mansfield's words are frequently quoted:

"The indorsement of a blank note is a letter of credit for an indefinite sum. The defendant said: 'Trust Galley to any amount and I will be his security.' It does not lie in his mouth to say the indorsement was not regular."<sup>2</sup>

The fact may be, and usually is, that the defendant said, and intended to say, nothing of the kind. The law merchant, however, declares that he did say it; and the defendant must submit. This comes out very clearly in the following language of Baron Pollock; and estoppel is excluded from operation:

"In such a case the acceptor is liable to a *bona fide* holder . . . and the reason for this is not because the acceptor gave authority for this or that sum to be inserted,—for in truth he gave no such authority,—but because in favor of commerce it is essential to uphold the negotiability of bills of exchange. That this is so may be further illustrated by a case in which a fraud is practiced upon the acceptor of a bill drawn in blank with reference to the amount. . . . Here is a clear absence of authority, and a fraud against A. (by inserting £75 instead of £50); yet he is liable, for the reason we have given. . . . In the present case . . . the ordinary rule as to authority cannot be adhered to, and something like a fiction must be resorted to, in favor of a *bona fide* indorsee for value; or, as we would prefer to say, the law merchant in such a case holds that, although the acceptor did not authorize the drawer's name to be used, he enabled the person to whom he gave the bill to use it, and so to give the bill currency, and this as against the acceptor is sufficient to render him liable. Estoppels are odious. . . . We should prefer not to use the word 'estoppel,' which seems to imply that a person by his conduct is excluded from showing what are the true facts; but rather to say that the question is whether, when all the facts are admitted, the acceptor is not liable upon the well known principle that where one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the third person to commit the fraud."<sup>3</sup>

To the same effect is the suggestive language of Baron Wilde:

"The law merchant validates in the interest of commerce a transaction which the common law would declare void for want of title or authority.

<sup>1</sup> This passage having been cited to Mr. Justice Byles in a subsequent case (*Foster v. McKinnon* (1869), L. R. 4 C. P. 709, and see 38 L. J. C. P. 313), he said: "If that be right, it can only be with reference to the case of a complete instrument; it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign."

<sup>2</sup> *Russell v. Langstaffe* (1780), Doug. 516. See *Merchants' Bank v. Good* (1890), 6 Man. R. 346.

<sup>3</sup> *London v. Wentworth* (1880), 5 Ex. D. 104; 49 L. J. Ex. 661. See in the same sense, *Marston v. Allen* (1841), 8 M. & W. 504; *Foster v. McKinnon* (1869), L. R. 4 C. P. 712; 38 L. J. C. P. 316; *Bechuanaland v. London* (1898), 2 Q. B. 679; 67 L. J. Q. B. 939.

and transactions within its operation are as absolutely valid and effectual as if made with title and authority. But *how different is the principle of estoppel*. It validates no transaction whatever. It all along implies a transaction itself invalid, and a person who is forbidden for equitable reasons to set up that invalidity. It operates in a different way, founded upon principles of equity and fairness, between man and man. It rests on a wider basis than the principle which supports title in negotiable instruments; and as it is not confined to commercial intercourse or the exigencies of trade, so it is not confined to instruments which have become negotiable by the demands of commerce."<sup>1</sup>

Williams, J., put the matter in this way:

"The reason is that such negotiable instruments have by the law merchant become part of the mercantile currency of the country; and in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency."<sup>2</sup>

In the opinion of Lord Herschell,

"the general rule of law is that where a person has obtained the property of another from one who is dealing with it, without the authority of the true owner, no title is acquired as against the owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained; unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown a good title is acquired by *persond estoppel* against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments."<sup>3</sup>

Finally, Mr. Bigelow, in his recent work on Bills and Notes, referring to transferees of them free from equities, says:

"It is here that the law merchant appears in its strongest colors and in its most striking contrast to the common law. It is negotiability that affords the coloring and the contrast."<sup>4</sup>

And Sir Frederick Pollock speaks of the doctrine as

"a positive exception to the ordinary principles of legal ownership."<sup>5</sup>

*Antagonism.*—These quotations (1) bring the law merchant and the common law into sharp antagonism. "The law merchant validates . . . a transaction which the common law would declare void;" (2) show that reconciliation has been attempted in some cases by the adoption of "something like a fiction," namely, imagined but non-existent principal-and-agent authority; (3) declare that the law of estoppel has nothing to do with any such cases; and (4) support the application of "the well-known principle that when one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the third person to commit the fraud."

<sup>1</sup>Swan v. N. B. A. (1862), 7 H. & N. 608; 81 L. J. Ex. 436.

<sup>2</sup>Ingham v. Primrose (1859), 7 C. B. N. S. 85; 2 L. J. C. P. 295.

<sup>3</sup>Simmons v. London (1892), A. C. 215; 61 L. J. Ch. 729.

<sup>4</sup>P. 206. And see p. 8.

<sup>5</sup>Pollock on Contracts (6th ed.), 427. And see p. 216.

It is of somewhat curious interest, too, that when it came to be held that

"the actual holder of an indorsed bill of lading may undoubtedly by indorsement convey a greater title than he himself has,"

all that could again be said for so holding was that

"it is at variance with the general principle of the law that a man should be allowed to transfer to another a right which he has not; but the exception is founded on the nature of the instrument in question, which being, like a bill of exchange, a negotiable instrument, for the general convenience of commerce has been allowed to have an effect at variance with the ordinary principles of law."<sup>1</sup>

### THE LAW MERCHANT.

What then is this law merchant which opposes itself to the common law and dominates it? and whence does it come? As a matter of fact, and not merely of phrase, may we not even ask whether there is a law of merchants, in any other sense than there is a law of financiers or a law of tailors? Frequent use of the word has almost produced the impression that as there was a civil law and a canon law, so also there was somewhere a "law merchant," of very peculiar authority and sanctity; about which, however, it is now quite futile to inquire and presumptuous to argue.<sup>2</sup>

If the custom of merchants as to bills of exchange was recognized by the courts, so also has the custom of financiers as to the "negotiability" of bonds and scrips been recognized; but no one would think of referring to the "law financier" in speaking of that "negotiability." The custom of financiers, as of social clubs or other organizations or coteries, is observed and enforced by the law; not because the financiers or clubs enacted or had power to enact laws, but because it is with reference to those customs that the parties have acted or con-

<sup>1</sup> Per Tindall, C. J., in *Jenkyns v. Osborne* (1844), 7 M. & G. 699; 13 L. J. C. P. 196. See also *Williams v. Colonial Bank* (1893), 38 Ch. D. 388; 57 L. J. Ch. 826; *Bank of Batavia v. New York* (1887), 106 N. Y. 145; 12 N. E. R. 433. As to the alleged antagonism in cases of bills of lading, see ch. XXIV.

<sup>2</sup> In *Blackburn on Sales* (2d ed.), 317, it is said that "there is no part of history of English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land. In the earlier times it was not a part of the common law as it is now, but a concurrent and co-existent law enforced by the power of the realm, but administered by its own courts in the staple or else in the Star Chamber." It is not suggested, however, that it is from precedents in these courts that the modern law is derived.

tracted; and it is with reference to them, therefore, that rights and liabilities ought to be adjusted. When these or any other customs obtain general acceptance by the community they then pass into and for the first time become *laws*. *Modus et conventio vincunt leges*.<sup>1</sup>

The rules respecting bills and notes are not traceable to any foreign or extraneous body of laws, but have been derived from the usages and customs of the people;<sup>2</sup> from whence also are derived the main part of the whole body of the law. And it would therefore be very extraordinary were we to find some portion of our law in antagonism to other parts of it; for we should then have to say either that one part of our usage was out of harmony with the rest, or else that, in process of crystallization into law, it had become so. The present writer begs to subscribe to the following extracts rather than to those which allege antagonism:

"This chronological list of authorities tends to elucidate the manner in which the custom of merchants gained an establishment in the courts of law as part of the common or general law of the land, and shows that it ought not to be considered as a system contrary to the common law, but as an essential constituent part of it, and that it always was of co-equal authority, so far as subjects existed for it to act upon."<sup>3</sup>

"The '*lex mercatoria*,' or custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The law relative to bills of exchange, insurance, and all mercantile contracts, are as much the general laws of the land as the laws relating to marriage or murder."<sup>4</sup>

Describing the law merchant, thus, as part of the general law makes the assertion of antagonism much more difficult than if it be thought of as some imported and despotic code to which "the ordinary rules of the common law are made to bend." We feel that reconciling principles between a part and the

<sup>1</sup>Usage adopted by the courts, having been thus the whole of the so-called law merchant," per Cockburn, C. J., in *Goodwin v. Roberts* (1875), L. R. 10 Ex. 352; 44 L. J. Ex. 163. Negotiability of bills is but an example of that which Mr. Herbert Spencer speaks when he says (*Man v. The State*, 298): "One of the most familiar political truths is that, in the course of social evolutions, usage precedes law; and that when usage has been well established it becomes law by receiving authoritative indorsement and defined form."

<sup>2</sup>See *Goodwin v. Roberts* (1875), L. R. 10 Ex. 346; 44 L. J. Ex. 163. In *Woodworth v. Bank* (1821), 19 Johns. (N. Y.) 413, there is the following: "The law merchant, says Malynes in the time of King James, is a customary law approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any one prince."

<sup>3</sup>*Dunlop v. Silver* (1801), 5 U. S. App. 374, a most valuable exposition of the early law.

<sup>4</sup>Christian's note to 1 Bl. Com. 75.

whole must exist, unless indeed our jurisprudence is, so far, an absurdity. Let us return to antagonism, at all events, only if harmonizing efforts shall fail.

*What Custom of Merchants?*— And let this meanwhile be answered: What custom of merchants was recognized by the courts? A custom that the transferee could sue in his own name? No; custom could not possibly affect that question, or determine that in equity he could, and at law he could not. Well, then, a custom that the transfer cut out the equities, and that a thief could pass a good title? No; there is no more reason for so saying that than for asserting that we are indebted to farmers for the law which declares that the purchaser of land, taking the legal title, is not affected by equities, or to horsemen for the provision that the thief of a chattel can give a good title by a sale in market overt. Then it must have been a custom that the transferee acquired the legal title, and not the equitable only? Once more, no; the merchants were not sufficiently skilled in such abstruse matters as to draw a finely dividing line among them. No custom then? Yes; this and nothing but this: The law finally and with much apprehension recognized the fact that ambulatory promises—promises redeemable to third person—had by custom become an essential requisite of commerce; and the courts thereupon set themselves to develop law applicable to instruments of that kind, naming them “negotiable” instruments. The simplicity of the law had declared that there could not be a contract redeemable to persons other than the immediate contractor; the merchants said that they constantly used such contracts, could not indeed get along without them; and the usage finally received “authoritative indorsement and defined form.”

To the writer it has always seemed to be somewhat absurd to suggest that such works as those of Mr. Justice Byles, Mr. Daniel and others were the result of investigations into the law merchant. Judge-made law (not merchant-made), with Lord Mansfield as chief builder, is what we have here.

#### “NEGOTIABILITY.”

After being informed that “it is negotiability that affords the coloring and the contrast”<sup>1</sup> between the law merchant and

<sup>1</sup> *Ante*, p. 372.



the common law, it is somewhat depressing to find that there is very little agreement as to what "negotiability" really is. Probably many would agree with the widely-quoted language of Blackburn, J. It will furnish at any rate a sufficient basis for discussion:

"Bills of exchange and promissory notes, whether payable to order or to the bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or where it is payable to bearer by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."<sup>1</sup>

I. *Transferee Suing in His Own Name.*—The first of these distinguishing characteristics of bills and notes—that a transferee can sue upon them in his own name<sup>2</sup>—is very easily displaced, and that in four different ways:

(1) Assignees of covenants "running with the land" can sue upon them in their own name.<sup>3</sup> This is not because of any law merchant or law farmer, but because the covenant was made with the person who, for the time being, might have the land. That is to say, the covenant was ambulatory.

(2) It was for the same reason, and not because the law merchant so declared (an absurd idea), that the transferee of a note could sue upon it in his own name.

"The note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise moving from the maker to the bearer."<sup>4</sup>

"Bearer is *descriptio personae*, and a person may take by that description as well as any other. In the nature of the contract there is no im-

<sup>1</sup> Crouch v. Credit Foncier (1878), L. R. 8 Q. B. 374; 42 L. J. Q. B. 183. Quoted approvingly in Pollock on Contracts (6th ed.), 219; Chalmers on Bills (5th ed.), 103; McLaren on Bills, 197, 445; Addison on Contracts (9th ed.), 1096; Cababé on Estoppel, 130. And see Bouvier's Law Dic. (Rawle), title "Negotiate." To same effect per Bowen, L. J., in Simmons v. London (1891), 2 Ch. 294; 60 L. J. Ch. 824.

<sup>2</sup> In a noteworthy judgment in Shaw v. Railroad Co. (1879), 101 U. S. 557, Strong, J., contends that "the capability of being thus transferred, so as to give to the indorsee a right

to sue on the contract in his own name, is what constitutes negotiability." The acquisition of a better title than that of the transferor he treats as a consequence of this capability.

<sup>3</sup> Onward v. Smithson (1898), 1 Ch. 6; 62 L. J. Ch. 138; Spencer's Case and notes, 1 Sm. L. C. (10th ed.) 52, ff; Mitchell v. Warner (1825), 5 Conn. 493; Tapscott v. Williams (1841), 10 Ohio, 443.

<sup>4</sup> Per Story, J., in Bullard v. Bell (1817), Mason, 243. And see Reed v. Ingham (1759), 3 Dall. (Pa.) 505, and Thompson v. Perrine (1882), 106 U. S. 593. And see *post*, p. 388.

propriety in doing so. It is a contract 'to pay the bearer, or the person to whom he may deliver it' (whether it be a note or a bill of exchange), and it is repugnant to the contract that the drawer should object that the bearer has no right to demand payment from him."<sup>1</sup>

"For the words, 'or to his order,' give authority to the plaintiff to assign it by indorsement; and 'tis an agreement by the first drawer that he would answer it to the assignee."<sup>2</sup>

"The person seems sufficiently described at the time that 'tis made a deed, which is at its delivery; and suppose a bond were now made to the Lord Mayor of London, and the party seals it, and after this man's mayoralty is out he delivers the bond to the subsequent mayor, this is good, *et traditio facit chartam loqui*. And by the delivery he expounds the person before meant; as when a merchant promises to pay to bearer of the note, any one who brings the note shall be paid."<sup>3</sup>

(3) All choses in action may be sued upon in equity in the name of the transferees of them. The characteristic in hand, therefore, is that of the courts of law rather than that of certain choses in action; and that which has been spoken of as a distinguishing characteristic of bills and notes is really but a point of practice, upon which different courts took opposite views.<sup>4</sup>

<sup>1</sup>Grant v. Vaughan (1764), 2 Burr. 1527. See also Carter v. Palmer (1700), 12 Mod. 380; Peacock v. Rhodes (1781), Doug. 636; Re Agra (1867), L. R. 2 Ch. 391; 36 L. J. Ch. 232; per Bowen, L. J., in Easton v. London (1886), 34 Ch. D. 112; 57 L. J. Ch. 332; and per Lord Watson in Simmons v. London (1892), A. C. 20; 61 L. J. Ch. 313. But see Re Blakely (1867), L. R. 3 Ch. 158; 36 L. J. Ch. 655, and Dixon v. Bovill (1856), 3 Macq. 13, 14.

<sup>2</sup>Hill v. Lewis (1794), 1 Salk. 132.

<sup>3</sup>Sheldon v. Hurlley (1680), 2 Show. 161. Upon general principles it is much easier to understand why bills and notes should be sued upon in the name of the transferee than why they should not. In other words, if we look at some of the documents themselves (e. g., "I promise to pay to the bearer hereof," or to "Ship Fortune or bearer"), it is hard to imagine how it came about that there was any other course than that the action must be brought in the name of the bearer; for the promise is made to him. The best that can be said for the other view is that the maker of a note promises the person

to whom he gives it that he will pay it to the bearer; and that he makes no contract at all with the bearer: "I promise you that I will pay to the bearer." This is, however, not only to alter the form but the substance of the note — probably to take it out of the category of notes (as usually understood) altogether. If I were to advertise that I would pay \$5 to "the finder" of my dog, there could be no doubt that any one who answered that description could sue me for the money. My contract was not with the newspaper. Williams v. Carwardine (1833), 4 B. & Ad. 621; Denton v. Great Northern (1856), 5 E. & B. 860; 25 L. J. Q. B. 129; Warlow v. Harrison (1859), 1 E. & E. 295, 309; Scott v. Pilkington (1862), 2 B. & S. 11; 31 L. J. Q. B. 81.

<sup>4</sup>That the point was one of practice becomes very clear when it is remembered that although an assignee of a chose in action was not permitted to sue at law in his own name, yet his real presence was acknowledged when suing in the name of his assignor. To a defense, valid

(4) Whatever may be thought of these three points, it will not be doubted that in many jurisdictions modern statutes have abolished all distinctions between "negotiable" instruments and other choses in action (arising out of contract), with reference to the right of assignees to sue upon them in their own names. All transferees may now so sue.

As to this first characteristic then we may say either that it never existed or that if it did it has been abolished.

II. *Honest Acquisition Confers Title*.—It is very extraordinary that it should ever have been said that a distinguishing characteristic of "negotiable" instruments was that honest acquisition of them confers title. Consider these points:

(1) A "negotiable" instrument is a "negotiable" instrument whether it is due or overdue; and yet honest acquisition of it at one stage of its career will (generally) confer title, but when it is past due an honest transferee takes what is given him and no more. The language of Strong, J., seems to be correct:

"A bill or note past due is *negotiable* . . . but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it . . . and it does not give to the purchaser of lost or stolen bills the right of the real owner."<sup>1</sup>

The codes, too, tell us that

"where an overdue bill is *negotiated* it can be *negotiated* only subject to any defect of title affecting it at its maturity."<sup>2</sup>

What can be made of such a sentence with present ideas of "negotiability?"

(2) Again, it is not true, even of current instruments, that honest acquisition will always confer title, for it will be no assistance if the signatures to them have been obtained by certain frauds,<sup>3</sup> or if the amount payable has been fraudulently increased,<sup>4</sup> or if the signature to a blank piece of paper has been

as against his assignor, it was sometimes a good replication that the plaintiff (the assignor) was suing as a trustee for the assignee, who was therefore the real plaintiff. In other words, courts of law allowed transferees to assert their rights through their trustees, whereas equity permitted the same thing to be done directly. See *Master v. Miller* (1791), 4 T. R. 340, judgment of Buller, J., *passim*. See *post*, p. 383.

<sup>1</sup> *Shaw v. Railroad Co.* (1879), 101 U. S. 557.

<sup>2</sup> 45 & 46 Vic. (Imp.), ch. 61, § 36 (2); 53 Vic. (Can.), ch. 33, § 86 (2).

<sup>3</sup> *Foster v. McKinnon* (1869), L. R. 4 C. P. 704; 38 L. J. C. P. 310; *Second Nat. Bank v. Hewitt* (1896), 59 N. J. L. 57; 34 Atl. R. 988.

<sup>4</sup> *Schofield v. Londesborough* (1894), 2 Q. B. 660; 63 L. J. Q. B. 649; (1895) 1 Q. B. 536; 64 L. J. Q. B. 293; (1896) A. C. 514; 63 L. J. Q. B. 593.

stolen and converted into a bill,<sup>1</sup> or if even a completed but unissued bill be stolen,<sup>2</sup> or if a material alteration has been made in a bill,<sup>3</sup> or in many other cases.<sup>4</sup>

(3) Nor can it be said that the "honest acquisition" doctrine is confined to "negotiable" instruments, for there is the ever-widening class of cases provided for by that most important rule:

"Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities."<sup>5</sup>

(4) The cases are legion, moreover, in which acquisition of such "non-negotiable" articles as goods and lands will confer a better title than that held by the transferrer:

(a) A mortgagee allows the mortgagor to have the deeds and they are fraudulently deposited as security for a loan. The deposittee gets a better title than the depositor had.<sup>6</sup>

(b) Goods intrusted to a mercantile agent may be sold and a good title passed, although he had no interest in the goods and no right to sell them.<sup>7</sup>

<sup>1</sup> Byles on Bills (15th ed.), 255; Daniel on Negotiable Instruments, § 814; Parsons on N. & B., vol. 1, 114.

<sup>2</sup> *Baxendale v. Bennett* (1878), 3 Q. B. D. 525; 47 L. J. C. P. 624; Bigelow on Bills and Notes, 177, 178, and cases there cited. But see per Williams, J., in *Ingham v. Primrose* (1859), 7 C. B. N. S. 82; 28 L. J. C. P. 294.

<sup>3</sup> *Calvert v. Baker* (1838), 4 M. & W. 417; *Desbrow v. Wetherly* (1834), 1 Moo. & R. 488; *Crotty v. Hodges* (1842), 5 Sc. N. R. 221; 4 M. & G. 561; 11 L. J. C. P. 280; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261. See the codes, 45 & 46 Vic. (Imp.), ch. 61, § 64; 53 Vic. (Can.), ch. 33, § 63; *Mid-ough v. Elliott*, 1 Mo. App. 462; *Kingston Sav. Bank v. Bosserman* (1898), 53 Mo. App. 269; *Mount Morris v. Lawson* (1894), 58 N. Y. St. R. 35; 7 Misc. R. 228; 27 N. Y. Supp. 272; 63 N. Y. St. R. 432; 10 Misc. R. 359; 81 N. Y. Supp. 18; *Newman v. King* (1896), 54 Ohio St. 273; 43 N. E. R. 638.

<sup>4</sup> *Master v. Hill* (1763), 4 T. R. 320;

5 T. R. 367; 2 H. Bl. 140; *Mason v. Rowley* (1843), 11 M. & W. 593; 12 L. J. Ex. 425; *Harrison v. Cotgreave* (1847), 4 C. B. 562; 16 L. J. C. P. 198; *Warrington v. Early* (1853), 2 E. & B. 763; 23 L. J. Q. B. 47; *Gardner v. Walsh* (1855), 5 E. & B. 91; 24 L. J. Q. B. 285; *Hirschfield v. Smith* (1860), L. R. 1 C. P. 340; 35 L. J. C. P. 177; *Hirschman v. Budd* (1873), L. R. 8 Ex. 171; 42 L. J. Ex. 118; *Vance v. Lowther* (1876), 1 Ex. D. 176; 45 L. J. Q. B. 200; *Columbia v. Cornell* (1888), 130 U. S. 658; *Hosler v. Beard* (1896), 54 Ohio St. 398; 43 N. E. R. 1040; *Swinney v. Edwards* (1898), 55 Pac. R. (Wyo.) 306.

<sup>5</sup> *Re Agra & Masterman's Bank* (1867), L. R. 3 Ch. 397; 36 L. J. Ch. 222.

<sup>6</sup> *Perry-Herrick v. Attwood* (1857), 2 De G. & J. 21; 27 L. J. Ch. 121; *Brooklesby v. Temperance* (1895), A. C. 173; 64 L. J. Ch. 433.

<sup>7</sup> The Factors Act, 53 & 53 Vic. (Imp.), ch. 45, §§ 2, 7, 8, 9, 10.

(c) Any one held out as the owner of goods may transfer a better title than he has—at least the owner will be estopped from asserting to the contrary.<sup>1</sup>

(d) A purchaser in market overt may obtain a better title than that of his vendor.

These examples, and others that will readily occur to any one, amply warrant the statement that there is no antagonism between the law relating to bills and notes and the rest of the law in the respect referred to. On the contrary, we see that the phrase "Honest acquisition confers title" applies in many branches of the law other than that relating to bills and notes. And we shall see that it applies in all departments for the same reason.

It may be urged that, at all events, there is a distinction between bills and notes on the one hand and chattel property on the other, where title is acquired from a thief or finder. But once more, it is not always true that a good title to a bill or note is obtained from a thief or finder. The authorities seem to be agreed that if a signed blank bill be stolen and filled up, the transferee gets no title;<sup>2</sup> and it has been held that if a bill complete, save by delivery (and therefore an unissued bill), be stolen, no title to it can be acquired from a thief.<sup>3</sup>

And it is not always true that a thief or finder of chattels cannot give a better title than he himself has. Sale in market overt is a sufficient contradiction of the statement. And the fact that the law governing such sales is part of the general body of the law is some indication that sufficient sanction for a similar result in the case of bills and notes may also be found without going outside of it. The transferee of stolen bonds takes a good title.<sup>4</sup>

III. *Negotiability and Transferability.*—Abandoning then these two customary significations of "negotiability," let us

<sup>1</sup> See chs. XXI, XXII, XXIII.

<sup>2</sup> Byles on Bills (15th ed.), 255; Parsons on N. & B., vol. 1, 114; Daniel on Negotiable Insts. (4th ed.), §§ 814, 840. See the subject discussed in ch. XXV.

<sup>3</sup> *Baxendale v. Bennett* (1879), 3 Q. B. D. 525; 47 L. J. C. P. 624. And see Bigelow on B. & N. 176, ff; Daniel on Negotiable Insts. (4th ed.), vol. 1,

§ 839. It is doubtful whether the Bills of Exchange Act has affected this and the previous point. Probably it has. See §§ 21, 29.

<sup>4</sup> *Venables v. Baring* (1892), 3 Ch. 527; 61 L. J. Ch. 609; *Bechuanaland v. London* (1899), 2 Q. B. 659; 67 L. J. Q. B. 986; *Whiteside v. First Nat. Bank* (1898), 47 S. W. R. 1108 (Tenn.).

try the dictionary meaning, namely, "transferability." This has been adopted by some writers, but only very summarily to be departed from. For example, in "Daniel on Negotiable Instruments" we find it stated that

"an instrument is called negotiable when the legal title to the instrument itself, and and to the whole amount of money expressed upon its face, may be transferred from one to another by indorsement and delivery by the holder, or by delivery only."<sup>1</sup>

But the learned author approves of such language as the following:

"Written contracts are not necessarily negotiable, simply because by their terms they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word 'bearer' had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owners."<sup>2</sup>

Here then are documents which are transferable but not negotiable. In another paragraph, referring to bills of lading, the same writer says:

"Bills of lading are generally classed among negotiable instruments and are frequently spoken of as negotiable like bills of exchange by text-writers and by jurists of high reputation and authority.<sup>3</sup> But while they are assignable and possess certain capacities of negotiation which assimilate them quite closely in some respects to negotiable instruments, they are not negotiable in the same sense as bills of exchange or negotiable promissory notes.<sup>4</sup> And it is more correct to speak of them as quasi-negotiable instruments, since they are rather like, than of, them."<sup>5</sup>

It would of course be quite out of the question to substitute for "quasi-negotiable" the phrase "quasi-transferable." That would be to alter Mr. Daniel's meaning, which was that although bills of lading were capable of complete transfer, yet that they lacked some of "the peculiarities which attach to negotiable paper" — in other words, they are completely transferable, but only quasi-negotiable.

Not much help is to be obtained from the codes. We find it stated in the English and Canadian compilations that

"a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill."<sup>6</sup>

<sup>1</sup> Sec. 1. See also Smith's L. C. (10th ed.), 456; and Addison on Contracts (9th ed.), 1098.

<sup>2</sup> Railroad Co. v. Howard (1863), 7 Wall. 415. Quoted by Mr. Daniel, 1456.

<sup>3</sup> Lickbarrow v. Mason (1787), 2 T. R. 63, in which the jury found "that by the custom of merchants bills of lading . . . to order or assigns have been and are . . . ne-

gotiable and transferable." Berkling v. Watling (1837), 7 Ad. & E. 29; Bell v. Moss, 5 Whart. 189.

<sup>4</sup> Gurney v. Behrend (1854), 3 E. & B. 622; 23 L. J. Q. B. 265; Barnard v. Campbell (1874), 55 N. Y. 462; 1 Smith's Lead. Cas. (10th ed.), 693.

<sup>5</sup> Schouler's Personal Property, 410, 605; Davenport v. Homeyer (1869), 45 Mo. 145.

<sup>6</sup> 45 & 46 Vic. (Imp.), ch. 61, § 81;

But if we were to say that a blacksmith's account "is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the" account, the assertion would be quite as valid and just as fruitless. For the gist of both statements is merely that bills and accounts may both alike be transferred—a remark that, of course, does not help one to appreciate any distinction between them.

The last hope of intelligibility (upon the view that negotiability means simply transferability) seems to be removed with Mr. Chitty's perfectly accurate remark that

"it is now well established that it is not essential to the validity of a bill that it should be transferable from one person to another."<sup>1</sup>

If now we say that bills are negotiable instruments; that negotiable means transferable; and that bills are very often not transferable, we have some notion of the confusion to which current phraseology has reduced us.

The great uncertainty concerning the meaning of this word "negotiable" becomes so conspicuously noteworthy when, standing by itself, it has to be construed, that one cannot but be surprised that it should continue to be used as though it had some

53 Vic. (Can.), ch. 33, § 31. The codes also provide that a bill containing "words prohibiting transfer . . . is not negotiable" (§ 8). But the codes, of course, do not mean that such a bill cannot be transferred. For as Chalmers says (on Bills, p. 129): "A bill may be transferred by assignment or sale, subject to the same conditions as would be requisite in the case of an ordinary chose in action. Thus C. is the holder of a note payable to his order. He may transfer his title to D. by a separate writing assigning the note to D. (Re Barrington (1804), 2 Sch. & Lef. 112); or by a voluntary deed constituting a declaration of trust in favor of D. (Richardson v. Richardson (1867), L. R. 3 Eq. 686); or by a written contract of sale (Sheldon v. Parker (1875), 3 Hun (N. Y.), 498). A bill is a chattel, therefore it may be sold as a chattel.

A bill is a chose in action, therefore it may be assigned as a chose in action."

<sup>1</sup>Chitty on Bills (11th ed.), 115. For example, days of grace are allowed on a note payable to A. without adding "or to his order or bearer." Smith v. Kendall (1794), 6 T. R. 123. Of a similar note it was said that "it is not necessary that such a note should be in itself negotiable, it is sufficient that it should be a note for the certain payment of a sum of money, whether negotiable or not" (per Le Blanc, J., in King v. Box (1815), 6 Taunt. 328); and a conviction for forgery of such a document was sustained. And see Whyte v. Hayman (1859), 34 Pa. St. 143. Now by the codes—altering the law, 45 & 46 Vic. (Imp.), ch. 61, § 8 (4); 53 Vic. (Can.), ch. 33, § 8 (4)—such a note is "negotiable."

clear definition. For example, an American statute provided that bills of lading

"shall be negotiable, and may be transferred by indorsement and delivery;"

and another act declared that they

"shall be negotiable by written indorsement thereon and delivery in the same manner as bills of exchange;"

whereupon arose for decision the question whether transferees took a better title than that held by the transferors; and an answer quite contrary to generally accepted notions was given by the United States Supreme Court:

"The capability of being thus transferred so as to give to the indorsee a right to sue on the contract in his own name is what constitutes negotiability. . . . In regard to bills and notes certain other consequences generally, though not always, follow. . . . But none of these consequences are necessary attendants or constituents to negotiability or negotiation. They may exist without them."<sup>1</sup>

The bills of lading were negotiable, but honest acquisition of them did *not* confer title.

So in an English case evidence had been given that certain bonds were negotiable, and the judges could not agree what that meant. Bowen, L. J., declared that although the bonds passed by delivery, yet it did not follow

"that delivery by a person who has no title confers nevertheless a title on a *bona fide* holder."<sup>2</sup>

But in the House of Lords, Lord Watson thought that

"it necessarily follows from the negotiable character of the documents that Delmar, who was lawfully in possession of them for a special purpose, was nevertheless in a position to give a valid title to any person acquiring the bonds from him in good faith."

IV. *What then is Negotiability?* — The difficulties commence to dissolve as soon as it is observed that the word "negotiable" is used in two senses. The primary meaning unquestionably is transferable; but consider the following sentence:

"A *non-negotiable* promissory note is a mere chose in action; as such it is assignable, and the assignee thereof may maintain an action thereon in his own name."<sup>3</sup>

The language is in perfect harmony with our ideas; but of course it does not mean that a non-assignable note is assignable. In like manner, and in language that is customary, Mr. Daniel, treating of "the *transfer* of certificates of deposit,"<sup>4</sup> expresses doubts as to whether they are negotiable.<sup>5</sup> Stock

<sup>1</sup>Shaw v. Railroad Co. (1879), 101 U. S. 557.

<sup>2</sup>Barry v. Wachosky (1899), 77 N. W. R. 1080 (Neb.).

<sup>3</sup>Simmons v. London (1891), 1 Ch. 204; 60 L. J. Ch. 824; (1892) A. C. 219; 61 L. J. Ch. 727.

<sup>4</sup>On Negotiable Instruments, § 1702.

<sup>5</sup>Id., § 1708.



certificates are undoubtedly transferable, but Mr. Daniel says that they

"are not regarded as strictly negotiable, although they inure to the benefit of the bearer, and may be classed amongst instruments *quasi-negotiable*."<sup>1</sup>

The truth is that "negotiable" has an original and an acquired signification. Originally it meant transferable; but afterwards it was used to indicate the supposed effects of transfer, namely, that the transferee (1) took free from equities, and (2) could sue in his own name. And thus we say that certain choses are transferable, although not negotiable—meaning that they are transferable, but that certain effects do not accompany their transfer.<sup>2</sup>

According to primary meaning, then, a "negotiable" instrument is a transferable instrument; and in that sense the word truly indicated, at one time, a real distinction among choses in action. The secondary meaning, however—that in which it is taken as indicating the existence of peculiar effects of transfer—was always inaccurate and unscientific; for as to the transferee bringing an action in his own name, that is the normal result or effect of all transferability; and as to honest acquisition conferring title, this secondary meaning arrogates to the transfer of bills and notes alone, an effect (1) which existed sometimes in the case of other property, and (2) which sometimes was absent from bills themselves. In other words, "negotiable" was used (in the secondary sense) to mark off bills and notes from other choses in action, by a peculiarity of which they not only had no exclusive possession, but which frequently was altogether absent. However dubious to some lawyers this assertion may appear to be, there is at least no doubt (1) that at the present day all choses in action arising out of contract are transferable; and (2) that any rule as to transferees of choses in action taking free from equities is by no means confined to bills and notes, but is, as we have seen,

"a rule which must yield when it appears, from the nature or terms of the contract, that it must have been intended to be assignable free from and unaffected by such equities."<sup>3</sup>

<sup>1</sup> Id., § 1708. Consider also the sentence from Chalmers on Bills (5th ed. 115): "The character and incidents of negotiability depend upon the time of negotiability."

<sup>2</sup> Ashhurst, J., as early as 1787 had said: "The custom of merchants

only establishes that such an instrument may be indorsed, but the effect of the indorsement is a matter of law." *Liokbarrow v. Mason*, 2 T. R. 71.

<sup>3</sup> *Ante*, p. 379.

We must get away, then, from the terms "negotiable" and "non-negotiable." For (1) their primary and only true meaning has been lost to them; (2) that meaning would now be useful only to distinguish between choses which arise out of contract from those which do not (for the former are by statute assignable — *i. e.*, negotiable, while the others are not), and the word "transferable" (having no false connotations attached to it) is better for that purpose; (3) the acquired meaning of the terms was never scientific — at all events at the present time they are inaccurate and misleading.

#### AMBULATORY AND NON-AMBULATORY.

Nevertheless, as the quotation just made sufficiently shows, there is a real distinction among choses in action (arising out of contract), namely, between those "intended to be assignable" free from equities and those not so intended — or, as the present writer ventures to suggest, between ambulatory and non-ambulatory contracts. All contracts are now transferable (negotiable); but some are intended to be redeemable to persons other than the immediate promisee; are intended to be passed on from hand to hand; are intended, that is, to be ambulatory.

Of such contracts there were in early times none (the simple preceded the complex), and the courts declined to acknowledge their validity long after they came into existence, and the customary rules concerning them were well known to everybody. Foreign bills of exchange formed the thin edge of the wedge; the statute of Anne<sup>1</sup> overruled Chief Justice Holt in his refusal to sanction the admission of promissory notes; in 1758 a bank note was held to be negotiable;<sup>2</sup> in 1764 a draft or check on a bank;<sup>3</sup> in 1871 a note indorsed in blank;<sup>4</sup> exchequer bills in 1820;<sup>5</sup> and bonds of the King of Prussia, payable to the holder, in 1824.<sup>6</sup>

All these instruments have a common characteristic (they are intended to be ambulatory), but one that is by no means necessarily confined to them, as we shall see later on. Some members of a class must necessarily be known before the class

<sup>1</sup> 8 & 4 Anne, ch. 9.

<sup>2</sup> Miller v. Race, 1 Burr. 452.

<sup>3</sup> Grant v. Vaughan, 3 Burr. 1516.

<sup>4</sup> Peacock v. Rhodes, Doug. 636.

<sup>5</sup> Wookey v. Fole, 4 B. & Ald. 1.

<sup>6</sup> Gorgier v. Mieville, 3 B. & C. 45.

itself can be accurately described; and non-recognition of a true distinguishing characteristic has often led to unnecessary difficulty. Thus it happened that it remained for Lord Cairns (1862), in perhaps the most noteworthy single sentence of modern law, to indicate the clear and simple ground upon which rested the asserted peculiarities of "negotiable" instruments. It is worth repeating:

"Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities."<sup>1</sup>

In other words, when it is intended that an obligor is not to set up equities, he is not to be permitted to do it. Strange that there should ever have been any difficulty about that proposition — particularly in getting it stated.

Observe how this sentence and the statutes cut into our notions of "negotiability." A "negotiable" chose in action is one transferable at law, upon which the transferee may sue in his own name. Is it? Then all contracts arising out of contract are now "negotiable." A "negotiable" instrument is one that passes to a transferee free from equities. Is it? Then all contracts "intended to be assignable free from and unaffected by such equities" are "negotiable;" and overdue bills and notes are not.

#### THE CYCLE.

Observe the cycle through which we have come: (1) Certain instruments (bills, and afterwards notes) were intended to be ambulatory — to be performed to transferees, and therefore to be assignable free from equities. (2) The law, with certain misgivings, sanctioned the intention and enforced the contracts. (3) Customs expanded; contracts other than bills and notes arose which were intended to be ambulatory. (4) But the law remained crystallized — bills and notes, and at the utmost, checks, exchequer bills, and finally foreign government bonds — all *eo nomine* and not as examples of a class, are alone "negotiable;" transferees of all other choses in action (although in reality also members of the class) must take subject to equities. (5) Then Lord Cairns, with his exception to the general rule as to assignees of choses in action taking subject to equities, namely,

<sup>1</sup> *Ante*, p. 379.

that such is not the case where the choses were intended to be ambulatory; a dictum which placed all instruments belonging to the same class upon the same footing.

So we started and ended very reasonably — documents intended to be redeemable to third persons shall be so redeemed; although for many intermediate years we refused to admit the generality of the proposition, stumbling foolishly over law merchant and negotiability.

Choses in action, then, intended to be ambulatory are ambulatory, even although an equitable title to them merely may pass by transfer. But if this be too difficult a proposition for minds addicted to legal estate priorities, they may be comforted by the statute which provides that to all choses in action arising out of contract the legal title shall pass where the transfer is by writing. This may still leave open the annoying anomaly that the transferee of an instrument payable to order (his assignment being in writing) would be more favored than the transferee of a document redeemable to bearer (his assignment having been by delivery only). But the anomaly would be too absurd and worrying to live long. It would be unanimously clubbed upon its first appearance. By logic or club we must retain the faith, now that we have again got it; that ambulatory contracts are ambulatory.

*Decay of the Old System.*— Some idea of the old system and the inroads upon it—the evolution out of it—may be obtained by the perusal of two quotations. The first is taken from a judgment of the United States Supreme Court, in which may be found a most elaborate and exhaustive elucidation of the old law.<sup>1</sup> In it there is the following:<sup>2</sup>

"To this it may be answered that the antiquated doctrine that a chose in action is not assignable was introduced in early times before negotiable instruments were in use, when trade was carried on in its simplest form, and when the principal if not the only purpose intended to be answered by the rule was to prevent maintenance in controversies respecting titles to land. It was to prevent the poor man from being oppressed by a powerful antagonist, to whom his competitor might assign his title, and who by his wealth, his influence or his power might prevent justice. At what time or by what means it was first applied to personal rights is not ascertained; but it seems clear that in its original adoption it was never intended to apply to those instruments which by their nature and the original contract of the parties were made negotiable. Every man has a natural right to make such contracts as he pleases, provided they are not repugnant to any positive law nor injurious to others; and all contracts entered into without fraud or force are legally and morally obligatory, according

<sup>1</sup> *Dunlop v. Silver* (1863), 5 U. S. App. 367.

<sup>2</sup> At p. 423.

to their spirit and intent. The reason of the rule was to prevent maintenance. Co. Lit. 214. But no man could be oppressed by maintenance who had expressly agreed to pay his debt to such a person as his creditor might appoint."

With the above should be read a very able judgment of Buller, J.<sup>1</sup> In it he said:

"It is laid down in our old books that for avoiding maintenance a chose in action cannot be assigned, or granted over to another. Co. Lit. 214a, 266a; 2 Roll. 45, 1, 40.<sup>2</sup> The good sense of that rule seems to me to be very questionable; and in early as well as in modern times it has been so explained away that it remains at most only an objection to the form of the action in any case. . . . Courts of equity from the earliest times thought the doctrine too absurd for them to adopt, and therefore they always acted in direct contradiction to it; and we shall soon see that the courts of law also altered their language on the subject very much. . . ."

"After these cases we may venture to say that the maxim was a bad one, and that it proceeded on a foundation that fails. But still it must be admitted that though the courts of law have gone the length of taking notice of assignments of choses in action, and of acting upon them, yet in many cases they have adhered to the formal objection that the action shall be brought in the name of the assignor and not in the name of the assignee. I see no use or convenience in preserving that shadow when the substance is gone; and that it is merely a shadow is apparent from the later cases in which the courts have taken care that it shall not work injustice. . . ."

"There is no reason for confining the power of assignment to the two instruments which I have mentioned; and I will show you other cases in which the courts have allowed it. First, in *Fennel v. Mears*, where the defendant, a captain of an East-Indiaman, borrowed £1,000 of Cox, and gave two respondentia bonds, and signed an indorsement on the back of them, acknowledging that in case Cox chose to assign the bonds he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who was allowed to recover the amount of them in an action for money had and received. De Grey, Ch. J., in disposing of the motion for a new trial, said: 'Respondentia bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities and be productive of great inconvenience if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration that, upon such an assignment, the money which I have borrowed shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money in conscience; and therefore also I think at law; for the defendant has promised to pay any person who is entitled to the money.'"

<sup>1</sup>*Masters v. Miller* (1791), 4 T. R. 340; and also the exposition of Cockburn, C. J., in *Goodwin v. Roberts* (1875), L. R. 10 Ex. 346; 44 L. J. Ex. 157, which did much to bring the law into harmony with modern finance.

<sup>2</sup>Sir Frederick Pollock would assign a different reason. He says (On Contracts, 6th ed., p. 206): "The origin of the rule was attributable by Coke to the 'wisdom and policy of the founders of our law' in discouraging maintenance and litigation; but it is better explained as a logical consequence of the archaic view of

a contract as creating a strictly personal obligation between the creditor and the debtor." In truth the founders of our law were too much given to inalienability, for which probably the necessarily personal relation of the feudal system is largely responsible. Lands were inalienable and non-devisable, until the equity lawyers invented their system of uses. And even after *Quia Emptores* and the Statute of *Wills*, rights of entry remained inalienable—upon the ground mentioned in the text.

"And in *Winch v. Keeley*, K. B. Hil. 27 Geo. 3, where the obligee assigned over a bond, and afterwards became a bankrupt, the court holds that he might notwithstanding maintain the action. Mr. J. Ashhurst said: 'It is true that formerly courts of law did not take notice of an equity or trust; but of late years, as it has been found productive of great expense to send the parties to the other side of the hall, wherever this court has seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then, if this court will take notice of a trust, why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned, but this court will take notice of a trust, and see who is beneficially interested.'"

We see here the old law — contracts must be sued upon in the name of the original parties to them — law formulated for certain kinds of contracts, fading by usual process before the introduction of other sorts of contracts to which it is inapplicable. It is clear that these early judges were not conscious of excursions outside the general law. They were quite aware that they were dealing with a new kind of contract; but they were applying to it their general law, with such expansions to suit novel conditions as they could devise.

#### SUMMARY.

Let us sum up the conclusions arrived at:

1. As to the alleged distinction between "negotiable" and "non-negotiable" instruments upon the ground that "the person who becomes holder may sue in his own name on the contract," we may say:

(a) Originally and correctly the distinction was attributed to the difference between the contracts themselves, and not between the general law and the law merchant. That is to say, a contract with A. could not be sued upon by B.; but a contract with the bearer of a document could be sued upon by the person so described.

(b) The distinction therefore is one between ambulatory and non-ambulatory promises; and not one between bills and notes on the one hand, and — covenants for title (for example) upon the other.

(c) In any event the right to sue in the name of the transferee was a mere point of practice in the courts.

(d) And has now by statutes been abolished.

2. As to the other alleged distinction — that a transferee "has a good title notwithstanding any defect of title in the party from whom he took it" — we may say:

(a) Transferees of "negotiable" instruments sometimes take

subject to equities, and transferees of other choses in action sometimes take free from them.

(b) Purchasers of such "non-negotiable" commodities as goods and lands often acquire better titles than those of their vendors.

(c) And, as we shall see, for precisely the same reason as do transferees of "negotiable" instruments.

3. If by "negotiability" we mean merely transferability, we better say so; for "negotiability" has now too many meanings — or none at all.

4. There are two very distinct classes of choses in action, which not being describable by any known terms may (until better is suggested) be called ambulatory and non-ambulatory.

*Retrospect.*— Looking back over the many legal battle-fields we can now see that this classification contains the principle which was struggling towards the light; and we can rightly gauge the forces opposed to it. The "wisdom of the common law" declared against the recognition of trusts. Thus arose the war of legal and equitable estates, not to be completely terminated even by the annihilation of the contestants.<sup>1</sup> The same wisdom forbade the sale of rights of entry until overruled by statute. And the same wisdom declared that "for avoiding maintenance a chose in action cannot be assigned or granted over to another." To this is due all the trouble about negotiability. To evade it all sorts of subterfuges and fictions have been resorted to. Probably we have not altogether done with them yet; and "negotiability by estoppel" has recently been added to our perplexities.<sup>2</sup>

#### FREEDOM FROM EQUITIES.

There are generally supposed to be two points at which "negotiability" affects the rights of the holders of bills and notes. The first has regard to equities affecting liability upon them; and the second relates to the equities of the real owner of the paper against some holder of it who claims title through a finder, a thief, or a fraudulent trustee. These two cases must

<sup>1</sup> Recent legislation in many jurisdictions has merged courts of equity and law into one court. Nevertheless we still speak of equitable estates, by which we mean those that are recognized by the one court and tabooed by the other.

<sup>2</sup> See *infra*.

be treated separately in order to ascertain accurately the true foundation of the law which governs them. The law we know fairly well; what is the rationale of that law?

I. *Equities of the Obligors.*— There is a choice of explanations in the case of the first of these problems (Why cannot the maker of a note set up his equities as against a *bona fide* transferee of it?); and neither of them is indebted for its rationality to the law merchant:

(a) One of them has already been indicated: the maker of a note is liable upon it to a holder in due course, although he may have equities, because

“the note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer.”<sup>1</sup>

Observe carefully what is here meant. It is not that the transferee does not acquire title to a note “by virtue of any assignment” of it; but that, having so acquired it, the promise that he sues upon is one directly with himself. That is to say, he does not allege that the maker promised the payee that he would pay a third person; but that the promise was to the transferee, although at the time of the promise he was an unascertained person. In this view the case would be analogous to promises frequently made by advertisement to pay to the finder of a lost article, in which the promise is not with the newspaper (as we have noted), but with the person who answers the description contained in the promise. The promise is “an original and direct promise moving from the” advertiser to the finder.

(b) Perhaps, however, the better view is that of Page Wood, L. J., who, in holding a company liable upon its bonds notwithstanding equities between it and the original holder, said:

“Where there is a distinct promise held out by the company informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own.”<sup>2</sup>

In other words, although there may be equities, yet the company is estopped from setting them up. It issued bonds redeemable to bearer; it was aware that the bonds, being ambulatory, would probably be transferred to third parties; it might

<sup>1</sup> *Ante*, p. 376.

<sup>2</sup> *Re General Estates Co. (1868)*, L. R. 3 Ch. 758; 38 L. J. Ch. 233.



have placed upon the face of the bonds notice of the equities; it enabled the original holder to deceive innocent purchasers, and it is consequently estopped from setting up its equities. Here we are upon firm ground. No support is required from the law merchant, nor from "negotiability." We are not in antagonism to the general law. We are appealing to it.

II. *Equities of the True Owner.*—When a thief, a finder or a fraudulent trustee of a "negotiable" instrument transfers it to a holder in due course, it is said that the transferee takes it free from the equities, meaning thereby that a good title passes to the purchaser. But the phrase is wrong. The transfer does not affect any *equity* of the true owner of the document. It disturbs his legal title. This premised, let us ascertain the rationale of the law.

The usual suggestion is "law merchant" and "negotiability" in hopeless antagonism to the general law:

"The law merchant validates in the interest of commerce a transaction which the common law would declare void for want of title or authority."<sup>1</sup>

And thus, when the question of title to lost, stolen or misappropriated bonds came to be decided, and the courts felt that transferees in due course ought to be protected, the Canadian<sup>2</sup> and American<sup>3</sup> judges declared that the bonds were "negotiable." That was thought to be a sufficiently satisfactory solution of the problem.

In England a different and a most peculiar course was adopted. Most of the judges were quite unwilling to hold that bonds were "negotiable," and yet they were unable to see any other ground upon which they could decide in favor of the transferee. They therefore determined that although bonds were not "negotiable," yet that the persons dealing with them were estopped by their form (payable to bearer) from so saying. We shall return to this point.

"Negotiability," then, whether real or by estoppel, is the reason assigned for holding that the transferror's title may be improved by his assignment; but this explanation is altogether unsatisfactory, for "negotiability," as we have seen, itself stands very much in need of explanation.

<sup>1</sup> *Ante*, p. 371.

<sup>2</sup> Daniel on Negotiable Instru-

<sup>3</sup> *McKenzie v. Montreal* (1878), 29 U. C. C. P. 371. And see *infra*.

## ESTOPPEL BY OSTENSIBLE OWNERSHIP AND AGENCY.

Although without much direct support, the present writer ventures to suggest that the true foundation for the decision of such cases is to be found not in "estoppel by negotiability," nor in "negotiability" of any kind, but in estoppel by ostensible ownership or ostensible agency.

Let us commence with *Nemo dat quod non habet*. That proposition looks as though it ought to be universally true. But it is said that it fails in the case of "negotiable" instruments, and that a man can give that which he has not got, provided he is dealing with a "negotiable" document. Is the principle a true one? And, if so, are "negotiable" documents exceptions, and the only exceptions to it?

Let us remember that if a thief sells a horse in market overt he gives a title that he has not got. And if a mortgagor, having been foolishly intrusted by the mortgagee with the title-deeds, conveys to an innocent purchaser, he gives that which he has not got.<sup>1</sup> In short, the cases are legion in which ostensible owners of property give *bona fide* purchasers that which they have not got.

But we are going much too fast, and, although with plenty of precedent for it, are using language in much too loose a fashion. Is it true that an ostensible owner of property can convey to a purchaser a better title than he has? Should the true owner of a horse stand by while a pretending owner sold the animal to an innocent purchaser, it would be quite inaccurate to say that the vendor gave a better title than he had. He could not do so. And the language really imports nothing but this: that although the purchaser has acquired no title at all, yet that the true owner is estopped from so saying.

*Nemo dat quod non habet* is then true — universally true; but its truth in no way prevents an owner of property from being estopped by his conduct from setting up his good title as against a transferee who has none.<sup>2</sup>

That is the point. And it applies as well to "negotiable" instruments as to all other sorts of property. When so applied

<sup>1</sup> *Perry-Herrick v. Attwood* (1857). <sup>2</sup> See a good discussion of the 2 De G. & J. 21; 27 L. J. Ch. 121; maxim in *McMahon v. Sloan* (1849), *Brocklesby v. Temperance* (1895), A. 12 Pa. St. 229. C. 173; 64 L. J. Ch. 433.

it solves all the difficulties which, being thought to be insoluble, have been referred to the inscrutable play of the law-merchant operating in antagonism to the common law.

Remembering, then, that ostensible ownership may often estop a true owner (of all sorts of property) from setting up his title as against an innocent purchaser, attention must be directed to the fact that the appearance of ownership takes its color sometimes from the character of the property in question, sometimes from the nature of the usual employment of the ostensible owner, and sometimes from the customs of the locality in which the transaction takes place.<sup>1</sup> Observe next the distinction between the appearance of ownership (1) of goods and (2) of ambulatory instruments. Possession of goods is (usually) no indication of ownership of them, and therefore no one is misled by possession; but —

“Every holder of the bill takes the property, and his title is stamped on the bills themselves. The property and possession are inseparable. This was necessary to render them negotiable; and in this respect they differ essentially from goods of which the property and possession may be in different persons.”<sup>2</sup>

A holder of a bill then appears to be the owner of it, while there is usually no such appearance in the case of goods. Now the law of estoppel by ostensible ownership of goods is well known, and may shortly be stated to be, that if an owner permit another to appear to be the owner he will be estopped as against persons dealing with that other. And the rule includes of course ambulatory instruments; the only distinction between them and goods being as to the circumstances which constitute

<sup>1</sup> See ch. XXVI.

<sup>2</sup> *Collins v. Martin* (1879), 1 Bos. & P. 651. And see per Lord Mansfield in *Peacock v. Rhodes* (1781), Doug. 636; *Saltus v. Everett* (1838), 20 Wend. (N. Y.) 276; *Murray v. Lardner* (1864), 2 Wall. 110; *Craig v. Vicksburg* (1856), 31 Miss. 216; *Commissioners v. Clark* (1876), 94 U. S. 278, 285; *Martin v. Martin* (1898), 174 Ill. 371; 51 N. E. R. 691; Cent. Dig. vii, 2351, 2, 8. The language quoted in the text is inaccurate. Property and possession of bills, as of aught else, are separable; otherwise I could never bring trover for bills against my

book-keeper. What is meant is that possession and appearance of property are inseparable. Even that is not universally but only commonly true. Circumstances may sometimes indicate agency, and not title. It is very instructive in this connection to note the reason why assignment of a bill or note by a separate paper, and not by indorsement, is said to pass the equitable title only: “For such mode of transfer separates the evidence of ownership from the paper itself.” See *Daniel on Negotiable Instruments*, § 748.

appearance of ownership. In the case of ambulatory documents mere possession of them is enough;<sup>1</sup> while as to goods there must be something more. But in both cases alike the true owner must avoid the appearance of ownership in another person. And therefore the owner of an ambulatory instrument must, if he wish to be safe, keep it in his own possession.

*Estoppel by Ostensible Agency.*— Sometimes the validity of a transferee's title must be attributed to ostensible agency rather than to ostensible ownership. In the case of goods, for example, the owner may be estopped by a person alleging his agency to sell, although none in fact existed — if the owner has permitted the appearance of agency. The usual case of a sale by a factor in defiance of his instructions is a sufficient illustration of the point. In the same way a bill-broker having bills in his possession may be understood to be an agent merely; and a transferee of the bills would therefore be unable to plead that the broker was the ostensible owner of them. Ostensible agency to deal with the bills would answer the same purpose.

*Lost or Stolen.*— It may be suggested that this explanation is insufficient in the case of lost or stolen documents. No doubt it may be said if an owner of bills or of goods permit the appearance of ownership or agency in another person he ought to be estopped as against an innocent purchaser; but how can that apply to cases in which the true owner gives no such permission, to cases in which, indeed, he may be actively endeavoring to neutralize false appearances?

Much analogy to the law of estoppel is to be found in the department of torts which declares for liability as well where injury is due to carelessness as where it is the result of premeditation. And so also in the law of estoppel if, through the carelessness of the true owner of property, another person is enabled to pose as its owner, he may be estopped to the same extent as if the deception were designed.

An owner of ambulatory instruments is aware that possession of them is evidence of their ownership. It behooves him, therefore, to exercise "consummate caution" with regard to them, and if they escape him, he and not an innocent purchaser

<sup>1</sup> Possession of an equitable assignment of the fund. *State v. Hastings* (1862), 15 Wis. 83.

ought to suffer. This law is not more drastic than that which provides that

"more than ordinary care, nay 'consummate caution,'<sup>1</sup> is required of persons dealing with dangerous weapons;"<sup>2</sup>

and is supported by the dictum of Lord Coleridge:

"A man may be more careless with regard to the custody of a thing that can be made available only by means of forgery than if by mere larceny;"<sup>3</sup>

more careless, for example, of a wardrobe, than of money or company bonds.

Owners of ambulatory instruments have two courses open to them. They may, by appropriate indorsement, restrict the transferability of their documents; or they may leave them payable to bearer. If they adopt the former alternative they are safe from loss and theft. But if, for their own purposes, they prefer that the instruments should remain payable to bearer, they must provide sufficiently against their escape, in order that innocent purchasers may not be swindled. This doctrine found acceptance, as early as 1764:

"Though both the claimants are innocent, yet as Bicknell lost the note and Grant took it in the course of trade *bona fide* and upon a valuable consideration, Grant has the better equity. But if their equity were only equal, it is a known and good rule that *melior est conditio possidentis*, and that would be sufficient to turn the scale; if there was negligence on one side and none on the other, that also would turn the scale; and if there be any on either side in this case it should seem to have been rather imputable to the person who lost it than to him who thus took it in the course of trade."<sup>4</sup>

And in 1820 Mr. Justice Best, in dealing with misappropriated exchequer bills, which the owner had kept in blank instead of rendering them useless to others by filling in his own name, said:

"It is the plaintiff's own negligence in not filling up the blank that has rendered it impossible for the defendants to ascertain that he had any right to it; and it would therefore be inconsistent with the law of justice<sup>5</sup> that under such circumstances he should be allowed to call on them to make good the loss that had arisen from the fraud of his agent."<sup>6</sup>

<sup>1</sup>Per Earle, C. J., in *Potter v. Faulkner* (1861), 1 B. & S. 805. And see *Dixon v. Bell* (1816), 5 M. & S. 198.

<sup>2</sup>*Pollock on Torts* (5th ed.), 46, 455.  
<sup>3</sup>*Arnold v. Cheque Bank* (1876), 1 C. P. D. 581; 45 L. J. C. P. 582; *Hatchett v. Gibson* (1848), 13 Ala. 587.

<sup>4</sup>Per Willmot, J., in *Grant v. Vaughan*, 3 Burr. 1526. See the same reasoning applied to vouchers in *Cowdry v. Vanderberg* (1879), 101 U. S. 572; to bills of lading in *Lickbarrow v. Mason* (1787), 3 T. R. 71; to stock certificates, with blank but signed transfers and powers of attorney, in *National v. Gray* (1808), 13 App. D. C. 276. *Contra*, *Scollans v. Rollins* (1899), 53 N. E. R. 863 (Mass.).

<sup>5</sup>More specifically estoppel.

<sup>6</sup>*Wookey v. Pole* (1820), 4 B. & Ald. 1.

Bills and notes if stolen or found may be passed with a good title; bonds may now be said to be in the same category;<sup>1</sup> they are so placed because they are of ambulatory character; and the same considerations that warrant such law as to these instruments will justify the application of its fundamental principle to all other ambulatory documents. Let their owners observe "an appropriate measure of prudence to avoid causing harm" to others.<sup>2</sup>

#### ESTOPPEL AND AMBULATORY INSTRUMENTS.

Aided by the principles of estoppel let us for a moment consider an ambulatory instrument apart from all legal notions of negotiability and law merchant and fictions. The case is the simplest. Take the usual points:

1. I promise to pay to A. or bearer; or a company issues a debenture payable to A. or bearer; or a bank issues a deposit receipt redeemable to bearer; or a man gives me a voucher payable to my order; there are equities between the original parties to the document; but these equities cannot be set up between the obligor and the transferee. Why? Because the obligor intended the document to be ambulatory; he enabled the holder to pass that which appeared to be an unconditional obligation; and he is estopped by the assistance which he has rendered to the misrepresentation of no equities.

2. I give to "Galley" an acceptance, blank as to amount, authorizing him to fill it up for £100; he inserts £200; and I am liable to a holder in due course for the larger amount. Why? Not because Galley had authority; nor because he must (despite the evidence, and by fiction) be held to have authority; but because he had ostensible authority to fill up the blank for any amount the stamp would cover;<sup>3</sup> and I am estopped because I equipped him with such appearance of authority.<sup>4</sup>

<sup>1</sup> Venables v. Baring (1892), 3 Ch. 527; 61 L. J. Ch. 609; Bechuanaland B. A. (1862), 7 H. & N. 608; 31 L. J. Ex. 425; 2 H. & C. 175; 32 L. J. Ex. 273; Bangor v. Robinson (1892), 52 Fed. R. 520.

<sup>3</sup> Or for any amount whatever, in jurisdictions where there are no stamp laws.

<sup>2</sup> Ante, p. 80. The law has not, however, as yet gone that far. Ex parte Swan (1859), 7 C. B. N. S. 400;

<sup>4</sup> See chs. XXV, XXVI.

3. Suppose that the holder of an ambulatory instrument intrusted it to some agent, who fraudulently transferred it to an innocent purchaser; the holder must sustain the loss. Why? Because the agent appeared to be the owner of the instrument; the true owner enabled him so to represent; and the true owner is therefore estopped by the assistance rendered to the misrepresentation of ownership. Possession of a chattel is not usually ostensible ownership of it, but

"every holder of the bills takes the property, and his title is stamped on the bills themselves. The property and possession are inseparable."<sup>1</sup>

The holder of a bill or note is therefore the ostensible owner of it.

4. Suppose that the holder of such an instrument loses it, or that it is stolen from him; a transferee of a finder or thief will take a good title. Why? Because of the ostensible ownership of the finder or thief. But how has the true owner assisted in any misrepresentation of ownership? By lack of vigilance in its custody; or, at all events, by the fact that he chose, knowing the risk, to keep the instrument in easily transferable form. He might have restricted its negotiability by a word. He cannot, for his personal convenience, throw risks upon other people.

*Illustrations.*—A few words in illustration: If I send my horse to boarding-stables, no one has the right to presume that the horse is there for sale. But if I should send him to sale-stables—that is, to a place which is devoted solely to the custody of horses on sale,—I would certainly be estopped by ostensible agency from asserting my title as against a purchaser in due course.<sup>2</sup> No special law decrees this difference. The general law of estoppel is ample. In the first case the circumstances do not amount to a representation of agency; in the second they do; and ostensible agency may result in estoppel. Precisely the same law applies to bills and notes. Blanks in them indicate agency to fill up, and ostensible power will estop.

In France the rule as to movables is "Possession vaut titre." Chattels "are there on the same footing as these bonds, transferable by delivery, are with us."<sup>3</sup> But it is impossible to say

<sup>1</sup> *Ante*, p. 394.

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

<sup>3</sup> Per Ritchie, C. J., in *Young v.*

*MacNider* (1895), 25 S. C. Can. 278.

But see per Blackburn, J., in *City*

*Bank v. Barrow* (1880), 5 App. Cas. 678.

that in France it is the law merchant that declares in the interest of commerce, as to all movables, that "honest acquisition confers title." It confers title because "possession vaut titre;" and that is the reason also with us in the case of bills and notes.

Suppose that a mortgagee intrusts the deeds to the mortgagor, who fraudulently deposits them as security for a loan; the mortgagee is estopped. Why? Because he has enabled the mortgagor to appear as the unincumbered owner.<sup>1</sup> That is an application of the familiar rule of estoppel. Now suppose that the owner of a bill intrusts it to another, who fraudulently transfers it for his own benefit; the owner again loses. But this is said to be by virtue of the law merchant, which "validates in the interest of commerce a transaction which the common law would declare void."<sup>2</sup> The results are identical, but are said to be arrived at by antagonistic principles.

The holder of a note and a land mortgage as collateral security placed them in the hands of another under such circumstances as enabled the latter to represent himself as their owner; he did so, and assigned them to an innocent purchaser.<sup>3</sup> And are we to say that the law which declared in favor of the transferee as to the mortgage was the common law; that the law which declared in his favor as to the notes was the law merchant; and must we add, in the latter case, that "to this despotic but necessary principle the ordinary rules of the common law are made to bend?"

If "negotiability" and legal estate principles are to continue to influence decisions, the effect of the statutes authorizing the assignability of "non-negotiable" choses in action will raise some perplexing questions. In this way: Bills and notes were assignable at law; a purchaser of them for that reason (shall we say?) took them free from equities; now by statute other choses are transferable at law; purchasers of them therefore ought also to take free from equities; but the same statute provides that they are to be held subject to equities.

and *Saltus v. Everett* (1838), 20 Wend. 4 Jur. N. S. 101; 27 L. J. Ch. 121; (N. Y.) 276. The new German Code *Brocklesby v. Temperance* (1895), A. C. 173; 64 L. J. Ch. 433. (1896) proceeds upon the French principle: See §§ 931-935.

<sup>1</sup>*Perry-Herrick v. Attwood* (1858),

<sup>2</sup>See *ante*, p. 371.

<sup>3</sup>See *ante*, pp. 19, 20, note.



The difficulty is emphasized when attention is directed to a "negotiable" and a "non-negotiable" note. A note may be made payable to "A. and no other person." Prior to the statutes such an instrument could not be transferred at law, although it was assignable in equity. It may now be completely transferred, and the legal property will pass to the purchaser. Why then does the statute provide that the usual effect of an assignment of a legal interest shall not ensue? Why will the purchaser not take free from unknown equity?

The answer is to be found only by disregarding old ideas of "negotiability" and legal estate, and by attending to the distinction between contracts which are intended by the parties to be ambulatory, and those which are intended to be fulfilled as between the parties only. For although now both classes of contracts are assignable at law, and therefore the principles regulating the rights of transferees of them must be identical, that is far from saying that all distinction which exists in the contracts themselves must be abolished. It will at once be seen that if I promise to pay to "A. or bearer," a transferee of the contract may well assume the absence of equities between me and A.; whereas, if I promise to pay to "A. and no one else," the opposite assumption should be drawn. If I made a note to "A. or bearer" and underwrote a warning as to equities between A. and me, a transferee would take subject to such equities. Restricting the negotiability of a note by drawing it to "A. and no one else" has the same effect.

If then we ask, Why is it that transferees of bills and notes take free from equities, and the assignee of some other instruments do not? the answer is as follows: Bills and notes are usually intended to be ambulatory — intended to be redeemed to third parties; and these other instruments, although assignable at law, are usually intended to be redeemed as between the original parties to them; to both cases must be applied the principles of purchasers for value without notice and estoppel;<sup>1</sup> certain instruments indicate by their form the absence of equities, while certain other instruments carry with them (expressly or by convention) a warning or notice of equities; a purchaser

<sup>1</sup>In the light of chapter XI the "out notice and" might be omitted words "purchasers for value with- from this sentence.

for value may take free from equities of which he has no notice, but not from those of which he had warning.

There seems, then, to be a very plain path through all this, when the law merchant obstructions are removed. The principle employed is not only not antagonistic to the general law, but is a part of it. And that principle is at the present time in very active operation, and is being applied, although not always consciously, to the decision of many cases.

#### NEGOTIABILITY BY ESTOPPEL.<sup>1</sup>

Although the reader may now see his way through the various difficulties with which we have been dealing (without the aid of law merchant or "negotiability"), he cannot afford to be ignorant of the doctrine of "negotiability by estoppel" which has been put forward as the solution of all such questions, and a few pages must therefore be devoted to it.

Pressed by the apparent impossibility of applying the word "negotiable" to bonds—documents under seal with various contractual complications—it was at length ingeniously suggested that the parties might be estopped from saying that such instruments were not negotiable. In other words, that although the courts themselves would have to declare as a matter of law that certain documents had a certain character and none other, yet that a litigant could not only contend to the contrary, but might even preclude himself from asserting the law to be that which it indubitably is.

Observe the wide difference between this sort of estoppel and that above suggested, namely, that a man may be estopped from denying the ostensible ownership or agency of another person. Estoppel from denying negotiability means, or implies, this: If these documents were by law negotiable, the transferee would have a good title to them, free from equities; the owner is estopped from saying that they are not negotiable; therefore the transferee has a good title. The other view is entirely different. It is this: If the transferrer had been the owner of these documents, or had he had the owner's authority to sell them, the transferee would have a good title; the owner is es-

<sup>1</sup>The phrase belongs to Bowen, L. J.: *Easton v. London* (1886), 34 Ch. D. 118; 56 L. J. Ch. 509.

topped from saying that the transferrer was not the owner or his duly authorized agent; therefore the transferee has a good title. In the former case the estoppel is as to the legal character of a document. In the latter as to ownership or agency with respect to it. With the latter class of cases — estoppel by ostensible ownership or agency — we are perfectly familiar. Estoppel as to the legal character of a document is novel.

Negotiability by estoppel was put in this way by Lord Cairns:

“The scrip itself would be a representation to any one taking it—a representation which the appellant must be taken to have made or to have been a party to—that if the scrip were taken in good faith and for value the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed for a moment that the instrument was not negotiable; that no right of action was transferred by the delivery; and that no legal claim could be made by the taker in his own name against the foreign government; still the appellant is in the position of a person who has made a representation on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value; and who has put in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation. My lords, I am of opinion that on doctrines well established, of which *Pickard v. Sears* must be taken to be an example, the appellant cannot be allowed to defeat the title which the respondents have thus acquired.”<sup>1</sup>

This is the view that the estoppel is as to the legal character of the document. The representation “made on the face of his scrip” is “that it would pass with a good title.”

In the same case Lord Hatherly presented the other view, namely, that the broker was the ostensible owner or agent for the sale of the scrip; that the true owner had enabled the broker so to appear, and that the owner was therefore estopped. But, strangely enough, he indicates that this view is the same as that propounded by Lord Cairns. Lord Hatherly said:

“The appellant, therefore, gives the broker scrip which is and for the last fifty years has been disposed of every day in the market, and has for all those years been so disposed of upon the sole representation by the holder, the seller or pledger to the person to whom he wishes to sell or pledge it, and that without any suspicion being aroused to suggest the necessity or even the propriety of asking a single other question. Can a person who in that manner acquired the instrument, who knows that as long as he has it safe in his pocket, in his box, or in his desk, he can rely on that instrument; but that as soon as he parts with it the new holder will, as he did, become in a position to claim those bonds which he himself might have claimed if he had retained possession of the scrip—can he, by placing it in the hands of a broker, with no instructions whatever, except to dispose of it as he may direct—can he according to the principle of the cases which were referred to in the course of the argument, with regard to *limited agency*, hold any person to be bound by that limited agency, when, on the face of it, that which constitutes, you may say, the authority of the agent, namely, the possession of the document, appears to be sufficient

<sup>1</sup> *Goodwin v. Roberts* (1876), 1 A. C. 490; 45 L. J. Q. B. 748.

alone for obtaining the bonds in question? *I agree with my noble and learned friend on the woolsack in thinking that this case might be disposed of on that ground alone.*"

In a later case<sup>1</sup> the court of appeal judges adopted Lord Cairns' view, holding that the owner must lose because he was aware that, although the bonds were

"not strictly negotiable securities, they were to be treated as such between the parties."

Bowen, L. J., referred to both views of estoppel, and indicated that, practically, they ran into one another. He said:

"This second way of looking at the matter may be dealt with from two points of view, but practically they run into one another. You may say that Lord Sheffield — having placed in the hands of his agents these bonds with the intention that they should be transferred beyond these agents, and held his agents out to the world as clothed with authority to transfer them as negotiable, cannot afterwards, by any unknown dealing or any limitation of authority which he has conferred on his agents, prejudice those who took the bonds which have been so floated. Or you may say that as regards Lord Sheffield and the bank, these bonds have become negotiable by estoppel, and, therefore, Lord Sheffield is precluded from saying that the legal title to these bonds is not in the bank."

In *London v. Simmons*<sup>2</sup> Lord Watson recurs to Lord Cairns' view of "negotiability by estoppel." He said:

"Each bond, according to its tenor, appears to me to represent that the document will pass from hand to hand, and that a *bona fide* holder will be entitled to claim fulfillment of its terms."

But he seems also to approve of the other view, for he added:

"I think the appellants were entitled to assume, in the absence of anything to indicate the contrary, that whether the bonds belonged to Delmar or to a customer, he had full authority to deal with them."

The present writer has found it impossible to accept Lord Cairns' view of estoppel, although so substantially indorsed. Reduced to simple terms the proposition is this: A non-negotiable instrument payable to bearer is in itself a representation that it is a negotiable instrument, and such representation will estop some one from denying that such is its legal effect. But surely a non-negotiable instrument or any other document cannot in itself be a representation that it is anything but what it is. If, connected with the instrument, there was some misrepresentation of its character, that would be another matter. A man may allege that he is a woman, but he can hardly, himself, be such a representation.

Observe further that the point is that the document is a representation "that it would pass, with a good title, to any one

<sup>1</sup> *Easton v. London, etc. Bank* (1886), *Bank* (1888), 18 A. C. 333; 57 L. J. 34 Ch. D. 95; 56 L. J. Ch. 369; S. C. Ch. 986.  
<sup>2</sup> (1892) A. C. 213; 61 L. J. Ch. 723.  
*sub nom. Sheffield v. London, etc.*

on his taking it in good faith and for value." But the only feature that can be referred to in support of this is that the instrument was payable to "bearer," and that surely cannot amount to a representation that according to law the title of a new bearer would be any better than that of an old one.<sup>1</sup>

Another essential ingredient, too, of estoppel is entirely absent from the cases, namely, evidence that the purchaser of the bonds was misled by the misrepresentation, and upon the faith of it changed his position. The probabilities are that he had exactly the same opinion as the true owner of the documents had, and that he acted exclusively upon his own ideas of negotiability.

#### CONSIDERATIONS IN SUPPORT.

*Market Overt.*—It is noteworthy that the application of the law of estoppel suggested by the present writer, or something very nearly akin to it, was the foundation for holding that a purchaser from a thief in market overt was to be protected from the true owner. Cockburn, C. J., in *Crane v. London* said:

"Look to the origin of the law as to such sales. It arose at the time when there was much greater simplicity of practice between buyer and seller. The practice then was to buy in markets at fairs. Shops were very few in London, and persons whose goods were taken feloniously would know to what place to resort in order to find them. I can therefore quite understand that the law in question was established for the protection of buyers, that if a man did not pursue his goods to market where such goods were openly sold, he ought not to interfere with the right of the honest and bona fide purchaser."<sup>2</sup>

Observe the close analogy here presented to estoppel as applied to bills and notes. As we have seen, "title is stamped on the bills themselves;" the holder may, therefore, properly be presumed to be the owner; the real owner might have kept them "in his pocket;" but if he permitted others to have them, the representation of ownership which they carried with them would estop him from asserting his title. So it is in the case of sales of goods in market overt. There possession indicates ownership, and if a man does not "pursue his goods to market," but allows the representation of ownership in others to be made, "he ought not to interfere"—he is estopped.

<sup>1</sup> See the judgment of the same learned judge in *Re Natal* (1868), L. Ch. D. 659; 57 L. J. Ch. 826. R. 3 Ch. 360; 37 L. J. Ch. 362. Also *Williams v. Colonial Bank* (1888), 36 L. J. Ch. 826; 57 L. J. Ch. 826. <sup>2</sup> (1864) 5 B. & S. 318.

*Loss of Seal.*— Further support for the views advanced may be gathered from the olden times, when every man of property had his own distinctive seal, with which, rather than with his signature, he executed his obligations. In those days a finder, a thief, or a fraudulent custodian of the seal might bind the owner in favor of innocent persons, upon the ground that “*he (the owner) should have taken better care of it.*” Sufficient of the learning upon this subject for present purposes is contained in the following extract from a judgment of Wills, J.:

“In Glanvil, book 10, ch. 12, it is said that the man who intrusts his steward with his seal will be bound by it if the steward seals a deed with it, for *he should have taken better care of it.* Bracton (edition published by the Record Commissioners, and edited by Sir Travers Twiss, vol. vi, p. 126) says that a man may get rid of his deeds by showing various matters, such as duress, mistake, or the like, but adds the qualification that *there must be nothing in the way of negligence* on his own part—as in intrusting his seal to his seneschal or his wife. Britton says that a man may plead that the writing ought not to affect him, for when it was made he had lost his seal and caused it to be cried and published at the churches and markets; so that if anything was made under that seal after a certain day on which it was lost it ought not to affect him (book 1, ch. 29, pl. 17). A curious account is given in Mr. Nicholl’s note (vol. 1, p. 164 of his edition) of a plea of this description, relating to the seal of Arnold de Thorley, which was met and defeated by production of a record of acknowledgment at the Hertford Assizes 39 Hen. III. of the seal in question by the said Arnold; and two advertisements of the loss of a seal, warning the public that an instrument sealed with it after a certain day would be forgery, are given in Blount’s Law Dictionary, title “Seal” and “Sigillum.” The passage from Bracton is reproduced in Fleta, who wrote towards the end of the thirteenth century, but without any additional remarks.”<sup>1</sup>

Neglect as to the custody of your property then, be it horses, seals or transferable documents, may, where other persons are misled by ostensible title in possessors of them, estop the owner from following his property. This is general law and was not borrowed from the law merchant.<sup>2</sup>

*Further Consideration in Support.*— Acknowledging that there is not much direct and specific support for the proposition contended for in this chapter, it is nevertheless of interest to note the trend in that direction (culminating in something little short of formulation of the principles enounced), and to put in contrast the older view and the reasons for it.

<sup>1</sup> (1897) 21 Q. B. D. 166.

<sup>2</sup> In Pollock on Contracts (6th ed.), 135, referring to the loss of seals, it is said: “That the practice of publishing formal notice in case of loss really existed is shown by the exam-

ple given in Blount’s Law Dictionary, s. v. Sigillum, dated 18 Ric. II. *In modern law such questions, when they occur, come under the head of estoppel.*”

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Commencing with money, it is usually said that the reason that a thief can pass a good title is because "of the currency of it; it cannot be recovered after it has passed in currency;"<sup>1</sup> that is to say, a good title to money passes because it is money! And if we ask for something more satisfactory than this, we may find it in Lord Shand's remark (one hundred and thirty-five years afterwards) with reference to some cash which had been intrusted to an agent, and by him wrongfully diverted to his own purposes:

"He has thus the opportunity, and may take advantage of this, to misapply and to appropriate to his own use the money intrusted to him."<sup>2</sup>

This reason must, however, find foundation in some specific law, and its proper reference is clearly apparent. The true owner enabled his agent to pose as owner, and is therefore estopped by the assistance rendered to his misrepresentation of ownership.

If the reason in the case of money was because it was money, the rule was applied to bills and notes because they are "like so much money," and are "negotiable."

"If a bill be payable to A., or bearer, it is like so much money paid to whomsoever the note is given; that let whatever accounts or conditions soever be between the party who gives the note, and A. to whom it is given, yet it shall never affect the bearer."<sup>3</sup>

"Bills of exchange and promissory notes are representatives of money circulating in the commercial world as such."<sup>4</sup>

"The reason is that such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country."<sup>5</sup>

"A negotiable instrument for the general convenience of commerce has been allowed to have an effect at variance with the ordinary principles of law."<sup>6</sup>

Money passes with a good title because it is money; and notes because they are like money; and then a foreign bond because it is like a note. It is

"in its nature precisely analogous to a bank note payable to bearer, or to a

<sup>1</sup> Per Lord Mansfield, in *Miller v. Freeman*, 257. And see per Channell, *Race* (1758), Burr., p. 457. And so *B.*, in *Moss v. Hancock* (1809), 2 Q. B. 119; 68 L. J. Q. B. 657; *Byles on Bills* (15th ed.), 188; *Foster v. Green* (1862), 31 L. J. Ex. 158.

<sup>4</sup> *Friedlander v. Texas* (1889), 130 U. S. 416.

<sup>5</sup> Per Williams, J., in *Ingham v. Primrose* (1859), 7 C. B. N. S. 32.

<sup>6</sup> Per Tindal, J., in *Jenkyns v. Usborne* (1844), 7 M. & G. 699; 13 L. J. C. P. 196.

<sup>2</sup> *Thomson v. Clydesdale* (1803), A. C. 291; 62 L. J. P. C. 91.

<sup>3</sup> *Crowley v. Crowther* (1702), 2

bill of exchange indorsed in blank, Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it has power to give title to any person honestly acquiring it."<sup>1</sup>

The transition stage from mere empiricism to rationality may be represented by language of Lord Cairns with reference to certain misappropriated scrip for bonds:

"The appellant might have kept his scrip in his own possession, and if he had done so no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent; and although it is stated that it remained in the agent's hands for disposal, or to be exchanged for the bonds when issued as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant or of any private instructions he might have given to his agent."<sup>2</sup>

In other words, the broker had ostensible authority to sell; ostensible authority cannot be displaced by "private instruction;" therefore, although there was no authority to sell, yet the true owner is estopped from so asserting. That is the ordinary law of estoppel.

To the same effect, but much more nearly approaching scientific statement, is the language of Mr. Justice Tascherau in a case in the Canadian Supreme Court with reference to bonds:

"In constituting his agent the apparent absolute owner of these securities and conferring upon him all the *indicia* of ownership, he precludes himself from disputing the title of any subsequent *bona fide* transferee."<sup>3</sup>

There is much in the United States authorities which may be cited in support of some of the views here advocated. For example, in *Colebrook on Collateral Securities* it is said:

"The principle of estoppel by conduct, that when the owner of property in any form clothes another with the apparent title and power of disposition, third parties who are thereby induced to deal with him are protected, is applied to choses in action non-negotiable in character."<sup>4</sup>

"The rules of estoppel *in pais* are enforced against an owner of a non-negotiable chose in action who has, with mistaken confidence, intrusted the *indicia* of title and the apparent absolute ownership by indorsement and delivery to a third person, so that he is able to deceive *bona fide* pledgees advancing value upon the faith and credit of such documents of title and apparent absolute ownership without notice that the act of the pledgee is a fraudulent misappropriation and an unauthorized act."<sup>5</sup>

<sup>1</sup> *Gorgier v. Mieville* (1824), 3 B. & C. 45.

<sup>2</sup> *Goodwin v. Robarts* (1876), 1 App. Cas. 476; 45 L. J. Q. B. 748.

<sup>3</sup> *Young v. MacNider* (1895), 25 S. C. Can. 372, 379.

<sup>4</sup> P. 590; citing *Cowdry v. Vanderburgh* (1879), 101 U. S. 572; *McNeil v. Tenth Nat. Bank* (1871), 46 N. Y. 325. See to same effect, per *Boyd, C.*, in *Re Central Bank* (1899), 17 Ont. 586.

<sup>5</sup> P. 487; citing *Coombes v. Chandler* (1877), 83 Ohio St. 178; *Moore v. Bank* (1873), 55 N. Y. 41; *McNeil v. Tenth Nat. Bank* (1871), 46 id. 325; *Cowdry v. Vanderburgh* (1879), 101 U. S. 572; *Davis v. Beckstein* (1877), 69 N. Y. 442; *Werrich v. Mahoning Co. Bank* (1865), 16 Ohio St. 296; *Dillaye v. Commercial Bank* (1873), 51 N. Y. 345; *Clark v. Roberts* (1881), 25 Hun, 86.



So also in Bigelow on Estoppel:<sup>1</sup>

"It should be observed that while the rule in *Pickard v. Sears* finds most frequent expression in transfers of property, it is not confined to such cases; it includes all cases of false representation and fraudulent silence, whatever the nature of the transfer. . . . So again, if a man purchase *bona fide* and for value an unnegotiable chose in action from one whom the owner has, by assignment or otherwise, conferred the apparent absolute ownership, he obtains a valid title against the real owner, supposing the act of purchase to have been induced by such act of the owner."<sup>2</sup>

And in England in a case<sup>3</sup> in which a transfer of shares, blank as to the purchaser's name, was given to a broker who misapplied it, Lord Herschell said:

"If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, *he is estopped* from asserting his title as against a person to whom such third party has disposed of it and who received it in good faith and for value. And this doctrine has been held by the court of appeals of the state of New York to be applicable to the case of certificates of shares with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently or in excess of his authority sells or pledges them. The bank or other persons, taking them for value without notice, have been entitled to hold them as against the owner. As at present advised, I do not see any difference between the law of the state of New York and the law of England in this respect."<sup>4</sup>

It will be observed that these supporting quotations all deal with "non-negotiable" choses in action. They sufficiently establish the principle that ostensible ownership or agency of such documents may estop the true owner from setting up his title to them. But it has not hitherto been observed that the same doctrine applies to "negotiable" instruments also (why should it not?); and that there is no necessity, in their case either, for an appeal to the law merchant and its "antagonism" to the ordinary law.

<sup>1</sup>5th ed. p. 563; citing *Moore v. Metropolitan Bank* (1873), 55 N. Y. 41; *Henty v. Miller* (1883), 94 N. Y. 64; *Coombes v. Chandler*, 33 Ohio St. 178.

<sup>2</sup>Mr. Bigelow did not observe the general application of this language in his later work (on Bills and Notes) when he wrote (p. 3): "Purchase of land or goods for value and without notice cuts off equities; that is a cardinal rule of law and always has been in courts of equity. But it has never been applied to undertakings to pay in the case of common-law

contracts; applied to undertakings to pay, as purchase for value without notice often is, the principle has reference to bills, notes and checks only."

<sup>3</sup>*Colonial Bank v. Cady* (1890), 15 App. Cas. 257; 60 L. J. Ch. 131.

<sup>4</sup>For the New York law see *McNeil v. Tenth Nat. Bank* (1871), 46 N. Y. 325. See also in Ontario, *Smith v. Rogers* (1899), 30 Ont. 256; and in Ireland, *Horne v. Boyle* (1890), 27 L. R. Ir. 137; *Waterhouse v. Bank of Ireland* (1892), 29 L. R. Ir. 384.

## SUMMARY.

It is advisable to sum up what has been said:

1. A chose in action is ambulatory or non-ambulatory. It may also be sometimes the one and sometimes the other. A promissory note, for example, may be ambulatory (redeemable to third persons) or non-ambulatory (redeemable to a certain person only). It is always "negotiable" in the sense that, being a chose in action arising out of contract, it may be transferred. It is sometimes not "negotiable," in the sense that a transferee of it will take subject to equities.

2. Contractors in ambulatory agreements are estopped as against innocent transferees from setting up equities which may exist between them and their immediate contractees.

3. The true owners of ambulatory contracts may be estopped from asserting their title to them by permitting the appearance of ownership in other persons.

4. These results are in no way due to the law merchant; they are not in antagonism to the general law; they are parts of it.

5. The word "negotiability" with its *double entente* is not only unnecessary, it is disturbing and distracting.

6. There is no such thing as "negotiability by estoppel."

Having thus opened up a new category (ambulatory instruments) let us take a short survey of the documents to be placed in it.

## BONDS.

If the views here advanced are correct, there would seem to be no reason why company bonds should not always have been as "negotiable" as promissory notes;<sup>1</sup> and why a holder of them in due course should not have always been free of equities. Nevertheless it has only been within the last year in England<sup>2</sup> that their absolute "negotiability" has been recognized, and only with the assistance of the invention of a new doctrine was that result arrived at. A short resumé will be instructive.

<sup>1</sup> Reference is intended to bonds intended to be ambulatory. Those of other character are not of course assignable free from equities, for *Jones* (1715), 2 Vern. 692; *Cator v. Burke* (1795), 1 Bro. C. C. 434; *Gould v. Close* (1874), 21 Gr. 273. <sup>2</sup> *Bechuanaland v. London* (1898), 2 Q. B. 658; 67 L. J. Q. B. 988.

The question of the "negotiability" of bonds arose in *Gorgier v. Mieville*,<sup>1</sup> in 1824. Bonds of the King of Prussia payable to the "holder" had been misappropriated by an agent. There was evidence that "bonds of this description were negotiated like *exchequer bills*." Abbott, C. J., said:

"It is therefore in its nature precisely analogous to a bank note payable to bearer or to a bill of exchange in blank. Being an instrument therefore of the same description it must be subject to the same rule of law, that whoever is the holder of it has power to give title to any person honestly acquiring it."

In 1867, in *Re Blakely*,<sup>2</sup> it was held with reference to a company bond payable to bearer, that a transferee could not sue upon it in his own name, but had an equitable title only; that although an assignee of a chose in action takes subject to equities, yet that the obligor can contract to pay free from equities; that a bond payable to bearer is not necessarily such a contract; but that there being in fact at the time of the issue of the bonds an intention of the company that they should be transferred, such intention debarred the company from setting up the equities. In other words, a transferee of company bond payable to bearer was not safe unless he could show that the company had contemplated a transfer of it; and that such intent did not sufficiently appear by the bond being payable to bearer.

With some hesitation this difficulty was surmounted, and it is now said that "the negotiable character of the bond depends on the bond itself;"<sup>3</sup> and that the use of the word "bearer" exhibits an ambulatory intent, independently of evidence of extraneous intention.<sup>4</sup>

Escaping this point (that bonds are negotiable or not according to extrinsic evidence of ambulatory intent), it was said that they could only be negotiable if (as in the case of bills and notes) they were for a certain amount, and payable unconditionally, and at a certain time, and so on. Judges felt themselves much pressed with this objection. Was there a condition for payment by successive drawings;<sup>5</sup> or was there

<sup>1</sup>(1824) 3 B. & C. 45; 2 L. J. K. B. 206. *Glyn v. Baker* (1811), 13 East, 599, had decided the point adversely (subject to the possibility of evidence otherwise) as to East India bonds; as to which see 51 Geo. III., ch. 64.

<sup>2</sup>(1867) L. R. 3 Ch. 154; 36 L. J. Ch. 665.

<sup>3</sup>*Venables v. Baring* (1892), 3 Cl. 527; 61 L. J. Ch. 609.

<sup>4</sup>See *infra*, sub-title "Intended to be assigned."

<sup>5</sup>*Crouch v. Credit Foncier* (1873), L. R. 8 Q. B. 374; 42 L. J. Q. B. 183.

a mortgage as security, with provisions limiting the powers of the bondholder;<sup>1</sup> then there was a contractual relation outside of the promise to pay and associated with it which precluded the idea of "negotiability." No authoritative decision has yet declared that such considerations may be disregarded.<sup>2</sup> We are, however, rapidly reaching an intellectual climate which is very fatal to them; in fact the question will necessarily arise whether such objections can properly be held to affect the "negotiability" of even bills and notes. Though some of the asserted essentials of a note may be absent, yet if the instrument was intended to be transferred, does not a transferee, upon the principles enunciated, take free from equities?<sup>3</sup>

Returning to bonds unaffected by these special provisions, it may be observed that notwithstanding the partial recognition of their "negotiability" the judges were loath to admit it "in the full sense of the word." The term had for so long been confined to bills and notes, and its derivation was so thoroughly understood to be from the law merchant, that it seemed to be impossible to apply it to documents of more modern use. Accordingly in 1873 we find Blackburn, J., saying:

"but as the instruments themselves are only of recent introduction it can be no part of the law merchant."<sup>4</sup>

Bowen, L. J., too, in one case hesitated to say that they were negotiable, suggesting the presence of a seal as being a difficulty in the way.<sup>5</sup> And in another case in the face of evidence and admission that they "are dealt with as negotiable securities," the same learned judge objected that there was no evidence

"that delivery by a person who has no title confers nevertheless a title on a *bona fide* holder for value without notice."<sup>6</sup>

<sup>1</sup> Easton v. London (1886), 34 Ch. D. 95; 56 L. J. Ch. 569; S. C. *sub nom.* Sheffield v. London (1886), 13 App. Cas. 333; 57 L. J. Ch. 986.

<sup>2</sup> Goodwin v. Roberts (1875), L. R. 10 Ex. 76, 837; 1 App. Cas. 476; 45 L. J. Q. B. 748, dealt them a very severe blow.

<sup>3</sup> See practically to that effect, Bank of Hamilton v. Harvey (1885), 9 Ont. 658; 16 S. C. Can. 714.

<sup>4</sup> Crouch v. Credit Foncier (1873), L. R. 8 Q. B. 874; 42 L. J. Q. B. 183.

<sup>5</sup> Easton v. London (1886), 34 Ch. D. 113; 56 L. J. Ch. 569; S. C. *sub nom.* Sheffield v. London, 13 App. Cas. 333; 57 L. J. Ch. 986. No difficulty was felt upon this ground in Canada (Bank of Toronto v. Cobourg (1884), 7 Ont. 1); nor in the United States: Daniel on Neg. Inst., §§ 1487, 1500.

<sup>6</sup> Simmou v. London (1891), 1 Ch. 204; 60 L. J. Ch. 813; (1892) A. C. 201; 61 L. J. Ch. 723.

A further point raised a distinction between foreign and domestic bonds — raised much difference of opinion upon that question,<sup>1</sup> which it may be hoped has been settled in favor of no distinction, by a recent judgment of Mr. Justice Kennedy.<sup>2</sup>

*American Law.*—The United States courts do not appear to have been much troubled with such points. Pennsylvania in 1860, indeed, heroically declared that

“we will not treat bonds like these as negotiable securities. On this ground we stand alone. All the courts, American and English, are against us. Be it so.”<sup>3</sup>

But in 1884 Mercer, C. J., of the same State said:

“The clear intent of the maker was that they should pass as negotiable paper. With the language of negotiability on its face, did the seal impressed thereon destroy the negotiability of this bond?”<sup>4</sup>

No. And with this larger view (what was “the clear intent” of the maker?) the other courts agree.<sup>5</sup>

*Canadian Law.*—The Canadian courts too solved, or at least avoided, all difficulty as to bonds by declaring them to be “negotiable.”<sup>6</sup>

#### OTHER AMBULATORY CONTRACTS.

*Scrap for Bonds.*—It has been said that various objections were made to the recognition of debentures as negotiable instruments upon the ground of lack of some supposed essential

<sup>1</sup>Lang v. Smyth (1831), 7 Bing. 293; Smith v. Wegnellin (1869), L. R. 8 Eq. 198; 38 L. J. Ch. 465; Crouch v. Credit Foncier (1873), L. R. 8 Q. B. 384; 42 L. J. Q. B. 183; Goodwin v. Roberts (1875), L. R. 10 Ex. 76, 345; 1 App. Cas. 476; 45 L. J. Q. B. 748; Picker v. London (1887), 18 Q. B. D. 515; 56 L. J. Q. B. 299; Williams v. Colonial Bank (1887), 36 Ch. D. 493; 57 L. J. Ch. 826; 38 Ch. D. 388; 58 L. J. Ch. 826; S. C. sub nom. Colonial Bank v. Cady, 15 App. Cas. 267; 60 L. J. Ch. 181; Venables v. Baring (1892), 3 Ch. 539; 61 L. J. Ch. 600.

<sup>2</sup>Bechuanaland v. London (1896), 2 Q. B. 658; 67 L. J. Q. B. 936.

<sup>3</sup>Diamond v. Lawrence (1860), 37 Pa. St. 358.

<sup>4</sup>Mason v. Frick (1884), 105 Pa. St. 162. And see Carr v. La Fevre (1856), 27 Pa. St. 418.

<sup>5</sup>DeLafield v. Illinois (1841), 2 Hill (N. Y.), 177; Chaplin v. Vermont (1857), 74 Mass. 575; White v. Vermont (1858), 62 U. S. 575; Mercer v. Haokett (1863), 68 U. S. 83 (overruling the Pennsylvania case of 1860); Morgan v. United States (1885), 113 U. S. 476; Provident v. Mercer (1898), 170 U. S. 18; S. C. R. 788; American Nat. Bank v. American Wood Co. (1895), 19 R. I. 149; 32 Atl. R. 305; Strauss v. United Tel. Co. (1895), 164 Mass. 130; 41 N. E. R. 59; Whiteside v. First Nat. Bank (1898), 47 S. W. R. 1108 (Tenn.); Daniel on Neg. Inst., sec. 1487, 1491a, 1500; Colebrooke on Coll. Sec. 8; Massachusetts Pub. St., ch. 77, § 4.

<sup>6</sup>McKenzie v. Montreal (1878), 29 U. C. C. P. 555; Bank of Toronto v. Cobourg (1884), 7 Ont. 1; St. Cesaire v. McFarlane (1887), 14 S. C. Can. 73.

of form. These variations from old time rigidity were to some extent overlooked, but a point of dissimilarity arose in *Goodwin v. Robarts*,<sup>1</sup> which could not be altogether blinked:

"That these instruments be payable in money has always been essential, and the custom of merchants to that effect has received the sanction of statute."<sup>2</sup>

And here is a case<sup>3</sup> of a document not for money at all, but for the delivery of bonds, and redeemable at very uncertain time. It was as follows:

"Received the sum of twenty pounds, being the first instalment of twenty per cent. upon one hundred pounds stock, and on payment of the remaining instalments at the period specified the bearer will be entitled to receive a definite bond or bonds for one hundred pounds after receipt thereof from the Imperial Government."

Scrip in this form (which was admitted "to pass . . . by mere delivery as a negotiable instrument transferable by delivery") was left with a broker to be dealt with as the owner might direct; and the broker fraudulently pledged it for his own benefit. Ancient law merchant will evidently not help the pledgee. Bills and notes are undertakings to pay money. This document is one declaring that upon payment of money certain bonds will be delivered "after receipt thereof from the Imperial Government." It appears to be an ordinary contractual obligation; and legal-title theories are of no avail. According to all our notions it is "non-negotiable," and the purchaser must take subject to all equities.

The case is at the parting of the ways, or rather, perhaps, at their final rupture, though certain tendencies may remain for a little. Baron Bramwell's great good sense is of inestimable value. A Prussian bond redeemable in money, he says, has been held to be negotiable; and to distinguish between a bond and

"something preparatory to a bond being given . . . would be drawing a distinction which would be utterly unintelligible to the commercial world at large" —

subversion of the legal intellect luckily overlooked. And it was fortunate that Cockburn, C. J., sat in appeal. Ancient law merchant, without which it has been said<sup>4</sup> there can be no negotiability, he thus dealt with:

"Usage adopted by the courts having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to

<sup>1</sup> (1875) L. R. 10 Ex. 76, 343; 1 App. 10 Ex. 76, 345; 1 App. Cas. 476; 45 L. Cas. 476; 45 L. J. Q. B. 748. J. Q. B. 748.

<sup>2</sup> Bigelow on Bills and Notes, 14.

<sup>4</sup> Crouch v. Credit Foncier (1873),

<sup>3</sup> Goodwin v. Robarts (1875), L. R. L. R. 8 Q. B. 886; 42 L. J. Q. B. 183.

prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usage of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some possible and peremptory enactment? It is true that this scrip purports on the face of it to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure."<sup>1</sup>

The House of Lords, however, hesitated.<sup>2</sup> Unprepared to declare for negotiability, their Lordships find relief in estoppel, Lord Cairns promulgating the doctrine of negotiability by estoppel, while Lord Hatherly more correctly, as the present writer thinks, applies the well-known principles of estoppel by ostensible agency. Estoppel of some sort at all events we have arrived at; negotiability by estoppel we have already dealt with.

*Scrip for Shares.*—The case was almost immediately followed by *Rumball v. Metropolitan*.<sup>3</sup> This time scrip for shares (admitted to be customarily passed "by mere delivery as a negotiable instrument transferable by delivery"), deposited with and misappropriated by a broker, is the subject of controversy. *Held*, that the document was "negotiable," and passed free from equities to a holder in due course; but if not, it was at the least "negotiable by estoppel." The commercial world is evidently having its way—the particular language employed being a matter of indifference to it.

*Mortgage-debentures.*—The influence of Cockburn, C. J., was of value in a case preceding those just referred to.<sup>4</sup> Bonds might be negotiable, but what was the position of mortgage-debentures, or rather documents which, containing no promise at all,<sup>5</sup> merely mortgaged a proportionate part of the rates of a municipality? By statute these mortgages were assignable,

<sup>1</sup> L. R. 10 Ex. 352, and see 355, 356; 44 L. J. Ex. 157 ff. See, to same effect, *Mercer v. Hackett* (1863), 69 U. S. 83, where it is said that "this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law."

<sup>2</sup> It is very extraordinary that so

little attention was paid in the case to the Lord Cairns dictum. See *ante*, p. 336.

<sup>3</sup> (1876) 2 Q. B. D. 194; 46 L. J. Q. B. 346.

<sup>4</sup> *Webb v. Herne Bay* (1870), L. R. 5 Q. B. 642; 39 L. J. Q. B. 221.

<sup>5</sup> Absence of a promise is no objection in the United States. *Daniel on Neg. Inst.*, § 1494.

and the assignee was to have the benefit of the security transferred. Cockburn, C. J., said:

"The defendants issued the debentures with the knowledge that they were capable of being transferred and would very likely be transferred to a holder for value; how can it lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal?"

And Lush, J., going still further, said:

"Now the effect of these sections I think is to make these mortgages negotiable securities, and to attach to them the incidents of negotiable securities; one of which is that an innocent holder for value . . . acquires a title of his own, unaffected by any infirmity to which the title of his assignor would have been subject."<sup>1</sup>

*Mortgages.*—It is interesting to note the application of the principles in hand to the case of a mortgage. Here we have a debt—a chose in action<sup>2</sup>—and real-estate security for its payment. By its terms and by usage the document is intended to be ambulatory; but the transfer of it is a matter requiring time for its accomplishment, and it is therefore unsuitable for the rapid financial operations of the moment; moreover its payments are usually long deferred, and thus changes in the relations of the parties to it are more customary than in the case of shorter dated commercial paper.

The law of estoppel has adapted itself to these peculiarities. It is customary for a purchaser of a mortgage to make inquiries of the mortgagor as to the state of the account between him and the mortgagee; and it is not doubted that by his answers the mortgagor would be estopped. No such inquiry is made in the case of bills and notes, and transferees of them are not affected by premature payments. The reason is to be found in custom, and the custom is founded upon the considerations above suggested. Estoppel proceeds upon misrepresentation. In the case of a mortgage premature payment will not mislead because of the custom to inquire, which the mortgagor may depend upon being pursued. There is no such custom in the case of bills and notes; premature payment will mislead, and the payer may have to pay again.

But observe that if a mortgage be offered in sale to me, although I ought to inquire as to alterations of relations between the parties, I have no reason for doubting that the document is a real instrument, and that it truthfully sets forth the transaction as it originally existed. For example, if £200 appears

<sup>1</sup> But see *Jones v. Dulick* (1808), 55 Q. B. 205. See, however, *Hopkins v. Hemsworth* (1808), 2 Ch. 347; 67 L. J.

<sup>2</sup> *Martin v. Bearman* (1880), 45 U. C. Ch. 526.



to be secured by it (and more especially if a receipt for that amount appears upon it), I am not bound to imagine that only £40 was really advanced. The mortgagor knew when executing the document that it was of ambulatory character; he knew that people would rely upon its appearance; and he is therefore estopped.<sup>1</sup>

"But they were inexact and careless, and placed in the hands of Bates or Astley the means of deceiving other persons, and these are in the court of equity demerits."<sup>2</sup>

This law is of special importance in the United States, where usually a mortgage debt is also represented by a promissory note. It was there said that the mortgagor was estopped upon principles

"which forbid a man who, as security for negotiable notes, had executed a mortgage . . . to impair its binding force and effect by pleading secret equities created by his own fault, negligence or imprudence, and of which the subsequent holder of the notes had no notice and no means of information."<sup>3</sup>

*Vouchers.*— Sometimes vouchers or certificates, indicating that persons named in them are entitled to certain sums of money, are intended to be ambulatory; and transferees of them will therefore, upon principles of estoppel, take free from equities. In one case<sup>4</sup> a contractor obtained a certificate from the auditor of a board of works that he was entitled to \$8,451.88; the contractor indorsed the certificate in blank, and deposited it as security for a loan of \$3,160; and the pledgee fraudulently disposed of it to an innocent purchaser; it was held that

"the complainants could have expressed in their indorsement the purpose of the deposit . . . — that it was as security for a specified sum of money — and thus imparted notice to all subsequent purchasers or assignees that the pledgee had only a qualified interest in the claim. But having indorsed their name in blank, they virtually authorized the holder to transfer or dispose of the certificate by writing an absolute assignment over their signature."

In a case of somewhat similar circumstances the judgment (frequently cited) is summed in the head-note as follows:

"A *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has by assignment conferred the apparent absolute ownership, where the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner, who is estopped from asserting a title in hostility thereto."<sup>5</sup>

<sup>1</sup> Bickerton v. Walker (1885), 31 Ch. D. 151; 55 L. J. Ch. 227. And see cases cited with this one in ch. IV.

<sup>2</sup> Per Fry, L. J.

<sup>3</sup> State Bank v. Flathers (1892), 45 La. Ann. 78; 12 S. R. 244. See note, ante, pp. 19, 20.

<sup>4</sup> Cowdry v. Vandemburgh (1879), 101 U. S. 572. But see Crawford v. Board (1899), 58 Pac. R. 616; Hammond v. Evans (1899), 55 N. E. R. 784 (Ind.).

<sup>5</sup> Moore v. Metropolitan (1873), 55 N. Y. 41. See also Armour v. Michi-

In the judgment it is said:

"Where one known to be the owner of shares or chattels delivers to another the scrip or possession of the chattels, together with an absolute written transfer of all his title thereto, he thereby enables him to hold himself out as owner, and as such obtain credit upon, and make sale of the property; and if, after he has so done, the owner was permitted to come in and assert his title against those dealing upon the faith of these appearances, the dishonest might combine and practice the grossest frauds."

*Bank Documents.*—Letters of credit are peculiarly of ambulatory character.<sup>1</sup> So, usually, are deposit receipts<sup>2</sup> and certified checks.<sup>3</sup>

*Life Policies.*—Drawing still further away from the former narrow list of "negotiable" securities, we come to a document of debatable character. The owner of a life-insurance policy transferred it apparently absolutely, but really as security only for money lent; the assignee, being thus the ostensible owner, fraudulently assigned the policy to an innocent purchaser, who, it was held, took it free from equities.<sup>4</sup> It may be said that a policy is a "non-negotiable" chose in action, and that it therefore carries with it all equities of prior holders.<sup>5</sup> A fair reply

gan Ry. (1875), 65 N. Y. 123; Cudahy Co. v. Sioux (1896), 21 C. C. A. 428; 75 Fed. R. 473.

<sup>1</sup>Pillars v. Mierop (1765), Burr. 1663; Pierson v. Dunlop (1777), Cowp. 571; Re Agra (1867), L. R. 2 Ch. 391; 36 L. J. Ch. 223; Bank of Montreal v. Thomas (1888), 16 Ont. 503; Russell v. Wiggins (1842), 2 Story, 213; Coolidge v. Payson (1817), 15 U. S. 66; Boyce v. Edwards (1830), 29 U. S. 111; Carnegie v. Morrison (1841), 2 Met. (Mass.) 381; Franklin v. Lynch (1898), 52 Md. 270; Johannessen v. Munroe (1899), 185 N. Y. 641; 53 N. E. R. 535.

<sup>2</sup>See 3 & 4 Anne, ch. 9; Nicholson v. Sedgwick (1690), 1 Ld. Ray. 180; 3 Salk. 67; Partridge v. Bank of England (1846), 9 Q. B. 396; Re Commercial Bank (1897), 11 Man. 494; Re Central Bank (1889), 17 Ont. 574; First Nat. Bank v. Security (1892), 34 Neb. 71; 51 N. W. R. 395; Kirkwood v. First Nat. Bank (1894), 40 Neb. 484; 58 N. W. R. 1016; Sauce v. Exchange (1894), 40 Neb. 497; 58 N.

W. R. 1135; Hager v. Buffalo (1894), 31 N. Y. 448; Antem v. Crahan (1899), 81 Ill. App. 502. But see Mander v. Royal (1869), 20 U. C. C. P. 125; Lee v. Bank (1879), 30 U. C. C. P. 255; Richer v. Voyer (1874), L. R. 5 P. C. 461.

<sup>3</sup>American v. Crowes (1899), 83 Ill. App. 537.

<sup>4</sup>Quebec Bank v. Taggart (1896), 27 Ont. 162. And see Bridge v. Connecticut (1890), 152 Mass. 343; 25 N. E. R. 612.

<sup>5</sup>And it was very recently so held. Brown v. Equitable (1898), 78 N. W. R. 103 (Minn.). "The defendant has done nothing upon which to base an equitable estoppel except the bare fact that plaintiff delivered possession of the policy to H., accompanied by an absolute assignment without any expressed conditions or limitations, and thereby clothed him with the indicia of absolute ownership." Usually the bare fact of enabling another person to mislead third persons by appearing to be the owner

is that lands, too, are somewhat "non-negotiable," but that if an owner of real estate executes an absolute conveyance to his mortgagee instead of a mortgage, he is estopped from setting up his equities as against an innocent purchaser from the grantee. In other words, a life policy is an article of property, and the principles of estoppel by ostensible ownership apply equally to all sorts of property which is usually intended to be passed on from one person to another.

*Transfers of Shares.*—Securities of this character are more particularly treated of in a previous chapter.<sup>1</sup> At this place it must suffice to notice some very satisfactory dicta in *Williams v. Colonial Bank*,<sup>2</sup> in which blank transfers of shares were intrusted to a broker and by him misapplied. It was proved that

"merchants . . . do regard documents of this character as passing from hand to hand, or what I think is the better expression as equivalent to securities to bearer."

The case is unfortunately complicated by the fact that the true owner of the shares was an executor; but it is nevertheless valuable for its statement of the law where that feature is absent. Lord Watson said:

"When the registered shareholder executes the transfer indorsed on his certificate, he can have only one intelligible purpose in view, that of passing on his right to a transferee. It is not so in the case of an executor."

And Lord Herschell added:

"If, in the present case, the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them."

*Charter-parties.*—The importance of the distinction between documents which are intended to be transferred free from equities, and those which are not, may be seen by reference to the case of *Mangles v. Dixon*.<sup>3</sup> A ship-owner executed a charter-party to A. at a certain freight; in reality the ship-owner and charterer were partners in the venture; the ship-owner assigned the charter-party, and requested A. (in writing) to pay to the assignee "what is due;" the assignee was misled by the char-

of your property is thought to be an amply sufficient ground of estoppel. See the dissenting judgment in the same case, and the result after re-argument, 79 N. W. R. 968.

<sup>1</sup> See ch. XXII.

<sup>2</sup> (1897) 86 Ch. D. 659; 38 Ch. D. 888;

57 L. J. Ch. 826; 15 App. Cas. 267; 60 L. J. Ch. 131. See also *Robinson v. Montgomeryshire* (1896), 2 Ch. 841; 85 L. J. Ch. 915.

<sup>3</sup> (1848) 1 McN. & G. 437; 3 H. L. C. 702.

ter-party; he knew nothing of the partnership arrangement, and naturally thought that the ostensible charterer was liable to the ship-owner for the whole of the freight. Lord Cottenham held that the ostensible charterer was liable to the assignee for the freight, according to the terms of the charter-party;

"for not only was the secret equity suppressed, but the party claiming it armed the apparent owner with proof, resting upon their own declaration that none existed, and therefore cannot afterwards dispute an act founded upon such apparent right as against a party claiming under it."

In the House of Lords, however, this decision was reversed; but unfortunately the principle which supported it (above quoted) was entirely overlooked. Lord St. Leonards said:

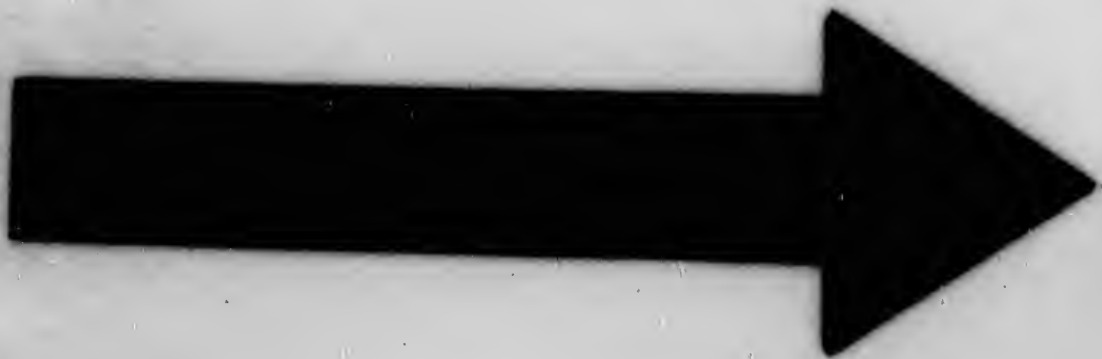
"The only ground on which I understand the decision was rested was this: that where a man having an interest in property stands by and sees another man dealing with that property as owner with another person who is ignorant of the want of title in the person with whom he is dealing, equity will bind the man who stands by. . . . I cannot find any facts to bring this case within that rule. There was no standing by on the part of Messrs. Mangles when they saw Messrs. Boyd dealing with Messrs. Dixon, the bankers; the dealing was behind their backs, five or six months before; they did not even know that the transaction had taken place."

Lord Cottenham was therefore overruled; but it cannot be said that his view of estoppel by having "armed the apparent owner with proof," etc., was dissented from; for it was not considered.

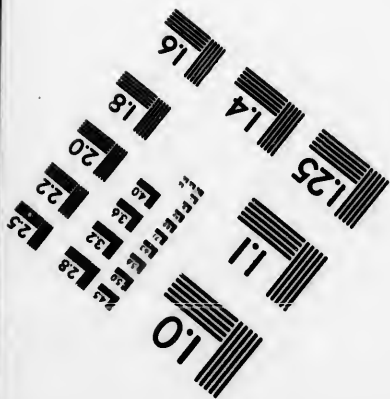
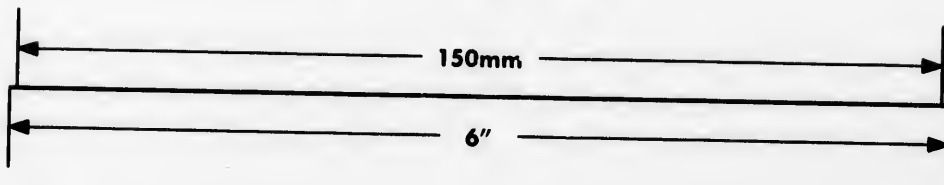
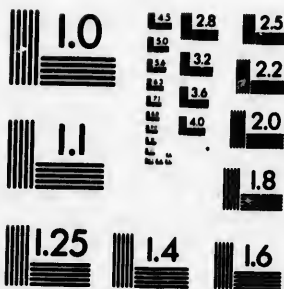
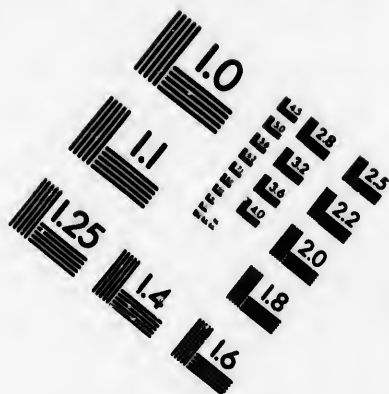
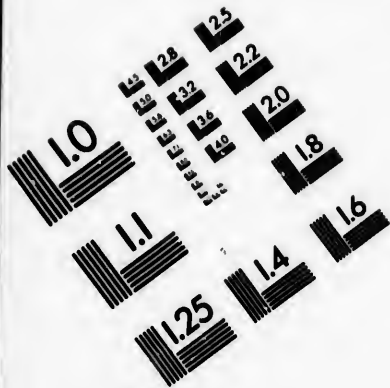
But there is a further point in the case (as the foregoing discussion has made apparent), namely, whether a charter-party is such a document as is intended by the charterer to be transferred by the ship-owner free from the equities between them. If yea, then it is submitted that Lord Cottenham's judgment ought to stand. But if nay, then the rule put forward in the House of Lords that an assignee of such a chose in action takes it subject, etc., is that which should govern the case.

*Generally.*— We have now arrived at this: Bonds, mortgage debentures, scrip for bonds, scrip for shares, mortgages (as explained), vouchers, letters of credit, deposit receipts, blank transfers of shares, life policies, and many other such documents are "negotiable" instruments. At all events it is quite immaterial whether they are or not, for either through negotiability by estoppel, or estoppel by ostensible ownership or agency, a good title free from equities will pass to a holder in due course. We are a long way from law merchant with its certain days, and times, and amounts, and antagonisms to the general law.

There is still, however, much reluctance completely to adopt



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the inevitable change of view. Expressions are, and for some-time no doubt will be met with, such as

"documents which, though not negotiable in the strict sense of the word, were . . . equivalent to securities to bearer."<sup>1</sup>

When, however, the current connotations of the word "negotiable" are displaced and the term "ambulatory" adopted, such language will cease, for the uncertain and mysterious significance of "negotiability" will have passed away. This is well illustrated by the decisions referred to in the next succeeding paragraph.

*Promises to Pay Money.*—It is a most curious fact, and one which well illustrates the frequently baneful effect of codifications, that while the law is (as we have just been observing) rapidly expanding upon the lines above indicated, so that we are now fairly well able to say that choses in action pass to a transferee free from equities where that was the intention of the parties (the wit of man has at length come that far), certain promises to pay money to order or bearer, on the other hand, by reason of certain recent decisions in England and Canada bid fair to become an exception to the rule.

A promissory note is by the codes closely defined. This is within the prescribed limits, and this is not. Any addition to the given form takes the document out of the category of notes. And if it is not a note, then it is thought that all its equities must assuredly accompany it upon transfer.<sup>2</sup> The result then is that a document which is very nearly a promissory note or bill of exchange carries its equities with it—even if it be one intended to be redeemable to third persons—because of the codes; while documents having no relation to bills or notes (and very much less like them), but which are also intended to be ambulatory, do not. The fault of the decisions is that they are still using the old classification of "negotiable" and "non-negotiable" instruments.<sup>3</sup> The language of Malins,

<sup>1</sup> *Williams v. Colonial Bank* (1887), 36 Ch. D. 671; *Carr v. Le Fevre* (1856), 27 Pa. St. 418. And see quotations *ante*, p. 381 ff.

<sup>2</sup> *Kirkwood v. Smith* (1896), 1 Q. B. 592; *Bank of Hamilton v. Gillies* (1890), 12 Man. 495.

<sup>3</sup> The cases in the United States

vary very much as to the effect of unusual clauses in notes. The most recent of them are *Citizens v. Booze* (1898), 75 Mo. App. 189; *Louisville v. Gray* (1899), 26 S. R. 205 (Ala.); *Third Nat. Bank v. Spring* (1899), 59 N. Y. Supp. 794; *Selauch v. O'Hare* (1899), 22 Pa. Co. Ct. 384.



V. C., of thirty years ago ought to be recognized as something more than a notion of a somewhat radical judge:

"Are they then promissory notes or debentures? or does it make any difference which they are in the result? My opinion is that whichever they are the result is the same, because they in any case make a contract by which the company have bound themselves to pay, not to any particular person, but to any person who may be the bearer, the sum appearing to be due upon their face."<sup>1</sup>

#### INTENDED TO BE ASSIGNED.

The rule that the assignee of a chose in action will not take subject to the equities between the original parties,

"when it appears from the nature, or terms, of the contract that it must have been intended to be assigned free from, and unaffected by, such equities,"<sup>2</sup>

opens wide and somewhat difficult questions, namely: (1) What is it, in "the nature" of documents, that indicates the intention referred to; and (2) What terms in a document will, and what will not, indicate such intention.

Custom must always supply the answer to the first of these questions. The difficulty in this connection is one largely of fact.

For complete answer to the second question we shall have to await some further development in the cases. The points so far raised involve the significance of such words as "his transferees," or "his assigns," or "the holder," or "the bearer." In *Re Natal Investment Co.*,<sup>3</sup> where a company's bonds were payable to "C., or to his executors, administrators or transferees, or to the holder for the time being of this debenture bond," Lord Cairns said:

"The word 'transferees' would obviously simply be equivalent to 'assigns;' and 'assigns' would mean, according to the ordinary construction of such an instrument, an assign by deed—an assign in a way in which an assignee of a bond or other chose in action of the same kind is created. . . . We then find added these words: . . . 'or to the holder for the time being of this debenture.' As I understand those words, they do nothing more than this: In order to save trouble and expense of assignments by deed, they provide that the company will recognize any person who holds the debenture to be in as good a position as if he had become the assign of it by deed, and will not insist upon his proving his title by producing a formal assignment; but there is nothing whatever in these words which, as it seems to me, is intended to put the holder, for the time being, in a better position than an assign by deed.' . . . There is nothing therefore . . . in the construction of the debenture itself to forego or

<sup>1</sup> *Re Imperial, etc.* (1870), L. R. 11 362. And see *Dickson v. Swansea* (1868), L. R. 4 Q. B. 44; 38 L. J. Q. B. 17; *Re Romford* (1883), L. R. 24 Ch. 85; 52 L. J. Ch. 720.

<sup>2</sup> *Ante*, p. 379.

<sup>3</sup> (1868) L. R. 3 Ch. 355; 37 L. J. Ch.

to renounce the ordinary rule that the assignee of a chose in action must take subject to the equities between the original parties."

In a case of about the same date, however, in which debentures were payable in a similar way, Rolt, L. J., said:<sup>1</sup>

"They are payable to bearer, and the object and intention of the parties in making them so payable was, no doubt, to give to any person taking them the right of resorting for payment directly to the obligors without regard to any equities that might exist between them as the original obligees."

Lord Cairns, subsequently in the House of Lords, seems to have adopted L. J. Rolt's view rather than his own, for he said:<sup>2</sup>

"The use of the word 'bearer' in the scrip itself made it negotiable; it made the Russian government liable to deliver a bond and pay money to any one who was the actual holder of the scrip. . . . And the actual bearer was in no way bound by any legal liability or by any equities that might be set up as to any of the previous holders of the scrip."

And it may now be said (as already indicated) that "the negotiable character of the bond depends on the bond itself;"<sup>3</sup> and that the use of the word "bearer" renders a document negotiable, independently of extraneous intention.<sup>4</sup>

A distinction may possibly be made between obligations entered into with the obligee and "his assigns," and those in which other more general terms are used, such as "the bearer" or "the holder." But probably the line is not to be drawn altogether with a view to the use of one particular word rather than another, but keeping in mind the nature of the document. In that case we shall judge the intention to make the instrument transferable free from the equities, not only from "the nature or terms of the contract," but by inference drawn from both of these sources.

*Conclusion.*— Enough has been said to indicate the safe line of further development.

Lands are intended to be transferred; so are goods; so are some choses in action.

The law as to all classes of property is the same. Ostensible

<sup>1</sup> Re Blakely (1867), L. R. 3 Ch. 159; Baring (1892), 3 Ch. 527; 61 L. J. Ch. 87 L. J. Ch. 420. And see to similar effect, Re General Estates Co. (1868), L. R. 3 Ch. 758; 38 I. J. Ch. 233. 609. And see Higgs v. Northern Assam Co. (1869), L. R. 4 Ex. 887; 88 L. J. Ex. 233; Re Imperial Land Co. (1871), L. R. 11 Eq. 478; 40 L. J. Ch. 79; Webb v. Herne Bay (1870), L. R. 5 Q. B. 651; 39 L. J. Q. B. 221.

<sup>2</sup> Goodwin v. Roberts (1870), 1 App. Cas. 495; 45 L. J. Ch. 750. And see McKenzie v. Montreal (1878), 29 U. C. C. P. 388. <sup>4</sup> Goodwin v. Roberts (1876), 1 App. Cas. 476; 45 L. J. Q. B. 748.

<sup>3</sup> Per Kekewich, J., in Venables v.

ownership or agency may estop the true owner from setting up his title as against an innocent purchaser.

The primary question then as to any particular chose in action is whether it was intended to be redeemed to the immediate contractee or to third persons also. It is not sufficient to ask whether or not it is a note or bill, for even so it may be ambulatory or non-ambulatory, and must be classified accordingly.

When the character of the document has been ascertained, either by its form or by usage with reference to the class of instruments to which it belongs, or by both of these considerations, the law of estoppel and not the law merchant — the ordinary law and not antagonism to it will suffice for the settlement of all questions relating to the rights of innocent transferees.

#### OVERDUE PAPER.

The principles advocated in this chapter necessitate some modification of current views as to overdue paper. Apart from any asserted *ipse dixit* of the law merchant, the only reason for declaring that the holder of an overdue bill or note takes it subject to equities is that he has notice that payment has been refused; this refusal may have been because of the existence of equities; the purchaser should have inquired; if he had he would have discovered equities; he therefore takes with notice actual or constructive of them, and for that reason ought to hold subject to them.

"After a bill or note is due it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it."<sup>1</sup>

But we must remember a distinction. The equities of which a transferee is relieved are (1) the equities of the obligors, and (2) the equities of the true owner of the document — or rather the legal title of this true owner. Now the reason for cutting out equities applies very forcibly to the former of these cases; but it has no relation to the latter.

Test it: The holder of an overdue note payable to bearer offers it for sale; the intending transferee inquires of all persons liable upon the note as to equities or claims, and is told that there are none; he then buys the note; afterwards some stranger demands it from him, saying that the transferor was his agent of the note for custody merely; that it was overdue

<sup>1</sup> Per Lord Ellenborough, in *Tinson v. Francis* (1807), 1 Camp. 19.

when it was transferred; and therefore that the transferee took it subject to all defects. It is at once apparent that the principle of notice, actual or constructive, will not aid this claimant. Nothing but *ipse dixit* and law merchant will fit his case.

Clearly our theory of ostensible ownership condemns him. The holder of a bill to bearer appears to be the owner of it—"the property and the possession are inseparable."<sup>1</sup> Due or not due does not affect or modify this appearance. The true owner is as much estopped by ostensible ownership of a dead horse (overdue as we may say) as of one still able to trot.

Nevertheless law merchant has had its way both in cases<sup>2</sup> and codes;<sup>3</sup> and the distinction has not sufficiently been drawn between equities in favor of persons liable upon a bill or note, and assertions of title to the instruments themselves.<sup>4</sup> It is to be remarked, however, that as soon as the same question arises as to bonds (when the close association between bills and law merchant ceases to dominate the mind) we easily slip into rationality and estoppel:

"I am of opinion that the appellants, having placed their bonds transferable by delivery in Welch's hands, and having thus enabled him to deal with them as his own, are now, when he has committed a fraud which must result in a loss either to themselves or to the respondents, precluded from asserting their title in such a way as to throw the loss upon the respondents. In applying this principle of estoppel it appears that the circumstances of the bonds being overdue is of no importance."<sup>5</sup>

The United States Supreme Court did not slip so easily. It has maintained that the same rule applies to bonds as to bills and notes.<sup>6</sup> But in declaring that although default has been made in payment of interest, yet that the holder of the instrument may be free from equities in respect of the principal sum, it has removed the only ground upon which the rule can be supported.

<sup>1</sup> *Ante*, p. 394.

<sup>2</sup> *Lee v. Zagury* (1817), 8 Taunt. 114; 1 Moo. 556; *West v. MacInnes* (1864), 23 U. C. 337; *Re European Bank* (1870), L. R. 5 Ch. 359; 39 L. J. Ch. 588; *Byles on Bills* (15th ed.), p. 40, note. But see *Moore v. Metropolitan* (1873), 55 N. Y. 41; *Pomeroy on Equity*, § 107 ff.

<sup>3</sup> 45 & 46 Vic. (Imp.), ch. 61, § 36 (2); 58 Vic. (Can.), ch. 33, § 36 (3).

<sup>4</sup> The remark that "the indorsee of an overdue bill takes it subject to the equities of the bill, not the equities of the parties" (*Re Overend*

(1868), L. R. 6 Eq. 359; *McArthur v. MacDowell* (1893), 23 S. C. Can. 595), involves the distinction referred to in the text, and may yet serve to establish it, if ostensible ownership fails.

<sup>5</sup> *Per Strong, C. J.*, in *Young v. MacNider* (1896), 25 S. C. Can. 277; and see p. 281. See also *McKenzie v. Montreal* (1878), 29 U. C. C. P. 333.

<sup>6</sup> *Cromwell v. Sac* (1877), 96 U. S. 51. And see *Morgan v. United States* (1884), 113 U. S. 476; and *Dillon on Mun. Corp.*, §§ 436, 513.

For the reason, as we have seen, why equities attach to an overdue instrument is that "it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it;" and it is disgraced as much by refusal to make one payment as by declining to meet the other instalments.

The principle advocated is also involved in the holding that the purchaser of a "non-negotiable" chose in action will take it subject to equities between the original parties to the instrument (about which he can inquire), but is not affected by equities between successive holders about which he can know or find out nothing.

This distinction received the sanction of the House of Lords in an early case,<sup>1</sup> and it was accepted by Chancellor Kent:

"It is a general and well-settled principle that the assignee of a chose in action takes it subject to the same equities it was subject to in the hands of the assignee. 2 Vern. 691-765; 1 P. Wms. 497; 1 Ves. 122; 4 Ves. 118. But this rule is generally understood to mean the equities residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. . . . The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee, but he may not be able, with the utmost diligence, to ascertain the latent equities of some third person against the obligee."<sup>2</sup>

The principle upon which the assignee of a non-negotiable chose in action takes it free from equities between prior holders of it must, however, be relegated to some more clearly defined principle than can be found in such general language—namely, to the law of estoppel.

<sup>1</sup> Redfern v. Ferrier (1813), 1 Dow, 50.

<sup>2</sup> Murray v. Lyburn (1817), 2 Johns. Ch. (N. Y.) 441. See also Mott v. Ciark (1848), 9 Pa. St. 399; Williams v. Donnelly (1896), 54 Neb. 193; 74 N. W. R. 601. The latest New York case is not in harmony with the Chancellor's view. David Stevenson v. Iba (1896), 155 N. Y. 224; 49 N. E. R. 677. The United States Supreme Court, while regarding it favorably in 1873 (National v. Texas, 87 U. S. 72), has in later cases departed from it. Cromwell v. Sac (1877), 96 U. S. 51; Morgan v. United States (1884), 113 U. S. 476. In Illinois a distinction has been drawn between equities and the legal title. If a trustee held overdue securities and had the legal

title to them, a purchaser from him would take free from the equities of the beneficiary; but if overdue securities were stolen, the thief not having title to them could not by transfer affect the title of the true owner. Rockford v. Young M. C. A. (1898), 78 Ill. App. 180; affirmed, 54 N. E. R. 207; and see Henderson v. Case (1879), 31 La. Ann. 215. According to this view if a trustee held notes for custody only and had not therefore the legal title to them, a fraudulent transfer would not affect the true owner. But we have seen much reason for the opinion that in such case he ought to be estopped by the ostensible ownership of the trustee.

## CHAPTER XXV.

### OSTENSIBLE OWNERSHIP AND AGENCY — EXECUTION OF DOCUMENTS.

There are two classes of cases to which attention is now asked:

I. Cases in which the execution of documents has been fraudulently obtained; and

II. Cases in which executed documents have been fraudulently completed.

And the questions for discussion are: (1) Under what circumstances are signatories bound by the documents with regard to third persons who have changed their position upon the faith of the documents? and (2) Upon what ground does such liability rest?

*Estoppel the Ground of Decision.*—It may be as well at the outset to suggest that the rules for such cases are those of estoppel as applied to cases of assisted misrepresentation. Instances arise in this way: The signature, whether fraudulently obtained or fraudulently applied, is by the defrauder represented to some innocent party as being of obligatory character, while, as a matter of fact owing to the fraud, it is not. Now the law of estoppel provides that a misrepresentation will estop not only him who makes it, but him who, in disregard of some duty, did that which provided the opportunity or occasion for the misrepresentation, and so made the misrepresentation credible.<sup>1</sup> Applied to the case in hand, then, estoppel would say that if there be a duty of carefulness in the execution of a document towards persons who afterwards and upon the faith of it may change their positions; and if that duty be disregarded; and if upon the faith of the document the position of some third party is changed, then the executing party will be estopped. One further qualification ought to be expressed, namely, that the document must be one of ambulatory character; that is to say, one that not merely operates between the original parties

<sup>1</sup>See ch. IV. The presence of other necessary conditions is assumed.

to it, but one that is usually passed on to other persons or acted upon in some way by them.

*A priori* there does not seem to be much difficulty in asserting a duty of carefulness with regard to the execution of ambulatory documents; indeed, the duty seems to be of the most apparent and obligatory character. Some one asks me to sign two documents, telling me that they are a petition in duplicate for a sewer; after I have signed them, they turn out to be a mortgage upon my lands and an order for the payment of the money to the defrauder; the mortgagee acts upon these documents, and, exercising every usual precaution, accepts the mortgage and pays my order. I ought to lose. And observe the reason. If the law imposes no duty of carefulness upon me, I have been no more negligent than the mortgagee, for without duty there can be no negligence.<sup>1</sup> If I have neglected no duty, I have acted quite properly. If I have acted properly, I cannot be blamed for the mortgagee's loss. And if I am not responsible for the loss, I ought not to pay it. Positing the existence of a duty of carefulness, however, we may say that, although the documents were not binding upon me when I signed them, yet by reason of my neglect of duty they became obligatory when the mortgagee changed his position upon the faith of them; or rather that I then became estopped from denying their obligatory character.

#### I. EXECUTION FRAUDULENTLY OBTAINED.

A study of the authorities of this class reveals the greatest confusion; principally, it is thought, because of the almost entire absence from them of conscious reference to the principles of the law of estoppel. Various other principles and various distinctions have been attempted, but without satisfactory result, or with this result only, that they may when closely examined be found to be, in one way or another, unconscious illustrations or adaptations of the principles of estoppel.

*Laymen and Lettered; Void and Voidable.*—For example, distinctions are drawn between the case of a dupe who is "a layman and not a lettered" individual, and a dupe of greater

<sup>1</sup> Per Bramwell, L. J., in *Dickson v. Reuters, etc.* (1877), 3 C. P. D. 5; 47 L. J. C. P. 1. And see *ante*, ch. V.

pretension; between occasions in "which no extraordinary caution was necessary" and those in which it was; between cases in which the dupe was deceived as to the actual contents of the document, and in others as to its legal effect; between cases in which the deception was as to the land affected by the document, and in others as to the disposition made of the land; and above all between cases in which the document was void, and in others in which it was voidable.

To the writer all these distinctions may be supplanted by the law of estoppel; and the various circumstances referred to will have their due effect in helping us to determine whether or not in each particular case the dupe ought to be estopped.

*The Authorities.*—A short review of some of the authorities is necessary to make this clear.

(1582) In *Thoroughgood's Case*<sup>1</sup> Lord Coke held that if a deed be read or explained

"to the party who delivereth it . . . in other words than in truth it is, . . . it shall not bind . . . so as he who maketh it be a layman and being not lettered be (without covin in himself) deceived; and that is proved by the usual form of pleading in such cases, that is to say, that he was a layman and not learned, and that the deed was read to him in other words."

Lord Coke said nothing as to lettered but lazy people who complacently assume the truth of that which is told them and are deceived; but it is not hard to see what he would have said to them.

In *Touchstone* (56) we find the following:

"So if the party that is to seal the deed can read himself and doth not, or being an illiterate or a blind man doth not require to hear the deed read or the contents thereof declared, in these cases, albeit the deed be contrary to his mind, yet it is good and unavoidable."

These two authorities are old, but their doctrine is wholesome.

(1831) In *Edwards v. Brown*<sup>2</sup> it is said:

"I agree with my brother Russell that whatever shows that the bond never was the deed of the defendant may be given in evidence under *non est factum*. But if the party actually executes it, and was competent at the time to execute it, and was not deceived as to the actual contents of the bond, though he might be misled as to the legal effect, and though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became by the execution the deed of the defendant, and he is not at liberty upon the plea of *non est factum* to say it was not."

(1852) *Hiorns v. Holton*.<sup>3</sup> The execution of a deed was "fraudulently obtained" (particulars not given), upon the faith of which money was advanced by a third person; and Sir

<sup>1</sup> 2 Rep. 9a.

<sup>2</sup> 1 Cr. & J. 311; 9 L. J. Ex. 984.

<sup>3</sup> 16 Beav. 250.



John Romilly held the dupe bound, although "he did not understand what he was doing." He was probably a lettered individual.

(1857) *Vorley v. Cooke*.<sup>1</sup> A solicitor laid before his client a mortgage reciting that costs (£780) were owing to the solicitor, and that it had been agreed to give a mortgage for the amount. The solicitor told the client that the instrument was a covenant to produce title-deeds, similar to other instruments which he had theretofore executed. The client took the solicitor's word for it, and executed the mortgage, which, of course, was shortly afterwards transferred to an innocent holder for value. Kindersley, V. C., decided in favor of the dupe, saying:

"If the solemnities of signing, sealing and delivering are tainted with imposture and deceit, these solemnities cease to have a binding effect, and the instrument to which they have been fraudulently applied cannot be the act and deed of him who had no mind or intention to execute such an instrument, and who applied these solemnities on a false representation of the nature of the deed, and with the mind and intention to execute a deed of a different kind and for a different purpose from that which, by deceit and fraud, was substituted. Therefore it is that evidence of the imposture, falsehood and fraud of such a description can be given at law under the plea *non est factum*, for the instrument is no more a genuine deed than if the signature had been forged."

No distinction here between lettered and lay people.

(1860) *Ogilvie v. Jeaffreson*,<sup>2</sup> three years later and by the same judge, was to the same effect, but with this important suggested qualification:

"When the plaintiff was imposed upon, the occasion was one on which no extraordinary caution was necessary."

(1869) *Foster v. McKinnon*.<sup>3</sup> The indorsement of a bill was obtained by fraudulently alleging that it was a guaranty, similar to one previously given. The bill was "in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper." The dupe placed his signature on the back of the bill, immediately after that of another indorser. In an action upon the bill by a *bona fide* holder a verdict went for the dupe upon the following charge:

"If the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict."

In term this charge was held to be right; but the court was evidently not very well satisfied that there was no negligence,

<sup>1</sup> 11 Giff. 290; 27 L. J. Ch. 185.

<sup>3</sup> L. R. 4 C. P. 704; 88 L. J. C. P.

<sup>2</sup> 2 Giff. 353; 28 L. J. Ch. 905.

310.

for a new trial was ordered so that there might be "further investigation."

(1871) In *Hunter v. Walters*<sup>1</sup> Lord Hatherley said:

"I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money—a document which, as the vice-chancellor observes, could not be mistaken,—he cannot affect not to know what he is doing, and it is not enough for him afterwards to say that he thought it was only a matter of form."

Mellish, L. J., said:

"Now in my opinion it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might by a very simple means have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts upon the faith of the deed being valid and who accepts an estate under it."

And James, L. J., said:

"I am of opinion that the rule of equity is the rule of common sense, that the principal must suffer for the fraud of his agent, and not the stranger who is dealing with the agent; that the man who has made the representations (i. e., the man who although deceived has executed the document), under whatever circumstances, must bear the consequences of those representations, and not the man who has trusted to the representations so made."

(1886) *National v. Jackson*.<sup>2</sup> One Jackson induced his two sisters to execute conveyances of property to him by telling them that they

"were two deeds respecting the mortgage of £700, which it was necessary that they should sign, as he was going to clear off King's mortgage and send the deeds to King."

Cotton, L. J., said:

"The defendants trusted Jackson, both as their brother and solicitor, and cannot be said to have been guilty of neglect in so doing. . . . Now the rule of law is, that if the person who seals and delivers a deed is misled by the misstatement or misrepresentation of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all; because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void. . . . On the evidence it is clear that nothing was said to mislead them as to the nature of the instrument they were executing. It is doubtful how far they understood the nature of the deeds, but it is in my opinion clear upon the evidence that they knew that the deeds dealt in some way with their houses. This contention therefore fails."

Lindley, L. J., said:

"It is impossible, consistently with legal principles, to hold the conveyance executed by their sisters absolutely void. They knew that they related to their houses although they did not understand their effect. They trusted their brother and were cheated by him. On the authority of *Thoroughgood's* case and other cases these deeds cannot be considered void, though they may be set aside as voidable, except as against a purchaser for value without notice."

<sup>1</sup>L. R. 7 Ch. 82; 41 L. J. Ch. 175.

<sup>2</sup>83 Ch. D. 1.

Lopes, L. J., said:

"Were their conveyances void in law? That depends on the evidence, from which it appears that they knew they were executing deeds of some kind or other. They clearly did not know the effect of them — but as to this they relied on their brother."

(1887) *Herchmer v. Elliott*.<sup>1</sup> A female mortgagee left her mortgage with her solicitor. Subsequently she executed an assignment of it upon a representation made by the solicitor that it was a document to extend the time for payment. Boyd, C., said:

"The plaintiff executed the assignment upon a misrepresentation made as to its nature, character and contents. She was told, and believed, that it was to provide an extension of the term of payment of the mortgage held by her, and that only. Her signature in this view was obtained by a piece of deception which involved a fundamental mistake on her part, and the assignment, according to authorities by which I am bound, would be void even in the hands of an innocent holder."

(1893) *Onward v. Smithson*.<sup>2</sup> A deed was executed upon the faith of a misrepresentation as to the land which it affected — probably the most important part of a deed,— and it was held not to be void.

"For they intended to execute a deed containing what this deed did contain, though they were induced to execute it by a fraudulent concealment of the fact that it related to land which they had already conveyed."

*Void and Voidable*.— One cannot peruse these various opinions and retain any clear view of the distinction between void and voidable deeds.<sup>3</sup> (1) If we take the distinction to be between deception "as to the actual contents" on the one hand, and "as to the legal effect" on the other (*Edwards v. Brown, ante*), we find ourselves confronted with *National v. Jackson (ante)*, and find it impossible to say whether the circumstances of that case brought it within the one or the other class. There the dupes "dealt in some way with their houses," and they

<sup>1</sup> 14 Ont. 714. But see *Dominion Bank v. Blair* (1880), 30 U. C. C. P. 591.

<sup>2</sup> (1893) 1 Ch. 14; 62 L. J. Ch. 188.

<sup>3</sup> In *Kerr on Fraud* (2d ed., p. 9) the matter is put thus (the italics are by the present writer): "A distinction must be taken between cases where a man executes an instrument with the mind and intention to execute it, though his assent may have been obtained by fraud, and cases where a man is by fraudulent contrivances induced to put his hand

and seal to an instrument which he never intended and had no mind to execute." If by this is meant that there is a distinction between cases in which a man intends to deliver a deed and those in which he does not, the proposition can be readily assented to, but in that case it has no relation to the problem of void and voidable deeds. If there be some other meaning in the sentence, its illusive quality well illustrates the prevalent confusion.

knew nothing as to the effect of the deeds because they knew little or nothing of their contents. We have also to explain *Onward v. Smithson (ante)*. (2) If we take the distinction to be between cases in which a document is executed "with the mind and intention to execute a deed of a different kind and for a different purpose from that which by deceit and fraud was substituted" (*Vorley v. Cooke, ante*), we are met with the quotation from *Touchstone (ante)* that in some such cases, albeit the deed be contrary to his mind, yet it is good and unavoidable;" by the statement in *Kennedy v. Green*<sup>1</sup> that "a man is not to avoid the consequences of a want of due diligence by stating that he has neglected those means which would have been required if he had used reasonable caution," and by the statement in *Hunter v. Walters (ante)* that sometimes a man "cannot affect not to know what he was doing."

The strong impression left by the cases is that the terms "void" and "voidable" are used teleologically, so to speak, rather than in a scientific classification. That is to say, we have no specification of the essential elements of the two classes of documents; but the words represent vaguely the quantity of moral shock which the various cases produce—a very abominable fraud, and we say "void;" one not so disturbing, and we say "voidable."

The justness of this criticism will become very apparent to any one who endeavors to follow the words into the numerous cases relating to the transactions of infants and lunatics. Perhaps the best that can be said with reference to the contracts of infants is contained in the old dictum of Eyre, C. J.:

"When the court can pronounce the contract to be to the infant's prejudice, it is void; and when to his benefit, as for necessaries, it is good; and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant."<sup>2</sup>

In an able judgment *Hemphill, C. J.*, suggested

"that if the semblance of benefit be regarded as a criterion, the more rational and consistent rule would be that the act should not be deemed void unless it was one of those which, as a general principle, it would be better for the infant that they should be deemed void than voidable."<sup>3</sup>

But the learned Chief Justice is constrained to avow that "notwithstanding the many attempts of the bench, the profession, and jurists to elucidate the subject, yet the questions as to what acts of minors

<sup>1</sup> (1834) 3 My. & K. 713.

<sup>3</sup> *Cummings v. Powell* (1852), 8 Tex.

<sup>2</sup> *Keane v. Boycott* (1795), 3 H. Bl. 90. And see the cases there cited.

shall be regarded as void and what voidable, and what the criterions by which the precise character of their acts shall be determined, remain involved in doubt and difficulty."<sup>1</sup>

The law in the United States with reference to the contracts of lunatics is still less satisfactory, for in such cases much is said to depend (in addition to considerations of benefit or disadvantage) upon whether "the incompetent has been placed under guardianship."<sup>2</sup>

The same uncertainty attends deeds made under duress, and there is the same attempt to divide them into void and voidable.<sup>3</sup>

The justness of the criticism (that the words are customarily used in loose and indefinite fashion) may also be argued from the ambiguous way in which they are employed in statutes — the word "void" being frequently used when "voidable" is intended;<sup>4</sup> and also from the fact that sometimes judicial language indicates that although a deed may be "null and void," yet, as between S. and a purchaser for value on the faith that they were valid, they may be *valid*.<sup>5</sup>

To the writer it appears that the current phraseology was employed *faute de mieux*; or rather, perhaps, in default of a clear apprehension of the principles involved. The two classes of cases were clearly seen to exist — those in which the signer ought and those in which he ought not to be bound; and the reason also was (for the most part) seen, namely, carelessness. What was not understood was, upon what principle a deed could be not binding when executed, as between the parties to it; and yet afterwards, without any further act on the part of

<sup>1</sup> Id. 86.

<sup>2</sup> Devlin on Deeds, vol. 1, 73, 74; Allis v. Billings (1843), 6 Met. (Mass.) 417; Cockrill v. Cockrill (1899), 34 C. C. App. 254; 92 Fed. R. 811.

<sup>3</sup> Anson on Contracts (2d Am. ed.), 177; Clark on Contracts, 303; Chand on Consent, 62; Bush v. Brown (1875), 49 Ind. 577; Oregon v. Forrest (1891), 128 N. Y. 83; 28 N. E. R. 137; Sornborger v. Sanford (1892), 34 Neb. 498; 52 N. W. R. 808; Miller v. Minor (1893), 98 Mich. 168; 57 N. W. R. 101.

<sup>4</sup> See Ewell v. Dags (1892), 103

U. S. 143; Bennett v. Mattingly (1836), 110 Ind. 203; 11 N. E. R. 792.

<sup>5</sup> Per Erle, C. J., in Swan v. North B. A. (1859), 7 C. B. N. S. 430; 30 L. J. C. P. 113. With reference to judgments, too, we are very truly told that "the distinctions between void and voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes." Ex parte Lange (1878), 18 Wall. (U. S.) 175, 176.

the signer, become binding upon him as against other persons.

Thus it was said that there is no case

"that shows that an instrument which, when executed, is incapable of having any operation and is no deed, can afterwards become a deed by being completed and delivered by a stranger in the absence of the party who executed, and unauthorized by instrument under seal."<sup>1</sup>

Distinctions were therefore attempted between degrees of fraud practiced on the dupe rather than between degrees of carelessness exhibited by him. And it was said that if the fraud of the knave was of certain (not very certain) character, the deed was void against strangers; instead of saying that if the carelessness of the dupe was the cause of his deception, he was estopped as against those strangers from asserting that it was void.

*Solution.*—Rightly viewed, no document obtained by misrepresentation (whether the vilest, the most complex, the most simple, or the most innocent) is binding upon the dupe; and its character remains constant (it cannot change), accompanying it into whatsoever remotest hands it may come.<sup>2</sup> As against persons, however, who upon the faith of it being a valid document have changed their positions, the dupe, if the fault be chargeable to his carelessness, is estopped, for he has assisted the misrepresentation and provided the opportunity for it. That is the rationale of the matter.

It may be suggested that admitting this solution to be theoretically sufficient, yet that it is of no practical utility, for we are still left to the uncertainty of the word "carelessness." That is perfectly true; but it is something at all events to know that it is carelessness that we have to deal with; for we shall then, for the first time, be in a position to develop rules for future guidance. That carelessness must be defined and ascertained is little reason for eliminating it from our jurisprudence; and the advance obtained by regarding the matter from an estoppel standpoint may readily be appreciated by observing the reason at present given for regarding a document as void:

"It is invalid not merely on the ground of fraud where fraud exists, but on the ground that the mind of the signer did not accompany the

<sup>1</sup>Hibblewhite v. McMorine (1840), 6 M. & W. 200. By curious coincidence the very deed to which the learned judge referred was afterwards an example of that which he thought to be without precedent. See Sheffield v. Woodcock (1841), 7 M. & W. 574; 10 L. J. Ex. 492.

<sup>2</sup>Somes v. Brewer (1824), 19 Mass. 183; Williams v. Given (1849), 6 Grat. (Va.) 268; Onward v. Smithson (1899), 1 Ch. 14; 63 L. J. Ch. 138.

signature; in other words, that he never intended to sign and *therefore in contemplation of the law never did sign* the contract to which his name is appended."<sup>1</sup>

It is something to be able to relieve the courts from such contradiction as this, and to substitute the remark that although the signer did in contemplation of everybody sign the contract, yet that because of the fraud he is not bound by it; and that he is or is not estopped from so saying according as his conduct may or may not exhibit "an appropriate measure of prudence to avoid causing harm" to others.<sup>2</sup>

It is not asserted that there is no true distinction between void and voidable deeds. Beyond question there is a very clear line between them, determinable by the well-known consideration that some of them are capable of confirmation and others are not.<sup>3</sup> According to this classification, certain deeds (such as those in violation of public policy) are void; and deeds obtained by misrepresentation (whatever the character of it) are voidable; that is to say, are capable of confirmation.<sup>4</sup> It would be clearly unscientific and confusing were we, by different definitions and fresh considerations, to subdivide these voidable deeds again into void and voidable.

The matter, therefore, may be put in this form: (1) The dupe, having been misled, is not bound by the document, and as between him and the knave there is no estoppel; but (2) as between him and innocent parties he will be estopped, if he have been careless, "albeit the deed be contrary to his mind." He will be estopped although he was tricked into executing a document of a nature wholly different from that which he in fact believed it to be —

"by executing it negligently be estopped as between himself and a person

<sup>1</sup> Foster v. MacKinnon (1869), L. R. 4 C. P. 711; 38 L. J. C. P. 310.

<sup>2</sup> *Ante*, p. 30.

<sup>3</sup> Cumings v. Powell (1852), 8 Tex. 85. The continental division into (1) absolutely void (*e. g.*, a will of an infant), (2) relatively void (*e. g.*, a bishop's lease "exceeding the period prescribed by law; which is good as against the bishop, but not as against his successor"), and (3) voidable, namely, "those which produce their legal result; but this result can be

set aside by the action of some person concerned" (Markby's Elements of Law, sec. 273), is scientific. It remained for English-speaking lawyers to subdivide this voidable class into void and voidable. See it referred to in Pearsoll v. Chapin (1862), 44 Pa. St. 15; Seylar v. Carson (1871), 60 Pa. St. 81.

<sup>4</sup> It cannot be contended that in any of the instances above given the document could not have been confirmed by the dupe.

who innocently acts upon the faith of the deed being valid and who accepts an estate under it."<sup>1</sup>

Or, as put in Coote on Mortgages:<sup>2</sup>

"Where two innocent persons are affected by the fraud of the solicitor, the one who, by signing documents, although in ignorance, enables the solicitor to commit the fraud, suffers."

In this view the distinctions between lettered and unlettered individuals, between occasions calling for "extraordinary caution," and other occasions, etc., are distinctions not in the law but in the facts. The question must always be whether the dupe has acted with reasonable diligence or whether he has been careless, and the circumstances (including those just referred to) of each case must be taken into account in judging his conduct.

*United States Law.*—The law in the United States seems to be fairly established upon this basis. Chief Justice Gibson thus states it:

"If a party who can read will not read a deed put before him for execution; or if, being unable to read, will not demand to have it read and explained to him, he is guilty of *supine negligence*, which I take it is not the subject of protection either in equity or law."<sup>3</sup>

So in *Green v. Wilkie* it is said that

"a party who is ignorant of the contents of a written instrument from inability to read, who signs it without intent to do so, and is chargeable with no negligence in not ascertaining its character, is not bound by it in the hands of a bona fide purchaser."<sup>4</sup>

<sup>1</sup>Per Mellish, L. J., in *Hunter v. Walters* (1871), L. R. 7 Ch. 82; 41 L. J. Ch. 175.

<sup>2</sup>4th ed. 856. So also, if a creditor be fraudulently induced to give up some of his securities, he, and not the surety, must suffer. *Merchants' Bank v. McKay* (1890), 12 Ont. 498.

<sup>3</sup>Re *Greenfield* (1850), 14 Pa. St. 496.

<sup>4</sup>(1896) 98 Iowa, 74; 66 N. W. R. 1046. Signer must read if he can. *Roach v. Karr* (1877), 18 Kan. 529; *Ætna v. Franks* (1880), 53 Iowa, 618; 6 N. W. R. 9; *Cowgill v. Pettifish* (1892), 51 Mo. App. 264; *Kalamazoo v. Clark* (1892), 52 Mo. App. 593; *Elmendorf v. Tejada* (1893), 23 S. W. R. 935 (Tex.); *Metcalfe v. Metcalfe* (1893), 85 Me. 478; 27 Atl. R. 457; *Blaisdell v. Leach*, (1894), 35 Pac. R. 1019; *Eldridge v. Railroad Co.* (1895), 88 Me. 191; 33 Atl. R. 974; *Hill v. Yarbrough* (1896), 62 Ark. 326; 35 S. W. R. 438; *Engstad v. Syverson* (1898), 72 Minn.

188; 75 N. W. R. 125; *Olson v. Royern* (1899), 77 N. W. R. 818 (Minn.). If signer cannot read he must require the document to be read to him. *Metcalfe v. Metcalfe*, 85 Me. 473. There must be no carelessness. *Webb v. Corbin* (1881), 78 Ind. 403; *Green v. Wilkie* (1896), 98 Iowa, 74; 66 N. W. R. 1046. For example, if the document be improperly read by a stranger, and neighbors are present who might have been appealed to, the signer is bound. *Swamell v. Watson* (1874), 71 Ill. 456. Distinction is sometimes taken where the document is altogether different from that intended. *Webb v. Corbin, ante*; and *Green v. Wilkie, ante*. But the general argument (as above) leaves no room for such a consideration. The question is not whether the dupe has been deluded as to the whole document, or as to part or parts of it only; but whether he has



In some cases even the excuse of reasonable diligence seems to be excluded; and it is certainly more in accordance with principle that the person selecting the rascal should suffer, rather than he who is misled by him.

"Upon this same principle it is almost universally held that whenever an instrument is procured from one person by the fraud or villainy of another, even if such fraud or villainy should amount to a criminal offense, if all the rights which the instrument apparently gives should at that time or afterwards be transferred to another who should be an innocent and *bona fide* holder for value, the innocent and *bona fide* holder could enforce the instrument against the maker, although the maker might also be an innocent person. In such a case the maker would be estopped from claiming that the instrument was void as against the innocent *bona fide* holder."<sup>1</sup>

*Analogy.*— Useful analogy may be found in one of the points considered in a previous chapter.<sup>2</sup> We there saw that if an owner of goods were swindled into parting with possession of them, a purchaser from the swindler would be protected if the title had passed from the owner to the swindler; but if it had not passed — if there had been in reality no contract at all between them — then of course the swindler's vendee could take nothing. We also saw, however, that although there might be no contract, yet if the owner had equipped the swindler with *indicia* of ownership of the goods, the owner would be estopped from denying that the title had passed.

These principles are applicable to the subject under discussion. For where a transfer of property is executed, the title passes to the grantee even though he be a swindler (for the act is separable from the motive which induced it, and is an act, although revocable for fraud); and the swindler, passing on the title, gives to the innocent purchaser that which he can be deprived of by superior equity only.

But waiving this point, the intervention of estoppel, as in the analogous case above referred to, ends the dispute. For even if it be admitted that the transfer from the owner to the swindler is void, yet the owner is estopped from so saying as against an innocent purchaser who has relied upon the document. The question then becomes, not one

"of affirming or disaffirming any contract" — not a question of void and voidable — "but a question whether the owner of the goods has by his con-

too easily fallen a prey to the swindle — whatever its character. would be bound by a note which he signed under misrepresentation. If

<sup>1</sup>State v. Matthews (1890), 44 Kan. 596; 25 Pac. R. 36. And see Atchison v. Brassfield (1893), 51 Kan. 167; 32 Pac. R. 814. It would hardly be contended, however, that a lunatic

the rule of "reasonable diligence" be sufficiently drastically construed and applied, it may meet the requirements of all cases.

<sup>2</sup>Ch. XXI.

duct allowed the person who has either deceived him, or to whom he has intrusted the goods, to hold himself out as the owner so as to give a good title to a *bona fide* purchaser for value."<sup>1</sup>

## II. EXECUTION FRAUDULENTLY COMPLETED.

The conclusion arrived at in the preceding paragraphs that there is a duty of carefulness with reference to the execution of documents upon the faith of which other persons may change their position — a duty that one shall inform himself as to the contents of that which he signs — does not involve, but is not disparate from that which is now to follow, namely, that there is a duty of carefulness not only as to the contents but as to the form and custody of such documents.

Once admitted that towards one's fellow-men there is some duty of carefulness that one is not too readily made an instrument for their undoing, and it would seem difficult to say that opportunity for fraud ought not to be given by carelessly signing a document the contents of which were misrepresented; but that such opportunity might with impunity be given by signing an incomplete document which was afterwards fraudulently filled up, or by intrusting a completed instrument to the custody of one who made fraudulent use of it. That in one case the fraud is prior, and in the others subsequent, to the execution of the instrument, is not sufficient ground for distinction; and there is the same carelessness and betrayed trustfulness in all such cases.

*Division of the Subject.*— For the sake of clearness it will be well to divide the subject into:

I. Documents confided to another person.

II. Documents stolen or found.

Cross-divisions will be made as follows:

(1) A. Documents in complete form.

B. Documents in incomplete form.

(a) Blanks purposely left.

(b) Spaces carelessly left.

(c) Signed, but otherwise blank slips of paper.

(aa) Blanks or spaces known to the transferee.

(bb) Blanks or spaces unknown to the transferee.

(2) A. "Negotiable" instruments.

B. Other documents.

<sup>1</sup>Henderson v. Williams (1895), 1 subject more fully discussed, *ante*, Q. B. 527; 64 L. J. Q. B. 308. See the p. 303.

## I. DOCUMENTS CONFIDED TO ANOTHER PERSON,

## A. "NEGOTIABLE" INSTRUMENTS.

Premising that the word "negotiable" is being used in its common acceptation,<sup>1</sup> observe that various cases may arise:

(1) A signed document, in complete form, may be left with some one for custody merely, or for delivery upon the happening of some contingency.

(2) The document so left may be in blank — blank spaces or entirely blank.

(1) *Completed Negotiable Documents.*— As to these cases the present writer adopts the language of Mitchell, J.:

"They themselves have created the agency or trust by means of which the fraud, if any, has been committed. It is the duty of the maker of negotiable paper to guard not only himself but also the public against frauds of this kind."<sup>2</sup>

In a very recent case in the Supreme Court of the United States Mr. Justice Brewer said:

"It is said that the bonds were placed in escrow, and that when an instrument is so placed there can be no valid delivery until the condition of the escrow has been performed, and if without performance the instrument passes out of the hands of the one holding the instrument in escrow it is not enforceable against the maker, and that in a suit on the instrument the inquiry is always open whether the condition of the escrow has been performed. Whatever may be the rule in case the instrument so placed in escrow be a deed or non-negotiable contract, we are of opinion that a different rule obtains when the instrument is a negotiable obligation."<sup>3</sup>

Mr. Daniel in his valuable book on Negotiable Instruments takes a different view:

"In these cases, it will be observed, the person with whom such instrument is left is its mere custodian, and not an agent having any absolute power to dispose of it. He is not as to the instrument an agent with limited powers, but the agency itself is conditioned upon the happening of the event upon which he is to become the agent to deliver it."<sup>4</sup>

<sup>1</sup>Its meaning is discussed in ch. XXIV.

<sup>2</sup>First Nat. Bank v. Compo (1895), 111 N. Y. 274; 63 N. W. R. 731. And see Fearing v. Clark (1860), 82 Mass. 74; Morris v. Preston (1879), 93 Ill. 215; Chase Nat. Bank v. Faurot (1896), 149 N. Y. 532; 44 N. E. R. 164; Galvin v. Syfers (1898), 52 N. E. R. (Ind.) 96; Cross v. Currie (1880), 5 Ont. App. 31; Merchants' Bank v. Good (1890), 6 Man. 339; Bills of Exchange Act, 45 & 46 Vic. (Imp.), ch. 61, § 21; 53 Vic. (Can.), ch. 33, § 21.

<sup>3</sup>Provident v. Mercer (1898), 170 U. S. 593; 18 S. C. R. 788. And see Vallett v. Parker (1831), 6 Wend. (N. Y.) 620; Graff v. Logue (1883), 61 Iowa, 707; 17 N. W. R. 171; Long Island v. Columbus (1895), 65 Fed. R. 455. But see Burson v. Huntingdon (1870), 21 Mich. 415.

<sup>4</sup>Sec. 854. And see Ontario Bank v. Gibson (1886), 3 Man. 406; 4 Man. 440. Mr. Daniel cites Awde v. Dixon (1851, 6 Ex. 869; 20 L. J. Ex. 295) as favorable to his views; but that case is complicated with the circum-

This reasoning would be appropriate were the question one of agency. But it is not; it is one of estoppel by ostensible ownership. It is within the language of Lord Herschell when he said:

"If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value."<sup>1</sup>

A distinction is sometimes taken between cases in which the deposittee was to remain a mere custodian, and those in which he was to become active upon the happening of a contingency.

"Whether the acceptor of a blank bill is liable upon it depends upon his having issued the acceptance intending it to be used."<sup>2</sup>

But it will be observed that Lord Herschell's language applies to the one case as well as to the other.

The ground of estoppel in such cases is clearly ostensible ownership (or in some special cases ostensible agency). As we have already seen,<sup>3</sup> the possession of a negotiable instrument carries with it the appearance of ownership; the person intrusted therefore is the ostensible although not the real owner of the document; the obligor is in some measure responsible for this appearance of ownership — he has assisted the misrepresentation of ownership by handing over the evidence of it; and for that reason ought to be estopped.

*Blanks in Negotiable Instruments.*—The instrument which is confided to another person may be in blank form. Let us deal more at length with such documents, for if when they are fraudulently filled up and transferred obligors are liable upon them, any question as to liability were the instruments in completed form when parted with will be set at rest.

A form of note is indorsed and given to another person, with authority to fill it up for £100; in fraud of the maker, this person fills it up for £500<sup>4</sup> and transfers it for value; is the

stance that the bill was incomplete in form when taken by the transferee; and the language of the judgment leaves it uncertain whether that fact was not the ground of decision.

<sup>1</sup> Colonial Bank v. Cady (1890), 15 App. Cas. 267; 60 L. J. Ch. 131. See also per Lord Cairns in Goodwin v. Roberts (1876), 1 App. Cas. 476; 45 L. J. Q. B. 748.

<sup>2</sup> Per Brett, L. J., in Baxendale v. Bennett (1878), 3 Q. B. D. 525; 47 L. J. Q. B. 624; Whitney v. Snyder (1870), 2 Lans. (N. Y.) 477; Ledwick v. McKine (1873), 53 N. Y. 307; Schuykill v. Copley (1871), 67 Pa. St. 380; Kagel v. Totten (1882), 59 Md. 447; Randolph on Commercial Paper, § 161.

<sup>3</sup> *Ante*, p. 304.

<sup>4</sup> In this and other supposititious

maker liable? and if so, why? Lord Mansfield would have answered both questions in this way:

"The indorsement of a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley to any amount, and I will be his security.'"<sup>1</sup>

This view has been very widely approved in English, Canadian and United States courts.<sup>2</sup> Indeed, in a recent case, it is said that it "has never been disputed."<sup>3</sup> And Mr. Bigelow in his latest work (1893) has the following:

"The rule of law upon this point may be thus stated: One who writes his name as maker, acceptor, drawer, or indorser, and intrusts the paper to another to fill up the contract and make him a party to a negotiable instrument, *thereby confers upon the person so intrusted in favor of bona fide holders for value the right to complete the contract at pleasure, so far as consistent with the instrument as written or printed, at the time it is delivered to the person intrusted with it.*"<sup>4</sup>

*Criticism.*— But this language is inexact. Either the power was conferred or it was not. The case is impossible that it was not conferred and yet that it was, even if we add to that statement, "in favor of *bona fide* holders." If it was conferred, then *cadit questio*. If it was not conferred, then it is impossible that the signer can be liable on the ground of authority.

Observe further that there are two classes of cases, and that the explanation, "Trust Galley to any amount," can have no reference at all to one of them. If the transferee knows that the document was delivered in blank, then it may be that its appearance indicates to him the existence of authority to fill up. But if Galley fills up the blanks *before going to the transferee*, and the transferee knows nothing of there having been blanks—believes that the instrument was complete when it was signed,—then no message about Galley's authority can have come to him. "Trust Galley" has nothing to do with such a transaction.

cases we shall assume that, in jurisdictions in which there are stamp laws, the amount filled in does not exceed the amount warranted by the stamp affixed.

<sup>1</sup> Russell v. Langstaffe (1780), Doug. 514. And see Schultz v. Astley (1836), 2 Bing. N. C. 544; 5 L. J. C. P. 130; 2 Sc. 815; Stoessing v. South Eastern (1854), 3 E. & B. 556; 83 L. J. Q. B. 293; Roba v. Tucker (1851), 16 Q. B. 560; 20 L. J. Q. B. 270.

<sup>2</sup> Schofield v. Londesborough (1895), 1 Q. B. 555; 64 L. J. Q. B. 293; McInnes v. Milton (1870), 30 U. C. Q. B. 489; Van Duzer v. Howe (1860), 21 N. Y. 535; First Nat. Bank v. Johnston (1892), 97 Ala. 655; 11 S. R. 690; Market v. Sargent (1893), 85 Me. 349; 27 Atl. R. 192.

<sup>3</sup> Per Kiliam, J., in Merchants' Bank v. Good (1890), 6 Man. 346.

<sup>4</sup> On Bills and Notes, 227.

Little notice, however, has heretofore been taken of this distinction, Lord Mansfield's dictum being supposed to be applicable to all cases. Of it Mr. Daniel says:

"This admirable statement of the law is almost universally quoted with approval and followed as a precedent, applying equally to maker, acceptor and drawer as to the indorser."<sup>1</sup>

"By some authorities it is held that if he knew that the paper had been signed as a blank and filled up by force of authority by the holder, he should inquire as to the extent of such authority, and if he fails to do so he takes the paper at his peril. But this qualification of Lord Mansfield's doctrine that the blank signature is 'a letter of credit for an indefinite sum' does not impress us as an improvement upon it. The paper being limitless in its terms is *prima facie* limitless as to the authority it confers. The holder is invested with a general authority as to that paper; and the graphic phrase of Lord Mansfield describes it to perfection. High authorities, including Story and Parsons, concur in these views, which seem to us clearly the most philosophical."<sup>2</sup>

The language most frequently met with in the cases is this:

"Where a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, . . . such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument."<sup>3</sup>

*Blanks in Negotiable Instruments Known to the Transferee.*  
Taking this class first, observe that the case we have to deal with is one in which Galley (the custodian of the instrument) has either no authority at all to fill the blanks or else has authority limited to a certain amount; and that Galley exceeds his authority and passes the document to a person who knows of the blanks. It is resorting to mere fiction in such a case to allege that the obligor said: "Trust Galley to any amount." The blanks may indeed have given to Galley the appearance of widest authority, and such ostensible agency may estop the obligee from denying the existence of such authority, but that is another matter.

Instances of estoppel in analogous cases are very familiar in the law of principal and agent. An agent may in many cases exceed his authority, but yet, the circumstances surrounding the agency having been such as to indicate the existence of the assumed power, the principal is estopped from denying its existence.<sup>4</sup> When I am dealing with one whom I know to be

<sup>1</sup> On Negotiable Instruments (4th ed.), § 142.

<sup>2</sup> Sec. 147. And see *First National Bank v. Compo* (1895), 61 Minn. 274; 63 N. W. R. 731.

<sup>3</sup> *Goodman v. Simonds* (1857), 61 U. S. 361; *Bank of Pittsburgh v. Neal* (1859), 63 U. S. 107; *Whitmore v. Nickerson* (1878), 125 Mass. 496; *Ellis*

*v. Wait* (1898), 4 S. Dak. 454; 57 N. W. R. 231; *Market v. Sargent* (1893), 85 Me. 351; 27 Atl. R. 192. And see *Am. Cent. Dig.* (ed. VII), pp. 134-147, and the innumerable cases there cited.

<sup>4</sup> See the subject fully treated of in ch. XXVI.

acting as an agent, the general rule is that I must, at my peril, inform myself as to the scope of his agency. I may, however, be misled by some act or omission of the principal; and it is upon this ground that the principal is sometimes estopped.

For example, a broker is employed to buy and sell shares in the market. In dealing with him I may be aware that he is acting as an agent; but, in considering his authority, I am entitled to assume that he has those powers which a broker, so acting, usually has.<sup>1</sup> Employment of a man in the line of his business is usually accompanied by delegation to him of the powers which he customarily exercises; and the principal is estopped by the appearance of usual authority from asserting the existence of any unusual instructions which he may have given but of which I have no notice.

Somewhat in the same way, custom may have attached to the possession of a blank note a presumption that the holder has power to fill it up for any amount he chooses. If so, the signer would be estopped from asserting the existence of any unknown limitation of that power. We cannot indeed say that signing a blank note "thereby confers upon the person so intrusted, in favor of *bona fide* holders for value, the right to complete the contract at pleasure" (for the real fact may be quite otherwise); we say merely that the signer is estopped, by the appearance of power, from denying that it was conferred.

*Customary Effect of Blanks.*—The cases are not quite unanimous as to the existence of such a custom.<sup>2</sup> They are, however, overwhelmingly in favor of it; and the law, whatever one may think of it,<sup>3</sup> firmly establishes the inference of au-

<sup>1</sup> Sutton v. Tatham (1830), 10 A. & E. 30; 8 L. J. Q. B. 210; Pickering v. Busk (1812), 15 East, 45.

<sup>2</sup> See a strong judgment of Kindersley, V. C., in Hatch v. Searls (1854), 2 Sm. & G. 147; 23 L. J. Ch. 407. See also Awde v. Dixon (1851), 6 Ex. 869; 20 L. J. Ex. 295; Hogarth v. Latham (1878), 47 L. J. Q. B. 339.

<sup>3</sup> Presumption proceeds upon probability. We presume that an event happened because experience has indicated its probability. We can hardly say that we are entitled to presume the existence of a fact when we are reasonably sure that it never occurred. In the present case it is said that one ought to assume, from the mere possession of a blank note, that the holder of it has authority to fill it up for "any amount" however magnificent, or, as Mr. Bigelow puts it, "at pleasure." In Canada, at all events, where fortunes are somewhat limited, such unbounded authority is of the very

thority to fill up blanks.<sup>1</sup> We have been speaking so far of blanks for amounts merely. The same rule applies to other blanks (for date, place of payment, and so on); and with better reason, for presumption proceeds upon probability, and it is much more likely that absolute discretion was conferred as to such features of the document than as to the amount of it.<sup>2</sup>

*Estoppel the True Ground for Decision.*—Proceeding by elimination it is quite clear that liability in such cases does not proceed from the fact that the signer himself made the instrument, or from the fact that any one having authority to do so

rarest occurrence. And in other countries, apart from unusual familiarity with the pleasures of unmeasured wealth, it is certain that in the very large majority of cases one ought rather to anticipate that some maximum amount had been agreed upon than that it had not. In business affairs every one knows that there is almost always some limit fixed.

No doubt the law, for ulterior purposes, may arbitrarily detach probability and presumption, and may declare that a certain act shall be taken as conclusive evidence of some intention which is not commonly associated with it. But unreasonable rules are bad ones. And it is unfortunate if we are compelled to say that although as a matter of fact the maker of a blank note seldom confers power upon the holder of it to fill it up for "any amount," yet, as a matter of law, he always does so. Fictions have no place in fully-developed jurisprudence.

The cases, too, show the impossibility of getting it into everybody's head that when one really says to Galley, "I authorize you to fill up this blank for \$5," he technically says to the world: "Trust Galley to any amount and I will be his security." And the frequent reappearance in the courts of Galley's surprised principals, amazed at the magnificence of their intrusted con-

fidences, almost leads one to wish that legal presumptions had sometimes closer relations to the undisputed facts.

One can easily see how the presumption arose, and was in its inception reasonable. If upon a blank note the maker should write "to be filled up with any amount not exceeding \$1,000," it could fairly enough be held that he had given authority up to that amount. And if under the provisions of some stamp act he should affix duty sufficient for a \$1,000 note, the same meaning might very well be taken out of his action. And the law so commenced. But it is irrational from that to argue that if there be no limitation upon the note the authority is unlimited. For that is to make a reasonable inference responsible for one known to be unreasonable and non-existent.

<sup>1</sup> The codes are however very puzzling. 45 & 46 Vic. (Imp.), ch. 61, § 20; 53 Vic. (Can.), ch. 33, § 20.

<sup>2</sup> *Cason v. Grant* (1895), 97 Ky. 487; 31 S. W. R. 40. But there would be no presumption of authority to fill in "with interest at six per cent." *Gettysburg Bank v. Chisholm* (1895), 169 Pa. St. 564; 32 Atl. R. 730; *Farmers' Bank v. Norrich* (1896), 89 Tex. 331; 34 S. W. R. 914; *First State Sav. Bank v. Webster* (1899), 79 N. W. R. 1068 (Mich.).



made it for him. *Ex hypothesi* these are not the facts. How then can he be liable? In one way only as the writer sees it and that is by estoppel — by estopping him from denying that the contract is his. As against this, however, there is much authority. There is the opinion of Baron Pollock:<sup>1</sup>

"In such a case the acceptor is liable to a *bona fide* holder, . . . and the reason for this is not because the the acceptor gave authority for this or that name to be inserted, — for in truth he gave no such authority, — but because, in favor of commerce, it is essential to uphold the negotiability of bills of exchange. That this is so may be further illustrated by a case in which a fraud is practiced upon the acceptor of a bill drawn in blank with reference to the amount. . . . Here is a clear absence of authority and a fraud against A. (by inserting £75 instead of £50), yet he is liable for the reason we have given. . . . In the present case the ordinary rule as to authority cannot be adhered to, and something like a *fiction must be resorted to* in favor of a *bona fide* indorsee for value, or, as we should prefer to say, the law merchant in such a case holds that although the acceptor did not authorize the drawer's name to be used he *enabled the person to whom he gave the bill to use it*, and so to give the bill currency, and this as against the acceptor is sufficient to render him liable. . . . Estoppels are odious. . . . We should prefer not to use the word *estoppel*, which seems to imply that a person by his conduct is excluded from showing what are the true facts, but rather to say that the question is whether, when all the facts are admitted, the acceptor is not liable upon the well-known principle that *where one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the third person to commit the fraud.*"<sup>2</sup>

With great respect for so learned a judge it must be said that while he was condemning estoppels as odious he was really deciding the case upon principles peculiar to that branch of the law. The learned judge said: "He enabled the person to whom he gave the bill to use it and so to give the bill currency" — that is to say, the signer had, by his conduct, induced, or assisted in inducing, the holder to believe that the bill was a genuine obligation, and the holder had acted upon that belief. In other words, although the instrument was not a real obligation the first holder of it had represented to the transferee that it was; the signer had assisted in this misrepresentation — had given opportunity for it and made it credible; and

<sup>1</sup> London v. Wentworth (1880), 5 Ex. D. 104; 49 L. J. Ex. 657.

<sup>2</sup> See in the same sense Marston v. Allen (1841), 8 M. & W. 504; 11 L. J. Ex. 122; Foster v. McKinnon (1869), L. R. 4 C. P. 712; 38 L. J. C. P. 310; Swan v. N. B. A. Co. (1863), 2 H. & C. 185; 32 L. J. Ex. 278. It was probably to this principle that Lord Esher referred when he said (Baxendale v. Bennett (1878), 3 Q. B. D. 525): "When a man has signed a blank acceptance and has issued it and authorized the holder to fill it up, he is liable on the bill whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party and he is liable." But the language is also referable to estoppel.

was therefore estopped from denying the truth of the representation.<sup>1</sup> To estoppel the learned judge prefers, as he says, "the well-known principle that where one of two innocent persons," etc. But, with respect, that principle is either estoppel or it is nothing, as will appear by reference to the chapter of this work devoted to it.<sup>2</sup>

There is, also, against us the opinion of Mr. Bigelow:<sup>3</sup>

"The rule that one who has left with another his signature to an incomplete mercantile instrument or other contract — that is, with a blank to be filled in — is bound by the act of that person in completing the instrument has been called an estoppel. Estoppel by conduct broadly this cannot be, for the principal's conduct in trusting the agent is not, or may not be, in the other's change of position, or in immediate connection with it, as it must be for an estoppel.<sup>4</sup> Nor is there any false representation — the only other kind of estoppel the case could fall under. On the contrary there is a true representation, to wit, agency; and the only question is how far the agency ought to extend. That is not estoppel, but agency pure and simple; the agent has only exceeded his instructions."

But there may be misrepresentation as to the extent of agency as well as to its existence.<sup>5</sup> If a man represents that he has authority to fill up a blank with £500, and his authority extends to £100 only, surely it is an undue stretch of charity to say that "there is a true representation," and that the only justifiable criticism is that "the agent has exceeded his instructions." Again, Mr. Bigelow takes it that the only representation made is as to agency. But if the transferee knew nothing of blanks, there is no representation of agency or appearance of agency. The tacit and real representation is that the note was a completed instrument when signed. This is false, and it is because the maker has assisted in that misrepresentation that he is estopped by it and is liable to those who have acted on the faith of it.

As against these authorities may be set the following from Jervis, C. J. :<sup>6</sup>

"The rules applicable to the question of authority on this bill of exchange do not differ from those which ought to govern the question if it arose in the case between principal and agent. In the case of a blank acceptance *prima facie* the person giving it gives the person to whom it is given authority to fill it up for the amount and for the time limited by the stamp laws. As between these two there may be secret stipulations binding upon them, but not binding as between the public and the person

<sup>1</sup>For a discussion of the principle here involved, see *ant.*, ch. IV.

<sup>2</sup>*Ante*, ch. XIV.

<sup>3</sup>On Estoppel (5th ed.), 457.

<sup>4</sup>This position is believed to be unsound. It is dealt with in ch. XVI.

<sup>5</sup>See ch. XXVI.

<sup>6</sup>*Montagu v. Perkins* (1853), 23 L. J. C. P. 187. See also *Brockleby v. Temperance* (1805), A. C. 173; 64 L. J. Ch. 433; *Merchants' Bank v. Good* (1800), 6 Man. 337, 347.

giving the acceptance. . . . *How does this differ from the ordinary case of an agent held out to the public at large as competent to contract for and to bind his principal?* The agent may have secret instructions, but notwithstanding he deviates from them the principal is bound by his acts”

And the following from Bowen, L. J.:

“I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is intrusted as *clothed with ostensible authority* to fill in the bill as he pleases within the limits of the stamp.”<sup>1</sup>

That estoppel is the only ground upon which it can be held that a principal is liable in “the ordinary case of an agent held out to the public at large as competent to contract for and bind his principal” is urged in a later chapter.<sup>2</sup>

Some direct support for the views here advocated is to be obtained too from a cautious note in Byles on Bills:<sup>3</sup>

“Perhaps the obligation created by blank makings, acceptances and indorsements of bills, checks or notes depends on the principles of estoppel, and not on any peculiarity of negotiable paper. On this ground it is put by Lord Mansfield, in *Russell v. Langstaffe*, Doug. 514, and by Lord Chief Justice Tindal, in *Shultz v. Astley*, 2 Bing, N. C. 544. But see the observations of Williams, J., in *Ex parte Swan*, 7 C. B. 447; and Martin, B., and Channel, B., in *Swan v. N. B. A. Co.*, 31 L. J. Ex. 435.”

In all fairness, however, it must be admitted that no very explicit reference to estoppel is to be found in the language of either of the learned judges who are here cited in support of the application of its doctrines.

*Blanks in Negotiable Instruments Unknown to the Transferee.*—If Galley fills up the blanks before offering the instrument in transfer, then, as has been said, Lord Mansfield’s dictum (“Trust Galley,” etc.) has no application; for the transferee cannot allege that he believed that Galley had authority to fill up the blanks. His position in such case is that he believed that the instrument was completed at the time of its execution; that the signer is responsible for that belief (having supplied Galley with a document which can easily be turned to a fraudulent purpose); and that he is therefore estopped from denying that it was so completed. Estoppel can have no competitor in this case as the ground of decision.

*Spaces as Distinguished from Blanks.*—Let distinction be made between blanks purposely left in documents (such as for amount, date, etc.) and spaces carelessly unfilled with pen scratch, which are afterwards fraudulently filled up; for example, a space left after the words “three hundred,” to which

<sup>1</sup> *Garrard v. Lewis* (1882), 10 Q. B. D. 25.

<sup>2</sup> Ch. XXVI.

<sup>3</sup> 15th ed. 255.

is added "and fifty." These latter cases are dealt with in chapter V.

*Signed but Otherwise Blank Slips of Paper.*—The distinction above drawn between cases in which instruments containing blanks are (1) known, and (2) not known, by a transferee to have been executed in incomplete form, becomes of greater practical importance when the paper signed is otherwise altogether blank.

*Imperfection Known to Transferee.*—If a person in possession of such a paper were to offer it in negotiation alleging authority to fill it up as he pleased, the transferee would undoubtedly have to take the chance of the assertion being well founded. There is no authority, so far as the present writer is aware, which would afford him any comfort. If the signer had affixed a revenue stamp the result would be otherwise,<sup>1</sup> for the signer has then indicated the existence of agency.

*Imperfection Unknown.*—More difficulty arises where the slip has been completely filled before it is offered in negotiation—where it has the appearance to the transferee of having been issued in perfect form. Upon this point the cases are far from satisfactory; due probably to oversight of the law of estoppel. For the question is not, Was there sufficient authority to fill up the slip? nor yet, Was it the signer's intention that a note should be made of it; but Did the signer assist the fraud in such manner as to estop him from alleging defect upon either of these grounds?—has he exercised "an appropriate measure of prudence to avoid causing harm" to others?<sup>2</sup> Some of the cases are cited in the notes.<sup>3</sup> They are not reducible to any principle.

To the present writer there is little difference between the case of a paper partially blank and one altogether blank, where the authority to fill up has been violated; for in both there are fraud and forgery, assisted by a signature intrusted to a rascal. In both the person who has selected the swindler and not the person cheated by him should lose.<sup>4</sup>

<sup>1</sup> 45 & 46 Vic. (Imp.), ch. 61, § 20.

<sup>2</sup> *Ante*, p. 30.

<sup>3</sup> *McDonald v. Muscatine* (1860), 27 Iowa, 319; *Abbott v. Rose* (1873), 63 Me. 194; *Breckenridge v. Lewis* (1892),

84 Me. 349; 24 Atl. R. 864. See a valuable judgment of Denio, J., in *Van Duzer v. Howe* (1860), 21 N. Y. 531.

<sup>4</sup> See remarks, *post*, p. 463 ff.

## SUMMARY.

As to negotiable instruments we may then say:

1. If when in complete form they are intrusted to other persons, either for custody merely or to be delivered upon the happening of a contingency, the obligors will be liable upon them to holders in due course, although the authority of the person intrusted is exceeded.
2. Obligors will also be liable in like cases, even if the instruments have in them certain blanks, whether the existence of such blanks were or were not known to the transferees.
3. If the papers were altogether blank, save for the signature, the obligors will be liable if the transferees were not aware of the imperfection at the time of negotiation, but not liable if the transferees knew of the defects.
4. Estoppel is the true ground for decision in all such cases.

## B. NON-NEGOTIABLE INSTRUMENTS.

*Deeds.*— Before considering, as a class, documents which are usually termed “non-negotiable,” we must ascertain whether or not deeds, because of their sealed character, can be properly combined with others of the class when treating of estoppel. It has been said that

“a deed delivered without the knowledge, consent or acquiescence of the grantor is no more effectual to pass title to the grantee than if it were a total forgery.”<sup>1</sup>

And it is therefore sometimes held that if a deed be deposited in escrow with instructions to deliver it upon a certain contingency, and it be otherwise delivered, and the grantee convey to an innocent purchaser, that the deed is altogether inoperative.<sup>2</sup>

Putting a stronger case: Suppose that the deed is not only incomplete as to delivery, but that it has some blanks in it which unknown to the grantee are filled up without authority before it is handed to him. Can estoppel avail? In such a case Martin, B., said there was no authority which shows that

“where a deed is not the deed of the party, he may be estopped, by negligence or carelessness on his part, from being permitted to aver that it is not.”<sup>3</sup>

<sup>1</sup>Henry v. Carson (1884), 96 Ind. 432. And see Everts v. Agnes (1857), 4 Wis. 356; 6 Wis. 445; Chipman v. Tucker (1875), 38 Wis. 43; Harkraeder v. Clayton (1877), 56 Miss. 383; Allen v. Ayer (1895), 26 Oreg. 589; 39 Pac. R. 1.  
<sup>2</sup>See cases in preceding note.  
<sup>3</sup>Swan v. North B. A. (1863), 7 H. & N. 649; 31 L. J. Ex. 423.

A like view was taken in the same case by Byles, J.;<sup>1</sup> and in another case by Willes, J.;<sup>2</sup> and although the point appears not to have been pressed upon the appeal from the former of these cases,<sup>3</sup> yet it finds acceptance in a modified form in the judgment given by Cockburn, C. J.<sup>4</sup>

In *Everest and Strode on Estoppel*, too, it is said that "the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments; and does not apply to deeds."<sup>5</sup>

At first sight the point seems to be somewhat formidable. The deed is incomplete; the signer does nothing further; no one has authority to perfect it (and of this there can be no question, for authority to complete a deed, it is said,<sup>6</sup> must itself be by deed); how then can the document become operative?

Upon reflection, however, the difficulty disappears. For the problem as to deeds is not different from that involved in other cases. In both it is admitted that the instrument was incomplete when signed, and that it was completed without sufficient authority. In both then, according to the facts, there is no binding document. But it is of the essence of the principles of estoppel that under various circumstances people may be precluded from setting up the facts; and a man may as well be estopped from saying that a deed is not his deed as from saying that a note is not his note. In a vigorous passage *Wilde, B.*, protests against the limitation of estoppel to negotiable instruments:

"It is, therefore, independent of negotiability; it operates in a different way, founded upon principles of equity and fairness between man and man; it rests on a wider basis than the principle which supports title in negotiable instruments; and as it has no relation to commercial intercourse with the exigencies of trade, so it is not confined to instruments which have become negotiable by the demands of commerce."<sup>7</sup>

*Mellor, J.*, was of the same opinion and put it thus tersely: Estoppel operates

"not by validating a void deed, as was supposed in the argument, but by holding that parties shall not be permitted to aver, against equity and good

<sup>1</sup> *Id.*; 2 H. & C. 184; 33 L. J. Ex. 273. Baker (1862), 9 Gr. 97, 298; *Martin v. Hanning* (1866), 26 U. C. Q. B. 80.  
<sup>2</sup> *Re Swan* (1859), 7 C. B. N. S. 400; A more recent case proceeds upon  
 30 L. J. C. P. 113. estoppel. *Bank of Toronto v. Co-  
 bourg* (1884), 7 Ont. 1. And see the  
<sup>3</sup> *Swan v. North B. A.* (1863), 2 H. American cases as to bonds *infra*;  
 & C. 175; 32 L. J. Ex. 273. and *Washburn on Real Prop.* (5th  
<sup>4</sup> *Id.* ed.), vol. 3, p. 256, note.  
<sup>5</sup> Page 358.  
<sup>6</sup> This old doctrine is losing some  
 of its authority. *Leonard v. Merritt*  
 (1830), *Dra.* 281; *Bank of Montreal v.*  
<sup>7</sup> *Swan v. North B. A.* (1862), 7 H.  
 & N. 634; 31 L. J. Ex. 425.

faith, the invalidity of a deed which, either by words or conduct, they have asserted to be valid and upon which the others have acted."<sup>1</sup>

It would be extraordinary if deeds were to be placed outside the reach of the principles of estoppel. If a deed or any other document has in reality not been executed by a party to it, but if he represents that it has, and it appears so to have been, why should he not be estopped? If, for example, a man signs and seals a document, and procures it to be attested in the usual form,<sup>2</sup> and if afterwards some blanks which he has left in it are filled up, and upon the faith of the document in its completed form some one changes his position, the signer ought to be estopped.

At all events, the only point that we have in hand at present is that the presence of a seal does not oust the application of estoppel. Lord Mansfield was not much troubled because of a seal, in *Texira v. Evans*;<sup>3</sup> and although he was overruled upon the ground that authority to complete a deed must be by deed,<sup>4</sup> yet we have now estoppel wherewith to reply that lack of authority is granted but is quite immaterial.

A very recent (1899) writer in the United States<sup>5</sup> adheres to the old rule, saying that it is still the law where the distinction between sealed and unsealed documents continues. And no doubt there are many cases which so say; but they all overlook the estoppel point, which nevertheless is by no means without exposition and application in that country.<sup>6</sup> And there can be little doubt that the American cases overwhelmingly hold that if a bond be executed by a surety, and handed to the principal debtor with a condition that it is not to be delivered unless executed by another surety; and if the bond be delivered without fulfillment of the condition, and without further intervention of the surety, he is liable.<sup>7</sup> The language of Turner, L. J., is to the same effect:

"If a party will leave a deed executed by him in the hands of another

<sup>1</sup> *Id.*; 2 H. & C. 177; 32 L. J. Ex. 274. See also per Erle, C. J. § 184. See a better opinion in Washburn on R. P. (5th ed.), vol. 3, p. 250, note.

<sup>2</sup> An attestation clause is evidence of delivery. *Evans v. Grey* (1892), 9 L. R. Ir. 539.

<sup>3</sup> Cited 1 Anst. 228.

<sup>4</sup> *Hibblewhite v. McMorin* (1840), 6 M. & W. 200; *Squire v. Whitton* (1848), 1 H. L. C. 333.

<sup>5</sup> Randolph on Commercial Paper,

<sup>6</sup> See *State v. Pepper* (1860), 31 Ind. 76; *Smith v. Peoria* (1871), 59 Ill. 412; *Bartlett v. Board*, *id.* 364. The case of *State v. Dean* (1867), 40 Mo. 464, probably goes too far, for there was no ground of estoppel in it.

<sup>7</sup> *State v. Peck* (1865), 53 Me. 284;

person, and that deed so left in his hands is made by him a security to a third party, who acts honestly and fairly in the transaction, I am by no means satisfied that it is competent for the person who has left the deed in his hands to set up against the third party, who has honestly taken it as security, the fact, if fact it be, of fraud having been committed upon the person having it."<sup>1</sup>

Perhaps enough has now been said to warrant the inclusion of deeds with other "non-negotiable" instruments in the remarks which have to be made concerning them.

*Completed Non-negotiable Instruments.*—No distinction upon principle can be made between negotiable and non-negotiable instruments which have been intrusted to some person either for custody merely, or to be delivered upon the happening of some contingency, when the decision of such cases is based upon estoppel. No doubt if we were to admit considerations of law merchant and negotiability (as to which see chapter XXIV); or if we referred the point to the law of agency merely; or if we ran wreck upon the theory that authority to complete a deed must itself be by deed, we might have to say that although the makers of the deeds "themselves have created the agency or trust by means of which the fraud . . . has been committed," yet they are saved by the presence of a seal. But the law of estoppel disregards all such points. It fixes attention upon the fact that the purchaser has changed his position upon the faith of some misrepresentation of ownership; that the person who "created the agency or trust" assisted the misrepresentation and made it credible; and declares that by reason of such assisted misrepresentation he ought to be estopped—seal or no seal very immaterial.

Smith v. Peoria (1871), 59 Ill. 412; 458; and the Canadian case, Reg. v. McCormick v. Bay City (1874), 23 Chesley (1889), 16 S. C. Can. 306. Mich. 457; Nash v. Frigate (1874), 24 See as to a mortgage, Garland v. Grat. (Va.) 202; Hunt v. States (1876), Wells (1893), 15 Neb. 298; 18 N. W. R. 53 Ind. 321; State v. Potter (1876), 63 132; Hollis v. Harris (1892), 96 Ala. Mo. 212; Brown v. Probate (1880), 42 288; 11 S. R. 377; Lloyds v. Bullock Mich. 501; 4 N. W. R. 195; Lyttle v. (1896), 2 Ch. 192; 65 L. J. Ch. 580. A Cozard (1893), 21 W. Va. 183; Pala- case of forced delivery, Gould v. cios v. Brasher (1893), 18 Colo. 593; 84 Wise (1893), 108 Cal. 365; 32 Pac. R. Pac. R. 251; Rose v. Douglas (1893), 576; 41 Pac. R. 408.  
53 Kan. 451; 34 Pac. R. 1046; Dol-  
beer v. Livingston (1893), 100 Cal. 617; 35 Pac. R. 328; Crystal Lake v. Hill (1896), 100 Mich. 246; 67 N. W. R. 121; Stoner v. Keith (1896), 48 Neb. 279; 67 N. W. R. 311; Hart v. Mead (1897), 53 Neb. 153; 73 N. W. R.

<sup>1</sup>Greenfield v. Edwards (1865), 2 De G., J. & S. 596. And see per Wilde, B., in Swan v. North B. A. (1862), 7 H. & N. 631; 31 L. J. Ex. 425; Benterick v. London (1893), 2 Ch. 141; 62 L. J. Ch. 358.



But of course we will not apply this principle unless the assistance referred to has been of effective quality. If a deed from A. to B. has been delivered in escrow and been improperly handed over, and B. afterwards sells the property to C., A. ought to be estopped because of the ostensible ownership of B. But B. could not claim the same estoppel; for he did not act upon any representation of ownership—he did not think that the custodian of the deed was the owner of the property. He knew that he was an agent merely; and as to the extent of authority, inquiry ought to have been made—as in other cases.

*Blanks in Non-negotiable Instruments.*—Let it be remembered that with reference to bills and notes we found two principles of estoppel in operation:

1. Where an agent exceeds his authority the principal may be estopped from denying the existence of the assumed authority, if he has enabled the agent to mislead the person with whom he dealt. That principle was applied in this way: Intrusting a person with a blank note is evidence of such person's authority to fill it up as he pleases; therefore the signer of a blank note is estopped from denying the existence of such authority as against any one who dealt upon the faith of the appearance of authority.

2. If the blanks have been filled up prior to delivery of the document then also the signer is estopped, not because of ostensible agency (for nothing in this case is known of agency), but because of the appearance of an originally completed document, for which appearance the signer is, by his assistance rendered to the fraud, responsible.

Now observe that there is nothing in these two principles which suggests their limitation to cases of bills and notes; and that there can be no reason why persons who have been misled by other documents in similar ways should not have the like benefit of the law of estoppel.<sup>1</sup>

*Blanks Known to the Transferee.*—For example, it has been quite customary to execute transfers of shares leaving the name of the transferee blank; and the hiatus is filled up only when some one of the successive owners desires to register the transfer. Of such instruments Lord Mansfield would no doubt have

<sup>1</sup> Angle v. N. W. Mutual (1875), 92 Brown (1894), 59 Mo. App. 431; Jewel U. S. 339; New England, etc. v. v. Rock River (1881), 101 Ill. 57.

said that their plain import was "Galley or any subsequent holder may fill up as he pleases," and some of the more modern judges would have agreed with him. In one case Chitty, J., said:

"Having regard to the practice proved, and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where . . . the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bona fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority; and to this extent and in this manner, but not further, is estopped from denying the title of such holder for the time being."<sup>1</sup>

It will be observed that everything depends upon custom. No one would suggest, with reference to a conveyance of land, that the existence of blanks in it indicated authority to fill them up.<sup>2</sup> Custom has, however, attached that interpretation to a blank for the name of the transferee in share transfers;<sup>3</sup> such blanks, therefore, constitute a representation by the signer of them that the holder has authority to fill up, and by such representation the signer is estopped as against a purchaser for value without notice.

Lord Herschell recently said:<sup>4</sup>

"And this doctrine has been held, by the court of appeals of the state of New York,<sup>5</sup> to be applicable in the case of certificates of shares with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently or in excess of his authority sells or pledges them. The banks or other persons taking them for value without notice have been entitled to hold them as against the owner. As at present advised, I do not see any difference between the state of New York and the law of England in this respect."

No assumption of unlimited authority to fill up would probably arise in case of blanks left for the description of the shares

<sup>1</sup> Colonial Bank v. Hepworth (1887), 86 Ch. D. 53; 56 L. J. Ch. 1099. There is some confusion here. If by handing over blank transfers "each prior holder confers . . . an authority to fill in the name of the transferee," there is no place or ground for estoppel. It is because such authority is not always so conferred, but because it appears to have been conferred, that estoppel arises.

<sup>2</sup> Ellis v. Wait (1893), 4 S. D. 454; 57 N. W. R. 229.

<sup>3</sup> In Taylor v. Great Indian, etc. Co. (1859, 4 De G. & J. 571; 28 L. J. Ch. 709), Turner, L. J., said: "It appears that it is a common, perhaps

a universal, practice on the Stock Exchange, between the brokers and jobbers or dealers in shares, for the broker or dealer who sells, to deliver the deed of transfer of the shares to the dealer who purchases in blank as to the name of the transferee, leaving the name to be filled in when the dealer who purchases may himself find a purchaser for the shares."

<sup>4</sup> Colonial Bank v. Cady (1890), 15 App. Cas. 285; 60 L. J. Ch. 131.

<sup>5</sup> As to the New York law, see *Mo-Nil v. Tenth National Bank* (1871), 46 N. Y. 325. See also the cases cited with this one in ch. XXII.

to be transferred. A purchaser from a holder of such a transfer would not be justified by custom in believing that the signer had given authority to fill up any class and any amount of shares. In such case the purchaser would be in the usual position of one dealing with a person known to be acting as an agent; he would have to inquire as to his authority, and no answer to such inquiry would be found in the form of the document, as in the case by custom where the transferee's name merely is omitted.

If, however, transfers blank as to the description of the shares were filled up before negotiation, and the transferee had no reason to suspect that the document was incomplete when executed, then the signer ought to be estopped from denying the validity of the document, upon the principle laid down by Kindersley, V. C., in *Hatch v. Searles*.<sup>1</sup>

*General Applicability of Estoppel.*—It will now be seen that there is thus far no difference in principle between bills and notes and other documents with reference to blanks in them when signed. The question always is, What, according to custom, do such blanks import? If they indicate the existence of authority to fill up, then there is estoppel. If they do not so indicate, there is none. Custom established the law as to bills and notes. It can do the same for other documents:

“Usage, adopted by the courts, having been thus the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usage of past times? Why is the door to be now shut to the admission and adoption of usage in a matter of altogether cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment?”<sup>2</sup>

Not merely transfers of shares, then, but bills of lading, warehouse and cotton-press receipts, and other like symbols of property, are all subject to the same principle.<sup>3</sup> The question as to all documents is the same.

*Blanks Unknown to the Transferee.*—As has already been pointed out,<sup>4</sup> where the existence of blanks is unknown to the transferee, the ground of estoppel is not, and cannot be, the

<sup>1</sup> (1854) 2 Sm. & G. 147; 23 L. J. Ch. 467. And see Reg. v. Chesley (1869), 16 S. C. Can. 306.

<sup>2</sup> Per Cockburn, C. J., in Goodwin v. Roberts (1875), L. R. 10 Ex. 351; 44 L. J. Ex. 157.

<sup>3</sup> Colebrooke on Collateral Securities, 34. And see the cases there cited.

<sup>4</sup> See cases *ante*, p. 451, note 7.

presumption of authority to fill up the blanks, but the justifiable assumption that the document was complete when executed. It is obvious that the reason for estoppel in such cases applies equally to negotiable and non-negotiable instruments; although, no doubt, it is more frequently invoked in the former than in the latter class of documents. Blanks in a bond, therefore, left by the sureties and filled up without authority will not constitute a defense as against an obligee who has had no notice of them.

And where a deed, blank as to consideration and name of grantee, but signed and sealed and indorsed by the proper officer, with a certificate of execution, was delivered to an agent for use in case he found a purchaser; and the agent filled in his own name and a pretended consideration, and sold the land as his own to an innocent purchaser, it was held that the grantor was estopped.<sup>1</sup>

## II. DOCUMENTS STOLEN OR FOUND.

### A. NEGOTIABLE INSTRUMENTS.

*Present Uncertainty.*—It is curious that there should be doubt as to the liability of the maker of a note who loses it, or from whom it is stolen. A well-known writer, in a recent work as to stolen instruments, says:

"Thus it is laid down that where a negotiable instrument is stolen or fraudulently taken from the acceptor or maker, such party cannot be required to pay it to any holder whatever; and that, too, though the acceptor or maker may have made the theft or fraud easy by putting the paper in an unlocked drawer in a desk to which clerks and servants and others had access."<sup>2</sup>

In the case of a lost note, on the other hand, there might, in view of the same writer, be liability:

"If this be sound doctrine, it will follow that where the instrument got into circulation by being dropped, picked up and passed, there has been no delivery, unless the dropping was negligent: possibly to drop a negotiable instrument transferable by delivery would be presumptive negligence."<sup>3</sup>

The learned author deprecates the introduction of the principles of estoppel into the discussion of the case of a stolen note, because "theft is not the natural consequence of negligence" in the method of its custody. May it not, however, similarly be said in the case of a found note that the fraudulent passing

<sup>1</sup> Pence v. Arbuckle (1876), 22 Minn. 417. And see cases as to mortgages, ante, p. 452, note.

<sup>2</sup> Bigelow on Bills and Notes, 177.

<sup>3</sup> Id.

of it is not the natural consequence of the maker losing it? Yet in such case the author thinks that there may be liability and estoppel. If in both cases there is the criminal appropriation of another person's property, and in both an innocent purchaser for value, ought not the result in both to be the same?

*Baxendale v. Bennett.*—In the well-known case of *Baxendale v. Bennett*,<sup>1</sup> a blank acceptance was returned before issued to the acceptor, who put it in a drawer from which it was stolen. It was held that the acceptor was not liable. Bramwell, L. J., said:

"Is it not a rule that every one has a right to suppose that a crime will not be committed and to act on that belief? . . . If suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of check or bill to the signature, would the signer be liable?"

Referring to *Young v. Grote* and *Ingham v. Primrose*, he said that they

"go a long way to justify the judgment; but in all those cases, and in all the others when the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This undoubtedly is a distinction, and a real distinction."

Brett, L. J., put the case upon this ground:

"Whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used."<sup>2</sup>

*A Crucial Question.*—Lord Justice Bramwell's question is a crucial one; and if, as he assumes, there is but one possible answer to it, much difficulty will arise in drawing an intelligible line between cases in which there is liability and those in which there is none.

The point is simply this: A man has a habit of writing his name upon blank forms of promissory notes, and leaving them carelessly within reach of every one; somebody fills in the blanks in one of the papers, and passes it to a *bona fide* holder for value; is the signer liable? Or (to bring the case more clearly within the Lord Justice's language), suppose that the note was put "in an unlocked drawer in a desk to which clerks

<sup>1</sup>(1879) 3 Q. B. D. 525; 47 L. J. Q. B. 624. otherwise held in *Gould v. Legee* (1856), 5 Duer, 270; differing from the earlier case of *Hall v. Wilson*

<sup>2</sup>This distinction has found favor in *New York. Ledwick v. McKim* (1853), 16 Barb. 555. See also *Schuylkill v. Copley* (1871), 67 Pa. St. 386; (1873), 53 N. Y. 307; *Davis v. Best* (1887), 105 N. Y. 67. It had been *Kagel v. Totten* (1882), 59 Md. 447.

and servants and others had access," from whence it was stolen and made into a note; would the signer be liable?

*Complete and Incomplete Instruments.*—To these fundamental questions the answer of the authorities is in the negative.<sup>1</sup> But as soon as one gets away from the simplest form of the question the cases commence to vary, and the lack of principle of decision becomes apparent. For example, Mr. Daniel distinguishes between complete and incomplete instruments. As to the former he says:

"Where the maker has perfected the instrument and left it undelivered in a safe, desk, or other receptacle, it should then be at his hazard. Such papers are made for use and not for preservation. The maker creates the risk of their being eloiigned by keeping them on hand, and places them on the same base as negotiable papers which have been put upon the market. When once issued the purchaser is protected and the owner loses, even though he had guarded his property with bolt and bar; and if bankers and others who must necessarily be in possession of negotiable securities in the course of trade are not protected, we can discover no principle which can be invoked to protect one who holds his own paper contrary to the ordinary wants and usages of trade."<sup>2</sup>

As to incomplete instruments, on the other hand, the same author says:

"The second class of cases arises when an incomplete instrument has been signed and stolen, without any delivery to an agent in trust or otherwise intervening. In such cases no trust for any purpose has been created. No instrument has been perfected. No appearance of validity has been given it. No negligence can be imputed. Therefore if the blank be filled it is sheer forgery, in which the maker is in no wise involved, and he is not therefore bound, even to a *bona fide* holder without notice."<sup>3</sup>

Lord Justice Bramwell, as we have seen, would not have admitted the validity of Mr. Daniel's distinction between the theft of a complete and an incomplete instrument. His principle:

"Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief?" applies to both cases alike. Lord Justice Brett would also repudiate the distinction, basing his opinion, however, not upon the ground of orime, but because liability depends upon issuing

<sup>1</sup>To the cases already cited add *First Nat. Bank v. Zeims* (1894), 93 Iowa, 140; 61 N. W. R. 488; *Byles on Bills* (15th ed.), 255. See, however, *Cooke v. United States* (1875), 91 U. S. 389. Treasury notes were fraudulently printed from the genuine plates and the treasury was held to be liable upon them. No signature was necessary. Distinguish Colum-

*bia v. Cornell* (1889), 130 U. S. 655, where the word "canceled," written in ink upon negotiable certificates, was erased, and the certificates passed.

<sup>2</sup>*On Negotiable Instruments* (4th ed.), vol. 1, p. 852.

<sup>3</sup>*Id.* 853. The same distinction is made in *Parsons on Bills and Notes*, vol. 1, 114.

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an instrument "intending it to be used," and in neither case was there any issue, or any such intention.

Williams, J., on the other hand, would agree with Mr. Daniel's contention as to a complete instrument:

"It is we think settled law that if the defendant had drawn a check, and before he had issued it he had lost it, or if it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice who had sued the defendant upon it, he would have had no answer to the action. So if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee. The reason is, that such negotiable instruments have by the law merchant become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency."<sup>1</sup>

And Cockburn, C. J., may be taken to have thought that there would be liability even when the instrument had not been completed prior to its being feloniously applied, for in *Watson v. Russell*<sup>2</sup> he said:

"I consider the law to be now quite settled, that if a person puts his name to a paper which either is, or by being filled up or indorsed may be, converted into a negotiable security, and allows such paper to get into the hands of another person, who transfers the same to a holder for consideration and without notice, such party is liable to such *bona fide* holder, however fraudulent or felonious as against him the transfer of the security may have been."

*Criticism of Present Rules.*—It is hard to get a footing here. Lord Justice Bramwell's rule that every one may safely act upon the supposition that a crime will not be committed finds ample contradiction not only as to one's own interests (as an overwhelming matter of fact), but with regard to the interests of others in various departments of the law. In the realm of torts many examples are met with; and the law of estoppel by misrepresentation is largely founded upon the contrary view. Not, however, to leave the subject of bills and notes, the following may be taken to be undisputed law:

"The misapplication of a genuine signature, written across a slip of stamped paper (which transaction being a forgery would in ordinary cases convey no title), may give a good title to any sum fraudulently inscribed, within the limits of the stamp."<sup>3</sup>

And it can hardly be argued that if the signer of a slip of paper may be made liable by forgery, it is beyond the bounds

<sup>1</sup> *Ingham v. Primrose* (1859), 7 C. B. N. S. 82; 28 L. J. C. P. 294.

<sup>2</sup> (1862) 31 L. J. 304. And see *McInnis v. Milton* (1870), 80 U. C. Q. B. 493.

<sup>3</sup> Per Byles, J., in *Swan v. North British* (1863), 2 H. & C. 185. (See the report in 32 L. J. Ex. 277.)

of reason to hold that the signer of a completed note may be made liable by larceny.

The distinction of Lord Justice Brett:

"Whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used," must, of course, be subject to this: that the acceptor may be estopped from denying the issue of the bill, and his intentions with regard to it, by appearances for which he is responsible. And the argument comes back once more to the question of "the duty of fellow-citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to others"<sup>1</sup>— the duty, in this case, of preventing the appearance of a note issued and intended to be used. May it not be said that "It is the duty of the maker of the note to guard not only himself, but the public, against fraud and alteration by refusing to sign negotiable paper made in such form as to admit of fraudulent practice upon them with ease and without ready detection."<sup>2</sup>

*Egoistic and Altruistic Views.*—As has already been said,<sup>3</sup> there are two views which may be taken with reference to the conduct of affairs — the egoistic and the altruistic. According to the former, as applied to the subject in hand, I may sign my name to as many pieces of paper as I wish, scattering them broadcast among my neighbors, leaving other people to take the risk of forgery; I may amuse myself by signing dozens of completed notes and carelessly permit "clerks and servants and others" to remove them if they please, aware that not I, but other people, must suffer for my alleged faith in universal honesty; I may, with easy indifference, leave spaces of the most tempting character in notes which I sign and issue, and if they be improperly filled and my seeming liability increased, I may say that I acted upon the assumption that there was no one in the world that would do such a thing, and that there are places to which, with certain difficulties of procedure, such an one may be sent.

According to the altruistic view, I shall have some care for the interests of my fellow-citizens. Being perfectly aware that the world is full of rascals, and that my pretense of other belief is absurd, I shall not furnish them, if I can avoid it, with tempting opportunities for defrauding others. As I would not

<sup>1</sup> Pollock on Torts, 22. See *ante*, (1875), 79 Pa. St. 370. See cases re-  
ch. V. *passim*. referred to with these in ch. V.

<sup>2</sup> Zimmerman v. Rote (1874), 75 Pa. St. 191. And see Brown v. Reed

<sup>3</sup> See ch. V.



indulge myself in signing slips of paper were the risk of notes being written on them my own, so, also, shall I exercise proper circumspection where there is danger to others. And as notes are made for use and not for storage, I shall refrain from signing them until they are needed, or at least so draw them that they may not be immediately negotiable. I would do that were the risk my own.<sup>1</sup>

*Ostensible Ownership.*—Liability in all such cases must rest upon the principles of estoppel by ostensible ownership. A thief appears to be the owner of the instrument which he proposes to negotiate. Possession of a watch does not indicate ownership;<sup>2</sup> but the property and possession of bills and notes are inseparable.

"Every holder of the bills takes the property, and his title is stamped in the bills themselves."<sup>3</sup>

Possession of a bill is ostensible ownership of it. If the real owner assists in the misrepresentation of property by an ostensible owner, such real owner ought to be estopped from setting up his own title. And it is hard to see how such assistance can more effectually be afforded than by bringing into existence that which from its very nature carries with it a representation of ownership. Did I write upon my goods, "The bearer is the owner of these," I would certainly be estopped from setting up my title to them, even though some one tempted by the writing had stolen them from me and passed them on. I would have assisted in his misrepresentation. And if I create a document which carries with it to everybody a similar assertion, I ought likewise to be estopped.<sup>4</sup>

*Incomplete Instruments.*—These remarks have primary reference to cases of completed instruments which have been stolen

<sup>1</sup>This precaution would insure safety, for it would be unreasonable to hold that a thief could effect a transfer by forging my signature. *First Nat. Bank v. Bremer* (1893), 7 Ind. App. 685; 84 N. E. R. 1017. See, however, *Wegner v. Second Ward* (1890), 44 N. W. R. 1096; *Tobin v. Manhattan* (1893), 57 N. Y. St. R. 856; 4 Misc. R. 119; 24 N. Y. Supp. 14; 27 id. 1124. And see *Leather v. Morgan* (1897), 117 U. S. 96; *Walters v. Tielk-meyer* (1897), 70 Mo. App. 371.

<sup>2</sup>*Gabarron v. Kreeft* (1875), L. R. 10 Ex. 281; 44 L. J. Ex. 238. See ch. XXI.

<sup>3</sup>*Collins v. Martin* (1797), 1 Bos. & P. 651.

<sup>4</sup>Some authorities are, however, otherwise. *Ledwick v. McKim* (1873), 53 N. Y. 307; *Hinckley v. Bank* (1881), 181 Mass. 147; *Bangor v. Robinson* (1892), 53 Fed. R. 520; *Young v. Brewster* (1895), 62 Mo. App. 628.

or found and subsequently passed on. Let us now look at Mr. Daniel's reasons for a contrary conclusion in the case of incomplete instruments — those in which blanks have been left. He mentions five:

1. "No trust for any purpose has been created." But there was no trust either in the case of the completed instrument.

2. "No instrument has been perfected." Nor in the other case either; for delivery is necessary to a perfected note.<sup>1</sup>

3. "No appearance of validity has been given it." As the authorities stand, the holder of a blank note has the appearance of authority to fill it up. A blank note is then just as available in the hands of a thief as is a completed one. There is therefore in both cases the same appearance of validity.

4. "No negligence can be imputed." But there is exactly the same negligence in the one case as in the other.

5. "If the blank be filled it is sheer forgery, in which the maker is in no wise involved." And in the case of the completed note there is sheer larceny, "in which the maker is in no wise involved;" and also the wrongful emission of the document which may well be argued to be a further criminal act.

It is difficult then to see any ground for distinction between a complete and an incomplete note. They are equally negotiable, and over both the maker ought to exercise the same vigilance and control.

Among the authorities relating to instruments fraudulently appropriated the much-discussed case of *Ingham v. Primrose*<sup>2</sup> may be noticed. A drawer of a bill returned it to the accommodation acceptor unused. The acceptor, intending to cancel it, tore it into two pieces and threw them on the ground. The drawer picked them up, pasted them together, and passed the bill. The appearance would not have suggested anything but a severance for more secure transmission. The acceptor was held to be liable

"because the defendant, by abstaining from an effectual cancellation or destruction of the bill, has led to the plaintiffs becoming the holder of it for value."

In other words, he has provided an opportunity or occasion for fraud — has by his negligence made credible the misrepres-

<sup>1</sup> See the Codes, 45 & 46 Vic. (Imp.), 2 (1859) 7 C. B. N. S. 82; 28 L. J. C. ch. 61, § 21; 53 Vic. (Can.), ch. 33, P. 294.  
§ 21.

resentation of the drawer that the paper was a real obligation. He is therefore estopped from denying that it is such.

Although the case has been seriously questioned in *Baxendale v. Bennett*,<sup>1</sup> the writer ventures the opinion that it is well founded, and ample justification for it can be found in the principles of the law of estoppel. There seems to be little reason for holding an acceptor liable upon a really uncanceled bill confided to another person who fraudulently negotiates it, if he is not to be liable upon one which is in appearance at least uncanceled, and which he throws down in the presence of the person to whom a moment before it had been confided. There is a difference in the acceptor's intention, no doubt; but none in the facility afforded for fraud, and none in the position of the transferee.

*Signed Slips.*—If distinction between a completed and a blank note may be denied (upon the ground that the latter carries with it ostensible authority to fill it up), the same argument will not apply when comparing the case of a completed note with that of a mere slip of paper bearing a signature, for there is not in that case any appearance of authority to subscribe a note. If, indeed, a stamp required by the local law had been affixed by the signer, the case would be different and within the statutory law as to blank notes.<sup>2</sup> But if the slip be entirely blank it cannot be said that there is ostensible authority to write on it a bill or note; and if there be no ostensible authority there can be no estoppel by appearance of agency.

This remark, however, is necessarily limited to cases in which the transferee knew that the superscription had been added by some one other than the signer.<sup>3</sup> If the instrument be in complete form when offered in negotiation, then its appearance indicates that the body of it was written prior to the signature; and the case is not at all one of ostensible authority to fill up blanks. In such a case, if the signer is to be liable, it is upon the ground already indicated, namely, "the duty of fellow-citizens to observe, in varying circumstances, an appropriate measure of prudence to avoid causing harm to others."<sup>4</sup>

<sup>1</sup> (1878) 3 Q. B. D. 532; 47 L. J. Q. B. 624. <sup>2</sup> See the same distinction noticed, *ante*, p. 455.

<sup>3</sup> *Post*, pp. 464, 465. And see the Codes, 45 & 46 Vic. (Imp.), ch. 61, § 20; 53 Vic. (Can.), ch. 83, § 20. <sup>4</sup> See *ante*, p. 80.

Can it be said that there is an appropriate, or indeed any, measure of prudence in spreading broadcast your autograph upon slips of paper suggestive of promissory notes, and in blindly trusting to the impeccability of the world?

Distinction is made between completed or blank instruments on the one hand, and mere autographs on the other, by Beck, J.,<sup>1</sup> as follows:

"The reason is obvious. The maker ought to suffer on account of the fraudulent act of one to whom he intrusts his paper, or who is made agent in respect of it, rather than an innocent party. The law esteems him in fault in thus putting it in the power of another to perpetrate the fraud, and requires him to bear the loss consequent upon this negligence. In the case under consideration, no fault can be imputed to the defendant. He did not intrust his signature to the possession of the forger for the purpose of binding himself by a contract. He conferred no power upon the party who committed the crime to use it for any such purpose. He was not guilty of negligence in thus giving it, for it is not unusual, in order to identify signatures and for other purposes, for men thus to make their autographs."

But do not the same remarks apply to both cases? May it not be said in both cases that "he did not intrust his signature . . . for the purpose of binding himself by a contract;" that "he conferred no power upon the party who committed the crime to use it for any such purpose;" and that "he was not guilty of negligence, . . . for it is not unusual . . . for men thus" either to intrust their bills for custody or to give their signatures for identification. And may it not be added, too, that "the maker (signer) ought to suffer on account of the fraudulent act of one to whom he intrusts his paper . . . rather than an innocent party," etc.,— for there is not much difference between "intrusting" your clerk with papers partially blank which you tell him to put in the safe and which he misappropriates, and "trusting" that he will not appropriate and use other papers wholly blank (with the exception of your accommodating signature) which you put in his way. In both cases trust is betrayed; in both crime is committed; in both an innocent purchaser has paid out his money; and in both you have supplied the opportunity for the fraud. Should you not be more careful for the interests of others? What is "an appropriate measure of prudence?"

The English Code provides:<sup>2</sup>

"When a simple signature on a blank stamped paper is delivered by the

<sup>1</sup> *Caulkins v. Whisler*, 27 Iowa, 495. *Jacques Cartier* (1886), 13 Que. L. R. Quoted by Mr. Daniel (on Negotiable Instruments), 495. And see *Ford v. Auger* (1874), 18 L. C. J. 296; *Banque* <sup>2</sup> 45 & 46 Vic. (Imp.), ch. 61, § 20; 53 Vic. (Can.), ch. 61, § 20.

signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover."

The Canadian Code is similar, but omits all reference to stamps; and its effect, therefore, is to declare that a mere signature delivered "in order that it may be converted into a bill operates as *prima facie* authority," etc. The transferee must, therefore, inquire whether it was delivered for the purpose of being converted; but he need not inquire as to the particulars of the authority, or as to any conditions attached to its exercise. You may not assume that there was any authority at all. But if there was, you may assume that it was absolutely unlimited and untrammelled!

*Current Practice.*—In considering the cases upon the subject in hand one cannot help attributing their rarity to the universal existence of a very strong sense of the danger of either storing blank notes or distributing signatures, and also of the absolute necessity for care with regard to them. Were a well-known merchant to amuse himself by leaving his autograph on blank slips of paper in hotel reading-rooms, and were some rascal to superscribe a note upon one of them, it would seem to the writer to be a mere travesty of justice to say that he should not be liable (1) because he did not intrust the paper to any one, (2) because he conferred no power upon any one, and (3) because he was not guilty of any negligence. Mr. Daniel is, however, of a different opinion. He says:<sup>1</sup>

"It could hardly be said that the party was guilty of any negligence in exercising his right to do so simple a thing as the mere writing of his name when he attached no words to it to give it any significance."

But cannot it fairly be argued that the negligence consists in attaching "no words to it." When it is considered that there are so many simple methods of protecting an autograph from misapplication (*e. g.*, placing it at the top of the page, instead of at the bottom; superscribing the words "Yours very truly;" filling the blank above with a pen-scratch) — methods which are adopted by probably every reasonable business man (despite the authorities which indicate that there is no negligence in doing otherwise), is it too much to say that if such simple, every-day precautions are neglected there is sufficient carelessness to estop? Is there not in this region also a "duty of fellow-citizens to observe . . . an appropriate measure of prudence to avoid causing harm to others?"<sup>2</sup>

<sup>1</sup> On Negotiable Instruments, 858.    <sup>2</sup> *Ante*, p. 30.

For example, payment of a bill before due date is a satisfaction of it. But suppose that afterwards it be fraudulently reissued to an innocent holder, the parties to it are liable. They should have destroyed or canceled it—they owed a duty to their fellow-citizens to do so.

"It is the duty of bankers to make some memo. on bills and notes which have been paid; but if they do not, the holders of such securities cannot be affected by any payment made before they are due."<sup>1</sup>

It may indeed be that liability should not arise out of some new product of "ingenious wickedness;"<sup>2</sup> but it is quite another thing to declare that the strongest temptation to the simplest fraud may be held out to all the rascals in the world, and that the temptor should not be the one to bear the loss.

*Unissued Bills Under the Code.*—Section 21 of the Code<sup>3</sup> provides that

"every contract on a bill, whether it is the drawer's, the acceptor's or an indorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto."

"2. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery:

"(a) In order to be effectual, must be made either by or under the authority of the party drawing, accepting or indorsing, as the case may be.

"(b) May be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the bill.

"But if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

"3. Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

This legislation terminates controversy in jurisdictions in which it is in force as to liability upon a completed bill or note which is stolen or found and passed on to a holder in due course. The signers of such instruments can no longer "suppose that a crime will not be committed, and act on that belief." They can no longer urge that liability depends upon having issued the instrument "intending it to be used." Larceny may make him liable.

But it is doubtful whether the statute applies to incomplete bills, and still more questionable whether it was intended to provide for the case of a mere signature. The language is,

"Every contract on a bill . . . is incomplete and revocable until delivery;"

and where the instrument is in blank, and still more where

<sup>1</sup> Per Lord Ellenborough in *Burbridge v. Manners* (1812), 3 Camp. 193, 195. And see *Wheeler v. Guild* (1838), 37 Mass. 545.

<sup>2</sup> *Columbia v. Cornell* (1835), 130 U. S. 655.

<sup>3</sup> 45 & 46 Vic. (Imp.), ch. 61; 53 Vic. (Can.), ch. 33, § 21.

there is nothing but a signature, can it be said that there is a "contract."<sup>1</sup> Possibly it may be argued that the clauses quoted (assisted by section 20) do apply to the case of blank notes, but that the legislation does not touch the question of papers carrying nothing but signatures.

The statute does, however, take us away from the principles of Lords Justices Bramwell and Brett above dealt with, viz.: (1) That no liability can arise out of a crime; and (2) that the question of liability depends upon "his having issued the acceptance intending it to be used." And it gives some effect to the principle of appropriate prudence where the interests of others are involved.

The question in cases not provided for by the statute ought to be whether requisite prudence has been exercised. Some observations upon this subject are to be found in a preceding chapter.<sup>2</sup>

#### B. NON-NEGOTIABLE INSTRUMENTS, STOLEN OR FOUND.

The term "negotiable" is being used in this chapter in its customary acceptation. But the term is inaccurate and misleading, and in considering the difference between "negotiable" and "non-negotiable" instruments when misapplied, stolen or found, perusal of a previous chapter is recommended.<sup>3</sup> Reference is also requested, for the purposes of the present section, to the discussion in a previous part of this chapter of the misapplication of non-negotiable instruments by persons to whose custody they had been confided.<sup>4</sup>

In considering the question of liability upon non-negotiable instruments when stolen or found, as indeed all other questions relating to estoppel by misrepresentation, "the duty of fellow-citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to others"<sup>5</sup> cannot be too strongly insisted upon. Opinion will vary as to the degree of prudence required; but once we get away from the idea that one cannot throw the burden of suggested dishonesty on other people's shoulders, and adopt in place of it the view that "an appropriate measure of prudence" means that although "parties cannot prevent forgery being committed, they must use reasonable care not to afford opportunity for it,"<sup>6</sup>

<sup>1</sup> See section 8 of the Code as to the requisites of a contract.

<sup>2</sup> Ch. XXIV, *ante*, p. 295.

<sup>3</sup> Ch. XXIV.

<sup>4</sup> *Ante*, p. 30.

<sup>5</sup> Pollock on Torts, 22. And see ch. V, *passim*.

<sup>6</sup> *Société v. Metropolitan* (1873), 37 L. T. 849.

and that "too much opportunity"<sup>1</sup> must not be given for the commission of fraud, there will be less divergence of opinion. Meanwhile let it be noted that some progress has already been made.

For example, stolen company bonds may be passed with a good title.<sup>2</sup>

And if a certificate of shares should be taken in the name of a non-owner, and he should steal it and sell the shares, the purchaser would be safe,<sup>3</sup> although it is thought that it would be otherwise were the thief an entire stranger to the shares.<sup>4</sup>

It has been held, too, that although the thief of a bill of lading cannot give a good title to the goods represented by it,<sup>5</sup> yet if the theft be due to the negligence of the owner of the bill the result would be otherwise.<sup>6</sup>

But if a mortgagor should steal, or even upon fraudulent excuse obtain the title-deeds from the mortgagee, and make use of them adversely to the mortgagee, the purchaser would take the equity of redemption only.<sup>7</sup>

To the writer the only distinction between different classes of documents (for the purposes in hand) rests upon the facility with which they lend themselves to fraud. A completed note can be passed with somewhat greater difficulty than money; but, given a person willing to purchase it, its possession evidences the title of the holder.<sup>8</sup> If, therefore, its owner allow it to escape, he, and not an innocent purchaser of it, ought to lose.

Transfers of shares under present methods are as easily transferred as notes.<sup>9</sup> If, then, an owner of shares will execute

<sup>1</sup> Per Best, C. J., in *Young v. Grote* (1827), 12 Moore, 484; 4 Bing. 253; 5 L. J. C. P. 165.

<sup>2</sup> *Venables v. Baring* (1892), 3 Ch. 537; 61 L. J. Ch. 609. And see cases cited with this one, *ante*, p. 380.

<sup>3</sup> *Winter v. Belmont*, 53 Cal. 423. *Cf. Ex parte Swan* (1859), 7 C. B. N. S. 400; 30 L. J. C. P. 113; *Swan v. North British* (1863), 7 H. & N. 603; 31 L. J. Ex. 425; (1863) 2 H. & C. 175; 32 L. J. Ex. 373.

<sup>4</sup> *Bangor v. Robinson* (1872), 52 Fed. R. 520. And see *Young v. Brewster*, 1 Mo. App. R. 577; 62 Mo. App. 623.

<sup>5</sup> *Gurney v. Behrend* (1854), 3 El. & B. 622; 23 L. J. Q. B. 265; *Shaw v. The Railroad* (1879), 101 U. S. 565.

<sup>6</sup> *Lowe v. Raleigh* (1897), 101 Ga. 320; 28 S. E. R. 367.

<sup>7</sup> *Northern Counties v. Whipp* (1884), 26 Ch. D. 492; 53 L. J. Ch. 629. And see cases referred to with this one in ch. XIX.

<sup>8</sup> *Ante*, p. 394.

<sup>9</sup> *McNeil v. Tenth Nat. Bank* (1871), 46 N. Y. 325. And see cases cited with this one in ch. XXII.



blank transfers of them prior to their being required, and allow them to escape, he, and not an innocent purchaser of them, ought to lose.

The same reasoning would reverse the decisions above referred to, in which it is held that a purchaser of land from a mortgagor ought to suffer and not the mortgagee, when the mortgagee hands over to the mortgagor (upon reasonable but fraudulent excuse) possession of the title-deeds; and it would impose consummately careful<sup>1</sup> circumspection on the part of the holders of bills of lading whose whim it was to keep them on hand in negotiable form.

“NEGOTIABLE.”

The reader should be now reminded of what has been said in the preceding chapters as to the use of the word “negotiable,” and the suggestion that it should be superseded by the term “ambulatory.” Thus far in the present discussion the old word has for convenience sake been used, for we have been engaged in the inquiry whether there is a distinction between instruments heretofore styled “negotiable” and other instruments, with reference to the applicability of the principles of estoppel to them. We have found that there is no distinction. And it should now be pointed out that there could be none, for (1) there is no distinction between “negotiable” and “non-negotiable” instruments; (2) the proper division is into “ambulatory” and “non-ambulatory” documents; and (3) the ambulatory list embraces some “non-negotiable” as well as all “negotiable” instruments.

Is there then some distinction between ambulatory and non-ambulatory documents?—that is to say, between documents intended to be operative between the original parties to them only and those intended to be passed on? Yes, there is the very clear and important distinction that third persons do not acquire interests under non-ambulatory documents. There is therefore no estoppel in connection with them; for there is no estoppel between the original parties to the instrument (when it has been obtained or completed by the fraud of the estoppel-asserter); and no estoppel as against third persons, for there are none such in the case.

<sup>1</sup> *Ante*, pp. 62, 395.

The estoppel, then, of which we have been treating occurs in cases of ambulatory instruments, and as against persons who have changed their position upon the faith of their being validly executed. And any distinctions to be met with among such documents are to be attributed not to the inapplicability to any of them of the unvarying principles of estoppel, but to the difference in usage with reference to them. For all cases alike the law imposes

"the duty of fellow-citizens to observe, in varying circumstances, an appropriate measure of prudence to avoid causing harm to others."<sup>1</sup>

#### SUMMARY OF THE CHAPTER.

##### I. EXECUTION FRAUDULENTLY OBTAINED.

1. The true distinction between void and voidable transactions is determined by the consideration whether or not they are capable of ratification.

2. Documents impeachable because of fraud are voidable, and not void, for they may always be ratified.

3. As between a swindler and his dupe, transactions may be rescinded.

4. But if there have been carelessness on the part of the dupe, he will be estopped as against innocent third parties who have changed their position upon the faith of an executed document.

5. Distinctions between lettered and unlettered people, with reference to occasions calling for "extraordinary caution," etc., are merely factors in determining whether the dupe has observed that rule of conduct by which every one is required to exercise "an appropriate measure of prudence to avoid causing harm to one another."

6. Analogy from fraudulent purchase of goods. If the owner of goods, although induced thereto by fraud, has transferred the property in them to another, an innocent sub-purchaser will be protected. If the property has not passed — if there has in fact been no contract between the swindler and the dupe — a sub-purchaser takes nothing. Nevertheless, if the dupe has equipped the swindler with *indicia* of title to the goods, he may be estopped from denying the existence of a contract under which the property passed.

<sup>1</sup> *Ante*, p. 80.

## II. EXECUTION FRAUDULENTLY COMPLETED.

## A. Negotiable instruments:

- (a) Completed instruments intrusted to other persons will carry their obligation to pay with them, although the authority of the persons intrusted is exceeded.
- (b) Blank instruments are in the same category.
- (c) Signed slips will carry liability if the transferee had no notice of their original imperfection; otherwise there is no liability.

## B. Non-negotiable instruments:

- (a) Completed instruments intrusted to other persons will estop the signers of them in favor of those who change their position upon the faith of them.
- (b) Blank instruments are subject to the same principle; but observe that where the existence of the blanks is known to the estoppel-asserter, he will be safe only in cases in which custom authorizes him to infer authority to fill up the blanks.

## C. Documents stolen or found:

## (a) Negotiable instruments:

- (1) There is no difference between complete and incomplete instruments.
- (2) Nor between those intended, and those not intended, to be issued.
- (3) There is no rule that every one has a right to suppose that a crime will not be committed, and to act on that belief.
- (4) Estoppel declares for liability in all such cases.
- (5) Signed slips are distinguishable, but here too the rule ought to exact "an appropriate measure of prudence to avoid causing harm to others."

## (b) Non-negotiable instruments:

- (1) The rule just quoted ought to apply to all sorts of instruments.
- (2) Stolen or found company bonds pass with a good title.
- (3) The law is approaching the same conclusion as to company shares.
- (4) And also as to bills of lading.

- (5) But a mortgagee is thus far safe as against damage through abstraction from him of the title deeds.
- (6) The true distinction among all classes of documents ought to be made with reference to the facility with which they lend themselves to fraud — failure to exercise “an appropriate measure of prudence” should be the test of estoppel.

D. The classification into “negotiable” and “non-negotiable” instruments is unscientific and misleading.

## CHAPTER XXVI.

### OSTENSIBLE AGENCY -- PRINCIPAL AND AGENT.

The principal difficulties in the way of scientific treatment of the law of principal and agent are four: (I) the vogue of serious misconceptions relative to the classification of agents into general and special; (II) lack of clear appreciation of the application to the subject of the principles of the law of estoppel; (III) misunderstanding as to the effect upon an unauthorized act of its having been done "for the master's benefit;" and (IV) confusion arising out of the phrase "within the scope of his apparent authority." An attempt will be made to clear away these difficulties. Their discussion will form the four chief divisions of the present chapter.

#### SOME PROPOSITIONS.

It will be well, however, to interpose and tentatively suggest a few simple propositions:

1. A man cannot be bound by the act of another unless he authorized it.<sup>1</sup>

2. Nevertheless, if he personally represents that he has authorized it, and on the faith of that representation some third party has changed his position, he ought to be estopped from denying the existence of authority. In such case the act was, and remains, unauthorized; but there is estoppel against so saying.

3. Assisted misrepresentation also will estop:<sup>2</sup> If the ostensible agent is the one who makes the representation of authority, and the supposed principal has merely assisted that representation — done that which has made it credible — he will be as much estopped as if he had himself made the representation. For example, if I should employ a broker to sell some shares, he would appear to have all the authority usually possessed by a broker.<sup>3</sup> Now suppose that I had in fact limited that au-

<sup>1</sup> Ratification as a ground of liability is not within the scope of the chapter.

<sup>2</sup> See *ante*, ch. IV.

<sup>3</sup> *Pickering v. Busk* (1812), 15 East, 38. And see *infra*.

thority, and the broker nevertheless acted as though it were unlimited, I would be estopped from denying his possession of customary power; because I had, by my employment of that particular sort of a person, given the appearance of usual authority.

4. Representation of the existence of authority may arise in two classes of cases:

(a) There may be a representation that the person acting was an agent, when in fact he was not.

(b) There may be a representation that the person acting had larger powers than he in fact had.

In other words, there may be representation (1) as to the existence of agency; or (2) as to the extent of it. This distinction (although probably not scientific) will be of much service.

#### I. GENERAL AND SPECIAL AGENCY.

It will be observed that in the above short but comprehensive view of the principles of estoppel as applied to the law of principal and agent, nothing is said as to the much-used distinction between general and special agents. Indeed there appears to be not only no necessity but no place for it. Nevertheless there is hardly any distinction more generally affirmed and more frequently appealed to. We must see what there is in it.

The most usually adopted statements of the distinction are constructions of the language of Lord Ellenborough which is quoted everywhere:

"When that question is discussed it may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances, whereas the former is confined to an individual instance."<sup>1</sup>

A general authority is that "which is derived from a multitude of instances;" and a particular authority "is confined to an individual instance." Does this mean that if particular authority be given in a multitude of instances, then at some point in the sequence, or at the end of it, the authority will become general? If so, and there be some real distinction between the power of a general and special agent, it is extremely

<sup>1</sup> *Whitehead v. Tuokett* (1812), 15 East 408. *Butler v. Maples* (1869), 9 Wall. (U.S.) 766. Among the scores of cases and text books see a discussion in

important that we should be able to say exactly how many instances make up the magic number? Unless indeed we are to be told that the multitude of instances spoken of are not instances of particular authority at all (changing mechanically into general authority), but instances, all of them, of general authority. In which event, however, a new difficulty confronts us, for the first of the series is then, *ex hypothesi*, a case of general authority; while according to our definition it can only be a case of particular authority, for it is "confined to an individual instance."

It is hard to see how the extent or nature of an agent's authority can, in any way, depend upon the frequency or infrequency of the employment. Powers of all and every sort, unlimited as well as the most restricted, may be bestowed upon the agent at his first employment; and may be so continued throughout his life-time. And his exercise for decades of the powers which are given him cannot alter, or affect, or enlarge their extent.

For another and altogether different purpose, no doubt former acts of agency are frequently of great importance: You want to prove that A. is B.'s agent, with certain powers; and you know that on previous occasions A. so acted with B.'s consent. But observe that these previous instances (even though there be a multitude of them) do not in any way enlarge or affect the character of the agency.<sup>1</sup> They are merely evidence of an express grant of that sort of authority which the agent has theretofore exercised. For example, a servant has been accustomed to pledge his master's credit for wine; the master refuses to pay the last of a long series of bills; and evidence is given of the previous dealings to prove that the master had in fact authorized the pledge of his credit — not to show that the servant was a general agent or any other sort of an agent, but to prove actual grant of authority. That is the full extent of the doctrine of "a multitude of instances." It proves agency.<sup>2</sup> It does not alter it. A long course of deal-

<sup>1</sup> Note particularly the reasoning in *Spooner v. Browning* (1898), 1 Q. B. 528; 67 L. J. Q. B. 339.

<sup>2</sup> "A single instance repudiated, not enough." *Stewart v. Rounds* (1892), 7 Ont. App. 515. As to several

instances, see *Spooner v. Browning* (1898), 1 Q. B. 528; 67 L. J. Q. B. 339; *Spooner v. Cummings* (1890), 151 Mass. 318; 28 N. E. R. 839; *Marsh v. French* (1890), 82 Ill. App. 76.

ing "raises a presumption that the agent had actual authority to do what is done by him;"<sup>1</sup> not to do something else.<sup>2</sup>

Mr. Justice Story, in his work on Agency,<sup>3</sup> refers to Lord Ellenborough's dictum as containing "the true distinction;" but himself frames one which is quite different from it:<sup>4</sup>

"A special agency properly exists when there is a delegation of authority to do a single act; a general agency properly exists when there is a delegation to do all acts connected with a particular trade, business or employment."<sup>5</sup>

This distinction is defective because (if for no other reason) its classifications are not sufficiently discriminative or exhaustive. For example, suppose that I employ a broker to purchase all the stock of company A. that he can from time to time obtain; but insist upon his acting in some unusual method. Here I employ him to do more than "a single act;" and yet there is no "delegation to do all acts connected" with his business. In which category is such a case?

Mr. Campbell, in his recent work on "Sale of Goods and Commercial Agency," refers to Lord Ellenborough's dictum as "pregnant language, truly indicating a distinction."<sup>6</sup> If so, one would expect to find a factor, and a broker, in the same category — in an individual instance of employment both of them would always be particular agents; and the line would be drawn between "an individual instance" and "a multitude of instances;" and not between persons of such closely allied occupations. Nevertheless Mr. Campbell says:

"A factor is the term used in English law as a general agent having authority to sell."<sup>7</sup>

"Nor is there by the mere fact of employment as a broker any presumption of general authority. *Prima facie* he is a special agent; but a general authority of limited extent may easily be inferred from a course of dealing."<sup>8</sup>

Of the authority of partners, Mr. Campbell says<sup>9</sup> that "every member of an ordinary partnership is its general agent." But

<sup>1</sup>Wheeler v. Benton (1897), 67 Minn. 293; 69 N. W. R. 927; Graves v. Horton (1887), 38 Minn. 66; 35 N. W. R. 568; Lythe v. Bank (1899), 26 S. R. 6 (Ala.); Marsh v. French (1899), 82 Ill. App. 76.

<sup>2</sup>For example, the receipt of rent on many occasions through an agent will not extend the authority so as to cover payment to the agent in kind, or in repairs. Paisley v. Bannatyne (1887), 4 Man. 255.

<sup>3</sup>Sec. 19.

<sup>4</sup>Sec. 17.

<sup>5</sup>Paley on Agency, p. 2; and Stephen's Com. (9th ed.), II, 65, are to the same effect. And see Montgomery v. Hardaway (1893), 104 Ala. 115; 16 S. R. 83.

<sup>6</sup>Page 526.

<sup>7</sup>Page 555. And see p. 540.

<sup>8</sup>Page 558.

<sup>9</sup>Page 632.



not evidently because of "a multitude of instances;" for prior to a single instance there is the same authority as after twenty years of action.

In the oft-quoted case of *Fenn v. Harrison*,<sup>1</sup> Buller, J., said:

"I agree with my brother Ashhurst that there is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent constituted so for a particular purpose and under a limited and circumscribed power cannot bind the principal by any act in which he exceeds his authority; for that would be to say that one man may bind another against his consent."

Is there any such distinction? Here is the crux of the whole situation, and a complete understanding of it will banish much difficulty: "The principal is bound by the acts of a general agent; but a particular agent cannot bind the principal by any act in which he exceeds his authority." If this were really the law the cases would be replete with examinations of the exact nature of the distinction between general and special agents. That point once well settled, the prescribed result in each case would invariably follow. But there are no such examinations, nothing but general statements of the nature of those already referred to, and no analysis of them.

Mr. Broom's statement of the law may form the basis of exposition:<sup>2</sup>

"An important difference is to be noted between a 'general' and a 'particular' agency; for, if a particular agent exceeds his authority, his principal is not bound by what he does; whereas if a general agent exceeds his authority, his principal is bound, provided what he does is in the ordinary and usual scope of the business which he is deputed to transact."

Observe the proviso—the principal is bound by the acts of a general agent, not in all cases, but only (a very necessary qualification) where "what he (the agent) does is within the ordinary and usual scope of the business which he is deputed to transact." What is meant is this: I employ a general agent in a certain business; such agents usually have certain powers bestowed upon them by their principals; my agent does something within those usual powers, but something which I have prohibited him from doing; and I am bound by his act. The agent exceeds his powers; nevertheless I am bound.<sup>3</sup>

<sup>1</sup>(1790) 3 T. R. 762.

<sup>2</sup>Common Law (8th ed.), 575. See also *East India v. Hensley* (1794), 1 Esp. 182; *Banks v. Everst* (1886), 85 Kan. 687; 12 Pac. R. 141; *Catholic*

*Bishop v. Troup* (1895), 61 Ill. App. 641; *Phoenix v. Gray* (1899), 32 S. E. R. (Ga.) 948.

<sup>3</sup>Or rather I am estopped from denying the existence of authority.

But that is not because the agent was a general agent; for precisely the same result will attend the case of any agent. In other words, it may as well be said of a particular agent as of a general, that the principal will be bound although the agent exceeds his authority, "provided what he does is within the ordinary and usual scope of the business which he is deputed to transact." Many examples of this will be given later on. One at present: I employ a broker (a special agent, according to Mr. Campbell<sup>1</sup>) in "a single instance," prohibiting him, however, from doing something which is usual in the stock markets; he acts for me and disregards my prohibition; and I am bound.<sup>2</sup>

And the reason is the same as in all other cases of agency. It has nothing to do with any distinction between different sorts of agency. It depends upon the fact that my agent has ostensibly certain powers; I have enabled him so to appear; and I am therefore estopped from denying that he has those powers. If I stood by and allowed another person to pose as the owner of my horse, I would be estopped from setting up my title to him as against a purchaser in good faith. Ostensible ownership would there estop me. Ostensible agency, for which I am responsible, will also estop, and for precisely the same reason.

The current rule as stated in Smith's Mercantile Law is as follows:

"The authority of an agent to perform all things usual in the line of business in which he is employed cannot be limited<sup>3</sup> by any private order or direction not known to the party dealing with him. The rule is directly the reverse concerning a particular agent, that is, an agent employed in one single transaction; for it is the duty of the party dealing with such an one to ascertain the scope of his authority; and if he do not, he must abide the consequences."<sup>4</sup>

The first part of this rule is open to the observation that it is a patent truism; for it is plainly impossible to give authority to an agent "to perform all things usual," and yet to withhold

<sup>1</sup> *Ante*, p. 476.

<sup>2</sup> *Pickering v. Busk* (1812), 15 East, 45; *Sutton v. Tatham* (1839), 10 A. & E. 31; 8 L. J. Q. B. 210; *Robinson v. Montgomery* (1896), 2 Ch. 841; 65 L. J. Ch. 915.

<sup>3</sup> The expression "cannot be limited," although often made use of (*Towle v. Leavitt* (1851), 23 N. H.

358), is inaccurate. A principal can, of course, impose such limitations as he pleases upon his own agent. What is meant is that he may be estopped from alleging the existence of limitations.

<sup>4</sup> 10th ed., 140. See also *Bryant v. Moore* (1846), 26 Me. 84.

from him the power to do some of these things. Waiving this point, what is meant, no doubt, is that "it is the duty of the party dealing with" a particular agent "to ascertain the scope of his authority," whereas there is no such duty in the case of a general agent; and a particular agent is one "employed in a single transaction," while a general agent is one employed "to perform all things usual in a line of business."

Now, suppose that I employ a broker to purchase on the stock market twenty shares of certain stock for me, what are his powers? and what sort of an agent is he? If we answer that he is a particular agent because he is "employed in one single transaction," then every one dealing with him must inquire into the exact limit of his authority—a result which will not be asserted.<sup>1</sup> And if we reply that he is a general agent, as being employed "to perform all things usual in the line of business" of a broker, then we shall probably be asked as to the value of "one single transaction" as a test of particular agency. In fact, the case suggested is within both of the alternatives, and would therefore have, by it, to be decided both ways.

Mr. Dicey properly criticises the statements of law above quoted, but does not quite rid himself of the current ideas:

"But the distinction thus laid down is not, it is submitted, maintainable, since if even a particular agent (though the term itself is not a very happy one<sup>2</sup>) is held out to other persons as having an authority beyond that which his principal intends him to possess, the principal will be bound up to the extent of the agent's apparent authority.<sup>3</sup> The true rule seems to be that an apparent authority can never be restrained by private orders from the principal which are unknown to the third party; but that a particular agent as being employed in one instance only can rarely have any apparent authority whatever, and third persons, therefore, must as a general rule trust to his real or actual authority."<sup>4</sup>

Mr. Dicey clearly sees that the same law must be applied to all sorts of agencies, but retains the "one instance only," because in such cases he says the agent "can rarely have any apparent authority whatever." But the cases are far from rare. On the contrary they are multitudinous. Every day there are thousands of brokers plying their vocation. If I send one of them into the market he has "an apparent authority," namely, that authority which a broker usually exercises in that line of business; and not any the less is this the case that he is "em-

<sup>1</sup> See *ante*, p. 478.

<sup>2</sup> Byles on Bills (8th. ed.), 29.

<sup>3</sup> Story on Agency, sec. 127.

<sup>4</sup> Dicey on Parties, 243, n.

ployed in one instance only." It would be better to leave by itself Mr. Dicey's statement

"that an apparent authority can never be restrained by private orders from the principal which are unknown to the third party."

But this, too, cannot be strictly accurate; for Mr. Dicey himself says:<sup>1</sup>

"The principal is always bound by the acts of the agent up to the extent of the agent's authority; and is never bound beyond the extent of that authority."

If this be true, and it indisputably is, the extent of the real authority must be everything, and the extent of the "apparent" authority must be wholly immaterial. And so it would be but for the law of estoppel, the application of which the text writers almost unanimously overlook. The principal cannot be bound by an unauthorized act; but if the principal has enabled the agent (any sort of agent) to appear to have greater authority than he really has, the principal is estopped from asserting that such authority does not exist. This, and not distinctions between single and multitudinous instances, explains all the difficulties.<sup>2</sup>

Although Mr. Justice Story, at one part of his work (sec. 21), says that the distinction between general and special agents is very important,

"as the doctrine applicable to the one sometimes wholly fails in regard to the other,"

at another (sec. 133) he contends that,

"properly considered, the same principle pervades and governs each of the cases;"<sup>3</sup>

and again (sec. 70) he says:

"Principles very similar may be traced back to the Roman law; for in that law, where the authority was express or special, the agent was bound to act within it; and where it was of a more general nature, still the agent could not bind the principal beyond the manifest scope of the objects to be accomplished by it."

See also sections 71, 73, 83; and the longer note to section 127, in which he says:

"It has been already suggested (*ante*, sec. 73) that the same general prin-

<sup>1</sup> On Parties, 240.

<sup>2</sup> The distinction is very important. The court does not say, "the agent has no authority, nevertheless the principal is bound;" which would be absurd. But it does say: "Upon the facts proved, the agent apparently had authority; the principal permitted such appearance; this is good evidence against the principal that

there was, in fact, such authority; the principal will not be allowed to assert anything inconsistent with that on the faith of which the contract was made; the evidence therefore proves the existence of the authority."

<sup>3</sup> See *Beem v. Lockhart* (1891), 1 Ind. App. 202; 27 N. E. R. 239.

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principle pervades all cases of agency, whether the party be a general or a special agent. But nevertheless the distinction between general and special agents is not unfounded or useless. It is sufficient to solve many cases."

So far as the present writer can see, however, the very able author makes no such use of it; and if it be true that "the same general principle pervades all cases of agency," it is difficult to see what can be obtained from a division of them into an employment on one occasion and an employment on more than one.

Mr. Justice Story then may be said to agree that in considering the contractual relation between the principal and the third party the same general principles are applicable, whether the agency be general or special. Those principles, in the language of estoppel, are: (1) That an agent cannot bind his principal unless he has authority to do so; but (2) that nevertheless the principal may by his conduct be estopped from asserting the lack of authority. Not observing the estoppel feature of the case, and substituting therefor (as the writer thinks) an erroneous principle, Mr. Justice Story (sec. 127, n.) put the matter in this way:

"The principle which pervades all cases of agency, whether it be a general or a special agency, is this: The principal is bound by all acts of his agent within the scope of the authority which he holds himself out to the world to possess; although he may have given him more limited private instructions unknown to the persons dealing with him. And this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and having authority in that matter, shall be bound by it. It will at once be perceived that this doctrine is equally applicable to all cases of agency, whether it be the case of a general or special agency."

If this paragraph be turned (as it easily may) into the language of estoppel, it would declare the law in accordance with the present writer's contention; and if it would then be correct there can be no reason for continuing the old division into single and multitudinous instances.

Mr. Mechem, while giving the usual distinction between general and special agents,<sup>1</sup> points out that "as ordinarily drawn" it is "artificial and unsatisfactory, if not positively misleading,"<sup>2</sup> and suggests the following:

"One is in its nature limited and implies limitations of power. Of these limitations third persons must inform themselves, unless the principal has by his words or conduct held out the agent as one upon whose authority such limitations are not imposed. The other is in its nature general and unrestricted by other limitations than those which confine the authority within the bounds of what is usual, proper and necessary under like circumstances. If there are other limitations the principal must disclose them."<sup>3</sup>

<sup>1</sup> On Agency, § 6.

<sup>2</sup> *Id.*, § 284. And see §§ 279, 283, 287, 288.

<sup>3</sup> § 285.

To test the validity of this distinction let us recur to the case of a broker employed in a single transaction, and let us ask again whether it is a case of special or general agency? It is "in its nature limited," and so special; but the limitations are confined to "what is usual, proper and necessary under like circumstances," and so the agency is general. In fact it seems to be a case (if we are to use the customary terms) within the difficult definition of Shepley, J.:

"A special agent is one employed for a *particular* purpose only. He also may have *general* authority to accomplish that purpose."<sup>1</sup>

And probably if our present phraseology gives us special agents with general powers, and (for the same reason) general agents with special powers, something of a case is made out for the revision which Mr. Mechem attempts.

But all must agree that the powers of both general and special agents are limited, and that no agent of any kind can bind his principal by an *ultra vires* act — general and special agents are alike so circumscribed. And Mr. Mechem would also agree that there is no distinction between general and special agency with reference to the estoppel of a principal by holding out an agent as having larger powers than he really possesses. His language upon this point is well worth quotation:

"It may therefore be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in the capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed so far as it may be necessary to protect the rights of third parties who have relied thereon in good faith and in the exercise of reasonable prudence, and he will not be permitted to deny that such other was his agent authorized to do the act that he assumed to do, provided that such act is within the real or apparent scope of the presumed authority."<sup>2</sup>

*Summary.*—We may then say:

1. No advantage is derivable from the usual division of agents into general and special.

<sup>1</sup> *Bryant v. Moore* (1846), 26 Me. 87.

<sup>2</sup> *Chicago v. Troup* (1895), 6 Ill. App. 641, may perhaps be in the same category. *New Albany v. Meyers* (1890), 43 Mo. App. 124, was the case of a general agent "in a particular line." The master of a ship on a par-

ticular voyage, too, is sometimes called a general agent. *Arthur v. Barton* (1840), 6 M. & W. 143; 9 L. J. Ex. 187.

<sup>3</sup> *On Agency*, § 84. Approved in *Johnson v. Hurley* (1893), 115 Mo. 513; 22 S. W. R. 492.

## 2. For in all cases of agency

"the principal is always bound by the acts of the agent up to the extent of the agent's authority, and is never bound beyond the extent of that authority."

3. Nevertheless, if the principal should untruly represent that his agent (any sort of agent) had authority to do the act in question, the principal would be estopped from denying the authority.

4. And if he assisted the agent's misrepresentation of authority — did that which made it credible — then also he would be estopped.

5. "The same general principle pervades all cases of agency whether the party be a general or a special agent."

## II. ESTOPPEL.

Having now some clear idea of the significance of individual and multitudinous instances, let attention be more particularly directed to the relation of estoppel to the law of principal and agent.

It has been said that although an act be unauthorized, yet if the person on whose behalf it was assumed to be done was responsible for the appearance of real authority he ought to be estopped from denying its existence. For the purposes of discussion let the subject be divided into:

I. Cases in which the appearance of power relates to the existence of agency.

2. Cases in which it relates to the extent of the agency. But for the purposes of discussion and clearness only; for if the extent of the agency do not include the act (No. 2), then as to that act agency does not exist at all (No. 1). And contrariwise, if agency exists as to a certain act (No. 1), the extent of the agency (No. 2), *ex hypothesi*, includes the act.

(1) *Estoppel as to Existence of Agency.*— Although it is universal knowledge that a principal may be bound by the unauthorized act of his agent (if the act be within the agent's ostensible authority), it is not only somewhat unfamiliar, but is sometimes denied that there may be estoppel where there was in fact no agency at all, but only the appearance of agency.

Yet the merest reference to the multitudinous cases which arise in the law of partnership ought to dispel all doubt upon the point. Those cases are so numerous that a special chapter

of this work is devoted to their consideration. They are of this sort: A man appearing to be a member of a partnership, but in reality not so, is sued upon the firm's obligation, and the question is as to his liability. Observe that there is no controversy whatever as to the extent of the agency of one member of a firm to bind his partners. The point is, was the defendant a partner at all? was there any agency? The question is as to existence of agency; and this is to be settled by appearance of agency — that is, by estoppel.<sup>1</sup>

Many cases overlook this point. *Biggs v. Evans*<sup>2</sup> is one of the most notable of them. The owner of a table-top sent it to a dealer in such things, accompanied by the following letter:

"I will intrust you with the sale of my opal table upon the following conditions: That the table shall not be sold to any person, nor at any price, without my authorization is first obtained that such sale shall be effected. That the check handed to you in payment for the table shall be handed over to me intact," etc.

The dealer, disregarding the limitations imposed, sold the table-top; and it was held that the owner was not bound by the sale. Wills, J., said:

"It is said that the plaintiff enabled G. to sell the table-top as his own, and that his doing so was within the scope of his authority as it would be understood by persons who dealt with him; and that as he had put it in the power of G. to commit the fraud, he must bear the loss. I think, however, that a fallacy underlies the expression that he enabled G. to commit the fraud. In one sense, and one only, did he do so. He gave him the corporal possession of the table-top, and it was that power that enabled G. to sell it as his own, or by way of a transaction within the scope of his apparent authority, as a person carrying on a business in which sales are habitually effected. But it is quite clear that it requires more to found the argument in question. In one sense every person who intrusts an article to any person who deals in second-hand articles of that description enables him, if so disposed, to commit a fraud by selling it as his own. A man who lends a book to a second-hand bookseller puts it into his power, in the same sense, to sell it as his own. A man who intrusts goods for safe custody to a wharfinger who also deals in his own goods, or in other people's goods intrusted to him for sale, in such a sense enables him to commit a fraud by selling them to a customer. But such a transaction clearly could not give a title to a purchaser as against the owner. *The true test is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all.* If it does, and the

<sup>1</sup>The California Civil Code provides forestoppel as to existence of agency: "An agency is ostensible when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Sec. 2300. And see *Heald v. Henely* (1891), 89 Cal. 632; 27 Pac. R. 67. Persons dealing with an agent, whether

"general or special, are bound at their peril to ascertain not only the fact of the agency, but the extent of the authority, and in case either is controverted the burden of proof is upon them to establish it." *Lester v. Snyder* (1898), 12 Colo. App. 351; 55 Pac. R. 615.

<sup>2</sup>(1894) 1 Q. B. 88.



dealing effected is of the same nature as the dealings contemplated by the authority, and the agent carries on a business in which he ordinarily effects for other people such dispositions as he does effect, what he has done is within the general authority conferred; and any limitations imposed as to the terms on which, or manner in which, he is to sell are matters which may give a right of action by the principal, but cannot affect the person who contracts with the agent. *The foundation, however, of the whole thing is that the agent should be authorized to enter into some transaction.* Now, in the present case, the letter taken as a whole shows that the table-top never was intrusted to G. to sell. He was forbidden in express terms to sell without further authority.<sup>1</sup>

This judgment would limit the application of estoppel to cases in which there has been some minor departure from an authorized course. There must be (1) authority to do something; (2) something done "of the same nature as the dealings contemplated by the authority;" and (3) a departure merely as to terms or manner. In other words, there must as a "foundation of the whole thing" be some agency. The authority of the agent may be exceeded, but agency itself cannot be constituted by estoppel.

Simplify the case: Suppose that a man is in reality not my agent, but I tell some person that he is, or stand by while he professes to act as my agent, would I not be estopped as against any one misled by my conduct?<sup>2</sup> If I stood by while another person pretended to own my goods, and sold them as owner to an innocent purchaser, I certainly would be estopped because of the ostensible ownership. The case cannot be different if the vendor pretended to be my agent. It is only changed to an instance of ostensible agency.

This, however, is not the only answer to the remarks of Mr. Justice Wills. There is this further: that the case was probably not one of ostensible agency at all, but one of ostensible ownership;<sup>3</sup> and the principles of the two classes of cases are confounded together in the judgment. Note that the learned judge observes that the contention was "that the plaintiff enabled G. to sell the table-top as his own;" and that his answer to this is that (changing over to ostensible agency)

"the true test is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all."

But the question is not one of authority or agency at all. Admittedly there was no agency; and as there was no appear-

<sup>1</sup> (1894) 1 Q. B. 89.

<sup>2</sup> *Cf. Re Consort Deep Level Gold Mines Co.* (1897), 1 Ch. 575; 66 L. J. Ch. 122, in which the question was whether Stark was estopped by his

conduct from denying that Ackerman's authority to act for him had arisen.

<sup>3</sup> See this distinction treated of, *ante*, ch. XVII.

ance of agency there could be no estoppel by ostensible authority. There was, however, an appearance of ownership, for which the plaintiff was responsible, and, with deference, he should have been estopped upon that ground.

Observe the distinction between ostensible ownership and agency. Were I to allow my watch to appear amongst the stock in a jewelry shop, the proprietor of the establishment would be the ostensible owner of my watch, and I would certainly be estopped by its sale. But if I were to send my goods to an auction-room, the auctioneer would be the ostensible agent for the purpose of selling them in the usual way, and ostensible agency would be the ground of estoppel. Lord Ellenborough's language applies to the latter case:

"If the principal send his commodity to a place where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he has sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? When the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."<sup>1</sup>

— Distinguish carefully this statement of the law from that of Blackburn, J., in *Cole v. North Western Bank*.<sup>2</sup> If a furnished house be rented to an auctioneer, and he surreptitiously remove the furniture to his auction-rooms and sell it there, the owner would not be estopped. But the case would be very different if the owner himself sent his furniture to the auction-rooms (if only for the purpose of enabling the auctioneer to present the appearance of doing large business), and with the strictest instructions not to sell.

Two noteworthy cases are cited below in which there was held not to have been ostensible agency, although upon cursory glance it might have been thought otherwise.<sup>3</sup>

(2) *Estoppel as to Extent of Agency*.—This second class includes all those cases in which, admittedly, there is some agency, and the question is as to the extent of it. The agent not having had authority to do this particular thing, is the principal nevertheless, by permitted appearance of authority, estopped

<sup>1</sup> Pickering v. Busk (1812), 15 East, 43. See authorities cited with this one, ante, p. 299.

<sup>2</sup> (1874) L. R. 9 C. P. 470; 10 id. 854; 48 L. J. C. P. 104; 44 id. 233.

<sup>3</sup> Re Consort Deep Level Gold Mines (1897), 1 Ch. 575; 66 L. J. Ch. 123, 297; Timpson v. Allen (1896), 149 N. Y. 518; 44 N. E. R. 111.

from denying its existence. This question, too, can be answered without reference to single or multitudinous instances.

Mr. Bigelow is of opinion, however, that estoppel has nothing to do with such a question. He says:<sup>1</sup>

"The question is simply one of the right to dispute not the agency altogether, but the extent of the agency—that is, whether the act done was within the admitted agency. There lies the line between agency and estoppel."

But it may well be asked why a man may not by misrepresentation be estopped to dispute extent of agency as well as existence of it?—indeed, as already pointed out, are not these in reality but two phases of the same question? If agency exists as to a certain act, the extent of the agency must *ex necessitate* recover the act. In any case, it cannot be according to the law of principal and agent that I am bound if I permit my agent to appear to have larger powers than he really has and he takes advantage of his situation to exceed his authority, for by that law

"the principal is bound by the acts of the agent up to the extent of the agent's authority; and is never bound beyond the extent of that authority."<sup>2</sup>

In other words, I am not bound for the reason that the person who did the act was not for that purpose my agent. Nevertheless, by estoppel, I am precluded from saying that his power was not sufficiently extensive. Lord Cranworth's view was that, in order to affix liability to a principal, you

"must show that the agency did exist, and that the agent had the authority he assumed to exercise, or, otherwise, that the principal is estopped from disputing it."<sup>3</sup>

In other words, you must prove agency and extent of agency, or else estoppel—agency or estoppel; fact or preclusion to deny fact.

(3) *Estoppel, in What Cases?*—In general terms we shall now endeavor to indicate the circumstances under which a principal will be estopped when his agent has exceeded his authority. Where the principal himself has personally and directly misled the third party, there is of course no difficulty. But troublesome questions arise where, from the character of the employment of the agent or other circumstances, certain deductions

<sup>1</sup> On Estoppel (5th ed.), 565, 566.    <sup>2</sup> Pole v. Leask (1868), 88 L. J. Ch. 162.

And see pages 457 and 503, n.

<sup>3</sup> *Ante*, p. 480.

or assumptions are drawn by the third party, and we have to inquire whether such inferences were sufficiently well founded to have justified action upon them by the estoppel-asserter and consequent estoppel of the principal.

*General Proposition.*—At the outset this general proposition is worth noting: that in cases in which the law assumes (from the nature of the duty to be performed, from the relation of the parties, or from aught else) the existence of certain powers, the public will be justified in making a similar assumption.

*Medium Powers.*—Authority will be implied by the law, and may be assumed by the public, in the following cases:

A. When an agent is employed to perform a certain duty, he has the power to do those things usually incidental to the discharge of such duty.

B. When an agent is employed to act in a certain capacity, he has the power which persons acting in that capacity usually have.

C. When an agent is employed to act in the line of a certain business, he has the power usually exercised in that business.

D. When an agent is employed to act in a certain place, he has the power which persons doing such things, at such place, usually have.

E. When an agent is employed to act under certain circumstances, he has the power which persons acting under such circumstances usually have.

F. When agency arises as incidental to some other legal relationship, the agent has the power which persons in such relationship usually have.

It is not pretended that these rules are framed according to scientific ideal. Indeed, by such standard, they are open to the criticism that class E. includes all the others, or might easily be made to do so. For practical purposes, however, and at all events in exposition of the subject, they will prove useful; for it will be found that the vast majority of the cases range themselves into classes represented by these rules. A few of the authorities to support them are as follows:

*Rule A.*

"An authority of this nature (to pay debts, etc.) necessarily includes medium powers which are not expressed. By medium powers I mean all

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the means necessary to be used in order to attain the accomplishment of the object of the principal power."<sup>1</sup>

*Rules B. and C.*

"A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed."<sup>2</sup>

*Rule D.<sup>3</sup>*

"If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity was sent thither for the purpose of sale."

"A person who deals in a particular market must be taken to deal according to the custom of that market; and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place."<sup>4</sup>

A principal gave power to insurance brokers at Liverpool to write policies "not exceeding £100 for any one vessel." The brokers underwrote a policy for £150. Liability now depends upon whether, at Liverpool, brokers generally have or have not unlimited authority as to amount. If they have then there was appearance of authority to underwrite the £150 policy, and the principal is estopped. From the evidence it appeared that at Liverpool "in almost all cases, if not in all, a limit is put on the amount for which a broker can sign his principal's name." In Liverpool, therefore, there could be nothing to in-

<sup>1</sup> Howard v. Baillie (1796), 2 H. Bl. 618. And see Dingle v. Hare (1850), 7 C. B. N. S. 154; 29 L. J. C. P. 143; Wheeler v. McGuire (1868), 86 Ala. 398; Montgomery v. Hardaway (1894), 104 Ala. 100; 16 S. R. 29; Van Dusen v. Jungleblut (1899), 77 N. W. R. (Minn.) 970.

<sup>2</sup> Sutton v. Latham (1889), 10 Ad. & E. 30; 8 L. J. Q. B. 210. And see Taylor v. Stray (1857), 2 C. B. N. S. 193; 26 L. J. C. P. 185; Mollett v. Robinson (1870), L. R. 5 C. P. 646; L. R. 7 C. P. 84; L. R. 7 H. L. 802; 39 L. J. C. P. 290; 41 id. 65; Harrison v. Kansas, 50 Mo. App. 332; Heath v. Stoddard (1898), 91 Me. 499; 40 Atl. R. 547.

<sup>3</sup> Pickering v. Busk (1812), 15 East, 38. And see among its many confirmations: Meggy v. Imperial (1878), 3 Q. B. D. 717; 47 L. J. Q. B. 119; 48 L. J. Q. B. 54; Lausatt v. Lippincott (1821), 6 Serg. & R. (Pa.) 392; Towle

v. Leavitt (1851), 28 N. H. 358; Taylor v. Pope (1868), 45 Cold. (Tenn.) 416; Lewenberg v. Hayes (1897), 91 Me. 104; 39 Atl. R. 469; Atlanta v. Hunt (1897), 100 Tenn. 94; 42 S. W. R. 483; Heath v. Stoddard (1898), 91 Me. 499; 40 Atl. R. 547; Van Dusen v. Jungleblut (1899), 77 N. W. R. (Minn.) 970.

<sup>4</sup> Bayliffe v. Butterworth (1847), 1 Ex. 429; Bailey v. Bensley (1877), 87 Ill. 556. The usage must of course be reasonable. Mollett v. Robinson (1870), L. R. 5 C. P. 646; 7 id. 84; L. R. 7 H. L. 802; 39 L. J. C. P. 290; 41 id. 65. And see Ireland v. Livingstone (1866), L. R. 2 Q. B. 107; 36 L. J. Q. B. 50; Pickert v. Marston, 68 Wis. 465; 42 N. W. R. 550; Western v. Page (1896), 94 Wis. 251; 68 N. W. R. 1003; Herring v. Skaggs (1878), 63 Ala. 186; Reese v. Bates (1897), 94 Va. 321; 26 S. E. R. 863.

dicating that the agency was other than what it really was, and the principal could not be estopped.<sup>1</sup>

The fact that the agent is employed to operate at a place distant from the principal has often much bearing upon the appearance of the extent of his authority.<sup>2</sup>

*Rule E.*

"This is the common and usual manner in which the business is done, and the agent must be taken to be vested with power to transact the business with which he is intrusted in the common and usual manner."<sup>3</sup>

*Rule F.*

"One partner, by virtue of that relation, is constituted a general agent for another as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership business, and all such as are usually exercised by partners in that business in which they are engaged."<sup>4</sup>

*Medium Powers Withheld — Estoppel.*— As has already been pointed out, the law assumes the grant of medium or usual powers in the various cases just treated of. But this assumption is, of course, only made in the absence of special arrangement between the principal and agent to the contrary. Whatever the arrangement is, by that they must be bound. The public, too, is entitled to assume the grant of similar powers; the agent is acting as though he had such powers; and the public assumes that he has them. If he has not! In such case the law of agency declares that the principal cannot be bound; for, as Mr. Dicey told us:

"The principal is always bound by the acts of the agent, up to the extent of the agent's authority, and is never bound beyond the extent of that authority."

But it is precisely at this point that the law of estoppel intervenes — the law which prohibits the principal asserting the fact that the power of the agent is other than that which he has allowed it to appear to be.

The following are some of the statements of the rules which apply to such cases. It will be observed that they are not

<sup>1</sup> *Baines v. Ewing* (1866), L. R. 1 Ex. 320; 4 H. & C. 511; 35 L. J. Ex. 194.

<sup>2</sup> *Rathburn v. Snow* (1890), 123 N. Y. 343; 25 N. E. R. 379.

<sup>3</sup> *Alexander v. Gibson*, 2 Camp. 555. And see also *Smith v. Hull* (1849), 2 C. B. 668; 19 L. J. C. P. 123; *Taunton v. Royal* (1864), 2 H. & M. 135; 33 L. J. Ch. 406; *Ex parte Dixon* (1876),

4 Ch. D. 133; 46 L. J. Bk. 20; *Atty. Gen. v. Great Eastern* (1880), 5 App. Cas. 473; 49 L. J. Ch. 545; *McMullen v. Williams* (1880), 5 Ont. App. 518; *Hayner v. Churchill* (1888), 20 Mo. App. 676; *Cawthorn v. Lusk* (1892), 97 Ala. 674; 11 S. R. 731.

<sup>4</sup> *Hawken v. Bourne* (1841), 8 M. & W. 710; 10 L. J. Ex. 361.

couched in the language of the law of estoppel, but it is a simple matter to make the necessary translation:

"When a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner."<sup>1</sup>

He may show that he was misled by the appearance of the character of the authority. The rule as to this is expressed in various ways. *Pickering v. Busk*<sup>2</sup> is the leading case. In it Lord Ellenborough said:

"Strangers can only look at the acts of the parties, and to the external *indicia* of property, and not to the first communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."

In more modern cases it is said:

"Where the true owner has clothed any one with apparent authority to act as his agent, he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority."<sup>3</sup>

"Where an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal."<sup>4</sup>

And the American law is to the same effect:

"Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority."<sup>5</sup>

"Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency."<sup>6</sup>

It will be observed that in none of these rules is there any reference to the distinction between general and special agency. And there is no suggestion that they would not apply equally in an individual as in multitudinous instances.

#### APPLICATIONS.

Having now a sufficiently clear idea of the principles and methods to be employed in determining questions of liability of principals for *ultra vires* acts of other persons, let us apply

<sup>1</sup> *Cole v. Northwestern* (1875), L. R. 10 C. P. 372; 44 L. J. C. P. 233.

<sup>2</sup> (1812) 15 East, 43.

<sup>3</sup> *Cole v. Northwestern* (1875), L. R. 10 C. P. 384; 44 L. J. C. P. 233.

<sup>4</sup> *National v. Wilson* (1880), 5 App. Cas. 209.

<sup>5</sup> *Johnson v. Investment Co.* (1895), 46 Neb. 498; 64 N. W. R. 1100. And see *Holt v. Schneider* (1899), 77 N. W. R. 1086 (Neb.).

<sup>6</sup> *Thompson v. Shelton* (1896), 49 Neb. 644; 68 N. W. R. 1055.

them to some of the cases usually placed in the category of special agency — that is, cases of a single employment. If the rules in present vogue as to the difference between general and special agents are correct, the principal will of course never be liable, for (as we have seen), according to Broom's Common Law,

“if a particular agent exceed his authority, his principal is not bound by what he does.”<sup>1</sup>

And according to Smith's Mercantile Law,

“the rule is directly the reverse concerning a particular agent; *i. e.* an agent employed in one single transaction; for it is the duty of the party dealing with such an one to ascertain the extent of his authority; and if he do not he must abide the consequences.”<sup>2</sup>

*A Horse Case.*—The results to be arrived at, however, are far otherwise. “Take the case of a horse,” which the owner intrusts (on a single occasion) to an agent for sale, prohibiting all warranty, and let the circumstances vary as follows: 1. The agent is told to sell the horse at a fair. 2. The owner of the horse is a horse-dealer. 3. The agent is a horse-dealer. 4. Neither the owner, nor the agent, is a horse-dealer, and no particular place of sale is prescribed.

Now, if the rule be that “it is the duty of the party dealing with” an agent, employed in one single transaction, “to ascertain the extent of his authority,” then the owner is not bound in any of these cases by the warranty. But the solution is not so simple, and the varying answers will be found to be in no way affected by the singleness or frequency of the transaction. They are as follows:

1. Instructions to sell at a fair indicates a place at which the authority is to be exercised; if at that place (as has been held<sup>3</sup>) it is customary in selling horses to give a warranty, then the agent appears to have authority to warrant, and the owner being responsible for that appearance is estopped from denying the actual existence of the power. If it is not usual at that place to sell with a warranty, then there is no appearance of power and therefore no estoppel.<sup>4</sup>

<sup>1</sup>8th ed., 575.

<sup>2</sup>10th ed., 140.

<sup>3</sup>In England. It is held otherwise in the United States.

<sup>4</sup>Alexander v. Gibson (1811), 2 Camp. 555; Moran v. Pitt (1873), 42 L. J. Q. B. 47; Brooks v. Hassal (1883),

49 L. T. N. S. 509. As to sale of horses at fairs see the English Statutes, 2 & 3 P. & M., ch. 7; 31 Eliz., ch. 12, which are not interfered with by The Sale of Goods Act, 56 & 57 Vic. (Imp.), ch. 71, § 22.



2. If a horse-dealer (as has been held) usually sells with a warranty, then an agent of a horse-dealer appears to have authority to warrant, and the horse-dealer will be estopped from asserting the contrary. If it were not usual for a horse-dealer to sell with a warranty, then there would be no appearance of power and no estoppel.<sup>1</sup>

3. So, also, if (as has been held) a horse-dealer in selling for others usually gives a warranty, then, inasmuch as in the given case he appears to have authority, the owner will be estopped from denying the authority. And if not usual, there is no estoppel.<sup>2</sup>

4. If there are no circumstances indicating existence of authority (such as place of operation, usual employment of the parties, etc.), then, as there is no false appearance, there is no reason why the owner should be estopped from asserting the facts.<sup>3</sup>

*The Text Books.*—Simple and necessary as all this seems to be, the present writer cannot but be aware that in so stating the law he is out of harmony with most of the text-writers. The views of some of them are as follows:

Evans on Principal and Agent, referring to *Alexander v. Gibson*<sup>4</sup> (in which it was held that when a horse was sent to a fair and the usual mode of selling there was by giving a warranty, the principal was bound by a warranty), indicates his dissent from its conclusions, declaring that it

“was afterwards overruled by the Court of Common Pleas: *Brady v. Todd*, 9 C. B. N. S. 592.”<sup>5</sup>

And the learned author might cite the language of Martin, B., in *Udell v. Atherton*<sup>6</sup> in support of the statement. Both, however, overlooked the fact that *Alexander v. Campbell* was the case of an agent sent to a fair, and that *Brady v. Todd*, so far from dissenting from that case, has these words:

“When the facts raise the question, it will be time enough to decide the liability created by such servant as . . . a person intrusted with the sale of a horse in a fair or other public mart.”

<sup>1</sup> *Fenn v. Harrison* (1790), 3 T. R. 760.

<sup>2</sup> *Howard v. Sheward* (1866), L. R. 2 C. P. 151; 36 L. J. C. P. 42; *Baldry v. Bates* (1855), 52 L. T. N. S. 620; *McMullen v. Williams* (1880), 5 Ont. App. 518; *Taylor v. Gardiner* (1892), 8 Man. 810.

<sup>3</sup> *Brady v. Todd* (1861), 9 C. B. N. S. 592; 30 L. J. C. P. 223.

<sup>4</sup> *Supra*.

<sup>5</sup> P. 467.

<sup>6</sup> (1861) 7 H. & N. 172; 30 L. J. Ex. 337.

Story on Agency has the following:

"But if the owner of a horse should send the horse to a fair by a stranger, with express directions not to warrant him, and the latter should on the sale, contrary to his orders, warrant him, the owner would not be bound by the warranty."<sup>1</sup>

Everything depends, surely, upon what is usual at that particular fair.

Paley on Principal and Agent says:

"So a servant intrusted to sell a horse may warrant, unless forbidden. And it is not necessary for the party insisting on the warranty to show that he had special authority for that purpose."<sup>2</sup>

This, with deference, is very clearly wrong.

Smith's Mercantile Law<sup>3</sup> says:

"And it is said an agent intrusted to sell, *prima facie* binds the principal."

Under certain circumstances, no doubt, yes; but under others, no.

Radison on Contracts says:

"It has been held that a buyer who takes a warranty from a known agent professedly selling on behalf of his principal takes the warranty at the risk of being able to prove that the agent had the principal's authority for giving the warranty, and that the law clothes a known servant intrusted to sell with no implied authority to warrant, unless such servant is the general agent of a tradesman employed in the business of buying and selling."<sup>4</sup>

Later on the author adds:

"The servant of a horse-dealer, with express directions not to warrant, does warrant; the master is bound, because the servant, having a general authority to sell, is in a condition to warrant, and the master had not notified to the world that the general authority is circumscribed."

The reason is not that the servant had "a general authority to sell," for it was of "circumscribed" character, as the language of the author indicates. The reason is that although the servant had only special authority, the horse-dealer, for reasons already given, was estopped from so saying.

Still later (at p. 560) the law is better stated:

"The general presumption is that where a principal intrusts property to an agent to sell, he authorizes him to make all such warranties as are usual in the ordinary course of that particular business of selling, and that if it is usual to sell with a warranty he has an implied authority to warrant."

But the true point is missed. The effect of the presumption is not that there is "an implied authority to warrant," but that

<sup>1</sup>9th ed., sec. 132.

<sup>2</sup>P. 191. To the same effect is *Schuchardt v. Allens* (1863), 1 Wall. (U. S.) 369. "Authority without restriction to an agent to sell carries with it authority to warrant." This

was very recently approved in *Belmont v. Talbot* (1899), 51 S. W. R. 588 (Ky.). And see *Bryant v. Moore* (1873), 26 Me. 84.

<sup>3</sup>10th ed., 142.  
<sup>4</sup>9th ed., 314.

the principal is estopped from denying that there was express authority.

"The case of a horse" has been used for illustration. But it must not be understood that the law with reference to horses differs from the law as to goods of any other character.<sup>1</sup> For variety consider for a moment the law under other circumstances.

Originally factors were those to whom goods were sent for sale. An owner, therefore, was bound by any sale made, whether authorized or not<sup>2</sup>—or rather he was estopped from denying the plenary character of the power which the factor appeared from his employment to have. It was held nevertheless that the owner was not bound by a pledge made by the factor in breach of instructions,<sup>3</sup> for it was thought that factors usually sold merely and did not pledge. Afterwards the Factors Acts recognized that it had

"become a usual and accustomed course for factors intrusted with goods for sale to make advances to their principals, either in money or by the acceptance of bills against their consignments, and to keep themselves in funds by repledging the documents of title with brokers or other money dealers;"<sup>4</sup>

and therefore enacted that the owner should be bound by pledges. Everything depends upon custom. The statutes proceed upon that.

And if it be asked whether a factor may bind his principal by a warranty given in defiance of instructions, the answer to that, too, is that everything depends upon custom and circumstance. If from the custom or from any other circumstance (for which the owner is responsible) an agent appears to have certain authority, the owner is estopped from denying its actual existence. All cases ought to proceed upon the same principle.

<sup>1</sup> Mechem on Agency, § 350, says: 224; 3 id. 32; 47 L. J. C. P. 241; Warner v. Martin (1850), 11 How. (U. S.) 678; Berry v. W. D. Allan & Co. (1894), 59 Ill. App. 149.

<sup>2</sup> 45 & 6 Vic. (Imp.), ch. 39. See Fuentes v. Montis (1868), L. R. 3 C. P. 277; 33 L. J. C. P. 93; London v. Simmons (1892), A. C. 217; 61 L. J. Ch. 730. And see Cartwright v. Wilherding (1862), 24 N. Y. 521; Soltau v. Gerdau (1890), 119 N. Y. 380; 23 N. E. R. 864; Fourth Nat. Bank v. American (1890), 137 U. S. 234.

<sup>3</sup> See statute 4 Geo. IV., ch. 83.

<sup>4</sup> Paterson v. Tash (1742), 2 Str. 1178; Fletcher v. Heath (1827), 7 B. & C. 517; Cole v. N. W. Bank (1875), L. R. 10 C. P. 367; 44 L. J. C. P. 233; Johnson v. Credit (1877), 2 C. P. D.

## III. "FOR THE MASTER'S BENEFIT."

The third of the "difficulties" referred to in the opening sentence of the present chapter is the current misunderstanding as to the effect upon an unauthorized act of its having been done "for the master's benefit." This difficulty can be removed by a little careful analysis.

Let us commence with the case of *Mutual v. Charnwood*:<sup>1</sup> A secretary of a company represented that certain debenture stock of the company existed; the representation was false, for the stock had been fraudulently issued by the secretary for his own purposes and in excess of the powers of the company; and the representation was therefore made not for the benefit of the company, but to shield the secretary; *held*, that the company was not liable in deceit. Lord Esher decided the case upon the following ground:

"The secretary was held out by the defendants as a person to answer such questions as those put to him, . . . and if he had answered them falsely on behalf of the defendants, he being then authorized by them to give answer for them, it may be that they would be liable. But, although what the secretary said related to the matters about which he was authorized to give answer, *he did not make the statements for the defendants, but for himself.*"

Compare this with the decision in *Shaw v. Port Phillip*:<sup>2</sup> The secretary of a company, not being intrusted with the seal,

<sup>1</sup>(1887) 18 Q. B. D. 714; 56 L. J. Q. B. 449. See *Barwick v. English J. S. Bank* (1867), L. R. 2 Ex. 259; 36 L. J. Ex. 147; *Thorne v. Heard* (1894), 1 Ch. 611; 63 L. J. Ch. 362; *Erb v. G. W. Ry.*, 3 Ont. App. 479, 480; *Molson's Bank v. Brookville* (1880), 31 U. C. C. P. 174; *Gibbons v. Wilson* (1889), 17 Ont. 290; *Richards v. Bank of Nova Scotia* (1896), 26 S. C. Can. 381; and the decision of the Privy Council in *McKay v. Commercial Bank* (1874), L. R. 5 P. C. 394; 43 L. J. P. C. 31, where is expressly reserved the question whether the absence of benefit would have varied the result.

<sup>2</sup>(1884) 13 Q. B. D. 108; and see 53 L. J. Q. B. 372. Distinguish the contemporaneous case of *Northern Counties v. Whipp* (1884), 26 Ch. D. 457; 53 L. J. Ch. 635, where the company was not estopped by the act of

its manager, because he had no authority to do the class of acts of which the instance in question was one. See also *Re Overend* (1869), L. R. 4 Ch. 475; 39 L. J. Ch. 27; *Bryant v. La Banque* (1893), A. C. 170; 63 L. J. P. C. 68; *Re Building, etc.* (1896), 1 Ch. 100; 65 L. J. Ch. 104; *Biggerstaff v. Rowatts* (1896), 2 Ch. 93; 65 L. J. Ch. 536; *Re Concessions* (1896), 2 Ch. 757; 65 L. J. Ch. 909; *Robinson v. Montgomery* (1896), 2 Ch. 841; 65 L. J. Ch. 915; *Smith v. Walkerville* (1896), 23 Ont. App. 102.

The American cases agree with *Shaw v. Port Phillip*: *Fifth Avenue Bank v. Forty Second* (1892), 63 Hun, 629; 17 N. Y. Supp. 826; 137 N. Y. 231; 33 N. E. R. 378; *Allen v. South Boston* (1889), 150 Mass. 200; 22 N. E. R. 917; *Union Loan v. Southern California* (1892), 51 Fed. R. 840.

Distinction where the certificate is that duty

got possession of it and affixed it to a certificate of shares, and forged also the signature of one of the directors. He was acting entirely for his own benefit. The plaintiff acted upon the faith of the certificate, and the company was held to be estopped.

"The company made it the duty of the secretary to procure the preparation, execution, and signature of certificates with the prescribed formalities, and thereupon to issue them to the persons entitled to receive them. They thereby gave the secretary the opportunity of doing what he has done in this case. A person can inform himself whether the certificate comes from the secretary, because he gets it from the secretary's office; but I do not see how, according to any practicable course of business, he can go behind the certificate, and ascertain for himself such matters as whether the signature of the director is genuine. It appears to me, therefore, that the company have authorized the secretary, and made it his official duty, to act in such a way that his acts amount to a warranty by them of the genuineness of the certificate issued by him."

Both cases seem to have some foundation. With the first we go this far: An agent has authority to do a certain act for his principal; but that gives him no power to bind his principal if he does the same thing on his own behalf; therefore, whether the principal ought to be liable must depend upon whether the agent was acting for the principal's benefit or for his own. But the second case takes us further, and suggests that where an agent appears to be acting in pursuance of his authority and not for himself, it would be unjust to affect the person dealing with him by that which was purposely kept concealed, and as to which he could obtain no information. Now when we observe that in the first case the secretary "was held out by the defendants as a person to answer such questions as those put to him;" and in answering them he appeared to be exercising the authority with which he had been intrusted, we feel that the two decisions are inconsistent; unless indeed one can be upheld upon the ground that it was an action in deceit, and the other because it proceeded upon estoppel. Is there a distinction here, or is one of the cases wrong?

*Deceit and Estoppel.*— Observe the difference between estoppel and tort as to the reason for holding a principal liable for the unauthorized act of an agent. In estoppel you say that the agent appeared to have authority; that the principal was re-

Distinction must of course be made where the officer who issues the certificate is not the one intrusted with that duty: *Hill v. Jewett* (1891), 154 Mass. 172; or where the purchaser had notice: *Moores v. Citizens* (1888), 111 U. S. 156; 15 Fed. R. 141; 4 S. C. R. 345.

sponsible for that appearance; that upon the faith of that appearance you changed your position; and that therefore the principal ought to be estopped. Nothing of that sort can be said in tort. An omnibus driver, in defiance of instructions, overturns a rival omnibus,<sup>1</sup> or runs over a pedestrian, and the master is liable; but not because the party injured changed his position upon the faith of any appearance of authority. In estoppel you say that you were misled; that you acted upon the misrepresentation, and so were injured. In tort you say merely that you were injured. In estoppel you acted voluntarily; and seek notwithstanding that to put the responsibility elsewhere. In tort you were acted upon.

The cases then are very different, and we must expect to find some difference between them as to the ground of liability of the employer. In tort, inasmuch as nothing can turn upon appearance of authority, everything must depend upon whether the agent was really acting for his master's benefit or for his own — in other words, whether he was acting in the course of his employment or outside of it. But in estoppel the contrary is the case. There appearance of authority is the *sine qua non*; and the reality is unimportant, for the fact is excluded by the estoppel.

In tort, then, we may say with Willes, J.:<sup>2</sup>

"A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted, either in the manner of doing such an act or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done not from any caprice of the servant, but in the course of his employment."

In estoppel, on the other hand, it is immaterial that the agent was really acting for himself and in fraud of his principal, if the agent had or appeared to have the authority; or appeared to be or was acting within the authority which he had. Estoppel provides that

"Whenever the very act of the agent is authorized by the terms of the power . . . such act is binding on the constituent as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts *aliunde*."<sup>3</sup>

<sup>1</sup> *Limpus v. London* (1862), 1 H. & Bell (1878), 3 Ex. D. 245; 47 L. J. Ex. C. 526; 32 L. J. Ex. 35. 708; *Barwick v. English* (1867), L. R.

<sup>2</sup> *Bayley v. Manchester* (1872), L. R. 2 Ex. 356; 36 L. J. Ex. 147.

<sup>3</sup> *Infra*.  
7 C. P. 420; and see 43 L. J. C. P. 78.  
See per Bramwell, L. J., in *Weir v.*

Consider the partnership cases — the firm is liable upon an acceptance given by an individual member in the name of the firm but for his own purposes. Could it be said (as in the *British Mutual v. Charnwood* case) that there was no liability, because although the accepting partner was authorized to accept for the firm and appeared to be doing so, yet that he did not do it "for the defendants, but for himself?"

This is a clear case of principals being liable, although the agent was not only not acting for their benefit, but in fraud of them and to their detriment. And he was not acting in the course of his employment in any other sense than was the secretary in the *British Mutual v. Charnwood* case.

It seems, then, that a principal may be liable in estoppel although the agent was acting for himself, and not for his master's benefit, but that it is otherwise in tort. The *Shaw v. Port Phillip* case therefore is unimpeachable. How stands *British Mutual v. Charnwood*?

It was an action in deceit. It was therefore (as usually classified) in tort;<sup>1</sup> and we have said that in tort the complaint is not that you were misled; that you consequently changed your position; and so were injured; but merely that you were injured. But have we not generalized too widely? Is it true that in deceit the case is merely that you were injured? Not at all. Upon the contrary, the necessary factors in deceit are precisely those which we found to be necessary in estoppel: (1) a misrepresentation, (2) change of position, and (3) consequent damage? In this respect, then, deceit seems to be distinguished from other kinds of torts; and to be closely allied to estoppel.<sup>2</sup>

And it approaches contract also in this: that there is in the necessary change of position something very much akin to a consideration. I represent to a merchant that A. is a man of substance; upon the faith of that representation the merchant gives A. credit and suffers damage; and consideration may as well be detriment to the promisee as benefit to the promisor — the merchant has therefore given some sort of consideration for my representation. If, in consideration of the merchant

<sup>1</sup> Pollock on Torts (5th ed.), 1 and 7. chapter upon Deceit and Estoppel:

<sup>2</sup> Peruse in this connection the ch. XVI.

giving credit to A., I had guarantied his solvency there would have been a clear contract. It is not very far from that to this: I represent to you that A. is solvent; and if, upon the faith of that statement, you trust him and lose, the law will compel me to pay your loss — remember, I do not guarantee to pay, it is the law that will make me pay. There is an express promise in the one case; while in the other the law compels payment just as though there were an express promise. This is often called an implied promise. Note also that in deceit there is (as in contract) the element of voluntary action, the responsibility for which, however, you desire to place elsewhere; and that in this respect also it differs from other torts.

The action in contract is: In consideration of the plaintiff doing so-and-so, the defendant promised so-and-so. In deceit it is: The defendant, by falsely representing so-and-so, induced the plaintiff to do so-and-so. The essentials are somewhat the same, namely: (1) an inducement by the defendant to action on the part of the plaintiff; and (2) some change of position on the part of the plaintiff.

On the other hand, claims in other actions of tort run in these forms: "That the defendant wrongfully converted," etc.; "that the defendant disregarding his duty," etc.; "that the defendant so negligently carried that," etc. The action, in other words, arises *ex parte*, as it were, and not from mutual interaction, as in contract and deceit.

Admitting then the general rule that in tort the principal is not liable for the unauthorized act of his agent unless it is done, not for himself, but for his master; but observing that in estoppel appearance of acting for the master is sufficient to make him liable, what is to be said with reference to actions of deceit? Are they for this purpose to be classed with actions of tort or to be placed with their closer affiliations? To the present writer's mind (somewhat filled, as at present it is, with the principle of estoppel) the answer cannot be doubtful. In the *British Mutual v. Charnwood* case

"the secretary was held out by the defendants as a person to answer such questions as those put to him;" he did answer them, and answered falsely; and it is said that the defendants are not liable in deceit, because "he did not make the statement for the defendants, but for himself." But



the secretary had authority to do the class of acts; and his act appeared to be within that class;<sup>1</sup> and the defendants ought to have been estopped from denying that the act was theirs.<sup>2</sup>

#### IV. "WITHIN THE SCOPE OF HIS APPARENT AUTHORITY."

Elucidation must now be directed to another phrase constantly met with in the law of principal and agent: namely, that an agent's unauthorized acts will bind his principal where such acts are "within the scope of his apparent authority." This is difficulty number four.

Let us drop the word "scope," for it is useless and misleading. It is sufficient to say that the agent acted within or beyond his authority. Inserting the word "scope" adds nothing to the expression, for an act cannot be beyond authority and yet within the scope or extent of it. Omitting the word, we have the statement that if an agent act within his apparent authority (within the authority which he appears to have — within his ostensible authority) the principal will be bound. This is true; but it is also true (although it is not usually so formulated) that if an agent appears to be acting within his authority, the principal will be bound. Let these alternatives be put in the following form, and denominated (A.) and (B.); and let us test their value:

(A.) If an agent acts within what appears to be his authority, the principal is bound.

(B.) If an agent appears to be acting within his authority, the principal is bound.<sup>3</sup>

*Application of (A.).*— I employ a broker to sell my shares in the market, giving him special instructions which limit his usual powers; he sells in disregard of my instructions; and I am bound.<sup>4</sup> Observe that the reason is because he was acting within what appeared to be his authority (A.). And it cannot be said that he appeared to be acting within his real authority (B.), for his real authority was unknown.

<sup>1</sup> See this point elaborated in the next succeeding paragraphs of the present chapter.

<sup>2</sup> *Barwick v. English* (1867), L. R. 2 Ex. 266; 36 L. J. Ex. 147, bears out the conclusion.

<sup>3</sup> It would be more correct of course to say in these cases that the principal is estopped from denying that he is bound.

<sup>4</sup> *Ante*, p. 489.

*Application of (B).*—I take a check to a bank for acceptance; the ledger-keeper has no authority to accept unless there are funds; nevertheless, in the absence of funds he does accept; and the bank is bound. The reason is that the ledger-keeper appeared to be acting within his authority (B.). It cannot be said that he was acting within what appeared to be his authority (A.); for I did not imagine that he had authority to accept if there was nothing at the check-drawer's credit. There was no appearance of authority that did not correspond to the fact (A.). But so far as I could see, the ledger-keeper was acting within his authority (B.).

In other words, in the (A.) case the question is whether the act is really within the ostensible authority; and in the (B.) case whether it appears to be within the real authority. There may be appearance as to the extent of the real authority (A.); and appearance as to the act being within the real authority (B.)—appearance in relation to the authority (A.); and appearance in relation to the act (B.).

*"Class of Acts."*—This distinction is of peculiar assistance in dealing with those very various cases in which an agent is intrusted with authority to perform a certain "class of acts," and in which he does an act which appears to be within the class—as, for example, the case of the bank ledger-keeper just referred to. Had it been appreciated, it is probable that the cases affected by it would present more uniformity than can be predicated of them.

In some departments of the law the operation of the distinction, if not the distinction itself, is very apparent. Observe first the law of partnership. Each partner is usually intrusted with the performance of a class of acts; amongst other things, to accept bills for the purposes of the firm. Now, suppose that a partner accepts a bill in the firm's name, but for his own purposes; is the firm liable? May it not be said that he had no power to bind the firm by such an acceptance? He had authority to accept for firm purposes; everybody knew that his authority was thus limited; should not everybody interested have inquired whether this particular instance of the class to which it belonged was within his authority? The true answer and its reason have just been stated. The act appeared to be within the accepting partner's authority (B.), and his copartners are therefore estopped.

A good example of the same doctrine is presented by the case of *Swire v. Francis*.<sup>1</sup> An agent in charge of his principal's business had power to draw bills upon B. & S. for advances in respect of purchases made on account of that firm. The agent drew upon B. & S. for an amount which had not been, but which he asserted to them had been, advanced for purchases on their account, and received the money. The principal was held to be bound to repay the amount to B. & S. The act appeared to be within the authority (B.).

*Montaignac v. Shitta*<sup>2</sup> was somewhat similar. It related to powers of borrowing to be exercised under certain circumstances. In giving judgment Lord Herschell said:

"If the occasion might have arisen on which his borrowing powers would have been properly interpreted as comprising the recourse to such means as these, then their lordships do not think it was incumbent upon the lender to inquire whether in the particular case the emergency had arisen or not."

In an American case<sup>3</sup> it was contended without much success that the authority of an agent to sell goods was limited to sales to persons who were "responsible and in first-class credit," and that contracts, therefore, with persons of other character were not binding upon the principal. In another case<sup>4</sup> an agent's purchase of unripe cabbages was repudiated (but unsuccessfully) because his authority was to purchase those only which were quite mature.

The law applicable to such cases cannot be better put than in the following extract from a judgment by Finch, J. It suggests some better phraseology than that associated with a "class of acts:"

"It is a settled doctrine of the law of agency in this state, that where a principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."<sup>5</sup>

This language is very applicable to the case (already referred to) of a bank ledger-keeper "marking" a check. It may be

<sup>1</sup> (1877) 3 App. Cas. 106; 47 L. J. P. C. 18.

<sup>2</sup> (1890) 15 App. Cas. 362.

<sup>3</sup> *Merrimac v. Illinois* (1888), 30 Ill. App. 263; 21 N. E. R. 787.

<sup>4</sup> *Baker v. Barnett* (1897), 118 Mich. 533; 71 N. W. R. 866.

<sup>5</sup> *Bank of Batavia v. New York Ry. Co.* (1887), 106 N. Y. 190. And see *Bank of New York v. American, etc. Co.* (1894), 149 N. Y. 563; 88 N. E. R. 713.

said that that officer's authority extends only to cases in which there are funds of the drawer on hand. But this is an "extrinsic fact, necessarily and peculiarly within the knowledge" of the ledger-keeper. In a very instructive judgment concerning such a case Selden, J., said:

"The bank selects its teller, and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, as far as is known or can be seen by the party dealing with him, he is guilty of a misrepresentation, ought not the bank to be held responsible?"<sup>1</sup>

"It is, I think, a sound rule that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and cannot be ascertained by a comparison of the power with the act done under it."<sup>2</sup>

Making reference to *Attwood v. Munnings*<sup>3</sup> and *Alexander v. McKenzie*,<sup>4</sup> the learned judge added:

"The general principle laid down in such cases is in perfect accordance with the views here expressed. It is simply that where an agent accepts a bill in a form which imports that he acts by virtue of a special power, any person taking the bill is bound to inquire into, and is chargeable with knowledge of, the terms of the power. This is not denied. But the question is whether, after inquiring into the terms of the power, and ascertaining as far as can be done by comparison that the act of the agent is within the power, he is chargeable without proof with a knowledge of extrinsic facts which show the act to be unauthorized?"

Applying that rule to the case in hand the learned judge said:

"It is conceded that every one taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprise him that the certificate was defective. To discover that he must not only have notice of the limitation upon the powers of the teller, but of the extrinsic fact that the bank had no funds; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representations of the agent. There is a plain distinction between the terms of a power, and facts entirely extraneous upon which the right to exercise the authority conferred may depend. One who deals with an agent has no right to confide in the representations of the agent as to the extent of his powers. . . . But in regard to the extrinsic fact, whether the bank had funds or not, the case is different. This is a fact which a stranger who takes a check certified by the teller cannot be supposed to have any means of knowing."<sup>5</sup>

<sup>1</sup> *Farmers' & M. Bank v. The Butchers' & D. Bank* (1857), 16 N. Y. 133. The passage has been quoted with approval in the United States Supreme Court. *Merchants' Bank v. State Bank* (1870), 10 Wall. 643.

<sup>2</sup> *Id.*, p. 135.

<sup>3</sup> (1827) 7 B. & C. 278; 1 Man. & Ry. 66; 6 L. J. K. B. O. S. 2.

<sup>4</sup> (1848) 6 C. B. 766; 18 L. J. C. P. 94.

<sup>5</sup> See also *Exchange Bank v. People's Bank* (1837), 23 Can. L. J. 301 (S. C. Can.); *North River Bank v. Aymar* (1842), 3 Hill, 262; *New York v. National* (1872), 50 N. Y. 575. But see *Murray v. Eagle Bank* (1845), 50 Mass. 304.

The view of the law here presented was carried from the United States to the Province of Quebec; and, upon appeal from the court there, was adopted by the Judicial Committee of the Privy Council,<sup>1</sup> where it was said:

"The law appears to their lordships to be very well stated in the court of appeal of the state of New York in *President v. Cornen*,<sup>2</sup> cited by Andrews, J., in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows: 'Wherever the very act of the agent is authorized by the terms of the power, that is whenever by comparing the act done by the agent with the words of the power the act in itself is warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority.'<sup>3</sup>

*Jarmain v. Hopper*<sup>4</sup> is in another department of the law, and although not so professing, in reality proceeds upon the principle in hand. Plaintiff's attorney directed a sheriff to seize goods, which turned out not to be the goods of the defendant. The plaintiff repudiated the act of the attorney, asserting that he had no authority to direct the seizure of anybody's goods but those of the debtor. Tindal, C. J., said:

"And when it is argued that he (the attorney) cannot be his agent in giving false information, the answer is that if his agent do the particular act the client must stand the consequence if he act inadvertently or ignorantly, as in *Parsons v. Lloyd*, 3 Wils. 341, where trespass was held maintainable against the client for causing the plaintiff to be arrested under a writ which was afterwards set aside for irregularity. It was argued in that case that suing out of the writ was the immediate act of the attorney; that he had not been retained to sue out a void or an irregular writ; and that it was therefore not within the scope of his authority. But it was answered by De Grey, C. J., that 'the act of the attorney is the act of his client,' and by Gould, J., that 'the plaintiff should have employed a more skilful and diligent attorney; for the act of the attorney in point of law is the act of the party his client.'"

The attorney did not act within his apparent authority (A.), for his apparent authority did not differ from his real authority. He did, however, appear to be acting within his authority (B.), and the client was liable.

So also where a manager of a bank made a representation (false to his knowledge) as to the credit of R., and upon the faith of the representation the plaintiff advanced money, the bank was held to be liable. For although it was not within

<sup>1</sup> *Bryant v. La Banque du Peuple* (1893), A. C. 180; 62 L. J. P. C. 73.

<sup>2</sup> (1847) 37 N. Y. 323.

<sup>3</sup> This last sentence is incorrect; substituting as it does our (A.) for our (B.) case. The apparent authority (in the cases alluded to) is as a mat-

ter of fact always the real authority, and requires no assumption or principles of law to make it so. That the act is apparently within that authority (B.) is the point intended.

<sup>4</sup> (1843) 6 M. & G. 850; 13 L. J. C. P. 66.

the manager's authority to make false representations as to credit, yet to a person not aware of the falsity he appeared to be acting within his authority (B.). Upon appeal the decision was reversed, but upon other grounds.<sup>1</sup>

In a somewhat similar case<sup>2</sup> a bank manager by misrepresentation induced the plaintiffs to accept bills of exchange in which the bank was interested. *Held*, that the bank was liable in deceit, and the language of a prior judgment<sup>3</sup> is quoted with approval:

"In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which was the act of the master to place him in."

This language, however, is not satisfactory; for may it not be said that the question is begged when it is asserted that the agent had authority to perform the class of acts in question?—the fact being that he had no power to do the particular act. In truth are not the statements contradictory? If the particular act belongs to a class, and if there was authority to perform all the acts in that class, there was, of course, necessarily power to do the particular act—but *ex hypothesi* there was not.<sup>4</sup> This difficulty is avoided by using the better phraseology employed by Finch, J., already quoted.<sup>5</sup>

The foregoing review shows very clearly the widely extended operation of the (B.) principle; and seems to demonstrate that it merely requires to be formulated in order to be accepted. For lack of earlier formulation and the consequent grouping together under a recognized principle of the seemingly very diverse cases to which it is applicable, one set of them (shortly to be mentioned) has somewhat rigidly (in England and Canada) established itself in opposition to the general trend. These cases may, however, be searched in vain for any attempt at

<sup>1</sup> *Swift v. Winterbotham* (1873), L. R. 8 Q. B. 244; L. R. 9 Q. B. 301; 42 L. J. Q. B. 111; 43 *id.* 56. See, however, *British v. Charnwood* (1887), 18 Q. B. D. 717; 56 L. J. Q. B. 449, per Bowen, L. J.

<sup>2</sup> *McKay v. Commercial Bank* (1874), L. R. 5 P. C. 410; 43 L. J. P. C. 36.

<sup>3</sup> *Barwick v. English* (1867), L. R. 2 Ex. 266; 36 L. J. Ex. 147.

<sup>4</sup> This reminds one very much of the obvious criticism of the syllogism as a form of reasoning, namely, that when the conclusion arrived at is correct, it is always already contained in the premises.

<sup>5</sup> *Ante*, p. 503.

a general synthesis of the law applicable to them, and the text-writers unfortunately do not suggest their close relation to those with which we have been dealing.

Before passing to them let it be remarked that not the least advantage to be derived from a clear perception of the recognition of the dual character of the subject (hitherto theoretically referred to one phrase — “within the scope of his apparent authority”) is the fact that we are now better able to test liability of principals in disputed cases. Hitherto it has sometimes been impossible to declare against liability, even if the case did not fall within the customary phrase; for we were conscious that there were very many cases to which it did not apply but yet in which there ought to be liability; and for these we had no rule. The present writer ventures to hope that it is now otherwise.

Will not the distinction assist in giving us a clear view of this case: A company wanted to borrow £3,000 upon the security of some of its stock; its broker fraudulently applied to a banker for £6,000, who agreed to make the loan upon receiving £8,000 of the stock; the company issued that amount, and the broker received £6,000 from the banker and paid over £3,000 to the company; the banker knew that the broker was an agent. Who is to lose — the company or the banker? For answer we say that the real authority was to borrow £3,000; that the transaction had no appearance of being within that real authority (B.), and there was no appearance of any other authority than that actually conferred (A.). We must then say that the company cannot be bound by the unauthorized act; nor can it be estopped from saying that it was unauthorized.

A recent case, nevertheless, contradicts this conclusion:<sup>1</sup>

“It seems to me that the one fact which was present to his (the banker's) mind was the fact that the company deliberately put Power into a position to represent them.”

But that is what everybody does who employs an agent; and estoppel arises only when the principal puts an agent into a position to misrepresent him — enables him either to present the appearance of having greater power than he really has (A.), or to make the act appear to be within his real authority (B.).

If this conclusion is wrong the present writer will at least

<sup>1</sup> *Robinson v. Montgomeryshire* (1891), 2 Ch. 841; 65 L. J. Ch. 915.

have the satisfaction of knowing that the case brings destruction to those also who insist that in the case of

"an agent employed in one single transaction . . . It is the duty of the party dealing with such an one to ascertain the scope of his authority; and if he do not, he must abide the consequences."<sup>1</sup>

*Bills of Lading.*—We are now ready to approach the law with reference to unauthorized bills of lading; but we are hardly prepared for the very exceptional results which have been arrived at in that department of the law. The problem is this: The master of a ship, or the freight agent of a railway company, signs and issues a bill of lading for goods which have not been shipped; it was part of his duty to sign bills of lading for goods shipped, but he had no power to sign if the goods were not shipped; the bill is transferred to a holder in due course; are the ship-owners liable upon the bill?

Acceptance of the conclusions already arrived at would seem to leave little room for hesitation as to the answer to be given. It is but another example of the (B.) cases, namely, those in which the agent appears to be acting within his authority—a case in which

"a principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent;"<sup>2</sup>

and it

"was not incumbent . . . to inquire whether in the particular case the emergency had arisen or not."<sup>3</sup>

The authorities nevertheless are to the contrary effect, and determine that the carriers are not liable. No general survey of the law is, however, attempted; and the reasons advanced are out of harmony with the cases above quoted, and appear to the writer to be fallacious. A short review and discussion of them will aid in the understanding of the general application of the principles of estoppel; and may perhaps be not without some benefit in clearing the particular subject of some of its difficulties. Let us look at the two principal decisions:

(1851) *Grant v. Norway*.<sup>4</sup> This is the leading case on the subject. The master of a ship gave a bill of lading for goods not

<sup>1</sup> *Ante*, p. 492.

<sup>2</sup> *Ante*, p. 503.

<sup>3</sup> *Ante*, p. 503.

<sup>4</sup> 10 C. B. 688; 20 L. J. C. P. 98. See also the earlier case of *Howard v. Tucker* (1831), 1 B. & Ad. 712; 9 L. J.

K. B. O. S. 103; and the later ones, *Hubbersty v. Ward* (1853), 8 Ex. 330; 29 L. J. Ex. 113; *McLean v. Fleming* (1871), L. R. 2 H. L. Sc. 128; *Brown v. Powell* (1875), L. R. 10 C. P. 562; 44 L. J. C. P. 289; *Cox v. Bruce* (1886),

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shipped; the bill was assigned to the plaintiff; the jury found that, "by the custom of merchants, bills of lading are commonly pledged and deposited by the holders with others as security for the payment of money;" and that by the bill the holders of it "were enabled to pledge and deposit the said bill . . . as security for the payment of money." It was held that the ship-owners were not liable:

"It is not contended that the captain had any real authority to sign bills of lading unless the goods had been shipped; nor can we discover any grounds upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not. If then from the usage of trade and the general practice of shipmasters it is generally known that the master derives no authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and in that case undoubtedly he could not claim to bind the owner by a bill of lading signed when the goods therein mentioned were never shipped."

The master did not act within his apparent authority (A.). That he apparently acted within his authority (B.) was not present to the minds of the judges.

(1881) *Erb v. Great Western Ry. Co.*<sup>1</sup> is to the same effect — the authority of the agent

"was a limited authority: his power and the authority to sign a bill of lading depended on the actual receipt and shipping of the goods. If the fact on which the power depended did not exist the authority could not exist."<sup>2</sup>

The data of the problem are that the master had no authority to sign a bill of lading unless the goods were shipped;<sup>3</sup> and that he did sign although the goods were not shipped. There can be no doubt, therefore, that the owners cannot be bound unless they are in some way estopped from showing the facts. If now the question be whether the master was held out as having authority to sign when no goods were delivered — whether this signing was within his apparent authority (A.)? the answer

18 Q. B. D. 447; 56 L. J. Q. R. 121; affect the question under discussion. *Thorman v. Burt* (1886), 54 L. T. N. S. 349; *Porter on Bills of Lading*, §§ 167, 180, 428; *Travis on Sales*, vol. II, pp. 8-22. The point seems to have been overlooked in *Coventry v. G. E. Ry. Co.* (1883), 11 Q. B. D. 776; 53 L. J. Q. B. 694. The statute (18 & 19 Vic. (Imp.), ch. 111, § 3) rendering bills of lading conclusive evidence of shipment "against the master or other person signing the same" does not

*Jessel v. Bath* (1867), L. R. 2 Ex. 267; 36 L. J. Ex. 149; *Brown v. Powell* (1875), L. R. 10 C. P. 562; 44 L. J. C. P. 230.

<sup>1</sup>(1877) 42 U. C. Q. B. 90; 30 Ont. App. 446; 5 S. C. Can. 179. See also *Oliver v. G. W. R. Co.* (1877), 28 U. C. C. P. 143.

<sup>2</sup>5 S. C. Can. 189.

<sup>3</sup>If he had *caedit questio*. See 18 & 19 Vic. (Imp.), ch. 111, § 3.

must still be in the negative, and there can be no estoppel. A sentence from the case<sup>1</sup> is indisputable:

"Be this as it may, it cannot be doubted that every person in business who deals with a railway company knows that in the ordinary and usual course of business no such receipts and bills of lading are ever given or issued unless the goods have been actually received to be shipped; and nobody so dealing but must know that if a freight agent, discharging the ordinary duties of a freight agent, did give or issue such receipts and bills of lading without the goods having been delivered, he would be acting in direct opposition to his duty and in fraud of his principals."

Undoubtedly so. But every person "knows that in the ordinary and usual course of business" a partner who uses the firm name for his own purposes "would be acting in direct opposition to his duty, and in fraud of his principals;" nevertheless the firm is liable.

Every one knows, too, that a bank ledger-keeper is "acting in direct opposition to his duty" if he mark a check for which there are no funds; but yet the bank is liable.

There must be some general principle which will apply to cases in which a partner binds the firm although acting for his own benefit; in which an attorney binds his client although he makes grievous blunders quite unwarranted by his instructions; in which an agent, having power to borrow money for his firm under certain circumstances, borrows in their absence; in which an agent, having authority to give receipts, issues one without observing certain specified prerequisites; and many other analogous cases. For such cases may we not say that it is

"a sound rule that, where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent and which cannot be ascertained by a comparison of the power with the act done under it."<sup>2</sup>

"For, seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."<sup>3</sup>

Or, in other words: "If an agent appears to be acting within his authority (B.), the principal is bound." If this rule be valid, then the decisions which declare that carriers are not liable to transferees of bills of lading for goods not put on board cannot be maintained.

An American writer agrees that such a holding is, at all

<sup>1</sup> 5 S. C. Can. 192.

<sup>2</sup> *Ante*, p. 504.

<sup>3</sup> Per Holt, C. J., in *Hern v. Nichols* (1712), 1 Salk. 289.

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events, "most consonant with reason and justice;"<sup>1</sup> but although many of the authorities in his country have ranged themselves upon that side of the question,<sup>2</sup> yet there are many others which hold the other view.<sup>3</sup>

*Appearance of Authority.*—An interesting point connected with the appearance of authority was raised in *Cole v. North Western Bank*.<sup>4</sup> Suppose that the owner of goods sends them to a person who carries on two businesses, that of a factor and that of a warehouseman — sends the goods to be warehoused and not sold; and suppose that the goods are nevertheless sold; is the owner bound by the sale? that is, is he estopped by appearance of authority to sell? Had he sent them to a factor (who usually has power to sell) he would undoubtedly be estopped.<sup>5</sup> Had he sent them to a warehouseman (who usually has no power to sell) he would not.<sup>6</sup> Suppose he sends them to a man who carries on both businesses? The decision was in favor of the owner. Blackburn, J., said:

"For example, if a furnished house be let to one who carries on the business of an auctioneer, he is intrusted, as tenant, with the furniture, being in fact an auctioneer; but it never was the common law, and could not be intended to be enacted, that if he carried the furniture to his auction room and there sold it, he could confer any better title on the purchaser than if he, as auctioneer, acted for some other tenant who committed a similar larceny as a fraudulent bailee; nor, to come nearer to the present case, that a warehouseman or wharfinger who as such is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by sale of the goods than he could if they had been intrusted to some other warehouseman who employed him to sell."<sup>7</sup>

<sup>1</sup> Mechem on Agency, § 717.

<sup>2</sup> *Wichita v. Atchison* (1878), 20 Kan. 519; *Sioux v. First Nat. Bank* (1880), 10 Neb. 556; 7 N. W. R. 811; *Brooke v. New York* (1885), 108 Pa. St. 529; *Bank of Batavia v. New York* (1887), 106 N. Y. 195; 12 N. E. R. 438; *Smith v. Missouri* (1897), 74 Mo. App. 48; *American, etc. v. Maddock* (1899), 86 C. C. App. 42; 98 Fed. R. 980.

<sup>3</sup> *The Freeman v. Buckingham* (1855), 18 How. (U. S.) 182; *Dean v. King* (1871), 23 Ohio St. 118; *Louisiana v. Laveille* (1873), 52 Mo. 380; *Baltimore v. Wilkins* (1875), 44 Ind. 11; *Hunt v. Mississippi* (1877), 29 La. Ann. 446; *Witzler v. Collins* (1879), 70 Me. 290; *Pollard v. Vinton* (1881), 195 U. S. 7; *Williams v. Wilmington*

(1885), 98 N. C. 42; *National v. Chicago* (1890), 44 Minn. 224; 46 N. W. R. 342, 560. See Porter on Bills of Lading, ch. 81.

<sup>4</sup> (1874) L. R. 9 C. P. 470; 10 id. 354; 43 L. J. C. P. 194; 44 L. J. C. P. 233. See also *Johnson v. Credit* (1877), L. R. 2 C. P. 224; 3 id. 32; 47 L. J. C. P. 241.

<sup>5</sup> *Ante*, p. 489.

<sup>6</sup> *Wilkinson v. King* (1809), 2 Camp. 335; as explained in *Pickering v. Busk* (1812), 15 East, 42; *Cole v. N. W. Bank* (1874), L. R. 9 C. P. 470; 10 id. 354; 44 L. J. C. P. 233; *Fuentes v. Montis* (1868), L. R. 3 C. P. 277; 37 L. J. C. P. 137.

<sup>7</sup> L. R. 10 C. P. 369; 44 L. J. C. P. 233.

As to the relative negligence of the parties the learned judge added:

"But if the plaintiffs knew that the warehouseman whom they trusted was also a wool broker, the defendants were aware that the wool broker whom they trusted was a warehouseman; and there seems no reason why, without inquiring, they should think he was intrusted in one capacity rather than the other."

The decision was approved in the House of Lords in *City Bank v. Barrlow*.<sup>1</sup>

<sup>1</sup>(1880) 5 App. Cas. 677. See also 813; (1892) A. C. 201; 61 L. J. Ch. 728; Sheffield v. London (1886), 13 App. Cas. 338; 57 L. J. Ch. 986; Cooke v. Towle v. Leavitt (1851), 23 N. H. 360; Tripp v. Martin (1891), 45 Kan. 765; Eshelly (1887), 12 App. Cas. 271; 56 26 Pac. R. 424; Hamlin v. Abell L. J. Q. B. 505; Baker v. Nottingham (1893), 120 Mo. 188; 25 S. W. R. 516; (1891), 60 L. J. Q. B. 542; Simmons v. Baxter v. Sherman (1898), 73 Minn. London (1891), 1 Ch. 270; 60 L. J. Ch. 434; 76 N. W. R. 211.

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## CHAPTER XXVII.

### OSTENSIBLE AGENCY—PARTNERSHIP.

Although headed "Partnership," this chapter is devoted to cases in which there is no partnership. If partnership exists, liability for partnership acts is clear; and it is not within the purposes of this work to determine the circumstances under which partnership exists. The law of estoppel commences where the law of partnership ends. It treats of cases in which, admittedly, there was no partnership; and declares that, under such-and-such circumstances, the defendant<sup>1</sup> is estopped from saying that he was not a partner—that he is liable as though he were. For like reasons we have nothing to do with the law of agency.<sup>2</sup>

*Relation of Estoppel to Partnership and Agency.*—The cases with reference to the liability of promoters of companies illustrate very clearly the relation of estoppel to partnership and agency. In such cases liability may arise in several ways: (A) Promoters may be engaged in making preliminary arrangements, *e. g.*, obtaining the charter, advertising, etc. In such cases there is usually no partnership. The question for decision is either one of agency or of estoppel—agency if real authority is alleged; and estoppel where the defendant is not

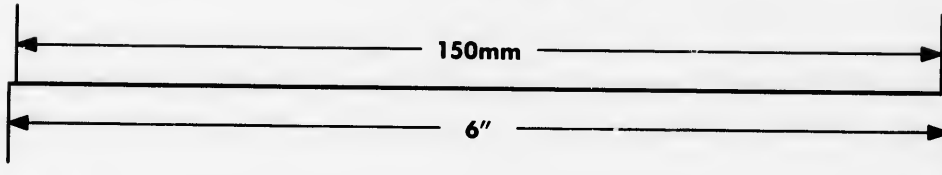
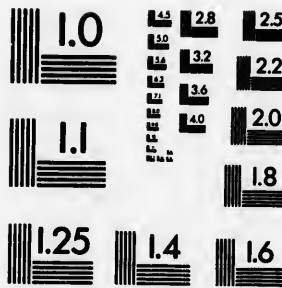
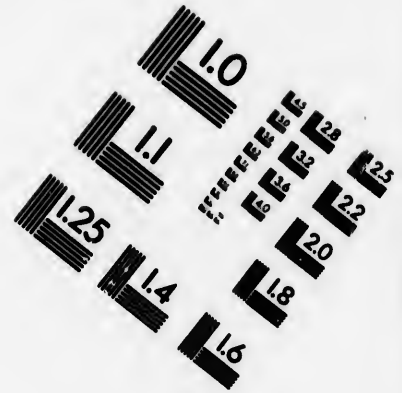
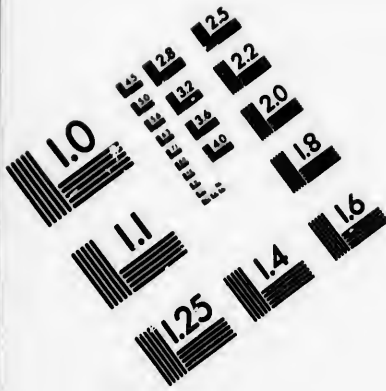
<sup>1</sup> For convenience, "the defendant," in this chapter, will represent the person alleged to be a partner.

<sup>2</sup> It is usual, no doubt, to speak of a partner as an agent of the firm (53 & 54 Vic. (Imp.), ch. 39, § 5; 60 Vic. (Man.), ch. 24, § 5; Barber v. Van Horn (1894), 54 Kan. 33; 80 Pac. R. 1070); but that is not quite correct, although the method of expression has its advantages, and is made use of in the present work. When an individual acts as such, his action is of course his own. When he acts as a member of a firm, the act is not his, but that of the firm. He is not in such case an agent of the firm—for he cannot be agent for himself.

Nor can it be said that he is acting for himself as principal and for the others as agent, for the firm is an entity. As was said by Jessel, M. R.: "If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this: that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you must insist upon ignoring the existence of the firm as a separate entity." Pooley v. Driver (1876), L. R. 5 Ch. D. 478; 46 L. J. Ch. 469.



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a promoter, but, having held himself out as such, is estopped from saying that he was not one. *Lake v. Argyll*<sup>1</sup> was a case of this latter kind; but the judgment does not draw a clear line. (B) The promoters may be carrying on business to which it is intended the company shall succeed. Liability, in such cases, is frequently based upon partnership. Estoppel arises where the person sought to be charged is not a promoter or partner, but has been held out to be such.<sup>2</sup>

The following case<sup>3</sup> shows the necessity for carefully distinguishing between agency and estoppel: A man for a consideration gave to two other persons "leave, license and liberty to use his name in their firm, and for all and every the business purposes of said firm," stipulating, however, that he was not to be a partner. A creditor, who had known nothing of the man or the arrangement, sued him as a member of the firm, and succeeded upon a rule which had been suggested in Parsons on Partnership:<sup>4</sup>

"Where one is held forth to the world as a partner the first question is, was he so held out by his own authority, assent or connivance, or by his negligence. If by his authority, consent or connivance, the presumption is absolute that he was so held out to every creditor or customer. If so held out by his own negligence only, he should be held only to a creditor who had been actually misled thereby."

Mr. Parsons has wisely omitted this rule from a later edition of the book, although it had been thus judicially indorsed, and declares that the decision which was founded upon it is erroneous.<sup>5</sup> It is submitted, however, that the case may<sup>6</sup> be upheld upon another ground, namely, that of actual agency. For the defendant having given authority to make contracts in his name, he was by that law liable upon them. It is not a sufficient reply that the contract was made in the name of the firm, and that the defendant was not a member of the firm; for the name was intended to include the defendant as well as the partners. People may contract under any name they please to adopt. The case is very like *Brown v. Leonard*,<sup>7</sup> in which the defendant told the plaintiff "that he had ceased to be a part-

<sup>1</sup> (1844) 6 Q. B. 477. The later case of *Maddick v. Marshall* (1864), 16 C. B. N. S. 887; 17 id. 829, is more satisfactory.

<sup>2</sup> See *Wood v. Argyll* (1844), 6 Man. & G. 929; 13 L. J. C. P. 96; *Collingwood v. Blakley* (1863), 15 C. B. N. S. 145.

<sup>3</sup> *Poillon v. Secor* (1875), 61 N. Y. 456.

<sup>4</sup> 3d ed., 180.

<sup>5</sup> 4th ed., 104, n. 2.

<sup>6</sup> It depends upon the interpretation of the document. And see *post*, p. 519 ff.

<sup>7</sup> (1816) 2 Chitty, 120. Compare *Miles v. Furber* (1873), L. R. 8 Q. B. 77; 42 L. J. Q. B. 41.

ner . . . but that his name was to continue for a certain time," and Bayley, J., said:

"Brown, notwithstanding the knowledge of the dissolution of the partnership, knew that Bush's name was to be continued and that he was therefore responsible."

#### DIVISION OF THE SUBJECT.

There are two classes of cases in which the law of estoppel in relation to partnership is most frequently appealed to:

1. Cases in which the defendant never was a member of the firm with which the plaintiff dealt; but he is alleged to be estopped from denying membership.<sup>1</sup>

2. Cases in which the defendant had been prior to, but was not at the time of, the transaction in question a member of the firm; and it is alleged that he is estopped from setting up his retirement from the firm. This latter case may be divided into two orders of which each has two species:

1. With reference to dealings with the firm prior to the dissolution:

(a) Persons who had such dealings.

(b) Persons who had no such dealings.

2. With reference to knowledge of the constitution of the firm prior to the dissolution:

(a) Persons who had such knowledge.

(b) Persons who had no such knowledge.

The requisites of estoppel most frequently involved in these cases are as follows:

1. There must have been a representation of partnership.
2. The defendant must have either made the representation or assisted it — done that which made it credible.
3. It must have been made to the plaintiff.
4. Upon the faith of the representation credit must have been given, which implies, of course, that the plaintiff must have been aware of the representation.

#### 1. A REPRESENTATION.

Premising that a representation may as well be made by conduct as by direct assertion,<sup>2</sup> let distinction be made between

<sup>1</sup> Upon the general principle may be cited *Jacobs v. Shorey* (1868), 48 N. H. 100; *Moore v. Harper* (1896), 42 W. Va. 59; 24 S. E. R. 633.

<sup>2</sup> *Dickinson v. Valpy* (1829), 10 B. & C. 141; *Re Fraser* (1892), 2 Q. B. 687; *McLean v. Clark* (1893), 20 Ont. App. 671. Representation being a

(1) the case of a defendant who, as a matter of fact, never was a member of the firm, and (2) the case of a retired partner.

(1) *Defendant Never Was a Partner.*—In this class of cases the representation is usually of some active character. The defendant has asserted directly that he was a member, or some one else with his authority or connivance has so asserted, or his conduct has been such as to produce that impression. There is seldom much difficulty in these cases—they usually involve questions of fact only.<sup>1</sup> The law is clearly stated in some of the codifications:

“Every one 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 any one who has, on the faith of 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.”<sup>2</sup>

It may be noted, however, that a representation of an intention to become a member of a firm is no estoppel.<sup>3</sup>

(2) *A Retired Partner.*—Upon what ground may we say that although a member of a firm retires from it, nevertheless he may be liable upon its subsequent contracts. Clearly nothing but estoppel will suffice. For observe that the defendant is not, as a matter of fact, a party to the contracts; yet he is sued upon them, and when he pleads and proves *non assumpsit* he must succeed but for estoppel.

But why should he be estopped? What has he done? Usually he has done nothing, and is estopped because he ought to have been active. He was aware that third persons might assume that he was still a partner and might give credit upon that assumption; he was under obligation as a member of society “to observe in varying circumstances an appropriate measure of prudence to avoid causing harm” to others;<sup>4</sup> it was his “duty to be active;”<sup>5</sup> it was his “duty” to give such

question of fact, different juries may come to different conclusions upon the same facts. *Wood v. Argyll* (1844), 6 Man. & G. 928; 13 L. J. C. P. 93; *Lake v. Argyll* (1844), 5 Q. B. 477.

<sup>1</sup> *Sherrod v. Langdon* (1866), 21 Iowa, 518.

<sup>2</sup> 53 & 54 Vic. (Imp.), ch. 39, § 14 (1); 60 Vic. (Man.), ch. 24, § 14 (1).

<sup>3</sup> *Bourne v. Freeth* (1820), 9 B. & C. 632; 7 L. J. K. B. O. S. 292; *Reynell v. Lewis* (1846), 15 M. & W. 517; 16 L. J. Ex. 65.

<sup>4</sup> *Pollock on Torts* (5th ed.), 22.

<sup>5</sup> Compare *Ramsden v. Dyson* (1866), L. R. 1 H. L. 141.

notice of his retirement as would protect third persons from injury because of that fact.<sup>1</sup>

The reason for the classification above suggested will now be apparent; for evidently the retiring partner's duty will not be the same to all persons, but must vary according to the position in which they respectively stood with reference to the firm at the time of the dissolution.

For example, if after the partner's withdrawal goods were sold to the firm, and the vendor sued the retired member, alleging that the usual notices had not been given, it would obviously be a sufficient reply that the vendor knew nothing of the constitution of the firm, and had no dealings with it, previous to the dissolution; and was not therefore misled by it. But observe that (1) if the vendor had known of the constitution of the firm, or (2) if he had had dealings with it (before dissolution of course), the retired member would be liable — if he had not given the customary notice.

Distinguish between these two grounds. Observe that either of them will suffice for liability; and that the only difference between them is as to the sort of notice each is entitled to receive — as we shall see. In the meantime notice how little regard some of the codifications of the law of partnership pay to the existence of such points. The Imperial and Manitoba statutes provide that:

"Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change."<sup>2</sup>

What description of "a person" is here intended? If one who had prior knowledge of the constitution of the firm, the statute (if we may so say) is right. But if "a person" includes "any person," it is wrong. Again, if persons who have had previous dealings with the firm are intended, the statute is intelligible; but if all persons are included, it is not.

It might be suggested that there is sufficient ambiguity about the word "apparent" to permit of any elasticity which might be necessary in the application of the clause. For it might be said to a plaintiff who desired "to treat all apparent

<sup>1</sup> *Scarf v. Jardine* (1883), 7 App. Cas. 53 & 54 Vic. (Imp.), ch. 39, § 36; 357; 51 L. J. Q. B. 612; *Stinson v. Whitney* (1881), 130 Mass. 391; *Strecker v. Conn* (1883), 90 Ind. 469.

<sup>2</sup> 53 & 54 Vic. (Imp.), ch. 39, § 36; 60 Vic. (Man.), ch. 24, § 36.

members of the old firm as still being members," that they must have been thus apparent to him. But to give this relative meaning to the word would be to alter the law in a way probably not intended with reference to persons who had previously dealt with the firm. For in such cases, although the person dealing knew nothing of the constitution of the firm, yet he is entitled to assume that there has been no change in its membership.

"The principle of law . . . is incontrovertible . . . that when an ostensible partner retires, or when a partnership between several known parties is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred."<sup>1</sup>

As to prior dealers, therefore, we cannot say that they are entitled to treat as members those persons only who were apparently so to them.

Apart from the statute and observing the distinction suggested, there is not much difficulty. Let us make three classes of cases:

1. As to those who have had dealings with the firm prior to dissolution, they "are entitled to assume, until they have notice to the contrary, that no change has occurred." In other words, persons who were members of the firm at the time of the prior dealings, whether then known to be members or not, may still be held liable as partners. This general statement must not be understood as applying to a person who two years before the transaction in question had made a single cash sale to the firm;<sup>2</sup> but rather to persons who had been in the habit of dealing with the firm.

2. As to persons (1) who have had no previous dealings with the firm, but (2) who were aware of its constitution, we may say that

"in case a known member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware as one of the public that it existed, and has not

<sup>1</sup> Per Lord Selborne, in *Scarf v. Jardine* (1892), 7 App. Cas. 349; 51 L. J. Q. B. 615. And see *Miles v. Furber* (1873), L. R. 8 Q. B. 77; 49 L. J. Q. B. 41; *McLenmore v. Rankin* (1891), 68 Miss. 196; 8 S. R. 345; *Frankel v. Wathen* (1890), 58 Hun. 543; 12 N. Y. Supp. 591 (firm changed to company); *Norquist v. Dalton* (1891), 32 N. Y. 240; 11 N. Y.

Supp. 351; *Gage v. Rogers* (1892), 51 Mo. App. 428; *Robinson v. Floyd* (1894), 159 Pa. St. 163; 28 Atl. R. 258; *Brown v. Foster* (1894), 41 S. C. 118; 10 S. E. R. 299; *Arnold v. Hart* (1898), 176 Ill. 445; 52 N. E. R. 937.

<sup>2</sup> *Merritt v. Williams* (1876), 17 Kan. 297.

become aware of his retirement, the retiring member is liable for the amount, unless he shows that he has given reasonable public notice of his retirement."<sup>1</sup>

3. And as to persons (1) who had no previous dealings; and (2) who had no information as to the prior constitution of the firm, we may adopt the language of an American judge:<sup>2</sup>

"When a firm which remains after the dissolution as the successor of the partnership dissolved, whether carrying on business under the same or a different name, has business relations with a stranger who has had no dealings with the former partnership, and who has had no knowledge of such partnership, notice of any kind is unnecessary in order to enable the retiring members of the old company to escape liability for such subsequent contracts; but it would be otherwise held where the stranger had knowledge of the former partnership, but had no notice, actual or constructive, of its dissolution."

The persons then to whom it is the duty of the retiring partner to give notice are: (1) persons who had previously dealt with the firm; and (2) persons who had become aware of the constitution of the firm, although they might not have dealt with it; and the notices to be given are those prescribed by the rule requiring "an appropriate measure of prudence," namely, specific notices to the prior dealers (for they are known and can be personally reached), and general notice by public advertisement to all others.<sup>3</sup>

*Name of Firm.*—In connection with the points just suggested, the continuation of the name used by the old firm is frequently of importance. For example, in the case of persons who have had no dealings with the firm prior to the dissolution, the name, if indicative of the persons carrying on the business, may sometimes be taken as a representation that such persons are members of the firm; and such a representation would of course create an estoppel in favor of people acting upon it. For the

<sup>1</sup> Reid v. Coleman (1890), 19 Ont. (1893), 52 Minn. 565; 54 N. W. R. 789. See also Carter v. Whalley (1830), 1 102. See Wigle v. Williams (1895), 24 S. C. Can. 713; Dreher v. Connolly (1890), 30 N. Y. 674; 9 N. Y. Supp. 635; Hahn v. Kenefich (1892), 48 Mo. App. 518; Alexander v. Harkins (1897), 120 N. C. 452; 27 S. E. R. 120. The words, "as one of the public," might, for the purposes of a general rule, well be omitted; for if the same information had been obtained as an individual the result would no doubt be the same.

<sup>2</sup> Collins, J., in Swigert v. Aspden

(1893), 53 & 54 Vic. (Imp.), ch. 39, § 36 (2); 60 Vic. (Man.), ch. 24, § 36 (2). In Canada and the United States it would be very advisable to give notice to the mercantile agencies. Reid v. Coleman (1890), 19 Ont. 102; Gage v. Rogers (1892), 51 Mo. App. 428; Bank of Monongahela v. Weston (1899), 150 N. Y. 201; 54 N. E. R. 40.

use of a firm name may estop as well those persons who were at one time partners of the firm as those who never were members of it.

"If I go to a shop and find the name 'Thompson & Jones' on the door, and I go in and find Thompson and Jones selling goods, am I not warranted in believing that they are partners?"<sup>1</sup>

The general principle may be said to be that the permitted use of a name is

"a holding out of himself as a partner in that firm to any one who knew, or had reason to believe, that this represented the name of the defendant, and not that of some other person."<sup>2</sup>

Employment upon the premises in such way as might indicate either partnership or managership, without more, is said not to be sufficient to estop.<sup>3</sup>

*Historic and Indicative Names.*—Turning to the cases in which a prior name has remained unchanged notwithstanding the withdrawal of one of its members, a distinction must be made. Firm names are sometimes indicative and sometimes merely historic; and may easily pass from the one to the other. Where they indicate who the members of the firm are, great care has to be taken by a retiring member, for the firm name is a constant assertion that he is still there.

The often-cited case of *Newsome v. Coles*<sup>4</sup> was a case in which the name had become historic. Thos. Coles & Sons, by that name, had carried on business, and when the father died the name was continued. It then, of course, ceased to be indicative. Afterwards two of the sons retired, leaving the third the sole proprietor of the business, who still maintained the old name. He became indebted to a creditor who tried to hold the other sons liable because of the continuation of the sign. But the clear answer was (although not put exactly in that way) that the name was historic, and owing to the death of Thos. Coles had ceased to have the appearance of being indicative.

This reasoning would not apply, of course, to a case in which "Archer" retired from the firm of "Keats, Archer & Co." For there, although the name has in reality become historic, it still

<sup>1</sup> Ex parte Hayman (1878), 8 Ch. D. 17; 14 L. J. Bk. 54. And see *McLean v. Clark* (1893), 20 Ont. App. 665; *Bartlett v. Raymond* (1895), 139 Mass. 275; 80 N. E. R. 91.

<sup>2</sup> Per Osler, J., in *McLean v. Clark* (1893), 20 Ont. App. 668.

<sup>3</sup> *Edmunson v. Thompson* (1861), 2 Foa. & F. 564.

<sup>4</sup> (1811) 2 Camp. 617.

retains the appearance of being indicative. In that case Archer was liable because

"he had imprudently suffered notice to be given of the continuance of the partnership, by permitting his name to remain on the door."<sup>1</sup>

The distinction between historic and indicative names was altogether overlooked in *Re Fraser*.<sup>2</sup> From the firm of "W. & J. Fraser" the J. retired; the old name was continued; afterwards certain bankers discounted a bill accepted by "W. & J. Fraser," and sued the J. member upon it. They were beaten, Kay, L. J., saying that *Newsome v. Coles* showed that carrying on the business in the old name did not

"amount to a representation by him to the bank that he, John Fraser, was a partner in the firm."

Lord Esher said that there was no evidence of any holding out by John Fraser to the petitioning creditors:

"If they had dealt with the old firm, and had no notice of the dissolution of partnership, the case would be entirely different."

But it is immaterial, as we have seen, whether the case is one of a new or an old dealer, if the creditor had had knowledge of the constitution of the firm. And so the case would be reduced to one of fact, in which respect it is defectively reported. It suggests this question, however: whether if an indicative name be continued and people be misled, it is a sufficient answer to say that notice of the dissolution was advertised in the Gazette — whether an official and never-read notice of a dissolution will outweigh the constant and obtrusive assertion that there was none?

## II. MISREPRESENTATION BY THE DEFENDANT.

Discussion in a previous chapter<sup>3</sup> of one of the prime requisites of estoppel,

"the misrepresentation must be made either (1) by the estoppel-denier (Personal Misrepresentation), or (2) by some person whose misrepresentation the estoppel-denier has made credible (Assisted Misrepresentation),"

renders it unnecessary to say much here upon a point that *a priori* seems to be sufficiently clear, namely, that a misrepresentation which will estop must be one for which the defendant is responsible. It may be pointed out, however, that the

<sup>1</sup> *Williams v. Keats* (1817), 2 Stark. 200; *Dolman v. Orchard* (1825), 2 C. & P. 184; *Evans v. Hadfield* (1806), 93 Wis. 663; 68 N. W. R. 463.

<sup>2</sup> (1892) 2 Q. B. 633.

<sup>3</sup> Ch. III.



assertion that a man cannot be estopped from denying membership in a firm merely because some other person chooses to represent him as such, includes the case of the misrepresentation being made by the real members of the firm, who are as little capable as other people of binding the defendant by their falsehoods.<sup>1</sup> According to the language of the Imperial Statute<sup>2</sup> it is

"every one 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,"

that is liable. The necessity for bringing the representation home to the defendant is illustrated in the holding that he cannot be estopped by what takes place after his death. Suppose that a partner dies; that the continuing partners give no notice of dissolution; and that the old firm name (possibly the name of the deceased) is flamingly continued; nevertheless the decedent's estate is not liable.<sup>3</sup>

### III. MISREPRESENTATION TO THE PLAINTIFF.

One of the essential conditions of estoppel is that

"the estoppel-asserter must be a person to whom immediately or mediately the misrepresentation was made."<sup>4</sup>

It need not, however, surprise us to find that prior to the development of the law of estoppel this point was not always insisted upon.

"Formerly it was considered sufficient if the party was held out to the world as a member of the firm or company; now, however, it is necessary that there should be direct evidence that the holding out had come to the knowledge of the plaintiff; he need not hear or see the defendant's conduct; it is enough if the fact has come to his knowledge."<sup>5</sup>

*Indirect Misrepresentation.*—In one case<sup>6</sup> too much stress was laid upon the necessity for distinct authority from the

<sup>1</sup> Even if advertised. *First Nat. Bank v. Cody* (1894), 93 Ga. 127; 19 S. E. R. 831. See also *Fox v. Clifton* (1890), 8 L. J. C. P. 261; *Marschall v. Alkin* (1897), 170 Mass. 3; 48 N. E. R. 845.

<sup>2</sup> 53 & 54 Vic. (Imp.), ch. 39, § 14 (1); 60 Vic. (Man.), ch. 24, § 14 (1).

<sup>3</sup> *Webster v. Webster* (1791), 3 Sw. 490; *Vulliamy v. Noble* (1817), 3 Mer. 614. And see the Imp. St., 53 & 54 Vic., ch. 39, §§ 14 (2), 36 (3); 60 Vic. (Man.), ch. 24, same sections.

<sup>4</sup> *Ante*, ch. X

<sup>5</sup> *Martyn v. Gray* (1863), 14 C. B. N. S. 839. And see *Shott v. Stréatfield* (1830), 1 M. & Rob. 8; *McLean v. Clark* (1893), 20 Ont. App. 671; *Holman v. Herscher* (1891), 16 S. W. R. 964 (Tex.); *Burrows v. Grover* (1897), 41 S. W. R. 822 (Tex.); *Marschall v. Alkin* (1897), 70 Mass. 3; 48 N. E. R. 845; *Norfinger v. Goldman* (1898), 123 Cal. 609; 54 Pac. R. 425; *Thornton v. McDonald* (1899), 33 S. E. R. 680 (Ga.).

<sup>6</sup> *Edmonson v. Thompson* (1862), 2 Fos. & F. 564; 81 L. J. Ex. 207. And

plaintiff in order that he might be bound by a representation made by another person. The defendant had represented himself to be a partner to various persons; but neither he nor such persons had made any representation to the plaintiff — thus far no estoppel. A real member of the firm, however, had made representations to the plaintiff; but did so without authority from the defendant — and again it was said that there was no estoppel.

But the cases do not usually proceed upon the law of principal and agent, and the necessity for authority to transmit information; but upon this, rather, that the defendant has originated an impression which has in some way reached the plaintiff. And it might very well have been held in the case just referred to that if a man was accustomed to represent himself as a partner, such action would be sufficient evidence that he "knowingly suffered" the real members of the firm to do likewise. He could hardly expect them to contradict him. His own representation would of course be strong evidence against him of the fact of partnership;<sup>1</sup> but that is a remark not pertinent to estoppel. The law may be taken to be that "if the defendant informs A. B. that he is a partner in a commercial establishment, and A. B. informs the plaintiff; and the plaintiff, believing the defendant to be a member of the firm, supplies goods to them, the defendant is liable."<sup>2</sup>

The case mentions but leaves undecided the question whether if the estoppel-denier, instead of informing A. B. that he is a partner, does acts from which A. B. fairly draws that inference; and A. B. either communicates his information to the estoppel-asserter or informs him that the estoppel-denier is a partner — whether, in such case, there is a sufficient holding out. It is submitted that there is, and that the dictum of Erle, C. J., in the same case is correct:

"He need not hear or see the defendant's conduct; it is enough if the fact has come to his knowledge."

The Imperial Statute declares for liability

"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."<sup>3</sup>

see *Armstrong v. Potter* (1894), 103 Mich. 409; 61 N. W. R. 657.

<sup>1</sup> *McNeillan's Estate* (1894), 16 Pa. Co. Ct. R. 46. Affirmed in 167 Pa. St. 478; 81 Atl. R. 727.

<sup>2</sup> *Martyn v. Gray* (1863), 14 C. B. N.

S. 841. And see *Shott v. Streatfield* (1890), 1 M. & Rob. 8; *Quirk v. Thomas* (1858), 6 Mich. 74, 119; *Rimel v. Hayes* (1884), 88 Mo. 208.

<sup>3</sup> 53 & 54 Vic. (Imp.), ch. 89, § 14 (1). And see 60 Vic. (Man.), ch. 24, § 14 (1).

The expression held out "to the world," although now usually repudiated,<sup>1</sup> still retains something of its influence, and necessitates some careful distinguishings. For example, in a quotation upon a previous page<sup>2</sup> it is said "that there should be direct evidence that the holding out had come to the knowledge of the plaintiff."

But sometimes it is thought that if the holding out were sufficiently public, direct evidence would be unnecessary; and this seems to be coming back to the statement that if a man be held out "to the world" as a partner he is liable. But it is not so. The law remains that there must be proof that "the holding out had come to the knowledge of the plaintiff;" and all that is asserted is that

"there may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. . . . The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of law is always the same, that one who had no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner, if he was not a partner in fact."<sup>3</sup>

It is sometimes loosely asserted, too, that if a retiring partner allows his name to continue to appear — in this way to hold himself out to the world — he will be liable for the subsequent debts of the firm. The law is more accurately stated as follows:

"A partner withdrawing from a firm must see to it that his name is removed from the business signs in front of the establishment, or persons relying upon such signs as evidence of the firm's continuation and knowing nothing to the contrary are entitled to recover for all goods parted with on the faith of the partnership relation."<sup>4</sup>

It has been pointed out that one who has previously dealt with a firm is entitled to treat all active<sup>5</sup> partners "as still being members of the firm until he has notice of the change," whether such partners had or had not been "apparent members" to him — that is, whether he did or did not know of their membership. That statement, however, in no way conflicts with the rule that misrepresentation as to partnership must be made to the plaintiff; for the misrepresentation to him in such a case is that there has been no change in the constitution of the firm.

<sup>1</sup> Mr. Parsons would continue it: *On Partnership* (4th ed.), 104.  
<sup>2</sup> *Ante*, p. 532.

<sup>3</sup> *Thompson v. First Nat. Bank* (1883), 111 U. S. 537. And see *Dickenson v. Valpy* (1829), 10 B. & C. 140; *Davis v. Allen* (1849), 3 N. Y. 168;

*Hefner v. Palmer* (1873), 67 Ill. 168; *Rizey v. James* (1891), 26 Kan. 221; *Braithwaite v. Power* (1891), 1 N. D. 496; 48 N. W. R. 359.

<sup>4</sup> *Norquist v. Dalton* (1890), 83 N. Y. 240; 11 N. Y. Supp. 351.

<sup>5</sup> As to dormant partners, see *infra*.

## IV. CREDIT UPON FAITH OF REPRESENTATION.

*Knowledge of the Representation.*—In order that a plaintiff may be able to say that he gave credit upon the faith of a representation it is clearly necessary that he should have known of it prior to his action;<sup>1</sup> and believed it to be true;<sup>2</sup> which of course includes that he did not know it to be untrue.<sup>3</sup>

It is because a representation cannot estop unless it be known, that a dormant partner cannot be estopped from denying partnership after his retirement from the firm.<sup>4</sup> But the term "dormant partner" must be construed strictly, as

"one who takes no part in the business and whose connection with the business is unknown. Both secrecy and inactivity are implied by the word."<sup>5</sup>

For if he chooses to throw off his character he may leave himself open to the estoppel which befalls other partners.<sup>6</sup> And of course the retirement of a dormant partner will not relieve him from contracts already made, even if part of the consideration for the firm's promise be furnished after the dissolution.<sup>7</sup>

*Nature of the Representation.*—Observe that what the plaintiff relies upon is the presence of the defendant in the firm, and, as a consequence, his being a party to the contract. It is not at all essential that the plaintiff should be able to establish that the defendant was a man of "financial ability," and so an *important* factor in the contract.<sup>8</sup> Nor indeed that he should be able to swear that if the defendant had not been a partner he (the plaintiff) would not have sold the goods.<sup>9</sup> All that is

<sup>1</sup> Baird v. Planque (1856), 1 Fos. & F. 344; Rives v. Michaels (1896), 16 Misc. R. 57; 37 N. Y. Supp. 644; Stewart v. Brown (1898), 103 Ga. 836; 80 S. E. R. 264.

<sup>2</sup> Pott v. Eyton (1846), 3 C. B. 32; 15 L. J. C. P. 237; Wright v. Fonda (1891), 44 Mo. App. 634.

<sup>3</sup> McLean v. Clark (1893), 20 Ont. App. 660; Alderson v. Pope (1899), 1 Camp. 404, n.; Kraus v. Lutly (1894), 56 Ill. App. 506.

<sup>4</sup> 53 & 54 Vic. (Imp.), ch. 39, § 36 (3); 60 Vic. (Man.), ch. 60, § 36 (3); Farrar v. Deslinne (1844), 1 Car. & K. 580; McFarlane v. McHugh (1891), 13 Ohio Cir. Ct. 485; 1 Ohio C. D. 546; Pitkin

v. Benfer (1892), 50 Kan. 100; 31 Pac. R. 695; Milmo Nat. Bank v. Carter (1892), 1 Tex. Civ. App. 151; 20 S. W. R. 836; Gorman v. Davis (1896), 118 N. C. 370; 24 S. E. R. 770.

<sup>5</sup> National v. Thomas (1871), 47 N. Y. 19.

<sup>6</sup> Elmira v. Harris (1891), 124 N. Y. 280; 26 N. E. R. 541; Brown v. Foster (1894), 41 S. C. 118; 19 S. E. R. 299.

<sup>7</sup> Court v. Berlin (1897), 2 Q. B. 396; 66 L. J. Q. B. 714. See 14 Law Quarterly Review, 5. And see *ante*, p. 247.

<sup>8</sup> Strecker v. Conn (1883), 90 Ind. 469.

<sup>9</sup> Libel v. Craddock (1883), 37 Ky. 525.

necessary is that, believing the defendant to be a partner, the plaintiff entered into a contract with the firm. And if he be asked whether he would have made it had he known that the defendant was not a partner, he may reply that that question was not raised and is therefore immaterial. Upon the faith of this, he *did* that; he has changed his position — that is the requisite of estoppel.

#### ELECTION AND ESTOPPEL.

We have seen that, by estoppel, a retired partner may continue to be liable for the engagements of the firm. For example, if Smith & Co. be composed of two partners and one of them withdraws without notice to an old customer, both will remain liable. Now suppose that as one man drops out another goes in; will all three be liable? In other words, will the old as well as the new partner be liable — the new partner because of the contract to which he is a party, and the old partner because he is estopped from denying that he is also a party to it.

In *Scarf v. Jarzine* (in the House of Lords<sup>1</sup>) it was held that, in such case, the creditor must elect between the old firm and the new — that he cannot hold both the retired and the added member. Lord Selborne said:

“Put it as I can, I am unable to understand how there could have been a joint liability of the three. The two principles are not capable of being brought into play together: You cannot, at once, rely upon estoppel and set up the facts; and if the estoppel makes A. & B. liable, neither the estoppel, nor the facts, nor any combination of the two, can possibly make A., B. & C. all liable jointly.”

With deference, however, it is a mistake to make two situations out of one; and to say that “the estoppel makes A. and B. liable; and the facts make B. and C. liable;” for estoppel cannot operate apart from facts.<sup>2</sup> Nor are there two sets of facts. The only duality is that B. and C. would be liable upon one principle of law (contract) and A. upon another (estoppel), and that seems hardly to be a sufficient reason for saying that either A. or C. cannot be sued at all.

Take the ordinary case of a partner retiring from his firm, and the continuing partner making a contract. It is not

<sup>1</sup>(1882) 7 App. Cas. 349; 51 L. J. facts.” *Rector v. Board of Improvement* (1887), 50 Ark. 128.  
Q. B. 615.

<sup>2</sup>“Estoppels *in pais* depend upon

doubted that both may be liable. But how? One is liable upon the facts, and the other by estoppel again — if we choose to say so. But perhaps it would be better to declare that the continuing partner is liable upon one principle of law (contract), and the other member upon another principle (estoppel). We have it, then, that if A. and B. are in partnership, and A. goes out, both may be liable — A. by estoppel and B. by contract. And what difficulty is added if B. has taken a new partner, C., and that B. and C. are the parties liable upon the contract?

Suppose that the customer was not aware that A. had left the firm, but was aware that C. had joined it; ought not both A. and C. to be liable to him? C. is, in reality, a party to the contract — perhaps the signature to it is in his own handwriting. In no case can he escape. And A. too ought to be liable, for the contract was made upon the faith of his membership, and he is therefore estopped from denying his liability.

It is said that this conclusion cannot be correct, for were the new firm sued they could not plead in abatement the non-joinder of the old member — the old member is, therefore, it is said, not a proper party to the suit. But observe that the reason that they could not so plead is that *they* could not say that the retired partner was a party to the contract. The creditor may, if he wishes, sue the old member; but he is not bound to do so. He may, if he chooses, sue on the contract as it is in fact, and the real contractors cannot defend themselves by asserting the plaintiff's right to add to their number by estoppel. But it is quite another thing to say that he himself cannot claim the right which estoppel gives him. The objection moreover goes much too far. For if it be valid, then if A. and B. are in partnership, and after A. retires B. makes a contract, these two can never be jointly liable — B. if sued alone would, in this case too, be unable to plead in abatement the absence of A.

It is also argued that if A., B. and C. were all sued together there must be a nonsuit, for the plaintiff could not prove a joint contract. That may be technically true. But if A. and B. were sued alone, they could plead the non-joinder of C.<sup>2</sup>

<sup>1</sup> Schmidt v. Ittman (1894), 46 La. Ann. 888; 15 S. R. 310.

<sup>2</sup> See Cameron v. Cameron (1886), 3 Man. 303.

Thus the difficulties may be set off the one against the other. An argument derived from obsolete forms of pleading, moreover, is not always the most convincing.<sup>1</sup> It might, indeed, be employed to show that A. could not be liable at all. Take it that the contract was made with B. and C. It is impossible now for the plaintiff to sue B. without C.<sup>2</sup> For the same reason he cannot sue A. without joining B. But, according to *Scarf v. Jardine*, A. (the retired partner) and C. (the new one) cannot be sued together. Therefore A. cannot be sued at all;<sup>3</sup> and there is no election!

If the case be one of election it is of this peculiar character: that a creditor having two persons liable to him in respect of the same contract must abandon one of them if he desires to sue the other. That the liability of one of these depends upon his being undoubtedly a party to the contract, and the liability of the other upon his inability to deny that he too is a party to it, does not seem to be a sufficient ground for requiring a release of either one or the other. Estoppel may add a man as a party to a contract, but it is difficult to see how it can subtract one, or how the addition of one can entail the discharge of another.<sup>4</sup>

<sup>1</sup>For example, Lord Eldon, in *Ex parte Hodgkinson* (1815), 19 Ves. 294, when dealing with an analogous difficulty, said: "It has been constantly taken as clear law that a creditor dealing with A., and knowing nothing of a dormant partner, may consider himself a separate creditor; yet it has been determined very lately that the defendant in an action may plead in abatement that there is a dormant partner. I, however, will not disturb the decisions which have taken place here for thirty years . . . declaring that those decisions . . . will not induce me to alter my course in bankruptcy."

<sup>2</sup>*Summers v. Heard* (1899), 50 S. W. R. 78 (Ark.); *Parsons v. Kruger* (1899), 57 N. Y. Supp. 416; *Hyde v. Casey-Grimshawe* (1899), 83 Ill. App. 88.

<sup>3</sup>In the case supposed the creditor

knew of the accession to the firm, of C. That is, however, immaterial. It merely serves to make clear the justice of the creditor's claim to hold both him with whom he contracted and the retired member with whom he believed he was contracting liable for the debt. The real point is that the contract was made with the new member, and that it is the contract that is the basis of the action.

<sup>4</sup>It might be that if a contract was made with A., B. and C. under the belief that the parties were A., B. and D., there would be no contract at all (*Boulton v. Jones* (1857), 2 H. & N. 564; 27 L. J. Ex. 1117); but if the contract is, as a matter of fact, or as an allegation which cannot be disputed, with A., B. and C., how can estoppel ever eliminate C.?

## LIABILITY IN TORT.

When, as formerly, liability proceeded upon a holding out to "the world" (instead of to the plaintiff), it might well be that persons so held out as partners would be liable for the negligence of the servants of the firm, although they were not, in fact, members of it. And so, in *Stables v. Eley*,<sup>1</sup> such a person was held liable for a collision caused by the firm's driver.

But the modern doctrine requires that if a man is to be liable as a partner in a firm of which he is not a member, it must be because the plaintiff has dealt with the firm in the belief that the defendant was a member of it — has changed his position upon the faith of the misrepresentation. It would be hard to contend, in the case of a man injured in a collision, that he had sustained his hurts because of representations that had previously been made to him as to the ownership of the guilty wagon.

<sup>1</sup>(1825) 1 C. & P. 614. And see the later case of *Burk v. Clark* (1889), 5 Man. 150.



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## INDEX.

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The figures sometimes indicate the page at which the subject commences, merely.

### ACTIVITY —

obligation to be active, 40, 43, 48, 103, 136.

as against crime or fraud, 50.

see PASSIVE MISREPRESENTATION.

### ACTUAL AND CONTRACTUAL ESTATE, 269.

### ADMISSION —

estoppel not an, 4.

### AGENT (see OSTENSIBLE AGENCY; PRINCIPAL AND AGENT).

### ALTRUISM (see EGOISM).

### AMBIGUITY OF MISREPRESENTATION, 14, 141.

factor also a trader, 511.

### AMBULATORY AND NON-AMBULATORY INSTRUMENTS —

classification suggested, 395.

Lord Cairns' dictum, 386.

transferee takes free from equities of the obligors, 391.

even although parties themselves defrauded, 96.

transferee takes free from legal title of the owners, 392.

possession of ambulatory instruments is appearance of ownership, 394.

or of agency to transfer, 395.

duty of owners of ambulatory instruments, 395.

estoppel applied to ambulatory instruments, 397.

considerations in support of suggested views, 404.

market overt, 404.

lost seal, 405.

further considerations, 405.

contrast with old view, 406.

### ambulatory instruments —

bonds, 409.

scrip for bonds, 412.

shares, 414.

mortgage debentures, 414.

mortgages, 415.

vouchers, 416.

bank documents, 417.

life policies, 417.

share transfers, 418.

charter-parties, 418.

bills and notes, 420.

**AMBULATORY AND NON-AMBULATORY INSTRUMENTS (con.)—**

- intended to be assigned, 421.
- conclusions, 422.
- overdue paper, 423.
- blanks and spaces in, see **CUSTODY OF DOCUMENTS**.
- stolen or found instruments, see **CUSTODY OF DOCUMENTS**.

**ANTICIPATION OF CHANGE —**

- estoppel-denier must have reasonable ground for, 155.
- personal misrepresentation, 156.
- impertinent questions, 156.
- assisted misrepresentation, 160.
- summary, 161.

**APPROPRIATE MEASURE OF PRUDENCE —**

- a rule in torts, 30.
- what is, 30, 31.
- application to estoppel, 31, 37, 67.
- already made, 34.
- but other reasons given, 35.
- duty to be active, 40, 42, 48, 105, 136.
- as against crime and fraud, 50.
- see also specific heads.

**ASSIGNMENTS OF CHOSSES (see AMBULATORY).****ASSISTED MISREPRESENTATION, 18.**

- requisites for estoppel, 20.
- examples, 21.
- no fraud necessary, 94.
- carelessness sometimes essential, see **CARELESSNESS**.

**B.****BANK DOCUMENTS —**

- ambulatory character of, 417.

**BANK OFFICERS —**

- exceeding authority, 504.

**BANK PASS-BOOKS —**

- duty to check over, 105, 136.

**BILLS AND NOTES (see AMBULATORY AND NON-AMBULATORY; FORGERIES; NEGOTIABLE INSTRUMENTS; CUSTODY OF DOCUMENTS; OVERDUE).****BILLS OF LADING —**

- for goods not delivered; carelessness, 106, 503.
- see **DOCUMENTS OF TITLE; INDICIA OF TITLE**.

**BLANKS (see EXECUTION OF DOCUMENTS).****BONDS (see AMBULATORY INSTRUMENTS; OVERDUE INSTRUMENTS).****BROKER —**

- as a special agent, 476, 478, 479, 483.

## C.

**CARELESSNESS SOMETIMES ESSENTIAL, 98.**

- only important where there is misrepresentation, 100.
- personal misrepresentation; carelessness not essential, 101.
- assisted misrepresentation; carelessness sometimes essential, 102.
  - execution of documents, 103.
  - mortgagee intrusting deeds to mortgagor, 104.
  - ostensible agency, 105.
  - checking over bank pass-books, 105, 136.
  - standing-by, 28, 103.
  - bill of lading for goods not delivered, 106, 503.
  - bills and notes, spaces in, 107. See CUSTODY OF DOCUMENTS.
- rules supplied by the cases, 109.
  - Mr. Bigelow's criticism, 109.
  - Mr. Cababé's criticism, 111.
  - I. There must be neglect of some duty, 112.
  - II. The neglect must be in the transaction itself, 113.
    - this impossible, 113.
    - authorities reviewed, 115.
    - result and its explanation, 116.
    - "in the transaction," 117.
    - analogy from law of torts, 119.
  - III. The neglect must be the proximate cause, etc., 119.
    - this impossible, 119.
    - proximate and real cause, 120.
- summary of chapter, 121.

**CAUSE OF ACTION —**

- estoppel as a, 187.

**CERTAINTY (see IMPLIED MISREPRESENTATION).****CHANGE OF POSITION ESSENTIAL, 131.**

- misrepresentation not acted upon, 131.
- change prior to misrepresentation, 132.
- misrepresentation unknown, 132.
- inactivity may be a change of position, see LULLING INTO SECURITY.
- means of knowledge of incorrectness of misrepresentation immaterial, 137.
- what is a change of position, 139.
  - change of style of living, 139.
  - change by bringing an action, 139.
  - a possible change, 140.
- on the faith of the misrepresentation, 140.
  - where truth known, 140.
  - where misrepresentation withdrawn, 140.
  - where misrepresentation not believed, 140.
  - where representation ambiguous, 141.
  - certificate of shares not relied on, 141.
  - seeming exceptions where classes of estoppel-asserters, 141.

- CHANGE OF POSITION ESSENTIAL** (continued) —  
 on the faith of the misrepresentation (continued) —  
   reputed-ownership clauses, 142.  
   two sets of bankruptoy creditors, 143.  
   what was the actuating motive, 144.  
     onus of proof, 145.  
 several reasons for change, 146.  
 prejudice, 146.  
   damage, real or assumed, 147.  
   amount of damage, 191.  
   lulling to rest, 147.  
 purchaser for value, see **PURCHASER**.  
 anticipation of change, see **ANTICIPATION**.  
 change must be reasonably consequent, see **CONSEQUENT**.  
 change other than that intended, see **CONSEQUENT**.
- CHECKS** (see **NEGOTIABLE INSTRUMENTS; AMBULATORY INSTRUMENTS; EXECUTION OF DOCUMENTS; CUSTODY OF DOCUMENTS**).
- CLASSES OF PERSONS CLAIM ESTOPPEL** —  
 although not act upon faith of misrepresentation, 142.
- COMMERCIAL AGENCIES** —  
 information to, intended for members, 128.  
 notice to, upon dissolution of partnership, 519.
- CONDITIONS OF ESTOPPEL**, 10.
- CONSEQUENCES** —  
 does estoppel proceed upon duty, or has it consequences merely, 232.
- CONSEQUENT** —  
 change of position must be reasonably consequent, 163.  
 Barry v. Croskey and Carr v. London rules compared, 163.  
 change other than that intended, 163.  
   direct and indirect misrepresentation, 163.  
   honest and fraudulent misrepresentation, 163.  
 application to the cases, 171.  
 what are consequent changes, 174.  
 summary, 175.
- CREDITORS** —  
 estoppel in favor of, as to ostensible property of debtor, 25.  
 creditors in class, claim estoppel although not act upon faith of misrepresentation, 142.  
 effect of estoppel of debtor upon his creditors, 209.  
 bearing of privity considerations, 209.  
   true position, 212.  
 joint and separate creditors of partners, 213.  
 effect of estoppel of company to deny validity of some debentures upon other debenture holders, 217.  
 same question as to some shareholders, 219.  
   see **REPUTED OWNERSHIP**.
- CRIME** —  
 duty to guard against, 43.

**CUSTODY OF DOCUMENTS—**

- stolen or found negotiable instruments, 456.
- when forgery necessary to complete, 22, 51, 458, 466.
- signed slips, 463.
- when in complete form, 61, 461, 466.
- stolen or found documents of title, 345.
- stolen or found non-negotiable instruments, 467.

**CUSTODY OF SEALS—**

- duty as to, 63, 106, 237, 405.

**CUSTODY OF RUBBER STAMPS, 65.****D.****DAMAGES—**

- amount of, 191.
- necessary to estoppel, 146.
- see CHANGE OF POSITION.

**DEBENTURE HOLDERS—**

- effect of estoppel of company to deny validity of some debentures upon other debenture holders, 217.

**DECEIT—**

- compared with misrepresentation, 83.
- compared with estoppel, 227.
- fraud necessary in deceit, 224.
- fraud unnecessary in estoppel, 226.
- application of respective remedies, 226.
- anomalous result, 227.
- illustrations, 228.
- present situation, 231.
- company's secretary giving erroneous information, 237.
- acts done by agent not "for master's benefit," 497.

**DEEDS—**

- estoppel applies to, 345, 449.
- possession of, see POSSESSION OF TITLE DEEDS.

**DEFAULT—**

- taking advantage of one's own, 185.

**DELIVERY ORDERS (see DOCUMENTS OF TITLE; INDICIA OF TITLE).****DIRECT AND INDIRECT—**

- misrepresentation may be direct or indirect, 123.
- Barry v. Croskey criticised, 163.

**DOCUMENTS—**

- custody of, see CUSTODY OF DOCUMENTS.
- execution of, see EXECUTION OF DOCUMENTS.

**DOCUMENTS OF TITLE—**

- three classes of documents, 305.
  1. Certificates of title, 305.
  2. Transfers of title, 305.
  3. Records of transfers, 305.

## DOCUMENTS OF TITLE (continued)—

- estoppel by transfers of title, 303.
- lands and goods, 306.
- conveyances are intended as representations and will estop, 307.
- bills of lading —
  - not operative merely between the parties, 308.
  - intended as representation and will estop, 308.
- dock warrants, etc., also so intended, 309.
- share certificates and transfers also so intended, 309.
- resemblances among all documents of title, 310.
- estoppel the true ground of decision, 311.
- purposes of documents of title to goods, 313.
  - intended to be passed on, 125.
- signers of them estopped, 313, 314, 316.
  - carelessness material in cases of bills of lading, 106, 316.
  - carelessness not material in other cases, 39, 316.
  - no estoppel as to certain points, 318.
  - when issued improperly by agents, see PRINCIPAL AND AGENT.
- transferrers estopped, 313, 319.
- bills of lading —
  - estoppel of transferrer only as to stoppage *in transitu*, 319.
    1. Passing property by transfers, 320.
    2. Negotiability, 322, 323.
    3. Symbolism, 324.
  - these three compared, 325.
  - the true view — estoppel, 327.
  - tendency in that direction, 330.
- dock warrants, etc.—
  - early law enunciated valuable principles, 335.
  - submergence, 336.
  - parliament versus the courts, 336.
  - compared with bills of lading, 338.
  - right to stop *in transitu* not affected by, 338.
    - until statute, 339.
    - other documents unaffected by statute, 339.
- shares in companies —
  - company estopped by certificates, 340.
  - compared with land, 340.
  - transferrer estopped, 341.
  - seals, 345.
- stolen or found, see CUSTODY OF DOCUMENTS; INDICIA OF TITLE.

## DOWRESS —

standing-by, 27.

## DUTY —

- as a requisite of estoppel, 28.
- estoppel proceeds upon duty, 282.
- as to appearance of ownership, see OSTENSIBLE OWNERSHIP.

**DUTY (continued)—**

- as to appearance of agency, see **PRINCIPAL AND AGENT.**
- as to execution of documents, see **EXECUTION OF DOCUMENTS.**
- as to custody of documents, see **CUSTODY OF DOCUMENTS.**
- as to guarding against crime, see **CRIME.**
- of activity, see **PASSIVE MISREPRESENTATION; LULLING TO REST.**
- in partnership cases, see **PARTNERSHIP.**
- egoism and altruism, see **EGOISM.**
- appropriate measure of prudence, see **APPROPRIATE.**

**E.**

**EFFECT OF ESTOPPEL (see NATURE AND EFFECT).**

**EGOISM AND ALTRUISM, 37, 291, 460.**

**ELECTION —**

in partnership cases, 526.

**EQUITABLE RIGHT AND ESTATE —**

- estoppel is an equitable right, 199.
- parallel between equity under contract for sale and estoppel, 202.
- solution applied, 202.
- does an estate pass by estoppel, 206.
- effect under Factors Act, 208.
- see **LEGAL ESTATE.**

**EQUITIES —**

- the phrase equivalent to "merits," 251, 291.
- estoppel concealed under the phrase, 200.
- "no defenses," 128.
- see **AMBULATORY.**

**ESTOPPEL —**

- subdivisions, 1, 2.
- classification, 3.
- definition, 3.
- justification, 5.
- history, 7.
- conditions, 10.

**EVIDENCE —**

estoppel as a rule of, 188.

**EXECUTION OF DOCUMENTS —**

- carelessness in execution may stop, 103, 425.
- I. Execution fraudulently obtained —
  - the authorities, 428.
  - void and voidable, 427.
  - solution, 434.
  - analogy, 437.



**EXECUTION OF DOCUMENTS (continued) —****II. Execution fraudulently completed, 438.**

division of subject, 438.

negotiable instrument confided to another person, 439.

(1) completed instruments, 439.

grounds of liability, 245.

(2) blank instruments, 440.

current phraseology, 441.

criticism, 441.

blanks known to transferee, 442.

customary effect of blanks, 443.

estoppel, 444.

blanks unknown to transferee, 447.

(3) spaces in instruments, 42.

carelessness as to, 107.

(4) signed slips of paper, 448.

imperfection known, 448.

unknown, 448.

summary, 449.

non-negotiable instruments confided to another person, 449.

deed, estoppel applies to, 345, 449.

completed instruments, 453.

blank instruments, 453.

blanks known, 453.

unknown, 455.

documents stolen or found —

negotiable instruments, 456.

carelessness, 457.

complete and incomplete instruments, 458.

criticism of present rules, 459.

egoism and altruism, 460.

signed slips of paper, 463.

current practice, 463.

the codes, 463.

non-negotiable instruments, 467.

summary of chapter, 470.

**EXPECTED CHANGE (see ANTICIPATED CHANGE).****F.****FACT AND INTENTION —**

misrepresentation of, 68.

**FACT AND LAW —**

misrepresentation of, 72.

**FACT AND OPINION —**

misrepresentation of, 72.

**FACTORS —**

conflict between courts and parliament, 350.

confusion in Factors Acts, 240.

**FACTORS (continued)—**

general principles sufficient for factors, 350.

legal-estate considerations ignored in Factors Acts, 274.

goods intrusted to one who is a factor, 351.

    specially accredited factor, 351.

    merchant, 352.

    and factor, 352, 511.

review of legislation, 353.

"factors cannot pledge," 353, 368.

    corrected by statute, 353.

    criticism of the statute, 356.

documents of title with factor "with the consent of the owner," 358.

possession of goods for consignment or sale, 360.

vendor retaining possession or *indicia*, 361.

purchaser prematurely getting possession or *indicia*, 364.

vendor's lien and stoppage *in transitu* affected by all documents of title, 365.

summary, 366.

American legislation, 368.

**FAIRS —**

power of agents when dealing at, 493.

**FALSÂVERT, III, 149.****FORGERIES —**

duty to guard against, 22, 48.

not advising of, 135.

    see LULLING INTO SECURITY; BANK PASS-BOOKS; CRIME.

**FRAUD —**

what is, 259.

as affecting priorities, 259, 285.

used by court of equity as against legal estate, 257.

not essential to estoppel, 83.

sometimes an ingredient in misrepresentation, 89.

diverse views, 86.

reconciliation by classification, 87.

possession of goods obtained by, 302.

possession of *indicia* of title obtained by, 303.

no difference between land and goods with regard to fraud, 97. See

**CRIME.**

as affecting character of change of position, 164.

duty to guard against fraud as compared with crime, 48.

**G.**

**GOODS** (see POSSESSION OF GOODS; SALE OF GOODS; OSTENSIBLE OWNERSHIP; OSTENSIBLE AGENCY).

**H.**

**HALIFAX v. WHEELWRIGHT RULE, 185.**

    either inaccurate or estoppel insufficiently stated, 185.

HISTORY OF ESTOPPEL, 7.

HONEST (see FRAUD).

HORSES—

power of agent to warrant upon sale, 492.

I.

IMPLIED MISREPRESENTATION —

certainty, 14, 141.

general statements as to, 14.

examples, 15.

distinction where fraud, 17.

INDICIA OF TITLE—

possession of by third party will estop true owner, 811, 813, 815, 819,  
825, 838, 850-869, 407.

even if possession obtained by fraud, 803, 804, 812.

as applied to ambulatory instruments, 407.

when stolen or found, see CUSTODY OF DOCUMENTS.

INDIRECT MISREPRESENTATION (see DIRECT).

INFANTS—

estopped by misrepresentation of agent, although innocently made, 98.

INNOCENT (see FRAUD).

INNOCENT PERSONS SUFFERING (see LICKBARROW v. MASON).

INSURANCE BROKER —

extent of authority, 489.

INTENDED TO BE PASSED ON —

delivery orders, 125.

warehouse receipts, 126.

letters of credit, 126.

bills of lading, 126.

certificates of shares, 126.

company's reports and prospectuses, 127.

commercial agencies, 128.

stock exchange, 128.

title deeds, 128.

no defenses, 128.

persons who will probably be questioned, 129.

negotiable instruments, 129.

subscription lists, 130.

see AMBULATORY INSTRUMENTS.

INTENTION —

misrepresentation of, will not estop, 68.

J.

JUSTIFICATION OF ESTOPPEL, 5.

## KNOWLEDGE —

- by-stander must be aware of his own rights, 90.
- estoppel-asserter must be unaware of by-stander's rights, 90.
- of incorrectness of misrepresentation, means of, 137.

## L.

LAND (see LEGAL ESTATE; POSSESSION OF TITLE DEEDS; QUI PRIOR EST TEMPORE).

## LANDLORD —

- giving undertaking to grant lease which he had already given, 228.

## LAW —

- misrepresentation of, 72.

## LAW MERCHANT —

- usual solution of certain questions, 370.
- antagonism to general law, 372.
- what is it, 373.

## LEGAL AND EQUITABLE ESTOPPELS —

- distinction, 6.

## LEGAL ESTATE — PRIORITY BY —

- the scramble, 252.
- ubi pig, ibi priority*, 254.
- contrasted with estoppel, 254, 263.
- originated in defective administration, 255.
- equity checked by it, 256.
- equity introduces questions of fraud, 257.
- union of courts and opportunity for reform, 258.
- "fraud or evidence of fraud" as ground to postpone legal estate, 259.
- apologies for old rule, 268.
- actual and contractual estates, 269.
- support for new methods, 271.
- not apply to estoppel of owner of shares, 344.
- not applicable to Factors Acts, 374.

## LICKBARROW v. MASON RULE —

- an anticipation of estoppel by assisted misrepresentation, 7, 178.
- not disparate from estoppel, 178.
- priorities, 179.
- bills of exchange, 179.
- principal and agent, 180.
- sales of goods, 181.
- Mr. Pomeroy's concurrence, 181.
- ubiquity of rule, 184.
- the case itself, 184.
- not incapable of support, 183.

## LOST (see CUSTODY OF DOCUMENTS).

**LULLING INTO SECURITY, 40.**

- inactivity may be a change of position, 133.
- vendor handing receipt for purchase-money to agent who keeps the money and delivers receipt to purchaser, 134.
- not advising of forgery, 135.
- not objecting to accounts, 105, 136.
- must be damage to estoppel-asserter, 147.
- see CHANGE OF POSITION.

**M.****MARGINAL WRITINGS (see AMBULATORY INSTRUMENTS).****MARKET OVERT, 404.****MASTER AND SERVANT (see PRINCIPAL AND AGENT).****MATERIALITY OF MISREPRESENTATION AND ASSISTANCE, 80.**  
several misrepresentations, 81.**MEDIUM POWERS —**

- assumed to exist, 483.
- when withheld, 490.
- see PRINCIPAL AND AGENT.

**MISREPRESENTATION —**

- definition, 12.
- necessity for, 12.
- classification, 13.
- personal and assisted, 19. See ASSISTED MISREPRESENTATION.
- direct and indirect, see DIRECT AND INDIRECT.
- active and passive, see PASSIVE MISREPRESENTATION; LULLING INTO SECURITY.
- expressed and implied, 14. See IMPLIED MISREPRESENTATION.

**MORTGAGE DEBENTURES (see AMBULATORY).****MORTGAGEE —**

- estoppel by conduct with reference to deeds, 23, 243, 279.
- carelessness essential, 105.
- estoppel by misstatements, 229.

**MORTGAGOR —**

- estoppel as to amount stated to be secured by mortgage, 23, 415.
- even although himself deceived, 95.

**MOTIVE —**

- what was the, 144.

**N.****NATURE AND EFFECT OF ESTOPPEL, 187.**

- as a cause of action, 187.
- as a rule of evidence, 189.
- relief granted, character of, 190.
- goods not ordered to be delivered where title rests on estoppel, 190.

**NATURE AND EFFECT OF ESTOPPEL (continued)—**

- amount of damages recoverable, 191.
- parties and privies, see **PARTIES AND PRIVIES**.
- does estoppel bind purchasers from estoppel-denier, 196.
  - creditors of the estoppel-denier, 208. And see **CREDITORS**.
  - in favor of assignee of estoppel-asserter, 220.

**NEGLIGENCE—**

- double application of word, 98.
- carelessness substituted, 99.
- see **CARELESSNESS**.

**NEGOTIABLE INSTRUMENTS —**

- definition, 376.
- transferee suing in his own name, 376.
- honest acquisition confers title, 378.
- negotiability and transferability, 380.
- negotiability explained, 383, 399.
- application of estoppel to, 179.
- ambulatory and non-ambulatory, 385. See **AMBULATORY**.
- cycle through which law passed, 386.
- summary, 389.

see **EXECUTION OF DOCUMENTS; CUSTODY OF DOCUMENTS**.

**NEGOTIABILITY BY ESTOPPEL —**

- reason for statements of doctrine, 401.
- difficulty of accepting doctrine, 403.

**NEMO DAT QUOD NON HABET**, 296, 311, 335, 350, 393.

**O.****OMNIBUS DRIVER —**

- acting contrary to instructions, 497.

**ONUS OF PROOF —**

- as to the actuating motive, 145.

**OPINION —**

- misrepresentation of, 72.

**OSTENSIBLE AGENCY —**

- contrasted with ostensible ownership, 238, 436.
- confusion between, 239.
- benefit of distinction, 242.
- agent to borrow upon deeds exceeding his authority, 244.
- agent to sell goods exceeding his authority, 246.
- estoppel as to existence of agency, 238, 246.
  - extent of agency, 246.
- carelessness essential, 40, 105.
- see **PRINCIPAL AND AGENT; Specific heads**.

**OSTENSIBLE OWNERSHIP —**

- contrasted with ostensible agency, 238, 436.
- confusion between, 239.
- benefit of distinction, 242.

**OSTENSIBLE OWNERSHIP (continued) —**

- accrediting title, 233.
- where ostensible owner is a real agent, 242.
- will not support an act of agency, 247.
- application of estoppel, 24, 39, 248.
- in trustees, 254, 293, 311.
  - involuntary trustees, 295.
- name of purchaser painted on goods, 304.
- owner defrauded, 36.

see POSSESSION OF GOODS; INDICIA OF TITLE.

**OVERDUE DOCUMENTS —**

- equities of obligors, 423.
- title of true owners, 423.

**P.****PARTIES AND PRIVIES —**

- purchasers from the estoppel-denier, 196.
- who are privies, 196.
- rule as to privies not intended for estoppel by misrepresentation, 198.
- suggested solution, 199.
- relation of to rule respecting creditors of estoppel-denier, 209.

**PARTNERSHIP —**

- relation to agency, 513.
  - estoppel, 513.
- use of non-partner's name, 514.
- estoppel although estoppel-denier himself defrauded, 96.
- representation of partnership, 22, 515.
  - where defendant never a partner, 516.
  - defendant is a retired partner; 511.
  - duty to give notice, 41, 511.

**three classes:**

1. Those who had prior dealings with firm, 518.
  2. Those who had none, but who were aware of its membership, 518.
  3. Those who had neither prior dealings, nor such knowledge, 519.
- firm's name, 519, 524.
    - historic and indicative names, 520.
  - conflict between joint and several creditors, 218.
  - dormant partner, when liable, 247.

**PASSED ON (see INTENDED TO BE PASSED ON; AMBULATORY).****PASSIVE MISREPRESENTATION —**

- duty of activity, 40, 42, 48-57, 105, 134, 135, 136.
  - as to recorded transactions, 138.
- no duty to anticipate ignorance, 66.
  - of insurance company to advise as to premiums, 66.
  - to warn against self-deception, 69.
  - of surety to warn creditor not to release debtor, 66.
  - of purchaser to advise vendor of non-arrival of goods, 67.
- see STANDING-BY.

**PATENTEE—**

duty to advise intending purchasers, 91.

**POLICIES—**

assignee's rights regarding prior equities, 417.

**POSSESSION OF GOODS—**

mere possession not appearance of ownership, 297.

by factor or auctioneer constitutes appearance of agency, 246.

when constitutes appearance of ownership or agency, 298, 484.

character of the goods, 298.

place, 298.

usual employment of the person, 299.

reputed-ownership statute, 300.

contrast with estoppel, 300.

vendors and vendees, 301.

name of vendee painted on goods, 304.

other circumstances, 301.

obtained by fraud, 302.

by merchant, when appearance of ownership, 312.

by person who is both merchant and factor, 511.

for consignment or sale, 360.

**POSSESSION OF TITLE DEEDS, PRIORITY BY, 276.**

current phraseology, 276.

suggestion of estoppel, 276.

possession a circumstance merely, 278.

tables of cases, 279.

analysis of them, 283.

estoppel the true doctrine, 287.

**PREJUDICE (see CHANGE OF POSITION).****PRINCIPAL AND AGENT—**

propositions respecting estoppel, 473.

general and special agency discussed, 474.

single and multitudinous instances of employment, 474.

application of estoppel, 180, 483.

estoppel as to existence of agency, 488.

extent of agency, 246, 483, 486.

application of distinction, 484.

estoppel in what cases, 487.

medium powers, 488.

agent employed to perform certain duty, 488.

in certain capacity, 488.

to act in line of particular business, 488.

to act under certain circumstances, 488.

when employment arises out of legal relation, 488.

horses, sales of, power of agent to warrant, 492.

"for the master's benefit," 496.

distinction between tort, deceit and estoppel, 287.

secretary of company acting for himself, 496.

deceit and estoppel compared, 497.

partner acting for his own benefit, 499.



**PRINCIPAL AND AGENT (continued)—**

"within the scope of his authority," 501.

A. Acting within ostensible authority, 501.

B. Appearing to act within real authority, 501.

"classes of acts," 502.

partnership cases, 502.

borrowing powers, 503.

extrinsic facts, 503.

bank officers exceeding authority, 504.

attorney exceeding authority, 505.

agent of company exceeding authority, 507.

bills of lading and warehouse receipts, 505.

appearance of authority, 511.

factor who is also trader, 511.

agent also an owner, 141.

by possession of receipt for money to be paid, 133.

see **OSTENSIBLE AGENCY**.

**PRIVIES (see PARTIES AND PRIVIES).**

**PROXIMATE CAUSE (see CARELESSNESS).**

**PRUDENCE (see APPROPRIATE MEASURE OF PRUDENCE).**

**PURCHASER FOR VALUE WITHOUT NOTICE—**

auxiliary jurisdiction, 150.

concurrent jurisdiction, 150.

supersession by estoppel, 151, 154.

legal estate, 153.

**PURCHASERS FROM ESTOPPEL-ASSERTER (see PARTIES AND PRIVIES).**

**PURCHASERS FROM ESTOPPEL-DENIER (see PARTIES AND PRIVIES).**

**Q.**

**QUI PRIOR EST TEMPORE, ETC.—**

relation to other priority rules, 240.

resemblance to estoppel, 291.

divergence from estoppel over word "merits," 291.

egoism and altruism, 291.

illustration of divergent conclusions, 293.

**R.**

**REASONABLE GROUND FOR ANTICIPATING CHANGE (see ANTICIPATION).**

**REASONABLY CONSEQUENT (see CONSEQUENT).**

**REGISTRY OFFICES—**

silence as to recorded transactions, 138.

**RELIANCE UPON MISREPRESENTATION (see CHANGE OF POSITION).**

**REPUTED-OWNERSHIP CLAUSES, 25, 142, 214, 300. See CREDITORS.**

**RESCISSION —**

compared with misrepresentation, 85.

**RESTITUTION —**

its relation to estoppel, 222.

is fraud necessary, 223.

**RUBBER STAMPS —**

custody of, 65.

**S.****SALE OF GOODS —**

confusion in statute between ostensible ownership and ostensible agency, 241.

estoppel of owner by wrongful sale, 246.

where owner tricked, 181.

power of agent to give warranty, 492.

property passes by estoppel under statute, 206.

appearance of authority to sell, 484.

see **OSTENSIBLE OWNERSHIP; OSTENSIBLE AGENCY.**

**SCRIP (see AMBULATORY).****SEAL (see CUSTODY OF SEAL).****SHARES, CERTIFICATES OF —**

estoppel of company, 23, 40, 230, 264, 300, 313, 340.

although itself deceived, 95.

**SHARE-TRANSFERS (see AMBULATORY INSTRUMENTS; DOCUMENTS OF TITLE).****SHAREHOLDERS —**

effect of estoppel of company to deny validity of some shares upon other shareholders, 219.

in class may claim estoppel although not act upon faith of misrepresentation, 142.

**SIGNATURES MISAPPROPRIATED (see EXECUTION OF DOCUMENTS).****SPACES IN INSTRUMENTS (see EXECUTION OF DOCUMENTS).****STANDING-BY —**

duty when mistake is observed, 89.

must be aware of my own right, 90.

other party must be unaware of my right, 90.

must have reasonable ground for assuming other party's ignorance, 90, 106.

at tax sale, 26.

building on another's land, 106.

see **PASSIVE MISREPRESENTATION.**

**STOCK EXCHANGE —**

information to, intended for members, 123.

**STOLEN AND FOUND INSTRUMENTS (see CUSTODY OF INSTRUMENTS).**

**STOPPAGE IN TRANSITU —**  
affected by transfer of bill of lading, 319.  
estoppel the true reason, 327.  
statute as to other documents of title, 339, 365.  
**SYMBOLISM, 324. See DOCUMENTS OF TITLE**

**T.**

**TAX SALE —**  
standing-by at, 26.  
**TITLE DEEDS (see POSSESSION OF TITLE DEEDS).**  
**TORT —**  
liability of partners, 529.  
compared with estoppel, 493.  
**TRUSTEE —**  
giving incorrect answer to inquiries by intending purchaser of the  
fund, 228.  
ostensible ownership, estoppel by, 254, 264, 340.

**V.**

**VENDORS AND VENDEES OF GOODS (see POSSESSION OF GOODS).**  
**VOID AND VOIDABLE (see EXECUTION OF DOCUMENTS).**  
**VOUCHERS (see AMBULATORY).**

**W.**

**WAREHOUSE RECEIPTS (see DOCUMENTS OF TITLE).**  
**WAREHOUSEMAN —**  
issuing erroneous receipt, 229, 235.  
**WARRANTY —**  
power of agent to give, 492.

ing purchaser of the

SSION OF Goods).

MENTS).

E).

