An exposition of the principles of estoppel by misrepresentation

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PREFACE.

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." If 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;¹ 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."

Falsávert² has the advantage of having for its first syllable a word familiar enough to all lawyers, and for its second that

¹Cahabé on Estoppel, 53.
²Kindly 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 "Pitíh," the radical of a Greek verb signifying to persuade; and "allactos," a verbal adjective (from the Greek verb allasos, 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. *Falsi* is preferable to *false*, 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 *malà 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."\(^1\)

Although stated too broadly, and lacking therefore in scientific value, this rule embodies the principle of estoppel by assisted misrepresentation.\(^2\) 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*,\(^3\) 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.\(^4\)

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."\(^5\)

**Passive** misrepresentation is impossible without *malú 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,\(^6\) upon which the estoppel is founded.

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\(^1\) *Lickbarrow v. Mason*, 2 T. R. 63.

\(^2\) See ch. XIV.

\(^3\) 6 A. & E. 469.

\(^4\) See ch. XIV.

\(^5\) Per Lord Cairns in *Reese v. Smith* (1863), L. R. 4 H. L. 79; 30 L. J. Ch. 810.

\(^6\) 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.  

(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,” 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-

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1 See ch. XVII.  
2 Pollock on Torts (5th ed.), 32.
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.\(^1\) 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 fractionness to order and principle.\(^2\)

(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-

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\(^1\) Schofield v. Londesborough (1894).
\(^2\) See ch. XXIV.
onistic principles of (1) "negotiabilty" of the documents, and
(2) caveat emptor as to the goods they represent, can be ration-
alized 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 misrep-
resentation," 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.

(II) The relation of estoppel to deceit is in need of explana-
tion. Its elucidation will be attempted.

The method of the present work is to investigate and estab-
lish (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 *Pickering v. Mason:* ¹

"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

¹(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, 1860.
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