

CHAPTER 1

Introduction: definition and treatment

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ESTOPPEL

A bar that disables one party and thereby enables another

1.1 'Estop' is an old English variant of the word 'stop'. Sir Edward Coke wrote in 1628 that "'estop" 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',¹ and

1 Coke on Littleton vol II at s 667, 352a. Spencer Bower believed, however, that the English forms had a common and more or less contemporaneous origin with those used in other countries, and noted also that Dr Murray (*New English Dictionary*, 1897) gave as equivalents of the English 'estop' the following: Old French, 'estoper, estouper'; Anglo-French, 'estopper'; Provençal and Spanish, 'estopa'; Modern French, 'etoupe' with a first meaning: 'to stop with a dam, plug or bar – to fill up (a pool)', and a second: 'to stop, bar, hinder, prevent or preclude.'; see also Rastell, *Termes de la Ley* (1629 edn) at 142–43 with its parallel entries in law-French and in English: 'Estoppell is when one is concluded, and forbidden in lawe to speake against his owne act, or décede, yea, although it bée to say the truth'.

350 years later Lord Denning MR² repeated that ‘... the word “estoppel” only means stopped ... It was brought over by the Normans. They used the old French “estoupail”. That meant a bung or cork by which you stopped something from coming out. It was in common use in our courts when they carried on all their proceedings in Norman-French’. While ‘stop’ and ‘stoppage’ have survived in general use, ‘estop’ and its substantive ‘estoppel’ are employed exclusively in the law, for a prohibition on asserting facts, rights or freedom from obligation.

1.2 An estoppel is, however, Janus-faced: by precluding³ the party estopped, ‘B’,⁴ from denying a fact, right, or freedom from obligation, the estoppel allows the estoppel raiser, ‘A’, to assert that fact, right or freedom from obligation, and thereby affects the rights and obligations between them. It is important, moreover, to note from the outset that a claim to a right in or over property by proprietary estoppel is a claim to the very equity to which A’s detrimental reliance on B’s representation or silence gives rise, that is, the right created by the estoppel itself, whose substance is in the discretion of the court.⁵ Its result is not, therefore, a simple preclusion from denying other rights, but a positive remedy to satisfy the equity.

1.3 An estoppel by representation or convention may also, provided that it does not thereby unacceptably subvert the policy of a rule of law, create, as well as extinguish, a right and corresponding cause of action,⁶ but these doctrines do so by supplying or denying constituent elements of rights (and corresponding causes of action) under the law *dehors* the estoppel itself, whose content is determined by that law, as adjusted, or as applied to facts adjusted, by the absolute or limited preclusion imposed by the estoppel. A proprietary estoppel, however, creates its own equity with its own discretionary content that is its own cause of action.

1.4 For this reason it might be said that proprietary estoppel, as a cause of action in itself, substantially differs from the other estoppels, in not being, in spite of its name, primarily prohibitive, but A’s positive right in proprietary estoppel derives from his right to preclude B from unfairly changing his position,⁷ and proprietary estoppel is nonetheless a reliance-based estoppel, affecting the rights between the parties for this same fundamental reason⁸ as do the other overlapping reliance-based doctrines; it accordingly requires satisfaction of the same three heads of responsibility,⁹ causation¹⁰ and prejudice¹¹ as they require. We submit that differences, such as this, in operation of these reliance-based doctrines of estoppel reflect, or should reflect,¹² not a difference in their animating principle, but, first, the differences in subject matter to which that principle is applied, and, secondly, the impact of the law’s concern that an estoppel should not unacceptably subvert the policy of a statute or rule of law.¹³

RELIANCE-BASED ESTOPPEL

1.5 For, the common object of the overlapping doctrines that are the central subject of this work¹⁴ – estoppel by representation of law or fact, estoppel by silence, estoppel by negligence, estoppel by convention, proprietary estoppel and promissory estoppel – is to protect one party from an unfair change of position by another.¹⁵ The reason that the change is unfair is that B is responsible to A for A relying on B’s original position in such a way that A would suffer by reason of B’s change: the estoppel is founded on ‘detrimental’¹⁶ reliance. A unanimous Court of Appeal recently and uncontroversially so confirmed in relation

- 2 In *Hunter v Chief Constable of West Midlands* [1980] QB 283 at 316–317: ‘Littleton writes in the law-French of his day (15th century) using the words “pur ceo que le baron est estoppe a dire,” meaning simply that the husband is stopped from saying something’.
- 3 See *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752, at [14] per Lord Scott, with concurrence at [1], [94], [95] in a definition that has been criticised (see further 12.29) for not clearly encompassing all the qualities of proprietary estoppel identified at 1.2 and 1.3: ‘An “estoppel” bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel.’; and in *SmithKline Beecham Plc v Apotex Europe Ltd* [2007] Ch 71 at [110] Jacob LJ identified with concurrence: ‘... the fundamental nature of an estoppel. An estopped party is precluded from asserting that a particular fact or set of facts or state of affairs is so’. In *Samsung Electronics (UK) Ltd v Apple Inc* [2013] FSR 7, at [11], Mann J also observed: ‘An estoppel makes sense only in relation to something that the other party wishes to assert (or deny)’.
- 4 ‘A’ and ‘B’ are used throughout this book to denote respectively the party raising the estoppel and the party to be estopped thereby.
- 5 The decision of the House of Lords in *Thorner v Major* [2009] 1 WLR 776 has made clear that, in *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752, the House did not deny the operation of proprietary estoppel as an independent cause of action based on a right created by the constituent elements of the estoppel itself: see McFarlane and Robertson (2009) 125 LQR 535.
- 6 See 1.42 onwards.

- 7 See 1.9, 1.14 and, for the reason why we suggest proprietary estoppel gives a cause of action, 1.21.
- 8 See 1.5 onwards.
- 9 Of B for A’s understanding that he can rely on the relevant proposition.
- 10 Of A’s conduct or omission by his reliance on the proposition for which B is responsible.
- 11 To A by B resiling from the proposition in that A will then be worse off than he would be but for reliance on the proposition.
- 12 See *Sledmore v Dalby* (1996) 72 P & CR 196, CA, at 208 per Hobhouse LJ: ‘However, in so far as such terms are valid as a source of distinction, the differences probably reflect no more than the difference of subject matter’. Indeed, if and insofar as such differences in operation do not appear to be the just result of differences in subject matter of the estoppels, they must be an accident of the historical development of these doctrines. In that case the justification for, and the continued observance and application of, such distinctions bears reconsideration.
- 13 Addressed in Ch 7. One example of significance in this context prevents a cause of action being constituted by means of a promissory estoppel so as not to undermine the doctrine of consideration: see 1.47 onwards, 2.14 onwards, 2.23 onwards, 7.5, 8.56–8.60, 14.22, 14.25.
- 14 Which also covers, in addition to the doctrine of election, the following further estoppels: estoppel as to title, contractual estoppel and estoppel by deed, whereunder the change of position is prohibited by binding agreement; and statutory estoppel whereunder the change of position is prohibited by statute.
- 15 Proprietary estoppel is accordingly considered by Knowles and Balen [2011] Conv 176 to be animated by the restitutionary trigger of failure of basis. For a study of corresponding doctrines abroad, see Fauvarque-Cosson (ed): *La Confiance Legitime et L’Estoppel* (2007).
- 16 See 5.41 onwards.

to estoppel by representation of fact, estoppel by convention and proprietary estoppel in *Dixon v Blindley Heath Investments Ltd*,¹⁷ by approving the following dictum of Dixon J in the High Court of Australia:¹⁸

‘The object of estoppel in pais¹⁹ is to prevent an unjust departure by one person from an assumption by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other’s detriment.’

1.6 In the ‘classic’ authority²⁰ *Grundt v Great Boulder Pty Gold Mines Ltd*,²¹ Dixon J reaffirmed, in another passage²² repeatedly adopted as representing the law of England and Wales by the Court of Appeal,²³ that:

‘... the basal purpose of the doctrine ... is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption²⁴ upon which the former acted or abstained from acting. This means

17 [2016] 4 All ER 490 at [80].

18 *Thompson v Palmer* (1933) 49 CLR 507 at 547; followed in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 by Latham CJ (at 657) and Dixon J (at 676).

19 Dixon J used the ancient term ‘estoppel in pais’ (see 1.20, 1.21) as a compendium for these three doctrines (as identified in *Legione v Hateley* [1983] CLR 406 at 430, per Mason and Deane JJ at [2], which identification was also cited with approval in *Dixon v Blindley Heath Investments Ltd* at [72]). Reliance by A such that denial by B would be inequitable is also well established (subject to definition of detriment as reliance such that it would be inequitable for B to resile) as the foundation of promissory estoppel: there is an issue as to whether the requirement of detriment is the same for promissory estoppel as for the other reliance-based doctrines, but we submit (at 5.55–5.60) that it is; see eg *Fontana NV v Mautner* (1979) 254 Est Gaz LR 199; *The ‘Post Chaser’* [1981] 2 LI R 695 at 701; *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] AC 511 at 524; *James v Heim Gallery* (1980) 256 EG 819 at 825; *The ‘Superhulls Cover’ Case (No 2)* [1990] 2 LI R 431 at 454; *Fortisbank SA v Trenwick International Ltd* [2005] 2 Lloyd’s Rep IR 464 at [13]; *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] 2 All ER (Comm) 14 at [38]; see further 14.28–14.31.

20 So described by Carnwath LJ with unanimous concurrence in *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 at [61].

21 (1938) 59 CLR 641, at 674–675.

22 Also and more fully cited at 5.52.

23 Per Slade LJ with unanimous concurrence in *Jones v Watkins* [1987] CAT No 1200; per Robert Walker LJ with unanimous concurrence in *Gillett v Holt* [2001] Ch 210 at page 232D–F: ‘This passage was not directed specifically to proprietary estoppel, but Slade LJ was right, in my respectful view, to treat it as applicable to proprietary estoppel as well as to other forms of estoppel. The point made in the passage may be thought obvious, but sometimes it is useful to spell out even basic points.’; (and again in *Scottish Equitable plc v Derby* [2001] 3 All ER 818 at 831) and per Potter LJ with unanimous concurrence in *National Westminster Bank Plc v Somer International (UK) Ltd* [2002] QB 1286 at [28]; also recently reaffirmed by a unanimous High Court of Australia in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, at [23], [84], [149].

24 Although, as already noted, this is not the only result of an estoppel: if founded on an assumption that the estoppel raiser has or will have rights in property for which the party estopped is responsible, the result is in the discretion of the court (see 12.179 onwards) and, if founded on a promise or representation concerning a promise, the estoppel will compel only temporary adherence to the assumption unless it need be permanent to do justice (14.32 onwards); even in the case of a representation of fact, it has been recognised that the court may mitigate the result to avoid injustice: see *National Westminster Bank Plc v Somer International (UK) Ltd* [2002] QB 1286 and 1.57, 5.66.

that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.’

1.7 Dixon J went on to explain, again with the subsequent approval of the English courts,²⁵ that:

‘The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it ... “... He²⁶ may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations ...;²⁷ or because he has exercised against the other party rights which would exist only if the assumption were correct²⁸ ... or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so,²⁹ or because his imprudence, where care was required of him, was a proximate cause of the other party’s adopting and acting upon the faith of the assumption,³⁰ or because he directly made representations³¹ upon which the other party founded the assumption.”’

1.8 We therefore espouse ‘the view that a single purpose underlies all forms of [reliance-based] estoppel on the basis that all aspects of the rules developed are examples of general principle applied so as to prevent [B] from refusing to recognise, or seeking unjustly to deny or avoid, an assumption or belief which he has induced, permitted or encouraged in [A] and on the basis of which [A] has

25 Cited with approval by: Denning LJ (dissenting) in *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 KB 371 at 380: ‘His formulation of the principle is the most satisfactory that I know.’; and in *Moorgate Mercantile Co Ltd v Twichings* [1976] QB 225 at 241–2 and *Amalgamated Inv & Pty Co Ltd v Texas Commerce Intl Bank Ltd* [1982] QB 84, at 121; Kerr J in *The ‘Odenfeld’* [1978] 2 LI R 357, at 376 and, as Kerr LJ, giving the judgment of the CA in *The ‘August Leonhardt’* [1985] 2 LI R 28, at 35: ‘All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely.’; Brooke J in *Barclays Bank plc v Wright* [1990] BCC 663, at 677–8; Briggs J in *HMRC v Benchdollar* [2010] 1 All ER 174, at [44]; Lord Toulson giving the judgment of the PC in *Prime Sight Ltd v Lavarello* [2014] AC 436, at [41], [44]; Hildyard J giving the judgment of the CA in *Dixon v Blindley Heath Investments Ltd* [2016] 4 All ER 490, at [90].

26 Quoting, at 675–6, from this point on, his judgment in *Thompson v Palmer*, at 547.

27 An estoppel by convention.

28 A representation, or assent to a convention, by conduct.

29 An estoppel by silence.

30 An estoppel by negligence.

31 An estoppel by representation of fact or law, or if its subject matter is the ownership of property, a proprietary estoppel, or, if the representation is as to future performance, a promissory estoppel.

acted or regulated his affairs',³² submitting that these doctrines are applications of a rule of law which operates if B is responsible for A so acting on the basis of a proposition that A will suffer if B denies it. For this we use Professor Cooke's³³ compendious term 'reliance-based estoppel', in preference to the use, in the last edition, of the umbrella 'estoppel by representation',³⁴ by reason of the former's quality of identifying their common³⁵ animating principle,³⁶ its greater aptitude than the latter to include estoppel by convention and all estoppels by silence,³⁷ and its avoidance of semantic debate over whether the term 'representation' only refers to a representation of fact.³⁸ With due diffidence we have in this edition

therefore also altered Spencer Bower's title accordingly, whilst continuing his project of identifying the unifying characteristics of these doctrines that has been recently vindicated in the above respect³⁹ by the Court of Appeal.

Requirements for reliance-based estoppel

1.9 The unifying characteristics of these overlapping reliance-based doctrines are submitted to be their common requirements, addressed as follows in this book:

- 32 Suggested by Potter LJ in *National Westminster Bank plc v Somer International (UK) Ltd* [2002] QB 1286 at [38], and adapted here to confine it to the reliance-based estoppels, so as to exclude estoppels that bind other than by reason of detrimental reliance (estoppel by contract, estoppel by deed, statutory estoppel and issue estoppel) and avoid the objection of Millett LJ in *First National Bank plc v Thompson* [1996] Ch 231 at 236F (see 1.17), by reference to which Potter LJ held that such purpose does not underlie all estoppels.
- 33 Now Tribunal Judge Cooke, in *The Modern Law of Estoppel* (2000) at 14; see also Bant and Bryan (2015) 35 OJLS 427.
- 34 In this edition, as in the last, the word 'representation' is no longer used as connoting exclusively a representation of present fact but as including representations as to the future (ie promises), and the representation that a party to a convention makes as to his assent to the convention (see further n 38; 8.8 onwards).
- 35 There is, as noted at n 19, a debate as to whether the requirement for promissory estoppel of reliance on the relevant proposition such that denial would be inequitable is the same as, or different from, that of detrimental reliance for the other three doctrines. We submit (at 5.55–5.60) that it is the same, thereby avoiding the incoherence of a convention as to rights to future performance under a contract having different requirements to bind, according to whether it is analysed as a promissory estoppel or an estoppel by convention.
- 36 Although 'estoppel by representation' has this quality too, emphasising the common feature that B has *made himself responsible for the proposition* on which A has relied, as identified by Dixon J in the passage cited.
- 37 In particular, where A was unaware of the silent B and his position, so although the silence is regarded as causing the adoption or continuation of his mistaken belief because it was in breach of a duty to speak, it was not by means of a communication or representation: see further 1.88 onwards.
- 38 Etymological objection may be taken, and has been in *Handley Estoppel by Conduct and Election* (2nd edn, 2016) at [2-12], that representation means a re-presentation by language or conduct of something that has occurred, but the word has long been used also for representations as to the future, as, for instance, by Lord Cranworth LC and Lord St Leonards in *Jorden v Money* (1854) 5 HLC 185 at 214–215 and 251, which was the very case that defined the doctrine of estoppel by representation of fact (see also eg *Roebuck v Mungovin* [1994] 2 AC 224 at 235 per Lord Browne-Wilkinson: 'a representation as to future conduct'; *Sidhu v Van Dyke* (2014) 251 CLR 505 at [2], [23], [35], [58]). No more violence to language is done by allowing the term 'representation' to include representations as to the future than by adopting an umbrella term such as the Australian usage 'estoppel by conduct', which entails the confusion of including estoppels founded on spoken or written representations within the term 'estoppel by conduct', although an estoppel founded on conduct is more naturally understood as being an estoppel founded on a representation by means of communication other than language. The inclusion of a representation as to the future within the term also underlines the important point, identified by Lord St Leonards in his dissenting judgment in *Jorden v Money* at 251, that there is no significant distinction in substance between a statement that the representee has a right to, or does not have an obligation of, future performance (regarded in the authorities as present fact – see 2.31) on the one hand, and a representation that the representor will undertake the corresponding obligation, or not exercise the corresponding right

- (1) A must have faith in a *proposition*,⁴⁰ for A's reliance on which B is responsible because B has represented⁴¹ it to A, or by breach of a duty to speak allowed A to believe it. In the case of estoppel by representation of fact or law, the proposition is a matter of past or present fact, legal relationship or proposition of law, and B's responsibility for A's reliance derives from B's having represented it to A; in the case of a promissory estoppel, it is as to the future; in the case of proprietary estoppel, B's representation, or A's belief which B culpably fails to correct, is that A has acquired or will acquire an interest in or right over B's property, or have enhanced enjoyment of A's own property; in the case of estoppel by convention, the proposition is B's assent to a convention with A; in the case of an estoppel by silence, B's responsibility was to contradict the proposition and, by failing in this, B has allowed its adoption or continuation; in the case of estoppel by negligence, B is responsible for A being misled by C. The means by which a representation may be made, and the circumstances that will impose a duty to speak, or responsibility for C's representation, such as to found an estoppel, are examined in Chapter 3.
- (2) In addition to the making of a representation or giving of assent, for B to be responsible for A's reliance on A's understanding of that representation, the representation or assent must be *unequivocally* to the effect understood by A. This requirement, as considered in Chapter 4, is inherent in the requirement that a representation has been made at all, whether it is a representation of fact or law, a representation of assent to a convention, a representation as to the future, or a representation as to the ownership of property. Correspondingly, in the absence of a representation, unless B has a duty to correct the belief A has formed, B's silence is equivocal and will not found an estoppel.⁴²

(a promise) on the other, notwithstanding that one is in the form of a statement of fact and the other in that of a promise. It is true that one is descriptive and therefore true or false, and the other is transformative and predictive, but there is no justification for that to affect whether detrimental reliance on it affords relief and what relief it affords: see 2.23–2.27.

39 See n 17.

40 Relating to the present or future, facts, rights or law.

41 By words or, where carrying an implication which is so understood, by conduct or silence.

42 See *Liberty Insurance Pte Ltd v Argo Systems FZE* [2012] 1 Ll R 129 at [46] and cases at 4.9; but see 1.97–1.98 as to the possibility of estoppel based on common mistake when silence is combined with mutual dealings to which the mistake is crucial.

- (3) It is further necessary, as discussed in Chapter 5, that B actually, or as reasonably understood⁴³ by A, intended A to rely on the proposition as he did,⁴⁴ and B's responsibility to A for that reliance was not reserved⁴⁵ by B; correspondingly, in the case of an estoppel founded on silence,⁴⁶ it must have been B's responsibility to make a statement that would correct the proposition.
- (4) A must also have actually been induced by the proposition to act as he did, or, put another way, A must have acted as he did in reliance on the proposition.⁴⁷ This is also discussed in Chapter 5.
- (5) Finally, A must have so acted in reliance on the proposition that it would be unfair for B to resile from it because A would then be worse off (or B would be better off relative to A) than if A had not thus relied on it, as also discussed in Chapter 5.

1.10 The different consequences of estoppels are considered: in Chapter 5 as to estoppel by representation of fact or law, and in the individual chapters on estoppel by convention (Chapter 8), proprietary estoppel (Chapter 12) and promissory estoppel (Chapter 14). Chapter 2 considers the requirement of an estoppel by representation of fact that it be as to a matter of fact, and recognises that an estoppel by representation may (subject to the defence considered in Chapter 7) be founded on a representation as to law or rights. Chapter 6 identifies who may raise and will be bound by an estoppel, and Chapter 7 examines the defence to an estoppel that it would unacceptably subvert a statute or rule of law. In addition to estoppel by convention, Chapter 8 examines the doctrines of estoppel by contract and by deed, which are not reliance-based. Part II then considers applications of the doctrines of estoppel to particular relationships, and statutory estoppels; and Part III addresses the doctrines of proprietary estoppel, promissory estoppel and election, concluding with Chapter 15 on procedure. It will be noted that Spencer Bower's prioritisation of estoppel by representation of fact therefore continues to dictate the structure of this work, but the chapters of Part I, which in its first three editions treated their subject matter only in relation to estoppel by representation of fact, now do so with respect to all the reliance-based doctrines.

- 43 By reason of the relative difficulty of establishing B's actual intention, a reasonable understanding as to such intention is, in almost all cases, what A seeks to establish.
- 44 Although it is arguable that, having made a representation that was equivocal as to the assumption of such responsibility for A's reliance, B might become responsible to A by reason of his knowing acquiescence in the reliance of A on the expectation created by the representation, imposing a duty on him to speak if he is to deny such responsibility: see 4.16, 4.27, 4.32.
- 45 As it was in the circumstances of *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752: see further 5.19 onwards.
- 46 Which includes estoppels founded on acquiescence in a mistake and the overlapping category of estoppels founded on a breach of a duty of care, or negligence.
- 47 In the case of silence in the sense that A acted as he did in reliance on the proposition, and B's silence, in breach of a duty to correct the proposition, induced or allowed the adoption or continuation of A's belief and was therefore a cause of his so acting.

THE MODERN DOCTRINES: OVERLAPPING CATEGORIES

1.11 Criteria have been separately established⁴⁸ by discrete lines of precedent⁴⁹ for the application of each of the doctrines of reliance-based estoppel – estoppel by representation of fact or law, proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by acquiescence and estoppel by negligence – but, notwithstanding their separate evolution, the principal aim of this monograph remains that of providing, in the interest of consistency and coherence, a vantage from which it can be seen that they are neither all discrete categories, nor all categories of the same order, but overlapping categories of application of a single principle whose differences are the result of its engagement with their different subject matter.

1.12 In addition to the reliance-based doctrines, also here considered are: the doctrine of election that binds a party to a choice between mutually exclusive alternatives; estoppels by deed and contractual estoppels, which bind by agreement, respectively under seal and for consideration; and statutory estoppels, which bind by statutory fiat. The application and effect of these last three – estoppel by deed, contractual estoppel and statutory estoppel – are determined simply by construction of the terms of the relevant deed,⁵⁰ contract⁵¹ or statute.⁵² The doctrine of estoppel *per rem judicatam*, which prevents parties from re-litigating issues already the subject of a judicial decision between them, is the subject of a separate work⁵³ in the current editions of Spencer Bower's series of studies.⁵⁴ As Lord Hoffmann said in *Watt v Ahsan*,⁵⁵ 'Although estoppel *in pais* and estoppel *per rem judicatam* share the word estoppel, they share very little else.'⁵⁶

1.13 The different categories of reliance-based estoppel have independent historical origins⁵⁷ and in some respects different criteria and effects, but are nonetheless submitted to be different applications of a single doctrine of reliance-based estoppel that wholly or partly precludes assertion by B, a party responsible to A for his reliance on a proposition, of facts or rights contrary to that proposition, if A has so relied that their assertion would be unfair. Consideration of

48 See Chs 2 to 5, 8, 12, 14.

49 See 1.35 onwards.

50 See 8.79 onwards.

51 See 8.67 onwards.

52 See Ch 11.

53 Spencer Bower, Turner and Handley, *Res Judicata* (4th edn, 2009) Handley.

54 Containing also Spencer Bower, Turner and Sutton, *Actionable Non-disclosure* (2nd edn, 1990), Turner & Sutton, and Spencer Bower, Turner and Handley, *Actionable Misrepresentation* (5th edn, 2014) Handley.

55 [2007] UKHL 51 at [30]. Cf Prichard (1964) 80 LQR 370, at 372, n 8, identifying the latter as the origin of the former, with common ground as rules as to what may not be pleaded: see 1.35.

56 Although *res judicata* is historically the original estoppel in English law and a root for the subsequent evolution of estoppel *in pais*: see 1.35.

57 See 1.35 onwards.

these categories of estoppel as applications of a single doctrine of reliance-based estoppel is not only supported but demanded by the degree of overlap between them, as they are not all even categories of the same order. An estoppel by representation of fact⁵⁸ (or now law) is a categorisation of two different orders, being defined both by reference to how responsibility for the relevant proposition arises (representation by B to A) and by its subject matter. Estoppel by representation of fact and promissory estoppel are definitions of the same order, in being defined by reference to whether the representation in question is factual or promissory, but even they overlap, since B's representation as to A's present freedom from an obligation to B to perform a duty in the future may be said to be both factual (as to A's present freedom from obligation)⁵⁹ and promissory (in that its subject matter is A's promise or undertaking to perform the obligation in the future).⁶⁰

1.14 Categorisation of an estoppel as proprietary is of a different order, not by the tense of the representation or assumption on which it is founded, but by the representation or assumption being that A has or will have rights in or over property. Thus, if A tells B that the tree shown as marking the boundary between their properties on a plan is this tree rather than that one, an estoppel based on this representation may be said to be both an estoppel by representation of fact and a proprietary estoppel.⁶¹ Indeed, there is a more substantial overlap, as the authorities indicate that an estoppel by representation of fact may be founded on a representation as to the private rights of the parties,⁶² and estoppels based on representations as to the ownership of an interest in land or as to the existence of a present right to its future ownership can, in that sense, therefore be called estoppels by representation of fact as well as proprietary estoppels. So also, if the estoppel is based on A's promise that he will transfer land to B, it may be said to be both promissory and proprietary,⁶³ and even then, if it may also be characterised as based on a representation as to the existence of a present right to the future transfer,⁶⁴ to be an estoppel by representation of the fact of an existing private right also.

1.15 Estoppel by convention is a definition by reference to how B is responsible to A for the relevant proposition* (by their agreeing it, rather than B stating it to A), rather than by the subject matter of the relevant proposition (fact, promise or property) and is a definition of the same order as that which defines estoppel by representation as based on a representation. A convention, and an estoppel based

58 Even if described simply as an estoppel by representation on the basis that a representation can only be of fact; see n 38.

59 See 2.31.

60 See 2.23–2.27. The same may be said of a representation by B that A has a present right to future performance by B.

61 See eg *Hopgood v Brown* [1955] 1 WLR 213, CA; and *Mann v Shelfside Holdings Ltd* [2015] EWHC 2583 (QB) for a recent claim argued and rejected in terms of estoppel by representation of fact which might have been argued as a proprietary estoppel.

62 See 2.31.

63 See 1.22 onwards.

64 See 2.31.

on it, may therefore also be one or more of factual, promissory or proprietary as to its subject matter, and all estoppels by convention will also either be estoppels as to a fact, or in substance promissory estoppels relating to future performance, and/or proprietary estoppels as to a right in property.⁶⁵ This is because estoppel by convention is a category of a different order from those defined by reference to the subject matter of the proposition. Although, however, the ground for one party's responsibility to the other for the relevant proposition differs⁶⁶ (mutual assent and unilateral communication),⁶⁷ the estoppel is, no less than in the case of a representation of fact or promise as to the future, based on detrimental reliance on a proposition for which one party is responsible to the other,⁶⁸ and all are therefore different applications of the same principle of reliance-based estoppel. Estoppel by silence,⁶⁹ estoppel by acquiescence (the principal form of estoppel by silence) and estoppel by negligence are also categories defined by reference to the manner in which responsibility for the relevant proposition arises rather than its subject matter. Responsibility is founded, not on communication⁷⁰ of the proposition by B to A, but, in the case of estoppel by silence or acquiescence, on B's failure to contradict it when under a duty to A to do so, and, in the case of estoppel by negligence, on B causing reliance on the proposition by breach of a duty of care. These overlapping⁷¹ doctrines, being founded on A's reliance on a proposition for which B is responsible, are also therefore applications of the principle of reliance-based estoppel.

1.16 Since the different doctrines have from separate origins by different lines of authority developed criteria differing in various particulars for their application and effect, in practice, as the law stands, it might be said that, where they overlap, the doctrine whose criteria A can satisfy which affords A the greatest benefit will be that whose application A will be entitled to claim, in effect, trumping the others. If, however, A were to argue that B is *absolutely precluded* from denying his ownership or right to future ownership of land, by reason of A's detrimental reliance on B's representation, by words, conduct or silence, as to his ownership, or present right to future ownership, of the land, as being the result of an estoppel by representation as to the fact of his rights,⁷² as opposed to the result being in the *discretion* of the court⁷³ as the result of a proprietary

65 See eg *Rivertrade Ltd v EMG Finance Ltd* [2013] EWHC 3745 (Ch) at [203]–[211] and, on appeal, [2016] BCLC 226 at [46]–[51].

66 And in *Donegal International Ltd v Zambia* [2007] 1 Ll R 397 at [495], Andrew Smith J rejected a submission that 'estoppel by convention is a form of estoppel by representation and there is no relevant distinction between the two concepts'.

67 See Ch 3 and 8.8.

68 See Ch 5 and 8.23.

69 Although previous editions of this work have attempted, with judicial approval, to incorporate estoppels by silence in the category of estoppels by representation, it is recognised that they differ for the reasons stated.

70 See 1.88 onwards.

71 In that they are both based on a breach of duty.

72 See 2.31.

73 See 12.179 onwards.

estoppel, we suggest that the court would nonetheless exercise that discretion, recognising that estoppel by representation of fact and proprietary estoppel are different applications of the same fundamental principle, whose application to a representation or belief as to the ownership of property has the discretionary result of a proprietary estoppel.^{73a}

1.17 In his preface to the first edition of this work, Spencer Bower conceived of estoppel by representation of fact ‘as embracing every form of estoppel known to the law of England other than estoppel *per rem judicatam*’. His ‘valiant attempt’⁷⁴ to demonstrate this was abandoned in subsequent editions by Sir Alexander Turner (who treated the doctrines of proprietary estoppel and promissory estoppel as distinct), and has been criticised by Millett LJ⁷⁵ with specific reference to the classification of estoppels by deed as forms of estoppel by representation of fact. It is right that estoppel by deed is a distinct doctrine from estoppel by representation of fact and the other reliance-based estoppels, but, accepting a distinct doctrine of estoppel by deed, Spencer Bower’s endeavour may, we submit, nonetheless be recognised as having established the common characteristics⁷⁶ of the reliance-based estoppels:⁷⁷ that rights between parties are affected because B is responsible to A for A acting on a proposition⁷⁸ such that it would be unfair to allow B to resile from it. B is also ‘estopped’⁷⁹ from asserting a right or fact when he has bound himself to A by contract or deed not to do so, but such an estoppel derives its force from the contract or deed, and not from detrimental reliance,⁸⁰ just as statutory estoppels are dictated and bind by force

73a There is authority for this in the dictum of Lord Scott in *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752, at [14], with majority concurrence, that an estoppel which bars B from asserting a fact or matter of law and fact against a claim by A to a proprietary right is a proprietary estoppel. Lord Scott’s analysis is open to the criticisms identified at 1.2 n 3, 1.22 onwards and 12.28–12.29 but may still be good authority for the proposition that such an estoppel is a proprietary estoppel and therefore has the result of a proprietary estoppel. Otherwise, A might claim such absolute preclusion in every case in which B has, by words, represented A to have a particular proprietary right or, by silence, endorsed B’s belief that he has a particular proprietary right; see 1.59, 12.75 onwards and 12.192 onwards.

74 Per Millett LJ in *First National Bank plc v Thompson* [1996] Ch 231 at 236F.

75 ‘Historically unsound, it has been repudiated by academic writers and is unsupported by authority’: *First National Bank plc v Thompson* [1996] Ch 231 at 236F; see eg Ewart (1924) 37 Harv LR 170; Prichard (1964) 80 LQR 370, at 392–4.

76 See further 1.116 onwards.

77 Ie estoppel by representation of fact or law, proprietary estoppel, promissory estoppel, estoppel by convention.

78 Or an undertaking.

79 See 8.67 onwards, 8.79 onwards.

80 This expression is used in this work as shorthand for reliance on a proposition such that it would be unfair (unjust, inequitable or unconscionable) for the proponent to resile from it. The requirement, for such unfairness to be in prospect, that detriment will be suffered if the proponent resiles, is considered in Ch 5; others use the cognate expression ‘injurious reliance’: see Spence, *Protecting Reliance* (1999). In *Baynes Clarke v Corless* [2009] EWHC 1636 (Ch) at [21], [24], Proudman J recognised that the reliance may found an estoppel if it confers an advantage on B as well as where A would otherwise suffer detriment; the CA also so held ([2010] WTLR 751 at [37(4)]), framing the point, however, solely in terms of a constructive trust: see 5.61.

of statute. The reliance-based estoppels which are the central focus of this work are to be distinguished as having, on the common foundation of responsibility for detrimental reliance, an independent place in the law of obligations and property: ‘The gist of the claim’ to all these estoppels, as has been rightly observed in respect of proprietary estoppel,⁸¹ ‘... is prejudice’. We now turn briefly to introduce these doctrines.

Estoppel by representation of fact

1.18 Under the doctrine of estoppel by representation of fact:⁸² where one person (‘the representor’) has made a representation of fact to another person (‘the representee’) in words or by conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive)^{82a} and with the result of inducing the representee on the faith of such representation to alter his position to his relative⁸³ detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making any averment substantially at variance with his former representation, if the representee objects thereto, save to the extent that the court mitigates that result to avoid injustice,⁸⁴ and unless that estoppel would unjustifiably subvert the policy of a rule of law.⁸⁵

81 Again by P.J. Millett QC: 92 LQR 342 at 346. Lord Sumption made the same point in giving the advice of the Privy Council in *Kelly v Fraser* [2013] 1 AC 450 at [17] (followed in *Kaupthing Singer & Friedlander Ltd v UBS AG* [2014] EWHC 2450 (Comm) at [102]); see 1.73.

82 This paragraph in the first edition at [15] was approved by Evershed MR in *Hopgood v Brown* [1955] 1 WLR 213 at 224; by Harman J in *Re Exchange Securities Ltd* [1988] Ch 46 at 54C; and cited as authoritative by Akenhead J in *ADS Aerospace Ltd v EMS Global Tracking Ltd* (2012) 145 Con LR 29 at [140]. The third edition notes the following authorities from the first edition: *Pickard v Sears* (1837) 6 Ad & El 469 per Lord Denman CJ; *Freeman v Cooke* (1848) 2 Exch 654 at 663 per Parke B; *Jorden v Money* (1854) 5 HL Cas 185, at 213 per Lord Cranworth LC; *Swan v North British Australasian Co* (1863) 2 H & C 175 at 181 per Blackburn J; *Citizens’ Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352, at 360 per Lord Selborne LC; *Carr v London and North-Western Rly Co* (1875) LR 10 CP 307, at 316 per Brett J; *Geo Whitechurch Ltd v Cavanagh* [1902] AC 117, at 130 per Lord Macnaghten; *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188 at 202 per Bramwell LJ; to which *West v Jones* (1851) 1 Sim (NS) 205, at 207 should be added. The third edition adds the following: *Maclaine v Gatty* [1921] 1 AC 376, at 386 per Lord Birkenhead; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330, at 342 per Luxmoore J; *Greenwood v Martins Bank Ltd* [1933] AC 51, at 57 per Lord Tomlin; *Nippon Menkwa Kabushiki Kaisha v Dawson’s Bank Ltd* (1935) 51 Ll LR 143, PC, at 151 per Lord Russell of Killowen; and *Thompson v Palmer* (1933) 49 CLR 507, at 547 per Dixon J.

82a And see now n 88.

83 The addition of this adjective allows now for the case of B’s position relative to A being unfairly improved without A’s being worsened: see n 82, 5.61.

84 See now *Avon CC v Howlett* etc at 1.57, 5.66 for this addition.

85 See Ch 7 for this addition.

The following elements must therefore be established in order to constitute a valid estoppel by representation of fact:⁸⁶

- (1) the alleged representation of the party sought to be estopped was a representation of fact;
- (2) the precise representation relied upon was in fact made;⁸⁷
- (3) the case which the party is to be estopped from making contradicts in substance his original representation;
- (4) the representation was made with the intention (actual or as reasonably understood) and the result of inducing the estoppel raiser to alter his position on the faith⁸⁸ thereof to his detriment; and
- (5) the representation was made by the party to be estopped, or by some person for whose representations he is deemed in law responsible, and was made to the estoppel raiser, or to some person in right of whom he claims.

Estoppel by representation of law

1.19 In *Briggs v Gleeds*,⁸⁹ Newey J held on compelling reasoning that a representation as to law may found an estoppel by representation, provided that it does not unacceptably subvert the public policy underlying the relevant law. The principles of the doctrine of estoppel by representation of fact have thereby now been recognised as extending also to representations of law such that an estoppel may be founded on a representation of law if, *mutatis mutandis*, the elements analysed above of such an estoppel are established.⁹⁰ The criteria governing the result of an estoppel by representation of law have yet to be addressed by the courts, but must be affected by the subject matter of the representation so as to be consistent with the criteria governing the result of estoppels based on

86 This analysis in the fourth edition was recently adopted (*obiter*) by Carr J in *Spliethoff's Bevrachtungskantoor BV v Bank of China Limited* [2015] 1 CLC 651 at [156].

87 If a representation is made, there need not be intention to mislead, nor knowledge of the true position: see eg *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR Ind App 203 at 215–6 per Lord Shand, although both become relevant as to whether a representation has been made by silence.

88 Following *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 whose reasoning, there applied to a proprietary estoppel, is submitted to be equally applicable to any reliance-based estoppel, including estoppel by representation of fact, this requirement will not be satisfied where A knows or ought to know that B does not intend to be responsible for A's reliance; see further 5.19 onwards.

89 [2015] Ch 212; followed by Burton J in *NRAM plc v McAdam* [2015] 2 All ER 340, at [20(i)] and [30] and accepted on appeal as common ground [2016] 3 All ER 665, at [43] citing as authority *The 'Vistaford'* [1988] 2 Ll R 343; in *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 Con LR 157, at [51], Akenhead J reached the same conclusion independently without citation of either precedent, as did Popplewell J in *Emirates Trading Agency Llc v Sociedade De Fomento Industrial Private Ltd* [2015] 1 CLC 963, at [51].

90 See further Ch 2.

representations of fact, promises, and representations as to the present or future ownership of property, as well as avoiding unacceptable subversion of the statute or rule of law in question.⁹¹ The following obstacles will render the establishment of an estoppel by representation of law more difficult than one of fact:

- (1) The court's caution towards finding that a representation as to the law was made by B as a representation of certainty rather than opinion, with the intention (actual or as reasonably understood) to be responsible for, and the result of, inducing A to alter his position, rather than as B's opinion, argument or stance, on an issue on which A was intended to keep his own counsel or seek his own advice.⁹²
- (2) The increased likelihood that the estoppel, because it is by definition deployed to contradict the law that would otherwise apply, is invalidated because it would unjustifiably subvert the policy of the relevant rule of law;⁹³ or, that its result is mitigated for that reason, or otherwise to avoid injustice.⁹⁴

Proprietary estoppel

1.20 'Proprietary estoppel is a branch of estoppel by representation ...',⁹⁵ or as it is here termed, reliance-based estoppel,⁹⁶ whose criteria have been stated as follows: 'Where one person, A, has acted to his detriment on the faith of a belief, which was known to and encouraged by another person, B, that he either has or is going to be given a right over B's property, B cannot insist on his strict legal rights if to do so would be inconsistent with A's belief'.⁹⁷ In substance, the doctrine has the same requirements as for an estoppel by representation of fact or law that B has made a representation to A, or been under a duty to correct A's belief, and that A has been induced by the representation or belief so to act that it would be unfair for B to deny it. The principles considered at Chapter 3 as to how a representation may be made and Chapter 5 as to inducement⁹⁸ and detriment are, therefore, equally applicable to this doctrine. The representation on

91 See 1.47 onwards, 2.14 onwards, 2.23 onwards, 7.5, 8.56–8.60, 14.22, 14.25.

92 See 2.18–2.21, 2.28–2.35.

93 See Ch 7.

94 See n 91, 2.36, 2.37, Ch 7.

95 *University of London v Prag* [2015] WTLR 705 at [95] per Proudman J; Oliver J also held proprietary estoppel to be a branch of estoppel by representation in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133n, at 150B.

96 See 1.5–1.8.

97 *Re Basham* [1986] 1 WLR 1498 at 1503 per Edward Nugee QC: cited as agreed by the parties in *Wayling v Jones* (1993) 69 P & CR 170 per Balcombe LJ and, with approval, in *Gillett v Holt* [2001] Ch 210 at 226E–F per Robert Walker LJ.

98 It is submitted that, strictly, a proprietary estoppel should not lie where a representee *unreasonably* relies on a representation the representor did *not* intend him to rely on, even if the representor knows of the reliance unless (as may be the case) the representor is under a duty to correct the mistaken reliance: in such a case the proper analysis is that the estoppel is founded on the *silence or acquiescence* of the party estopped, not the original representation: see 5.25.

which a proprietary estoppel is founded may, however, be factual or promissory, provided that it is to the effect that A has or will acquire an interest in, or rights over, property.⁹⁹ Further, proprietary estoppel is a cause of action whose remedy is in the discretion of the court, whereas an estoppel by representation of fact establishes a fact on which a cause of action, or a defence to a cause of action, may be based.¹⁰⁰

1.21 For the doctrine of proprietary estoppel to operate, the Court of Appeal held in *Newport CC v Charles*,¹⁰¹ A must be claiming an interest in property. It is submitted that the authorities show that it may also operate in respect of a claim to rights over property,¹⁰² and, although the Court of Appeal in that case referred to land, the doctrine's application to other forms of property has been sanctioned by the dictum below of Lord Scott in *Cobbe v Yeoman's Row Management Ltd*,¹⁰³ and by application by the House of Lords to the copyright case of *Fisher v Brooker*.¹⁰⁴ The restriction of the doctrine's operation to a claim to rights in or over property, outlawing its application in a case such as *Salvation Army Trustee Co v West Yorks MCC*,¹⁰⁵ is welcome and derives authority also from the statement of Lord Scott¹⁰⁶ in *Cobbe v Yeoman's Row Management Ltd* that:

'The estoppel becomes a "proprietary" estoppel – a sub-species of a "promissory" estoppel – if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action.'

The most distinctive advantage of proprietary over other forms of estoppel is that establishment of its elements gives a cause of action. That its operation is restricted to the assertion of an interest in or right over property may be argued to give a corresponding reason, based on the relative nature of title¹⁰⁷ and the avoidance of a vacuum¹⁰⁸ in the ownership of property, why it has developed into a cause of action: by deploying an estoppel to bar B's claim to ownership or rights against A, a vacancy in ownership of or rights over the property is created which leaves the field open for A to assert a claim to rights in or over the property to the extent that B is barred.¹⁰⁹

99 While the representation or assumption may be equivocal as to the nature of the rights or interest, it must be unequivocally to the effect that A has acquired or will acquire an interest or some rights in or over property: see 4.40; see also 1.87.

100 See further 1.43–1.50.

101 [2009] 1 WLR 184, at [27].

102 See 12.38.

103 [2008] 1 WLR 1752 at [14].

104 [2009] 1 WLR 1764, and see cases at 1.87.

105 (1981) 41 P & CR 179.

106 With concurrence of the majority.

107 *Asher v Whitlock* [1865] LR 1 QB 1; see eg Megarry and Wade, *The Law of Real Property* (8th edn, 2012) Ch 4.

108 I.e. avoidance of the property becoming, to the extent B is barred, *bona vacantia*.

109 Lord Walker in *Thorne v Major* [2009] 1 WLR 776 at [61] cited, for the reason why proprietary estoppel is a cause of action, Lord Denning MR in *Crabb v Arun DC* [1976] Ch 179 at

1.22 It will be noted that Lord Scott, with the same authority, defined proprietary estoppel above as a 'sub-species' of promissory estoppel. Lord Walker has not been alone in expressing 'some difficulty'¹¹⁰ with that proposition, and there are a number of grounds of possible dispute with it.¹¹¹ First, the doctrines of promissory and proprietary estoppel have different origins¹¹² and different consequences (restraint of exercise of a contractual right in promissory estoppel, and satisfaction of an equity by conferral of rights in proprietary estoppel). To this it may be answered that Lord Scott was describing their respective places in the modern law of estoppel rather than their origins, and was not suggesting that the outcomes of the doctrines are the same, but rather that both arise from promises which have induced detrimental reliance: proprietary estoppels arising from the subset of promises as to the ownership or acquisition of property.

1.23 Objection may secondly then be made that not all proprietary estoppels are promissory estoppels, in that a representation of fact, as well as a promise, may found a claim to a proprietary right.¹¹³ Lord Scott appears to suggest that a claim to a proprietary right by estoppel is necessarily a claim to the benefit of a promise. His view appears to be that a representation that A has, as well as will have, a right in B's property is in substance indistinguishable from a promise to transfer those rights.¹¹⁴ Regarding a representation that A has rights which he does not have as a form of promise to confer those rights, seems inaccurate,

187, in turn citing his own statement in *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 242 'that the effects of estoppel on the true owner may be that "... his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein"; see also *Sutcliffe v Lloyd* [2008] EWHC 1329 (Ch) at [4] per Norris J; cf the reasons canvassed by Cooke, *The Modern Law of Estoppel* (2000) at 127–8, the focus on allowing informality by Moriarty (1984) 100 LQR 376, and the distinction from promissory estoppel by Halson [1999] LMCLQ 257.

110 In *Thorne v Major* [2009] 1 WLR 776 at [67].

111 A case might even be made for the opposite proposition to Lord Scott's in *Cobbe*: that promissory estoppel is a sub-species of proprietary estoppel as opposed to vice versa; since it must have as its subject rights under a contract or other legal relationship which, as a chose in action, are a form of incorporeal property: see 1.87. This is why, the argument would continue, promissory estoppel may be used as a shield, so as to reduce B's rights and A's obligations under an existing contract, but not as a sword to create rights where none existed before: there must be pre-existing rights and obligations, constituting a chose in action, on which the promissory estoppel can operate. We do not subscribe to this view, for the reasons set out in 12.37.

112 See 1.35 onwards.

113 It might also be said in answer that such an estoppel is an estoppel by representation of fact (rather than a proprietary estoppel) as A will claim such an estoppel because that will afford him greater relief: B is estopped from denying the fact and is granted relief on that basis (subject to equitable mitigation), whereas under a proprietary estoppel the relief granted is at the discretion of the court and may therefore be reduced (but see 1.16).

114 Otherwise, a proprietary estoppel could not be said to be a form of promissory estoppel. This would be a controversial way of addressing the issue as to the threshold between a representation of fact and a promise, where the representation is that A has rights against B. As already submitted, no just distinction may be made as to the outcome of an estoppel based on a representation by B that A has the right to future performance by B or is free from an obligation to B of future performance (regarded by the law as factual: see 2.31), and an estoppel based on

4.63 Unequivocality and construction

until the later unambiguous conduct clarifies the earlier ambiguous conduct that the latter becomes unequivocal,²⁶² unless the later conduct proves that A's actual understanding of B's intention by his earlier conduct was correct, in which case the later conduct is evidence that there was at the earlier stage an accurate communication of that intention.²⁶³

334, which may have proceeded on the theory, put forward by Byles J at 343, that the later unequivocal acts of the party (giving formal notice, painting out the old name, etc) might be regarded as giving shape and meaning to his indeterminate and neutral earlier acts (such as leaving the key, etc). It is only on this theory that the decision can be supported, according to Brett LJ, in *Oastler v Henderson* (1877) 2 QBD 575 at 580 *sed quaere*, as to timing, for the reason given in the text, unless the later acts show A's understanding of B's earlier act to have been correct; see also *Proudreed Ltd v Microgen Holdings plc* [1996] 1 EGLR 89.

262 See *Century (UK) Limited SA v Clibbery* [2004] EWHC 1870 (Ch), at [50] per Blackburne J: 'As he put it, the context and meaning of an assurance can evolve with time. I do not accept that submission. How an assurance is reasonably to be understood must depend upon how, at the time that it was made, the assurance was understood. Its meaning cannot change with the passage of time'; see 4.14 n 71.

263 See 4.17.

CHAPTER 5

Inducement and reliance; the effect of estoppel as to a fact

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INTRODUCTION

5.1 If an estoppel is to be based on reliance, then having established the fact that the representation relied upon was made to him by B¹ or that B breached his duty to correct A's belief, A must show that B's representation or A's uncorrected belief produced a certain effect upon A's mind, his will, and his temporal interests. A representation or uncorrected belief that has not caused A to act to his prejudice or detriment² is a mere *brutum fulmen*.³ It can no more be made the foundation of an estoppel than of proceedings for misrepresentation. A must prove that he was (either intentionally or reasonably) induced by the representation or (where B was under a duty to speak) caused by his uncorrected belief so to act or omit to act that he will suffer detriment if B does not stand by his representation or A's belief. This proposition will be examined by reference, in turn,

1 As throughout, denoting the party to be estopped, and 'A' the estoppel raiser.

2 But see 5.61.

3 Damp squib (literally 'unwieldable thunderbolt').

to its requirements: first (in both cases), of actual inducement; second (in the case of representation only),⁴ of actual or apparent intention to induce; and third (in both cases), of detriment.

5.2 The first requirement – that of actual inducement – is that the representation or uncorrected belief *caused* the relevant change of position by A. The second, for any estoppel based on a representation⁵ – that of intention to induce – is that B intended, or was reasonably understood by A to intend, that A act on his representation, and B's responsibility for such reliance was not reserved.⁶ The materiality of the representation or breach of duty to the conduct (that is, whether a reasonable person would be induced by the representation or breach of duty to act as A did) will, therefore, assist in establishing both these requirements. The final constituent element of a reliance-based estoppel that we consider here is that of detriment – that A has so changed his position that it would be unfair for B to deny the proposition he has represented or failed to correct.

5.3 In substance, the questions that these criteria address are whether B is responsible to A for the latter having acted as he did, and whether, if B is responsible, B has so acted that it would be unfair for B now to deny that which he represented or escape the consequences of his breach of duty. There is, however, a danger in reaching decisions as to whether an estoppel is made out simply on broad criteria of 'responsibility' and 'unfairness' that those decisions might be arbitrary or circular in their justification: whether B is responsible or answerable to A depends on whether the court makes him answer or respond, and whether it would be unfair of B to deny the relevant proposition will depend, in the absence of more specific criteria, on whether the court regards it as unfair. While, therefore, the need for flexibility and the difficulty of formulating universal criteria must be recognised, and reflected by consideration of the more detailed criteria always in the light of their underlying general purpose of determining responsibility and unfairness,⁷ further analysis is necessary as to when and why B will be responsible to A for his having acted as he did, and when and why it will be unfair for B to deny the relevant proposition or avoid the consequences of his breach of duty, in order to make out the structure necessary for the doctrine of estoppel to operate as a rule of law rather than a broad disposition towards justice.

4 If it is found that B is under a duty to speak to A then it has been found that he is responsible to A for the belief he allowed by not speaking, so the responsibility has been established without, as in the case of a representation, foundation of such responsibility on actual or apparent intention to induce.

5 See n 4 above.

6 As it was in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752.

7 As submitted in the fourth edition at V.1.3 and stated by Lord Walker in *Cobbe v Yeoman's Row Management Ltd* n 6 above; see 1.66, n 290.

INDUCEMENT

Inducement and reliance

5.4 Implicit in the requirement that B induce A by the representation, or allow A to be induced by the belief he culpably failed to contradict, is a requirement that A rely on the representation or belief. Inducement and reliance may be different concepts,⁸ but each tests whether the representation or breach of duty to speak *caused* the relevant conduct, from the point of view of B and A respectively, and B cannot induce A to act by a representation or breach of duty unless A relies on the representation or, in the latter case, his uncontradicted belief.

5.5 Except in the case of estoppels by convention or promises, this reliance necessarily involves belief by A in the truth of the representation by B or the proposition which B has failed in his duty to contradict.⁹ If A does not believe this representation or culpably undenied proposition of fact or law¹⁰ to be true, he cannot be said to have been induced by the representation,¹¹ nor for B's silence to have had a causative effect on his conduct, unless either (i) A understands B to be assuming liability to (or giving up rights he may have against) A if the facts are not as stated, or (ii) if B's belief or acquiescence in the representation influences A's conduct towards him, although A does not believe it himself. In the former case, an estoppel by convention, or a promissory (or, if otherwise appropriate,

8 *Bristol and West Building Society v Mothew* [1998] Ch 1 at 11A per Millett LJ; for instance, the Pied Piper induced the rats to leave Hamlyn but they did not *rely* on anything he said or did; further, inducement, unlike reliance, requires actual or constructive *intention* on the part of B that the representation should be acted on: see 5.19–5.32.

9 See *Lowe v Lombank Ltd* [1960] 1 WLR 196 at 207, CA: a statement in a delivery receipt for a car purchased under a hire-purchase (H-P) agreement, that the purchaser had examined the car and found it satisfactory, did not estop her, although the H-P company's practice was not to execute the agreement until the receipt was forwarded to it, because the H-P company put forward no evidence that it signed the agreement because it believed the statement in the receipt to be true, rather than requiring it to avoid liability. An estoppel by convention or contract was not argued, and the CA in *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 at [56]–[57] (in which *Lowe v Lombank* was not cited) and *Springwell Navigation Corp v JP Morgan Chase Bank (formerly Chase Manhattan Bank)* [2010] 2 CLC 705 at [141]–[169] (in which *Lowe v Lombank* was not followed) (see also *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2011] 1 Lloyd's Rep 123 at [250]–[256]) has now established that parties can bind themselves by contract that their relations should be governed on the basis that facts are deemed to be true: see 8.67 onwards on estoppel by contract.

10 See 2.8.

11 *Carr v London and North Western Rly Co* (1875) LR 10 CP 307 (Brett J); *Seton Laing & Co v Lafone* (1887) 19 QBD 68, CA at 72: 'the next question is whether the plaintiff believed it ...'; *Lebeau v General Steam Navigation Co* (1872) LR 8 CP 88 at 94 per Bovill CJ and at 96–97 per Brett J; *Bell v Marsh* [1903] 1 Ch 528 at 540–543 per Collins MR, at 544–545 per Romer LJ and at 545 per Cozens-Hardy LJ; *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, PC at 56 per Lord Wright: 'It is also true that he cannot be said to rely on the statement if he knew that it was false: he must reasonably believe it to be true and therefore act on it'.

a proprietary) estoppel, might be raised. In the latter, B would only be estopped from denying his state of mind at the time.

Actual inducement in result

5.6 Inducement is distinct from materiality, which is defined by whether a reasonable man in A's position would have acted as A did on B's representation, or (in the case of estoppel by culpable silence) would have altered his conduct had B spoken. Inducement concerns itself with (a) the actual effect of the representation or culpable silence on A and (b) in the case of representation,¹² the intention, actual or imputed, of B to bring about this result. In representation cases, it is clear that for the purposes of estoppel, no less than for those of an action for misrepresentation, inducement is established by proof that the representation was made both with the object, and with the result, of inducing A to alter his position (save where B has reserved responsibility for A so acting).¹³ Neither element suffices without the other. To prove B's intention to produce an effect comes to nothing, unless the effect itself be proved; and it is equally idle to establish the result, unless it be also shown that B, actually or presumptively, intended to bring it about. To support an estoppel it is, therefore, necessary for A to prove that he was in fact induced by the representation or culpably uncontradicted belief to act upon it. Even in cases where B is shown to have intended that his representation or silence should induce that result, it will not avail A, in setting up an estoppel, to prove such an intention on the part of B, unless he can show that he was in fact induced to act upon the faith of the representation or uncontradicted belief.¹⁴

Inference of inducement from materiality

5.7 Given proof of communication of the representation to A or of the breach of duty to speak, the court may, however, infer from the materiality¹⁵ of the representation or culpably uncontradicted belief to the conduct of A¹⁶ that A was induced by the representation or belief so to act without direct evidence from A to that effect.¹⁷ This has come to be regarded as an automatic but

12 As to silence in breach of duty to speak, see n 4 above.

13 As in *Cobbe v Yeoman's Row Management Ltd* n 6 above: see 5.21.

14 *Morrison v Universal Marine Insurance Co* (1873) LR 8 Exch 197 at 205–206; *Cooke v Eshelby* (1887) 12 App Cas 271 at 275, 278; *Hewlett v London County Council* (1908) 24 TLR 331 at 332–333. So too Lord Russell of Killowen in *Nippon Menkwa Kabushiki Kaisha v Dawson's Bank Ltd* (1935) 51 Ll L Rep 147, PC at 151: 'there is a complete absence of any evidence that P, when he paid the money to Sew Kai, relied on the presence of the letters "OK" on the delivery orders or bills, and this is an essential element in establishing the Plaintiff's plea of estoppel'.

15 See 5.33–5.40.

16 Viz that it would induce a reasonable man so to act: see 5.33.

17 By analogy with the authorities on misrepresentation: *Smith v Chadwick* (1884) 9 App Cas 187 at 196 per Lord Blackburn: 'I think that if it is proved that the defendants with a view to

rebuttable presumption, placing the onus on B to prove that A was not induced by the representation or breach of duty if it was material.¹⁸ However, the language of some authorities suggests, to the contrary, that where, although the representation or breach of duty was material to the relevant conduct of A, a reasonable man in the position of A might as easily have acted as he did for reasons wholly independent of the representation or breach of duty, the burden of establishing reliance remains on A.¹⁹ It is submitted that the resolution of the

induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement ... Its weight as evidence must greatly depend on the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act ... the plaintiff can be called as a witness on his own behalf, and ... if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one.'; *Re London and Leeds Bank Ltd* 56 LJ Ch 321; *Smith v Land and House Pty Corpn* (1887) 28 Ch D 7 at 16; *Spencer Bower, Turner and Handley on Actionable Misrepresentation* (5th edn) [6–15]; *Silver v Ocean SS Co Ltd* [1930] 1 KB 416 at 428, 434–5, 441; discussed in *Cremer v General Carriers* [1974] 1 WLR 341 at 351D–353B; *Nationwide Anglia Building Society v Lewis* [1998] Ch 482 where the Court of Appeal refused to presume reliance on the holding out of a solicitor on a letterhead as a partner (followed in *Sangster v Biddulph* [2005] PNLR 33 and *Walsh v Needleman Treon* [2014] EWHC 2554 (Ch)); see also *Bremer v Vanden Avenne Izegem* [1978] 2 Lloyd's Rep 109, HL at 127, col 2 (waiver) and *Lim v Ang* [1992] 1 WLR 113, PC at 118C–D (proprietary estoppel) for an 'irresistible' and an 'inevitable' inference of reliance; *Smith v Lawson* (1997) 75 P & CR 466 at 469–70 (promissory estoppel); *Hoyle Group Ltd v Cromer Town Council* [2015] HLR 43 at [81]–[82], 846 per Floyd LJ (proprietary estoppel).

- 18 *Brikom Investments v Carr* [1979] QB 467, CA at 483; *Greasley v Cooke* [1980] 1 WLR 1306, CA (proprietary estoppel) in which dicta of Jessel MR in *Smith v Chadwick* (1882) 20 Ch D 27, CA at 44–45 to this effect were cited, but not those of Lord Blackburn, in the House of Lords (n 17 above); followed in *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265, CA at 1287; *Grant v Edwards* [1986] Ch 638, CA at 657C per Browne-Wilkinson VC, whose approach is, it is submitted, to be preferred to Nourse LJ's objective test of reliance at 648G (see n 19 below and further *Lawson* [1996] LS 218 at 219–220); *Coombes v Smith* [1986] 1 WLR 808 at 821; *Wayling v Jones* (1993) 69 P & CR 170, CA at 173; *Stevens and Cutting Ltd v Anderson* [1990] 1 EGLR 95, CA at 97K–M, 99E–F; *Hammersmith & Fulham LBC v Top Shop Centres Ltd* [1990] Ch 237 at 262C–D; *Durrant v Heritage* [1994] EGCS 134; *Century (UK) Ltd SA v Clibbery* [2004] EWHC 1870 (Ch) at [73] (all proprietary estoppel cases, but, as the issue is evidential, the same rule must apply to all estoppels); cf *Steria v Hutchinson* [2007] ICR 445, CA at [75] per Mummery LJ, [130] per Neuberger LJ; in *Pan Atlantic Insurance Ltd v Pine Top Ltd* [1995] 1 AC 501 at 542A, 549C Lord Mustill, in relation to misrepresentation, referred to materiality raising a presumption of inducement, after citation (at 505F–G) of Lord Blackburn's dicta (n 17 above); contrast *Powell v Benney* [2007] EWCA Civ 1283, where the Court of Appeal refused to interfere with a finding by the judge below that A's conduct was motivated not by a promise by B that they would inherit his properties on his death but by 'their wish to help a man for whom they first had sympathy and then grew to like' (criticised in Pawlowski, Conv. 2008, 3, 253–261).
- 19 *Taylor's Fashions Ltd v Liverpool Trustees Co* [1982] QB 133n at 156B–157B per Oliver J, where a proprietary estoppel raiser failed to establish that he would not have spent what he did on a property had he not believed that he had a larger interest in it than he actually had: 'But what is there to indicate that the work was undertaken "on the faith of" that belief, rather than merely "in" that belief? ... But what Mr Taylor was unable to say was that they would not have done the work if they had not thought that option was available, much less that the

difference in these approaches lies in the court taking a practical view as to whether the representation or breach of duty, *in the particular context*, is such that the court would expect it to induce the relevant conduct, and if it is not, requiring proof²⁰ of reliance.²¹

Inducement to inactivity

5.8 If the detrimental conduct is inactivity, that is, failure by A to take positive steps to protect or improve his position which he would have taken had he known the truth, then he must prove that his inactivity, or failure to take such steps, was induced by the representation or culpably uncontradicted belief.²² It is submitted that in such a case an inference or rebuttable presumption of reliance, from the materiality of the representation or breach of duty to the inactivity, may still be made, albeit a less attractive inference, the presumption being of less weight, than if A had altered his conduct following a material representation or breach of duty, rather than simply continuing on the same course of conduct as before.²³ It will be easier in such a case for B to rebut the presumption and disprove inducement by proving that the inactivity would have resulted even had the truth been told.²⁴

5.9 Moreover, even if reliance by inaction is presumed, the onus nonetheless remains on A to show detriment, viz that his position (if B resiles from the

Defendants were or must have been aware that they would not have done it.'; cases at n 17 above; *Grant v Edwards* n 18 above at 648G per Nourse LJ: the conduct must be 'conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house'. In *Austin v Keele* (1987) 10 NSWLR 283, PC at 290F, 291G–292B, Lord Oliver said that the authorities only justified the inference of reliance upon a common intention where there was proof of contemplation at the time of formation of the common intention that acts of the relevant quality would be carried out in reliance on the relevant understanding; and see *Steria v Hutchinson* n 18 above, at [75] per Mummery LJ, [128]–[130] per Neuberger LJ.

- 20 See eg *Cropper v Smith* (1884) 26 Ch D 700, CA in which no evidence of reliance by the purchaser of a patent on a statement in the petition for the patent as to the novelty of the invention was adduced: 'The Plaintiffs gave a very small sum for this patent, and as a rule people do not rely on any statement made by the patentee, but they buy the patent, forming their own opinion as to its worth, taking their chance (unless it has been established) of their being able to establish its validity if the question comes before a Court of law.' per Cotton LJ at 706; *Watkins v Emslie* [1982] 1 EGLR 81, CA, where the court would not infer reliance by a landlord on a notice that was only valid if his tenant had a tenancy for a term of more than one year, as the landlord knew the tenancy was not for such a term, and had retained solicitors; *Nationwide Anglia Building Society v Lewis* n 17 above; see further 5.33–5.40.
- 21 This paragraph was cited with approval in *BRB (Residuary) Ltd v Connex South Eastern Ltd* [2008] 1 WLR 2867 at [24], 2879H. See also 5.72.
- 22 *Re Lewis* [1904] 2 Ch 656 at 662, 664; see also *Willesden Corpn v Gloss* (1962) 185 EG 377; *Fontana NV v Mautner* [1980] 1 EGLR 68.
- 23 See *Watkins v Emslie* n 20 above.
- 24 See 5.10(ii), 5.16–5.17.

representation or relies on facts he culpably failed to communicate)²⁵ will be worse as a result of his reliance than it would otherwise be;²⁶ this may, however, be proved, and often is, by establishing facts from which it can be inferred.²⁷ The issue here is whether the representation or breach of duty has been a cause of suppressing action that A would otherwise have taken: A may benefit from the presumption that a material representation or breach of duty has been such a cause, but he must still identify the action suppressed and the benefit thereby lost.

No actual inducement

5.10 Of course, in a case of estoppel by representation, if the representation had not come to the attention of A when he acted, no representation was made to him, so no question of inducement can arise.²⁸ Further, a claim of inducement may be defeated, and any presumption rebutted, by proof of the following:

- (i) A knew the truth, or did not believe the representation to be true,²⁹ or did not form any belief as a result of the conduct alleged to constitute a representation,³⁰ or did not understand the representation in the sense in which

25 See 5.51–5.53.

26 *Scottish Equitable plc v Derby* [2000] 3 All ER 793, ChD at 804g (aff'd [2001] 3 All ER 818, CA); 5.58–5.61.

27 *Kelly v Fraser* [2013] 1 AC 450, PC at [18].

28 *Re Northumberland and Durham District Banking Co, ex p Bigge* (1858) 28 LJ Ch 50 (misrepresentation); *Edmundson v Thompson and Blakey* (1861) 31 LJ Ex 207 at 210 (misrepresentation); in *Carr v London and North West Ry Co* n 11 above, Brett J said, at 317, that '... the plaintiff did not, in re-selling, act upon any representation of the defendants, for he re-sold before they made any communication to him.'; this seems odd on the facts as reported, as the advice-notes were received on the 7th and 9th of July, and the goods (according to the headnote) were not re-sold until the 21st of August; *MacFisheries Ltd v Harrison* (1924) 93 LJKB 811; *Farquharson Bros & Co v King & Co* [1902] AC 325 at 341 per Lindley LJ (citing *Dickinson v Valpy* (1829) 10 B & C 128 at 140): 'the "holding out" must be to the particular individual who says he relied on it, or under such circumstances of publicity as would justify the inference that he knew of it and acted upon it'; *Hudgell Yeates & Co v Watson* [1978] QB 451 at 470A–D; *Lark v Outhwaite* [1991] 2 Lloyd's Rep 132 at 142, col 2; *The 'Brimnes'* [1975] QB 929 at 959E per Megaw LJ.

29 In *Jennings v Broughton* (1853) 5 De GM & G 126: A knew from his own inspection that the vein to be mined had not been opened so representations as to quantity, although presented as fact, had to be speculative; *Eaglesfield v Marquis of Londonderry* (1876) 4 Ch D 693; (aff'd (1878) LT 303, HL); *Re Ambrose Lake Tin and Copper Mining Co* (1880) 14 Ch D 390; *Bellairs v Tucker* (1884) 13 QBD 562 at 576–8; *Bloomenthal v Ford* [1897] AC 156 at 168, PC; *Re African Gold Concessions and Devt Co* [1899] 1 Ch 414 at 430; *Evans v James Webster & Bros Ltd* (1928) 34 Com Cas 172; *Bell v Marsh* [1903] 1 Ch 528; *Lowe v Lombank* n 9 above at 207; *Bremer Hg EG v Raiffeisen* [1982] 1 Lloyd's Rep 599 at 605 (the representation was withdrawn before any reliance); see further 5.12; see also *Eurocopy v Teesdale* [1992] BCLC 1067; contrast *Re Stapleford Colliery Co* (1880) 14 Ch D 432.

30 *Morrison v Universal Marine Insurance Co* (1873) LR 8 Exch 197 at 205–6; *Cooke v Eshelby* (1887) 12 App Cas 271 at 275, 278; *Raiffeisen v Dreyfus* [1981] 1 Lloyd's Rep 345 at 352.

he now claims to have relied on it³¹ or did not act on it before its correction or withdrawal was communicated to him.³²

- (ii) A would have acted the same way had he been told the truth at the time³³ unless the misrepresentation and the other reason (or combination of reasons) for the relevant conduct would each, independently, have caused the conduct of A (that is, each was a sufficient cause of the conduct): in such a case, it is submitted, the representation may still be said to have induced the conduct.³⁴
- (iii) A checked the subject matter of the representation for himself and relied exclusively on his own check.³⁵ For instance, in relation to the construction of a written transaction, the courts have considered the issue whether an estoppel raiser relied on (or was 'influenced' by)³⁶ the express or implied agreement of the other party as to the interpretation of their transaction, or formed and maintained his own incorrect view independently of any such reliance.³⁷ In such a case, however, an estoppel by convention may yet

- 31 *Bellairs v Tucker* (1884) 13 QBD 562; *Smith v Chadwick* n 17 above.
- 32 See eg *H Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694 at 703 (withdrawal of admission in legal proceedings); *Norfolk CC v Secretary of State for the Environment* [1973] 1 WLR 1400; *United Overseas Bank Ltd v Jiwani* [1976] 1 WLR 964.
- 33 *JEB Fasteners v Marks, Bloom & Co* [1983] 1 All ER 583 at 588d-f, 589d-e (misrepresentation); *Cooper v Tamms* [1988] 1 EGLR 257 at 261G (misrepresentation); cf also *Lark v Outhwaite* n 28 above at 142, col 2 (promissory estoppel); *Wayling v Jones* n 18 above (proprietary estoppel) at 175, 176, where the issue whether a representation induced conduct was tested by asking whether A would have acted in the same way if the representation made had then been corrected or withdrawn (followed in *Ottey v Grundy* [2003] EWCA Civ 1176 at [56]); but this introduces an additional causative factor – the breakdown in trust as a result of the admission of the misrepresentation – as an inducement to respond differently, and does not, therefore, test accurately whether the representation itself was an operative cause of the relevant conduct; see criticism by Cooke: (1995) 111 LQR 389; and *Meghraj Bank Ltd v Arsiwalle* (10 February 1994, unreported), CA.
- 34 If I buy a cottage because I am told it has a thatched roof and because I am told it has four bedrooms (when it has three); and, I would have bought it because it is thatched, even if I knew it had only three bedrooms; but, I would also have bought it because I believed it had four bedrooms (but not if I knew it had three) even if it was not thatched; then the misrepresentation has induced the purchase, even though I would have made the purchase knowing the truth about the bedrooms; see 5.13 onwards; see also comments of Hobhouse LJ in *Swindle v Harrison* [1997] 4 All ER 705 at 728g-j that *Downs v Chappell* [1997] 1 WLR 426 was misunderstood in *Bristol and West Building Society v Mothew* n 8 above at 11.
- 35 *Attwood v Small* (1838) Cl & Fin 232, discussed in *Redgrave v Hurd* (1881) 20 Ch D 1 at 14–17 (he may still be induced if he made a limited or careless check which did not reveal the falsity of the representation: see 5.12); *Clarke v Mackintosh* (1862) 4 Giff 134; *Hartlelid v Sawyer and McClockin Real Estate Ltd* [1977] 5 WWR 481; see also *Jennings v Broughton* n 29 above; *Cooper v Tamms* n 33 above.
- 36 *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 105A.
- 37 Contrast, on the one hand, *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* n 36 above at 100H–101A, 107G–108C: '... although the Bank's erroneous belief that the Plaintiffs' guarantee was so binding and effec-

arise, although A's initial mistaken understanding of the transaction was neither created nor encouraged by B, provided that B has communicated to A that he shared that mistaken understanding,³⁸ but the element of inducement necessary to make it unfair for B to resile from the undertaking will be established only if B was 'responsible'³⁹ for A acting to his prejudice under the mistaken assumption,⁴⁰ for instance, because B induced A to enter the transaction in respect of which they shared the mistaken assumption.

... whilst ... all parties shared the common belief that there was a valid and enforceable option, it is difficult to see how that belief had been in any way created or encouraged by the Defendants ... I can find nothing in the Defendants' conduct which can properly be said to have encouraged Taylors to believe in the validity of the option to any greater extent than they had already been encouraged to do so by what they had previously been told by their legal advisers.' per Oliver J; *Ets Soules v International Trade Development Co* [1980] 1 Lloyd's Rep 129 at 138; *Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204; and *Bank of Scotland v Wright* [1990] BCC 663 at 679A–B, 681E–G, where, although the guarantor represented to the Bank his acceptance that his guarantee covered the subsequently disputed liability, Brooke J, emphasising the importance '... of the personalities and attributes of the two parties between whom the alleged estoppel was alleged to have arisen' (as to which, see also *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 586 per Kirby P), could 'find nothing in [the guarantor's] conduct throughout this affair which could properly be described as the act of encouragement or influencing of the Bank in its mistaken belief ...'; and cases in which the estoppel raiser was held to have relied on his own misunderstanding rather than any express or implied representation of the other party: *Cropper v Smith* n 20 above; *BP Exploration Co v Huni* [1979] 1 WLR 783 at 813G–H (aff'd without ref [1983] 2 AC 352); *Watkins v Emslie* n 20 above; *The 'Athos'* [1983] 1 Lloyd's Rep 127 at 136; *The 'Scaptrade'* [1983] QB 529 at 536E–537A (aff'd without ref [1983] 2 AC 694); *The 'August Leonhardt'* [1985] 2 Lloyd's Rep 28 at 35; *The 'Superhulls Cover' case* [1990] 2 Lloyd's Rep 431 at 452–5; *Wroe v Exmos Cover Ltd* [2000] 1 EGLR 66; *Iceland Foods v Dangoor* [2002] EWHC 107; see also 8.25; cf n 113 below.

- 38 *John v George* (1996) 71 P&CR 375 at 386 per Morritt LJ, 392 per Evans LJ, 395–396 per Simon Brown LJ.
- 39 A term imparting notions of duty and causation; contrast where the estoppel raiser himself is responsible for the error: *Cox, Patterson & Co v Bruce & Co* (1886) 18 QBD 147, CA at 151–2; *Holding v Elliott* (1860) 5 H & N 117; *Bank of Hindustan, China and Japan v Alison* (1871) LR 6 CP 222; *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, CA; *Foster v Tyne Pontoon and Dry Docks Co* (1893) 63 LJQB 50. See further 8.19 onwards.
- 40 *John v George* n 38 above at 394, 396 per Simon Brown LJ; cf 390–391 per Morritt LJ; *HMRC v Benchdollar Ltd* [2010] 1 All ER 174 at [52], 191a (approved in *Re Lehman Brothers International (Europe) (In Administration)* [2012] 2 BCLC 151 at [106]–[107], 182d–i; *Mitchell v Watkinson* [2015] L & TR 22 at [49]–[52], 405–407; and *Dixon v Blindley Health Investments Ltd* [2016] 4 All ER 490 at [91], [94], 501h–511h); see 5.19–5.22.

- (iv) A embarked on a course of conduct which was consciously designed to create an acquiescence or estoppel defence.⁴¹

Constructive notice or knowledge of the truth

5.11 A's claim to have been induced to act on the faith of a misrepresentation or of a breach of duty to speak will fail not only if he has actual knowledge⁴² (which includes Nelsonian knowledge),⁴³ but also if he has constructive knowledge,⁴⁴ of the representation's falsity or the uncommunicated facts. He will be held to have such constructive knowledge in the following circumstances:

- (1) Where notice given to, or knowledge held by, his agent is to be imputed to him. He will be deemed to receive such notice or have such knowledge of the truth if his (non-fraudulent) agent, acting within his authority,⁴⁵ receives it or acquires it. A will not, however, necessarily be ascribed knowledge of the correct legal analysis of a transaction because he retains a solicitor to act on it: it may be proved, against a presumption of such knowledge, that the solicitor was ignorant of the relevant law,⁴⁶ or that the solicitor was also misled as to the position by the representation,⁴⁷ or that A was induced by the representation to believe that inquiry of the solicitor was unnecessary, shutting him out from the contrary knowledge of the solicitor.⁴⁸
- (2) Where the law deems A to have notice of a fact as a matter of policy, placing the responsibility on A to acquire such knowledge, as where constructive notice of a company's public documents was held to defeat an estoppel,⁴⁹

publication of a partnership's dissolution also gives constructive notice thereof to all who have not previously dealt with the firm.⁵⁰

- (3) Where B is entitled to believe that A has received notice of the true position, so as to correct his misrepresentation or breach of duty. If, for instance, B, having made a misrepresentation, gives notice to A of the true position by a means which A has held out, expressly or impliedly, as a means by which communication may be made to him, yet A by reason of his own or his agent's negligence fails to receive such notice, then B, if he acts on the assumption that notice was received, may raise a counter-estoppel against A's denial that he has been notified of the true position.⁵¹

5.12 On the other hand, A will not be fixed with constructive notice or knowledge of the falsity of a representation if he negligently fails to avail himself of an opportunity to make a check of the accuracy of the representation, which would have revealed its falsity, provided that B, actually or presumptively, intended him to act on the representation.⁵² If, however, A was negligent in his failure to discover the truth, in the absence of proof that B *actually* intended him to rely on the representation, he may not be able to establish the alternative of *presumptive* intention, namely that he reasonably understood B to intend such reliance. Similarly, if it is only by reason of the negligence of A that he understands B's

41 *Dyson Ltd v Qualtex (UK) Ltd* [2004] EWHC 2981 (Ch) at [334] (a case of inducement by silence; Mann J described the claim as 'an attempt to establish a new mutation which could not unfairly be described as estoppel by entrapment').

42 Save in the case of an estoppel by convention where the parties have knowingly agreed to be bound by a counter-factual convention: see 8.64–8.65.

43 *Commission for New Towns v Cooper (GB) Ltd* [1995] 2 All ER 929, CA at 946f–947e, 957e–f; see further 13.25.

44 As to the distinction between 'constructive knowledge' and 'constructive notice' see *Lewin on Trusts* (19th edn) [42–64].

45 See eg *Bawden v London Assurance* [1892] 2 QB 534; *Dixon v Winch* [1900] 1 Ch 736; *Strover v Harrington* [1988] Ch 390; see further *Bowstead and Reynolds on Agency* (20th edn), Arts 94, 95 and *Ogilvie v West Australian Mortgage and Agency Corp'n* [1896] AC 257, PC at 268–9 (customer not put on notice of fraud by bank's agent).

46 *Stevens and Cutting Ltd v Anderson* n 18 above at 97D; cf *Peyman v Lanjani* [1985] 1 Ch 457; *Mitsui Babcock Energy Ltd v John Brown Engineering Ltd* (1996) 51 Con LR 129 at 185. See further 13.26.

47 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 444 per Deane J.

48 *Waltons Stores (Interstate) Ltd v Maher* n 47 above at 463 per Gaudron J.

49 *George Whitechurch Ltd v Cavanagh* [1902] AC 117 at 131–2: now overridden by ss 35–36 of the Companies Act 1985; cf *Midland Bank Ltd v Reckitt* [1933] AC 1 (constructive notice of agent exceeding ostensible authority would have defeated a claim based on ostensible authority).

50 Section 36 of the Partnership Act 1890.

51 *Strover v Harrington* n 45 above at 407E–408A; cf the constructive notice of the contents of documents received in *Panchaud Freres SA v Ets Gen Grain Co* [1970] 1 Lloyd's Rep 53 at 57–9, 61, founding an implied waiver of a defect apparent but unnoticed on the documents (as to which, see further 13.27, n 110); and *The 'Superhulls Cover' Case* n 37 above where an insurer, although careless in not noticing a limitation on cover in the proposed cover note sent by its brokers (which limitation did not accord with the insurer's instructions to the broker) was not, having accepted the proposal, estopped from denying against the brokers that the limitation did not accord with its instructions, because it was under no duty to the brokers to check the policy, and the broker (who represented the cover note to accord with the insurer's instructions) was not entitled to assume that the insurer had noticed the obscure limitation clause (p 451); see also *Lancashire and Yorkshire Rly Co v MacNicoll* (1918) 88 LJKB 601, DC (discussed at n 90 below). Cf also, as to constructive knowledge in the context of estoppel, *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187 where Nelsonian knowledge gave rise to a duty to speak founding an estoppel; and *Price Meats v Barclays Bank plc* [2000] 2 All ER (Comm) 346, where constructive notice was insufficient to found a duty to speak; cf also the authorities at 9.73: that a customer is under no duty to a bank to read his bank statements.

52 *Borries v Imperial Ottoman Bank* (1873) LR 9 CP 38; *Redgrave v Hurd* n 35 above (misrepresentation); *Gresham Life Assurance Society v Crowther* [1914] 2 Ch 219 at 228; *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287 (misrepresentation); *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 (CA) at 391 per Romer LJ; [1933] AC 51 (HL) at 59 per Lord Tomlin; *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128 at 1137D (misrepresentation); *Strover v Harrington* n 45 above at 410D–E (misrepresentation); *Trane (UK) Ltd v Provident Mutual Life Assurance* [1995] 1 EGLR 33 at 39B–C; *Quinn v CC Automotive Group Ltd (t/a Carcraft)* [2011] 2 All ER (Comm) 584 at [23], 592j–593f (deceit); see further n 104 below; cf *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113 where no duty of care was owed in negligence, chiefly because it was not reasonable for A to rely on the representation without checking it.

silence, language or conduct to amount to a representation to the relevant effect, then a representation to that effect has not been made to him and he may not raise an estoppel based on it.⁵³ In the case of estoppel by negligence, also, where a fraudulent intermediary makes a representation as to his authority to pass title, the principal will not be estopped, notwithstanding that he has enabled the intermediary to make the representation, if the purchaser is put on enquiry as to the truth.⁵⁴ the purchaser's own neglect prevents him from ascribing responsibility for his reliance on the intermediary's representation to the principal who enabled it to be made.

Causation

5.13 It is not enough to defeat a claim of inducement to show that there were other inducements,⁵⁵ nor that, even had the representation not been made or the breach of duty not occurred, A would still have acted as he did.⁵⁶ A number of

- 53 See eg *Carr v London and North Western Rly Co* n 11 above at 318; **2.12; 3.5; 4.5–4.43**.
- 54 *Williams v Colonial Bank* (1888) 38 Ch D 388; *Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333; *London Joint Stock Bank v Simmons* [1892] AC 201.
- 55 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (misrepresentation); *Wayling v Jones* n 18 above at 173; *McCullagh v Lane Fox & Partners Ltd* [1994] 1 EGLR 48 at 51, aff'd without ref n 9 above; *Century (UK) Ltd SA v Clibbery* n 18 above at [73].
- 56 *Re London & Leeds Bank Ltd* (1887) 56 LJ Ch 321 at 324; *The 'Siboen' and The 'Sibotre'* [1976] 1 Lloyd's Rep 293 at 324, col 1 (both the cases of misrepresentation establishing no onus on A to prove that he would not have acted as he did if the misrepresentation had not been made); *Brikom Investments Ltd v Carr* n 18 above at 482H–483A per Lord Denning MR: "It is no answer for the [representor] to say: "You would have gone on with the transaction anyway". That must be mere speculation. No-one can be sure what he would or would not have done in a hypothetical state of affairs which never took place ... Once it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced."; at 490D per Cumming-Bruce LJ: "Looking back on the transaction she said in evidence that she would have entered into the lease anyway. Nonetheless on her evidence the inducement of the landlord's promise was one of the factors that she relied upon. That is enough without giving rise to the necessity of assessing the weight or quantum of each of the factors that between them induced her to agree to enter into the lease."; *JEB Fasteners v Marks, Bloom & Co* n 33 above at 589a per Stephenson LJ: "But, as long as a misrepresentation plays a real and substantial part, though not by itself a decisive part, in inducing a plaintiff to act, it is a cause of his loss and he relies upon it, no matter how strong or how many are the other matters which play their part in inducing him to act."; *Nationwide Anglia Building Society v Lewis* n 17 above at 488 per Peter Gibson LJ (citing the Australian case of *Lynch v Stiff* (1943) 68 CLR 428 at 435): "The doctrine of 'holding out' is a branch of the law of estoppel. So far as the element of action by the party relying upon an estoppel is concerned, it is sufficient if that party acts to his prejudice upon a representation made with the intention that it should be so acted upon, though it is not proved that in the absence of the representation he would not have so acted."; *Ross River Ltd v Cambridge City FC Ltd* [2008] 1 All ER 1004 at [202], 1048d–e: "It is not enough for the representor to show that the representee would, even if the representation had not been made, still have entered the contract. It is sufficient for the representee to show that the misrepresentation "was actively present to his mind"; contrast the following cases: *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35 at 49 and *Assicurazioni Generali SpA v Arab*

judges have declared themselves wary of such speculation.⁵⁷ Yet such hypotheses are no more tenuous than those upon which a court determines any claim to compensatory damages;⁵⁸ and, in order to find that A did not act to his detriment

Insurance Group (BSC) [2002] 2 CLC 242 (misrepresentation) at [59], [62] and [80] per Clarke LJ and at [187] per Sir Christopher Staughton where the test of reliance was whether A would have acted as he did 'but for' a representation; *Horry v Tate & Lyle Refineries Ltd* [1982] 2 Lloyd's Rep 416 at 422, col 2: "... [The misrepresentation] only has to be one of the inducing factors. It has to be a factor without which the Plaintiff would not have entered into the settlement, and there may be other factors."; *Taylor's Fashions Ltd v Liverpool Trustees Co* n 19 above; *The 'Lucy'* [1983] 1 Lloyd's Rep 188 (rescission refused because the court was not satisfied that the plaintiff would have refused to enter the charter party but for the misrepresentation or would have done so only at a lower rate of hire); *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* n 9 above at 180.

- 57 *Cranworth LJ in Reynell v Sprye* (1852) 1 De GM & G 660 at 708 (deceit): "It is impossible so to analyse the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No-one can do this with certainty, even as to himself, still less as to another. Where 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 representation so made, that even if it had not been made, the same resolution would have been taken, or the same conduct followed."; Lord Chelmsford in *Smith v Kay* (1859) 7 HLC 750 at 759 (deceit): "Can it be permitted to a party has practised a deception with a view to a particular and which has been attained by it, to speculate on what might have been the result if there had been a full communication of the facts?"; Turner LJ in *Trailin v Baring* (1864) 4 De GJ & Sm 318 at 330 (deceit): "Had this representation of what has 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 that 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."; James VC in *Re Imperial Mercantile Credit Association* (1869) LR 9 Eq 223 at 226n: "I do not think a court of equity is in the habit of considering that a falsehood is not to be looked at because, if the truth had been told, the same thing might have resulted"; *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 (deceit) per Bowen LJ: "if his mind was disturbed by the misstatement ... and if such disturbance was in part because of what he did the mere fact of his also making a mistake himself would make no difference."; *Barton v Armstrong* [1976] AC 104, PC at 118H–119A (duress) per Lord Cross: "... for in this field the Court does not allow an examination into the relative importance of contributing causes ..."; Lord Denning MR in *Brikom Investments Ltd v Carr* n 18 above; Peter Gibson LJ in *Meghraj Bank Ltd v Arsiwalla* n 33 above: "In my judgment, the Court can only decide a question of promissory estoppel on the evidence put before it of what the promisee did in reliance on the promise rather than on speculation as to what the promisee might have done"; Hobhouse LJ in *Downs v Chappell* n 35 above at 433D, 441B; Lord Millett in the Scottish case of *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2003] 1 AC 197 at [103]–[105]; Lord Hoffmann in *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2003] 1 AC 959 at [16]: "... if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known it was false, it does not matter that he also held some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid".
- 58 Cf also 5.46.

in reliance upon a representation made to him or a belief he held, it is necessary to consider how A would have acted had the representation not been made or the belief not held. Some such speculation is, therefore, submitted to be legitimate in order properly to address the question of causation if it is in issue.⁵⁹

5.14 That a representation or culpably uncontradicted belief may induce conduct, notwithstanding that A would have so acted even had the representation not been made or the belief had not been held,⁶⁰ raises the question as to what the test is of whether a representation or belief had or did not have sufficient causative impact on the relevant conduct for it to be characterised as having induced it.⁶¹

59 Eg so as to dismiss the claim in *McKenzie v British Linen Co* (1881) 6 App Cas 82 at 91 per Lord Selborne LC because the party to be estopped 'has done nothing from first to last by which the [estoppel raisers] can have been led to act in any way in which they would not otherwise have acted or to omit to take any step for their own security, or in any sense for their benefit, which they would otherwise have taken'; and *Heilbut, Symons & Co v Buckleton* [1913] AC 30 (misrepresentation) because the representation that the defendants were bringing out a rubber company induced the plaintiffs to invest not because they believed it was a rubber company (which they did and which it was not) but because the defendants were bringing it out (which they were); or to find against a plea of (promissory) estoppel in *Fontana NV v Mautner* [1980] 1 EGLR 68 because the tenant did nothing in response to being told 'It is quite all right: you can stay here as long as you wish' that he would not have done anyway; so also in *Western Fish Products Ltd v Penwith DC* n 37 above at 217a-d because the absence of confirmation from the Planning Officer would not have affected the plaintiff's course of action, given its absolute conviction as to the incontrovertible status of its user rights; and in *Willesden Corpn v Gloss* (1962) 185 EG 377 because (inter alia) there was no evidence that the landlord acted other than he would have in any event, because of his belief as to the defendant's status as legal assignee of a tenancy; and in *The 'Scaptrade'* n 37 above (CA; not appealed on this point) at 536E-537A because there was no causal connection between the alleged representation and the conduct alleged to constitute detrimental reliance; and in *Doneghan v Ghadami* [2007] EWCA Civ 944 at [15]-[18], [20] where the court refused permission to appeal from a decision that a defence of proprietary estoppel had no real prospect of success because the matters relied upon as demonstrating detrimental reliance were all acts that would be expected of a party who was in the process of negotiating a joint venture; see also *Ets Soules & Co v International Trade Development Co Ltd* n 37 above at 138; *Taylor's Fashions Ltd v Liverpool Trustees Co* n 19 above; *Dadourian Group International Inc v Simms* [2009] 1 Lloyd's Rep 601 at [99], [107]; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* n 9 above at [180] (although we submit that proof that A would have so acted 'even if the representation had not been made' will not necessarily be sufficient to negative causation: see n 55 above, 5.15).

60 See n 56 above.

61 Thus, in *JEB Fasteners Ltd v Marks, Bloom & Co* n 33 above at 589a, Stephenson LJ required the representation to play 'a real and substantial part, though not by itself a decisive part, in inducing the Plaintiff to act ...' (this test was approved in *Avon Insurance Plc v Swire Fraser Ltd* [2000] 1 All ER (Comm) 573 at [18], 579h; *Dadourian Group International Inc v Simms* n 59 above at [99]-[100]; and *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* n 9 above at [153]), and in *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897 at 929h, Knox J held that 'the critical point is whether the representation affects the judgment of the person to whom it was made to a material degree', respectively leaving uncalibrated the measure of 'a real and substantial part' and 'a material degree'; see also *Smith New Court Ltd v Scrimgeour Vickers* [1997] AC 254 at 285A per Lord Steyn: 'But it is settled that at any rate in the law of obligations causation is to be categorised as an issue of fact. What has further been established is that the "but for" test, although it often yields the right answer, does not

There is some conflict between the authorities that the representation must be a 'real and substantial' cause of the conduct, affecting the judgement of A 'to a material degree',⁶² and those which indicate that it will suffice if the representation was a cause by affecting the judgement of A in any degree, and the court will not enquire into the different weight to be attributed to that and other causes.⁶³ It is submitted, however, that they can be reconciled on the basis that the test is whether B's representation affected A's judgement,⁶⁴ and to describe its effect as immaterial, unreal or lacking any substance means in practice that it did not affect A's judgement.⁶⁵ Nonetheless, it is submitted that some counterfactual or hypothetical enquiry is permissible, as, if B can establish that A would have acted as he did, even if B had corrected his misrepresentation or A's mistaken belief, then B will have established that his representation or silence did not affect A's judgement.⁶⁶

5.15 To hold that a representation or belief induced conduct, although A would have acted in the same way even had the representation not been made or the belief had not been held,⁶⁷ is justified if the conduct had more than one sufficient

always do so. That has led judges to apply the pragmatic test whether the condition in question was a substantial factor in producing the result.'; and *JEB Fasteners Ltd v Marks, Bloom & Co* at 588c-d per Donaldson LJ: 'In real life decisions are made on the basis of a complex of assumptions of fact. Some of these may be fundamental to the validity of the decision. "But for" that assumption, the decision would not be made. Others may be important factors in reaching the decision and collectively, but not individually, fundamental to its validity. Yet others may be subsidiary factors which support or encourage the taking of the decision. If these latter assumptions are falsified in the event, whether individually or collectively, this will be a cause for disappointment to the decision-taker, but will not affect the validity of his decision in the sense that if the truth had been known or suspected before the decision was taken, the same decision would still have been made'.

62 See n 61 above.

63 See nn 56, 58 above.

64 See cases at nn 56 and 57 above; *Sidhu v Van Dyke* (2014) 251 CLR 505.

65 But cf *Dadourian Group International Inc v Simms* n 59 above at [99], which suggests a distinction.

66 See 5.17. It is submitted that cases which suggest that no such enquiry at all is permissible (see n 57 above) are based on authorities concerning fraudulent representations and should be restricted to that context, (and even then may be questioned unless an irrebuttable presumption is to be made against a fraudster), since it would be wrong to shut out B from establishing that A did not rely on his representation by proving that A would have acted as he did even had he been told the contrary: see 5.13, *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* n 9 above at [153]-[199]. Cf *Actavis UK Ltd v Eli Lilly & Co (Rev 1)* [2016] EWHC 234 (Pat) at [221] (promissory estoppel), where lack of reliance was held to be 'plainly' demonstrated by A's failure to act when the promise was withdrawn.

67 Contrast the approach in estoppel by representation cases, viz that the necessary causal link may be established even if the representation was not a *causa sine qua non* of the resultant conduct (and the representation may, therefore, paradoxically, be a *causa causans*, although it is not a *causa sine qua non*), with that in breach of duty to speak cases, such as *Walker v Manchester and Liverpool District Banking Co Ltd* (1913) 108 LT 728: the customer of a bank failed to examine his passbook and notice that three forged cheques were drawn on his account. Had he noticed the first, he and the bank would have stopped the others being drawn. It was held that, regardless of whether he had a duty to examine the book, he did not cause the

CHAPTER 9

Applications of reliance-based estoppel to various relationships

- Agency, partnership and ownership by estoppel 9.2
- Landlord and tenant 9.18
- Bailor and bailee 9.52
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- Employers, trustees and members of occupational pension schemes 9.77

9.1 This work has so far been concerned with the constituent elements of the various kinds of reliance-based estoppel set out in Chapter 1 considered generally, and of the defence of illegality to those estoppels (Chapter 7). Chapter 8, which dealt with estoppels by convention and by deed, concluded this general section. In this and the following chapters, which comprise Part II of the work, the principles set out in Part I will be examined in their operation upon, and application to, various types of transactions. The present chapter is concerned with their application to the following categories of relationships between the parties: principal and agent (including partnership); landlord and tenant; bailor and bailee; patentee and licensee; and banker and customer. There is a new concluding section in which we consider the doctrine of reliance-based estoppel in relation to the position of employers, trustees and members of occupational pension schemes.

AGENCY, PARTNERSHIP AND OWNERSHIP BY ESTOPPEL

9.2 This section is concerned with the class of cases in which one person has represented ('held out') to another, by words or conduct, that a third person stands to the representor (or does not stand to him) in the relationship of agent, or partner, for the purposes of a particular transaction, or is the owner of property

or entitled to deal with property as owner. Some of these cases are dealt with as part of the substantive law of agency or partnership,¹ and do not necessarily refer to 'estoppel':² expressions such as 'apparent' or 'ostensible' authority' are often used. But whether they are described as examples of estoppel or by those other terms, the consequences are those which result from the application of the principles of reliance-based estoppel.³

9.3 Subject to the matter discussed in the following two paragraphs, the proposition that apparent authority is based on estoppel is clearly supported by the authorities.⁴

9.4 It is not in doubt that a disposition of a principal's property by a person who either has apparent authority to bind the owner, or is the apparent owner of the property, may be effective not only to bind the owner in favour of the

1 And, in the case of partnership, some of the relevant estoppels have been given statutory effect in the provisions of the Partnership Act 1890: see 11.105 onwards.

2 But see *Pole v Leask* (1862) 33 LJ Ch 155 at 162 per Lord Cranworth, where he referred to the representor's being 'estopped' from disputing the agency, and the difference between 'agency by estoppel' and 'real agency, however constituted'.

3 *Scarf v Jardine* (1882) 7 App Cas 345, HL, at 349 (Lord Selborne); *Re Fraser* [1892] 2 QB 633, CA, at 637 (Lord Esher); *Lloyds Bank v Cooke* [1907] 1 KB 794, CA, at 799 (Collins MR); *Rama Corp v Proved Tin & General Investments Ltd v Reckitt* [1933] AC 1, HL, at 17–8 (Lord Atkin); *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, CA, at 498 (Pearson LJ) and 503 and 506 (Diplock LJ); *R v Charles* [1977] AC 177, HL, at 183 (Lord Diplock); *Hudgell Yeates v Watson* [1978] QB 451, CA, at 470C (Megaw LJ); *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717, HL, at 777 (Lord Keith); *Northside Developments Pty Ltd v Registrar-General* (1989–1990) 170 CLR 146 (High Court of Australia), at 173–4 (Brennan J); *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110, CA, at 122 and 133, where Waller LJ, with Peter Gibson LJ's agreement, said that the weight of authority was to the effect that the doctrine of apparent authority was based on estoppel; *SEB Trygg Liv Holding AB v Manches* [2006] 1 WLR 2276, CA, at [31] per Buxton LJ (delivering the judgment of the CA): 'Recognition that ostensible authority operates as a form of estoppel goes back at least as far as the speech of Lord Selborne LC in *Scarf v Jardine*'; *Thanakharn v Akai Holdings Ltd* [2010] HKCFR 64 (Court of Final Appeal, Hong Kong), at [52] per Lord Neuberger NPJ: 'apparent authority is essentially a species of estoppel by representation'; *Acute Property Developments Limited v Apostolou* [2013] EWHC 200 (Ch) (N Strauss QC) at [4].

4 See the previous footnote. In the 18th and subsequent editions of *Bowstead and Reynolds on Agency* a distinction is drawn between two classes of case, 'estoppel from denying existence of agency relationship' (formerly labelled 'agency by estoppel') and 'apparent authority'. 'Estoppel from denying existence of agency relationship' is reserved for situations where the person concerned has no authority whatever to act as agent, so that there is no agency other than by estoppel. This is in contrast with 'apparent authority', where the agent has been authorised to act by the principal only to a certain extent, but has been allowed by the principal to appear to have a wider authority than that actually conferred on him. It is suggested that in many cases in the second class ('apparent authority') the full requirements of estoppel may not be satisfied, because the representation giving rise to the estoppel may be general and the detriment incurred by the representee may be small. In these cases, it is said to be more appropriate to regard the estoppel as one with weak requirements, special to agency: see *Bowstead and Reynolds* (20th edn, 2014) at [2-100] and [8-028]. At [8-127] of that work there is identified a further difficulty in treating cases of apparent authority or ownership as examples of estoppel by representation, namely the rule that an estoppel only operates between the parties to it and their privies, and its alleged corollary that the estoppel raiser cannot acquire

disponee but also to divest the owner pro tanto of ownership of the property.⁵ This must be set alongside the rule that an estoppel only binds the parties to it and their privies.⁶ Basing himself on this rule, Spencer Bower advanced the proposition in the first edition of this work that estoppel by representation cannot prevent third parties from denying the estoppel raiser's title and cannot therefore confer a title *contra mundum*. He went on to maintain that the phrase 'title by estoppel' is 'a highly metaphorical and elliptical mode of indicating the use which may be made of the representation,' and that a title by estoppel is 'a mere negative title'.⁷ In *Eastern Distributors Ltd v Goldring* the Court of Appeal appeared to support this position, by holding that an apparent owner (or, possibly, apparent agent) could pass a 'real' title, while simultaneously doubting whether apparent authority or ownership ought to be regarded as part of the law of estoppel.⁸ Subsequent decisions of the Court of Appeal have nevertheless made it clear that a transaction the effectiveness of which clearly depends, at least in part, on estoppel by representation⁹ may nevertheless pass a 'real' title, divesting wholly or pro tanto the title of the party against whom the estoppel is raised.¹⁰ The position, therefore, is that, in this respect also, the authorities support – or, at any rate, do not impede – the view that apparent authority is an aspect of estoppel.

a good title *contra mundum*. The point affects both classes ('estoppel from denying existence of agency relationship' and 'apparent authority') to the extent that they depend on estoppel. See further 9.4 and 9.5.

5 *Pickering v Busk* (1812) 15 East 37; *Fuentes v Montis* (1867–68) LR 3 CP 268 (Willes, Keating and Montague Smith JJ).

6 *Richards v Johnston* (1859) 4 H & N 660; *Richards v Jenkins* (1887) 18 QBD 451; *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, CA, at 203 per Brett LJ, *obiter*: 'an estoppel gives no title to that which is the subject-matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances'.

7 First edition, 1923, [13]. The last phrase quoted is from Lord Lyndhurst LC in *Bensley v Burdon* (1830) 8 LJ (OS) Ch 85 at 88. The same text was retained up to the third edition, Ch I, [13]. It is, of course, consistent with the view that, if apparent ownership or authority depends on estoppel, only a 'metaphorical title by estoppel' can pass. See also *In re Goldcorp Exchange Ltd (In Receivership)* [1995] 1 AC 74, PC, at 94–G, per Lord Mustill, referring, in the context of estoppel, to 'the pretence of title where no title exists'.

8 [1957] 2 QB 600, CA, at 610–1 (Devlin J giving the judgment of the Court of Appeal). A 'real title' was contrasted with 'a metaphorical title by estoppel', no doubt referring to the first edition of this work.

9 See the authorities referred to in n 3.

10 The title thus transmitted is not limited to a 'metaphorical title by estoppel'. See *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242, CA, at 270 per Pearson LJ: 'Under section 21(1) [of the Sale of Goods Act 1893] there would not be a mere estoppel: [the owner] would lose her title and the [buyer] would acquire the title'; *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, CA, at 577–8 per Russell LJ: 'the title acquired by the plaintiffs would be a real title, and not merely a right to plead an estoppel'; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, CA, at 803–4 (Russell LJ); *Moorgate Mercantile Co Ltd v Twiichings* [1977] AC 890, HL, at 918 per Lord Edmund-Davies: 'the buyer acquires a good title to the goods and not merely a right to plead an estoppel'; and *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] QB 110 at 122 per Waller LJ: 'It is true that a disposition of property can be effective under the doctrine of apparent authority so as to confer "a real title and not merely a metaphorical title by estoppel," viz a title which can be transmitted to persons unable to rely on the estoppel'. The cases since *Goldring* thus provide no support for Spencer Bower's proposition.

9.5 The case of apparent ownership should be the same as that of apparent authority, although there appear to be few English authorities.¹¹ There is no reason to doubt that, in all or at least some cases, apparent ownership depends on estoppel by representation.¹² It is clear that a disposition by a person invested with apparent ownership passes a 'real' title and not merely a 'metaphorical title by estoppel'.¹³ The notion of 'apparent ownership' was part of the 'principle' on which the decision in *Goldring* itself was based.¹⁴ If, as the authorities clearly show, apparent agency is a species of estoppel and a disposition by an apparent agent passes a 'real' title, there can be no impediment to the view that apparent ownership is itself a species of estoppel, operating, in its dispositive effects, in the same way as apparent agency.¹⁵

9.6 Four kinds of representation will be considered: first, B may represent to A that X is his agent (or partner) or has his authority, for certain purposes. Secondly, and conversely, B may represent to A that X is not his agent (or partner), or otherwise associated with or connected with him, but occupies a position entirely independent of him. Thirdly, B may represent to A that X is his principal; or, fourthly, and conversely, B may represent to A that he (B) has no principal.

11 *Pickering v Busk* (1812) 15 East 37 (where, however, estoppel is not referred to); *Pickard v Sears* (1837) 6 Ad & El 469.

12 This was the view of the New Zealand Court of Appeal in *Knight v Matson & Co* (1902) 22 NZLR 293, where an agent to whom cattle had been entrusted for sale through an auctioneer was held not to be a mercantile agent. In breach of his actual authority he received from the auctioneer, and appropriated, the proceeds of sale. It was held, in proceedings between the owner of the cattle and the auctioneer, that the owner was estopped from denying the authority of the agent to receive the proceeds of sale, as if he was the owner.

13 *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, CA.

14 *Goldring*, above, at 607–11.

15 It remains unclear how a theoretical reconciliation is to be achieved between (i) the judicial consensus that apparent authority is a species of estoppel by representation, (ii) the submission in the text that apparent ownership is also a species of estoppel, (iii) the ability of an apparent agent or owner to pass a real title in the true owner's property, (iv) the rule that an estoppel only binds the parties to it and their privies, and (v) the suggestion in *Goldring* at 607 that 'privies' in estoppel do not include purchasers for value without notice. One partial solution might be found in the undoubtedly true propositions that (a) title to goods may pass by contract, and (b) an apparent agent is capable of binding his principal by contract. It is difficult to see how it is possible for an apparent agent and a third party to enter into a contract, binding by estoppel on the principal, without the contract also being able to pass a 'real' title in the principal's goods. To this extent the propositions in (iv) and/or (v) – in particular, the version of (iv) found in *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, CA, at 203 per Brett LJ (see n 6) – may need to be qualified. See further 1.33–1.34 and 11.46 onwards. This approach does not work, however, in the case of an apparent owner: he contracts for himself, not for the true owner, and nothing he does affects the rights of the true owner – eg his contract with the third party is not binding on the true owner – save that he is able to vest in the third party the true owner's title to goods. The cases in n 10 suggest that Spencer Bower's proposition must be abandoned or heavily qualified (though *Goldring* has not been expressly overruled in this respect), or that 'privies' in estoppel include purchasers for value without notice, or that the dispositive effects of transactions involving apparent authority or ownership do not depend – or do not depend only – on estoppel, but may also proceed on the basis of a rule of mercantile convenience ensuring the safety of mercantile transactions, which would be to adopt the reasoning of the Court of Appeal in *Goldring* at 607–8.

Holding out as agent

9.7 The application of the doctrine of estoppel to representations of this kind results in the following well-established rules. Where B, by words or acts, or by silence or inaction (if there was a duty on him to speak or act),¹⁶ represents to A, or to the public or to a class of which A is a member, that X is his (B's) agent, or has his authority, either generally,¹⁷ or for the purposes of a particular transaction or type of business, and A is induced by such representation to alter his position,¹⁸ B is estopped from afterwards disputing, as against A, that X was invested with such agency or authority at the time at which he was so accredited.¹⁹ The corollary is that, in the absence of a representation made by B,²⁰ or conduct on B's part, a representation made by X to A that he (X) is B's agent cannot give rise to agency by estoppel or ostensible agency, for in such a case there has not been a holding out by B.²¹ Illustrations of the operation of this rule are abundant and can readily be found in, for example: the authority deemed to be given to a mercantile agent to dispose of goods;²² the apparent authority given by

16 All the circumstances must be taken into account when considering the conduct of the representor: *Gurtner v Beaton* [1993] 2 Lloyd's Rep 369, CA, at p 379 per Neill LJ.

17 Apparent or ostensible authority is normally 'general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question': *The Ocean Frost* [1986] AC 717, HL, at 777 (Lord Keith).

18 See 5.41–5.48. It seems to be sufficient for the estoppel raiser to show that he entered into a contract believing that the agent had the principal's authority to contract on his behalf, and only if the principal can adduce evidence that the estoppel raiser is no worse off, taking into account the benefits he has received under the contract, is the estoppel defeated.

19 *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd (The Raffaella)* [1985] 2 Lloyd's Rep 36, CA, at 41 (Browne-Wilkinson LJ); *The Ocean Frost*, above, at 777 (Lord Keith); *Strover v Harrington* [1988] Ch 390 (Browne-Wilkinson V-C), at 409–10; *Polish Steamship Co v A J Williams Fuels (Overseas Sales) Ltd (The Suwalki)* [1989] 1 Lloyd's Rep 511 (Steyn J), at 514. See also n 31.

20 If X tells A, expressly or by implication, that he has B's authority to enter into a transaction, this will not normally result in X having apparent authority to bind B: *The Ocean Frost*, above, at 779 (Lord Keith). It is nevertheless conceptually possible for X to have actual or apparent authority to communicate to A that B has authorised the transaction. In *The Raffaella*, above, Browne-Wilkinson LJ said at 43: 'suppose a company confers actual or apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction; why should not such a representation be relied upon as part of the holding out of Y by the company? By parity of reasoning, if a company confers actual or apparent authority on [X] to make representations on the company's behalf but no actual authority on [X] to enter into the specific transaction, why should a representation made by [X] as to his [own] authority not be capable of being relied on as one of the acts of holding out?'. In *Kelly v Fraser* [2013] 1 AC 450, at [12] and [13], the Privy Council endorsed the proposition implicit in this passage. Such a case is one of 'ostensible specific authority', described by Lord Keith in *The Ocean Frost* at 777 as 'very rare and unusual'.

21 See *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, CA, at 498 (Pearson LJ) and 503 and 506 (Diplock LJ); *R v Charles* [1977] AC 177, HL, at 183 (Lord Diplock).

22 *Pickering v Busk* (1812) 15 East 38; *Weiner v Harris* [1910] 1 KB 285, CA; *Turner v Sampson* (1911) 27 TLR 200. See 11.22, 11.26 and 11.29, for the provisions of s 2 and ss 8 and 9 of the Factors Act 1889 (ss 24 and 25(1) of the Sale of Goods Act 1979) which apply. See also Ch 3 in connection with estoppel by negligence.

the maker of a negotiable instrument who signs it in blank to him to whom he hands it, to fill it in;²³ company cases, in which the owner of shares or similar securities hands them or other documents of title to a broker, together with a transfer executed in blank;²⁴ or where a representor allows himself to be held out as the person with whom goods may be deposited, by lending his name to the occupier of the premises where the business is carried on, and is thus estopped, as against a depositor, from asserting that such occupier is his tenant, and not his agent, and from setting up a claim to distrain upon the goods for rent on the former supposition.²⁵

Holding out as partner

9.8 The same estoppel arises in cases of partnership as in those of agency, for the partners in a firm are agents for one another.²⁶ Therefore, any person who represents, or allows it to be represented, to another or to a class of which that other is a member, that the relationship of partnership exists between him and a third person is estopped, as against a representee who has given credit to the person so held out as a partner, from denying the existence of the relationship at the time when it was stated to exist.²⁷

No estoppel

9.9 Where, however, the representee fails to establish either a definite and unambiguous representation, or acts and conduct from which such a

- 23 *Garrard v Lewis* (1882) 10 QBD 30 (Bowen LJ), at 35; *Nash v De Freville* [1906] 2 QB 72, CA, at 83; *Lloyds Bank v Cooke* [1907] 1 KB 794, CA. But the apparent authority may be modified by the act of the maker in crossing the cheque 'not negotiable': *Wilson and Meeson v Pickering* [1946] KB 422. See further 11.76 for the provisions of s 20 of the Bills of Exchange Act 1882 which apply.
- 24 *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168 at 175-7; *London Joint Stock Bank v Simmons* [1892] AC 201, HL. Transfers in blank are expressly authorised by the Stock Transfer Act 1963 for the purpose of stock exchange transactions, but see also s 67 of the Finance Act 1963.
- 25 *Miles v Furber* (1873) LR 8 QB 77 at 82.
- 26 See s 5 of the Partnership Act 1890.
- 27 *Waugh v Carver* (1793) 2 Hy BI 235 at 246; *Gurney v Evans* (1858) 3 H & N 122; *Martyn v Gray* (1863) 14 CB (NS) 824; *Hogg v Skeen* (1865) 18 CB (NS) 426; *Re Pulsford, ex p Hayman* (1878) 8 Ch D 11; *In re Rowland and Crankshaw* (1866) 1 Ch App 421, CA, at 424 (Lord Cranworth LC); *Mollwo March & Co v Court of Wards* (1872) LR 4 PC 419, at 435 (Sir Montague Smith); *Scarv v Jardine* (1882) 7 App Cas 345, HL, at 349 (Lord Selborne LC); *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397. The rule, enacted as s 14 of the Partnership Act 1890, reflects the common law: see *UCB Home Loans Corporation Ltd v Soni* [2013] EWCA Civ 62, CA, at [5] (Lloyd LJ). If the statutory estoppel is narrower in scope than the common law, this is only because it refers to the giving of credit as the only relevant act of reliance on the part of the estoppel raiser. As to this, see *Lindley & Banks on Partnership* (19th edn, 2010) at [5-43] (the giving of credit should not be construed in a technical or restrictive sense but as describing any transaction of the firm). In *Nationwide Building Society v Lewis* [1998] Ch 482, at 487A (Peter Gibson LJ), and in *Sangster v Biddulph* [2005] PNLR 33, at

representation may reasonably be implied,²⁸ or fails to establish that the representation was made to the representee, or to a class of persons under such conditions of publicity as to justify the inference that it was made to the representee as a member of that class, and was acted upon by him, it has always been held that there is no estoppel against disputing the agency,²⁹ or the partnership,³⁰ as the case may be.

Limitation on authority must be express

9.10 It follows, as a corollary from the main proposition set out above, that the representor, in the circumstances described, is estopped from asserting any limitation upon, or qualification of, the authority represented to have been conferred on the third person, just as much as he is from asserting its non-existence; for, in holding out the third person as his agent, or partner, he is deemed, in the absence of any indication to the contrary, to have represented the apparent authority to be of a general, absolute and unconditional character, unless he can show (and the onus is on him to show it) that, though not so informed by himself,

[18] (Etherton J), this was accepted as correct without argument. In *HMRC v Pal* [2008] STC 2442, at [33], Patten J held that giving credit does not include the registration of persons for VAT purposes, but rather denotes 'a private law transaction of some kind with the partnership which arises either directly or indirectly out of reliance on the representations made'. The section applies even if there is no partnership at all: *In re Stanton Iron Co* (1855) 21 Beav 164, at 169 (Romilly MR); *Bunny (D & H) Pty Ltd v Atkins* [1961] VR 61; *Spree Engineering & Testing Limited v O'Rourke Civil & Structural Engineering Limited*, 18 May 1999, unreported, at [29] (Stow QC); *UCB Home Loans Corporation Ltd v Soni*, above, at [21] (Lloyd LJ). Where, however, the court's jurisdiction depends on the *de facto* existence of a partnership (as under ss 220-1 of the Insolvency Act 1986) this cannot be established by an estoppel, eg by proving that A has held out B as his partner: see *In re C & M Ashberg* (1990) Times, 17 July (G Lightman QC). See also *Revenue & Customs Commissioners v Pal*, above, at [35]: in order for an alleged partner to be a 'taxable person' for VAT purposes, it is not enough that he be held out or that he held himself out as a partner; he must in fact have been carrying on business in partnership within s 45 of the Value Added Tax Act 1994.

- 28 *The Suwalki* [1989] 1 Lloyd's Rep 511 (Steyn J).
- 29 *Way v Great Eastern Rly Co* (1876) 1 QBD 692, at 695; *Farquharson Bros & Co v King & Co* [1902] AC 325, HL; *Bailey and Whites Ltd v House* (1915) 31 TLR 583. In *First Sport Ltd v Barclays Bank plc* [1993] 1 WLR 1229, the majority of the Court of Appeal held that the wording on a cheque guarantee card issued by the defendant bank did not clearly indicate that the bank would not pay against forged cheques supported by the card, and the bank was accordingly held liable to the representee on a forged cheque. See also *Elite Business Systems UK Ltd v Price* [2005] EWCA Civ 920; *PEC Ltd v Asia Golden Rice Co Ltd* [2014] EWHC 1583 (Comm) (Andrew Smith J) (in which the fact that the principal had previously fulfilled unauthorised contracts made by J on its behalf was not enough to amount to a representation that J had authority to conclude contracts for it; cf *The Ocean Frost* [1986] AC 717, HL, at 777, where Lord Keith said that apparent authority may arise where the agent has had a course of dealing with a particular contractor in which the principal acquiesced, honouring transactions arising out of it); *Dzekova v Thomas Eggar LLP* [2015] EWHC 2600 (QB) (Stewart J); *Galaxy Aviation v Sayegh Group Aviation* [2015] EWHC 3478 (Comm) (Andrew Smith J).
- 30 *Carter v Whalley* (1830) 1 B & Ad 11; *Fox v Clifton* (1830) 6 Bing 776; *Edmundson v Thompson and Blakey* (1861) 31 LJ Ex 207; *Spree Engineering & Testing Limited v O'Rourke Civil & Structural Engineering Limited*, 18 May 1999, unreported (Stow QC).

the representee had, from other sources, express or implied knowledge of the limitation, restriction or reservation sought to be set up.³¹ Difficult questions may arise in the case of modern corporations as to the extent of the apparent authority of an agent.³²

9.11 On the other hand, whenever the representee has failed to establish that the authority or agency asserted by the representor was of this absolute, unqualified and unconditional character, the estoppel has always been defeated, and the representor has not been precluded from setting up any restriction or condition which he brought to the notice of the representee at the time of making the representation, or before the representee altered his position to his detriment on the faith of the non-existence of any such qualification.³³

9.12 Furthermore, it is to be observed that, even where the representee has proved a representation of general authority sufficient to raise a *prima facie* case of estoppel against any assertion by the representor of a limitation upon an apparent general authority, it is still open to the representor, in his defence, to show that, although undisclosed by himself, such limitation was, from an external source, actually or presumptively known to the representee. The burden of establishing the representee's actual or presumptive knowledge is upon the representor: accordingly, wherever this onus has not been discharged, the estoppel, if otherwise good, has always been sustained.³⁴

- 31 *Baines v Swainson* (1863) 32 LJQB 281 at 289, per Blackburn J; *Edmunds v Bushell and Jones* (1865) LR 1 QB 281 at 289; *Waugh v H B Clifford & Sons Ltd* [1982] Ch 374; *The Raffaella* [1985] 2 Lloyd's Rep 36, CA; *Dornier GMBH v Cannon* (1991) SC 310, Ct of Session, 1st Division; *Freeman v Sovereign Chicken Ltd* [1991] IRLR 408, EAT; *Credit Lyonnais v Export Credit Guarantee Department* [1996] 1 Lloyd's Rep 200 (Longmore J).
- 32 In *British Bank of the Middle East v Sun Life Insurance Co of Canada (UK) Ltd* [1983] 2 Lloyd's Rep 9, HL, a lender wrote to the 'general manager' of a company seeking confirmation that the 'unit manager' had authority to bind the company to enter into a guarantee. The letter was answered affirmatively by a 'branch manager' giving the requisite confirmation. Neither the unit manager nor the branch manager had authority to bind the company to enter into the guarantee, and there was no office of general manager. The company was held not to be bound by either unauthorised representation: the letter had been written to a 'top manager' (see at 17 per Lord Brandon) but was not answered by one. In *The Ocean Frost* [1986] AC 717, HL, the agent was known by the other party not to have general authority to enter into the specific transaction, but it was argued (unsuccessfully) that he had ostensible specific authority to do so. In *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, CA, it was held that the senior manager of a provincial branch of a bank had been clothed with ostensible authority to communicate that head office approval for a loan had been given, although he had no authority to sanction the loan. See also *Credit Lyonnais Bank Nederland v Export Credit Guarantee Department*, above.
- 33 *Australian Bank of Commerce v Perel* [1926] AC 737, PC; in *Wilson and Meeson v Pickering* [1946] KB 422, CA, the crossing of an inchoate cheque 'not negotiable' reduced the apparent authority of the agent in consequence of s 81 of the Bills of Exchange Act 1882 ('Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had'); *Yona International Ltd v La Reunion Francaise Société Anonyme d'Assurances et de Reassurances* [1996] 2 Lloyd's Rep 84 (Moore-Bick J).
- 34 As in *Garrard v Lewis* (1882) 10 QBD 30 (Bowen LJ); *London and Joint Stock Bank v Simmons* [1892] AC 201, HL; *Re Henry Bentley & Co and Yorkshire Breweries Ltd, ex p Harrison*

Continuing nature of representation

9.13 There is another rule of estoppel, namely, the rule as to continuing representations and their revocation, the application of which to the present class of case gives rise to numerous illustrations. It follows from the principles governing these matters enunciated earlier in this work³⁵ that, where A has once held out X as his agent, or partner, to B, or to a class of which B is a member, the representation is regarded as a continuing one, unless and until, before the time when B acts, or further acts, to his detriment on the faith of it, A wholly or partially revokes it, and A is accordingly estopped from setting up against B any withdrawal or restriction of X's ostensible general authority, as originally represented to exist, of which he has not given B timely notice.³⁶ But no estoppel arises where the representor proves that he gave such notice of revocation to the individual representee, if the original representation was made to a specific person,³⁷ or, if it was made to a class of persons of whom the representee is one, on proof of notice by some means not less effectual to convey the withdrawal or restriction than were the means employed to convey the original 'holding out', to any member of that class.³⁸ Where the representor fails to discharge this onus, the estoppel prevails.³⁹

Representations of ownership or non-agency or independence

9.14 This is the converse of the type of case just discussed. It frequently happens that, whether from the motive of giving another a certain status and position, or with the object of safeguarding his own interests from inconvenient cross-claims, or in mere idleness, a man who is principal, or partner, of another, or is an incumbrancer upon his property, furnishes that other with all the indicia of absolute and unincumbered ownership, and either deliberately suppresses, or

(1893) 69 LT 204; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168 (Pickford J); *Hopkins v T L Dallas Group Ltd* [2004] EWHC 1379 (Ch) (Lightman J).

35 See Ch 5.

36 See *Carter v Whalley* (1830) 1 B & Ad 11, at 13-4 (Parke B); cf the observations of Lord Selborne LC at p 33 of *Debenham v Mellon* (1880) 6 App Cas 24, HL. See also *Scarf v Jardine* (1882) 7 App Cas 345, HL, at 356-7 per Lord Blackburn: 'where a person has given authority to another (it is not peculiar to partnership) the authority being such as would apparently continue, he is bound to those who act upon the faith of that authority, though he has revoked it, unless he has given the proper notice of the revocation'. More recently, see *Morgan v Lifetime Building Supplies Ltd* (1967) 61 DLR (2d) 178; *Crabb v Arun DC* [1976] Ch 179, CA, at 193 (Scarman LJ); *Rockland Industries Inc v American Minerals Corp of Canada Ltd* (1980) 108 DLR (3d) 513 (Sup Ct of Can); *Puplampu v Pathfinder Mental Health Service NHS Trust*, EAT, 20 September 2001, Official Transcript, at [6]. See also s 36 of the Partnership Act 1890, setting out the position in the case of partnership.

37 As in *Goode and Bennion v Harrison* (1821) 5 B & Ald 147; *Drew v Nunn* (1879) 4 QBD 661, CA; *Re Hodgson, Beckett v Ramsdale* (1885) 31 Ch D 177, CA.

38 See *Godfrey v Turnbull* (1795) 1 Esp 371; *Williams v Keats* (1817) 2 Stark 290; *Trueman v Loder* (1840) 11 Ad & El 589; cf *Willis Faber & Co Ltd v Joyce* (1911) 104 LT 576.

39 In *re Fraser* [1892] 2 QB 633, CA.

omits to disclose, the existence of his claims upon, or his connection with, the other person, as principal, partner, incumbrancer, or otherwise. He thus provides all the scenic apparatus by which his agent or debtor may pose as unaccountable to anyone. Indeed, he may go further and covertly pull the strings by which the puppet is made to assume the appearance of independent activity. This amounts to a representation by silence and inaction, or by negligence, types which have already been discussed in detail⁴⁰ – as well as by conduct, that the person so armed with the external indications of independence is in fact unrelated and unaccountable to the representor as agent, debtor, or otherwise, and accordingly estops the representor from afterwards asserting, as against anyone dealing with the supposed independent person as if he were so in reality, the existence of any such relation or accountability, or from setting up any claim, incumbrance, or security which he otherwise would have been entitled to establish against the third person to the exclusion or prejudice of any claim against that person, or any set-off against himself, which may be advanced by the representee. In relation to the sale of goods, the rule has been judicially stated as follows:

‘Where goods are placed in the hands of a factor for sale, and sold by him in circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the seller is not permitted afterwards to turn round and tell the purchaser that the character he has himself allowed the factor to assume did not really belong to him.’⁴¹

Another group of cases forming examples of this type of estoppel are those in which it has been declared that, where a man by conduct or inaction, or both, has represented that he is not, or that, having once been, he is no longer, a partner or interested in a company or an undertaking, business, adventure or concern, and has disowned any association or connection with it, or has acquiesced in the determination, by forfeiture or otherwise, of any such interest therein as he may have formerly possessed, he is estopped afterwards, as against that company, from claiming to be a member thereof, and from denying, when that enterprise turns the corner, that independence of and disconnection with it, which he formerly found to his advantage to assert.⁴² And, generally, whenever a person, having a claim or incumbrance or right against, or on, or in respect of, a third person or his property, either designedly suppresses it, or carelessly omits to assert it at the proper time, and holds out such third person as, or encourages and enables him to present the appearance of, one who is entirely independent and entitled, so far as he (the representor) is concerned, to deal with the property as if it were wholly unincumbered, he is precluded, as against any representee who has, to his detriment, given credit to, or dealt with, the third person on the footing of the entire independence so represented to exist, from afterwards setting up any such

40 See 3.9 onwards, 3.27 onwards.

41 Per Wilde CJ at pp 691–2 of *Fish v Kempton* (1849) 7 CB 687; cf *Borries v Imperial Ottoman Bank* (1873) LR 9 CP 38.

42 *Prendergast v Turton* (1843) 13 LJ Ch 268; *Rule v Jewell* (1881) 18 Ch D 660; *Palmer v Moore* [1900] AC 293; *Jones v North Vancouver Land and Improvement Co* [1910] AC 317, PC.

claim, incumbrance or right.⁴³ But the estoppel fails, whenever any representee is unable to establish that the alleged representation of independence or dissociation was made to him either expressly, or by reasonable implication from the conduct, or inaction of the representor;⁴⁴ or where the only representation proved is of an ambiguous or equivocal character,⁴⁵ or where the representee, having succeeded in establishing a *prima facie* estoppel, is met by proof that he had at all material dates actual or presumptive knowledge of the connection between the representor and the third person,⁴⁶ such knowledge on the part of the representee precluding him from contending that he was induced to act by the representation. It is for the representor to prove that the representee had such knowledge, at least in the sense that the burden lies upon him of adducing such evidence in answer to the representee’s statement that he was induced.⁴⁷

Holding out a third person as principal of the representor

9.15 Where B represents to A that he is acting for a principal, but does not name him, there is no ground on which B can be estopped as against A from afterwards asserting that he is, and was all the time, his own principal. Obviously there is no inconsistency between the two statements, and the representee, who was content to render himself liable to a principal without ascertaining his name, can have no cause for complaint, since the identity of the principal can make no possible difference to him.⁴⁸ But it may be otherwise where B represents to A that his principal is X. In that case, B may be estopped, as against A, from declaring at any subsequent time, before the contract or transaction has been wholly performed or carried through, that any person other than X is his principal, or, therefore, that he (B) is his own principal, if the personality of X, from the point of view of skill, financial responsibility or character as compared with that of B, was a material inducement to A to enter into the contract or transaction, in the sense that he would not have done so if he had been informed by B, or had

43 *Rice v Rice* (1854) 2 Drew 73; *Briggs v Jones* (1870) LR 10 Eq 92 (Lord Romilly MR); *Gordon v James* (1885) 30 Ch D 249, CA; *Bickerton v Walker* (1885) 31 Ch D 151, CA; *Brocklesby v Temperance Permanent Building Society* [1895] AC 173, HL; *Lloyds Bank v Bullock* [1896] 2 Ch 192 (Chitty J); *Rimmer v Webster* [1902] 2 Ch 163 (Farwell J); *Powell v Browne* (1907) 97 LT 854; *In re King’s Settlement, King v King* [1931] 2 Ch 294 (Farwell J).

44 *Clarke v Hart* (1858) 6 HL Cas 633, at p 671; contrast the cases cited in n 42, which illustrate the kind of conduct, inaction or acquiescence which does amount to a representation of dissociation with the company or concern: *Bowie’s Trustees v Watson* [1913] SC 326.

45 *Shropshire Union Rly and Canal Co v Robson* (1875) LR 7 HL 496; *Burgis v Constantine* [1908] 2 KB 484, CA; *Carritt v Real and Personal Advance Co* (1889) 42 Ch D 263 (Chitty J).

46 *Waring v Favenck* (1807) 1 Camp 85; cf *Semenza v Brinsley* (1865) 18 CBNS 467.

47 *Bickerton v Walker* (1885) 31 Ch D 151, CA; *Hone v Boyle Low Murray & Co* (1890) 27 LR Ir 137, CA; *Marshall v National Provincial Bank of England* (1892) 61 LJ Ch 465.

48 *Schmaltz v Avery* (1851) 16 QB 655, where a charterparty having been executed by the plaintiffs, described as ‘agents for the freighters’, and the defendants having afterwards declared themselves to be the freighters, it was held that they were not precluded from asserting that they were their own principals, or from claiming, in that character, against the shipowners for breach of the charterparty (per Patteson J, delivering the judgment of the court, at 659–61), and where (at 662–3) *Rayner v Grote* (1846) 1 M & W 359 was distinguished.

believed, that B, or any person other than X, was the party in whose skill, integrity or solvency he was to confide;⁴⁹ and B may equally be estopped by any representation that he was acting as agent only for X, which led A into a transaction which, if the representation had been true, would not have been obnoxious to a statute rendering transactions of the nature in question unenforceable as between principals.⁵⁰ Where, however, the contract or transaction between the parties has been wholly performed or carried through at the time when the representation is sought to be made against which the estoppel is raised, or where, whether or not this be so, the personality of X is not of the slightest materiality to A, B is not estopped from denying that X is his principal;⁵¹ nor is he so estopped in any case when he is able to establish that A had actual or presumptive knowledge that B's principal was himself, or some person other than X.⁵²

Representations that the representor has no principal

9.16 This is the converse case to that last discussed. Just as the representor may under certain conditions be estopped from denying, so here he may be estopped under corresponding conditions from asserting, that he was at the time of the representation acting solely as agent for a principal. The conditions in the latter class of case are that the representee be proved to have acted to his prejudice on the faith of the non-existence of such principal.⁵³

Questions of law and fact

9.17 It is a question of fact whether, there being evidence both ways, the particular words or acts said to constitute the 'holding out' were, or were not, used or done by the representor respectively.⁵⁴ It is a question of law, however,

- ⁴⁹ It was so stated by Alderson B, delivering the judgment of the Court of Exchequer, in the following passage at p 365 of *Rayner v Grote*, above: 'if, indeed, the contract had been wholly unperformed ... the question might admit of some doubt. In many cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then state himself to be the real principal, and sue in his own name; and perhaps it may be fairly argued that this, in all, executory contracts, if wholly unperformed, or if partly performed, without the knowledge of who is the real principal, may be the general rule'.
- ⁵⁰ As in *Moore v Peachey* (1891) 7 TLR 748, where it was held (per Collins J, at 749) that the defendant having represented himself as a turf commission agent, and not a bookmaker, by express statements on his card and book of terms, as well as by other acts, was 'estopped by his conduct from saying that he betted as a principal', and from taking advantage of the Gaming Act 1845.
- ⁵¹ This may be inferred from the passage cited in n 49, from *Rayner v Grote* (1846) 1 M & W 359.
- ⁵² This was the actual decision in *Rayner v Grote*, above: see at 365-6 (Baron Alderson).
- ⁵³ The only instances in the books appear to be cases of women holding themselves out as a feme sole or widow. For further details, see the fourth edition, [IX.2-12], n 1.
- ⁵⁴ As in *Filmer v Lynn* (1835) 4 Nev & M KB 559; *Martyn v Gray* (1863) 14 CBNS 824; *Debenham v Mellon* (1880) 6 App Cas 24, HL, at 32-3; *Maddick v Marshall* (1864) 17 CBNS 829; *Durrant v Holdsworth* (1886) 2 TLR 763.

whether there is any evidence at all of such words or conduct, and also whether the alleged, or any, representation can properly be inferred from the proved or admitted or assumed words or conduct of the representor.⁵⁵

LANDLORD AND TENANT

9.18 Where, by his acts with respect to demised land, a person represents to another that he acknowledges the other as his landlord, or as his tenant (as the case may be), or conducts himself in his dealings with the other in relation to the land in a manner which is consistent only with a recognition and assertion of the subsistence and validity of such a relation between them, he is estopped, as long as the acts and conduct continue, from denying that the other party had an estate or title sufficient to warrant the demise of the land, or (as the case may be) from denying the validity of the other party's tenancy and his right to enjoy possession of the premises in that character, and from setting up against the other party any title, interest, or right in himself, or in anyone else, which contradicts the right, title and interest so acknowledged.⁵⁶ It will be noticed that, as in the case of other relationships, the estoppel against disputing the relation of landlord

- ⁵⁵ See *Carter v Whalley* (1830) 1 B & Ad 11; *Edmundson v Thompson* (1861) 31 LJ Exch 207; *M'Iver v Humble* (1812) 16 East 169; *Dickinson v Valpy* (1829) 10 B & C 128; *Schmaltz v Avery* (1851) 16 QB 655; *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174, PC; *George Whitechurch Ltd v Cavanagh* [1902] AC 117, HL; *Farquharson Bros & Co v King & Co* [1902] AC 325, HL; *Morel Bros v Earl of Westmoreland* [1904] AC 11, HL; *Paquin Ltd v Beauclerk* [1906] AC 148, HL; *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA; *Baring v Corrie* (1818) 2 B & Ald 137; *Wilson v Anderton* (1830) 1 B & Ad 450; *Miles v Furber* (1873) LR 8 QB 77; *Société Generale v Metropolitan Bank Ltd* (1873) 27 LT 849; *Way v Great Eastern Rly Co* (1876) 1 QBD 692; *Shaw v Port Philip and Colonial Gold Mining Co Ltd* (1884) 13 QBD 103; *Lea Bridge District Gas Co v Malvern* [1917] 1 KB 803; *Waller v Drakeford* (1853) 1 E & B 749; *Herdman v Wheeler* [1902] 1 KB 361; *French v Howie* [1906] 2 KB 674, CA; *In re Jones Bros, ex p Associated Newspapers* [1912] 3 KB 234; *Semenza v Brinsley* (1865) 18 CB NS 467; *Borries v Imperial Ottoman Bank* (1873) LR 9 CP 38; *British Linen Co v Cowan* (1906) 8 F 704 (Scotland). (For further details concerning these cases, see the fourth edition, [IX.2-13], n 3.)
- ⁵⁶ See for instance *Cooke v Loxley* (1792) 5 Term Rep 4; *Mackley v Nutting* [1949] 2 KB 55, CA. Spencer Bower stipulated that, in a case of tenancy by estoppel, 'all the other conditions of a valid estoppel by representation must be satisfied'. It is, however, the case that such a tenancy will arise even if, at the time of the representation, the tenant knows that the landlord does not own the reversion out of which he purports to grant the lease: *Morton v Woods* (1869) LR 4 QB 293, Ex Ch; *E H Lewis & Son Ltd v Morelli* [1948] 2 All ER 1021, CA. It should also be noticed, when the requirement of inducement is being considered, that this type of estoppel is one which rests on an assumption of fact derived, not from misrepresentation but from the convention of the parties; cf 8.32 onwards; *National Westminster Bank Ltd v Hart* [1983] QB 773, CA, at 778. The analogy between this type of estoppel, albeit that the tenancy may be created orally, and estoppel by deed, was noted by Harman J in *E H Lewis & Son Ltd v Morelli*, above, at 1024. It is the tenancy which creates the estoppel, and not the estoppel which gives rise to the tenancy; the estoppel arises when one or other of the parties wants to deny one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate. The basis of the estoppel is that, having entered into an agreement which constitutes a lease or tenancy, he cannot repudiate that obligation: see *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406, HL, at 416 (Lord Hoffmann). It is the fact that the

and tenant is a reciprocal one.⁵⁷ The obvious fairness of this rule, particularly that side of it which requires that the tenant shall be estopped from disputing his landlord's title, has often been insisted upon in the authorities. 'This state of law', it was said in *Cuthbertson v Irving*,⁵⁸ 'in reality tends to maintain right and justice, and the enforcement of contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is?'. And other cases commend the rule for its convenience, policy, good sense and justice.⁵⁹

Acts and conduct of the tenant which involve a recognition of the landlord's title

Acceptance of lease

9.19 The simplest example of an act by the tenant amounting to a representation and recognition of the landlord's title is the act of accepting a lease from

agreement between the parties constitutes a tenancy that gives rise to the estoppel and not the other way round. A tenancy by estoppel may arise by agreement between the landlord and the tenant: *ibid.* A tenancy by estoppel of business premises is capable of attracting the protection of Part II of the Landlord and Tenant Act 1954: *Bell v General Accident Fire and Life Assurance Corp Ltd* [1998] 1 EGLR 69, CA. In *First National Bank plc v Thompson* [1996] Ch 231, CA, Millett LJ, having at 236 commented that Spencer Bower's 'valiant attempt' to demonstrate that all estoppels other than estoppel by record were subsumed in the single and all-embracing doctrine of estoppel by representation, and were all governed by the same requirements had been shown to be unsound (but see 1.29, 1.104), indicated at 237 that 'title by estoppel' covered (a) a species of estoppel by representation, involving a clear representation of title by the grantor, and (b) an example of the common law principle that, quite apart from any representation, a grantor is precluded from disputing the validity or effect of his own grant. At 239 he observed that the former operated so as to estop the grantor from denying that he had the particular title which he had asserted, and he could be estopped even if he had a lesser estate; the estoppel bound the grantor and all claiming under him, whether for value, and with, or without, notice. The latter estopped the grantor from denying that he had a legal title, but no title by estoppel could arise if the grantor had a lesser estate; the grantee would obtain an estate 'in interest' but it could not exceed the estate of the grantor; the estoppel did not bind a bona fide purchaser for value without notice. See 8.90 onwards.

⁵⁷ As to reciprocity generally, in cases of estoppel by representation between two persons in a contractual or other relation, see 6.11. The importance of mutuality in landlord and tenant cases is illustrated in *Otago Harbour Board v Spedding* (1886) 4 NZLR 272. Here a landlord executed a lease which it had no power by law to grant. It was clear that the landlord could not be estopped from setting up the illegality of the contract. When therefore the landlord contended that the tenant was estopped from denying the validity of the lease, it was held that lack of mutuality was fatal to the submission of estoppel.

⁵⁸ (1859) 4 H & N 742.

⁵⁹ See *Cooke v Loxley* (1792) 5 Term Rep 4, at 5 per Lord Kenyon CJ ('It ought not to be permitted to a tenant who occupies land by a licence of another to call upon that other to show the title under which he let the land. This is not a mere technical rule, but is founded on public convenience and policy') and per Grose J on the same page. Cf *Parker v Manning* (1798) 7 Term Rep 537 at 539 and *Alchorne v Gomme* (1824) 2 Bing 54 at 61. The rule can be justified on the basis that, historically, title to land in English law was relative, and not absolute.

him and going into possession, which of itself precludes the party so accepting the lease from setting up, as against the party granting it, any plea disputing the existence of an estate in the grantor sufficient to warrant the grant of the lease.⁶⁰ Generally speaking, not only any person who accepts a lease from another, but anyone who is let into possession or occupation by, or 'comes under' another, including a licensee,⁶¹ lodger, caretaker, servant and the like, by so doing acknowledges the title of that other to grant the right or licence by virtue of which he occupies the premises, and is accordingly estopped, so long as he remains in occupation, from controverting such title.⁶² But the transaction must be one of demise, or of licence,⁶³ and the party sought to be estopped must have his grant or receive his possession from the party raising the estoppel.⁶⁴

9.20 One who is in possession pursuant to a demise or licence from one landlord or licensor may, upon his term or licence coming to an end (for example, in the case of a licence revocable at will, by the death of the licensor), be deemed to have been let into possession afresh by the person who succeeds to the title of that landlord or licensor, notwithstanding that his physical possession has been continuous, and thereupon, by such an act, equivalent to attornment to the new landlord or licensor, as the payment of rent or dues to him, may become estopped as against such new landlord or licensor from denying the title of the latter. Thus in *Terunnanse v Terunnanse*,⁶⁵ a licence having been terminated by the death of the licensor, the licensee remained in possession, and thereafter paid dues to the successor of the licensor. It was held by the Judicial Committee that he was estopped thereby from denying the latter's title; notwithstanding that he had not been let physically into possession by the successor – he was already in

⁶⁰ *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, CA, at 596 (Lord Denning MR).

⁶¹ *Government of Penang v Oon* [1972] AC 425, PC, at 433.

⁶² 2 Coke on Littleton at 352a ('Acceptance of an estate'); *Cuthbertson v Irving* (1859) 4 H & N 742, at 758 (Martin B); *Williams v Heales* (1874) LR 9 CP 177, at 183–6 (Keating, Brett and Denman JJ); *Weeks v Birch* (1893) 69 LT 759. The licence cases are illustrated in *R v Swifte* [1913] 2 Ir R 113 (caretaker of a football ground) and *Tadman v Henman* [1893] 2 QB 168, in which case it was held to be no estoppel against the alleged licensee, because he was never let into possession of, or went upon, the land, but the absence of any distinction between the case of a licensee and tenant, for the purposes of estoppel, was fully recognised by Charles J at 171.

⁶³ *Crofts v Middleton* (1855) 2 K & J 194 at 204–5; *Government of Penang v Oon* [1972] AC 425, PC.

⁶⁴ 'There is a distinction', as pointed out by Patteson J at 206–7 of *Hall v Butler* (1839) 10 Ad & El 204, 'between disputing the title of one who has actually let the party into possession, and of one who afterwards claims to be entitled to it'. The following are illustrations of the failure of the estoppel set up on the ground that the party sought to be estopped had not been let into possession of the premises by the party setting up the estoppel: *Brook v Biggs* (1836) 2 Bing NC 572 (per Tindal CJ at 574); *Gaunt v Wainman* (1836) 3 Bing NC 69, at p 574 (Tindal CJ); *Doe d Marchant v Errington* (1839) 6 Bing NC 79, at 83–4 (Tindal CJ) and 84 (Coltman and Maule JJ).

⁶⁵ [1968] AC 1086, PC. Although the case was from Ceylon, where the law of estoppel had been codified, s 100 of the Ordinance provided that 'whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or by other law in force in Ceylon, such question shall be determined in accordance with the English law of evidence for the time

possession at the date of the death of the licensor – he was deemed to have been let into possession afresh,⁶⁶ and thereafter only the payment of dues was necessary to complete the foundation for an estoppel as to title.

Payment of rent

9.21 Payment of rent by a person in occupation of the premises to the person who let him into possession is an acknowledgment by the former of the latter's right to such rent and therefore of his title as landlord, which the former is accordingly estopped from disputing.⁶⁷ The payment, however, must be satisfactorily proved, and it must be established that it was expressly or by necessary implication made as and for rent for the premises.⁶⁸ Where the person receiving the payment was not the person who let the payer into possession, but someone who is claiming title as the latter's assign, or successor, or otherwise, the mere act of paying the money as and for rent, without more, is not conclusive, and does not estop the payer from afterwards disputing the payee's title, if he can explain away the payment by showing that he made it in mistake, misapprehension, ignorance or incomplete knowledge of the circumstances of the payee's title, or of other material facts.⁶⁹ Still less can he be denied the right and opportunity of showing that any such misapprehension or ignorance was brought about or fostered or encouraged by fraudulent misrepresentation or fraudulent concealment

being'. The decision of the Board was therefore one made in accordance with the principles of the common law.

- ⁶⁶ On an application of the principle in *Foster v Robinson* [1951] 1 KB 149, CA, at 157–8, for which see 9.42.
- ⁶⁷ And the tenant was accordingly so estopped in *Cooke v Loxley* (1792) 5 Term Rep 4; *Cuthbertson v Irving* (1859) 4 H & N 742, affd (1860) 6 H & N 135; *Duke v Ashby* (1862) 7 H & N 600; *Weeks v Birch* (1893) 69 LT 759. In *Moncure v Cahusac* [2006] UKPC 54 there was a five-year lease, with options for the tenant to obtain nine renewals of the lease, with an increased rent at each renewal. The tenant failed to exercise the second option, but remained in occupation as if he had, paying the increased rent, which the landlord accepted over the next five years; it was held that the landlord was estopped from denying that the option had been exercised. At [33], Lord Scott suggested that there are two possible explanations for a tenancy arising on the payment and acceptance of rent: an estoppel by representation, or a contract by conduct.
- ⁶⁸ See *A-G v Stephens* (1855) 6 De GM & G 111; *Batten-Pooll v Kennedy* [1907] 1 Ch 256 (Warrington J).
- ⁶⁹ As in *Fenner v Duplock* (1824) 2 Bing 10, where the party paying the rent was ignorant, or rather was not proved to have been fully aware, that the payee had only an estate *pur autre vie* in the premises, which estate had expired (per Best CJ at p 11: 'before he can be so bound, it must appear that he was acquainted with the circumstances of the landlord's title'); *Gregory v Doidge* (1826) 3 Bing 474 (*per curiam*, at 475, 476), a similar case; *Doe d Harvey v Francis* (1837) 2 Mood & R 57 (per Patteson J at p 58: 'where a tenancy is attempted to be established by mere payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent'); *Doe d Higginbotham v Barton* (1840) 11 Ad & El 307, a case of payment of rent in ignorance of the fact that the premises had been previously mortgaged by the recipient of the rent (per Lord Denman CJ at 312–3: 'with respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by such payment of rent, if he can show that it was paid under a mistake'); *Jew v Wood* (1841) Cr & Ph 185 (per Lord Cottenham LC at 194), a similar

of material facts on the part of the person receiving the payment, and founding thereon his claim to the benefit of an estoppel.⁷⁰ But, in the absence of fraud, the payment of rent by the tenant to any person is *prima facie* evidence of that person's title; thereafter, it is not sufficient for the tenant to show that the person to whom he has been paying had no title, his receipt of the rent being sufficient until a better title is shown.⁷¹

Submission to distress

9.22 Submission to a distress for rent is, in like manner, a recognition of the distrainer's title as landlord which gives rise to an estoppel.⁷² Indeed, it is a more conclusive and unequivocal recognition than any voluntary payment of money: for submission to any act which, unless done in the character of landlord, would be a gross outrage, is of itself obviously inconsistent with any attitude but that of acknowledging the distrainer's right to assume that character; whereas, as has just been pointed out, the mere payment of a sum, or of periodical sums, of money is not an act which, of itself, always and necessarily imports such an acknowledgment.

Attornment

9.23 Where a tenant, with full knowledge of the facts, either expressly in writing, or impliedly by acts, such as the payment of rent, attorns tenant to a person other than his original landlord or one who is claiming the estate or interest of such original landlord by assignment, succession, or otherwise, he is ordinarily estopped from questioning the title of the person to whom he has so attorned.⁷³ But here, too, it is open to the party sought to be estopped to explain away the

case to the last; *Claridge v Mackenzie* (1842) 4 Man & G 143, a case of the same class as the first two cited in this note (per Tindal CJ at 153–4, Coltman J at 155, Erskine J at 155–7, and Cresswell J at 157); *Knight v Cox* (1856) 18 CB 645, where rent had been paid to the plaintiff and executrix and devisee of the administratrix of the survivor of three lessors in ignorance of the facts showing that neither the plaintiff, nor her testatrix, had any title whatever (*per curiam*, at 650–1); *Serjeant v Nash, Field & Co* [1903] 2 KB 304, CA, at 314–5 (Stirling LJ) and 316 (Mathew LJ); *Batten-Pooll v Kennedy* [1907] 1 Ch 256, a case of mere 'voluntary payment under a supposed legal obligation' which did not exist: at 268–9 (Warrington J). The rule is recognised in the following cases where the facts were not such as to bring the tenant within its protection: *Cooper v Blandy* (1834) 1 Bing NC 45, at 52 (Bosanquet J); *Carlton v Bowcock* (1885) 51 LT 659, at 660 (Cave J). Whether there was such ignorance or mistake is a question of fact: *Fenner v Duplock*, above, at 11 (Best CJ) and 12 (Burrough J); *Claridge v Mackenzie*, above, at 153–4 (Tindal CJ).

- ⁷⁰ For illustrations of payment of rent by the tenant under a mistake induced by the landlord's representation, see *Rogers v Pitcher* (1815) 6 Taunt 202; *Gravenor v Woodhouse* (1822) 1 Bing 38; *Doe d Plevin v Brown* (1837) 7 Ad & El 447. The rule is also referred to in *Carleton v Bowcock* (1885) 51 LT 659.
- ⁷¹ *Hindle v Hick Bros Manufacturing Co Ltd* [1947] 2 All ER 825, CA.
- ⁷² See *Panton v Jones* (1813) 3 Camp 372, at 373 (Bayley J), *Cooper v Blandy* (1834) 1 Bing NC 45, at 52 (Bosanquet J).
- ⁷³ As in *Rennie v Robinson* (1823) 1 Bing 147, at 149 (Dallas CJ); *Morton v Woods* (1869) LR 4 QB 293, Ex Ch, at 303 (Kelly CB).

attornment, and so escape the estoppel to which he would otherwise be subject, by proof that, when he so attorned, he was labouring under mistake or ignorance as to material facts affecting the title of the person to whom he attorned, particularly if such error or ignorance was due to the fraud of that person.⁷⁴

9.24 Where an equitable assignee of a lease has applied to the landlord for, and has been granted, a consent to a legal assignment to him of the lease, and has thereafter paid rent, but has taken no legal assignment, he may be precluded from contending (by way of defence to an action for rent) that he is not a legal assignee;⁷⁵ but where an under-lessee in possession has paid rent, while he will thereby be estopped from denying the title of him to whom the rent is paid, yet by these acts alone he will not be estopped from denying that he is the assignee of the lease – for his conduct cannot be said to be unequivocal in this regard.⁷⁶

Acts on the part of the landlord which involve recognition of the tenancy

9.25 These acts are the counterparts of the acts by which the tenant acknowledges the landlord's title. The first and simplest of them is the grant of a lease, which act, of itself, imports a recognition of the tenant's right to possession of the premises as such, and the validity of the lease, which he is accordingly estopped from afterwards contradicting, as against the tenant,⁷⁷ just as, conversely, the tenant, by the mere act of accepting the lease, is estopped from afterwards denying the right of the landlord to grant it.

9.26 Just as payment of rent by the tenant ordinarily estops him from disputing his landlord's title, so the acceptance of rent by the landlord ordinarily estops him from disputing his tenant's right to possession of the premises, as such, and the validity of the lease or demise.⁷⁸ But the acceptance by a lessor, without more, of rents due under a lease from a stranger who has, without notice to him, stepped into the shoes of a deceased lessee, will not be effective to estop the lessor from asserting a claim to possession.⁷⁹ And the mere demand of rent by a landlord, after the expiration of notice to quit, is not necessarily even evidence,

much less a conclusive recognition, of a new tenancy, or of the continuance of the tenant's right to possession: it is a question of fact, to be determined with reference to this and the other circumstances of the case, whether such was the intention and effect of the demand.⁸⁰

9.27 Where the landlord has received the rent in mistake or without any reason to suppose that the term was not properly vested or had ceased to be vested, in the person paying the rent, or otherwise in ignorance or imperfect knowledge of facts giving him a right to refuse the rent, or to put an end to the tenancy, there is no estoppel.⁸¹

9.28 Just as the tenant is estopped from disputing his landlord's title by submission to a distress for rent, and even more unqualifiedly estopped thereby than by voluntary payment, as has already been observed,⁸² so the landlord is estopped from disputing his tenant's right to possession, as such, by levying a distress which is acquiesced in by the tenant,⁸³ and even more clearly so estopped than by acceptance of rent, which can be explained, whereas, 'of course by a distress, the distrainer affirms by solemn act that a tenancy subsists', and such act 'cannot be qualified'.⁸⁴

9.29 Where a landlord without title purports to serve on his tenant a notice to quit, or purports to forfeit the tenancy, he may be estopped from denying the validity of the notice or the forfeiture.⁸⁵

'Election cases'

9.30 As will be seen when the topic of election is later considered,⁸⁶ the relationship of landlord and tenant furnishes many examples of cases where, if given alternative courses of action of which he may choose one, a landlord's election becomes binding upon him and precludes him thereafter from pursuing the other.

Who are entitled and bound by the estoppel

9.31 The following persons are liable as successors to the estoppel which in the first instance operates against the representor, whether tenant, or (as the case

74 *Rogers v Pitcher* (1815) 6 Taunt 202, at 210; *Gravenor v Woodhouse* (1822) 1 Bing 38, at 43–4; *Cornish v Searell* (1828) 8 B & C 471, at 475; *Doe d Plevin v Brown* (1837) 7 Ad & El 447; *Jew v Wood* (1841) Cr & Ph 185, at 194; *Pearce v Boulton*; *Boulton v R* (1902) 21 NZLR 464, CA.

75 *Rodenhurst Estates v WH Barnes Ltd* [1936] 2 All ER 3, CA.

76 *Official Trustee of Charity Lands v Ferriman Trust Ltd* [1937] 3 All ER 85.

77 *Cuthbertson v Irving* (1859) 4 H & N 742 (Martin B); *Ward v Ryan* (1875) IR 1 CL 17, at 21; *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, CA.

78 See 2 Coke on Littleton at 352(a) ('acceptance of rent'); *Strong v Stringer* (1889) 61 LT 470, at 472 (Kekewich J); *Hartell v Blackler* [1920] 2 KB 161, at 165–8 (Bailhache J) and 169 (Sankey J); and cf the landlord and tenant cases on election noted below.

79 *Tickner v Buzzacott* [1965] Ch 426 (Plowman J).

80 *Blyth v Dennett* (1853) 13 CB 178.

81 *Stait v Fenner* [1912] 2 Ch 504 (Neville J).

82 In 9.22.

83 See *Panton v Jones* (1813) 3 Camp 372, at 373 per Bayley J: 'the landlord after distraining cannot bring an ejectment'; *Cooper v Blandy* (1834) 1 Bing NC 45, at 53 (Bayley J); *Doe d David v Williams* (1835) 7 C & P 322, at 323 (Patteson J); *Walrond v Hawkins* (1875) LR 10 CP 342, at 348–50 (Lord Coleridge CJ) and 350–3 (Grove J).

84 *Blyth v Dennett* (1853) 13 CB 178 at 181.

85 *Farrow v Ortewell* [1933] 1 Ch 480, CA; *Rother District Investments Ltd v Corke* [2004] 2 P & CR 17 (Lightman J).

86 In Ch 13.

may be) landlord: any heir, devisee, or assignee of such representor's reversion, or term, as the case may be, and, generally, any person who 'came in', or is claiming 'under' him;⁸⁷ and any person licensed by a tenant to go or be upon the demised premises,⁸⁸ but not one who has a mere licence from the tenant to keep goods thereon which were previously his own and who has never acquired any interest in the land itself.⁸⁹ In *Mackley v Nutting*⁹⁰ the personal representative of a deceased person who had been admitted to possession by the plaintiff, and had paid rent thereafter, was held entitled to the benefit of the estoppel which would have been available to the deceased to establish a tenancy by way of a defence to an action for ejectment. But a mortgagee, who has excluded the statutory power of leasing, is not bound by a lease entered into by the mortgagor, and such a lease can take effect only by way of estoppel.⁹¹

Limits of the estoppel as between landlord and tenant

9.32 The validity of a lease is dependent on the landlord having a title sufficient to justify its grant; and to deny the existence of such a title is to attack the validity of the transaction into which the parties have entered, by removing its foundation. This is the classic basis of estoppels by convention and estoppels by deed;⁹² and, as against the landlord from whom he has taken possession, every tenant is consequently estopped from disputing the subsistence and validity of an estate in him, as at the date of the demise, sufficient to warrant the demise.⁹³ But this is the limit of his disability: he is not further or otherwise estopped, because it is only a denial so limited which necessarily results in that contradiction or inconsistency between the original and the new position which, as has already been explained,⁹⁴ is a condition of any valid estoppel by representation. Thus, in a case in which, at the time of granting the lease, the landlord did not own the legal estate in the land, but only an equitable interest under a contract for the sale and purchase of the land, in proceedings for damages for dilapidations brought by the landlord after the expiry of the term, the landlord was entitled to enforce the tenant's covenant to deliver the premises in good repair at the end of the term; it was irrelevant to the liability which had arisen at the conclusion of the term that, by the

time the proceedings had been commenced, the term had expired.⁹⁵ A tenant may dispute any estate, title or interest alleged by the landlord to be vested in him if, in so doing, he does not expressly or impliedly deny that the landlord had, at the date of granting the lease, an estate, title or interest of a kind adequate to justify the grant of that lease. Conversely a landlord, who refrains from disputing his tenant's title to possession as such, is not precluded from showing that the nature and quality of the tenancy is other or less than that asserted by the tenant.⁹⁶

9.33 As to the duration of the estoppel in point of time, a tenant who is estopped from disputing his landlord's title, or power to grant the lease, *at the date of the demise*, is nevertheless, if and when that title, or power to grant, subsequently lapses or comes to an end, at liberty to say so, and to contend that the landlord *no longer has such title or power*, because there is obviously no contradiction between his old and his new version of the facts. But he may still not deny that his landlord had that title or power as at the date of the demise;⁹⁷ his denial is limited to an assertion that the title or power which the landlord once had, he has no longer. Accordingly, if and when his landlord's title is determined, subsequently to the grant of the lease, either by his death, if he had an estate for life only, or by the death of another, if his estate was *pur autre vie*, or by the expiration of his own term, if he was a termor, or by any other means, the tenant, who was theretofore estopped from disputing his landlord's title, is no longer precluded from setting up against the landlord that the title, which he once had, has now been determined; and the landlord, under the like conditions, enjoys a corresponding freedom against the tenant.⁹⁸ So, where the landlord's title to the reversion was determined, but the landlord failed to notify the tenant of that fact, the tenant was not estopped from relying on the determination of the landlord's title in resisting the landlord's claim for rent in relation to the period after the determination, even though no third party had made a claim.⁹⁹ The estoppel, however, continues if there is no strict proof of the subsequent determination of the landlord's title which, as at the date of the demise, is the subject of the estoppel;¹⁰⁰ as, for instance, when it is shown that the title expired before, and not after, the commencement of the tenancy created by the estoppel,¹⁰¹ or where

87 *Cuthbertson v Irving* (1859) 4 H & N 742, adopting a passage from 2 Williams' Saunders 418a. This judgment was affirmed by the Court of Exchequer Chamber in a short judgment: (1860) 6 H & N 135. See, further, *London and North Western Rly Co v West* (1867) LR 2 CP 553, and 6.25-6.29.

88 As in *Doe d Johnson v Baytop* (1835) 3 Ad & El 188, at 191-2 (Patteson J) and 192-3 (Coleridge J). The liability of a tenant's licensee to estoppel is recognised by Charles J in *Tadman v Henman* [1893] 2 QB 168, at 171.

89 *Tadman v Henman*, above, at 170-1.

90 [1949] 2 KB 55, CA; followed in *Whitmore v Lambert* [1955] 1 WLR 495, CA.

91 *Dudley and District Benefit Building Society v Emerson* [1949] Ch 707, CA. But see also *Quennell v Maltby* [1979] 1 WLR 318, CA.

92 See *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] 59 CLR 641 (High Court of Australia) at 676.

93 See *Cuthbertson v Irving* (1860) 6 H & N 135.

94 See 4.4.

95 *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, CA.

96 *Ward v Ryan* (1875) IR 1 CL 17 at 21.

97 See *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, CA.

98 In view of the decision in *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, CA, the older authorities are no longer dealt with in detail. They are: *James v Landon* (1585) Cor Eliz 36; *Brudnell v Roberts* (1762) 2 Wils 143, 144; *Watson v Lane* (1856) 11 Exch 769, 773; *Langford v Selmes* (1875) 3 K & J 143, 144; *Watson v Lane* (1856) 11 Exch 220, 226; *Weller v Spiers* (1872) 26 LT 866; *Serjeant v Nash Field & Co* [1903] 2 KB 304, CA. *Harrison v Wells* [1967] 1 QB 263, CA, was overruled in the *Industrial Properties* decision.

99 *National Westminster Bank Ltd v Hart* [1983] QB 773, CA.

100 As in *Gibbins v Buckland* (1863) 1 H & C 732, at 738-9 (Pollock CB) and 739-740 (Martin B).

101 As in *London and North Western Rly Co v West* (1867) LR 2 CP 553, at 555 (Willes, Keating, Montague Smith JJ).

the tenant's evidence proves too much, and shows that the landlord never had any title at all – an assertion which the tenant is clearly estopped from making.¹⁰²

9.34 It has been said that the tenant may free himself from the estoppel by giving up possession;¹⁰³ but this is clearly too wide a statement. The mere expiry of his term, and his giving back possession to the lessor in consequence thereof, cannot so avail him; for, notwithstanding that he has given up possession in this way, he may still not dispute his lessor's title, or his power to grant the lease, and for the duration of the term granted.¹⁰⁴ It is only by acknowledging or by being compelled to acknowledge the validity of a claim to possession by some *tertius*, with the consequence of being put in peril of an adverse claim, that he is freed from the estoppel.¹⁰⁵

Eviction of tenant by title paramount

9.35 The estoppels which mutually bind a landlord and tenant are estoppels by convention;¹⁰⁶ and, when the lease is *de facto* as well as *de jure* 'disrupted' by the process of eviction by title paramount, there can be no injustice in allowing a tenant to establish this fact – and, indeed, this has always been allowed, and the tenant is permitted to use the evidence for the purpose of extinguishing completely any right to estoppel which the landlord might previously have enjoyed;¹⁰⁷ for it is here a case, not of the mere innocent determination of the landlord's estate, but of the dispossession of the tenant, and the destruction of his rights, contrary to the implied representation of the landlord at the time of the demise that he (the tenant) could safely accept the tenancy.¹⁰⁸

102 As in *Wogan v Doyle* (1883) 12 LR Ir 69, at 74 (Palles CB).

103 It was so said in the first and second editions of this work, and Spencer Bower cited in support *Doe d Knight v Lady Smythe* (1815) M & S 347, 348–9; *Doe d Manton v Austin* (1832) 9 Bing 41, 45; *Ward v Ryan* (1875) IR 1 CL 17, 20–1; *Tadman v Henman* [1893] 2 QJ 168 (Charles J), at 171.

104 *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, CA. The estoppel by convention, which binds the landlord and the tenant as to the landlord's title, will continue to bind the tenant in an action by the landlord for dilapidations, brought after the expiration of the term of the lease.

105 *Harrison v Wells* [1967] 1 QB 263, CA, was a case in which the tenant in fact enjoyed uninterrupted possession of the demised premises throughout the term. He nevertheless sought to deny the landlord's title on the basis that his enjoyment might have been disturbed, and was permitted to do so. In *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, CA, Lord Denning MR held that it had been wrongly decided, and Roskill and Lawton LJ held that it had been decided *per incuriam*.

106 See, for example, the judgment of the Court of Appeal, delivered by Harman J, in *E H Lewis & Sons v Morelli* [1948] 2 All ER 1021, CA, at 1024 onwards. See, however, n 56.

107 So stated or conceded in *Parker v Manning* (1798) 7 Term Rep 537 (per Lord Kenyon CJ and Ashurst J at 539); *Cooper v Blandy* (1834) 1 Bing NC 45 (per Bosanquet J at 52); *Hall v Butler* (1839) 10 Ad & El 204 (per Patteson J at 207); *Cuthbertson v Irving* (1859) 4 H & N 742, at 757 per Martin B: 'if the lessor has no title, and the lessee be evicted by him who has title paramount, the lessee can plead this, and establish a defence to any action brought against him'.

108 *Biddle v Bond* (1865) 6 B & S 225, at 232–3 per Blackburn J: 'the case (which was one of bailment, in which ordinarily the representation is by the bailor to the bailee that he may safely

9.36 Actual physical dispossession or expulsion is the most obvious and ordinary form of eviction; but eviction may be proved by less than this, and it is sufficient to prove acts and proceedings on the part of the third person, and reasonably and properly submitted to by the tenant, which are tantamount to actual dispossession by force. Such constructive or symbolic eviction is established by proof that there exists a third person claiming title paramount to the demised premises, that this third person has threatened to evict the tenant unless he attorns, or pays rent to, or makes a new arrangement with, him, and that such an attornment, payment, or arrangement is thereupon made by the tenant in reasonable apprehension that the threats and demands of the *tertius* are warranted by a title paramount, and are not made gratuitously or in collusion with the landlord.¹⁰⁹ And to a *prima facie* case of estoppel raised by a person claiming as the assignee of the landlord's reversion, the *jus tertii* is a sufficient answer without more, that is to say without proving even actual threats, or anything beyond the fact that there exists a *tertius* who is the real assignee, a *persona designata* who, if he were to bring ejectment, would be entitled to evict the tenant;¹¹⁰ but it is necessary for the tenant to show such a title in the *persona designata* as would entitle the latter to a verdict in ejectment.¹¹¹ So also the *jus tertii* can be set up by a tenant who is co-operating with any such *tertius*, and defending himself upon his right and title and on his authority.¹¹²

Surrender by act and operation of law

9.37 The principles regulating the surrender of leases by operation of law are substantially the same as those which govern estoppels between landlord and tenant in general, of which such surrender is only one amongst several examples. But, since there are certain peculiar features and incidents to be noticed in the application of the general principles to this particular subject matter, it has been thought desirable to reserve the topic for special and separate examination.

9.38 The tenant may surrender his lease or interest to his landlord either by express agreement, or by acts and conduct from which the law infers a surrender, whether there was any surrender in fact or not, and whatever the tenant's intention may have been, and for that reason the surrender in the latter case is said to be 'by act and operation of law'. Surrenders by express agreement are

accept the bailment) is one of eviction by title paramount analogous to that of landlord and tenant'.

109 *Hill v Saunders* (1825) 4 B & C 529; *Mountmoy v Collier* (1853) 1 E & B 630; *Watson v Lane* (1856) 11 Exch 769.

110 *Carlton v Bowcock* (1885) 51 LT 659, at 661.

111 *Hindle v Hick Bros Manufacturing Co Ltd* [1947] 2 All ER 825, CA.

112 See *Rogers v Pitcher* (1815) 6 Taunt 202, as explained and distinguished in *Doe d Nepean v Budden* (1822) 5 B & Ald 626 (per curiam, at 627). So, in the analogous case of bailments, as to which see below, 'the bailee can set up the title of another only if he defends upon the right and title, and on the authority of that person' (per Blackburn J, at 233–4 of *Biddle v Bond* (1865) 6 B & S 225); but see 9.55 and 9.56.

by the provisions of the Law of Property Act 1925 required to be by deed;¹¹³ but s 52(2)(c) of that statute expressly excepts 'surrenders by operation of law'. Such surrenders may arise from the relinquishment of possession by the tenant, or from the grant and acceptance of a new interest irreconcilable with the supposition that the old interest is still subsisting. The principles which underlie this doctrine can be found expressed in a judgment of Parke B¹¹⁴ in which it was said:

'This term (surrender by act and operation of law) is applied to cases where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for remainder to another in fee, and the remainderman comes on to the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is estopped from disputing the seisin in fee of the remainderman, and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is estopped from disputing his lessor's right to grant the rent, and as this could not be done during the term, therefore he is deemed in law to have surrendered his term to the lessor.'

9.39 It is clear from the above, and other judicial statements,¹¹⁵ that the rule of surrender by operation of law rests ultimately on the theory that the surrenderer is estopped by his acts from disputing the grant to him of a new interest inconsistent with the continuance of his former interest, and, consequently, from disputing the surrender of such former interest, although there may have been no surrender in fact. Whether the term 'estoppel' be actually used, as it is in many of the authorities,¹¹⁶ or not, the basis of the doctrine is unquestionably estoppel by representation.

113 Law of Property Act 1925, ss 52, 205.

114 *Lyon v Reed* (1844) 1 M & W 285, at 306-7; *Phene v Popplewell* (1862) CBNS 334; *Tarjomani v Panther Securities Ltd* (1983) 46 P & CR 32 (Peter Gibson J); *Proudreed Ltd v Microgen Holdings plc* [1996] 1 EGLR 89, CA.

115 The passage cited in 9.38 from the judgment of Parke B may be compared with the language used by Chitty J in *Wallis v Hands* [1893] 2 at 83: 'the foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender of law is estoppel by act *in pais*'. In *Tarjomani v Panther Securities Ltd* (1983) 46 P & CR 32, Peter Gibson J said at 41: 'It is indeed estoppel that forms the foundation of the doctrine. The doctrine operates when the tenant is a party to a transaction that is inconsistent with the continuation of his tenancy, but in my judgment the conduct of the tenant must unequivocally amount to an acceptance that the tenancy has been terminated. There must either be relinquishment of possession and its acceptance by the landlord or other conduct consistent only with the cesser of the tenancy, and the circumstances must be such as to render it inequitable for the tenant to dispute that the tenancy has ceased'.

116 For example, *Oastler v Henderson* (1877) 2 QBD 575, at 577-8 and 580.

Physical surrender no longer necessary

9.40 In the first edition of this work, the view was expressed that there could be no effective surrender by act and operation of law unless there was some physical surrender of possession either actual or symbolic (eg by delivery of the key) on the part of the lessee. It has long been settled, however, that this is not the position, and that, while this type of surrender is indeed the consequence in law of the actual relinquishment and acceptance of possession, such relinquishment is not essential in every case to effect a surrender by act and operation of law. The modern rule appears to be that there may be a surrender in law where parties purport to surrender, but without the requisite legal formality, and their agreement results in either (a) an actual relinquishment of possession by the lessee and its acceptance by the lessor, or (b) other acts of the parties whereby it is rendered inequitable that the lessee should thereafter contend that there has been no valid surrender.¹¹⁷

9.41 These requirements will be considered in turn. The first case is that in which a relinquishment of possession is relied upon as supporting the informal agreement to surrender. Such cases offer little difficulty; all that is required is an actual abandonment of possession by the surrenderor and a giving up of such possession to the surrenderee, or, in the case of a new tenancy being granted to a third person, to such new tenant.

9.42 But actual or even symbolic delivery of possession is no longer essential to support a surrender by operation of law. This result may now be brought about by unequivocal¹¹⁸ acts on the part of the surrenderor which make it plainly inequitable for him to contend that there had been no valid surrender. In *Metcalf v Boyce*¹¹⁹ the plaintiff landlord sought possession from the defendant, a police constable, who had originally been his tenant. After the tenancy had continued for two years, there was a change in police procedure whereby the chief constable became the tenant of all police houses, the police officers occupying them as servants, and not as tenants. An arrangement was therefore concluded between the landlord, his policeman tenant, and the chief constable, whereby the old tenancy was to be surrendered and the chief constable constituted the landlord's tenant, he thereafter being responsible for paying rent; the actual occupation continued as before, in the policeman. There was no formal surrender. It was held that, notwithstanding the continuity of occupation, there had been a surrender by act and operation of law, the defendant having ceased to occupy as tenant and begun to occupy as the servant of his master. This decision was followed and approved by the Court of Appeal in *Foster v Robinson*.¹²⁰ In that case, Sir Raymond Evershed MR was able to conclude that there was something equivalent to a delivery-up of possession; but the facts appear to show that there was no physical delivery of possession and no symbolic act from which a delivery could be

117 *Metcalf v Boyce* [1927] 1 KB 758 (Salter and Mackinnon JJ). This case is considered in 9.42.

118 *Relvok Properties Ltd v Dixon* (1972) 25 P & CR 1, CA, at 5.

119 [1927] 1 KB 758.

120 [1951] 1 KB 149, CA.