THE CANADIAN BAR REVIEW

Vol. VIII. TORONTO, JUNE, 1930. No. 6

ESTOPPEL IN THE LAW OF QUEBEC.

INTRODUCTION.

Conflicts of laws are implicit in any federation, and the Canadian case forms no exception to this rule, as is evidenced by the mass of constitutional doctrine to be found in our reported decisions since 1867. Such has been the common legal problem of all nine Canadian provinces, but to this Quebec peculiarly has another difficulty superadded. This peculiar difficulty is historical, and arises from the fact that the law of Quebec is drawn from two distinct sources—the ancient civil law of France, and the common law of England. Though the sources are distinct, the results of the combination are not always so, and the courts of the province are continually faced with problems of reconciliation and adjustment. In the main, of course, the civil law is drawn from French authority, but such important portions as the commercial law and much of the law of evidence finds its precedent in the law of England. When to such parts of the Civil Code is added the Dominion legislation upon such matters as fall properly within the Federal sphere, it can readily be seen that the mutual pressure of the systems, one upon the other, must lead to cases of considerable difficulty and confusion.

Such confusion cannot of course arise where the provisions of the Civil Code are clear, but only when it becomes necessary to go behind the statute to find underlying principles of the law. In such cases unfortunately the reports of the codifiers are not always clear as to the origin of the particular article. Inevitably these reports are not exhaustive, and, as well, many provisions are drawn from more than one source—in not a few instances both English and French authorities are cited. This difficulty of interpretation has been further involved by the somewhat wholesale manner in which counsel in argument, and even, it is to be regretted, learned

judges in their decisions, have invoked both French and English decisions and opinions in support of their particular propositions. The result of this dual origin has been in many instances to leave the law in a most unsatisfactory state; and when it is remembered that the courts of Quebec are not common law courts, and hence not bound by their own decisions or those of higher courts, it will be realized that the Quebec lawyer may not infrequently find himself in a quandary.

The subject of this present paper appears to offer such a difficulty as has been just described. So far there has been no pronouncement of authority upon the matter, though the term has appeared not infrequently in our reported cases, and the highest tribunal in the Empire has perhaps taken it for granted that the doctrine does exist in our law.[1] On the other hand, the Supreme Court of Canada appears recently to have rejected a plea of estoppel raised in a Quebec case,[2] when such a plea would seem to have been well founded, if estoppel exists at all in our law. These cases will be examined more carefully later, but enough has been said to show that confusion does exist as to whether the principle, or a kindred one, is present in the law of the province.

Only an examination of the text of the civil law and a review of the reported cases will enable one to reach any conclusion in the matter. If estoppel, or a similar principle, exists it must exist by virtue of a text of law, for, except in regard to certain special divisions, the Quebec lawyer has no right to go back to the common law for his principles. Neither, as it is hoped will be shown, is estoppel a principle of all jurisprudential systems. If it is present in the Quebec system, it is there in virtue of some text which either enunciates the principle itself, or, casting us back to "the laws in force at the coming into force of this Code,"[3] enables us to find in the sources of that text some such general principle as that under discussion. If, again, utilizing such a method no general principle can be established, we must conclude that none such exists in our legal system.

I.

Estoppel in English Law.

Even in English law the doctrine is not altogether without difficulty. Generally, however, it would seem that "there is said to be an estoppel where a party is not allowed to say that a certain state-

[1] *Michaud & The City of Montreal* (P.C.), [1923] 30 K.B. 46.
[2] *Rawleigh Co. v. Dumoulin et al.*, [1925] 26 S.C.R. 551.
[3] C.C. 2613.

ment of fact is untrue, whether in reality it be true or not."[4] Again, "estoppel is an admission of so conclusive a nature that the party whom it affects is not permitted to aver against it, or offer evidence to controvert it."[5]

It is well established that estoppel in English law is part of the law of evidence and cannot be a cause of action.[6] That is to say, estoppel is personal to the parties to a suit, and cannot be invoked in favour of titles and rights against the world. It can be invoked to prevent the opposite party from denying the particular title or right in question, but it cannot prevent third parties from doing so. This should be borne in mind when we come to examine the Quebec law.

The classic classification of estoppels is that of the great common lawyer Lord Coke, who divided them into estoppels:

1. By matter of record; 2. by matter of deed; 3. by matter *in pais*.

This classification has been objected to as regards the modern law by a recent English authority on the subject, Spencer Bowen.[7] and with apparent reason. So far as our investigation is concerned, we must admit forthright the first two classes as existent in our law as corresponding for all practical purposes to—1. our law of "*chose jugée*," and 2. our rule of evidence set forth in C.C. 1210 regarding proof by authentic writings.

It is the third class, viz., estoppel *in pais* with which we are concerned. This phrase has continued to be used since Coke's day to mean estoppel by representation, whereas in its original context it was restricted to transactions relating to land and title thereto, taking place *sur le champ*, and of such notoriety, ceremony and solemnity as to render them equivalent to a declaration of title under seal. Since the leading case on estoppel of *Pickard* v. *Sears*,[8] the term *in pais* has been taken as meaning by representation, and Spencer Bowen would have us take the one term "estoppel by representation" to cover all forms of estoppel except that *per rem judicatem*, which is the only form distinguishable from that covering expression.

The truth of the matter would appear to be that although the term estoppel was Coke's in the 17th century, the doctrine of estoppel by representation as we know it is new even to English law. *Pickard* v. *Sears* (*supra*) is spoken of as "the first approach to estoppel by representation in its modern form,"[9] and a case decided only

[4] Halsbury, Laws of Eng., verb. "estoppel," v. 13 p. 321.
[5] Byrne, Law Dictionary, verb. "estoppel."
[6] *Low* v. *Bouverie* (1891), 3 Ch. 82 C.A.
[7] Law relating to Estoppel.
[8] (1837), 6 A. & E. 469.
[9] Spencer Bowen (*supra*).

seventy-five years before that[10] was apparently the first decision even to suggest anything beyond Coke's narrow conception of estoppel *in pais*. Coke's estoppel *in pais* was narrowed to estoppel "by liverie, by entrie, by acceptance of rent, by partition, and by acceptance of an estate," outward forms only less ceremonious than the solemn instruments of the law of real property. Modern English estoppel by representation is concerned with a much wider class of cases variously referred to with greater or less accuracy as, "estoppel by deed," "by negligence," "equitable estoppel," "acquiescence," "waiver," "quasi-estoppel," and so forth. Furthermore, the representation requisite in the present English law need only be such as a reasonable man would feel justified in acting upon. It may be, as suggested above, by a deed, in words or by acts and conduct, or even (when the "representor" is under a duty to speak or act) by mere silence or inaction.

When such a representation, as has been outlined, has been made the English law requires that it, in fact, conform to four general conditions before it can result in an estoppel. These conditions are as follows:

(a) The representation made must be one *of fact* and not mere intention.

(b) The party estopped must have *intended* the representation to have been acted upon.

(c) The representation must have been *acted upon* by the party relying on the estoppel *to his detriment*.

(d)) The representation must have been the *proximate cause* of the detriment.

A sufficient representation being proved which complies with these conditions, a party to an action in a court of common law may plead an estoppel. This will result in his opponent being precluded from adducing evidence tending to disprove his original representation of fact. He will be compelled to "make good" his earlier assertion, or will not be allowed to speak when he has remained silent on a former occasion when he ought to have spoken.[11]

II.

Fins de non Recevoir.

A further preliminary to be dealt with before attempting our examination into the text and sources of the Quebec civil law is that

[10] *Montefiori* v. *Montefiori* (1762), 1 W. Bl. 362.

[11] The foregoing summary of the modern English law of estoppel has been drawn largely from the authors herewith mentioned, and the leading English decisions cited: Bigelow, *on Estoppel; Halsbury, Laws of England*, verb. "Estoppel" v. 13, p. 321 *et seq.*, Spencer Bowen, *Law relating to Estoppel.*

of the French "fin de non recevoir." Amongst some these "fins de non recevoir" have been too readily assumed to be equivalent to English estoppels. The result of this rather hasty judgment has led in some instances to the French and English terms being used as synonymous, and the official reports of the province are not free from examples of this confusion. If one is to trust the report of a somewhat recent case before the Supreme Court of Canada, one of the leading advocates of the Bar of Lower Canada referred therein to "fin de non recevoir" and estoppel as convertible terms.[12] Even certain of our learned judges have apparently not been loathe to draw a conclusion, which, it is submitted, is not as real as it is apparent, and not without dangerous implications.

Not that the conclusion that the two terms are identical is difficult to understand—indeed, on the surface the identity would appear almost obvious. Certainly the effect of a "fin de non recevoir" is much that of an estoppel, viz., to prevent the making of certain evidence of fact by one of the parties to a suit. Further investigation, however, into the French doctrine would make it appear that "fin de non recevoir" is applied in France to an altogether wider class of pleas or the results thereof. The English law of estoppel appears by contrast a much narrower and more technical rule of evidence, particularly if we confine ourselves to the estoppel by representation as set forth above. "Les fins de non recevoir," are defined as, "les moyens qui tendent á anéantir non seulement la demande ou l'instance, mais le droit même en vertu duquel elle est exercée, soit que le demandeur soit reçu à prouver le fondement de sa prétention."[13] Further investigation into the same French source reveals the typical "fins de non recevoir," viz., incapacity, "chose jugée," "défaut d'intérêt," compensation, prescription, "bénéfice de discussion ou de division," not only these, but, it is added, "une infinité d'autres." Planiol's definition would certainly cover the English estoppel when he speaks of "fins de non recevoir" as "les exceptions que le defendeur peut opposer à la demande, non pas pour contester les faits qu'on lui reproche, mais pour faire écarter la demande quoique ces faits soient prouvés ou susceptibles de l' être,"[14] but again the author shows the wide range of the term when he adds prescription, peremption and "chose jugée" as the examples par excellence.

Turning to the older French writers, we find similar broad definitions. Pothier, in many directions the father of our civil law,

[12] *Delorme* v. *Cusson*, 28 S.C.R. 66.
[13] Dalloz Rep. 23 "Exceptions" No. 528.
[14] Droit Civile under "Divorce" No. 1202.

speaks of "fins de non recevoir contre les creances" as "certaines causes qui empêchent le créancier d'être écouté en justice pour exiger son créancé."[15] Three instances are given, each descended from Roman law, exceptions which had the effect not of extinguishing the debt, but of rendering it "inefficace" — "exceptio rei judicatae," "exceptio juris jurandi," and "exceptio præscriptionis." Again, although the definition might be taken to include estoppel as understood in English law, the instances grouped thereunder show the broader intention of the French expression. The exception of the "chose jugée" is indeed one of the classes of estoppel mentioned by Coke, and the "serment decisoire" has disappeared from our law, but the inclusion of prescription demonstrates the relative comprehensiveness of the "fin de non recevoir."

The truth of the matter would appear to be that, both in modern and ancient French law, "fin de non recevoir" is more an expression than a legal doctrine, and whereas it may quite properly be applied to an estoppel such as exists in the common law, the English expression is confined to a very definite doctrine. Thus a French jurist writing in 1819 notices that "fin de non recevoir" covers all peremptory exceptions except those to the form alone. "Les fins de non recevoir sont des exceptions péremptoires par le moyer desquelles on peut faire réjeter une demande sans entrer dans la discussion; et les exceptions peremptoires sont des motifs d'exclusion de l'action tellement puissants, qu'ils anéantissent cette action."[16] Taking the whole field of French civil law, this writer discovers six general divisions of "fin de non recevoir," or rather classes, viz.— "préscription, péremption, déchéances, renonciations tacites, approbations et chose jugée." Further, in his examination of the text of the French civil code, he reveals not less than forty-six instances which may properly be classed under the term. These latter again are divided into such as are, "d'non receivables," "inadmissibles" or "y'interdites et deniées."

So far as one can perceive, this last treatment of the subject, despite the objections which may be urged against the treatise generally, is in accord with the idea of "fins de non recevoir" set forth in Pothier and more modern French authorities. In such case it is obvious that to identify the civil law exception with the common law doctrine under discussion must confuse rather than clarify the issue.

[15] Oeuvres II, 371.

[16] Lemerle—*Traîté des fins de non recevoir.*

III.

The Civil Code.

If estoppel, or a kindred doctrine, exists in the law of Quebec, it must be found in the text or sources of the Civil Code. For the present purposes large divisions of the law applicable in the province must be left aside, viz., such as falls within Federal competence, and the public and municipal law which is modelled substantially upon the law of England. This restriction of the field of investigation removes not only the criminal law and the statutory enactments to be found within the Dominion statute books, but also the "Bills of Exchange Act," usually to be found together with the provincial law within the covers of the Civil Code. This last Act embodies the principle of estoppel in its provisions,[17] and our law in the matter is the English law relating to bills, notes and cheques.[18] Furthermore, Book Fourth of the Code must likewise be set aside, since it deals with the "Commercial Law" based almost entirely upon English authority.[19] To find the principle of estoppel in such cases would carry us no nearer to a conclusion in an inquiry, the object of which is to discover whether or not there be a principle similar to estoppel in our pure civil law. When we are thrown back in specific instances to the law of England, the existence of estoppel should not be surprising in such cases, and in any event will not be applicable beyond that specific instance. On the other hand, if by an examination of texts in the body of the Code which is drawn from French sources, a general principle can be extracted justified by the sources, then the investigation will bear fruit. In the latter event something will have been discovered to which appeal can be made when a case is not specifically provided for by a text of law.

It has already been admitted that of Coke's three classes of estoppels, the law of Quebec contains in effect the first two, i.e. estoppel by record and estoppel by deed (*supra*); it is with the third class —estoppel *in pais*, or estoppel by representation exclusive of deed, that we are now concerned.

I.—Implied Consent.

"Consent is either express or implied,"[20] and a considerable number of articles in the Civil Code which at first sight would seem to

[17] E.g. s. 129 and s. 133.
[18] *Ibid.* s. 10 and C.C. 2340.
[19] The principle of estoppel undoubtedly exists in Book Fourth notably in the sections relating to Insurance, C.C. 2468 *et seq.*
[20] C.C. 988.

bear out a theory of estoppel underlying the law, are, on further examination, merely the application of the principle that consent may be implied from conduct. So C.C. 151 precludes an action for the annulling of a marriage of a minor by those whose consent thereto is required by law, not only if the marriage have been approved expressly, but also if it have been tactily approved. Pothier says that a father will not be allowed to attack the marriage of his minor son contracted without his consent, if he have become the godfather of a child born of the marriage, for, by that his consent will be implied.[21] This instance has the characteristics of a representation by conduct which in English law would lead to an estoppel, though not all of the conditions are present.[22] It appears, however, that the principle here is merely an application of C.C. 988, and an inheritance from the Roman law aiming at the preservation of the family.[23]

Another example of a party being prevented from denying his own consent is found in the tacit acceptance of an heir—C.C. 645, 659 and 874—"when the heir performs an act which necessarily implies his intention to accept, and, which he would have had no right to perform" except as heir, he will not be allowed to deny his quality. Here again the principle is that conduct has proved consent, and the heir will no more be allowed to deny his quality than if he had made his acceptance "in an authentic or private act." This is pure Roman law—"pro herede gerere videtur is qui aliquid facit quasi heres," and Julianus writes, "eum demum pro herede querere qui aliquid quasi heres gerit." The acceptance is as binding if made thus "facto" as if made "verbo." No question of estopped arises here, for a court will hold not that he is estopped from denying the fact of non-heirship, but that the evidence shows heirship as a fact.

In the same way tacit release of an obligation may be made by the surrender to the debtor of the original title thereto;[24] and the presumption of community in marriage, where there is no stipulation to the contrary, may possibly be regarded in the same light.[25]

The tacit renewal of lease under C.C. 1609 by the lessee remaining in possession more than eight days after the expiration of the original contract, bears some resemblance to an estoppel. From

[21] Marriage No. 446.

[22] E.g. it cannot be said that the representation of the father here was acted upon to the minor's detriment, and certainly it was not the proximate cause thereof v. *supra.*

[23] 3 Pand. franc. p. 265.

[24] C.C. 1181, 1182, 1183.

[25] C.C. 1260.

this point of view the lessor may be regarded as being estopped from setting up the termination because of his "standing by." or the lessee estopped as against the lessor by his negligence. The sources of the provision, however, reveal the fact that the text of Ulpian upon which it is based regarded these circumstances as a new contract tacitly entered upon by both parties. Pothier[26] tells us that it is common to all the provincial systems even in the "pays coutumier;" and Domat agrees further with him that it is a "présomption de droit" only, and not *juris et de jure.* If this was an instance of estoppel, either party would, in the face of the other, be precluded from setting up any proof to the contrary.

A more serious difficulty of distinction arises in regard to C.C. 2048 and C.C. 2081-4, which admit of being treated together. On first sight both articles appear to embody clear cases of English estoppel, brought about by the silence or inaction of a creditor, who is under a clear duty to speak or act. No doubt, if similar circumstances were to occur in English law, the creditor would be estopped from denying the logical conclusion made from his "acquiescence or "standing by." It is submitted, however, that an examination into the principles behind these provisions of our Code will show, as in the cases cited above, that the principal angle from which the question is to be viewed is that of consent or non-consent. In either case the creditor will be allowed to set up the facts, although if his opponent is able to prove that his previous actions amounted to a tacit cession or remission of hypothec, he (the creditor) will be compelled to acquiesce. To examine the articles more carefully—C.C. 2048 provides that a "creditor who expressly or *tacitly* consents to the hypothecation in favour of another of the immoveable hypothecated to himself is deemed to have ceded to the latter his preference; and in such cases an inversion of order takes place between these creditors." Pothier traces this article, or rather principle, to the jurisconsult Paul,[27] and the codifiers cite a number of old French "arrêts" dealing with the presence of a hypothecary creditor at the passing of a subsequent hypothec, and his failure to declare his own prior right over the immoveable.[28] It appears from the early French cases that an important distinction was made as regards the capacity in which the creditor assisted in the subsequent act of hypothecation. If the creditor is the notary himself before whom the act is passed, he will be declared "déchu de cette hypotheque à regard des créanciers postérieures dont il a reçu les contrats." Likewise if the

[26] 4 Loyage.
[27] Intro. as tit. 20 Coutume d'Orleans No. 64.
[28] 2 Lamoignon,, Recueil des Arrêtés, p. 114.

creditor's signature appears as a principal party, "sa signature suppose un consentement et une renonciation à son droit" on the principle "Creditor qui permittit rem venire, pignos dimittit." On the other hand, if the creditor have been present in a mere secondary capacity, e.g. as a witness, his presence will not have the effect of depriving him of his priority, "à moins qu'il n' intervienne comme prenant part aux clauses, alors sa presence emporte une renonciation tacite á son droit. This is the rule, we are informed, "consacrée par le droit romain."[29] However, in the case of presence or even signature, the creditor will be given an opportunity of proving that his silence can be explained otherwise than by an abandonment of his rights. It is obvious that such a situation is far removed from an estoppel, and the two early Quebec cases referred to by the codifiers confirm the opinion that the article contemplates the tacit consent of C.C. 988. In *Symes* v. *Macdonald and Robertson,*[30] citing in an elaborate judgment, the old French law, Meredith, J., based his judgment on the "waiver" constituted by a tacit consent; and in *Robertson* v. *Young,*[31] Badgely, J. also citing Pothier to the same effect,[32] raised no principle similar to that of an English estoppel.

The analysis of C.C. 2081-4 produces much the same conclusion. Under this article the authorities cited are rather stricter as to what will be sufficient to constitute a tacit "rémise d'hypothèque." Domat[33] says that knowledge which the creditor has means of obtaining, or silence which he maintains after such knowledge, cannot be taken for consent. In order to deprive him of his right he must have appeared by some act to consent to the alienation. This is a stricter rule than that regarding consent sufficient for mere ceding of priority noticed above under C.C. 2048. Pothier refers to the case of the notary-creditor already dealt with,[34] laying it down that, if such a notary receives an act whereby a hypothec is granted, and the "fonds" declared free from all charges, or is alienated with a similar warranty, it is at least true that he cannot exercise his prior right as against a new mortgagor or acquirer. If such a creditor did not intend by his silence to remit his own hypothec, he cannot free himself from the charge of having by his dissimulation concurred with the debtor to deceive the new creditor or acquirer, and, says Pothier, "c'est pourquoi ils (new creditor or acquirer) auront contre

[29] 11 Pont sur art. 2180 C.N. No. 1231 *et seq.*
[30] 9 Déc. du B.C. p. 182, C.S. Québec, 1859.
[31] 17 Déc .du B.C. p. 458 C. d'Appel, Québec, 1867.
[32] "Le consentement que donne de le créancier à l'aliénation ou même à l'obligation de la chose hypothequée présume une remise tacite de son droit d'hypothèque.
[33] 2 Domat liv. 3, tit. 1.
[34] 9 Pothier "Hypothèques" No. 197.

lui l'exception de dol." This latter possibility of meeting the creditor with an allegation of fraud is, according to Delvincourt,[35] founded on a text of Ulpian where an "exceptio doli mali" is given against both the hypothecary creditor and the usufructuary who seek to enforce their rights after a tacit renunciation.

The principles lying behind the tacit acceptance of a succession have already been noticed. The same principles apply to the wife who, having "intermeddled" with the property of the community, is held thereby to have given a tacit acceptance thereof. She cannot renounce the community once she has done "quelque chose qui suppose en elle la volunté d'être commune.[36] She would be held to have done such "un acte de commune" if, for example, she pays community debts or makes a transfer of her rights in the community. Again the source of the provision is the Roman law,[37] and the same tests are applied as in regard to the acceptance of a succession by an heir.

Two further articles might with less accuracy be treated under the general caption of "tacit consent," viz., C.C. 859 and C.C. 1676. The former article provides that "the acknowledgment of a will by the heir, or by any interested person, has its effect against him, as regards his right to contest its validity subsequently." Such a provision would appear much similar to an estoppel, but on turning to the sources it will be discovered that English authorities are given for the whole of this section. In all probability waiver is the correct interpretation;[38] in any case the provision is useless so far as our inquiry is concerned. The same is true of C.C. 1676 in regard to the effect of notice by a carrier of special conditions limiting his liability. English statutes are cited by the codifiers, and, although the French mercantile law is and was much similar, no satisfaction can be found in the authorities referred to. In all probability in English law proof of sufficient notice by the carrier would preclude the other party from pleading ignorance of the special conditions of the contract.

It is contended that from the explanation of the articles so far examined, no theory of estoppel is either justified in reason, nor by reference to the sources from which they are derived. No further principle has been necessary beyond that, that consent may be tacit, as well as express, and will involve the same consequences in either case, and will be governed by the general law of obligations and

[35] Cited in 2 Troplong "Privilèges" No. 868.
[36] Pothier, Intro. tit C. d'Orleans.
[37] Merlin, sur art. 1340 C.N.
[38] Lovelass cited under this art. by codifiers.

contracts. The instances given have been particular applications as to when a tacit consent may be implied from the circumstances, and no more.

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(To be Continued.)

THE PRESS AND OFFICIAL SECRETS.—We are glad to see that the whole of the London newspapers, including the *Daily Herald,* have joined in a protest to Mr. MacDonald and a demand for the amendment of the Official Secrets Acts.

British newspaper editors are not fools or knaves who do not know how to respect confidences. In point of fact, they are always expending care in keeping secret what ought to be kept secret. But it is preposterous that they and their staffs should be forbidden to put two and two together and say the answer is four, simply because the politicians require it to be nought. When the Act was passing through the House of Commons, the present Lord Chief Justice (as the *Daily News* pertinently reminds us) scoffed at the idea that it had anything to do with the press. Alas for the vanity of Parliamentary wishes! We have now seen how it can actually serve the purpose of a quasi-censorship. Such a control over the press is not necessary—and indeed it is intolerable—at any rate in times of peace. Nor surely is it necessary that any private citizen should be subject to the inquisitions and the pains and penalties prescribed in the section which the Attorney-General so solemnly expounded on Monday, May 12th. We can think of no more desirable task for the Law Officers of the Crown than the drafting of a new Official Secrets Act.

—*The New Statesman.*