THE DOCTRINE OF CARLISLE AND CUMBERLAND BANKING CO. v. BRAGG.*

The facts of this well known case[1] are that Bragg was induced by the fraud of Rigg to sign a guarantee of the latter's debts upon the representation that it was an insurance paper. On an occasion when Rigg and the defendant had been drinking together, Rigg produced a paper purporting to relate to insurance, and asked Bragg to sign it, explaining that a similar paper which Bragg had signed on a previous day had become wet and blurred by the rain. The defendant signed without reading it. In an action brought by the Bank on the guarantee, Bragg pleaded *non est factum*. The jury found that the defendant did not know that the document was a guarantee, and that he was negligent in signing. The Court of Appeal held that, in contemplation of law, Bragg had never signed the instrument, and that his negligence did not estop him from setting up the plea of *non est factum*.

Before this decision there was a strong current of long recognized authority for the proposition that a person who negligently executes an instrument is estopped as against third parties who acquired rights under it.[2] *Thoroughgood's Case* is the first decision. Lord Coke held that if a deed be explained in words other than the truth it shall not bind the unlettered layman who is deceived.[3] Skinner reports a case where the court commented on a defendant's liability under a carelessly signed lease; "being able to read it was his own folly, otherwise if he had been unlettered."[3a] Sheppard declares that if a party who can read seals a deed without reading it, or if illiterate or blind, without requiring it to be read over to him, then although the deed be contrary to his mind, it is good and unavoidable.[4] Thus, in the absence of negligence the illiteracy of the person

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[1] [1911] 1 K.B. 489.

[2] The embryo of this idea appears in Bracton, who said that a man could get rid of his deeds by showing various matters, such as fraud, mistake, duress but added the qualification that there must be nothing like negligence on his part. Bracton: Record Commissioners' edition vol. vi. 126, cited, *Merchants Staple* v. *Bank of England* (1888), 21 Q.B.D. 160, per Wills, J., at p. 167. Fleta, writing at the close of the twelfth century, stated that a deed executed under a mistake as to its contents and without negligence was not binding, see Holdsworth, *History of English Law*, vol. viii, 50.

[3] 2 Co. Rep. 9a.

[3a] Anonymous, Skin. 159; 90 E.R. 74.

[4] Sheppard's Touchstone, 56.

deceived is immaterial. This doctrine, wholesome though old, reappears in *Hunter* v. *Walters,* where James, L.J., said:[5]

> To my mind it is almost ludicrous to contend and it would be most injurious to hold that a man executing a deed and signing a receipt as a matter of form should be able to say it is a mere nullity . . . Many a trustee has endeavoured in vain in this court to escape—by saying . . . I executed it as a matter of form. But these trustees have been made most painfully to learn that the instrument they have so signed will, with the consequences, follow them and cause them to suffer for their negligence.

This principle, applying to deeds, the Court in *Foster* v. *Mackinnon* held applicable to all written instruments.[6] The Court of Appeal reviewed the matter in *Howatson* v. *Webb.*[7] Farwell, L.J., thought "that the question raised by Mellish, L.J., in *Hunter* v. *Walters* will some day have to be determined, viz., whether the old cases on misrepresentation as to the contents of a deed were not based on the illiterate character of the person to whom the deed was read over; . . . and whether at the present time an educated person who is not blind is not estopped from availing himself of the plea of *non est factum* against a person who innocently acts upon the faith of the deed being valid." *Howatson* v. *Webb* stood as a strong authority for the proposition that a man who executes a deed without inquiring into the character will be bound by it.[8] *Carlisle* v. *Bragg* negatived the doctrine that the negligent act of the defendant in executing excluded the plea of *non est factum* and showed that the rule is general and not subject to limitation except in respect of negotiable instruments.

For leaving the safe ground of precedent the Court of Appeal gave as reasons that the negligence was not the proximate cause of the injury to the bank, that the document was not a negotiable instrument, and that Bragg was under no duty to use care as to the documents which he signed.

Disapproval by text-writers has been outspoken and emphatic.[9]

[5] (1871) 7 Ch. App. 75.
[6] (1869), L.R. 4 C.P. 704.
[7] [1908] 1 Ch. 1, at p. 3.
[8] Unless, of course, something remains to complete the fraud, as in *Swan's* case (1863), 2 H. & C. 175. See article: Anson, *The Doctrine of Carlisle and Cumberland Banking Co.* v. *Bragg,* (1912), 28 Law Q. Rev. 190; Annotation, Falconbridge, [1923] 4 D.L.R. 1; Salmond and Winfield on Contracts, 182-4.
[9] See Anson: *Doctrine of Carlisle and Cumberland Banking Co* v. *Bragg, supra*; Anson on Contracts, 17th ed., 167-169; Anson on Contracts, 3rd American ed., by Arthur Corbin, 205, where the learned editor agrees that the decision fully deserves the drastic criticism given it by Sir Wm. Anson; Beven on Negligence, 4th ed., 1538-1539. Pollock on Contracts, 9th ed., 503; Kerr on Fraud and Mistake, 6th ed., 150-151. Salmond and Winfield on Contracts, 182-184; Benjamin on Sale, 6th ed., 124; *contra,* Spencer Bower on Actionable Misrepresentation, 2nd ed., 313-314; Spencer Bower on Estoppel by Representation, 83.

The decision of *Carlisle* v. *Bragg*, however, has run the gauntlet of judicial criticism with singular immunity.

The Canadian Courts have accepted *Carlisle* v. *Bragg* with an unquestioning faith which is reflective of doubtful credit. The Courts of several provinces have followed it, some in decisions which the Supreme Court of Canada has affirmed, with the result that the principle must be taken to be well established. Few attempts have been made to distinguish it, and the rule has received approval by way of obiter in a considerable number of cases where the facts made its application unnecessary.

The Canadian cases which have considered *Carlisle* v. *Bragg* exclude in large part, on their particular facts, the strict operation of the principle that negligence in the execution of documents does not estop a defendant from availing himself of *non est factum*. An examination of the decisions shows that they fall into four groups: (a) Cases in which the illiteracy of the defendant gave rise to a *non est factum*. (b) Cases in which the defendant, though illiterate and not negligent, failed to show a *non est factum*. (c) Cases in which the defendant was not negligent. (d) Cases in which the defendant, though negligent, was not estopped for the reasons given by the Court of Appeal. It is in this group of cases that the doctrine of *Carlisle* v. *Bragg* has attained full bloom.

All four classes are reducible to the type that C is brought by the fraud of A into contractual relations with B which neither C nor B contemplated. In all four, assisted misrepresentation occurred, by which the defendant, negligently or otherwise, executed at the request of a third party an instrument the contents of which he did not know, but under which others subsequently acquired rights, or changed their positions. In all four the plaintiff alleges that he was misled by some falsity, and that his opponent ought to be precluded from showing the facts.[10]

The bulk of the decisions which deal with *Carlisle* v. *Bragg* are concerned with illiterate persons who signed instruments under a fraudulently produced misapprehension of their contents. In *Watkins* v. *Hannah*,[11] a pedlar engaged in selling goods of Watkins Co., secured the defendant's signature to a guarantee by alleging that it was an application for the renewal of a license. In *Rawleigh* v. *Dumoulin*[12] a pedlar of Rawleigh & Co., obtained a guarantee from the defendant under the guise of a letter of reference. In *Watkins*

[10] Ewart on Estoppel, chap. 25; article: Ewart, Estoppel by Negligence (1899), 15 Law Q. Rev. 384.
[11] [1926] 4 D.L.R. 93 (Sask.).
[12] [1926] 4 D.L.R. 141; [1926] Can. S.C.R. 551.

v. *Jansen*[13] the defendants signed a guarantee for future advances but information was purposely withheld that the document covered past indebtedness. The defendants in all three cases could neither read nor write English. The recent Ontario case of *Royal Bank* v. *Wannamaker*[14] dealt with a sales agreement for an automobile. After paying the purchase price, the defendant learned that among the papers which he had signed was a note payable personally to the agent, who had taken advantage of his customer's illiteracy. The note later came into the hands of an innocent holder. The defence in all four cases was *non est factum.*

These decisions may be supported on the ground that if a man who cannot read has a written contract falsely read over to him, so as to appear different in nature from the contract pretended to be read from the paper which the illiterate person afterwards signs, then the signature so obtained is of no force.[15] It is clear that these cases turning on the illiteracy of the defendant may be explained without reference to the doctrine of *Carlisle* v. *Bragg.* It is, however, equally clear that this was not the intention of the courts. Haultain, C.J.S., states that if negligence were present it woud be immaterial in the absence of a duty to the plaintiff. Turgeon, J.A., indulges in the generalization that the rule of responsibility to innocent third parties applies only to negotiable instruments and that the negligent signer of a guarantee may consequently avail himself of the plea that his act was a nullity.

The solitary representative of the class where the defendant, though illiterate and not negligent, failed to establish *non est factum,* is *Canadian Bank of Commerce* v. *Dembeck.*[15a] The defendant gave the Bank a guarantee but did not intend that it should cover future advances. The manager who obtained the guarantee did not know that the defendant was unaware that the document included sums to become owing to the Bank.[16] The defendant failed because he attached his signature with the full intention that that which preceded was to be his act and deed.[17] This decision recognizes the fact that mere proof of illiteracy is not enough sufficient to give effect to the plea of *non est factum.*

[13] [1928] 1 D.L.R. 1073 (Sask.); affirmed in the Supreme Court of Canada, [1928] S.C.R. 414, *sub nom. Watkins* v. *Minke.*

[14] [1929] 4 D.L.R. 999 (Ont.).

[15] *Foster* v. *Mackinnon,* L.R. (1869) 4 C.P. 704. See *Pigot's Case,* 11 Co. Rep. 26 (*b*).

[15a] [1929] 4 D.L.R. 220 (Sask.); *Carlisle* v. *Bragg* referred to at pp. 222, 228 and 230.

[16] See Lord Blackburn in *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597.

[17] See Buckley, L.J., in *Carlisle* v. *Bragg,* [1911] 1 K.B. 489 at p. 495.

The third division is concerned with the problem where the defendant was neither illiterate nor negligent. This situation occurred in *Rose* v. *Mahoney*, the first Canadian case in which *Carlisle* v. *Bragg* appears to have received judicial attention.[18] The defendant signed an agreement, prepared by his solicitor, for the sale of a lot, not knowing that it named the plaintiff as the agent who secured the sale. The arrangement had been that the solicitor himself was to make the sale. Kelly, J., allowed the defendant to succeed on a plea of *non est factum* because he was deceived as to the nature and character of what he signed in so far as it related to agency. In the face of the finding that Mahoney was not negligent, no question of estoppel arose, but the Court, referring to *Carlisle* v. *Bragg*, doubted whether negligence would matter.

All the cases thus far discussed may be justified on the authorities as they stood after the decision of *Howatson* v. *Webb*, without the application of the rule that the defendant's carelessness in the execution of a document is not enough to raise an estoppel. In *Cooil* v. *Clarkson*,[19] however, the facts paralleled those in *Carlisle* v. *Bragg*. Stewart acted as Clarkson's agent to obtain a loan with which to purchase a mortgage on the land bought, and presented the mortgage to the defendant to sign. The latter was pleased to state that he signed the document without reading it, under the impression that it was a receipt to Stewart. The British Columbia Court of Appeal decided the case on the grounds given in *Carlisle* v. *Bragg*. Clarkson's negligence was not the proximate cause of the plaintiff advancing the money. Negligence was not a question because the defendant owed no duty to the plaintiff.

The conclusion is that the doctrine of *Carlisle* v. *Bragg* must be

[18] (1915), 34 O.L.R. 238. It is open to doubt whether the facts really support a plea of *non est factum*. The decision certainly seems a diminution of the rule stated in *Howatson* v. *Webb*, that mistake must be as to the nature and character of the document. It is difficult to show a fundamental mistake. See *Bk. of Ireland* v. *M'Nanamy* [1916] 2 I.R. 161 at p. 173: "Where a party signs a document under a fundamental mistake as to its nature and character he is not bound by his signature, upon the ground that there is in reality no contract at all binding on his part." The rule is more happily stated in the Ontario case of *Bradley* v. *Imperial Bank*, [1926] 3 D.L.R. 38. See Mellish, L.J., in *Hunter* v. *Walters*, *supra*, where the learned Judge stated that if a man knows he is conveying or doing something with his property but does not ask what is the precise effect of the deeds out of confidence in his solicitor, the deed he signs may be voidable but not void. Farwell, J., commented on this in *King* v. *Smith*, [1900] 2 Ch. 425, at p. 430: "The learned Judge was a most accurate man and when he said 'doing something' he meant to make a general statement not restricted to a conveyance or mortgage or any kind of deed." For a recent case in which the rule in *Howatson* v. *Webb* was applied, see *Blay* v. *Pollard*, [1930] 1 K.B. 628, per Scrutton, L.J., at pp. 632-3.

[19] [1925] 2 D.L.R. 493 (B.C.).

taken as firmly entrenched. The only corrective that can be looked for in England is a contrary pronouncement of the House of Lords. The Courts of Appeal in British Columbia and Saskatchewan have accepted it unqualifiedly.[20] Courts of inferior jurisdiction in Ontario have recognized it.[21] So also has the Appellate Court of Manitoba.[22] Finally, affirming a decision of the Saskatchewan Court of Appeal,[23] and by dictum in an appeal from Quebec,[24] the Supreme Court of Canada has twice set the seal of its approval to the principle of *Carlisle* v. *Bragg*.

It is time to attempt an analysis of the *ratio decidendi* of this case. The first reason advanced stated that Bragg's negligence was not the proximate cause of the injury to the Bank. Only the courage of strong convictions would dispute the validity of the rule that the negligence alleged must have been the real cause of the plaintiff's detriment.[24a] What difference exists relates not to the principle but to its application, and argument can afford little enlightenment. Sir William Anson considers the guarantee as effective in its action as cause could be. "Short of Bragg taking the document to the Bank in person it is difficult to see what intervened between his signing the guarantee and the Bank acting on it, except the transit by Rigg to the Bank."[25] The objection raised by Kennedy, L.J., that Rigg forged the name of a witness carries no weight because attestation is unnecessary for a promise to answer for the debt, default, or miscarriage of another. Pickford, J., relying on *Swan's* case,[26] gave judgment for the defendant. The distinction, however, is unmistakable, for in *Swan's Case* the theft by the broker

[20] *Watkins* v. *Hannah, Watkins* v. *Jansen, Canadian Bk. of Commerce* v. *Dembeck, supra.*

[21] *Rose* v. *Mahoney* (1915), 34 O.L.R. 238; *Royal Bank* v. *Wannamaker,* [1929] 4 D.L.R. 999. But see *Lewis* v. *Dane* (1930), 38 O.W.N. 72 at p. 75, where Orde, J.A., says: "Not only is there no evidence that Campbell made any misrepresentations as to the nature of the document which he induced the plaintiff to sign (a mortgage), but there was the plaintiff's own negligence in signing it, without reading it or satisfying himself as to its real nature. He is estopped as against these defendants from setting up the alleged invalidity of the mortgage." *Carlisle* v. *Bragg* was not referred to. It may be doubted whether the full implication of the statement was appreciated.

[22] *Union Bank* v. *Irish,* [1926] 1 D.L.R. at p. 551.

[23] *Watkins* v. *Hannah, supra.*

[24] *Rawleigh* v. *Dumoulin, supra.* Civil law was applied but the learned Judge remarked: "At common law there would be no estoppel in a case such as this."

[24a] For the necessity of the plaintiff's having suffered loss, see Lord Moulton in *Monarch Life* v. *MacKenzie* (1913), 15 D.L.R. 695 at p. 700. For the rule that negligence must be the proximate cause of the loss, see Everest and Strode on Estoppel, 3rd ed., 252 (*f*); Phipson on Evidence, 6th ed., 686-7 and the authorities there collected.

[25] (1912), 28 Law Q. Rev. 190.

[26] (1863), 2 H. & C. 175.

was necessary to make the transfer of shares operative, and so Swan's negligence was not the proximate cause of the removal of his name from the shareholders' lists. The two cases thus stand on different ground.

Equally pertinent is Anson's criticism of the second reason offered, that negligence is only material in respect of negotiable instruments.[26a] In *Foster* v. *Mackinnon* and *Lewis* v. *Clay* the defendants, though totally ignorant of what they signed, were required to show circumstances absolving them from making that inquiry which is reasonable and customary upon the request to sign a legal document. To confine the necessity of inquiry to negotiable instruments is arbitrary and unsound. The fact that the rule has an historical explanation in one branch of the law does not appear to be an unanswerable reason why it should not be extended to another branch of the law to which it is fully as appropriate.[27]

The storm centre of the controversy, which has raged about *Carlisle* v. *Bragg*, is the question of what duty, if any, must the negligent defendant owe to the estopped asserter, before the former's carelessness will preclude him from asserting that the document which he signed was an absolute nullity. Certain of the great statements of the law of estoppel are much in point. The doctrine applies where the person against whom it is made has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct.[28] Such a rule often affords the only means of defending a position which is just and fair as between man and man.[29] In *Freeman* v. *Cooke*, the fount from which all subsequent discussion on the subject has flowed, Parke, B., declared that whatever a man's

[26a] A learned writer in a note in 46 Law Q. Rev. 263 at pp. 264-265 doubts whether "it is as certain as Anson assumes it to be that the law does, under such circumstances, distinguish between negotiable and other instruments." *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704 is referred to as uncertain authority for the distinction. The famous passage in Byles, J.'s judgment assigning the basis for the difference is discounted as having nothing to do with *non est factum*. Against this view see in *Foster* v. *Mackinnon* the direction to the jury that if the defendant was not negligent in writing his name on the bill without ascertaining what he was signing, he would be entitled to the verdict. A rule nisi having been obtained, Byles, J., upheld the direction. "It was not his design, and if he was guilty of no negligence it was not even his fault that the instrument he signed turned out to be a bill of exchange." Perhaps *Foster* v. *Mackinnon* is a stronger authority on the distinction than has been supposed.

[27] Derived from the law merchant, see Everest and Strode on Estoppel, 3rd ed., 218-221

[28] Bramwell, L.J., in *Baxendale* v. *Bennett* (1878), 3 Q.B.D. 525 at p. 529.

[29] Sir Ignatius O'Brien, C., after examining the authorities in *Cox* v. *Dublin Distillery*, [1917] 1 I.R. 203.

real intention may be, if he so conducts himself that a reasonable man would take the representation to be true, believing that it was meant for him to act upon it, then, if he does act upon it, the party making the representation is not permitted to contest its truth.[30] If a man so conducts himself that a reasonable person would infer that a certain state of facts exists and acts on that inference, he shall afterwards be estopped.[31] The third of Brett, J.'s four famous propositions in *Carr* v. *L. & N.W. Ry. Co.* runs to the same effect.[32] How useful these attempts at definition are is open to question. Lord Macnaghten referred to estoppel as "founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of society that I sometimes doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those formulated in *Carr* v. *L. & N.W. Ry. Co.*"[33] The result of the authorities is condensed by James, L.J., in *Ex parte Adamson*:[34] "Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect, his now averring the truth or asserting the demand would work wrong to some other person who has been induced to do something or to abstain from doing something, by reason of what he had said or done or omitted to say or do."

No convincing reason appears why this statement of the law is not of sufficient generality to embrace all cases of estoppel by assisted misrepresentation, including estoppel by negligence. It fully covers the situation where A has been brought by the fraud of C into contractual relations with B which neither contemplated. The application to *Carlisle* v. *Bragg* of the principle laid down by James, L.J., is evident. Having induced the Bank to advance money to Rigg by neglecting to read the paper which he signed, Bragg ought not be heard to plead mistake as to the nature and character of the document signed, when the consequence of that assertion is to work injury to the Bank. Decisions such as *Ex parte Adamson* and declarations such as those of Bramwell, L.J., James, L.J., and Lord Macnaghten are beacon lights in the law of estoppel, the guidance of which may well be accepted in deciding cases of the type of *Carlisle* v. *Bragg*.

The Court of Appeal, however, addressed itself to the question, whether Bragg owed a duty to the bank. The learned Lords

[30] (1849), 18 L.J.Q.B. 114, qualifying the definition of Lord Denman in *Pickard* v. *Sears* (1837), 6 A. & E. 469.
[31] *Cornish* v. *Abington* (1859), 4 H. & N. 556; 157 E.R. 956, p. 959.
[32] (1875), L.R. 10 C.P. 307.
[33] *Whitechurch* v. *Cavanagh*, [1902] A.C. 117 at p. 130.
[34] (1878), 8 Ch. D. 807, at p. 817. See comment on Beven, 4th ed., 1535.

Justices appear to have had in mind the classic statements of negligence in the law of torts as expressed in cases like *Thomas* v. *Quartermaine*[35] and *Dickson* v. *Reuter's*[36] which declare that negligence must involve a duty. In the words of Bowen, L.J., a duty in the air does not exist, but only a duty to particular people. To the effect of this strict rule Alderson, B.'s, famous definition acts as a salutary palliative.[37] The modern law of negligence has broadened down from precedent to precedent so that it recognizes the duty to observe an appropriate degree of prudence to avoid causing harm to others.[38] The situations where such duty exists are exceptional. The view of the Court of Appeal rendered unnecessary deference to the older rules of negligence without regard to the modifications of the *Heaven* v. *Pender*[38a] line of authority, for the sake of maintaining harmony with the earlier pronouncements on the subject. Legal symmetry in itself, however, is an insufficient consideration for seeking a given end. "It is something to show that the consistency of a system requires a particular result but that is not all. The life of the law has not been logic but experience."[39]

The true solution is that there should be a duty to use care in the execution of documents upon the faith of which others may alter their position, a duty of informing oneself of the contents of a document which one signs. The rationale of the question is that, as against persons who have changed their position, the negligent defendant should be estopped, for he has assisted the misrepresentation, and provided the opportunity for the plaintiff's loss.

With the growing complexity of society, the consequences of negligence become more far-reaching, and the obligation to use care grows stricter in morals and will have to grow stricter in law.[40] The duty of observing an appropriate measure of prudence, which is the foundation of the law of torts, should be the corner-stone also of estoppel by assisted misrepresentation and persons should be punished, sometimes by damages, sometimes by estoppel for "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human

[35] (1887), 18 Q.B.D. 685.
[36] (1877), 3 C.P.D. 1.
[37] *Blyth* v. *Birmingham* (1856), 11 Ex. 781. Compare Willes, J., in *Vaughan* v. *Taff Vale* (1860), 5 H. & N. 679, at p. 688: "Negligence is the absence of care according to the circumstances"; and Fry, L.J., in *Northern Counties* v. *Whipp* (1884), 26 Ch. D. 482 at p. 489: "Negligence is the not doing of something from carelessness and want of thought."
[38] Pollock on Torts, 13th ed., 21; Underhill on Torts, 4th ed., 166.
[38a] (1883), 11 Q.B.D. 503.
[39] Holmes, Common Law, 1.
[40] (1891), 7 Law Q. Rev. 10.

affairs, would do, or doing something which a reasonable and prudent man would not do."[41] Any other result cannot fail to create situations which offer a premium upon fraud.[42]

That this principle, which, it is urged, should govern the execution of documents, has not the objection of novelty appears from the fact that it has been invoked to create estoppel in other departments of the law. It appears in cases of ostensible ownership.[43] The law of partnership recognizes a similar duty to be active.

A more satisfactory exposition of the doctrine which ought to support estoppel by negligence could scarcely be found than that given by Girouard, J., in the Supreme Court of Canada:[44]

> Every merchant or business man owes some duty to his fellow-members of the commercial community. Is he not under an obligation to cause no damage by his fault or negligence, by his acts of omission or commission? —I cannot conceive that the appellants ought not to be punished for the omission to do something which a fair and reasonable man, guided by those considerations which regulate the conduct of commercial or even ordinary affairs would do. That may consist in the payment of damages but according to English law, forms an estoppel.

Davies, J., declared that any other rule would generate want of confidence in the ordinary business relations of life and would place a premium upon gross business negligence. Such are the dangers inherent in the doctrine of *Carlisle* v. *Bragg*.

Enough has been said of the grounds upon which *Carlisle* v. *Bragg* was decided. It remains to point out a line of authority which the Court of Appeal did not consider. The facts made it necessary to decide which of two innocent persons should suffer for

[41] Article: Ewart, Estoppel by Negligence (1899), 15 Law Q. Rev. 384; Ewart on Estoppel, chap. 25; Alderson, B.'s definition in *Blyth* v. *Birmingham Water Works* (1856), 11 Ex. 781.

[42] A person who signs a document without reading it may by his carelessness offer opportunities for fraud. See *Merchants* v. *Bank of England* (1887), 21 Q.B.D. 160, per Day, J., at pp. 162, 163: "Now it has been said that there can be no negligence attributable—because it is not to be assumed that any man will commit the grave offence of availing himself of opportunities that are placed in his way, that no man ought to be assumed to yield to a temptation with which he is surrounded. That sort of reason does not commend itself to me nor to my experience of the world, nor—to the common sense of men in general." To the same effect, see *Johnson* v. *Credit Lyonnais* (1877), 3 C.P.D. 32.

[43] *Savage* v. *Foster* (1723), 9 Mod. 35; 88 E.R. 299. Note the language of Brett, M.R., in *Coventry* v. *G.E. Ry.* (1883), 11 Q.B.D. 776 at p. 780, where the defendants by an oversight issued two delivery orders for the same goods and then refused delivery to an innocent transferee of the second of them. It was a mistake, but the Master of the Rolls said: "It is true there can be no negligence unless there is a duty, but here the documents have a certain mercantile meaning attached to them and therefore the defendants owed a duty to merchants and persons likely to deal with them." Lord Esher speaks to the same effect in *Seton* v. *Lafone* (1887), 19 Q.B.D. 68.

[44] *Ewing* v. *Dominion Bank* (1904), 35 Can. S.C.R. 133 at pp. 143-144.

the fraud of a third, a task which Lord Cairns believed should always be done by applying the settled and well-known rules of law.[45] This dictum, which, indeed, if it had been applied, would have given a contrary result, falls far short of justifying the case, for the Court of Appeal disregarded a weighty line of authorities[46] to formulate rules of law as novel as they were unsettled.

A long series of decisions accepted the principle laid down by Ashurst, J., in the famous case of *Lickbarrow* v. *Mason* that, wherever one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it.[47] He who gives the confidence, not he who believes the false affirmation, must suffer. Lord Halsbury used substantially the same language in *Henderson* v. *Williams*.[48] "I think it is not undesirable to refer to American authority—*Root* v. *French*,[49] where Savage, C.J.—says: 'He is protected on the principle—that when one of two innocent persons must suffer for the fraud of a third, he shall suffer who, by his indiscretion, has enabled such person to commit the fraud.' A contrary principle would endanger the security of commercial transactions and destroy that confidence upon which—the usual course of trade materially rests." In a subsequent decision Lord Halsbury emphasized the effect of the phrase "by his indiscretion."[50] Lord Lindley stated that the rule in *Lickbarrow* v. *Mason* was too wide and added the qualification that the other must have been misled.[51] The accepted limitation is that he who

[45] *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459 at p. 463. Approved by Lord Macnaghten in *Farquharson* v. *King*, [1902] A.C. 325 at p. 337.

[46] The admission of Spencer Bower in Actionable Misrepresentation, 2nd ed., 313.

[47] (1787), 2 Term Rep. 70. That the doctrine, however, does not begin with *Lickbarrow* v. *Mason* appears from *Hern* v. *Nichols* (1708), 1 Salk. 289; 91 E.R. 256, where Holt, C.J., remarked: Seeing somebody must be the loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser and not a stranger." To the same effect, see Buller, J., in *Fitzherbert* v. *Mather* (1785), 1 Term. Rep. 16; 99 E.R. 944 at pp. 946-7, a decision to which Ashhurst, J., was a party; *Kingsford* v. *Merry* (1856), 1 H. & N. 503; 156 E.R. 1299; *Rodger* v. *Comptoir D'Escompte de Paris* (1869), L.R. 2 P.C. 393 at p. 406; *Arnold* v. *Cheque Bank* (1876), L.R. 1 C.P.D. 578, per Lord Coleridge, C.J., at p. 587; *London and South-western Bank* v. *Wentworth* (1880), 5 Ex. D. 96; per Pollock, B., at p. 105. *Brocklesby* v. *Temperance Building Society*, [1895] A.C. 173, per Lord Macnaghten at p. 184; *Nash* v. *De Freville*, [1900] 2 Q.B. 72, per A. L. Smith and Collins, L. JJ., at pp. 83 and 84; *Fry* v. *Smellie*, [1912] 3 K.B. 282, per Vaughan Williams, L.J., at p. 293; *Meyer* v. *Sze Hai Tong Banking Co.*, [1913] A.C. 847 at p. 852.

[48] [1895] 1 Q.B. 521 at pp. 528-529.

[49] *Root* v. *French*, 13 Wend. 570 (N.Y.) is the American *locus classicus*. See *Putnam* v. *Sullivan* (1808), 4 Mass. 45.

[50] *Farquharson* v. *King*, [1902] A.C. 325 at p. 333.

[51] *Farquharson* v. *King*, *supra*, at p. 342. Compare A. L. Smith, M.R., in *Farquharson* v. *King*, [1901] 2 K.B. 697 at p. 708: "Ashurst's dictum is good law, subject to certain limitations." See also Vaughan Williams and Farwell, L.JJ., in the same decision.

has enabled the third party to hold out false colours to the world must sustain the loss, provided he has done something which has in fact misled the others.[52]

Ashurst's dictum, thus modified, remains applicable to *Carlisle* v. *Bragg*. What misled the plaintiffs and involved them in loss was the paper which Bragg had negligently signed at Rigg's request and upon which the plaintiff acted. It appears more in accordance with principle that the person selecting the rascal should suffer rather than he whom the rascal deceives. This problem did not engage the attention of the Lords Justices. In *Cooil* v. *Clarkson*, however, the difficulty was recognized, only to be dismissed in the extraordinary statement that it was not a question in these cases.[53] Not only did the rejection of the *Lickbarrow* v. *Mason* rule do violence to precedent but it worked an unfairness to an innocent plaintiff in favor of a negligent defendant. "It is sometimes necessary in applying legal rules to do injustice to individuals; but where a rule (an alleged rule) of unwritten law is doubtful, the fact that its application is likely frequently to do injustice is a weighty argument against its existence.[54] The law is a practical science, concerned with the affairs of life, and any rule is unwise, if in its general application it does not, as a usual result, meet the purposes of justice.[55]

The conclusion is that the *ratio decidendi* of *Carlisle* v. *Bragg* cannot be regarded as satisfactory. Far from being one of the great abiding fountains of truth which have achieved the dignity of leading cases, the decision falls little short of a very *fons et origo malorum*; and the reflection is the greater because at least three different lines of authority presented grounds for a contrary result. The well known cases laying down the rules of estoppel were sufficiently wide to govern the situation in *Carlisle* v. *Bragg*. Still weightier expression of judicial opinion was offered in the *Hunter* v. *Walters* class of cases. Three years before the decision, it could be asserted with some confidence that an educated person who had negligently executed a document was not allowed to contest the fact that it was his act and deed. A third guide over the course traversed by the Court of Appeal appeared in the modified *Lickbarrow* v. *Mason* rule. When the path before the Court stood so clearly outlined, to depart from it in order to formulate new prin-

[52] Kerr, Fraud and Mistake, 6th ed., 15 and 144. This is the conclusion drawn from an exhaustive examination of the cases.

[53] Macdonald, J.A., [1925] 2 D.L.R. 493 at p. 502. See the able dissenting opinion of MacPhillips, J.A.

[54] Terry: Leading Principles of Anglo-American Law, 351.

[55] See Allen, J., in *Spade* v. *Lynn* (1897), 168 Mass. 285 at p. 288

ciples was a rash adventure, which only the excellence of the result could justify. That justification is hard to find.

The doctrine of *Carlisle* v. *Bragg* is, however, well settled. One may say in paraphrase that the Court of Appeal planted it, the courts of four provinces supported by the Supreme Court of Canada, watered it, and the devil gave it increase. There is little hope of persuading the Canadian Courts to break away from the rule laid down in the case but "a decision on the face of it so astonishing may indeed on some future day, receive the consideration of the House of Lords."[56] Until then the utmost that can be said is that it is a "principle which should be sparingly applied where one not blind or illiterate seeks to escape from the consequences of his own act in signing a document."[57]

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[56] Beven on Negligence, 4th ed., 1539.
[57] MacDonald, J.A., in *Jack* v. *Wellington Collieries*, [1925] 3 D.L.R. 398 at p. 405.