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THE LAW OF EVIDENCE

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ESTOPPEL

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1. **Meaning and nature of estoppel.** Sir Edward Coke defined estoppel in the following words : "An estoppel is where a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth". "There

is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. Estoppel or 'conclusion', as it is frequently called by the older authorities may, therefore, be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability".¹ The word "estoppel" is not infrequently used to cover transactions to which it has no proper application. In its essence, it means that the party estopped has, by conduct or language, prevented himself from asserting the true facts on which he would otherwise have been entitled to rely.² Estoppel is often described as a rule of evidence,³ as indeed it may be so described.

But the whole concept is more correctly viewed as a substantive rule of law,⁴ in so far as it helps to create or defeat rights which would not exist or be taken away but for that doctrine.⁵ The rule of estoppel can also be viewed as a rule of substantive law. It prevails over a simple rule of procedure contained in Section 92.⁶

2. Presumptions and estoppels. The subject of estoppels⁷ differs from that of presumptions, which are partly dealt with in the preceding chapter, in the circumstance that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts; whereas a presumption is a rule that a particular inference shall be drawn from particular facts whoever proves them.⁸ Estoppels have been variously treated as conclusive presumptions of law; as solemn admissions and as conclusive evidence. They are, however, distinguishable from each of these, e. g., from the first named, in that an estoppel may be waived by the party in whose favour it operates; from the second as well as the first, in that it cannot in general be taken advantage of by strangers; and from the third in that the conclusiveness of evidence may result from mere logical cogency in the particular proceedings, while, when conclusiveness results from rule of law, it operates indifferently for or against all persons.⁹

1. Halsbury's Laws of England, (Simond's Edition,) Vol. XV, p. 168.

2. Durga Prasad v. Tata Iron & Steel Co., Ltd., 1918 P.C. 125, 129; 45 I.A. 275; I.L.R. 46 Cal. 552; 52 I.C. 909.

3. You cannot found an action upon estoppel; Low v. Bouverie, (1891) 3 Ch. 82 (CA.) at p. 105, per Bowen, L.J., cited in Lyle Meller v. A. Lewis & Co. (Westminster), Ltd., (1956) 1 All E.R. 247, (C.A.) at pp. 252-253; Harriman v. Harriman, (1909) P. 123 (C.A.) at 144; Brandon v. Dowager Baroness Michelham, (1919) 35 T.L.R. 617 and of Combe v. Combe, (1951) 2 K.B. 215 (C.A.): (1951) 1 All E.R. 767; Union of India v. Ram Nath, A.I.R. 1974 All. 296.

4. Canada and Dominion Sugar Co., Ltd. v. Canadian National (West Indies) Steamships, Ltd., 1947 P.C. 40, at 43; 1947 A.C. 46 at 56 (P.C.): 228 I.C. 614; Govindsa-

Marotisa v. Ismail, 1950 Nag. 22; I.L.R. 1949 Nag. 933; 1950 N. L.J. 1.

5. Veeraraghava v. Kamalamma, 1951 Mad. 403 at 405; (1950) 2 M.L.J. 575; 63 L.W. 952; M.K. Jujhawan v. Jamshedpur Municipality I.L.R. (1972) Cut. 1364; A.I.R. 1973 Orissa 186.

6. State Bank of India v. J. Baij Nath, 1974 M.P.L.J. 329; 1974 Jab. L. J. 476; A.I.R. 1974 M.P. 193.

7. See as to the Law of Estoppel, Bigelow's Treatise on the Law of Estoppel, 6th Ed. (1913); Everest and Stode's Law of Estoppel, 2nd Ed. (1907); Cababe: Principles of Estoppel (1888); and Estoppel by Representation and *res judicata* in British India, by A. Caspersz, being the Tagore Law Lectures, 1893, 4th Ed. (1915).

8. Steph. Introd., 175.

9. Phipson, Ev., 11th Ed., pp. 923, 924.

An estoppel is only a matter of proof.¹⁰ The onus of proving an estoppel lies of course on him who sets it up.¹¹ The representation, which is the basis for the rule must be clear and unambiguous and not indefinite.¹²

Once in a particular case, the authorised officer of the Railways makes the representation that a consignment has not arrived and on the basis of such representation the consignee acts, the plea of estoppel would be available to the consignee against the Railway Administration.¹³ An estoppel cannot be created either by an ambiguous document or an ambiguous act.¹⁴ It is not necessary that there should be any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel.¹⁵ A man is estopped when he has said, done or permitted something or act, which the law will not allow him to gainsay.

3. No odium attached to doctrine of estoppel. Owing to its use in ancient times, in shutting out the truth against reason and sound policy, the doctrine of estoppel was not favoured and was characterised as "odious". In modern times the doctrine has lost all ground of odium and become one of the most important, useful and just factors of the law. At the present day it is employed not to exclude the truth; its whole force being directed to preclude parties, and those in privity with them, from unsettling what has been fittingly determined—a just principle which can be and is daily administered to the well-being of society.¹⁶ As their Lordships of the Privy Council observed in a case: "There was perhaps a time when estoppels were described as odious and as such were viewed with suspicion and reluctance. But in more modern times, the law of estoppel has developed and has become recognised as a beneficial branch of law. That great lawyer Sir Frederick Pollock has described the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence'. A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities."¹⁷ In the case of one estoppel against another, the parties are set free and the Court has to see what their original rights are.¹⁸

4. Elements of estoppel. Generally, the elements of estoppel are :

- (1) A representation in any form, a declaration, act or omission.

10. *Bashi Chandra v. Enayat Ali*, (1892) 20 C. 236, 239.

11. *Birendra Kishore v. Baikunta Chandra*, 1919 Cal. 1032 : 46 I.C. 474 and the ordinary rules of proof apply. Therefore if an estoppel arising out of a written statement is produced, it and not the judgment, must be put in evidence. *Ananda Prasanna v. Badulla*, 1919 Cal. 963: 47 I.C. 985; an ectoppel can only be raised by pleading. If it is not pleaded the Court will not go into the matter; *Purgan Pande v. Dhanpat Tewari*, 1919 Pat. 309 : 52 I.C. 739.

12. *Bennett Coleman & Co. (Pvt.), Ltd. v. Punya Priya Das Gupta*, (1970)

1 S.C.R. 181 : (1970) 1 S.C.A. 123 : 1970 1 S.C.J. 401 : 37 F.J.R. 498 : 19 Fac. L.R. 32 : (1969) 2 Lab. L.J. 554 : A.I.R. 1970 S.C. 426 (434).

13. *Union of India v. Rasul Ahmad*, A.I.R. 1970 Orissa 157 (161).

14. *Mamsa v. Salliajee*, A.I.R. 1918 Lower Burma 53 : 46 I.C. 609.

15. *Balbir Prasad v. Jugal Kishore*, 1918 Pat. 646 (2) : 46 I.C. 473.

16. Bigelow, op. cit., 6th Ed., 5* 6.

17. *Canada and Dominion Sugar Co., Ltd. v. Canadian National (West Indies) Steamship, Ltd.*, 1947 P.C. 401 at 43.

18. *Jiwan Lal v. Behari Lal*, 1918 Lah. 392 : 45 I.C. 68.

(2) The representation must have been of the existence of a fact and not of promises *de futuro* or intention which might or might not be enforceable in contract.

(3) The representation must have been made under circumstances which amounted to an intentional causing or permitting belief in another. The proof of the intent may be direct or circumstantial, e. g., by conduct. It is not necessary that there should be a design to mislead or any fraudulent intention. Representation even when made innocently or mistakenly may operate as an estoppel.¹⁹

(1) Some person must have believed the representation to be true.

(5) That person must have acted on the belief so induced and been thus led to change his former position thereby to his prejudice.²⁰

(6) The misrepresentation, conduct or negligence must have been the proximate and not the remote cause of leading the other party to act to his prejudice.

(7) The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel.

Though, formerly, the term estoppel *in pais* had a limited connotation in English law, being applied only to acts of notoriety almost as solemn and formal as the execution of deeds, it is now used as synonymous with estoppel by conduct or representation. Estoppel *in pais* embraces all acts or statements of a party upon the faith of which another party has been led to act and to change his position and which it would be unfair to permit the first party to deny. It may arise from agreement, misrepresentation or negligence. Representation may be by conduct, act, omission or neglect. A man by omitting or neglecting to do a thing which he is under an obligation to do, may bring about a state of things equivalent to declaration. Estoppel may be brought about by acquiescence. Silence also may amount to conduct where it is equivalent to speech.

It is important to bear in mind that estoppel does not depend upon the motive or on the knowledge of the matter on the part of the person making the representation. It is not essential that the intention should have been fraudulent, or that he should have been acting with a full knowledge of circumstances and not under a mistake, or misapprehension. This is one main aspect in which it differs from ratification.²¹ "If a man, whatever his real meaning may be, so conducts himself that a responsible man would take his conduct to mean a certain representation of facts, estoppel may arise".²² It is well established that representation need not be false to the knowledge of the maker.

Constituent elements of estoppel: Thus, estoppel is a complex legal notion involving the statement to be acted upon, action on the faith of it

19. *Sarat v. Gopal*, I.L.R. 20 Cal. 296; *Vagliano v. Bank of England*, 1891 A.C. 107.

20. *Jagannath Prasad Singh v. Abdulla*, 45 C. 909 : 1918 P.C. 35 : 45 I.A.

97 : 45 I.C. 770.

21. *Sarat v. Gopal*, I.L.R. 20 Cal. 296.

22. *Carr. v. London and N.W. Rly. Co.*, (1875) L.R. 10 C.P. 347.

and resulting detriment to the actor.²³ The following elements must concur in order to constitute a valid estoppel by representation²⁴ :

(1) That the party sought to be estopped, or some person for whose representations such party is in law responsible, made a representation.

(2) That the case which the party is sought to be estopped from making, setting up, or attempting to prove, contradicts in substance his original representation.

(3) That such original representation was of a nature to induce, and was made with the intention of inducing, the party raising the estoppel to alter his position to his detriment and was of existing facts, not a promise *de futuro* or intention which might or might not be enforceable in contract.²⁵

(4) That on the part of the person claiming the benefit of estoppel there was mistake or ignorance as to the state of things and he was ignorant of the truth regarding the representation, as, when both parties are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel.¹ So, if both parties acted under a misapprehension as to their respective rights, the Court should scrutinise the connection between representation and alleged course of conduct.²

(5) That the party raising the estoppel actually altered his position to his detriment on the faith of such original representation.

(6) That the original representation was made to the party setting up the estoppel, or to some person in right of whom he claims.³

5. Kinds of Estoppel. At common law, there were three kinds of estoppel, namely, (a) by Record, (b) by Deed, and (c) *in pais*.

(a) *Estoppel by record.* Estoppel by record is dealt with by the Code of Civil Procedure, Sections 11–14, and by Sections 40–44 of this Act.⁴ There is a twofold estoppel arising by record, that is, from the proceedings of the Courts; first, in the record, considered as a memorial or entry of the judgment, and secondly, in the record, considered as a judgment. In the first case mentioned, the record has conclusive effect upon all the world. It imports absolute verity, not only against the parties to it and those in privity with them but against strangers also; no one may produce evidence to im-

23. Canada and Dominion Sugar Co. Ltd. v. Canada Steamships Ltd., 1947 P.C. 40; Dhyan Singh v. Jugal Kishore, 1952 S.C. 115; 1952 S.G.J. 142; 1952 S.C.R. 478.

24. Canada and Dominion Sugar Co. Ltd. v. Canada Steamships Ltd., 1947 P.C. 40; Dawson's Bank Ltd. v. Nippon Menkwa Kobushthi Kaish. I.L.R. 13 Rang. 256; 135 I.C. 1; 62 I.A. 100; 1935 P.C. 79, 32; Solano v. Ram Lal, 7 C.L.R. 481.

25. Maddison v. Alderson, (1883) L.R. 8 App. Cases 467; Dawson's Bank Ltd. v. Nippon, etc., 62 I.A. 100; A.I.R. 1935 P.C. 79; Bibhuti v. Maya, A.I.R. 1938 Cal. 172; 174

I.C. 790.

1. Swaminadha Aiyar v. Swaminatha Aiyar, 99 I.C. 772; A.I.R. 1927 M. 458; Lachman v. Collector, 146 I.C. 873; A.I.R. 1933 All. 641; Lotind v. Punjab National Bank, 191 I.C. 830; A.I.R. 1940 Lah. 254; Kanik v. Medni, A.I.R. 1942 Pat. 317; 201 I.C. 560.
2. Rama Kulanagar v. Pilavil, A.I.R. 1937 Mad. 158; 168 I.C. 842.
3. Dawson's Bank v. Nippon Menkwa Kabushthi Kaish, 62 I.A. 100; 1935 P.C. 79, 32; Solano v. Ram Lal, 7 C.L.R. 481; Spencer Bower on Estoppel, s. 36.
4. v. ante, 897–971.

peach it. Thus no one, whether party, privy or stranger, is permitted to deny the fact that the proceedings narrated in the record took place, or the time when they purport to have taken place, or that the parties, there named as litigants participated in the cause or that judgment was given as therein stated; unless in a direct proceeding instituted for the purpose of correcting or annulling the record.⁵

The estoppel of a record as a judgment⁶ is of greater importance. The force and effect of a judgment depend first upon the nature of the proceedings in which it was rendered, i. e., upon the question whether it was an action *in rem* or *in personam*,⁷ and secondly upon the forum in which it was pronounced, i. e., upon the question whether it was a judgment of a domestic or foreign Court.⁸ The record of a judgment *in rem* is generally conclusive upon all persons. In other cases, so far as the record purports to declare rights and duties, its material recitals import absolute verity between the parties to it and those who claim under them. The estoppel, arising from or fixed by the fact enrolled, constitutes the estoppel of a judgment. And to the question whether the judgment necessarily creates an estoppel, the general answer is, yes, if it results in *res judicata*; no, if it does not.⁹ There can be no estoppel by record where there is no judgment or decree.¹⁰ So also, a judgment can operate as estoppel only as between the parties thereto, unless it be a judgment *in rem*.¹¹ As to when a finding in a judgment does not amount to estoppel, see the undernoted case.¹²

The result of Section 12 (7) of the U. P. Consolidation of Holdings Act, 1954, can be called 'estoppel by record' inasmuch as what has taken place and is recorded and declared final cannot be questioned subsequently by a party which has already had an opportunity to object. The term 'estoppel by record' corresponds broadly to '*res judicata*' but it has also a wider connotation.¹³ The principle of estoppel by record is not applicable to mutation proceedings.¹⁴ Under taxation laws the findings of assessing authorities in respect of a previous year do not amount to estoppel. The assessee can question those findings in subsequent proceedings.¹⁵ Where an order for compulsory retirement of a Government servant was set aside and in the application for certificate for appeal to Supreme Court the Government stated that the employee could remain in service till the completion of 58 years, after dismissal of appeal by Supreme Court, the same employee was held not to be entitled to the plea of estoppel; the Government could terminate his service before the completion of 58 years.¹⁶

5. Bigelow, op. cit., 6th Ed., 8, 36.

6. Ahmad Ali Khan v. Veerayya, A.I.R. 1959 Andh. Pra. 280 : 1958 Andh. L.T. 938.

7. Bigelow, op. cit., 6th Ed., 8, 36, v. ante Vol. 1 pp. 858-863.

8. v. ante Vol. 1 pp. 858-863.

9. v. ib.

10. Bhuturi v. Mikira, 1950 Assam 162.

11. Ahmad Ali Khan v. Veerayya, A.I.R. 1959 Andh. Pra. 280.

12. Jogindra Singh v. Balbhaddar, A.I.R. 1971 All. 334 : (1971) 1 Cut. W.R. 993.

13. Sita v. State of U.P., 1967 A.W.R.

(H.C.) 731 : 1968 A.L.J. 144 : A.I.R. 1969 All. 342 (351) (F.B.). See American Jurisprudence, 2nd Ed., Vol. 28, p. 60 and Corpus Juris Secundum, Vol. 31, p. 193.

14. Shiv Dutt v. Kedar Nath, (1971) 1 Sim. L.J. (H.P.) 1 : A.I.R. 1972 H.P. 20.

15. V.N.R.M. Ammal v. Agriculture I.T.O. Kumbakonam, 1972 Tax. L.R. 1746 (Mad.).

16. Binapani Dei v. State, (1970) 1 Cut. W.R. 287 : I.L.R. (1971) Cut. 224 : A.I.R. 1971 Orissa 170.

But where the order of removal was withdrawn unconditionally the employer is estopped from starting second disciplinary proceedings on the same charges.¹⁷

Res judicata distinguished from estoppel. Estoppel must be distinguished from *res judicata*. Estoppel is part of the Law of Evidence and proceeds upon the equitable principle of altered situation, while the doctrine of *res judicata* belongs to procedure and is based on the principle that there must be an end to litigation.¹⁸ The plea of *res judicata* prohibits the Court from enquiring into a matter already adjudicated upon while estoppel prohibits a party from proving anything which contradicts his previous declarations or acts, to the prejudice of a party who, relying upon them, altered his position. "Perhaps the shortest way to describe the difference between the plea of *res judicata* and an estoppel is to say that while the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon, from proving anything which would contradict his own previous declarations or acts to the prejudice of another party who relying upon those declarations or acts, has altered his position. In other words, *res judicata* prohibits an inquiry *in limine* whilst an estoppel is only a piece of evidence."¹⁹ Estoppel results from the acts and conduct of parties while *res judicata* arises from the decision of a court.²⁰

Res judicata ousts the jurisdiction of the Court, while estoppel only shuts the mouth of a party.²¹ Neither the principle of estoppel nor of *res judicata* is applicable to the question of jurisdiction.²²

The general rule of evidence enacted in Section 115 of this Act is the rule of estoppel by conduct as distinguished from an estoppel by record which constitutes the bar of *res judicata*.²³ Estoppel by record is what is provided for in Section 11 of the Code of Civil Procedure. It is not within the province of a Court to introduce another kind of estoppel by judgment not covered by Section 11 or the general principles of *res judicata*.²⁴

(b) *Estoppel by deed.* The strict technical doctrine of estoppel by deed cannot be said to exist in India.²⁵ Section 115 of this Act is exhaus-

17. Sanjib v. Director (Administrator), Government of India, 1975 Lab. I.C. 1580 (Cal.).

18. See Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy Ebrahim, I.L.R. 36 Bom. 214 : 12 I.C. 225 : 13 Bom. L.R. 717; Baishanker Nana-bhai v. Morarji Keshavji, I.L.R. 36 Bom. 283 : 12 I.C. 535 : 13 Bom. L.R. 950; Kali Dayal v. Umesh Prasad, 1922 Pat. 63 : I.L.R. 1 Pat. 174 : 65 I.C. 266.

19. Sitaram v. Amir Begum, (1886) I. L.R. 8 All. 324 at p. 332, per Mahmud, J.

20. Radharani v. Binodamoyee, 1942 Cal. 92 : I.L.R. (1942), 1 Cal. 169 : 200 I.C. 216; Sarangapani v. Venkata Narasimhacharyulu, 1952 Mad. 384 : (1951) 2 M.L.J. 464; 64 L.W. 863. See also Jai Narain Har Narain v. Bulagi Das, 1968 A. L.J. 1047 : 1968 A.W.R. (H.C.)

704 : A.I.R. 1969 All. 504 (509) (F.B.).

21. Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy Ebrahim, I.L.R. 36 Bom. 214 : 12 I.C. 225 : 13 Bom. L.R. 717; Allah Baksh v. Nusserwanji & Co., 1936 Sind. 99 : 164 I.C. 43 : 29 S.L.R. 455.

22. Palaniappa Chettiar v. Babu Sahib, (1971) 84 M. L.W. 230.

23. Sunderbai v. Devaji Shanker Deshpande, 1954 S.C. 82 : 1953 S.C.J. 693 : (1953) 2 M.L.J. 782.

24. Sarangapani v. Venkata Narasimhacharyulu, 1952 Mad. 384, 387 : (1951) 2 M.L.J. 464 : 64 L.W. 863; Ahmad Ali Khan v. Veeralla, A.I.R. 1959 A.P. 280.

25. See Gokuldas Gopaldas v. Purnamal Premeukhdas, 11 I.A. 126 : I.L.R. 10 Cal. 1035; Zemindar Serimatu v. Virappa Chetty, (1864) 2 Mad. H. C.R. 174. "The strict technical

tive, and the law of estoppel in this country is contained in it.' However it has been held in several cases that Section 115 is not exhaustive and there may be rules of estoppel which may be applicable in India other than what is contained in that section.²

An estoppel by deed is a preclusion against the competent parties to a valid contract and their privies to deny its force and effect by any evidence of inferior solemnity.³ The rule declares that no man shall be permitted to dispute his own solemn deed. In a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of *non est factum* is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him not because he has read it or understands it, but because he has chosen to execute it. This is equally true (apart from fraud) in equity as at law except in those special cases where there is an equitable ground for setting aside or rectifying the deed.⁴ In India, however, conveyancing is of a simple and informal character⁵ and contracts under seal have no special privilege attached to them, being treated on the same footing as simple contracts.⁶ But while the technical doctrine has no application in this country, statements in documents are, as admissions, always evidence against the parties. And the admissions may be conclusive if they work an estoppel, that is, if the statement has been acted upon by the party to whom it was made.⁷

The Courts in England and America in recent times appear inclined to treat the estoppel by deed as resting on contract, an intelligible basis upon which a large class of estoppel is arising, namely, that the parties have agreed for the purposes of a particular transaction to treat certain facts as true.⁸

doctrine of the English law as to estoppel in the case of solemn deeds under seal rests upon peculiar grounds that have no application to the present bonds or the other written instruments ordinarily in use among natives" Gopal v. Blaquiere (1867) 1 B.L.R. O.C. 37; Param Singh v. Lalji Mal, (1877) 1 A. 403; Donzelle v. Kedarnath Chuckerbutty, (1871) 7 B.L.R. 720; Kedarnath Chuckerbutty v. Donzelle, (1873) 20 W.R. 352.

1. Asmatunessa Khatun v. Harendra Lal Biswas, (1908) 35 C. 901; 8 C.L.J. 29; 12 C.W.N. 721.
2. Jaikaran Singh v. Sita Ram, A.I.R. 1974 Pat. 364; for other cases see note 5 (c) (vi) (Estoppel under this Act) infra and note 2 under section 115.
3. Bigelow, op. cit., 6th Ed., 360-362; Bowman v. Taylor, 2 A. & F. 278, 291.
4. Martin Cashin v. Peter J. Cashin, 1938 P.C. 103, 109; 1939 M.W.N. 85.
5. See observations of Paul, J. in Donzelle v. Kedarnath Chuckerbutty, (1871) 7 B.L.R. 728-730; and see

Kedarnath Chuckerbutty v. Donzelle, (1873) 20 W.R. 353; and the deeds and contracts of the people of India are to be liberally construed: Hanooman Persaud v. Mst. Bahooce Munraj Kuer, (1856) 6 Moo. I.A. 411; Ram Lal Set v. Kanai Lal, (1886) 12 C. 663; Vasonji Morarji v. Mst. Chanda Bibi 1915 P.C. 18; 1 I.L.R. 37 All. 369; 29 I.C. 781.

6. Raja Sahib v. Budhu Singh, (1869) 12 Moo. I.A. 275; see 2 B.L.R. (P.C.) 111; Ram Gopal v. Blaquiere, (1867) 1 B.L.R.O.C. 37; Tirunala v. Tingala, (1863) 1 Mad. H.C.R. 312, 318; Mrs. N. Johnstone v. Gopal Singh, 1931 Lah. 419; 1 I.L.R. 12 Lah. 546; 133 I.C. 628; 32 P.L.R. 840 (the doctrine of estoppel by deed in its technical sense cannot be said to exist in India).
7. v. S. 31, ante, and Sadhu Churn v. Basudev Parbeary, (1905) 9 C.W.N. ccviii.
8. Bigelow, op. cit., 6th Ed., 361 note (3); see Carpenter v. Buller, 8 M.W. 200, 212.

In this country the technical doctrine is not recognised at all, and a statement in a deed or other document can only give rise to an estoppel if the case is one which can be brought within the rules as to estoppel by conduct. In some cases, such a statement amounts to a mere admission of more or less evidential value according to the circumstances, but not conclusive. In other cases, namely, those in which the other party has been induced to alter his position upon the faith of the statement contained in the document, such a statement will operate as an estoppel. In this view of the matter, an estoppel arising from a deed or other instrument is only a particular application of that estoppel by conduct or misrepresentation which is the subject-matter of Section 115 of this Act. An estoppel, however, *in pais*, may arise in connection with a deed as in connection with any other instrument. In the case of *Param Singh v. Lalji Mal*,⁹ the rule on this point was laid down as follows :

"If a party to a deed is to be precluded from questioning his solemn act much injustice would be brought in this country. The strictness of the rule of estoppel has been in England relaxed. If it is to be used to promote justice, the degree of strictness with which it is to be enforced must be proportioned to the degree of care and intelligence which the natives of the country in practice bring to bear upon their transactions. What is ordinarily known in these provinces as a deed, is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances, it appears to us that justice, equity and good conscience required no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument ; but where the question arises between parties, or the representatives-in-interest of parties, who at the time of the execution of the instrument were aware of its intention and object, and who have not been induced to alter their position by its execution, we consider that justice in this country will be more surely obtained by allowing any party, whether he be plaintiff or defendant, to show the truth."

Where the plaintiff's father had settled disputes and got his share of the sale-proceeds of trust property in the form of immovable properties, he (the plaintiff) cannot charge the trustee (defendant) for committing breach of trust nor follow the alleged trust properties.¹⁰ Admission of title of brother in a property and of its sale to a third person may amount to estoppel by deed.¹¹ Where in a deed, the land is described to be of a particular kind and that is acted upon by the parties, a contrary stand as to the kind of land cannot be permitted.¹²

Where a tender is made in response to a notice containing a valid condition, the tenderer is estopped from saying that the condition is not bind

9. (1877) 1 All. 403, 410 ; but see as to this case, *Chenvirappa v. Putappa*, (1887) 11 B. 708.
10. *Joseph v. Stanislaus*, I.L.R. (1966) 2 Mad. 385 ; A.I.R. 1968 Mad. 161 (168).

11. *Dattatraya v. Rangnath*, A.I.R. 1971 S.C. 2548.

12. *Narayan v. Kamnammal*, A.I.R. 1973 Madras 471 ; C.C. Nayak v. Marik Chandra, A.I.R. 1972 Cal 520.

ing on him.¹³ An employee is estopped from challenging the date of birth, entered in his service book for a long period, after he has been retired on the basis of that entry.¹⁴

The doctrine of election is the principle that the exercise of a choice by a person left to himself of his own freewill to do one thing or another binds him to the choice which he has voluntarily made and is founded on the equitable doctrine that he who accepts benefit under one instrument or a transaction of his choice must adopt the whole of it and renounce everything inconsistent with it. The Court exercising jurisdiction in equity will bind him to his election and preclude him from going behind the same. It may be that there can be no ratification of a void transaction but the principle of election does not require any ratification. It imposes a personal bar on the person benefited by the invalid transaction.¹⁵ However if a party does not rely upon estoppel arising from the recitals in a deed, but raises an issue of fact it is not open to him to plead estoppel to prevent his adversary from proving facts.¹⁶

As to the cases in which, in order to prevent fraud it may be shown that an apparent deed of sale is really a mortgage, see ante, Section 92, *sub voc.* "Evidence of Conduct" and authorities there cited.¹⁷ As to estoppel by pleading *v. ante*, Notes under Section 58.¹⁸

(c) *Estoppel in pais.* (i) *Ancient doctrine.* "Estoppel in pais" under the ancient doctrine of the common law sprang from (i) livery of seisin; (ii) entry; (iii) acceptance of rent; (iv) partition; (v) acceptance of an estate. Apart from the case of partition, only one of the above-mentioned instances, mentioned by Coke—estoppel by acceptance of rent—prevails at the present day, and even the character of this instance is widely different from what it was in his time. Estoppel by the acceptance of rent as known to Coke occurred where the landlord accepted rent from a tenant who held over after the expiration of a lease by deed. Such an estoppel depended upon the prior existence of a deed while at the present day it is immaterial how the tenure arose.¹⁹ The estoppel by partition was a case of implied warranty. In the case of a partition of lands by writ of partition between co-tenants, the law imported a warranty of the common title, and held it to be incompatible with their duty to each other for either to become defendant in a suit to recover any portion of the land by a paramount title and thus to place himself in antagonism to his co-tenants. No tenant after partition could set up an adverse title to the portion of another for the purpose

13. *M/s. Produce Exchange Ltd. v. Commissioner Excise*, (1972) Assam L.R. 23.

14. *Makradhwaj Singh v. State*, 1974 Lab. I.C. 1493.

15. *K. Shanmugham Pillai v. S. Shanmugham Pillai*, I.L.R. (1968) 2 Mad. 316 : (1967) 2 M.L.J. 581 : 80 M.L.W. 458 : A.I.R. 1968 Mad. 207 (211, 215) (question whether plaintiffs precluded from asserting their rights as reversioners).

16. *Rajendra Ram Das v. Devendra Das*, (1973) 1 S.C.C. 14 : 1973 S.C.D. 59 : (1973) 5 Civil App. J. (S.C.) 1 : (1973) 2 S.C.R. 911 : (1974) 2 S.C.J. 87 : (1975) 1 An.

W.R. (S.C.) 4 : A.I.R. 1973 S.C. 268.

17. *Bapuji v. Senrajji*, (1877) 2 B. 231 : *Mahadaji Gopal v. Bithal Ballal*, (1881) 7 B. 78.

18. *Bhugwandeem Doobey v. Myna Bace*, (1867) 11 Moo. I. A. 487, 497 : *Ram Surun v. Mst. Pran*, (1870) 13 M.T.A. 551, 559 : *Kristo Prea v. Puddo Lochan* (1866) 6 W.R. 288 : *Rangaswami v. Krishna*, (1862) 1 Mad H.C.R. 72 : *Dayal Jairaj v. Khatav Latha*, 12 Bom. H.C.J. 97.

19. *Bigelow*, op. cit., 6th Ed., 490 ; see Act IV of 1882 (Transfer of Property Act) S. 116.

of ousting him from the part which had been partitioned off to him.²⁰ In this country the question whether there is an estoppel by reason of partition will depend, in the case of a partition by decree, upon the question whether there is an estoppel by judgment or *res judicata*,²¹ and in the case of partition by act of parties whether there is under the circumstances such an estoppel by agreement or by such conduct as is provided for in Section 115, *post*.²² In the case cited it was held by the Privy Council that a decree for partition in a suit by a member of a joint Hindu family is *res judicata* as between all co-sharers who are parties to the suit.²³

(ii) *Modern doctrine*. In addition to the above forms of estoppel *in pais* which are now chiefly of historic interest only, there is the modern doctrine of estoppel *in pais*. Indeed the estoppel *in pais* of the present day has grown up entirely since the time of Coke, and embraces cases never contemplated in that character by him or by the lawyers of even much later times, though the old lines are often visible in the newer pathways.

Estoppel *in pais*, according to the modern sense of that term, has been said to arise firstly (a) from agreement or contract; secondly (b) independently of contract, from act or conduct of misrepresentation which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged.

(iii) *Estoppel by agreement*. Estoppel by agreement embraces (i) all cases in which there is an actual or virtual undertaking to treat a fact as settled, so that it must stand specifically as agreed, and (ii) all cases in which an estoppel grows out of the performance of the contract by operation of law. Estoppel by contract does not include cases of estoppel not arising by or by virtue of the contract itself, though arising in the course of the contract; if the estoppel is not part of the contract itself or of its legal effect it belongs to the next head. While there can be no estoppel by agreement where the justice of the case does not require it, such an estoppel may be found to exist where there is an agreement either express or to be implied

20. Bigelow, *op. cit.*, 6th Ed., 445—447. In the case of partition *in pais* by conveyance between the parties there appears to be no estoppel apart from recitals, unless there is an express warranty. And the rule itself has been subjected to some qualification, 6th Ed., 446.

21. As to the conclusiveness of partition proceedings, see *Mst. Oodia v. Bhopal*, (1868) 3 Agra Rep. 137; *Ghassee Khan v. Kulloo*, (1866) 1 Agra Rep. 152; *Shivram v. Narayan*, (1880) 5 B. 27; *Lakshman Dada Naik v. Ramchandra Dada Naik*, (1880) 5 B. 48; *Konnerav v. Gurrav*, (1881) 5 B. 589; *Nilo Ramchandra v. Govind Balla*, (1885) 10 B. 24; *Sadu v. Baiza*, (1878) 4 B. 37; *Ananta Balacharya v. Damodhar Makund*, (1888) 13 B. 25, 31; *Krishna Behari v. Banwari Lal*, (1875) 1 C. 144; 2 I.A., 283; *Rajah of Pitapur v. Sitty*, (1884) 12 I.A. 16; I.L.R. 8 Mad. 219

(P.C.); *Venkatadri v. Peda Venkayamma*, (1886) 10 Mad. 15; *Sheik Hossein v. Sheik Musund*, (1872) 18 W.R. 260; *Hari Narayan v. Ganpatrav Daji*, (1883) 7 B. 272; *Kirty Chunder v. Anath Nath*, (1883) 10 G. 97; 13 C.L.R. 249; and *Caspersz. op. cit.*, 4th Ed., (1915) ss. 860—866 where these cases are cited and considered; and *Chokhey Singh v. Jote Singh*, 36 I. A. 38; I.L.R. 31 All. 73; 1 I. C. 166 (P.C.).

22. Cf. *Greender Chunder v. Troylokho Nath*, (1892) 21 I.A. 35; I.L.R. 20 Cal. 373 (P.C.); *Ananta Balacharya v. Damodhar Makund*, (1881) 13 B. 25; *Srimati Sukkimani v. Mahendra Nath*, (1869) 4 B.L.R. 16 (P.C.); *Caspersz. op. cit.*, 4th Ed., (1915), s. 321, p. 306.

23. *Nalini Kanta Lahiri v. Sarnomoy Debby*, 1914 P.C. 31; 41 I.A. 247; 24 I.C. 294; 17 Bom. L.R. 1.