[HIGH COURT OF AUSTRALIA.]

AGNES FERRIER . . . . . APPELLANT;
DEFENDANT,

AND

JOHN GORDON STEWART AND ANOTHER RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 14, 17, 18, 24.

Griffith C.J., Barton and Isaacs JJ.

Promissory note—Liability of indorser—Order in time of indorsements—Indorsement by payee—Holder in due course—Estoppel—Instruments Act 1890 (*Vict.*) (*No.* 1103), *secs.* 21, 38, 55, 56, 57, 90.

A promissory note made by A. in favour of B. bore the indorsements "B. without recourse," "C," "B," above one another, and in that order. It appeared that C. took the note, which had been already signed by A., and was intended to be used by way of renewal of a previous promissory note made and indorsed in the same way, to B., who refused to take it unless C. herself first indorsed it. C. accordingly signed her name on the back of the note with the intention of indorsing it, and of being liable as an indorser to B., and then B. took it. B. subsequently placed his indorsements on the note in the order in which they appeared. In an action by B. against C. upon the note,

Held, that the indorsements were in the order in which they were intended by C. to appear, and that C. was estopped from denying either that she was an indorser, or that B. was a holder in due course.

Held, therefore, that C. was liable to B. either as an indorser or under sec. 57 of the *Instruments Act* 1890, which provides that "Where a person signs a bill otherwise than as drawer or acceptor he thereby incurs the liabilities of an indorser to a holder in due course."

Semble, per Griffith C.J., the promissory note was "a bill wanting in a material particular," which the persons in possession of it were entitled to fill up under sec. 21 of the *Instruments Act* 1890.

Steele v. *M'Kinlay*, 5 App. Cas , 754, discussed.

Decision of the Supreme Court of Victoria (*Hodges* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by John Gordon Stewart, as surviving partner of the firm of Gummow & Stewart, or, alternatively, by him and Hester Ann Gummow, as executrix of Frederic Forbes Lewis Gummow, against Agnes Ferrier and Joseph Ferrier, on five promissory notes, dated 18th March 1909, alleged to have been made by Joseph Ferrier in favour of the firm of Gummow & Stewart, or order, and indorsed by Agnes Ferrier, to have been made payable at the Bank of Victoria and to have been indorsed without recourse by the firm of Gummow & Stewart. It was alleged that each of the promissory notes was duly presented for payment and was dishonoured, that notice of dishonour was duly given, and that the plaintiff Stewart, or, alternatively, the plaintiffs Stewart and Gummow, were the holder, or holders, or alternatively the holder or holders in due course.

The facts are sufficiently stated in the judgments hereunder.

The action was heard by *Hodges* J., who gave judgment for the plaintiffs against the defendant Agnes Ferrier.

From this decision the defendant Agnes Ferrier appealed to the High Court on the following grounds (*inter alia*):—

"3. That the appellant was not liable as an indorser of the said promissory notes.

"4. That the appellant did not incur the liability of an indorser on the said promissory notes.

"5. That the respondents were not the holders of the said promissory notes.

"6. That the appellant was not liable on the said promissory notes by reason of any estoppel, agreement or otherwise."

Starke, for the appellant. The appellant was not an indorser of the notes. An indorser is a person who has title and gives title by delivery, and this was not the position of the appellant. A promissory note is not complete until it has been transferred to the payee, and there can be no indorsement which will make

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the indorser liable as such until the note is complete and unless it is transferred to the indorser. Gummow & Stewart were not "holders in due course" of the notes, within the meaning of sec. 57 of the *Instruments Act* 1890, so far as any title was given to them by the appellant. That section does not alter the law but merely expresses what the law merchant was: *Steele* v. *M'Kinlay* (1); *Moss* v. *Wilson* (2). The obligation which that section contemplates is an obligation not to parties to a bill but to subsequent holders. He referred to *Jenkins & Sons* v. *Coomber* (3); *Singer* v. *Elliott* (4); *Robinson* v. *Mann* (5); *Chalmers' Bills of Exchange*, 6th ed., p. 191; *Byles on Bills*, 17th ed., p. 176; *Macdonald* v. *Whitfield* (6); *Lewis* v. *Clay* (7); *Herdman* v. *Wheeler* (8); *Lloyd's Bank Ltd.* v. *Cooke* (9); *Glenie* v. *Bruce Smith* (10).

[GRIFFITH C.J. referred to *Bank of England* v. *Vagliano Brothers* (11).]

If there was any agreement by the appellant to pay the note, it is unenforceable by reason of the *Statute of Frauds*. The evidence does not show an agreement that Gummow & Stewart should indorse the notes to the appellant without recourse and that she should indorse back to them, but only an agreement that she would guarantee the payment of the notes. The signatures on the back of the notes were only for the purpose of facilitating further dealings with the notes. He also referred to the *Instruments Act* 1890, secs. 53, 56, 90 (2).

Irvine K.C. and *Davis*, for the respondents. The only inference to be drawn from the facts was that the appellant authorized Gummow & Stewart to complete the note by putting their names as payees before her indorsement. If her signature was prior in point of time but subsequent in position she was liable to them as an indorser. The intention of the parties was exactly carried out by the form which the note took. That is independent of sec. 57 of the *Instruments Act* 1890. As to that section the

(1) 5 App. Cas., 754.
(2) (1908) V.L.R., 140, at p. 167; 29 A.L.T., 203.
(3) (1898) 2 Q.B., 168.
(4) 4 T.L.R., 524.
(5) 31 Can. Sup. Ct. R., 484.
(6) 8 App. Cas., 733.
(7) 67 L.J.Q.B., 224.
(8) (1902) 1 K.B., 361.
(9) (1907) 1 K.B., 794.
(10) (1907) 2 K.B., 507; (1908) 1 K.B., 263.
(11) (1891) A.C., 107.

appellant cannot be in a better position than if the signature "Gummow & Stewart without recourse" were struck out. Then if she had never signed the note Gummow & Stewart would have been holders in due course within sec. 57. Then the effect of her signature is under that section that she is liable to a holder in due course, that is in this case to Gummow & Stewart. In *Steele* v. *M'Kinlay* (1) and the other cases referred to on the same point there was no agreement between the parties and no evidence of the intention with which the person whose name was upon the bill put his name there. *Glenie* v. *Bruce Smith* (2) is directly in the respondents' favour. Gummow & Stewart were holders in due course because they *bonâ fide* gave value for the notes: *Talbot* v. *Von Boris* (3). As to what constitutes indorsement they referred to *Byles on Bills*, 17th ed., p. 175; *Castrique* v. *Buttigieg* (4).

[ISAACS J. referred to *Smith* v. *Commercial Banking Co. of Sydney* (5).]

Starke, in reply.

Cur. adv. vult.

June 24.

GRIFFITH C.J. read the following judgment:—This was an action brought by the respondents against the appellant as indorser of five promissory notes, each of which was drawn by Joseph Ferrier, the defendant's husband, in favour of the firm of Gummow & Stewart. Each of them, when produced, appeared to be indorsed as follows:—"Gummow & Stewart without recourse," "Agnes Ferrier," "Gummow & Stewart," in that order.

The plaintiffs were the surviving member of the firm of Gummow & Stewart and the executrix of a deceased member. On the face of the documents, therefore, the plaintiffs' title was complete, and it was for the defendant to displace it. This she sought to do by showing that her signature was placed upon the notes before the first signature of Gummow & Stewart. It is admitted that the order of time in which successive indorsements are made upon a negotiable instrument is not material if they

(1) 5 App. Cas., 754.
(2) (1908) 1 K.B., 263.
(3) (1911) 1 K.B., 854, at p. 865.
(4) 10 Moo. P.C.C., 94.
(5) 11 C.L.R., 667.

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appear in the order of succession intended by the parties (see *per* Lord *Watson* in *Steele* v. *M'Kinlay* (1), and *per Fletcher Moulton* L.J. in *Glenie* v. *Bruce Smith* (2)). The plaintiffs offered evidence to show that the signatures as appearing on the notes were in the order intended by the parties. They proved that the defendant took the notes, which had been already signed by her husband as maker, and were intended to be used by way of renewal of previous promissory notes made and indorsed in the same manner, to Gummow & Stewart, who refused to take them unless she herself indorsed them. She accordingly did so, and delivered the notes to them with the intention of making herself liable upon the notes. If, then, the law be that she would not be liable unless the notes bore an indorsement by the payees above her own, it follows, in my opinion, that by putting her indorsement upon them and delivering them to Gummow & Stewart with that intention she authorized them to do the one act without which her intention could not be effectuated. In this view the indorsements as they now appear are in the order in which they were intended to appear, and the *primâ facie* effect of them as they stand is not displaced. This conclusion does not depend upon the provisions of the *Bills of Exchange Act*, but follows from the application of the ordinary rules relating to implied authority. In the cases of *Steele* v. *M'Kinlay* (3); *Singer* v. *Elliott* (4); and *Jenkins & Sons* v. *Coomber* (5), relied upon by the appellant, the notes did not bear the indorsement of the payee above that of the defendants.

The facts which I have stated are, in my opinion, sufficient to dispose of the case.

If regard is had to the *Instruments Act* 1890 (No. 1103) (Victoria) the same result will follow. I will cite the sections by the numbers of the sections of the English *Bills of Exchange Act* 1882, of which they are a transcript.

Sec. 54 defines the obligations of an acceptor of a bill of exchange, and sec. 55 the obligations of a drawer and of an indorser. Sec. 56 is as follows:—"Where a person signs a bill

(1) 5 App. Cas., 754, at p. 779.
(2) (1908) 1 K.B., 263.
(3) 5 App. Cas., 754.
(4) 4 T.L.R., 524.
(5) (1898) 2 Q.B., 168.

otherwise than as drawer or acceptor he thereby incurs the liabilities of an indorser to a holder in due course."

Mr. *Starke* contends that this section did not alter the law as declared in *Steele* v. *M'Kinlay* (1). I do not think it material to discuss that question. I prefer to follow the rule laid down by Lord *Herschell* in the well known case of *Bank of England* v. *Vagliano Brothers* (2), and to inquire what the law now is as declared by the Statute, irrespective of what it was before the Statute. By sec. 89 the provisions of the Act relating to bills of exchange apply with the necessary modifications to promissory notes, and in particular the maker of a note is deemed to correspond with the acceptor of a bill, and the first indorser of a note is deemed to correspond with the drawer of an accepted bill payable to the drawer's order. Applying sec. 56 to the present case, Joseph Ferrier is to be regarded as the acceptor, and Gummow & Stewart, whose indorsement was necessary in order to make the note negotiable, as the drawers. The appellant is neither one nor the other, and is therefore within the literal words of sec. 56. It is to be noticed that sec. 56, read by the light of sec. 89, assumes the existence of a first indorser, to whom the person incurring the liabilities of an indorser must necessarily be subsequent. It seems to me to follow, by the mere effect of the section, that when a person indorses a promissory note not already indorsed by the payee, he *ipso facto* authorizes the payee to place his indorsement above his own, if actual indorsement by the payee is necessary.

Interesting arguments were addressed to us on the question whether the payee of a note can be called a holder in due course, and whether the delivery of a note by the maker to the payee can be called negotiation, but I do not think it necessary to deal with them at length. The liabilities of an indorser as defined by sec. 55 are necessarily liabilities to subsequent holders of the note, and not to prior holders as such. As between them, therefore, a payee is not, *quâ* payee, a holder in due course in a relevant sense, but there is no reason why a payee should not afterwards become a holder subsequent to the indorsement. This is, indeed, expressly recognized by sec. 37, and is not contested.

(1) 5 App. Cas., 754. (2) (1891) A.C., 107.

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I have, so far, dealt with the case on the assumption that a formal indorsement by the payee above that of the indorser is essential, as appears to have been held in *Singer* v. *Elliott* (1) and *Jenkins & Sons* v. *Coomber* (2). The contrary view seems to have been taken by the Court of Appeal in *Glenie* v. *Smith* (3) as to one of the notes sued upon in that case, but I am not sure.

Upon a literal construction of sec. 55, however, such an indorsement would not seem to be necessary. The terms of the section are absolute. The person who signs the note otherwise than as drawer or indorser incurs (sec. 56) the liabilities of an indorser. Those liabilities, as declared by sec. 55, include (*a*) that he engages that on due presentment the note shall be paid according to the tenor, (*c*) that he is precluded from denying to his immediate or any subsequent indorser that the note was at the time of his indorsement a valid and subsisting note and that he had then a good title to it. The term "indorsement" by sec. 2 means indorsement completed by delivery. It follows that the appellant, who wrote her name on the back of the notes and delivered them to Gummow & Stewart, is precluded from denying to them that the notes were then valid and subsisting notes, and that she had then a good title to them. If in point of form her title depended upon the writing above her own signature of that of Gummow & Stewart, which, as I have shown, is assumed by sec. 89 to be already there, she is precluded from denying that that which is assumed by law to be there is actually there. It does not follow that a subsequent holder could sue Gummow & Stewart in the absence of actual indorsement by them. But the indorser is estopped by the Statute from setting up the formal defect if it be one.

In my opinion, therefore, the notes were, as between the parties, regular on their face within the meaning of sec. 29, and the title of the appellant when she negotiated them was not defective within the meaning of that section. The respondents are, therefore, holders in due course, and the case falls within sec. 56.

I am disposed, also, to think that a promissory note which has been indorsed by a stranger before it has been indorsed by the

(1) 4 T.L.R., 524.

(2) (1898) 2 Q.B., 168.

(3) (1908) 1 K.B., 263.

payee is a bill "wanting in a material particular" within the meaning of sec. 20, and that the person in possession of it has a *primâ facie* authority to fill up or procure the filling up of the omission by any person who can do so without the unauthorized use of another person's signature. Gummow & Stewart were clearly such persons.

For all these reasons I am of opinion that the defendant is liable to the plaintiffs upon her indorsements, and that the appeal fails.

BARTON J. I agree with the conclusion at which the Chief Justice has arrived and with his reasoning, but I have a few words to add.

From what is the entire contract of an indorser to be deduced? On that question there is an extremely pertinent passage in the judgment of the Privy Council delivered by *Sir William Maule* in *Castrique* v. *Buttigieg* (1). He said:—"The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question, but that contract arises out of the written indorsement itself, the delivery of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances (such as the usage at the place, the course of dealing between the parties and their relative situations) under which the delivery takes place."

As to the course of dealing, there were five antecedent promissory notes maturing on the day the notes now in question were executed, and they were all in the same form and indorsed by three successive indorsements:—"Gummow & Stewart, without recourse," "Agnes Ferrier," and "Gummow & Stewart." This state of their dealings must be borne in mind in considering the conversation between the appellant and Stewart at his office when the previous notes were near maturity. It is clear that before indorsing the appellant understood that, if the maturing

(1) 10 Moo. P.C.C., 94, at p. 108.

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notes were not replaced by new ones similarly indorsed, she was liable to be sued on her indorsements signed on 15th September 1908. She knew therefore that she was being asked to undertake, by indorsing the new notes, a liability to be substituted for that then existing; and for the valuable consideration that her liability on the old notes would be extinguished she did undertake the substituted liability. Having regard to the previous transactions between her, her husband and the firm, the conversation between her and the respondent Stewart was clear as to the form she understood her liability was to take under the new indorsements. I think all this is clear evidence that she authorized the firm of Gummow & Stewart to place their indorsement without recourse before her own, and to place their signature also below her general indorsement. There was no mention of any other sort of liability than that which was then impending and no suggestion that it was to be evidenced in any different form. She simply undertook a substituted liability to avoid an action against which she by words and conduct admitted there was no defence. What could that mean except that with the view of making herself liable she made a contract on all fours with that which she admitted to be binding on her under the previous series of notes identical in form? Does this conversation, added to which is the evidence of the contract afforded by the instrument itself and the previous dealings, alter the relations between the parties to be inferred from the instrument as it stands? So far from doing so it appears to me to confirm them. She knew that Gummow & Stewart had indorsed the old notes "without recourse" to make them negotiable but without undertaking any liability to her. She knew also that she had indorsed the old notes by way of incurring a liability to Gummow & Stewart. This was clearly to be a similar transaction, so that the order of the signatures as they appear on the notes expresses the agreement between the parties.

It may be objected that where a promissory note is negotiated back to the prior indorser, though he may re-issue the note and further negotiate it, he cannot enforce payment of it against a party whose indorsement intervenes between his prior and his subsequent indorsements. That is so where the prior indorsement

is unqualified. The liability of the intervening to the subsequent indorser is cancelled by his liability to the same person under his own first indorsement. But in this case the objection is met by the form in which Gummow & Stewart made their first indorsement, namely, "without recourse." Sec. 38 of the *Instruments Act* 1890 (sec. 37 of the English *Bills of Exchange Act* 1882) is in these words:—"Where a bill is negotiated back to the drawer or to a prior indorser or to the acceptor, such party may subject to the provisions of this Part of this Act re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable." That is the state of things here, with this exception, that the previous liability does not exist owing to the first indorsement being "without recourse." The inference from sec. 38 seems to me to be that, where a subsequent indorser has not made himself in respect of his prior indorsement liable to the intervening indorser, he may enforce payment against the latter. If that inference is correct, as I think it is, there can be no defence founded on the fact that Gummow & Stewart are both prior and subsequent indorsers.

While I agree with what the Chief Justice has said as to the construction of sec. 57 of the *Instruments Act* 1890 I think the oral evidence completely establishes the liability of the appellant, even if sec. 57 does not alter the law as stated in *Steele* v. *M'Kinlay* (1). I think, therefore, that the appeal should be dismissed.

ISAACS J. read the following judgment:—The appellant's case rests finally upon two positions of fact: first, that Mrs. Ferrier did not authorize Gummow & Stewart to write their name above hers; and next, that even if that be determined against her, they did not deliver the note to her, with their name so written, so as to "indorse" it to her. And so, it is said for her, it cannot be said she was an indorser of the note to the respondents within the meaning of the Act; whatever might have been her liability to a subsequent holder under the doctrine of an aval.

The respondents rely, to begin with, on sec. 57, which gives to "a holder in due course" the same rights against any person who

(1) 5 App. Cas., 754.

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signs a bill otherwise than as drawer or acceptor as he would have against a person strictly indorsing.

Two competing views have been expressed by high judicial authority in England. The opinion of Lord *Russell of Killowen* in *Lewis* v. *Clay* (1) is adverse to the respondents, that of *Fletcher Moulton* L.J. in *Lloyd's Bank Ltd.* v. *Cooke* (2) is in their favour. The later observations by members of the Court of Appeal in *Talbot* v. *Von Boris* (3) are by no means decisive of the question in favour of the opinion of *Fletcher Moulton* L.J. above referred to. That opinion apparently rests ultimately on the meaning of the word "transferred." It is not necessary in this case to pronounce definitely upon the question, but the point has been argued, and I am not at all persuaded that Lord *Russell* was wrong. Among other enactments of the Statute sec. 32 (3) looks in the direction of his view. *Herdman* v. *Wheeler* (4) is opposed to it; but that decision of a Divisional Court was expressly left open for consideration by *Collins* M.R. and *Cozens-Hardy* L.J. in *Lloyd's Bank* v. *Cooke* (2). If we look at the long stream of mercantile decisions upon negotiable instruments for over a century and a half by which the subject has been developed, the notion of the "holder in due course" appears to have assumed a fairly definite shape. No doubt where a point is specifically dealt with by this Statute, which is termed an Act to consolidate the law, and as to negotiable instruments in reality codifies it, its words alone, in their natural meaning govern the question, and without any assumption of intention to leave unaltered the law as it existed before. *Vagliano's Case* (5) so decides, and Lord *Herschell's* observations were adopted by Lord *Macnaghten* for the Privy Council in *Norrendro Nath Sorcar* v. *Kamalabasini Dasi* (6). But where terms and expressions are not expressly defined, then, unless inconsistent with the context, common law decisions, and the common signification of these terms and expressions are material guides. Especially is this so, since sec. 105 preserves the rules of common law, including the law merchant, where not inconsistent with the express provisions of the Act. There being no express definition of "transfer," and no collocation

(1) 67 L.J.Q.B., 224; 77 L.T., 653.
(2) (1907) 1 K.B., 794.
(3) (1911) 1 K.B., 854.
(4) (1902) 1 K.B., 361.
(5) (1891) A.C., 107
(6) L.R. 23 Ind. App., 18.

clearly applying it in any special sense, the way in which it has been hitherto understood is material. Without expressing a final opinion on this point, I may say that my strong impression is that the "transfer" of a promissory note connotes its previous complete issue, which involves its having already reached the hands of the payee and so become a contractual obligation: See *Chitty on Bills*, 11th ed., p. 157. This would leave the word "course" in the phrase "in due course" practically a short but comprehensive substitute for the expression "course of business" or "course of trade" so commonly met with. Among the earliest forms of expressions are "the course of trade" (Lord *Holt in Anon.* (1)); "the general course of business" and "the usual course of business" (Lord *Mansfield* in *Miller* v. *Race* (2)); "in the course of trade" (Lord *Mansfield* in *Peacock* v. *Rhodes* (3)), and "fairly and *bonâ fide* in the course of trade" (*Wilmot* J. in *Grant* v. *Vaughan* (4)); "the regular and proper course of business" (*Abbott* C.J. in *Snow* v. *Leatham* (5)). Late instances are found in *London Joint Stock Bank* v. *Simmons* (6), where we find "the ordinary course of business" (Lord *Halsbury* L.C. (7), Lord *Watson* (8), and Lord *Herschell* (9)); and "proper course of business" (Lord *Selborne* in *Vagliano's Case* (10)). Sec. 30 on this basis appears to assume that the bill in a complete and fully issued form was taken from the first "holder," in the course of dealing with it, and the real force, or at all events the main force, of the section consists in defining in an explicit way what is a "due" course of dealing, having regard to time, good faith, value and notice. It may not be unprofitable to observe the marked departure in form of the English legislation in sec. 29 (Victorian sec. 30) from that in the Indian *Negotiable Instruments Act* 1881, in sec. 9 of which, dealing with the "holder in due course," the bearer of a note payable to bearer and a payee of a note payable to or to his order, were expressly included. If the result depended on the construction of sec. 57 I should have great difficulty in seeing any escape from the view contended for by Mr. *Starke*.

(1) 1 Salk., 126.
(2) 1 Burr., 452.
(3) 1 Dougl., 633, at p. 636.
(4) 3 Burr., 1516.
(5) 2 C. & P., 314.
(6) (1892) A.C., 201.
(7) (1892) A.C., 201, at p. 208.
(8) (1892) A.C., 201, at p. 213.
(9) (1892) A.C., 201, at pp. 217-218.
(10) (1891) A.C., 107, at p. 127.

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But there is what I regard as a more serious obstacle in his way. The facts establish beyond question that Mrs. Ferrier did physically write her name as, and with the intention of becoming, an indorser of the note. And what is most material, she did so intending and agreeing to become liable as indorser to the respondent firm. It must therefore be taken that Mrs. Ferrier authorized Gummow & Stewart, when making use of that note for any effective object, to write their name above hers, and in the circumstances without recourse. This they did—as if they were prior indorsers to her so as to enable her consistently with the Act to indorse back to them. But then comes the problem occasioned by the undoubted fact that they never did deliver the note to her. They would not receive it at all until after she had signed and delivered it to them. After receipt of it by them, they retained it, and so it is claimed there never was in fact delivery to the appellant, and so no indorsement. Thus it is urged a necessary link is wanting to complete her liability.

I agree that if it be held as a fact there was that defect in respect of the completion of indorsement, the appellant's argument so far as this branch of the case is concerned should prevail, because the express provisions of the Statute cannot be ignored. The true answer, however, in my opinion, is found in this, that the appellant is estopped from alleging that want of delivery. In *Low* v. *Bouverie* (1) it was laid down by *Lindley* and *Bowen* L.JJ., and in *Lloyd's Bank Ltd.* v. *Cooke* (2) by *Cozens-Hardy* L.J. that estoppel is only a rule of evidence; and so, if Mrs. Ferrier's conduct precludes her from relying on evidence of the actual fact, she cannot rely on the fact itself.

No doubt estoppel has reference to an existing fact, and not to a promise *de futuro*, which must rest, if at all, on contract. And I do not see my way to put my judgment upon any enforceable contract as such. But a person's conduct has reference to an existing fact, if a given state of things is taken as the assumed basis on which another is induced to act; and, if that other does so act to his prejudice, the first is estopped from denying the accuracy of the fact assumed. The real ground of estoppel is the injustice of allowing repudiation in such a case, even though the

(1) (1891) 3 Ch., 82, at pp. 101, 105. (2) (1907) 1 K.B., 794, at p. 804.

inducement was given under an innocent misapprehension. The matter is to be regarded from the standpoint of the person who acted on the assumption upon which the other intended he should act.

An instance very much in point where this principle was applied is found in the case of *Morton* v. *Woods* (1). There a mortgagor executed a mortgage of premises to the defendant in which he recited a prior mortgage still outstanding, and attorned as tenant at a yearly rent. The defendant distrained, and was sued on the ground that a landlord who has not the legal reversion cannot lawfully distrain, and it appeared on the face of the mortgage itself that by reason of the prior mortgage the defendant had not and could not have the legal reversion. But the action failed notwithstanding, *Cockburn* C.J. observing (2) that the Court was "able to carry out the intention of the parties, and do what is but justice, without contravening any rule of law." And the way that end was reached was thus stated by *Blackburn* J. (3):—"When one party is let into possession by the other under an agreement that the one shall be tenant and the other landlord, both parties are estopped as between themselves from denying the other's title. But in answer to that, it is said that in the present case it is disclosed on the face of the instrument evidencing the agreement of the parties, that the mortgagor had not the legal estate; but I do not see, on principle, why that should make any difference. The principle is, that if it is agreed that one shall be tenant to the other, both are estopped from disputing the other's title as landlord, and even though it be expressly stated that the landlord has no legal estate, still if they agree that the relation of landlord and tenant shall be created, and this agreement is carried out by the one being let into possession, as between them the relation of landlord and tenant is created, and they are just as much estopped as if there had been no such statement."

And so in the present case, the signature of Mrs. Ferrier and her delivery of the note to the respondent firm as and for an indorsement, satisfied the Statute if the respondents' signature

(1) L.R. 3 Q.B., 658; affirmed, L.R. 4 Q.B., 293.

(2) L.R. 3 Q.B., 658, at p. 666.

(3) L.R. 3 Q.B., 658, at p. 669.

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Isaacs J.

when written preceded hers in point of time, and if the note were in fact previously delivered by them to her. This state of things was the conventional basis on which the parties acted, and so far as they are concerned it must be taken to be the true one. If so she is, for the purposes of this case, an indorser within the meaning of the Statute.

For this reason, the judgment of *Hodges* J. should be affirmed.

Appeal dismissed with costs.

Solicitors, for the appellant, *D. H. Herald & Son* for *A. C. Palmer & Son*, Hamilton.

Solicitor, for the respondents, *W. Bruce* for *J. B. Westacott* Hamilton.

B. L.

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[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL OF QUEENSLAND . . . . . } APPELLANT;

AND

HOLLAND . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1912.

BRISBANE, *May* 3, 6, 7.

SYDNEY, *May* 17.

Griffith C.J. Barton and Isaacs JJ.

Divorce—Costs — Collusion — Intervention — Liability of Crown for costs —Matrimonial Causes Jurisdiction Act 1864 (*Qd.*) (28 *Vict. No.* 29), *secs.* 22, 46—*Matrimonial Causes Act* 1875 (*Qd.*) (39 *Vict. No.* 13), *sec.* 7.

Sec. 22 of the *Matrimonial Causes Jurisdiction Act* 1864 (Qd.) provides that notice must be given to the Attorney-General of the presentation of a petition for dissolution of marriage, and sec. 7 of the Act of 1875 (Qd.) amending the *Matrimonial Causes Jurisdiction Act* 1864, provides that any person may at any time during the progress of the cause or before the decree is made absolute give information to the Attorney-General of any matter material to the case, and that the Attorney-General may thereupon intervene.