[HIGH COURT OF AUSTRALIA.]

THOMPSON . . . . . APPELLANT;
DEFENDANT,

AND

PALMER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1933.

SYDNEY, *Aug.* 14; *Dec.* 14.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Vendor and Purchaser—Vendor's lien—Conflicting equities—Transfer of mortgages—Transfer of legal title completed by registration—Fraud of common agent—Claim by purchaser that vendor's conduct enabled fraud—Waiver or abandonment of lien—Estoppel—Personal liability of purchaser.

Trustees of a settlement lent two sums of £600 each to G. on the security respectively of two memoranda of mortgage under the *Real Property Act* 1900 (N.S.W.) over land comprised in two certificates of title, each of which mortgages was duly registered. Subsequently the trustees transferred the mortgages to the appellant, with a receipt for consideration money of £1,200 endorsed on the transfer, and the transfer was subsequently registered. At the time of the transfer no actual cash payment was in fact made by the appellant, but moneys exceeding the sum of £1,200 at that time were owed by the solicitor to the appellant, though such moneys had previously been misappropriated by him. The solicitor procured certain security to be given by his mother and his managing clerk to one of the trustees to cover the general shortage in respect of (amongst others) the investments which the trustees had made. The solicitor was declared bankrupt shortly after the mortgages were handed to the appellant. The present trustee of the settlement claimed that he was entitled, as unpaid vendor, to enforce a vendor's lien. The mortgages and the certificate of title were in the appellant's possession.

Held, by the whole Court, that (1) the present trustee was entitled to a lien in the nature of a vendor's lien over the mortgage security; (2) the lien was not in fact waived or abandoned; (3) he was not in fact estopped

H. C. OF A. 1933.

THOMPSON v. PALMER.

from asserting the lien. And by *Rich*, *Dixon* and *McTiernan* JJ. (*Starke* and *Evatt* JJ. dissenting), that the appellant was not personally liable for payment of the sum the subject of the lien.

Grant v. *Mills*, (1813) 2 Ves. & B. 306, at p. 309; 35 E.R. 335, at p. 336; *Gordon* v. *James*, (1885) 30 Ch. D. 249; *Greenwood* v. *Martins Bank Ltd.*, (1933) A.C. 51; *London Freehold and Leasehold Property Co.* v. *Baron Suffield*, (1897) 2 Ch. 608; *Wall* v. *Cockerell*, (1863) 10 H.L.C. 229; 32 L.J. Ch. 276; 11 E.R. 1013; *Wrout* v. *Dawes*, (1858) 25 Beav. 369; 53 E.R. 678; and *Young* v. *White*, (1844) 7 Beav. 506; 13 L.J. Ch. 418; 49 E.R. 1162, considered,

Decree of the Supreme Court of New South Wales (*Long Innes* J.): *Palmer* v. *Thompson*, (1933) 33 S.R. (N.S.W.) 166; 50 W.N. (N.S.W.) 45, affirmed, subject, by a majority, to a variation.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Arthur Joseph Howard Palmer against Edna Anne Thompson in which the statement of claim was substantially as follows:—

1. The plaintiff is the sole trustee for the time being under a deed of settlement dated 1st April 1915 made between Edwin Hallett Fieldhouse now deceased of the one part and Richmond Llewellyn Fieldhouse and Harry Eustace Farmer (trustees) of the other part.

2. On or about 10th March 1927 Richmond Llewellyn Fieldhouse and Farmer lent and advanced the sum of £600 to Mrs. Jessie Gillies who executed a memorandum of mortgage under the *Real Property Act* over land in certificate of title vol. 4022, fol. 231, to secure to them the repayment of the said sum with interest as therein mentioned. The mortgage was duly registered.

3. On or about 15th November 1927 Fieldhouse and Farmer lent and advanced the sum of £600 to Mrs. Gillies who executed a memorandum of mortgage under the *Real Property Act* over land in certificate of title vol. 4022, fol. 230, to secure to them the repayment of the said sum with interest as therein mentioned. The mortgage was duly registered.

4. Prior to February 1931 the principal moneys and certain interest under each of the mortgages being then unpaid and owing to Fieldhouse and Farmer the mortgages with the certificates of title were handed to one William Carnegie Clegg, who was then a solicitor, for action to obtain repayment of the principal moneys and interest, and not otherwise.

5. Without the knowledge or authority of Fieldhouse or Farmer a form of transfer was completed by Clegg, or by some person on his behalf, in favour of the defendant as transferee of the mortgages for an alleged consideration of £1,200.

6. The defendant did not pay to Fieldhouse or to Farmer or to any person on their behalf the sum of £1,200 or any part thereof and the same still remains wholly unpaid.

7. On or about 5th February 1931 the said transfer of mortgages was registered and the defendant became and is now the registered proprietor of the mortgages.

8. The two sums of £600 respectively lent and advanced by Fieldhouse and Farmer were lent and advanced by them out of trust moneys belonging to them as trustees of the said settlement and not otherwise and the same still remain owing to the trust estate of the settlement and the plaintiff as the sole trustee is the person now entitled to receive payment of the same.

9. The defendant has possession of the mortgages and certificates of title and has refused and still refuses to transfer the mortgages to the plaintiff or to deliver to him the certificates of title.

10. The defendant has refused and still refuses to pay to the plaintiff the sum of £1,200 with interest thereon.

The plaintiff claimed :—(1) That it be declared that the defendant held the mortgages and certificates of title in trust for the plaintiff until transfer and delivery of the same to him or until payment to him of the sum of £1,200 with interest thereon at the rate of £7 per cent per annum from 5th February 1931 ; (2) that the defendant be ordered to transfer the mortgages to the plaintiff and deliver to him the certificates of title ; (3) that an account be taken of the moneys received by the defendant in respect of the mortgages and that the defendant be ordered to pay the same to the plaintiff ; (4) that as an alternative the defendant be ordered to pay to the plaintiff the sum of £1,200 with interest thereon at the rate of £7 per cent per annum from the date of the transfer to the defendant of the mortgages until payment ; (5) that the defendant be restrained from selling, mortgaging, alienating or otherwise dealing with the mortgages or parting with possession of the certificates of title except under the direction of the plaintiff ; (6) that the defendant

H. C. OF A. 1933.

THOMPSON v. PALMER.

be ordered to pay to the plaintiff the costs of the plaintiff of the suit; and (7) that the plaintiff may have such further or other relief as the nature of the case may require.

In her statement of defence the defendant stated that she did not know and therefore could not admit the matters set out in pars. 1, 4, 5, 6 and 8 of the statement of claim. The defendant also stated: —(1) that in further answer to par. 4 of the statement of claim she believed and charged it to be a fact that at all material times Clegg was solicitor for Fieldhouse and Farmer and that prior to the registration referred to in par. 7 of the statement of claim the mortgages and certificates of title referred to in par. 4 were held by Clegg with the knowledge and authority of Fieldhouse and Farmer as their solicitor for the purpose of carrying out as such solicitor the transaction set forth in the transfer; (2) that in further answer to par. 5 of the statement of claim she believed and charged it to be a fact that Fieldhouse and Farmer for a consideration of £1,200, paid to them as shown hereunder, by duly executing a memorandum of transfer of mortgages transferred and assigned to her the mortgages and debts thereby respectively secured and that in so far as the memorandum of transfer was filled in or completed if at all by Clegg, or by some person on his behalf, Clegg, or such person, acted as agent of Fieldhouse and Farmer and with their authority; (3) that, contrary to the allegation in par. 6 of the statement of claim, she paid, as shown hereunder, the sum of £1,200 to Clegg who acted as solicitor for both parties in the transaction, and she charged it to be the fact that Fieldhouse and Farmer either prior to the receipt by Clegg from her of the consideration money authorized Clegg to receive the money on their behalf or subsequently to his receipt thereof ratified his receipt on their behalf of the money; (4) that, in further answer to par. 6, prior to the registration of the transfer Clegg had collected certain moneys belonging to her and to her husband and she by her husband and her husband instructed Clegg to apply out of such moneys the sum of £1,200 in satisfaction of the consideration mentioned in the transfer, and she believed and charged it to be the fact that Clegg subsequently accounted to Fieldhouse and Farmer for the full amount thereof in satisfaction of the consideration money; (5) that by way of alternative answer

to par. 6 she charged it to be the fact that after payment of the consideration money to Clegg, as shown above, Clegg gave and delivered to Fieldhouse and Farmer or to Fieldhouse in trust for him and Farmer and with the acquiescence and consent of Farmer certain real securities for the payment to them of the amount of the consideration money and Fieldhouse and Farmer accepted such securities in satisfaction and discharge of their claim to the consideration money; (6) that subsequently to the registration of the transfer of mortgages Fieldhouse and Farmer ratified and adopted all the acts of Clegg whereby she became the registered proprietor of the mortgages; and (7) that subsequently to the registration of the transfer Fieldhouse and Farmer by Fieldhouse represented to her that the mortgages had been duly transferred to her by them and that they had received from Clegg securities in satisfaction of the amount paid by her or on her account, and that she had ever since acted on such representation and in reliance thereon had expended moneys on the properties comprised in the mortgages; she submitted that the plaintiff as the alleged successor in title of Fieldhouse and Farmer was estopped from disputing the validity of the transfer of the mortgages.

Long Innes J. held that the suit failed on the evidence so far as the plaintiff disputed the validity of the transfer. His Honor, however, declared that the plaintiff was entitled to a vendor's lien for the sum of £600 on each of the two mortgages, and ordered the defendant to pay the sum of £1,200 to the plaintiff within fourteen days after service on her of the decree: *Palmer* v. *Thompson* (1).

From this decision the defendant now appealed to the High Court on the grounds (*inter alia*), that *Long Innes* J. was in error in holding (1) that on the pleadings the plaintiff was entitled to a declaration of a vendor's lien and consequential relief thereon; (2) that the equity of the plaintiff to a vendor's lien was not met by the countervailing equity of the defendant arising from the representation made by the plaintiff's predecessors in title that they had received the purchase money payable under the transfer of the mortgages; (3) that in a case such as the present where one of two innocent parties had to suffer by reason of the fraud of a third party the plaintiff

(1) (1933) 33 S.R. (N.S.W.) 166; 50 W.N. (N.S.W.) 45.

H. C. OF A. 1933.

THOMPSON v. PALMER.

was not the person who should suffer in as much as it was the acts and conduct of the plaintiff's predecessors in title which enabled the defendant to be imposed upon; (4) that the plaintiff was not estopped from alleging that the purchase money payable under the transfer of mortgages was not in fact received by the plaintiff's predecessors in title or their duly authorized agent; (5) that the defendant had not suffered any detriment by reason of the representation made by the plaintiff's predecessors in title that they in fact had received the purchase money; and that on the proved and admitted facts *Long Innes* J. should have held (*a*) that as the legal estate in the mortgages was in the defendant the plaintiff's equity to a vendor's lien was inferior to the equity of the defendant arising from acts and omissions of the plaintiff's predecessors in title; and (*b*) that the plaintiff's predecessors in title had accepted Clegg, the common agent of them and the defendant, as their debtor in lieu of the defendant and had accepted from him securities for the debt.

Other material facts appear in the judgments hereunder.

Teece K.C. (with him *Harrington*), for the appellant. The respondent was not entitled to relief on the footing of an unpaid vendor's lien because no claim for relief of that nature was made in the statement of claim. The essence of a claim for an unpaid vendor's lien is approbation, whereas the statement of claim as drawn is based on reprobation. The respondent, by his counsel, refused in the Court below to amend his pleadings. The proper remedy for the recovery of moneys said to be outstanding is by action at common law. It is well established that parties cannot obtain from an Equity Court relief which is open to them at common law. There is no evidence that the appellant agreed to pay the moneys claimed, the only allegation is, as appears in the memorandum of transfer, that it was in fact paid. At the date of the transfer the appellant had no knowledge that moneys belonging to her had been misappropriated by the solicitor, and in all the circumstances the appellant was entitled to assume that the purchase money had been received by the trustees (*Gordon* v. *James* (1)). In an action at common law the trustees would have been estopped from disputing

(1) (1885) 30 Ch. D. 249.

the receipt by them of the money. Where a purchaser believes payment to have been made there is no fraud. Of two innocent persons the one who should suffer for the fraud of a third person is the one whose acts or omissions enabled the fraud to be perpetrated. By executing and handing to the solicitor, the common agent, the transfer, in which the receipt by them of the money was acknowledged, before ascertaining whether in fact such money had been paid, the trustees enabled the solicitor to impose upon the appellants, therefore the trustees, as vendors, are not entitled to, and cannot enforce, a lien for unpaid purchase money (*Gordon* v. *James* (1); *London Freehold and Leasehold Property Co.* v. *Baron Suffield* (2)). A Court of equity will deprive the holder of the legal estate of the protection that title gives him only if he is guilty of fraud or negligence (*Northern Counties of England Fire Insurance Co.* v. *Whipp* (3)). The equity raised in *Gordon* v. *James* was not raised in *Young* v. *White* (4), and, although raised in *Wrout* v. *Dawes* (5), it was not proved, for which reasons the two last-named cases are not applicable.

[DIXON J. referred to *Greenwood* v. *Martins Bank Ltd.* (6) on the question of estoppel.]

Gordon v. *James* (1) is not distinguishable from this case merely because the memorandum of transfer was not actually seen by the appellant. That is an immaterial circumstance (*London Freehold and Leasehold Property Co.* v. *Baron Suffield* (2)). The appellant was lulled into security by the execution and handing over by the trustees of the memorandum of transfer containing the receipt clause, and also by the failure of one of the trustees, during the course of a conversation with the appellant's husband, to inform the latter of the true position as to moneys outstanding. There is not any evidence that at the time of the transaction the appellant knew that Fieldhouse and Farmer were trustees, or that the moneys were trust moneys. The fact that the solicitor employed by her knew of the falsity of the receipt clause does not conclude the matter against the appellant. The solicitor was, in fact, the common agent for both parties (*Gordon* v. *James*; and *London Freehold and Leasehold Property Co.* v. *Baron Suffield*).

(1) (1885) 30 Ch. D. 249.
(2) (1897) 2 Ch. 608.
(3) (1884) 26 Ch. D. 482.
(4) (1844) 7 Beav. 506; 49 E.R. 1162.
(5) (1858) 25 Beav. 369; 53 E.R. 678.
(6) (1933) A.C. 51.

H. C. OF A. 1933. THOMPSON v. PALMER.

[EVATT J. referred to *Ewart* on *Estoppel* (1900), at pp. 134, 135.]

The defence of estoppel is available to the appellant irrespective of whether she can or cannot show that she has suffered material damage (*Greenwood* v. *Martins Bank Ltd.* (1)). *In re Stucley*; *Stucley* v. *Kekewich* (2) does not apply to an ordinary transaction as here (see also *White and Tudor's Leading Cases in Equity*, 8th ed. (1912), vol. II., p. 954). By taking the mortgage from Mrs. Clegg and Mrs. Smith the trustees waived or abandoned the lien now claimed (*Story, Commentaries on Equity Jurisprudence*, 12th ed. (1877), vol. II., p. 476).

[STARKE J. referred to *Williams* on *Vendor and Purchaser*, 3rd ed. (1923), vol. II., p. 991.]

The mortgage so taken was accepted and relied upon by the trustees as security for all moneys outstanding (*Nairn* v. *Prowse* (3)). A vendor's lien does not rest upon an agreement. It is an equity given by the Court, and will not be given if it is inequitable to do so.

Maughan K.C. (with him *Young*), for the respondent. The evidence clearly establishes that the appellant is the registered proprietor of the mortgages and that the purchase money, although expressed to have been received by the trustees, was not in fact so received. The respondent is, therefore, entitled to a declaration that he has a vendor's lien in respect of the unpaid purchase money, and to its enforcement. It is established by the evidence that at the time the memorandum of transfer was executed by the trustees and handed to him, Clegg had not any moneys belonging to the appellant, because long before that time the moneys entrusted to him by the appellant for investment had been misappropriated by Clegg, and any securities alleged to represent those moneys were non-existent. The appellant was not prejudiced by the acts of the trustees because any action taken at the time of the transfer by the appellant against Clegg for the recovery of moneys would have been fruitless (see *Greenwood* v. *Martins Bank Ltd.* (1)). The evidence also shows that at the material times the appellant knew, or ought

(1) (1933) A.C. 51.
(2) (1906) 1 Ch. 67.
(3) (1802) 6 Ves. 752, at p. 760; 31 E.R. 1291, at p. 1295.

to have known, that Clegg was in serious financial difficulties whereas the trustees had no knowledge or suspicion of the position until long afterwards. The loss sustained by the appellant was not in any way contributed to by the trustees. There is not any reason either at law or in equity why the mortgages in question should be taken to make good loss sustained by the appellant as the result of Clegg's defalcations. The onus is upon the purchaser of a property to see that the purchase money is received by the vendor. The mere fact that the trustees executed and handed to the solicitor a transfer containing a receipt clause is not sufficient to excuse the appellant from paying the purchase money, or to deprive the respondent of the right to a vendor's lien in respect thereof. The point that the vendor's lien had been destroyed by the conduct of the trustees or one of them, was not pleaded, nor was any evidence directed to it. The respondent's equity, that is, vendor's lien, arises from the facts shown in the statement of claim, particularly par. 6 thereof. According to the Rules of Court, and practice, provided a prayer for further or other relief has been included, if a plaintiff has stated facts in his statement of claim entitling him to a particular form of relief he is not debarred therefrom merely because the specific relief claimed is not the appropriate one. It has not been shown that the trustee Farmer took any part in various acts, conversations and representations relied upon by the appellant, particularly as to the alleged waiver or abandonment of the lien, or that he authorized Fieldhouse or any other person to act on his behalf, therefore the defences raised are ineffective. In order to bind the trust estate the acts alleged must be the acts of all the trustees (*Luke* v. *South Kensington Hotel Co.* (1)). Even as against Fieldhouse the defences raised are unsupported by the evidence. The appellant knew that the moneys secured by the mortgages were trust moneys. The possession by the appellant of the legal estate is irrelevant. The facts present in this case are very similar to the facts in *Wall* v. *Cockerell* (2) ; *Wrout* v. *Dawes* (3) ; and *Young* v. *White* (4), and the principles established in those cases should be applied here. Whatever defences are taken must be pleaded and

(1) (1879) 11 Ch. D. 121.
(2) (1863) 10 H.L.C. 229 ; 32 L.J. Ch. 276 ; 11 E.R. 1013.
(3) (1858) 25 Beav. 369 ; 53 E.R. 678.
(4) (1844) 7 Beav. 506 ; 49 E.R. 1162.

H. C. OF A. 1933.

THOMPSON v. PALMER.

proved, especially a defence of fraud. *Gordon* v. *James* (1) is *sui generis*, and is distinguishable from the present case because there the money was handed over and estoppel arose, also five years elapsed before action was taken thus prejudicing the purchaser, which is not the position here. In *Coupe* v. *Collyer* (2), where the facts were similar to this case, it was held that the transferrees ought to have paid the solicitors in cash and were not entitled to set-off a debt due to them by the solicitors; and in that case *Gordon* v. *James* (3) was explained. In *Ex parte Swinbanks*; *In re Shanks* (4) it was held that the receipt clause was not important because at the time the deeds were handed over the money had not been paid by the purchaser. *London Freehold and Leasehold Property Co.* v. *Baron Suffield* (5) is distinguishable, as there the solicitors concerned were the bankers of the plaintiff, authorized to receive the money, and the money embezzled was the money of the plaintiff. A solicitor authorized to receive payment must receive such payment in cash. The defence that the appellant was lulled into security was not pleaded. That defence has not been established because the appellant has not shown that she believed and relied upon the representations said to have been made, or relied upon them to her detriment (*Greenwood* v. *Martins Bank Ltd.* (6)).

[DIXON J. referred to *Knights* v. *Wiffen* (7).]

Nor does the evidence show that the alleged representations were made, or, if made by Fieldhouse, that his co-trustee Farmer took any part whatsoever therein. An arrangement between Fieldhouse and third parties cannot affect the lien. The appellant is not entitled to derive an advantage from an arrangement to which she was not a party. There is nothing before the Court to show that the trustees either did or intended to waive or abandon the lien. The moneys expended by the appellant in connection with the property do not operate by way of estoppel against the respondent, but merely create a charge therefor in favour of the appellant (*Willmott* v. *Barber* (8); *Hamilton* v. *Geraghty* (9); see also *Lapin* v. *Abigail* (10)).

(1) (1885) 30 Ch. D. 249.
(2) (1890) 62 L.T. 927.
(3) (1885) 30 Ch. D. 249.
(4) (1879) 11 Ch. D. 525.
(5) (1897) 2 Ch. 608.
(6) (1933) A.C. 51.
(7) (1870) L.R. 5 Q.B. 660.
(8) (1880) 15 Ch. D. 96, at p. 105.
(9) (1901) 1 S.R. (N.S.W.) (Eq.) 81; 18 W.N. (N.S.W.) 64, 152.
(10) (1930) 44 C.L.R. 166.

Teece K.C., in reply. A vendor's lien is founded on contract (*Kettlewell* v. *Watson* (1)). The statement of claim nowhere refers to a contract of sale, and is in fact inconsistent with such a contract, therefore on the respondent's pleadings there was no relief for the vendor that could be given. As to the question of detriment, see *Dixon* v. *Kennaway & Co.* (2); *Knights* v. *Wiffen* (3); and *Kettlewell* v. *Watson* (4). *Wall* v. *Cockerell* (5)) is not identical with this case as there the transfer was of an equitable interest, nor was it a question as to a solicitor having no authority to receive purchase moneys, but of having no authority to hand over the property at all. As shown in *Coupe* v. *Collyer* (6), *Gordon* v. *James* (7) is not a case *sui generis* but is one in which a principle is laid down. *Lapin* v. *Abigail* (8) is distinguishable as there the defendant acted upon an assumption made without justification. In business transactions one of two trustees can act for both, and what is done by the one is binding on the other; the mere fact that they are trustees is immaterial (*West* v. *Jones* (9)).

[*Maughan* K.C. *West* v. *Jones* has been unfavourably commented upon (*Gordon* v. *James* (10)).]

Cur. adv. vult.

Nov. 14.

The following written judgments were delivered :—

RICH J. The facts have been very fully dealt with in other judgments of the Court and I do not propose to make a superfluous restatement of them. I shall content myself with expressing my opinion on the controversial questions which emerge for decision.

(1) Pleadings—Each party insisted even before this Court upon objections that the case set up by his adversary was not open upon his pleadings. It is clear that many of the matters relied upon by the appellant are not pleaded, at any rate in the shape which the argument has given them. The respondent's statement of claim may be fairly criticized as not clearly and unmistakably setting up

(1) (1884) 26 Ch. D. 501, at p. 507.
(2) (1900) 1 Ch. 833.
(3) (1870) L.R. 5 Q.B. 660.
(4) (1884) 26 Ch. D. 501.
(5) (1863) 10 H.L.C. 229; 32 L.J. Ch. 276; 11 E.R. 1013.
(6) (1890) 62 L.T. 927.
(7) (1885) 30 Ch. D. 249.
(8) (1930) 44 C.L.R. 166.
(9) (1851) 1 Sim. (N.S.) 205; 61 E.R. 79.
(10) (1885) 30 Ch. D., at p. 253.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Rich J.

the case upon which the respondent succeeded in the Court below. Closely considered, however, the statement of claim does include sufficient allegations of fact to found the relief which has been given, and amongst the relief claimed in the prayers there are claims which point only to some such alternative case. I think upon the principles given effect to in *Nocton* v. *Ashburton (Lord)* (1) the learned primary Judge was right in granting the relief on the view he took of the facts; but in any case the case was clearly one in which all necessary amendments should be allowed. This observation applies equally to the defence.

(2) Personal liability of the appellant—The decree appealed from declares a vendor's lien over the mortgages transferred by Fieldhouse to the appellant and orders that the defendant do within 14 days after service on her of this Decree pay to the plaintiff the sum of six hundred pounds in respect of each of the said mortgages together with an amount equal to simple interest at four pounds per cent per annum on each of the said sums. I do not think that this part of the decree should stand whatever view be taken of the remainder of the case. There is no evidence that the appellant authorized her husband to undertake on her behalf any obligation to pay any purchase money. She did not affix her signature to the transfer. Clegg purported to do so on her behalf but there is no evidence that she authorized him to do so. The mortgages were transferred into her name and, no doubt, she has accepted the assurance to her of the property in the mortgages both by failure to disclaim and by defending the action. I do not think that if she had signed the transfer, which contained the statement that the consideration was a total sum of £1,200 payment of which was acknowledged by the transferror, it would necessarily follow that she was fixed with a contractual liability to pay it, on it turning out that it was unpaid, but in the circumstances as they exist I am clearly of opinion that she cannot be fixed with this liability. She thought she was accepting property fully paid for by her husband not undertaking an obligation to pay for it.

(3) Vendor's Lien—Mr. *Teece* very properly did not dispute the position that if the consideration moneys expressed in the transfer,

(1) (1914) A.C. 932.

viz. £1,200, were never in fact paid or otherwise satisfied and if the respondent was not either on grounds of estoppel or otherwise disabled from relying upon that circumstance, a vendor's lien would subsist over the property transferred, namely, the mortgages. Mr. *Teece* adopted the view that Fieldhouse and Thompson, senior, had actually contracted for the transfer of the mortgages. The degree to which Clegg deluded each of them was such as to make it difficult to be sure that they were actually *ad idem*, but there is no doubt that the trustees transferred the mortgages expecting to receive out of Thompson's funds the equivalent in some form of £1,200 and Thompson took the mortgage upon the footing that the funds would be made available to the trustees in some form to that extent by Clegg who was accountable to Thompson. Equitable lien may arise out of contract but it is not contractual in its character and in such circumstances it appears to me the plainest equity that the transferee cannot retain the property except subject to a lien for the intended consideration moneys unless they have been paid or discharged or further circumstances make it inequitable to permit the transferrors to set up non-payment.

(4) Estoppel or Countervailing Equity—The real difficulty in the case is to determine whether the circumstances are such as to preclude the respondent from relying upon the fact that neither his predecessors in title nor himself actually received payment of the intended consideration moneys or anything in discharge thereof. *Long Innes* J. suggested in his judgment that the real principle upon which the appellant's case rests is the familiar principle of estoppel arising from representation by conduct. The cases of *Gordon* v. *James* (1), and *London Freehold and Leasehold Property Co.* v. *Baron Suffield* (2) relied upon by the appellant are, in my opinion, mere application of this principle and neither evidence nor establish any principle independent of estoppel. The cases relied upon by the respondent, *e.g.*, *Young* v. *White* (3); *Wrout* v. *Dawes* (4); *Wall* v. *Cockerell* (5); *Coupe* v. *Collyer* (6), appear to me also to be referable to the same principle in this sense that the conclusions reached in

(1) (1885) 30 Ch. D. 249.
(2) (1897) 2 Ch. 608.
(3) (1844) 7 Beav. 506; 49 E.R. 1162.
(4) (1858) 25 Beav. 369; 53 E.R. 678.
(5) (1863) 10 H.L.C. 229; 32 L.J. Ch. 276; 11 E.R. 1013.
(6) (1890) 62 L.T. 927.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Rich J.

each of those cases are to be explained by the absence of one or more of the essential ingredients of an estoppel. In *Greenwood* v. *Martins Bank Ltd.* (1), Lord *Tomlin* said :—" The essential factors giving rise to an estoppel are I think :—(1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made. (3) Detriment to such person as a consequence of the act or omission.

Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation."

The first question in the present case is whether there was any representation to Thompson for which the respondent was responsible that the purchase money had been received by Fieldhouse. The transfer was never seen by Thompson and the statement contained in it that the consideration had been paid was therefore unimportant. According to Thompson's son and to Mrs. Smith, Clegg's clerk, the supposed basis of the transfer was not that Fieldhouse and his co-trustee should receive the £1,200 in cash from Clegg but that it should be re-invested for the trustees upon a new investment described as one big mortgage. The precise question, therefore, is whether a representation was made to the effect that Clegg had accounted for the money short of actually paying it over. I do not think that the statement of account dated 6th February and the handing over of the registered mortgages by Clegg's clerk to Thompson amounted to such a representation. It was consistent with Clegg's still retaining the money he pretended to have, pending its application on the trustees' behalf to some new investment. But at a later stage it appears from the evidence that Fieldhouse made statements to Thompson calculated to induce a belief in Thompson that Clegg had settled with Fieldhouse. Upon the judgment of *Long Innes* J. I feel somewhat uncertain whether he was prepared to find that these statements were made but they are deposed to by witnesses whom he thought credible and accordingly,

(1) (1933) A.C., at p. 57.

but not without some misgiving, I shall proceed upon the assumption that they were made. I shall further assume that they did induce the necessary belief. This raises the question whether a detriment to Thompson arose as a consequence. Now the belief could not have arisen as the result of these representations much before the middle of March 1931. Clegg's arrest took place on 13th April 1931 and his bankruptcy inevitably followed without much delay. After his arrest there was nothing that could possibly be done by Thompson to retrieve any loss which he had suffered by Clegg's defalcations. No active course was taken in the interval on the faith of the representation and the sole detriment available must consist in passivity and its consequences. Can it be said that after the middle of March any step could have been taken by Thompson of advantage to himself or his wife which he omitted upon the faith of the representation? In my opinion at this date his loss was completely irretrievable. Nothing he could have done could have resulted in any restoration of any part of the money Clegg had stolen from him. Clegg could only have obtained funds, if he had been pressed, by stealing them elsewhere for the purpose. There is no reason to think that he would have been able or willing to do this at that date. In any event any payment by Clegg must have been set aside in the bankruptcy.

(5) Waiver of Lien—In my opinion the curious security which Fieldhouse obtained from Mrs. Smith and Mrs. Clegg in respect of the numerous depredations of Clegg from which Fieldhouse in one way or another was a sufferer did not constitute a waiver of the lien. For these reasons, subject to a variation relieving the appellant from personal liability, the decree should be affirmed and the appeal dismissed.

STARKE J. Fieldhouse and Farmer were registered as the proprietors of certain mortgages registered under the *Real Property Act* 1900 of New South Wales to secure two sums of £600 advanced by them to Jessie Gillies. It appears that the moneys were advanced out of trust moneys held under a deed of settlement dated 1st April 1915, of which the respondent Palmer is now the trustee. It appears also that one Clegg acted as solicitor for Fieldhouse and Farmer as

H. C. OF A. 1933.

THOMPSON v. PALMER.

Starke J.

well in connection with the settlement as in other trusts and matters; they entrusted him with large sums of money for investment—something in the neighbourhood of £50,000 according to the evidence—and the Gillies' mortgages were part of the investment of the trust funds held under the settlement. In 1930 default was made in payment of interest under the Gillies' mortgages, and late in that year or early in 1931 the trustees instructed Clegg to call up the mortgages. According to the evidence accepted by the learned trial Judge the trustees desired to call up, or transfer, these and other securities and re-invest the moneys through Clegg's office. Frederick Thompson was also a client of Clegg, and he had entrusted him with some £5,000 for investment, being either his own moneys or those of his wife. In December 1930, Clegg had, it seems, written a letter to Thompson stating that these moneys were available, and inquiring whether he would re-invest them in fresh security. Thompson saw Clegg, and agreed to re-invest if the securities offered were satisfactory when he saw them. Clegg put forward some twenty securities, which Thompson inspected; he agreed to take several of them, including the mortgages from Gillies and also mortgages from other persons, to Fieldhouse and Farmer. Early in 1931, Thompson was warned by his son against Clegg and advised to get his mortgages in order. But Thompson was not at first persuaded that the suspicions concerning Clegg were well founded. Sometime in January Thompson met Fieldhouse outside Clegg's office, where the following conversation took place:—

Thompson: "About these mortgages you have offered to transfer to me, is there anything wrong with them, because I do not want to take anything over that will be a nuisance to Sid" (his son) "because he is going to look after our things. I have been round and seen Gillies, Giblett, Wall, Jamieson and Read and Wrench."

Fieldhouse: "They are all right; there is nothing wrong with those."

Thompson: "I do not want Wrench's. I know him personally, and I do not want anything to do with anyone I know."

Fieldhouse: "The others are all right."

Thompson: "What do you want to get rid of them for?"

Fieldhouse: "I have been offered one mortgage from Mr. Clegg or Mrs. Clegg, and it will save me a lot of trouble if I have one mortgage."

Thompson: "If that is the case, that will be all right. We will go upstairs."

They went upstairs and saw Clegg. On 5th February 1931, Fieldhouse and Farmer "called 'transferror' in consideration of twelve hundred pounds (the receipt whereof is hereby acknowledged) paid to me by Edna Anne Thompson" executed a transfer to her of all their estate and interest in the Gillies' mortgages. The transfer was registered on 6th February 1931, and the documents of title were subsequently handed over to Edna Anne Thompson, and are now in her possession. But Palmer asserts that the sum of £1,200 was never paid to Fieldhouse and Farmer, and if this be so a charge or lien, in the nature of a vendor's lien for unpaid purchase money, *prima facie* subsists upon the land included in the Gillies' mortgages (*Mackreth* v. *Symmons* (1); *White and Tudor's Leading Cases in Equity*, 8th ed. (1912), vol. II., p. 946; *In re Stucley*; *Stucley* v. *Kekewich* (2)). Thompson, it is clear, made no payment in cash to Fieldhouse and Farmer, but he had, or understood that he had, in the hands of Clegg, a sum of £5,000 or thereabouts available for re-investment, out of which Fieldhouse and Farmer would be paid. But the evidence, particularly that of Mrs. L. B. Smith, makes it tolerably certain that Clegg had misappropriated this sum and never applied any part of it in or towards payment of Fieldhouse and Farmer. If they authorized Clegg to receive payment of the sum of £1,200, still, that authority to receive payment presumptively authorized payment in money only. "To hold otherwise would be to allow a payment which ought to be made in cash to be satisfied by substituting without the consent of the payee the liability of the agent" (*Coupe* v. *Collyer* (3); *Young* v. *White* (4); *Wrout* v. *Dawes* (5)). The case of *London Freehold and Leasehold Property Co.* v. *Baron Suffield* (6), much relied upon in argument, is distinguishable on the facts. The solicitor there was the managing director and the banker of the company, and the debit and credit entries proved represented, as

(1) (1808) 15 Ves. 329; 33 E.R. 778.
(2) (1906) 1 Ch. 67.
(3) (1890) 62 L.T. 927.
(4) (1844) 7 Beav. 506; 49 E.R. 1162.
(5) (1858) 25 Beav. 369; 53 E.R. 678.
(6) (1897) 2 Ch. 608.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Starke J.

the Court held, a real transaction. It is established therefore that the sum of £1,200 was never paid to Fieldhouse and Farmer in respect of the transfer of the Gillies' mortgages.

It is said, however, that the charge or lien in respect of the sum of £1,200 never attached, or else was waived or abandoned. The lien or charge arises or is created by construction of equity, independently of any agreement, and the burden is upon Mrs. Thompson to show that Fieldhouse and Farmer gave up their charge or lien. That depends upon intention and the circumstances of the case. Sometime in February 1931, conversations took place between Fieldhouse, Thompson, and Thompson's son (Sid). The substance is summed up in the following evidence:—

"Father said to Fieldhouse 'About these mortgages of Gillies, Jamieson, Giblett, and Wall. We have seen those mortgages. Read's is not here yet, Read's mortgage, what about that one?' Fieldhouse said 'I overlooked getting that one signed. I will get that one fixed up for you.' Father said 'What about the shortage —there is £175 and £100.' Fieldhouse said 'Yes, Sid told me about that, but I only received the reduced amount of the mortgage, what I received from Clegg in place of these. You will have to look to Clegg for that money.' Father said 'Mrs. Smith said you collected all your own moneys and looked after your own end and therefore you have not accounted to Clegg.' He said 'Clegg will fix it up for you when we get on to Mr. Clegg.'"

The shortages referred to the fact that certain moneys had been paid off Jamieson's and Wall's mortgages, taken over by Thompson. Late in February 1931, Clegg's office forwarded to Thompson a statement purporting to show securities of his which had been discharged, and new securities in which his moneys had been invested, and also a cheque for £75 10s. 10d., the balance due to him. The new securities included Gillies', Read's, Jamieson's, and other mortgages. Early in March 1931 Fieldhouse became suspicious of Clegg, and estimated that there was a deficiency of some £53,000 in respect of various trust moneys placed by Farmer and himself in Clegg's hands for investment. This amount included the sums invested on the Gillies' mortgages, and on other mortgages transferred to Mrs. Thompson. Fieldhouse reminded Clegg that he had promised

not to let him down or to lose any money, and asked that security be given to him. Finally Clegg arranged that his mother and Mrs. L. B. Smith should give security to Fieldhouse in respect of the deficiency estimated by him, and they did so. It is unnecessary to detail this security or its terms. But Clegg insisted that Fieldhouse, if he obtained this security, should transfer to Thompson the mortgage known as Read's mortgage, which Clegg had included in the securities offered to Thompson and which he had accepted. Fieldhouse agreed, and ultimately transferred Read's mortgage to Thompson or his wife.

Can it be inferred from these circumstances that Fieldhouse and Farmer gave up their lien or charge on the Gillies' mortgages, and rested exclusively upon the credit of Clegg, or upon the security given by Clegg's mother and Mrs. L. B. Smith ? The circumstances afford no clear and convincing evidence that either Fieldhouse or Farmer relied upon the personal credit of Clegg. And the security taken from Clegg's mother and Mrs. L. B. Smith was for the purpose of protecting Fieldhouse against loss representing moneys and securities misappropriated or unaccounted for by Clegg. Nothing in the evidence suggests that the security was taken for the purpose of discharging any lien or charge on Gillies' or any other mortgage. Thompson was no party to the giving of this security and knew nothing about it. Moreover Fieldhouse and Farmer were trustees, and Farmer was too ill to attend to the duties of his trust. It is difficult, therefore, to spell out any intention on Farmer's part to give up or discharge anything. And the security, it must be observed, was taken in the name of Fieldhouse alone, his co-trustee was not a party to it though it is expressed to be " in trust for the above-named funds," of which Farmer was a co-trustee. It is not established, in my opinion, that the charge or lien over the Gillies' mortgages in respect of the sum of £1,200, which was not paid to Fieldhouse and Farmer or either of them, never attached, or was waived or abandoned. (See *Mackreth* v. *Symmons* (1) ; *White and Tudor's Leading Cases in Equity*, 8th ed. (1912), vol. II., at pp. 964-970).

The final question is whether the respondent Palmer is estopped in the circumstances of this case from asserting that Fieldhouse and

(1) (1808) 15 Ves. 329 ; 33 E.R. 778.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Starke J.

Farmer were not paid the sum of £1,200 in respect of the transfer of the Gillies' mortgages. The essential factors giving rise to an estoppel are set forth in the speech of Lord *Tomlin* to the House of Lords in *Greenwood* v. *Martins Bank Ltd.* (1), and it is unnecessary to repeat them. The suggestion in the present case is that a representation for which Fieldhouse and Farmer are responsible, was made to Mrs. Thompson or her husband that the sum of £1,200 in respect of the transfer of the Gillies' mortgages was in fact paid. The facts relied upon are :

(*a*) The title deeds were handed over to Mrs. Thompson and a transfer was executed acknowledging receipt of the sum of £1,200.

But neither Mrs. Thompson nor her husband ever saw the transfer ; Clegg accepted it on Mrs. Thompson's behalf, and certified that obtaining her signature would cause delay. He lodged the transfer in the Registry, and there it remains. Gillies' mortgages, which were handed over to Mrs. Thompson, did not of course contain any receipt for the sum of £1,200 payable on the transfer of those mortgages. Clegg's dishonest conduct in handing over the mortgages to Mrs. Thompson without payment of the £1,200 does not, without any other fact to colour the act, amount to a representation on the part of Fieldhouse and Farmer that the money had been paid. So far *Wall* v. *Cockerell* (2) appears to me decisive of the case ; the cases of *Gordon* v. *James* (3), and *London Freehold and Leasehold Property Co.* v. *Baron Suffield* (4), turn on their own special facts.

(*b*) Clegg in February of 1931 gave a statement to Thompson showing moneys invested on his behalf in "new loans," one of which was the Gillies' mortgages, and also a cheque for £75 10s. 10d., the balance of Thompson's moneys in his hands.

In a sense (cf. Lord *Lindley* in *Farquharson Brothers & Co.* v. *King & Co.* (5)) Fieldhouse and Farmer enabled Clegg to make this statement, but can they be held responsible for it ? The statement was of transactions which Clegg carried out or purported to have carried out for and on behalf of Thompson or his wife. Fieldhouse and Farmer gave him no authority express or implied, to prepare or make it, nor was it within the scope of any authority

(1) (1933) A.C., at p. 57.
(2) (1863) 10 H.L.C. 229 ; 32 L.J. Ch. 276 ; 11 E.R. 1013.
(3) (1885) 30 Ch. D. 249.
(4) (1897) 2 Ch. 608.
(5) (1902) A.C. 325, at p. 342.

they had conferred upon him. The evidence does not suggest that they ever saw or heard of it. In no relevant sense can it be said that Fieldhouse and Farmer enabled Clegg to make the statement or that they are in any way bound by it. Some passages in the case of *London Freehold and Leasehold Property Co.* v. *Baron Suffield* (1), were relied upon, but those passages must be read in relation to the special facts proved in that case, and they have no relevance in the present case.

(*c*) Conversations between Fieldhouse and Sid Thompson about the middle of February 1931, and between Fieldhouse and Thompson —the son being also present—about the middle of March 1931. The substance of these conversations has already been stated: they related to Read's mortgage and to the shortages on Jamieson's and Wall's mortgages. It is claimed that Fieldhouse admitted in these conversations that he and Farmer had been paid or had received all the moneys payable in respect of the mortgages taken over by Mrs. Thompson, and thereby "lulled" the Thompsons "into a feeling of false security," and altered their position for the worse.

Fieldhouse's statement is, however, far from clear and unambiguous (*Low* v. *Bouverie* (2)). It suggests that moneys had been paid off the mortgages in question by Jamieson and Wall, for which Clegg was accountable, and not that Fieldhouse and Farmer had received any moneys from Thompson or his wife. It does not, I think, amount to a representation that the moneys payable by Mrs. Thompson in respect of the transfer of the mortgages to her, and particularly the sum of £1,200 in respect of the transfer of the Gillies' mortgages, had been paid to or received on behalf of Fieldhouse and Farmer. Had it, moreover, amounted to such a representation, the question remains whether Mrs. Thompson's position was altered for the worse; she may have been put to sleep, but her consequent inaction may not have prejudiced her (*M'Kenzie* v. *British Linen Co.* (3); *Simm* v. *Anglo-American Telegraph Co.* (4)). She has not proved that she lost anything "which" she "would otherwise have certainly obtained," but if she "lost a fair chance of obtaining

(1) (1897) 2 Ch., particularly at pp. 622-623.
(2) (1891) 3 Ch. 82, at p. 113.
(3) (1881) 6 App. Cas. 82, at p. 101.
(4) (1879) 5 Q.B.D. 188.

H. C. OF A. 1933. THOMPSON v. PALMER. Starke J.

that which " she " might have obtained by ordinary diligence, then such loss may of itself amount to an alteration of position for the worse " (*Cababé* on *Estoppel* (1888), pp. 80-81 ; *Ewart* on *Estoppel* (1900), pp. 146-149 ; *Knights* v. *Wiffen* (1) ; *Dixon* v. *Kennaway & Co.* (2)). It is clear enough that Clegg had misappropriated moneys of clients amounting to many thousands of pounds, and financially was hopelessly involved, but he seems to have had some call over considerable assets in the hands of his mother and Mrs. L. B. Smith. It is not proved what his position really was in relation to those assets, though we know that Fieldhouse obtained security over them so soon as he pressed Clegg. It was contended that Thompson or his wife lost a fair chance of obtaining from Clegg payment of the moneys due to them, or at all events a similar security to that given to Fieldhouse. Clegg, I am satisfied, was unable to make any payment unless he misappropriated the moneys of other clients, and a security such as is suggested would, in all probability, have been ineffective if Clegg's estate were sequestrated —as it was—under the provisions of the *Bankruptcy Act* 1924-1928 (see sec. 95, and *S. Richards & Co.* v. *Lloyd* (3)). The facts on which Mrs. Thompson relies are wholly speculative and conjectural, and afford no solid basis for concluding that her position was in any way altered or prejudiced, even if, contrary to my view, Fieldhouse's statements amounted to a representation that he and Farmer had been paid or had received the moneys payable in respect of the transfers of the mortgages to her.

Some objection was taken to the order that Mrs. Thompson pay to the plaintiff the sum of £600 in respect of each of Gillies' mortgages. But the transfer to her recites as the consideration therefor the sum of £1,200 paid by her. It predicates a contractual relationship between the parties and recites the performance of an obligation to pay assumed on her part pursuant to that relationship. In these circumstances the order should not be disturbed.

The pleadings on both sides are open to criticism, but the parties based their rights on the evidence adduced at the trial without

(1) (1870) L.R. 5 Q.B., at p. 665.
(2) (1900) 1 Ch. 833.
(3) (1933) 49 C.L.R. 49 ; 6 A.B.C. 150.

any meticulous regard for the pleadings, and they must now be bound by the course of the trial.

The result is that the appeal should be dismissed.

DIXON J. This appeal is against a decree made by *Long Innes* J. declaring that the respondent, the plaintiff in the suit, is entitled to a vendor's lien for the sum of £600 each over two mortgages under the *Real Property Act* standing in the name of the appellant, the defendant in the suit, and ordering the appellant to pay these two sums to the respondent.

The respondent is the sole trustee of a settlement made in 1915 by one, Edwin Hallett Fieldhouse, who died in 1922. By this instrument, the settlor vested a fund of over £75,000, chiefly consisting in mortgages, in his son Richmond Llewellyn Fieldhouse and one, Harry Eustace Farmer, as trustees upon trusts in favour of the settlor's wife, his six daughters and his three sons. The settlement confined the authorized investment of the fund to advances of not more than £1,000 on any one security upon mortgage over land under the *Real Property Act* situated in the County of Cumberland. During many years these two trustees invested moneys of the trust through a solicitor named William Carnegie Clegg, who seems to have been connected with much building and land speculation. In the case of subdivisions, the conditions of the power of investment were observed in form by taking separate mortgages over separate building allotments.

On 13th April 1931, Clegg was arrested for misappropriation and he was adjudicated bankrupt shortly afterwards, apparently on 22nd June 1931. A large part of the settled fund has been lost through Clegg's defalcations, which were vast, and extended to moneys belonging to the testamentary estate of the settlor, of which also Richmond Llewellyn Fieldhouse was a trustee. He retired from the trusts of the settlement on 5th May 1931 and the respondent was appointed in his stead. His co-trustee, Farmer, had for some time been incapacitated by illness from performing any active duties as trustee: he died on 22nd August 1931. At the end of 1930, notwithstanding Clegg's dishonesty, there remained in the names of the trustees some good and subsisting mortgages upon

H. C. OF A. 1933.

THOMPSON v. PALMER.

Dixon J.

which funds of the settlement had been invested through Clegg. Among these securities were the two mortgages, now vested in the appellant, over which the decree under appeal declares that a vendor's lien exists in favour of the respondent. The case turns upon the circumstances in which the trustees transferred the mortgages to the appellant, Mrs. Thompson. Her husband had for some years been a client of Clegg's and through his office had invested moneys both in his own and in his wife's name. The amount which Clegg had or pretended to have so invested on their behalf seems to have been a little less than £5,000. About the middle of 1930, Thompson requested Clegg to call in this sum. Owing to his death, which occurred on 5th September 1932, the Court is without Thompson's account of the communications and dealings between himself and Clegg, but it appears that, on 22nd December 1930, Clegg wrote to him to the effect that he had the money available and wished to know whether he should invest it on fresh security. The statement was false; in fact the money had long since disappeared. About this time distrust of Clegg was inspired in a son of Thompson who had dealings with him. He issued first one then another writ against Clegg and succeeded by this means in obtaining, in January 1931, repayment of some two or three thousand pounds. He endeavoured to persuade his father of the danger threatening the family affairs, but, perhaps, his father was slow to suspect Clegg's honesty. At any rate, it is not possible to say what, if any, degree of pressure was put upon Clegg; but whether stimulated by pressure or by his own natural apprehension he took steps to satisfy Thompson's demand for the money supposed to have been called up and to be lying in his hands awaiting re-investment. For a means of doing so he fell back upon the securities belonging to the trustees of the Fieldhouse settlement. How he was able to obtain transfers of these securities by the trustees is a question to which the evidence in these proceedings supplies no satisfactory answer. The account given by Richmond Llewellyn Fieldhouse has in the main been disbelieved, and with reason: Clegg, who is in gaol, was not called as a witness; Farmer, the co-trustee, is dead; and the remaining evidence supplies no explanation which may be relied upon with confidence. The decree,

however, proceeds upon the assumption that the transfer was made, as it is expressed to be, in consideration of a sum of £600 for each mortgage and that these sums were payable to the transferrors, the trustees. The correctness of this assumption is, of course, a question of some importance and accordingly the circumstances governing the actions of the transferrors as well as those affecting the conduct of the transferees will require examination. But, whatever may have been the inducement which actuated the trustees, Clegg was in the event able to obtain from them the requisite transfers to Mr. and Mrs. Thompson of the mortgages. Early in January, Clegg took Thompson to inspect some twenty securities which he proposed as investments for the money that he was supposed to have called in. He inspected the lands the subject of the two mortgages now in question, which had been given to the trustees by a mortgagor named Gillies, and lands the subject of several other mortgages held by the trustees, including mortgages given by mortgagors named respectively Read, Giblett, Jamieson, and Wall. Transfers of these mortgages were prepared, probably about 10th January 1931. About that time Fieldhouse executed the transfers of the mortgages, except Read's; Farmer's signature was then obtained, and, about 5th February 1931, each transfer was completed by Clegg's acceptance on behalf of the transferee, and, on 6th February 1931, the transfers were registered. A statement dated 5th February 1931 was prepared in the form of a letter from Clegg to Thompson. Under the heading "Discharge of Principal," it set out the names and amounts of a number of securities upon which Thompson's money to a total sum of £4,950 10s. 10d. once had been or ought to have been invested. Under the heading "New Loans," it set out the names and amounts of eight securities amounting to £4,875. A balance of £75 10s. 10d. was shown as due to Thompson. On 7th February 1931, he received from Clegg the mortgages endorsed with the registration of the transfers, and, apparently, was shown the statement. On 24th February, he was given Clegg's cheque for the balance, £75 10s. 10d., which was duly paid. The eight securities included the two mortgages by Gillies and the mortgages by Wall, by Jamieson, by Giblett and by Read. Except for the transfer of Read's mortgage, which remained unexecuted until 27th March,

H. C. OF A. 1933.

THOMPSON v. PALMER.

Dixon J.

the rehabilitation of Thompson's investments appeared complete. During the course of the transaction, Thompson took the precaution of asking Fieldhouse, whom he knew well, why he wished to transfer the mortgages; was there anything wrong with them? Fieldhouse appears to have replied that they were sound, but that he had been offered one large mortgage by Clegg, or Clegg's mother, and he wished to take it because it would save trouble. Clegg's chief female clerk, Mrs. Smith, whom *Long Innes* J. regarded as a credible witness, notwithstanding the degree to which she was implicated in Clegg's frauds, swore that Fieldhouse, who was in fact interested in a brick company at Kingswood, had in contemplation the investment of the money upon mortgages over about 13½ acres of land there to be sold in subdivision by a building syndicate. She also said that, in December 1930, she was present at an interview between Clegg and Fieldhouse at which the latter said that he had certain securities including the mortgages of Gillies, Wall, Jamieson, Giblett and Read, which he would be willing to transfer to Thompson, and that he wanted to call them in or transfer them over so as to obtain a certain sum of money through Clegg's office. The substance of Fieldhouse's ultimate account of his reason for executing the transfers, at any rate of Gillies' mortgage, was, that in order to obtain the money outstanding he authorized Clegg to transfer it to some "good client," that Clegg spoke about Gillies, asked Fieldhouse to sign the document, said that he had plenty of good clients, that he would have no trouble in "refinancing" it, and that he was going to "call the money up." It appears that shortly after 5th February 1931, the date of the transfers, Fieldhouse met with an injury, which confined him to hospital until 3rd March 1931. He was then informed that disquieting rumours about Clegg were current. He was advised to obtain all his securities and this advice he endeavoured to follow. There is no direct evidence of what took place between himself and Clegg, but Mrs. Smith says that Fieldhouse told her he wished to get all his securities together and gave the reason why, that he arranged to come to the office and that "he went through them all" with her. Fieldhouse says that Mrs. Smith promised from day to day to get his deeds but, except for producing a few odd ones, did nothing. What he discovered does not appear,

but in the result he prepared a list of missing securities or moneys amounting to £70,000, and brought it to Clegg's office. In the meantime Clegg had retired to a hospital to undergo an operation which seems to have been performed on 19th March 1931. Mrs. Smith expressed her disagreement with the amount made up by Fieldhouse and said that he would have to see Clegg. Fieldhouse told her that Clegg had promised him security from himself and his mother for anything that was short. Fieldhouse and Mrs. Smith then saw Clegg at the hospital. He said that the amount given by Fieldhouse was absurd. After a discussion in which Fieldhouse reiterated that Clegg had promised that he would give security to cover any deficiency and that Fieldhouse would not lose any money, Clegg said that he would get the estate of Edwin Hallett Fieldhouse's will in order first, and agreed to give a charge over some flats called "Clivedon" at Darlinghurst and some flats in Belmore Road, Coogee. The amount to be secured to that estate was fixed at £13,500 or thereabouts and a charge was drawn up and executed by Clegg. Fieldhouse then pressed for security for the sums due to the trustees of the settlement and sums due on other accounts. The course of events is by no means clear, but, apparently, Fieldhouse obtained through one of Clegg's clerks a list of assets standing in the name of Clegg's mother, and she was induced to execute a joint assignment by herself and her son covering these assets expressed to be in consideration of £53,550. Apparently the deficiency due to the testamentary estate of Edwin Hallett Fieldhouse was at this time set down at £13,550, and that due to the settled estate and on other accounts at £40,000. Clegg did not execute this charge. Another interview took place between him and Fieldhouse, who pressed for further security. According to Mrs. Smith, Clegg at first objected to his mother's giving any security, but after much discussion, he agreed subject to two conditions; the first was that Mrs. Smith should give whatever assets she had, and the second, that Fieldhouse should complete the transfer of Read's mortgage to Thompson. This was agreed and a security over a long list of assets by Mrs. Smith and Mrs. Clegg was drawn, settled, engrossed and executed. It was dated 26th March 1931, and was expressed to be "in consideration of all amounts due by"

H. C. OF A. 1933.

THOMPSON v. PALMER.

DIXON J.

Mrs. Clegg and Mrs. Smith "and all moneys uninvested and all amounts advanced on building loans or otherwise not paid over by" Clegg and due to the trustees of the settlement, to one Dr. Smith, to an estate described as "Fieldhouse and Fieldhouse," to persons called "Fieldhouse and Cato," and of moneys invested for Farmer and any other moneys invested by Fieldhouse through Clegg. The instrument then assigned the assets to Fieldhouse. It contained a provision requiring him as far as concerned the settlement trust to "accept securities over the lands at Balgowlah . . . Mascot and Kingswood in accordance with the arrangements already made" and thereupon to release from the charge securities of an equal value. The references to Balgowlah and Mascot as well as Kingswood are to building estates. In exchange for this security Fieldhouse gave up the assignment executed by Clegg's mother. Mrs. Smith was asked when giving evidence to explain in effect the first condition laid down by Clegg. She said she included in the security properties which had become hers while she was in Clegg's employ: that she did so because otherwise Clegg would not allow his mother to join and that she would have given anything then to get the matter settled. The second condition for which Clegg had stipulated was evidently directed to avoiding danger from the Thompsons. After obtaining the transfers of the other mortgages and the cheque for £75 10s. 10d., Thompson had ascertained that the full amount set down as secured by Jamieson's and by Wall's mortgage was no longer outstanding. £100 had been paid off Wall's mortgage and £175 off Jamieson's and the payments had been made to Fieldhouse. Thompson had asked Fieldhouse, early in March, to complete the transfer of Read's mortgage and to make up the shortage of £275. With the first request he promised to comply: the second he refused, on the ground that, in the security he said he had taken from Clegg, he had received credit only for the reduced amounts and he referred Thompson to Clegg for the money. Fieldhouse says that Thompson threatened to have Clegg arrested unless Read's mortgage was transferred. On 27th March 1931, the day after Mrs. Clegg's and Mrs. Smith's security was executed, Fieldhouse attended an appointment at Clegg's office and executed the transfer of Read's mortgage. Thompson was represented by a solicitor.

Clegg seems to have been similarly represented. It is suggested that a cheque for the deficiency of £275 was handed over on Clegg's behalf to Thompson's solicitor at the same time as the transfer. It appears that the security executed by Mrs. Clegg and Mrs. Smith was withheld from Fieldhouse until the transfer was completed. Between this date and 13th April, when Clegg was arrested in the hospital, Fieldhouse took possession of the Clivedon flats at Darlinghurst. On 12th April, some of Clegg's clients, including the Thompsons met at these flats. Thompson's son asked Fieldhouse whether he got the flats for the mortgages he had transferred to his father and mother. He answered, No, that those mortgages were all right, he had got a big mortgage for them. Later in the day he learned that Fieldhouse was seeking a bill of sale over the furniture in the flats from Clegg as further security. Again, he says, that he asked Fieldhouse whether it related to the mortgages he had transferred and again received the reply that it had nothing to do with it and that the Thompsons need not worry and were all right with those mortgages. The only additional facts which need be stated are that, on 24th June 1931, water rates on the Gillies' security for the year 1930-1931 were paid by Mr. Thompson's cheque and that subsequently other water and sewerage rates and municipal rates thereon were paid by the Thompsons and also a small sum for repairs. Mrs. Thompson was called to say that she had authorized these payments and that when she did so she believed that the mortgages were hers and that she was entitled to them and that everything was in order. The evidence she gave did not, probably owing to objections on the respondent's part, include conversations with her husband from which it might have been inferred whether she did or did not antecedently authorize the acquisition on her behalf of the Gillies' mortgage, and whether, by prior authority or subsequent ratification, she had become a party to a purchase of the mortgages at a money price. No evidence was given as to what became of the charge of 26th March 1931 given by Mrs. Clegg and Mrs. Smith, or of the value of the assets it included. It is highly probable that both Fieldhouse and Clegg intended that it should cover the amount of the mortgages transferred to the Thompsons. It appears inferentially that this amount was included

H. C. OF A. 1933.

THOMPSON v. PALMER.

Dixon J.

in the £53,550 given in the earlier assignment executed by Mrs. Clegg. It nowhere appears that Fieldhouse obtained any other security or consideration for the transfer and his statement to the contrary to Thompson, if made, was mistaken or false.

The decree appealed from does not set aside the transfer of the mortgages, but, treating it as affirmed, declares the existence of an equitable lien for the price. Upon the state of facts described, the first question which this declaration raises is whether, assuming the transferrors, the trustees, may be considered not to have received the price, they became upon transferring the mortgages entitled to an equitable lien or charge thereon for the consideration money stated in the transfer. I think this question should be answered that, upon the required assumption, they would be so entitled. Indeed the existence of what may be called this *prima facie* equity does not appear to have been disputed before *Long Innes* J., and in this Court the appellant's counsel, not merely admitted, but maintained, that an agreement between Thompson and Fieldhouse to buy the mortgages was proved, although he denied that the appellant herself, Mrs. Thompson, incurred any personal liability. It must be borne in mind, however, that the respondent's primary case was that the transfers were not in equity binding upon the trustees and that the appellant sought to meet this case by showing that Fieldhouse entered with full knowledge into the transaction expressed by the transfers. My reason for the conclusion I have expressed upon this question is that Thompson took the transfer in the name of his wife upon the footing that moneys for which Clegg was accountable to him would, to the extent of the consideration expressed, which was the amount secured by the two mortgages, be applied either at the direction of the transferrors or in satisfaction of some claim or demand on their part; and Fieldhouse had a corresponding expectation. I do not think that Farmer, his co-trustee, should be treated as intending anything less than regular payment by the transferees of the money sum stated in the transfer. He was a trustee, and, in the absence of evidence, he is not to be presumed, merely because he left the transaction of the business to his co-trustee, to have authorized him to commit breaches of trust in his manner of disposing of the trust property. But this is

immaterial, because I think an equitable lien or charge would result even if both of them concurred in the course I have attributed to Fieldhouse. There are difficulties in spelling out from the evidence an actual contract between Thompson and Fieldhouse and Farmer. But equitable lien is not the creature of contract. "Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt, indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons, claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case for the whole consideration; in the other for that part of the money, which was not paid" (per Lord *Eldon*, *Mackreth* v. *Symmons* (1)). "The principle upon which courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money" (*Story, Commentaries on Equity Jurisprudence*, 2nd Eng. ed. (1892), p. 844, par. 1219). It appears to me that an equitable charge arises from the circumstance that the transfer of the legal property in the mortgages was, on the one side given, and on the other, obtained on the supposition that value, defined in amount, would be received for it. When it turns out that value did not pass, neither Thompson nor his wife, who so far as she takes through him is a volunteer, can retain the property so transferred and treat it as free from the burden of the intended consideration for the transfer.

But, although I think the mortgages stand charged in the hands of the appellant with the amount of the intended consideration money, I am unable to see upon what ground the appellant herself can be saddled with a personal liability of the nature of debt. There is no evidence that she authorized her husband or Clegg to acquire the mortgages on her behalf, much less to agree to pay purchase money. She did not herself become a party to the transfer. Clegg accepted it for her. All the evidence is consistent with the

(1) (1808) 15 Ves., at p. 337; 33 E.R., at p. 781.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Dixon J.

view that the mortgages were transferred into her name as an advancement, or possibly subject to a resulting trust to her husband, and that she was first apprised of the transfer after registration and acquiesced believing the purchase money was paid. I do not think that so much of the decree can stand as orders the appellant personally to pay £1,200 with interest.

But although the primary equity in the nature of a vendor's lien may have existed in favour of the trustees, the appellant contends that it was subsequently lost or waived when Fieldhouse on 26th March 1931 obtained the security from Mrs. Smith and Mrs. Clegg. It may be conceded that if Fieldhouse with the authority of his co-trustee had obtained from Clegg " the one big mortgage " which it is said he claimed to have, the vendor's lien would have gone. But that result would be due to his acceptance of the security as a satisfaction of the consideration money for the transfers. The waiver of a vendor's lien by the acceptance of a security for the purchase money from a third party stands upon a different footing. In *Grant* v. *Mills* (1), Sir *William Grant* said that the effect upon a lien of a security, properly so denominated, of a third person, had never, he believed, been absolutely determined. His observation apparently still remains true. In the present case I think it is clear that the security given by Mrs. Smith and Mrs. Clegg could not operate to discharge the lien. It was an attempt by Fieldhouse to get in assets to cover a general deficiency in respect of all sorts of moneys and funds, which he feared had been lost through frauds the extent and nature of which he did not understand. His co-trustee was not a party to it. He had no intention of relying on it to the exclusion of any other right. There was no incompatibility between it and the lien.

The principal ground upon which this appeal was supported remains for consideration. That ground is that as between the parties the fact must be taken to be that the sum of £1,200 was received by the trustees. The conduct of Fieldhouse, and, in signing the transfers and leaving all to his co-trustee, of Farmer also, is relied upon as precluding the plaintiff, the respondent, from asserting in favour of the trust that the consideration for the transfer remains

(1) (1813) 2 Ves. & B. 306, at p. 309; 35 E.R. 335, at p. 336.

undischarged, or that a lien subsists over the subject of the transfer. The contention for the appellant is that the preclusion arises from an application of the principles of estoppel, or that the equity to a lien sought to be enforced against the legal estate or interest is defeated by a countervailing equity which that conduct and the circumstances raise. It is said that when Thompson received from Clegg the mortgages endorsed with the registration of the transfers to him and to his wife and then the cheque for the balance which these securities did not account for, he was justified in believing that Clegg had paid or accounted to the transferrors; Fieldhouse's earlier statement that he would obtain one large mortgage, his subsequent statements of the amount allowed or credited by Clegg in respect of Jamieson's and Wall's mortgages, his execution later of the transfer of Read's mortgage and his final assertions that he had a security for the mortgages transferred and the Thompsons were safe, were not merely calculated to strengthen such a belief but amount to independent representations of the fact; Fieldhouse knew, or ought to have known, that Clegg was supposed to have the Thompsons' funds under his charge which should be applied in payment for the mortgages transferred, and culpably executed a transfer containing a receipt, allowed the mortgage instruments to be handed over, looked to Clegg for payment, and confirmed the belief that payment of the consideration money had been satisfied. This array of circumstances is impressive, but other facts must also be considered and to them definite principles must be applied.

An intermediary, who has misappropriated funds or is about to do so, often adopts the plan of procuring the transfer of property to the person who supplies the funds from another who is deceived into parting with the property or believing that he has been paid for it. But it is not the nature of the device that determines upon which of the two the loss shall fall, but rather the manner in which it is carried into execution and the conduct of the respective parties themselves. This is well illustrated by the decisions which, on one side or the other, were claimed to be decisive of the present case. In *Young* v. *White* (1), upon which the respondent placed much reliance, a conveyancer named Rumsey managed to delude one

(1) (1844) 13 L.J. Ch. 418; 7 Beav. 506; 49 E.R. 1162.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Dixon J.

party into parting with the money and the other into giving a conveyance endorsed with a receipt. But, although superficially the facts appear to raise for decision the same or a similar question, essential elements of the present case were lacking. Young's property was subject to a mortgage. With his authority, Rumsey sold it to White for £920. Rumsey had obtained from White sums amounting to £550 falsely pretending that he was borrowing them on Young's behalf. After the sale he obtained payment of a further £335 from White as purchase money. On 25th March 1841, he put White into possession and on the following day produced a statement showing that, crediting the £550 which White supposed Young had received as a loan and crediting interest on that sum, a small amount of purchase money only remained payable and this amount White paid to Rumsey. Rumsey then obtained from Young a receipted conveyance to White, telling Young that all the purchase money but £123 was payable to the mortgagee and requesting instructions as to the disposal of the £123. Rumsey forwarded the receipted conveyance to White on 10th April 1841. But, on 12th April, Rumsey absconded and in May was made bankrupt. Upon these facts Lord *Langdale* M.R. held (1), (*a*) that Young was bound by Rumsey's receipt of £335 as purchase money because he had authorized him not merely to sell but to receive the purchase money; (*b*) but that the appropriation of the £550 was beyond the authority and to this extent the purchase money was unpaid; (*c*) that the handing over of the receipted conveyance ought not to be construed as a recognition by Young of Rumsey's acts. It is to be noticed that the effect of the receipted deed as a representation of payment was not discussed by Lord *Langdale*. Estoppel by representation had not in 1844 been developed as it now is, but the reason probably lies in the fact that, before Rumsey absconded and became bankrupt, Young could not have suffered any detriment through believing the representation. In *Wrout* v. *Dawes* (2), again the purchasers supposed that solicitors acting for both parties had paid or accounted for the purchase money out of funds of the purchasers, which were, or ought to have been, lying in their hands. In fact, of five persons

(1) (1844) 13 L.J. Ch. 418; 7 Beav. 506; 49 E.R. 1162.
(2) (1858) 25 Beav. 369; 53 E.R. 678.

entitled to share in the purchase money, four had received payment, and a conveyance, endorsed with a receipt in full, had been executed by those holding the legal estate, of whom one happened to be the unpaid beneficiary. The solicitors misappropriated his share and met his demands with the excuse that they had not received it from the purchasers. He directed them to retain the conveyance until the full purchase money was paid. In fact they did retain the conveyance in their custody but they placed it in the purchasers' deed box. The purchasers had been let into possession and appear to have supposed during a period of some eighteen months that the full purchase money had been paid over. They discovered the truth only after the solicitors had become bankrupt. Upon these facts, *Romilly* M.R. (1) held that the legal estate in the purchasers was subject to a vendor's lien for the unpaid share of purchase money. The decision illustrates the difference, in the case of a common agent whose authority from the vendor extends to the receipt of purchase money, between an actual payment to him, which absolves the purchaser and a direction to him to apply in discharge of the purchase money funds of the purchaser already in his hands or for which he is accountable, which does not absolve the purchaser unless the common agent actually pays or accounts for the amount owing to the vendor, or the vendor, by his conduct, is precluded from denying that he has done so. The decision, no doubt, would not have been in favour of the vendor if his acts and conduct had produced the assumption made by the purchasers that the money had been paid over: for it is unlikely that inaction on their part during so long a period would cause them no detriment. But the receipted conveyance did not induce the purchasers' belief, because they did not actually receive it and the vendor's failure to apply to them for the residue of the purchase money was not culpable.

Wall v. *Cockerell* (2), upon which the respondent also relied, affords another example of the production, to answer demands in respect of moneys already misappropriated, of securities fraudulently procured by the defaulting solicitor from another client. The solicitors received, on 10th February 1853, from a client a large

(1) (1858) 25 Beav., at p. 381; 53 E.R., at p. 682.

(2) (1863) 10 H.L.C. 229; 32 L.J. Ch. 276; 11 E.R. 1013.

H. C. OF A. 1933.

THOMPSON v. PALMER.

DIXON J.

sum of money for investment on mortgage and at once converted to their own use about £5,000 of it. Their clients repeatedly pressed them for the securities and at length, on 1st September 1854, they produced and handed over receipted mortgages for that amount bearing dates 1st March and 1st August 1853. The mortgages, which were antedated, had been obtained by fraud from another client who received no payment. The solicitors became bankrupt in June 1856, but, until 1859, no question of the validity of the securities appears to have been raised by the mortgagor who was ignorant of the fact that the solicitors had not received the money in the first instance on his behalf. *Romilly* M.R. held the mortgagor entitled to relief (1) but Lord *Campbell* L.C. (2) reversed his decree, upon the ground that the mortgagor confirmed the validity of the mortgages with knowledge or means of knowledge of all the material facts of the case and that, imagining the solicitors had received the money as his solicitors and were his debtors, he had repeatedly represented to the mortgagees that by his agents he had received the money and acknowledged the validity of the mortgages, by which the mortgagees were induced, *inter alia*, not to prosecute the claim which otherwise they would have had against the solicitors. On appeal to the House of Lords, Lord *Campbell's* decision was reversed by Lord *Westbury* L.C. and Lord *Chelmsford* (3). Lord *Westbury's* judgment proceeds upon the grounds, that until the consideration moneys were received or applied for the use of the mortgagor or paid by the mortgagees in such circumstances as would estop him from denying that he had received them, no interest would pass to the mortgagees; that he received none of the money which was in fact misapplied by the mortgagees' own agents who were intrusted with it before execution of the securities; that, when the receipted mortgage deeds were handed over on 1st September 1854, the mortgagees paid nothing on the faith and credit of the receipts but took the deeds trusting to the representations of the solicitors to whom the money had been confided but who had spent it; that all the mortgagees had done was to abstain from demanding repayment of the sum they had entrusted to the

(1) (1860) 29 L.J. Ch. 816.
(2) (1860) 30 L.J. Ch. 417; 3 De G. F. and J. 737; 45 E.R. 1064.
(3) (1863) 32 L.J. Ch. 276; 10 H.L.C. 229; 11 E.R. 1013.

solicitors as their own agents; that the mortgagor did not discover until immediately before the institution of the suit that the mortgagees had not paid over the money upon the faith of the mortgage instruments but had reason to believe that it was so paid, both from the demands of the mortgagees and the assurances of the solicitors. "Under these circumstances," said Lord *Westbury* L.C. (1) "it is impossible to impute to the Appellant," the mortgagor "laches or acquiescence, or an intention of confirming the respondents'," the mortgagees' "title." The burden of proving such a case would lie on the respondents and could not be discharged except by proving that the appellant was aware of the time and manner in which the respondents' money was deposited with the solicitors "and of the fact that no part of it had been applied for his own use or benefit." Lord *Chelmsford*, after expressing his entire agreement with the opinion of Lord *Westbury*, proceeded to distinguish the case from one in which the money, at the time of the execution of the securities, existed in the hands of the solicitors, but was afterwards misapplied. He said (2) that the mortgagees held the deeds without having given any value for them. The mortgagor's ignorance of this fact entirely avoided the effect of the acquiescence relied upon and of the mortgagor's undoubted recognition of the validity of the mortgages. The reasons given by both the learned Lords exclude the following grounds upon which the mortgagor might conceivably be considered bound:—(*a*) The receipt of the money by the solicitors as his agents. It was entrusted to them by the mortgagees as their agents and independently of the transaction. (*b*) Estoppel of the mortgagor from denying that the solicitors received it as his agents. The mortgagees knew the contrary, namely, that they had entrusted it to them as their agents. (*c*) Detriment, consisting in the loss of the money, induced by the representations made by the mortgagor in giving the receipted mortgage or otherwise. The money had already been lost.

A ground which is not explicitly dealt with is that of estoppel of the mortgagor from denying the receipt of the money from the solicitors, arising from representations inducing the mortgagees to

(1) (1863) 10 H.L.C., at p. 243; 11 E.R., at p. 1019.

(2) (1863) 10 H.L.C., at p. 246; 11 E.R., at p. 1020.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Dixon J.

remain inactive where action might have resulted in recovering some of the moneys misappropriated. The observations of Lord *Westbury* appear to negative it for two reasons; first, because no detriment was shown, "all which the respondents have done has been to abstain from demanding repayment," second, because in the absence of knowledge on the part of the mortgagor of when and on whose behalf the solicitors had received the money, his conduct was not culpable. Lord *Chelmsford* seems to emphasize the latter ground.

With these cases must be compared *Gordon* v. *James* (1), the case chiefly relied upon on the part of the appellant. Again the controversy was whether as against assignors who had received nothing for the assignment, a security could be retained by assignees who had taken it in respect of a payment made to solicitors acting as common agents who misappropriated the money. The security assigned was a mortgage for £1,000. The mortgagees, who executed the assignment, were trustees, and their solicitors, who proved fraudulent, managed the affairs of the trust, and had the custody of the mortgage and title deeds. The person to whom the mortgage was assigned was a client of the same solicitors. The transaction began by their inviting him to invest £1,000 on an assignment of mortgage and taking him to inspect the property under mortgage to the trustees. He consented to invest the money in the manner the solicitors proposed and on 19th June 1878 paid it to them. On, or shortly after, 5th and 15th July 1878, they procured the respective trustees to execute an assignment of the mortgage and sign an endorsed receipt, by telling them that the document was a deed relating to a mortgage of £1,000 about to be paid off. Before the end of the same month the solicitors handed this deed to the investing client, who retained it. The title to the mortgage did not disclose the trust. The solicitors misappropriated the money but for some years concealed the fraud by paying their client interest regularly out of their own funds and crediting to the trustees the interest actually paid by the mortgagee. In November 1883 they became bankrupt. The Court of Appeal decided that the trustees could not recover the security or enforce a lien over it. The judgment of *Cotton* L.J. (2) proceeded substantially upon the ground that the

(1) (1885) 30 Ch. D. 249.

(2) (1885) 30 Ch. D., at p. 254.

trustees had been negligent and by their negligence had enabled the solicitors to represent to the investing client that his money had really been paid over to the trustees. *Lindley* L.J. (1) thought that by their incautious act the trustees had enabled the solicitors to deceive the assignee, to lull him into security and to prevent his having recourse to those who got his money from him by the trick; five years had elapsed, for some part of which time the solicitors were in good credit. *Fry* L.J. (2) went on the ground that the trustees had given to the solicitors, who were generally recognized as their agents and who in fact received the money, the means of representing that it had been paid over to the trustees, so that the assignee did not make that inquiry and search after the money which otherwise he would have done.

These grounds refer to the essential elements of estoppel by conduct amounting to or assisting in a representation. It is to be noticed that between the payment of the money to the solicitors, and the receipt from them of the deeds, a few weeks only elapsed and that the money may not then have been lost. The detriment suffered through inaction consisted in possible failure to prevent, as well as to recoup, the loss. Again, the money was paid in respect of the very investment and it was a strong inducement which was furnished by the production of the receipted deed, which came to the personal knowledge of the assignee himself: and last, the trustees in dealing with documents possibly affecting others were guilty of a want of care in failing to perceive the nature of what they signed and afterwards in failing to see that they were receiving interest on a footing inconsistent with the transaction they had supposed they were giving effect to. *Lindley* L.J. (3) refers to the familiar general statement which he gives in the language of *Story* on *Agency*:— Where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon. But, although as a compendious description of the general results produced by the operation of independent principles, notably those of estoppel, the statement may be useful, it is not itself a rule of law. When in *Lickbarrow* v. *Mason* (4),

(1) (1885) 30 Ch. D., at p. 259.
(2) (1885) 30 Ch. D., at p. 260.
(3) (1885) 30 Ch. D., at p. 258.
(4) (1787) 2 T.R. 63, at p. 70; 100 E.R. 35, at p. 39.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Dixon J.

Ashhurst J. formulated the proposition :—" That, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it " ; he laid it down " as a broad general principle " only and described it as " a strong and leading clue " to the decision of the case. Sometimes direct reliance has been placed upon the statement (*e.g.*, *London and South Western Bank Ltd.* v. *Wentworth* (1) ; *Fry* v. *Smellie* (2) ; *Worsley* v. *Mathieson and Davis* (3) ; *Commonwealth Trust Ltd.* v. *Akotey* (4)) ; but warnings have often been given of the danger of applying it literally as a rule of law, and more than once attention has been recalled to the need of a duty and some neglect of it before the occasioning of the loss can be correctly attributed to the party sought to be made responsible (cf., per Lord *Coleridge* C.J., *Arnold* v. *Cheque Bank* (5) ; per Lord *Field*, *Bank of England* v. *Vagliano Brothers* (6) ; *Farquharson Brothers & Co.* v. *King & Co.* (7), per *Vaughan Williams* L.J, (8), per Lord *Lindley* (9) ; per Lord *Parmoor*, *London Joint Stock Bank Ltd.* v. *Macmillan and Arthur* (10) ; *R. E. Jones Ltd.* v. *Waring and Gillow Ltd.* (11), per Lord *Sumner*, who says that in *Commonwealth Trust Ltd.* v. *Akotey* (12), some of these observations were apparently overlooked). The true distinction between *Gordon* v. *James* (13) on the one hand and, on the other, *Young* v. *White* (14), *Wrout* v. *Dawes* (15) and *Wall* v. *Cockerell* (16), lies in the application of the principles of estoppel to the facts, and it is upon these principles that the present case depends.

In the present case the appellant cannot, in my opinion, succeed except upon the ground that by their conduct the trustees were estopped from denying that the consideration money for the transfer of the mortgages was actually paid over or accounted for to them by Clegg. The conduct upon which the appellant relies is of two

(1) (1880) L.R. 5 Ex. D. 96, at p. 105.
(2) (1912) 3 K.B. 282, at p. 293.
(3) (1916) 38 A.L.T. 114, at pp. 116-117.
(4) (1926) A.C. 72.
(5) (1876) 1 C.P.D. 578, at pp. 587-588,
(6) (1891) A.C. 107, at p. 169.
(7) (1901) 2 K.B. 697 ; (1902) A.C. 325,
(8) (1901) 2 K.B., at pp. 711-713.
(9) (1902) A.C., at p. 342.
(10) (1918) A.C. 777, at p. 836.
(11) (1926) A.C. 670, at p. 693.
(12) (1926) A.C. 72.
(13) (1885) 30 Ch. D. 249.
(14) (1844) 7 Beav. 506 ; 49 E.R. 1162.
(15) (1858) 25 Beav. 369 ; 53 E.R. 678.
(16) (1863) 10 H.L.C. 229 ; 32 L.J. Ch. 276 ; 11 E.R. 1013.

kinds, direct representations by Fieldhouse to the Thompsons, and conduct enabling Clegg to make representations, and, perhaps, on the part of Farmer, enabling Fieldhouse to do so. The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, as in *Yorkshire Insurance Co.* v. *Craine* (1); cp. *Cave* v. *Mills* (2); *Smith* v. *Baker* (3); *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co.* (4); and *Ambu Nair* v. *Kelu Nair* (5); or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted. To satisfy this requirement the appellant must establish that she or her husband believed that Clegg had paid or accounted for the consideration money to the trustees and upon the faith of that belief she, or he on her behalf, took a course, either of action or inaction, which would enure to her detriment.

I think it is clear that at no time did the Thompsons believe that Clegg had actually paid over the consideration money to the trustees.

(1) (1922) 2 A.C. 541, at pp. 546-547.
(2) (1862) 7 H. & N. 913, at pp. 927-928; 158 E.R. 740, at pp. 746-747.
(3) (1873) L.R. 8 C.P. 350, at p. 357.
(4) (1921) 2 K.B. 608, at p. 612.
(5) (1933) 60 I.A. 266, at p. 271.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Dixon J.

as distinguished from applying it to some new investment or otherwise accounting for it. There is no evidence that Clegg or Mrs. Smith expressly represented that it had been accounted for. But the submission of the statement, dated 5th February, the delivery over, on 7th February, of the mortgages endorsed with the registration of the transfer and the payment, on 24th February 1931, of the cheque for £75 10s. 10d. may perhaps amount to such a representation. The transfer itself containing the receipt clause did not come to the eyes of the Thompsons. The circumstances were such as to promote misgivings of Clegg's honesty and it may be doubted whether Thompson really believed upon the faith of these matters alone that Clegg had settled with Fieldhouse. The statements ascribed to Fieldhouse himself would have more weight. There is no distinct finding by *Long Innes* J. that Fieldhouse did tell the Thompsons that, in respect of Wall's and Jamieson's mortgages, Clegg had given him credit in the new security for the reduced amount, but he considered the witness to be truthful who deposes to it. This conversation is attributed to the earlier part of March 1931, and, on the whole, I think we ought to take it that Thompson had by the end of the second week in March formed the belief that the claims of the trustees had in some way been satisfied by Clegg.

The question at once arises, what detriment has been incurred as the result of the formation of that belief? Positive action to his detriment Thompson did not take, except for the payment on and after 24th June 1931 of rates and other outgoings in connection with the mortgaged property. I think that these payments can be put on one side. Even if Thompson doubted or did not believe that Clegg had settled with Fieldhouse, he would, I think, have made these payments, which were charges upon the property, and I am not satisfied that after Clegg's arrest he continued to rely upon the supposition that the claims of the trustees had been satisfied. But it is clear that Thompson did not take active measures to better the position he actually stood in and the question is whether his failure to do so effected such an alteration in the position he would otherwise have occupied as to produce the required detriment. A month elapsed before Clegg's arrest. The appellant did not in this

period undergo any change of right nor was there, as in *Greenwood* v. *Martins Bank Ltd.* (1), any loss of remedy. A change of remedy occurred later upon the bankruptcy of Clegg. Upon the authority of *Farwell* J. in *Dixon* v. *Kennaway & Co.* (2), it may be said that this fact shifts the burden of proof and that it lies upon the respondent to show that nothing productive of advantage to the appellant might have been done by the bankruptcy. The very foundation of the estoppel is the change of position to the prejudice of the party relying upon it, and I think the burden of proving the issue must lie upon him. The presumption which arises from the occurrence of a bankruptcy is one of fact and not of law. The facts in the present case make it incredible that Clegg, except possibly by the misappropriation of other assets for the purpose, could have met or secured any claim against him during March and April 1931. If he had done so, the payment or security would be voidable upon his bankruptcy.

In my opinion the appellant has completely failed to establish that she or her husband acted to the prejudice of either of them upon the faith of the belief that Clegg had settled with the trustees. It is, in this view, unnecessary to consider to what extent Fieldhouse's statements bound the trust. The appellant objected in the Supreme Court that the respondent's statement of claim was not framed so as to make a case for enforcement of a lien. *Long Innes* J. did not agree with this contention, but, if he had done so, he ought to have allowed an amendment. I do not think that we should decide the case on any question of pleading, and, in fact, on the appellant's side the actual frame of her defence has been disregarded. The appellant was deprived of no opportunity of meeting the case actually made against him that a vendor's lien existed.

I think that the decree appealed from should be varied by discharging the order that the appellant pay the sum of £600 in respect of each mortgage together with interest and that subject to that variation the appeal should be dismissed.

EVATT J. Argument in this appeal from the decision of the Supreme Court of New South Wales (*Long Innes* J.) has covered a wide field and occupied considerable time. But the gist of the dispute may be stated shortly.

(1) (1933) A.C. 51.

(2) (1900) 1 Ch., at p. 840.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Evatt J.

Both the parties agree that the appellant is to be taken as having, on or before February 5th, 1931, agreed to purchase from the predecessors in title of the plaintiff, Messrs. Fieldhouse and Farmer, for the sum of £1,200 two mortgages of which the vendors were then registered as proprietors under the *Real Property Act*. On February 5th, 1931, Fieldhouse and Farmer duly executed a memorandum of transfer, transferring the two mortgages to the appellant. The consideration expressed in the memorandum of transfer was £1,200, and the receipt of that sum by Fieldhouse and Farmer was expressly acknowledged in the memorandum. On February 6th the transfer was registered, and on February 7th the appellant or her agent received the two duplicate instruments of mortgage, the registered proprietor of the land in each case being one Gillies.

It is also common ground between the parties that Fieldhouse and Farmer received no part of the £1,200 purchase price. Fieldhouse was the active person in the transaction, and he and Farmer had allowed much of their business to be conducted for them by a solicitor named Clegg, who had committed large defalcations. The appellant also had placed a considerable sum of money with Clegg for the purpose of investing.

It was either Clegg or his conveyancing clerk, Mrs. Smith, who arranged for the transfer of February 5th, 1931, and it is admitted that Clegg had no authority from Fieldhouse and Farmer enabling him either to receive payment of the purchase price or to discharge the appellant's liability to pay it, by accepting in lieu of cash any personal liability of Clegg to the appellant, arising from Clegg's having misappropriated her moneys or otherwise.

Apart from one subordinate aspect of it which will be referred to separately the appellant's case is that Fieldhouse and Farmer, although they received none of the £1,200 from the appellant, are estopped from denying the receipt of it.

Pausing for one moment before dealing with this contention, it is perfectly clear that the declaration of vendor's lien made by *Long Innes* J. in favour of the respondent is the *prima facie* result of the admission by counsel of an agreement to sell the two securities for the sum stated. The appellant laid some emphasis upon the fact that the memorandum of transfer of the two mortgages was

duly registered, and the two duplicate instruments of mortgage were handed over to her, so that a complete legal and statutory title to the mortgages became vested in her. But, in relation to the question of vendor's lien, this vesting is only significant as creating the classical occasion for the application of the equitable doctrine. It is precisely because legal and statutory title are in the appellant that the respondent, affirming the transaction, seeks the declaration of lien on the ground that the purchase money has not been paid.

It is of course possible for a purchaser whose money has not found its way to his vendor to have the latter estopped from denying receipt of the purchase money. And Fieldhouse and Farmer certainly represented in the memorandum of transfer that they had received £1,200 from the appellant. It would appear that neither the appellant nor Sidney Thompson, who was then acting for her, saw the actual memorandum, but for the purpose of this opinion I shall assume that the appellant did have a representation made to her by Fieldhouse and Farmer that the £1,200 had been paid—whether the representation was made in the memorandum itself or in certain conversations or in both, it does not matter. The appellant thereby establishes the first link in the chain of estoppel.

Counsel for the respondent suggested that a complete answer to the claim of estoppel was furnished by the fact (which is clear enough) that the appellant did not pay £1,200 to the solicitor Clegg for the particular purpose of its being used to purchase the two Gillies' mortgages. It is true that in *Gordon* v. *James* (1), which is the case mostly relied upon by the appellant, *Cotton* L.J. said :—

> "Now *James* had already on the 19th of June, the very day on which the deed was dated when it was filled up by *Dodge*, paid into the hands of *Dodge* his money to be invested on the transfer of a security on this very property."

And *Lindley* L.J. (2) said :—

> "*Dodge* then, having got *James's* money for this property, and having got the deed from the plaintiffs, in which the plaintiffs say they have got the money, he hands that deed and all the title deeds over to *James*."

The single fact that the present appellant did not pay £1,200 to Clegg to be used in the purchase of the Gillies' mortgages is, according to the respondent, sufficient to defeat the plea of estoppel. This argument is, I think, erroneous. In *Gordon* v. *James* (3) the

(1) (1885) 30 Ch. D., at p. 256. (2) (1885) 30 Ch. D., at p. 259.
(3) (1885) 30 Ch. D. 249.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Evatt J.

estoppel was successful. It does not follow that it would have failed unless the purchase money had been received by the solicitor from the purchaser for the purpose of applying it to the very transaction in question.

Discussing this case in his work on *Estoppel* (1900), at pp. 134-135, *Ewart* summarizes its principle as follows :—

> " A purchaser receives through the vendor's solicitor a conveyance containing an acknowledgment of receipt of the purchase-money, and simultaneously or subsequently pays the purchase-money to the solicitor ; the solicitor had no authority to receive the money and the vendor is entitled afterwards to enforce payment. On the other hand, a purchaser pays his purchase-money to the solicitor and *afterwards* receives a conveyance containing an acknowledgment of payment, and the vendor is not entitled to enforce payment.
>
> What is the distinction ? It is this : In the former case the purchaser was not misled. In the latter he was. In both cases the deed represented that the vendor had received the purchase-money at the time of its execution. So far they are alike. But in the former case the purchaser was not deceived, for he knew the fact to be otherwise ; whereas in the latter, having previously paid his money, he believed, when he received the deed, that the representation which it contained (that the vendor had received the money) was true. He was misled ; he acted upon the misrepresentation to his disadvantage (by remaining quiescent), and the vendor was estopped."

A person setting up the doctrine of estoppel has to show, not only that the representation has been made to him, but that he believed in its truth. If the representation that the purchase-money has been received is made by a vendor at a time when, to the purchaser's knowledge, no sum has been made available for the purpose of the sale, the purchaser can have no belief in the truth of the vendor's incorrect representation. This is the point so clearly made by *Ewart*. In *Gordon* v. *James* (1) the solicitor received the purchase-money from James on June 19th, 1878, and it was subsequently that the vendor's representation of receipt of payment was made to the purchaser. Accordingly it was possible for the purchaser to have believed in its truth. The purchaser's belief was strengthened because he had paid the purchase money to the solicitor for the very purpose of carrying the transaction through. But that feature of *Gordon* v. *James*, is not an essential element in estopping an unpaid vendor from asserting the fact of non-payment.

Nor is the estoppel defeated merely because the moneys which a purchaser places in an intermediary's hands for investment are

(1) (1885) 30 Ch. D. 249.

no longer recoverable from the intermediary. In the present case, the respondent has greatly stressed the following finding of *Long Innes* J. (1) :—

> "On the evidence now before me I have no doubt that prior to the 5th February, 1931, Clegg had misappropriated the £1,200 of the defendant's moneys which he should have had in his hands at that date, and which he purported to have appropriated to the payment to the plaintiff's predecessors in title of the consideration money for the transfer of the two mortgages in question."

But, if an unpaid vendor represents to a purchaser that he has received payment of the purchase money, and the other elements of estoppel are not lacking, it is of no avail for the vendor to prove that the intermediary has misappropriated the purchaser's moneys long before.

In other words, the doctrine of estoppel is not defeated by proof of the existence, unknown to the person relying on the estoppel, of facts inconsistent with the truth of the representation. This view, I gather, *Long Innes* J. must have favoured because, although he made the above finding of prior misappropriation by Clegg, he did not, on that account, decline to give effect to the defence of estoppel; but rejected it only because the appellant was not shown to have altered her position for the worse by acting upon the representation that the vendor had received the purchase price.

I do not disagree with his Honor's finding that the appellant suffered no detriment, but it seems to me that the plea of estoppel fails because, at all material times, the appellant knew that the representation of actual payment in cash was false, and that Fieldhouse and Farmer had *not* received £1,200 in cash for the sale of their securities.

The situation existing on February 5th, 1931, between the appellant and Clegg the solicitor, was set out in Exhibit 1, a document purporting to be a statement of account between Clegg and the appellant's husband, Fred. Thompson. The statement asserts that principal moneys from the Thompsons' mortgages had recently come into Clegg's hands as a result of their discharge, the total amount of moneys received being stated at no less a sum than £4,950 10s. 10d.

(1) (1933) 33 S.R. (N.S.W.), at p. 174.

H. C. OF A. 1933.

THOMPSON v. PALMER.

Evatt J.

The statement also asserts that all of this large sum of money except £75 10s. 10d. has been newly invested by Clegg on account of the Thompsons in eight mortgages including the two Gillies' mortgages which are the subject of this suit.

It appears that Clegg had received the £4,950 from the Thompsons long before the transaction of February, 1931, and had fraudulently misappropriated the moneys. His method of fraud is sufficiently illustrated by taking the case of Blundell. Clegg's statement of February 5th alleges that Blundell had recently discharged a loan made to him by Thompson, the amount of it being £210 10s. 10d. Clegg's clerk, Mrs. L. B. Smith, says of this transaction :—

> Q. The next name is Blundell. I put it to you that there was no Blundell mortgage in the office at all ? A. I don't think it was ever completed.
>
> Q. It was merely a man that had been negotiated with ? A. Yes, I don't think he ever completed it.
>
> Q. No £210 10s. 10d. came in from Blundell to the office on account of Mr. Thompson ? A. No. Mr. Thompson paid it in to pay Mr. Blundell. It was not lent to Blundell.
>
> Q. Why did he pay it in ? A. I would have to look at the books.
>
> Q. You say that Mr. Thompson paid a cheque for £210 10s. 10d. ? A. If you let me look at the books I will tell you.
>
> Q. I want to test your memory. Was it a cheque of Mr. Thompson's ? A. Usually paid by cheque ; he usually paid by cheque.
>
> Q. Can you explain how it came to be 10s. 10d. ? A. Yes. Sometimes when he got his interest, a cheque every quarter, instead of taking the interest away he would hand back the cheque and give one of his own to make up an investment. That is the way the odd money comes in, and that is evidently what happened in that case.
>
> Q. Had not any proposal to lend to Blundell taken place years and years before ? A. No. I think it happened about 1929 or 1930 from memory.
>
> Q. Do you say that the money has lain there idle from 1929 until June 1930 without Mr. Thompson asking for it ? A. Yes.
>
> Q. You say it was Mr. Thompson's own payment in ? A. Yes.

It is clear that Clegg kept the principal moneys and subsequently, to avoid detection, made payments to Thompson on account of interest. It is also clear that no effective written security ever came into existence. Towards the end of the year 1930, the Thompsons must have been aware that Clegg was no longer in a position to meet his obligations. Sidney Thompson says in his evidence that " he called up some mortgages " about the end of the year 1930—by which he means that he instructed Clegg to obtain for him payment of the

moneys which the Thompsons then supposed to be safely secured in mortgage investments. Apparently Clegg gave Thompson no satisfaction, and in December 1930 Sidney Thompson issued a writ for "£2,000 or £3,000." Then, from sources which are not disclosed, Clegg paid the claim rather than enter upon a hopeless defence and face immediate exposure. The money was paid in January, about which time Fieldhouse came into relation with the Thompsons. On February 5th, 1931, Sidney Thompson and his father, who were then acting for the appellant, should have known that Clegg's statement that nine mortgagors had then, or shortly before, discharged a total indebtedness of nearly £5,000, (although the Moratorium Act was then in force) was false, indeed, almost incredible. None of the Thompsons had executed any discharge, and it is reasonably plain that, knowing of Clegg's insecure position, they would have insisted upon repayment in cash had it even occurred to them that Clegg had obtained cash. It would seem that, not unnaturally, they were pressing Clegg for payment in full, knowing that his position was bad, and suspecting that it was desperate. In point of fact, Clegg's shortages were enormous, and Fieldhouse and Farmer's position in relation to their investments through Clegg was even more insecure than that of the Thompsons.

There is much to indicate that the real transaction between Fieldhouse and Farmer on the one hand, and the Thompsons on the other, was somewhat different from the conventional basis upon which this suit has proceeded. One possible view is that, in order to prevent Clegg's being exposed by legal proceedings, with the probability that this would prevent him from paying anything, Fieldhouse and Farmer, acting in good faith, were prepared to hand over a number of good securities, including those here in dispute, in order to satisfy Thompson's demand upon Clegg for immediate payment, a demand also made, I assume, in perfect good faith. If this view were correct, the proper defence to the suit was the agreement between (1) Fieldhouse and Farmer, (2) Clegg and (3) Thompson that Clegg's liability to Thompson should be satisfied by Fieldhouse's arranging the transfer of the securities, including the two Gillies' mortgages. Difficulties in the way of such a defence would have

H. C. OF A. 1933.

THOMPSON v. PALMER.

Evatt J.

presented themselves, but these it is unnecessary and perhaps undesirable now to consider. But such a defence was not raised, and, on the contrary, the theory of a purchase and sale of the securities for £1,200 cash was the foundation upon which this litigation has been conducted and should be completed.

The appellant should fail because those acting for her throughout the transaction knew that Clegg had not paid £1,200 to Fieldhouse and Farmer for the two Gillies' securities, that in his then position it was impossible for Clegg to pay, and that the moneys which they had invested with Clegg had already been appropriated by him to some purpose other than that for which they were intended. Perhaps it is sufficient to say that the Thompsons did not believe in the truth of any representation by Fieldhouse and Farmer that the purchase money had been paid to them by Clegg, though it seems to me that the facts justify the further finding. It follows that the appellant's defence of estoppel is not made out.

The only other defence suggested is that Fieldhouse and Farmer chose to accept, in respect of Clegg's misappropriation of their moneys, an agreement in which the £1,200 (representing the purchase price of the Gillies' mortgages) was taken into account, and by which security for Clegg's total indebtedness to them was accepted by Fieldhouse and Farmer from Clegg's mother and Mrs. Smith. It seems to me that there is no substance in this contention. The transaction mentioned has evidentiary significance because it tends to show, as does a good deal of other evidence, that the agreement between Fieldhouse and Thompson was of the character I have indicated, and that Fieldhouse and Farmer were not intended to receive payment in cash from the appellant, but only to have the right of recourse to Clegg for the value of the securities transferred to Thompson. But such an agreement has not been relied upon by the appellant in the present proceedings, and it is only right to add that its chief support is found in circumstantial as distinct from direct evidence.

In my opinion *Long Innes* J. was right in granting relief to the respondent upon the footing of an unpaid vendor's lien, and the appeal should be dismissed.

Since preparing this opinion, I have had the opportunity of reading the judgments of the majority of the Court, The view accepted is that the evidence does not show that Mrs. Thompson, the appellant, agreed to pay £1,200 for the two mortgage securities and therefore the decree of *Long Innes* J. should be varied so as to relieve her of the obligation to make such payment. Because of the shadowy nature of the evidence of the agreement, Mr. *Teece*, who appeared for the appellant on this appeal, was asked, upon more than one occasion, whether he desired to seek an alteration of what I have described above as "the foundation upon which this litigation has been conducted." I understood him to repudiate such an alteration.

It seemed to me that his view was probably this, that, unless there was an antecedent agreement to sell the securities to Mrs. Thompson for £1,200, an equitable lien in the respondent's favour would have to be declared because (1) Fieldhouse and Farmer had parted with their securities upon the erroneous assumption that, as the memorandum of transfer itself said, £1,200 was payable to them by the transferee in respect of the securities and (2) the doctrine of estoppel could not be relied upon to justify his client's retention of the securities.

So far as estoppel is concerned, I fail to see how A, to whom B conveys Blackacre, acknowledging in the conveyance the receipt of the purchase money, can say "(1) I never agreed to purchase Blackacre from B, (2) I shall not pay B the consideration expressed in the conveyance, (3) I shall retain Blackacre because B represented to me that I paid him such consideration money. I believed his representation and acted upon it to my detriment." In such circumstances A is seeking to estop B from representing that the purchase money for Blackacre has not been paid. But, so soon as A establishes the absence of any antecedent agreement to purchase, he also establishes the impossibility of his ever having believed the representation he wishes to estop B from making, and so destroys his only chance of retaining Blackacre without paying B for it.

I am, therefore, for dismissing the appeal without varying the decree in the manner proposed.

H. C. OF A. 1933. THOMPSON v. PALMER. McTiernan J.

McTIERNAN J. The decree of the Supreme Court should, in my opinion, be varied by omitting the order that the appellant should pay the consideration moneys for the mortgages and interest thereon to the respondent. Subject to this variation, I think the appeal should be dismissed.

It is open on the evidence to conclude that the mortgages were transferred to the appellant by way of advancement or as a trustee for her husband but not on the footing that she became liable to pay the purchase money in respect of them. Whether they were transferred to her as a beneficial owner or as a trustee they are liable in her hands to a vendor's lien for the full consideration money (*Mackreth* v. *Symmons* (1)) unless, as the appellant contends, the lien was either waived or was displaced by a countervailing equity.

It was contended for the appellant that Fieldhouse waived the vendor's lien which he might otherwise have been entitled to assert against the subject mortgages by obtaining security on 26th March 1931 from Mrs. Clegg and Mrs. Smith for the moneys therein described. I agree with the reasons given by my brother *Dixon* for rejecting this contention. A countervailing equity displacing the vendor's lien, arose, it was contended, from the conduct of the respondent's predecessors in title in representing that they had received the purchase money for the two mortgages. I agree that the proof of this equity involves the proof of all the elements necessary to constitute an estoppel arising from a representation by conduct. The conduct relied upon in the present case has been fully set forth in other judgments. In *Greenwood* v. *Martins Bank Ltd.* (2), Lord *Tomlin* stated what is essential to give rise to an estoppel in the following terms :—" The essential factors giving rise to an estoppel are I think :—(1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made. (3) Detriment to such person as a consequence of the act or omission." Assuming, but without deciding, that (1) and (2)

(1) (1808) 15 Ves., at p. 337 ; 33 E.R., at p. 781.
(2) (1933) A.C., at p. 57.

are satisfied, I agree, as the learned trial Judge found, that it was not established that the appellant on the faith of the representation relied upon to prove the estoppel failed to take action against Clegg, or that such inaction on her part was to her detriment.

H. C. OF A. 1933. THOMPSON v. PALMER.

Decree appealed from varied by striking out the order that the defendant do within fourteen days after service on her of the decree pay to the plaintiff the sums of £600 *with interest. Otherwise decree affirmed and appeal dismissed. Appellant to pay respondent's costs.*

Solicitors for the appellant, *H. Hamilton Moore & Co.*

Solicitors for the respondent, *Piggott, Stinson, Macgregor & Palmer.*

J. B.

[HIGH COURT OF AUSTRALIA.]

BACKHOUSE AND ANOTHER . . . APPELLANTS;
DEFENDANTS,

AND

LLOYD AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1933. MELBOURNE, *Sept.* 19; *Nov.* 6. Rich, Starke, Dixon, Evatt and McTiernan JJ.

Will—Construction—Distinction between residuary gift and gift of distinct fund—Effect of enumeration of particular things in a residuary gift.

The testatrix made the following provisions with regard to the residue of her estate:—"7. I direct my trustees to set aside the sum of £10,000 upon trust to pay the income thereof to my husband . . . during his life . . . and from and after the death of my husband I direct that my trustees shall hold the said sum of £10,000 or until the said sum of £10,000 shall be