[1]CHAPTER VIII

ESTOPPEL

S. 115. Estoppel.—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representatives, to deny the truth of that thing.

Illustration.

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induced *B* to buy and pay for it.

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

SYNOPSIS

1. "Ch. X" in the Ceylon Evidence Ordinance.

COMMENTARY

Principle and Scope.—This chapter deals with the important subject of estoppel. Estoppel may be described as a rule by which a person, in some cases, will not be allowed to plead the contrary of a fact or state of things which he has formerly asserted by words or conduct. In plain words, a person shall not be allowed to say one thing at one time and the opposite of it at another time. The estoppel extends not only to a man's own declarations and acts, but also to those of all persons through whom he claims. In other words, estoppel binds both parties and privies. Ancient writers preferred to call estoppels "conclusions" as under the rule a man was concluded from pleading a state of things contrary to what he had said or done before. SIR EDWARD COKE defined estoppel thus: An estoppel is where "a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth". It means that a man is estopped from denying or withdrawing his previous assertion or from going back upon his own act, even if it be to tell the truth. The principle is that it would promote fraud and litigation if a man is allowed to speak against his own act

or representation on the faith of which another person was induced to alter his position. Thus, estoppel has been stated to be a rule of evidence which in certain circumstances precludes a person from establishing real facts and compels him to abide by a conventional set of facts [*Meherally v. Sukerwhanoobai*, 7 Bom LR 602].

The rule of estoppel is based on equity and good conscience, *viz* that it would be most inequitable and unjust to a person that if another by a representation made, or by conduct amounting to representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it [*Sarat v. Gopal*, 19 IA 203: 20 C 296, 311]. Estoppel deals with questions of fact and not of rights. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee [*Chhaganlal Keshavlal Mehta v. Patel Naradas Haribhai*, A 1982 SC 121, 125]. Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of Justice Estoppel can always be used as a weapon of defence [*Indira Bai v. Nand Kishore*, A 1991 SC, 1055, 1057]. The plea of estoppel is not available in matters of waiver of rights. Estoppel deals with questions of fact and not of rights. No one can be estopped from asserting his right, which he might have stated that he will not assert. There cannot be estoppel against statute [*Dr Sida Nitinkumar Laxmankumar v. Gujarat University*, A 1991 Guj 43, 55; *Lalji v. Shyam*, A 1979 A 579]. The object of estoppel is to prevent fraud and secure justice between parties by promotion of honesty and good faith; but in the old times, estoppel was not looked upon with much favour, as the doctrine of estoppel as now developed and understood, was unknown in those days and an impression prevailed that one effect of estoppel was to shut out truth. Hence the saying "estoppels are odious" (*Post*). This apprehension has now vanished and estoppel is at present considered valuable rule for elicitation of truth and promotion of justice by precluding a party from proving a state of things inconsistent with his former representation or action.

S 115 is founded on the law as laid down in the well known case of *Pickard v. Sears*, 1832 A & E 468, in which the rule was thus stated:—

> "Where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of things and induces him to act on that behalf so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time".

It was stated in a case that by substitution of the word "intentionally" for "wilfully" it was possibly the design to exclude cases from the operation of the rule in India to which it might be applied by the English courts [*Vishnu v. Krishnan*, 7 M 3, 8 FB, see also *Ganga v. Hira*, 2 A 809, 817]. But as pointed out by LORD SHAND it was not so and the law as enacted in s 115 is precisely the same as in England [*Sarat v. Gopal, sup*; see also *Mercantile Bank of India Ltd v. C B of India Ltd*, 1938 AC 287: 42 CWN 321, 331; *Ramlal v. Zohra*, A 1939 P 296; *South I E Co v. Subbier*, 29 IC 957]. In England, the rule was modified by substituting the words "*Intentionally*" for "Wilfully" in later decisions and the word "*intentionally*" has consequently been adopted in s 115 [*Sarat v. Gopal; sup* and *post*; "*Intentionally*"]. The law of estoppel has been compendiously set forth in s 115 and there is no peculiarity in the law of India as distinguished from that of England [*per* LORD SHAW in *Mitra Sen v. Janki Kunwar*, 46 A 728: 51 IA 326: A 1924 PC 213: 29 CWN 533; *Dawson Bank Ld v.*

Nippon M K Kaisha, 62 IA 100: A 1935 PC 79; *Lachman v. Munshi*, A 1933 P 708]. S 115 is only an abbreviated form of Art 102 of Stephen's Digest.

"A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities" [*per* LORD THANKERTON in *C D Sugar Co v. C N Steamship*, 1947 AC 46: A 1947 PC 40].

Taylor treats estoppels as conclusive presumptions [Tay s 89; see *post*]. The subject of estoppels (chap viii) differs from that of presumption in the circumstances that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts. A presumption is a rule that particular inferences should be drawn from peculiar facts whoever proves them [Steph Intro p 175]. Estoppels are sometimes compared with admissions, which are a species of self-harming evidence. Admissions being declarations against interest are good evidence, but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are mistaken and untrue. They become conclusive only when the other side has accepted them as true and has been induced to alter his condition and act upon those admissions. Admissions therefore are not conclusive and *may* operate as estoppels in certain cases [see s 31 *ante* p 339 and notes]. But estoppels create an absolute bar to the pleading of a contention denying the former assertion.

Nature and Scope of Estoppel. Estoppel should be distinguished from *res judicata* (see *ante* s 40). The rule of estoppel is not a rule of substantive law in the sense that it does not declare any immediate right or claim. It is a rule of evidence but capable of having the greatest effect on the substantive rights of parties [see *Cassamally v. Currembhoy*, 36 B 214; *Bhaishanker v. Morarji*, 36 B 283; *Mawji Shamji v. National Bank of India*, 25 B 499; *Kali v. Umesh*, 1 P 174: 65 IC 266; *Wahidan v. Nasir*, A 1930 A 434]; but it is capable of being viewed as a substantive rule of law in so far as it helps to create or defeat a right which would not exist or be taken away but for that doctrine [*Guruswami v. Ranganathan*, A 1954 M 402; *M K Raghavan v. Jharsuguda Mun*, A 1973 Or 186]. Estoppel being simply a principle of the law of evidence, it creates no substantive rights of an absolute character, but can only operate to close the mouths of certain people who have acted in a certain way from setting up what may be true of the case [*Josyam v. J*, A 1927 M 777: 103 IC 855]. It merely operates as a bar to the suit, it does not extinguish the right [*Ram Niwas v. S*, A 1970 Pu 462 FB]. An estoppel is only a matter of proof [*Bashi Ch v. Enayet*, 20 C 236, 239; *Hoorbai v. Aishabai*, 12 Bom LR 547]. It is rule of pleading based upon a man's conduct who by his representation to another has induced the latter to alter his position [*Shanmugavela v. Koyappa*, 1920 MWN 679]. Estoppel is both a rule of pleading and evidence because it extends to things which are matters of pleading and not proof [*Darbari v. Raneeganj Coal Assen*, A 1944 P 30].

A party shall not at the same time affirm and disaffirm the same transaction—affirm it as for as it is for his benefit and disaffirm it as far as it is to his prejudice. In *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, (1867-69) 12 Moo Ind App 157 LORD CHELMSFORD observed:—

> "A man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction has been applied by their Lordship in this committee to the consideration of Indian Appeals, as one applicable in the courts of that country, which are to administer justice according to equity and good conscience. The maxim is

> founded, not so much on any positive law, as on the broad and universally applicable principles of justice".

Relying the above passage the Bombay High Court hold that once having questioned the jurisdiction of the Cooperative Court, it is not open for the party to say that the dispute before the Cooperative, Court was maintainable and, therefore, the proceedings before the Rent Court, which are instituted without leave of the cooperative court, are not maintainable [*Mario Shaw v. Martin Fernander*, A 1996 Bom 116, 118].

Ewart refers to call estoppels as rule of equity. In *Munpl Corp of Bombay v. Secy of S*, 29 B 580, JENKINS CJ, said: "This equity (doctrine formulated in *Ramsden v. Dyson*, 1 E & I App 120) differs essentially from the doctrine embodied in s 115 of the Indian Evidence Act which is not a rule of equity, but is a rule of evidence that was formulated and applied in courts of law". [see also *Union v. Anglo-Afghan Agencies*, A 1968 SC 718, at 726-727 which following this recognizes the presence of an equity where a party acts to his prejudice relying upon another's representation although it makes no pronouncement as to whether estoppels are rules of equity or evidence]. It has been pointed out by a textwriter of the highest authority that the courts formerly through the pharseology and under the garb of "evidence", accomplished results which they now attain through the cautious reaching out of the principle of estoppel, the modern extension of the doctrine broadening the law by a direct and open application of maxims of justice [Thaver's Ev at Common Law, 80; cited by WOODROFE, J, in *Rupchand v. Sarbeswar*, 10 CWN 747: 3 CLJ 629]. Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a rule of substantive law" [*per* LORD THANKERTON in *CD Sugar Co v. C N Steamship*, 1947 AC 46, 56: A 1947 PC 40]. The doctrine of estoppel by representation forms part of the English law of evidence and such estoppel, except as a bar to testimony, has no operation or efficacy whatsoever. Its sole office is either to place an obstacle in the way of a case which might otherwise succeed, or to remove an impediment out of the way of a case which might otherwise fail. It has no other function [Spencer Bower and Turner "*Estoppel by Representation*" 2nd Ed p 67; see *Ram Niwas v. S*, A 1970 Pu 462 FB].

In India estoppels have been treated as rules of evidence and they have been given a place in the Evidence Act. "Estoppel is only a rule of evidence, you cannot found an action upon estoppel" [*Per* BOWEN LJ, in *Low v. Bouverie*, 1891, 3 Ch 82, 105 AC; *Dawson Bank Ld v. Nippon M K Kaisha*, 62 IA 100: 39 CWN 657: A 1935 PC 79]. The rule of evidence in s 115 is the rule of estoppel by conduct as distinguished from an estoppel by record which constitutes *res judicata* [*Sunderabai v. Devaji*, 1953 SCJ 693: A 1954 SC 82]. Estoppel, therefore, is not a cause of action but a rule of evidence by which a person is precluded from denying his former assertion, when there is a cause of action. As LORD RUSSELL observed in *Dawson Bank Ltd v. Nippon M K Kaisha, sup*:—

> "Estoppel is not a cause of action. It may, if established, assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action or (to put it in another way) by preventing a defendant from asserting the existence of some fact, the existence of which would destroy the cause of action".

Estoppel deals with questions of fact and not of right. A man is not estopped from asserting a right which he had said that he will not assert. It may be that man who agrees not to assert a right may in some circumstances be bound by his agreement, but that is a different matter [*Nathoo &c v. Hori Lall*, A 1945 A 196].

Estoppel is a rule of civil actions. It has no application to criminal proceedings, though in such proceedings matters which in civil actions create an estoppel are usually so cogent that it would be almost useless to set up a different story [Powell 9th Ed p 449]. The principle of estoppel has no place in criminal law [*Maham v. R*, 40 A 393: 45 IC 51]. (See *post* for the application of the doctrine of issue-estoppel in criminal proceedings). Rule of estoppel is purely personal and cannot create any substantive right in *rem* against the person estopped or his personal representative. An adopted son does not get a status by this doctrine for all purposes under the Hindu law [*Dharam v. Kalavati*, A 1928 A 459].

S 115 deals with the doctrine of estoppel by representation or misrepresentation (deliberate, negligent or innocent). Representation includes misrepresentation. The rule of estoppel applies to representation as to existing facts. An estoppel cannot be founded on promises *de jururo* or mere intention (see *post*: "*Representation must be of existing facts*"). There can be no estoppel against the provision of a statute. A representation may be made by statement or conduct. The words used in the section are "declaration, act or omission" which are included within the word 'representation'. The meaning has been made perfectly clear by the use of those words. In order to found an estoppel, the representation, *ie* a party's declaration, act or omission, must be clear, definite, unambiguous and unequivocal.

In *Asmatunnissa v. Harendra*, 35 C 904 it has been stated that s 115 is exhaustive and the law of estoppel in India is contained in that section. In *Ganges Mfg Co v. Saurujmull*, 5 C 669, GARTH CJ, said that "the fallacy of the argument is in supposing that all rules of estoppel are also rules of evidence. The enactment in s 115 is no doubt in one sense a rule of evidence. But the estoppels in the sense in which the term is used in English legal pharaseology are matters of infinite variety, and are by no means confined to the subjects dealt with in Ch viii of the Evidence Act" [see also *Rupchand v. Surbeshwar*, 33 C 915]. Following this it has been held that the provisions of s 115 are in one sense a rule of evidence but the Supreme Court refused to accept the contention that apart from s 115 there is "equitable estoppel". "We doubt whether the court while determining whether the conduct of a particular party amounts to an estoppel could travel beyond the provisions of s 115" [*Maddanappa v. Chandramma*, A 1965 SC 1812]. A later decision of the Supreme Court, however, categorically lays down that the section is not exhaustive [*Union v. Anglo-Afghan Agencies*, A 1968 SC 718; see further *post*].

Estoppel is an equitable relief and a party who has cheated another of his rightful claims cannot be allowed to raise an estoppel to deprive him further of his right [*Kokumanu v. Peddi*, 1923 MWN 679]. S 115 may no doubt override ss 91 to 94 because the law of estoppel is one which must prevail against a rule of procedure only. If a person has by his act permitted the other party to believe that the agreement was other than that embodied in the document and he caused him to act upon that belief, he cannot fall back on the provisions of s 92 and thereby escape the consequences of his own action [*Dhanna Ram v. Chabbil*, 72 IC 931].

There can be no estoppel in favour of the representee where he is aware of the true legal position. Where the representee is in charge of a property jointly owned he must be taken to have held the property on behalf of the owners even though one of the owners treated him as the true owner [*Maddanappa v. Chandramma*, A 1965 SC 1812].

There is no estoppel against law [*Phoneix Impex v. State of Rajasthan*, A 1998 SC 100]. The equitable principle of estoppel cannot override the provisions of a statute [*Kisto Chandra v. Anila Bala*, A 1968 P 487; *Ariff v. Jadunath*, A 1931 PC 79 **folld**].

Same:—The doctrine of estoppel as embodied in the very concise definition in s 115, may appear to be simple enough upon a reading of the few lines in it, but the subject is a difficult and comprehensive one and can only be properly understood by a diligent study of the numerous decisions and text-books in which the law has been discussed and expounded. The general rule embodied in s 115 comprehends an infinite variety of intricate matters and its application to particular cases with different sets of circumstances, is by no means easy. As observed by LORD THANKERTON "estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted upon, action on the faith of it, resulting detriment to the actor" [*C D Sugar Co v. C N Steamship sup*; see *Gyarsibai v. Dhansukhlal*, A 1965 SC 1055].

A statement of general principles of the doctrine of estoppel will therefore be of considerable advantage.

The general principle of estoppel by conduct is thus stated by the LORD CHANCELLOR in *Cairncross v. Lorimer*, 3 HLC 829:—

> "The doctrine will apply, which is to be found, I believe, in the laws of all civilised nations that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. ..... I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license" (**quoted** in *Sarat v. Gopal*, 19 IA 203: 20 C 298, 311 PC).

Estoppels may be ranked in the class of conclusive presumptions. A man is estopped when he has done or permitted some act, which the law will not allow him to gainsay. Its foundation rests partly on the obligation to speak and act in accordance with truth, by which every honest man is bound, and partly on the policy of law, which thus seeks to prevent the mischiefs that would inevitably result from uncertainty, confession, and want of confidence, were men permitted to deny what had deliberately asserted and received as true. Therefore, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time [*Pickard v. Sears, ante*]. The doctrine of estoppel has, however, been guarded with great strictness; not becuase the party enforcing it is presumed to be desirous of excluding the truth,—for the more reasonable supposition is that that is true, which the opposite party has already solemnly admitted;—but because the estoppel *may* exclude the truth. Hence estopples must be certain to every intent; for no one shall be prevented from setting up the truth, unless it be in plain contradiction to his former allegation and acts [*Bowman v. Taylor*, 2 A & E 278; Tay s 89].

In modern times the doctrine has lost all ground of odium and become one of the most important, useful and just factors of the law. At the present day it is employed not to exclude the truth; its whole force being directed to preclude parties, and those

in privity with them, from unsettling what has been fittingly determined as just principle which can be and is daily administered to the well-being of society [Bigelow pp 5-6].

Estoppel may be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Estoppel is often described as a rule of evidence but the whole concept is more correctly viewed as a substantive rule of law (citing *C D Sugar Co v. C N Steamship, ante*; Hals 3rd Ed Vol 15 para 334).

[*Ref Tay ss 89-103; Best ss 532-55; Steph Arts 102-5; Phip 8th Ed pp 667-72; Powell, 9th Ed pp 446-83; Halsbury 3rd Ed Vol 15 Title 'Estoppel' paras 334-472 (pp 168-256); 'Estoppel' by Ewart; Everest and Strode; Cababe; Bigelow and Caspersz; Spencer Bower and Turner on 'Estoppel by Representation' 2nd Ed and 'Res Judicata' 2nd Ed*].

Rule of Estoppel and Rule in S 92.—The rule of estoppel must prevail against a pure rule of procedure contained in S 92 [*State Bank of Indore v. Jasroop*, A 1974 MP 193].

Things Necessary to Bring a Case Within the Section.—The rule of evidence in s 115 comes into operation if—(*a*) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or some one on his behalf, (*b*) with the intention that the plaintiff should act upon the faith and the statement and (*c*) the plaintiff does act upon the faith of the statement [*Dawson Bank Ltd v. Nippon M K Kaisha*, 62 IA 100: 13 R 256: 39 CWN 657; *Square v. S*, 1935 P 120: 153 LT 179].

To bring a case within the scope of 'estoppel' as defined in s 115—

(*1*) There must be a *representation* by a person or his authorized agent to another in any form—a declaration, act or omission.

(2) The representation must have been of the existence of a *fact* and not of promises *de futuro* or intention which might or might not be enforceable in contract [*post*: "*Representation Must be of Existing Facts*"].

(*3*) The representation must have ment to be relied upon, *ie* it must have been made under circumstances which amounted to an *intentioned causing or permitting* belief in another. The proof of the intent may be direct or circumstantial, *eg* by conduct. It is not necessary that there should be a design to mislead, or any fraudulent intention or that the representation should be false to the knowledge of the maker. Representation even when made innocently or mistakenly may operate as an estoppel [*Sarat v. Goapl ante*; *Vagliano v. Bank of England*, 1891 AC 197; *post*].

(*4*) There must have been *belief* on the part of the other party *in its truth*.

(*5*) There must have been *action* on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to *act on the faith of it, and to alter his former position* to his prejudice or detriment.

[The doctrine of estoppel is based upon the change of position brought about by the representation or acting of the person bound by the estoppel (*Jagannath v. Abdullah*, 45 IA 97: 45 C 909: 35 MLJ 46; *Ram Singh v. Baldeo*, A 1932 A 643; see *Rambaran v. Ram Nihora*, 57 IC 263; *Ram Dat v. Chattak*, A 1928 O 23). A party who has not been misled by any act or representation of the other party (*Prativa v. Benode*, 61 CLJ 75; *Madanappa v. Chandramma*, A 1965 SC 1812; *Bennett Coleman & Co v. Punya Priya*, A 1970 SC 426; *Noor Moham-*

med v. Shahul Hameed Amin, 1996 AIHC 2550 (Del)) or who has not suffered detriment by acting upon the representation of the parties (*George v. S*, A 1970 K 21 FB) cannot invoke the doctrine of estoppel.

(6) The misrepresentation or conduct or negligence must have been the *proximate cause* of leading the other party to act to his prejudice (:*Post*: "*Estoppel by Negligent conduct &c*").

(7) The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel [*Madanappa v. Chandramma*, A 1965 SC 1812].

Different Kinds of Estoppel.—"There be three kinds of estoppels *viz* by matter of record, by matter in writting, and by matter in *pais*" . [*2 Coke on Litt 352a*].

(1) Estoppel By Record or Judgment.—"Where a final judicial decision has been pronounced by" a "judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision *in rem*, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case, or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner" [*Spencer Bower and Turner 'Res Judicata'* 2nd Ed p 9]. Ss 11-14 of the C P Code (Act 5 of 1908) ss 40-44 of the Evidence Act deal with this kind of estoppel and the subject has been fully treated in ss 40-44 Estoppel by matter of record is chiefly concerned with the effects of judgments *in rem* and in *personam* and their admissibility in evidence. Under this there is a recognized distinction between *cause of action estoppel* and *issue estoppel* which it has, been held is a recognized form of estoppel [*Carl Zeiss Stiftung v. Rayner and Keeler Ltd*, 1966, 1 All ER 536 HL]. Estoppel because of *res justicata* cannot be raised unless there are identity of parties or privity of interest for the purposes of issue estoppel [*Carl Zeiss Stiftung v. Rayner and Keeler Ltd sup*]. In view of the earlier judgment of the High Court holding that the jurisdiction of the civil court to decide disputed question of title to the suit land was not barred the jurisdiction of the civil court cannot be challenged in a subsequent proceedings on the same ground [*Hari Nath v. Raghu Nath*, A 1998 HP 28].

—Issue Estoppel.—"An issue, in the sense relevant to issue estoppel, is a decision as to the legal consequences of particular facts, constituting a necessary step in determining what are the legal rights and duties of parties resulting from the totality of facts" (*per* DIPLOCK, LJ, in *Fidelitas Shipping Co v. V/O Exportchleb*, 1965, 2 All ER 4: 1966, 1 QB 630].

Issue estoppel represents an extension of the doctrine of *res judicata* to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings, but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time.' (See *Fudelitas Shipping Co Ltd. v. V/O Exportchleb*, (1965) 2 All ER 4 at 10, (1961) 1 QB 630 at 643 *per* DIPLOCK LJ, **quoting** from *Henderson v. Henderson*, (1843) 3 Hare 100 at 115, (1843-60) All ER Rep 378 at 382. *C v. Hackney London BC*, (1996) 1 All ER 973 (CA).

As LORD KEITH put it in *Arnold v. National Westminster Bank plc*, (1991) 3 All ER 41 at 47, (1991) 2 AC 93 at 106:

> 'Issue extoppel, too, has been extended to cover not only the case where a particular point' has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.'

In *Talbot v. Berkshire CC*, (1993) 4 All ER 9 at 18, (1994) QB 290 at 301 the court spoke of the rule as 'a salutary one', observing that 'it prevents prolixity in litigation and encourages the earliest resolution of disputes'.

In issue estoppel case, the plea of *res judicata* will not be applied where to do so would cause injustice The 'special circumstances (the phrase used in several of the authorities) justifying the non application of the rule ordinarily arise where further material becomes available which could not by reasonable diligence have been adduced in the earlier proceedings, or where (as in *Arnold v. National Westminster Bank plc*) there has been a change or changed perception of the law [*C v. Hackey London BC*, (1996) 1 All ER 973 (CA)].

In *Arnold's* case the House of Lords considered what 'special circumstances would allow the reopening of an issue which had already been decided inter partes. It was held that the doctrine of issue estoppel was not unflexible and a disputed issue can be reopened where it would in effect be an abuse of process if permission were refused.

It seems to me to follow from *Arnold's* case that it would be possible in special circumstances to allow a claim to be put forward which was not the subject of *res judicata* in the strict sense but which could have been brought forward in some earlier proceedings. I have come to the conclusion, however, that this possible relaxation of the rule does not assist Mrs Barber in the present case. The qualifying conditions for her claim for a redundancy payment were the same as those for a claim for compensation for unfair dismissal. It was not the provisions of the 1978 Act which prevenced the *addition* of the second claim. [*Barber v. Staffordshire Country Council*, (1996) 2 All ER 748 (CA)].

In *SCF Finance Co. Ltd. v. A Masri*, (1987) 1 All ER 194, (1987) QB 1028 the Court of Appeal considered the earlier decision in *Khan v. Golecha International Ltd.*, (1980) 2 All ER 259, (1980) 1 V/LR 1482, where it had been held that on express admission and a subsequent order by consent could give rise to an issue estoppel The court continued:

> "The decision in *Khan's* case makes it clear that an order dismissing proceedings capable of giving rises of issue estoppel even though the court making such other has not heard arguments or evidence directed to the merits. If a party puts forward, positive case, as the basis of asking the court to make the order which the party seeks, and then at trial declines to proceed and accepts that the claim must be dismissed, then that party must, in our view save in exceptional one instances, lose the right to raise again that case against the other party to those proceedings. [See also *Barber v. Staffordshire Country Council*, (1996) 2 All ER 748 (CA)].

Issue-estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation [*per* DIXON J, in *R v. Wilkes*, 77 CLR 511, 518]. The doctrine applies as much in the case of criminal proceedings as in civil proceedings [*Sambasivan v. PP*, 1950 AC 458 PC; *Sealform v. US*, 332 US 575; *Connelly v. DPP*, 1964 AC 1254 HL: cases *inf*]. Where an issue of fact has been tried by a competent court on a previous occasion and a finding has been reached in

favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact in the latter proceeding when the accused is tried subsequently even for a different offence which might be permitted by law [*Masud Khan v. S*, A 1974 SC 28 (*Pritam v. S*, A 1956 SC 415; *Manipur Admn v. Bira Singh*, A 1965 SC 87; *Piara v. S*, A 1969 SC 961 **rel** on)]. This rule commonly knows as that of issue-estoppel is not the same as the plea of double jeopardy or *autrefois acquit*. It does not prevent the trial but relates to the admissibility of evidence to upset the finding of fact. The rule is in accord with sound principle and s 403 (now s 300) Cr PC does not prevent its application [*Manipur Admn v. Bira Singh*, A 1965 SC 87; **folld in** *Piara v. S*, A 1969 SC 961; *S v. Kokkiligada*, A 1970 SC 771]. For issue-estoppel to arise there must have been distinctly and inevitably decided the same issue in the earlier proceedings between the same parties. Thus any issue as between the State and one of the accused persons in the same litigation cannot operate as binding upon the State with regard to the other accused [*Piara v. S*, A 1969 SC 961]. The rule has no application where the parties are not the same as in the previous case [*Mohar v. S*, A 1968 SC 1281]. If the acquittal, however, was based on circumstances other than the negativing of the basic fact in issue the evidence would be admissible [see *R v. Ollis*, 1900, 2 QB 758, 768].

In order to invoke the rule of issue estoppel the facts-in-issue proved or not in the earlier trial must be identical with what is sought to be reagitated in the subsequent trial [*Ravinder v. S*, A 1975 SC 856]. The rule of issue estoppel does not predicate that evidence given at one trial against the accused cannot again be given in another trial for a distinct offence. The rejection of evidence given in a proceeding to sustain an order for binding over does not preclude the trial for an offence [*S v. Kokkiligada*, A 1970 SC 771]. Where an acquittal in a case of defalcation was based on a finding that the accused was not in charge of cash the finding would not operate as issue estoppel in a subsequent case of defalcation relating to an altogether different period [*Gopal Pd v. S*, A 1971 SC 458]. Where the order of acquittal by a magistrate on a minor offence was validly set aside and accused committed for trial on major offence, the principle of *res judicata* did not apply [*Ramekbal v. Madanmohan*, A 1967 SC 1156 (*Pritam Singh v. S*, A 1956 SC 415; *Sambasivam v. PP*, 1950 AC 458 **dist**)]. An acquittal under Foreigners Act does not operate as issue estoppel to bar subsequent action under Foreigners (Internment) Order being not a criminal proceeding [*Masud Khan v. S*, A 1974 SC 28]. Some accused were tried under s 302 read with s 149 PC. One of them was acquitted in a simultaneous but separate case under s 27 Arms Act for possession of gun alleged to have been used in committing murder. On conviction in the murder trial the contention of issue estoppel for acquittal in Arms Act case was negatived on the ground that murder trial was decided first and acquittal order in Arms Act case was passed perhaps erroneously [*Bhoor Singh v. S*, A 1974 SC 1256].

It has not yet been finally settled whether the rule can be enforced against the accused or not. The question came up for consideration in *Manipur Administration v. Bira Singh, sup* and *Mohar v. S, sup* but was expressly left open. In this connection one cannot help but recognize the cogency of the arguments put forward by LORD DEVLIN in his dissenting view in *Connelly's case sup* that issue-estoppel should not apply in criminal proceedings. He pointed out that estoppels are in their nature reciprocal (at 1344 *et seq*)].

Estoppel by judgment extends also to admissions fundamental to the decision. In *Hoystead v. Commrs of Taxation*, 1926 AC 155: 134 LT 354, LORD SHAW said: "It is

settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and á fresh litigation started, with a view to obtaining judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact". So, where the government claimed the right under the Madras Proprietory Estate Village Service Act to enfranchise the village service *inams* in the zemindar's estate irrespective of reservation and obtained judgment upholding the right, albeit on the admission of the zemindar, it is estopped from contending that Government had no such right [*In re Govinda Rao*, A 1947 M 5: 1946, 2 MLJ 53 (*Hoystead v. Commrs of T, sup* **relied** on)].

"The doctrine (of estoppel by record) applies to all matters which existed at the time of giving the judgment, and which the party had an opportunity of brining before the court. If, however, there is matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it" (Hals 3rd Ed Vol 15 para 359).

Res judicata is either estoppel by *verdict* or estoppel by *judgment* (or *record*), and apart from this there is no such thing as estoppel by *decree*. Where the same property is the subject matter of two *contemporaneous* suits between the same parties, in which common issues are involved and they are tried together and disposed of by single judgment, but two decrees are prepared and an appeal is preferred against one decree, the fact that there is an unappealed decree does not create an estoppel against proceeding with the appeal [*Lachmi v. Bhulli*, 104 IC 849: 8 L 384 FB: A 1927 L 289; *Jai Narain v. Bulaqi*, A 1969 All 504 FB]. When a case is taken from one court to another on appeal and is finally disposed of on a particular ground, that alone is a matter of estoppel by record, though in the court below many other grounds might have been relied upon [*Chitpore Golabari Co Ltd v. Girdhari*, 78 IC 353]. Estoppel by record operates as an estoppel of the whole right and not to a fragment of it which might be given effect to or repelled by the decree of the court [*Badar Bee v. Habib*, 1909 AC 615; *Jones Ltd v. Woodhouse*, 1923 Ch D 117: *Durga v. Jagat*, A 1928 O 359]. Where a charge is created by a decree, the rights of the charge-holder against a *bona fide* purchaser for value without notice should be founded not upon the provisions of the T P Act but upon the law of estoppel by record. The T P Act does not purport to cut down estoppel by record [*Ashan v. Maina*, A 1938 N 129 : 172 IC 242]. The subject of *res judicata* has been relegated to the C P Code, as it belongs properly to procedure (*ante* s 40 "*Res Judicata*"). The principle of estoppel by record does not strictly apply in the Income-tax assessments as it is a decision relating to a particular assessment year [*H A Shah & Co v. Commr I-T*, A 1956 B 375].

Legislature has extended the doctrine in the United States. *Clayton Act* s *5a* makes a final judgment or decree in any civil or criminal proceeding brought by or on behalf of the United States *prima facie* evidence in subsequent private suit 'as to all matters respecting which the said judgement or decree would be an estoppel as between the parties thereto' thus extending the principle further by doing away with the requirement of identity of parties. The purpose is to minimize the burden of litigation for injured private suitors by making available all matters previously established by the government and to permit them as large an advantage as the estoppel doctrine would afford had the government brought the suit [*Minnesota Mining case*, 381 US 311]. In determining the extent of such estoppel the court is not limited to the decree; if by reference to the findings, opinion and decree it is determined that an issue was actually adjudicated in the government's anti-trust suit, the private plaintiff in a subsequent action against the same defendant can treat the

outcome as *prima facie* evidence on that issue [*Hanover Shoe v. United Shoe Mach Corp*, 392 US 481].

Issue estoppel can be based on a foreign judgment [*Carl Zeiss Stiftung v. Rayner and Keeler Ltd, sup*].

The limitation of the doctrine of estoppel by record is as strict in England as they are here. It is not any and every expression of opinion in a judgment which gives rise to the estoppel, nor can the actual decision be carried further than the circumstances warrant. In England the decision must be a final one: the matter must have been distinctly put in issue, and then only the precise point which was so put in issue and solemnly found against a party, is deemed to have been finally decided for the purpose of this rule [*Ghasiram v. Kundanbai*, A 1940 N 163 (Hals 3rd Ed Vol 15 para 359, quoted *ante*, relied on)]. Where an order of the court made in the exercise of its paternal and administrative jurisdiction under a statute merely approves an arrangement estoppel by record is of no use [see *Spens v. IRC*, 1970, 3 All ER 205]. The term as used in English Law corresponds broadly to our *res judicata* [*Sita v. S*, A 1969 A 342, 351 FB]. Estoppel by record is what is provided for in s 11 C P Code and no court can introduce another kind of estoppel not covered by it [*Samavedan v. Kandala*, A 1952 M 384]. A judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment though not as regards findings which did not form the basis of decision or were in conflict therewith [*Dwijendra v. Jogesh*, A 1924 C 600; 39 CLJ 40: *Nazoo v. Mazar*, 43 CLJ 501]. Where the earlier decision is that of a court of record, the resulting estoppel is said to be "of record", where it is that of any other tribunal, whether constituted by agreement of the parties or otherwise, the estoppel is said to be "quasi of record" (Hals 3rd Ed Vol 15 para 336).

A judgment, *A* is not entitled to be given collateral estoppel effect in a later decision, *B* (before the Supreme Court), where *A* is pending before the Supreme Court and must fall in consequence of the court's decision in *B*. Where a case is decided in the interval between the argument and the Court of Appeal decision a contention relating to collateral estoppel may be properly and timely raised in the petition for rehearing before the higher court [*Maryland case*, 381 US 41].

It appears that the term can be used for matters formally recorded and declared final by statute where opportunity to object had been afforded to person estopped [*Sita v. S*, A 1969 A 342 FB].

A compromise decree creates an estoppel by judgment [*Sailendranarayan v. S*, A 1956 SC 346; follo in *Kesavan v. Padmanabhan*, A 1971 K 234]. Order of Rent Controller fixing fair rent in terms of compromise is void and doctrine of estoppel by judgment cannot be invoked to debar the Controller to entertain subsequent application for fixing fair rent [*Surjit v. Pritam*, A 1975 HP 43 FB].

(2) Estoppel by Deed.—It rests on the principle that when a person has entered into a solemn engagement by deed under seal with another party, he or the persons claiming through or under him, shall not be allowed to set up the contrary of his assertion in the deed [see *Bowman v. Taylor*, 2 A & E 228; *per* TAUNTON J, in *Bateman v. Hunt*, 1904 2 KB 530]. LORD MANSFIELD said: "No man shall be allowed to dispute his own solemn deed" [*Goodtitle v. Bailey*, 2 Cowp 579]. "If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is unquestionably true as between the parties to that instrument and in an action upon it, it is not competent for the party bound, to deny the recital" [*per* PARKE B, in *Carpenter v. Buller*, 8 M & W 212]. There are however several exceptions to the rule of estoppel by deed:—

(*a*) It binds only the parties and privies and is applicable only in actions on the deed. It does not apply to actions on collateral matters even between the same parties [*Exp Morgan, Re Simpson*, 2 Ch D 72]; nor does it apply in general to proceedings between strangers, or a party and a stranger [*Craknell v. Janson*, 11 Ch D 1, CA; Phip 11th Ed p 925; Tay s 99].

(*b*) There is no estoppel where the deed is tainted by fraud or illegality &c.

(*c*) The estoppel does not extend to the description or immaterial part of the deed, *eg* the date of the document, the quantity or nature of land &c (*ante* p 744). "To make a recital operate as an estoppel, there must be *first*, a distinct statement of some material [*Carpenter v. Buller, sup*] particular fact [*eg* in a grant of land by *A*, a covenant that he had power to grant will not create an estoppel, though a statement that he was seized of the legal state will (*Genl F Co v. Liberator Soc*, 10 Ch D 15; *Onward Bldg Soc v. Smithson*, 1893, 1 Ch 1)]; *secondly*, a contract made with reference to such statement [*Stroughill v. Buck*, 14 QB 781, 787]; and *thirdly* either an action directly founded on the instrument containing the recital, or one which is brought to enforce the rights arising out of such instrument" [*Wiles v. Woodward*, 5 Ex 557; Tay s 98; Phip 8th Ed pp 660-69].

(*d*) A deed which can take effect by insterest shall not be construed to take effect by estoppel [*Does v. Barton*, 11 A & E 311]. Thus, if a party leases premises to another for a longer terms than he himself possesses, it only enures to the extent of his own interest and no further [*Doe v. Barton, sup*]; but where he leases premises to which he has no title, this will estop the parties to the deed and their privies from alleging his want of title [*Dalton v. Fitzeralad*, 1897, 2 Ch 86; Phip 11th Ed p 926]. It is an essential condition for the application of the doctrine of estoppel in *Dalton v. Fitzeralad, ante* that the persons sought to be estopped or his predecessor-in-interest must have obtained possession of the property under the deed [*Damaraju v. Narayana*, 1941 Mad 551].

The decision of PATTERSON J, in *Stroughill v. Buck*, 1850, 14 QB 781, 787 that "where a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, where it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument" was approved in *Greer & another v. Kettle*, 1938 AC 156; see also *Trinidad Co v. Coryat*, 1896 AC 587; *Young v. Raincock*, 7 CB 310. A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part [*Brooke v. Haymes*, 1868 LR Eq 25]. A company charged certain specified shares in *I* company as security in consideration of an advance to it of £250,000 by *M* Company. Another agreement between *M* company and *P* company recited that *M* company having advanced the money to *A* company at the request of *P* company, *P* company covenanted that in the event of *A* company failing to repay the sum *P* company should be considered and held as principal debtors. At the time of the agreements both *M* company and *P* company believed that the shares had not been so issued and that accordingly the debt had never been secured on these shares—*held* that as what the *P* Company agreed to guarantee was the repayment of a debt effectively secured by the shares in *I* company, and as in fact the debt was not so secured, *P* company was not estopped by the terms of the recital in the guarantee [*Greer & Another v. Kettle, sup*]. It is clear that where a deed is rectifiable (*ie* ought to be rectified) the doctrine of estoppel by deed will not bind the parties to it [*Wilson v. Wilson*, 1969, 3 All ER 945]. See also *post*, "*Estoppel by Recital in Deeds*", p 1074.

Statements in documents may no doubt amount to admissions of varying weight in proper cases (ss 17, 18) though not conclusive. They may create estoppels in cases where the opponent has been induced to alter his conditions and to act upon the admissions (see s 31 *ante*). In India the art of conveyancing is of so simple and informal character that the strict technical doctrine of the English law as to estoppel in the case of solemn deeds under seal which rests upon peculiar grounds, has been expressly discountenanced by the courts here [see *Ram Gopal v. Blaquire*, 1 BLR (OC) 37; *Gokul Das v. Puranmal*, 10 C 1035; *Zemindar Serimatu v. Virappa Chetti*, 2 MHC 174; *Param v. Lalji Mal*, 1 A 403; *Donzelle v. Kedar*, 7 BLR 720; *Kedar Nath v. Donzelle*, 20 WR 352; *Deenabandhu v. Makim*, 63 C 763]. The strict technical doctine of English law as to estoppels, in the case of deeds under seal, does not apply to the written instruments ordinarily in use amongst the people of India. Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense is not so much to be regarded as the real meaning of the parties, which the transaction discloses [*Ram Lal v. Kanai*, 12 C 663; see also *Johnstone v. Gopal*, A 1931 419: 12 L 546: *Thakur v. Chandra Bibi*, 19 CWN 873: A 1915 PC 18: 37 A 369; *Upendra v. Bindesri Pd*, 20 CWN 210; 34 CLJ 323: A 1921 C 487].

Justice and equity required no more than that a party to an instrument should be precluded from contradicting it to the prejudice of another person, when that other person or the person through whom the other person claims has been induced to alter his position by virtue of the instrument; but when the question arises between parties or representatives of parties who at the time of the execution of instrument were aware of its intention and object and who have not been induced to alter their position by its execution, justice would more surely be obtained by allowing any party, whether he be plaintiff or defendant to show the truth [*Pran Singh v. Lalji*, 1 A 403; *Ram Surun v. Paran*, 13 MIA 551: 1 WR 156] and there is no authority for holding that recitals in a deed form an exception to the above rule in this country [*Johnstone v. Gopal, sup*]. The strict rule of admission by non-traverse is not also applicable in India, see *ante*: "*Admission by non-traverse*" under ss 31 and 58].

There would be monstrous injustice if a party having suggested one construction of a deed in a previous suit and succeeded on that footing were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed; it would be playing fast and loose with justice if the court allowed that [*Gandy v. G*, 1885, 53 LT 306 (relied on it *Md Khalil v. Mahboob*, A 1942 A 122)]. Those who rely upon a document as an estoppel must clearly establish its meaning; if there is any ambiguity, the construction may be aided by looking at the surrounding circumstances [*Mewa Kuwari v. Hulas*, 13 BLR 312 PC]. The mere fact of a person having in a previous suit admitted the execution of a deed does not preclude her from contesting its validity and maintaining that it was a colourable and not a real conveyance [*Ushufoonessa v. Gridharee*, 19 WR 118].

As to recitals in deed see *ante*, notes to ss 101-104 under "*Recital in a deed or other instrument*" and *post*: "*Estoppel by Recitals in Deeds*".

(3) Estoppel in pais or Estoppel by Conduct.—In ancient times the term estoppel *in pais* or estoppel *in pais dehors*, (*ie* with regard to matters outside a record or deed), was applied to cases different from what are now known as estoppel by conduct. In *Lyon v. Reed*, 13 M & W 285, 309, speaking of the old estoppel in *pais*, PARKE B, said: "The acts in *pais* which bind parties by way of estoppel, are but few, and are pointed out by Lord Coke Co Litt 352*a*".

Estoppel *in pais* is now known as estoppel by conduct or representation. The doctrine of estoppel in *pais* has gradually developed into its present form, and is now

widely applied to an infinite variety of cases. It embraces all acts or statements of a party upon the faith of which another reasonable party has been led to act and to change his position and which it would be unfair to permit the first party to deny. Estoppel by conduct may arise from agreement, misrepresentation, or negligence. Conduct by act or omission amounting to representation has been placed on the same footing as an express representation. When *A* by his representation (statement or conduct) intentionally cause *B* to believe that a certain state of things exists and *B* acts on such representation and alters his position to his prejudice, an estoppel arises against *A*; and *A* or his representatives will not be allowed in a subsequent proceeding between *A* and *B* (or his representative) to deny that the state of things existed (s 115). This rule of estoppel by conduct was definitely and clearly laid down by DENMAN CJ, in 1937 in *Pickard v. Sears* (*ante*, "*Principle and Scope*") and s 115 is founded on that statement of law. The general principles of this kind of estoppel have already been explained (*ante*).

Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be" [Hals 3rd Ed Vol 15 para 338; **approved** by HUMPHREYS J, in *Algar v. Middlesex C Council*, 1945, 2 All ER 243 DC at p 250].

Estoppel by representation may arise from (*a*) contract or agreement, and it may also arise (*b*) apart from contract, *eg* misrepresentation, negligence &c. "It seems to me that every representation, false when made or falsified by event, must operate in one of three ways, if it is to prejudice any legal consequence. *First*, it may be a term in a contract, in which case its falsity will, according to circumstances either render the contract voidable or render the person making the representation liable either to damages or to decree that he or his representatives shall give effect to the representation. *Secondly*, it may operate as an estoppel preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it. *Thirdly*, it may amount to a criminal offence" [*per* STEPHEN J, in *Alderson v. Maddison*, LR 5 Ex D 293]. The rule of estoppel by representation or conduct as embodied in ss 115, 116, 117 deals with the first and second kind of estoppel. The third belongs to the domain of criminal law, *eg* money obtained by false representation. As to *estoppels* independent of contract, there may be an infinite variety of cases. Estoppels arising from representation or conduct are numerous. In many transactions the parties do not come to any express contract, but persons are induced to act on the representation or conduct of the other party and thereby alter their position on the belief that the representation was intended to be acted upon. S 115 deals with such estoppels. "It is one of the essential elements of estoppel by conduct that the party against whom it is pleaded should have made some representation intended to induce a course of conduct by the party to whom it was made" [*per* LORD MAC DERMOTT, in *Palestine K B &c Ltd v. Govt of Palestine*, 52 CWN 719, 722 PC: A 1948 PC 207].

As to estoppels arising from contracts, ss 116, 117 are instances. Estoppels may be founded on agreements express or implied, wherever justice requires it, *eg* estoppel in the case of bailees, tenants, licencees, acceptors of bills of exchange &c. It has been pointed out in *Rupchand v. Surbeshwar*, 33 C 915 that ss 115-117

are exhaustive of the doctrine of estoppel by agreement. Estoppel may also arise from a contract created by operation of law. It cannot of course be said that estoppels by contract or agreement do not come under s 115. Though principally s 115 deals with estoppel by representation or conduct, it also embraces estoppels by agreement. The whole subject of estoppel is contained in ss 115, 116 and 117. Whether estoppel arises on certain facts is a question of law [*Sriranga v. Nayanim*, 13 IC 81]. The circumstances that give rise to an estoppel *in pais* may be proved by evidence of any kind [*Chettyar Firm v. Mg Po*, A 1935 R 279].

Mahants filing returns under Religious Trust Act not being conscious of their rights or being aware of true state of law or facts are not barred from denying that there was public trust [*Board of Religious Trust v. A M Amrit Das*, A 1974 P 95].

Representation ["Declaration, Act or Omission"].—In s 115 the words used are "declaration, act or omission" and they mean what is embraced by the word '*representation*' which has been generally used by English writers. Representation may be express or implied. It may be in any form—by words written or spoken,—or by conduct. The conduct may be an act, or omission or even neglect. A man by omitting or neglecting to do a thing, which he is under an obligation to do, may bring about a state of things equivalent to a declaration. Estoppel may be brought about by acquiescence. Silence also may amount to conduct where there is a clear duty to speak. The main thing is whether the representation, in whatever form it may have been made, has caused the person to whom it is made to believe in the state of things asserted or suggested and to act on the faith of it so to alter his own position. It is important to bear in mind that estoppel does not depend on the motive or on the knowledge of the matter, on the part of the person making the representation. *It is not essential that the intention should have been fraudulent, or that he should have been acting with a full knowledge of circumstances and not under mistake or misapprehension* (*Sarat v. Gopal, ante*; *Jagaribai v. Ramkhilawan*, A 1976 MP 106). The representation must relate to existing facts, not to promise *de futuro* or intention, or to matters of law and it must be clear and unambiguous (*post*; "*Estoppels must be clear, unambiguous and certain*"). A representation to form the basis of an estoppel may be made by words or conduct and conduct includes negligence [*Freeman v. Cooke*, 2 Exch 654, 644]. Such representation may be made in ways too numerous to mention. No exhaustive description is possible. What kinds of representation operate as estoppel, may be best learnt by looking into reported decisions. [See further *post*: "*Estoppel by Representation*"]. Unless a person is found guilty of either an overt act or an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel [*Ramdat v. Chattak*, A 1928 O 23].

Representation in connection with estoppel have been classified by Casperz under the following heads: Active misrepresentation, *ie* estoppel arising out of representations made deliberately with a knowledge of their falsehood, (*b*) Conduct of culpable negligence, (*c*) Conduct of indifference or acquiescence. In making the classification he had presumably in view the propositions laid down in *Carr v. L & N W Ry Co, infra*.

Carr v. London and N W Ry Co.—In *Carr v. London & N W Ry Co*, LR 10 CP 307; 44 LJCP 109, the following propositions were laid down of an estoppel by conduct BRETT J, (afterwards LORD ESHER):—

(*1*) "If a man by his word or conduct *wilfully* endeavours to cause another to believe in a certain state of things which the first *knows to be false*, and if the second believes in such a state of things and acts upon his belief, he who knowingly made

the false statement is estopped from averring afterwards that such a state of things in fact did not exist."

"[This refers to fraudulent misrepresentation (by "declaration" or "act")].

(2) "If a man either in *express terms* or *by conduct makes* a representation to another of the existence of a certain state of facts which *he intends to be acted upon* in a certain way, and it be acted upon in the belief of the existence of such a state of facts, to the damage or him who so believes and acts, the first is estopped from denying the existence of such a state of facts".

[This refers to representation by statement of conduct (by "declaration" or "act") without fraud and without belief either way as to its truth, but intended to be acted upon. Here the representation is innocent but intentional].

(3) "If a man *whatever his real meaning may be, so conducts himself that a responsible man would take his conduct to mean a certain representation of facts* and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in a certain way to his damage, the first is estopped from denying that the facts were represented."

[This refers to representation by conduct or acquiescence ("act", *eg* standing by) giving rise to belief leading to infer the existence of a certain state of facts. Here the representation is by misleading conduct].

(4) "If, in the transaction itself which is in dispute, one had led another into the belief of a certain state of facts by *conduct of culpable negligence* calculated to have that result, and such culpable negligence had been the *proximate cause* of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist".

[This refers to representation by conduct of culpable negligence ("omission"), such negligence being the proximate cause of the mistaken belief. Before there may be estoppel from negligent conduct, there must be duty to use proper care].

The above propositions contain a very clear and correct statement of the law on the subject, and they have been approved by the Court of Appeal (LORD ESHER and LORD JUSTICES FRY AND LOPEZ) in *Seton v. Lafone*, 1887, 19 QBD 68, by a unanimous judgment and in *Coventry v. G E Ry Co*, 1883, 11 QBD 776; *London Joint Stock Bank v. Macmillan & Arthur*, 1918 AC 777, 836. They have been frequently referred to and cited in many other cases. In *Seton v. Lafone, sup* (p 71) ESHER MR in concurrence with the other members of the Court of Appeal explained the words "proximate cause" in the fourth proposition to mean "real cause". He said "I use the expression 'proximate cause' as meaning direct and immediate cause".

In *Seton v. Lafone, sup*, ESHER MR, said: "Estoppels may arise on various grounds, all of which the judgement in *Carr v. L & N W Ry Co*, endeavours to state and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others". *Carr v. L & N Ry Co, sup* was cited and approved in *Sarat v. Gopal*, 19 IA 203: 20 C 296 : 56 JP 741, the leading Indian case on the subject of estoppel by representation.

It may be noted that the statement in the first proposition (*supra*) that the representation must be one which the maker "knows to be false" has not been regarded as quite correct in subsequent decisions, for a representation would still operate as

estoppel if the maker of it, without any knowledge of its falsity, intends that it should be acted upon in a certain way and it is so acted upon to the injury of the other party (; see next heading and *Satibhusan v. Corpn*, A 1949 C 20, 22). When supply of lube products was made to a person for a long number of years only on the basis of *ad hoc* arrangements or indent to indent or invoice to invoice basis or product indent-cum-delivery order and there was no promise or representation held out by the company to continue the supply indefinitely and uninterruptly, the principle of promissory estoppel cannot be invoked. [*Mahabir Auto Stores v. Indian Oil Corporation Ltd*, A 1989 Delhi 315, 328 (DB)].

"Intentionally".—The rule laid down in *Pickard v. Sears*, 6 A & E 469, is embodied in s 115 [*Anath v. Vishtu*, 4 C 783]. In that case, DENMAN CJ, in stating the law usedthe words "*wilfully*" (*ante*: "*Principle and Scope*"). That rule was explained by PARKE B, in *Freeman v. Cooke*, 1848, 2 Ex 653, 662, 663 in the following terms:

> "That rule was founded on previous authorities, and has been acted upon in some cases since. The principle is stated more broadly by LORD DENMAN in the case of *Gregg v. Wells* (10 A & E 90). The proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears*, must be considered as established. By the term "*wilfully*", however, in the rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, accordingly; and *if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it*, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence, or omission, where there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. As for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorised." The same view was taken in *Cornish v. Abington*, 4 H & N 549; *Coventry v. G E Ry.*, 11 QBD 776; *McKenzie v. British Linen Co.*, 6 App Cas 82; *Seton v. Lafone*, 19 QBD 68; *Carr v. L & N W Ry Co*, LR 10 CP 307 and other cases.

The above remarks show that BARON PARKE, in effect stated that the term "wilfully" used in the case of *Pickard v. Sears* was really equivalent to "intentionally" [*per* LORD SHAND in *Sarat v. Gopal*, 20 C 296, 314 PC]. The meaning of the word 'wilful', says Taylor, has been the subject of divergent judicial remarks [see observations of PARKE B, in *Freeman v. Cooke* (*sup*;); *Cornish v. Abington*, 28 LJ Ex 262]. In *Howard v. Hudson*, 22 LJQB 341, LORD CAMPBELL laid down a more restricted rule, observing:—"The party setting up such a bar to the reception of the truth must show, both that there was a wilful intent to make him act on the faith of the representation and that he did so act"; and CROMETON J, adds:—"The rule takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, and *malo animo*, but so far wilfully that the party making the representation on which the other acts *means* it to be acted upon in that way. That is the criterion". See, further on this subject, *Foster v. Mentor Life Ass Co*, 23 LJQB 145 [Tay s 840].

"As the rule had been modified in England by there substituting the word "intentionally" for the word 'wilfully' which had been previously used, it seems to their Lordships that the term "intentionally" was used in the Evidence Act (1872) for

the purpose of declaring the law in India to be precisely that of the law in England" [LORD SHAND in *Sarat v. Gopal, sup* at p 314]. The rule was thus stated in that case:—

> "A person who, by his declaration, act or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so "*intentionally*" within the meaning of the statute, if a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it" (*ibid* p 314).
>
> "The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*, it may, if the result be unfortunate for him; but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do" [*per* LORD SHAND, *ibid* pp 310-311].

So long as there was no duty cast upon the person induced not to rely upon the statement made but to make further enquiries, it cannot be said that the word 'intentionally' has not been satisfied [*Barkat v. Prasanna*, 33 CWN 873: A 1929 C 819]. S 115 does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension [*Sarat v. Gopal*, 20 C 296, 310, PC (**overruling** *Ganga v. Hira*, 2 A 809; *Vishnu v. Krishna*, 7 M 3); *Low v. Bouverie*, 1891, 3 Ch D 82; *Colonial Bank v. Cady*, 15 App Cas 267; *Bank of England v. Vagliano*, 1891 AC 107].

> LORD ESHER in *Seton v. Lafone*, LR 19 QBD 68: "One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud and another acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel."
>
> In quoting these lines with approval in *Sarat v. Gopal, sup* LORD SHAND said:—
>
> "To this statement, it appears to their Lordships, it may be added that there may be statement made, and which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterised as "misrepresentation", as for example what occurred in the present case in which the inference to be drawn from the conduct of Ahmed was either that the *hiba* in favour of Arju Bibi was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid" see also *post*: "*Intentionally caused or permitted another person to believe*"].

S 43 of the T P Act deals with title by estoppel, and there erroneous representation is enough, but under s 115 it must be made "intentionally and falsely" (see *illus*) [*Hattikudur v. Kudar Sayed*, 28 MLJ 44].

The case of *Low v. Bouverie*, (1891) 3 Ch D 82 was applied in *General Bills v. Ship "Betty Out"*, (1990) 3 NZLR 715 High Court, Wanganu, so as to hold that the essence of estoppel claim is a representation, reliance upon it, and consequential detriment, and the language upon which the estoppel is founded must be precise and unambiguous.

—Summary.—It is therefore well established that it is not at all necessary that the person making the representation which induces another to act, must be influenced by *fraudulent intention*, or that the representation should be *false to his knowledge*. There need not be any actual design to mislead. Nor is it necessary that he was acting with a full knowledge of the circumstances and under no mistake or misapprehension. If the representation or act is calculated to mislead and does mislead the other person, to his injury, it is sufficient. The main question is whether it was intended to be acted upon in the manner in which it was acted upon. And the test is whether the person making the representation so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it. Intention (fraudulent or innocent) of the maker is of no moment.

Who Can Act Upon the Representation And Claim the Benefit of Estoppel?—On this point Bigelow says: "Only the person to whom the representation was made or for whom it was designed can avail himself of it.....A person who receives statements secondhand, not intended for him, clearly has no right to act upon them. Indeed it is equally clear that a mere bystander who has overheard a statement made to and for another has no better right to act upon it than if it had been communicated without authority to him; and so it has been decided. If however, the declaration was intended to be general, then, it seems that one who did not hear it, but to whom it was made known directly afterwards, or within the time to be allowed for acting upon it, may act upon it. This should be the limit of the law: more than that would be to make a man responsible for an act not his own or that of his agent" (Bigelow's Estoppel, 6th Ed pp 708-709; see also Hals 3rd Ed Vol 15 para 431). Acting upon this rule it has been held that a declaration in the sale-proclamation by the decree-holder that the property is not subject to any incumbrance does not act as estoppel as against him in favour of a purchaser of the property from the judgment-debtor and not in auction sale to which the proclamation related [*Jogesh v. Entaj*, A 1927 C 34: 97 IC 625]. A person is entitled to plead estoppel in his own individual character and not representative of his assignee [*Satibhusan v. Corpn*, A 1949 C 20]. A person is not estopped from asserting his own title to property which he did not claim in a previous suit wherein he, as a witness, had supported the defence [*Langa v. Jaba*, A 1971 P 185].

A stranger having no privity between him and the person to be estopped cannot raise the plea of estoppel [*Karimuddin v. Meherunnissa*, A 1948 N 19]. "The declaration of *A* to *B*, not made with the purpose or belief that it would be communicated to *C*, or would influence his action, constitutes no estoppel upon *A*, although *C* afterwards hears of it and acts upon it. But conduct or declaration may be of so general or notorious a character that the public generally may assume that they are intended to be relied upon, as where a man publicly, treats a woman as his wife, or an associate as his partner" (Jones s 280). Only those can take advantage of an estoppel who claim or defend in the later proceeding in the same right as they, or those whom they are privy, claimed or defended in the earlier [Hals 3rd Ed Vol 15 para 379]. See *post*: "*Estoppels are Binding Upon Parties or Privies*".

Rules of Estoppel in the Act Whether Exhaustive.—In *Asmatunnisa v. Harendra*, 35 C 904: 12 CWN 721, it has been stated that s 115 is exhaustive and the law of estoppel in this country is contained in that section. In *Rupchand v. Sarbeshwar*, 33 C 915: 10 CWN 747: 3 CLJ 629, however, it has been said that ss 115-117 are not exhaustive of the doctrine of estoppel by agreement. See also, *Bhaiganta v. Himmat*, 20 CWN 1335; *Gotha v. Sitaram*, 23 MLJ 335. The following observations of GARTH CJ, in *Ganges Mfg Co v. Saurujmal*, 5 C 669 are very helpful:—

> "It was contended that sections 115 to 117 of the Evidence Act contained the only rules of estoppel now intended to be in force .....If this argument were well founded, the consequences would indeed be serious. The courts here would be debarred from entertaining any question in the nature of estoppel which did not come within the scope of sections 115 to 117; however important those questions might be to the due administration of the law. The fallacy of the argument is in supposing that all rules estoppel are also rules of evidence. The enactment in section 115 of the Evidence Act is, no doubt, in one sense a rule of evidence. It is founded upon the well known doctrine laid down in *Pickard v. Sears*, 6 A & E 469 and other cases .....In such a case the rule of estoppel becomes so far a rule of evidence that evidence is not admissible to disprove the fact or state of circumstances which was represented to exist. But the estoppels in the sense in which the term is used in English legal phraseology are matters of infinite variety, and are by no means confined to the subjects dealt with in Chapter VIII of the Evidence Act. A man may be estopped, not only from giving particular evidence, but from doing acts or relying upon any particular agreement or contention, which the rules of equity and good conscience prevent his using against his opponent. A large number of cases of this kind will be found collected in the notes to *Doe v. Oliver*, 2 Smith LC 8th Ed p 775,....."

Part of this observation was approved in *Maddanappa v. Chandramma*, A 1965 SC 1812 which held that the provisions of s 115 are in one sense a rule of evidence and further refused to accept the contention that apart from s 115 there is "equitable estoppel". "We doubt whether the court while determining whether the conduct of a particular party amounts to an estoppel could travel beyond the provisions of s 115". The same court, however, thought otherwise on another later occasion where approving the concluding portion of GARTH CJ's, observation it held that even though a case did not fall within the terms of s 115 is was still open to a party who had acted on representation made by the government to claim that the government shall be bound by its promise though the recording of the promise did not satisfy the requirements of a formal contract as specified in Art 299 of the Constitution [*Union v. Anglo-Afghan Agencies*, A 1968 SC 718; see also *Amritlal v. Alla Annapurannamma*, A 1959 AP 9].

The law of estoppel by representation is capable of application in an infinite variety of cases. Representation of a man by words or conduct, may give rise to innumerable cases of estoppel. It can hardly be conceived that s 115 is exhaustive of the doctrine of estoppel by representation. If the judicial decisions are scanned, it will appear that principles have not been infrequently applied to cases which do not strictly come within s 115. The exposition of the law in *Sarat v. Gopal, ante* shows that its scope is wider than what was thought of in days before. Apart from the rules of estoppel contained in ss 115-117 of the Evidence Act, the principle of estoppel was codified in the case of partners in s 28 of Indian Partnership Act; of principal and agent in ss 235 and 237 of Contract Act; and of vendor and purchaser in ss 98,

108, and 234 *ibid*. S 13 of the Specific Relief Act, 1963 embodied the principle of title by estoppel and the same principle was embodied in s 43 of the T P Act of 1882. Estoppel against the real owner was embodied in s 41 of the T P Act. Various sections of the Indian Trusts Act, 1882 and the Negotiable Instruments Act of 1881, also contain rules of estoppel. Thus estoppels are not confined to the subjects which are dealt with in Chapter VIII of the Evidence Act. Under Or 21, r 2, an executing court cannot recognize an uncertified payment even though there is fraud. The general law as to estoppel cannot be allowed to override the special rule of law in Or 21, r 2 [*Matoomal v.Teoomal*, 79 IC 89; (See also *Humayun Properties v. Ferrazzinis*, A 1963 C 473)].

Estoppel Should be Pleaded.—Estoppels by record or by deed must be pleaded, as failure to do so might be construed as waived. It was held in several cases that under the old system of pleading estoppels *in pais* need not be pleaded, estoppel being a rule of evidence. For instance, if a man represents another as his agent, in order to procure a person to contract with him as such, and this person so contracts, the contract binds the principal equally with one made by himself, and no form of pleading can leave such matter at large, or enable the jury to treat it as no contract [*Freeman v. Cooke*, 18 LJ Ex 114: Tay s 92: Phip 8th Ed p 667; Best s 544. See also *Fleming v. Bank of N Zealand*, 1909 AC 557; *per* PARKE B, in *Boilleau v. Rutlin*, 2 Ex 662]. Under the modern practice, the facts relied on to establish as estoppel of any kind (including estoppel *in pais*) should be pleaded [Hals 3rd Ed Vol 15 para 381]. By reason of Or 8, r 2, all pleas of estoppel of whatever nature are not barred if they are not taken in the written statement [*Kishen v. Md Amirul*, 19 CWN 942]. When a party to the litigation admitted before trial court that the report of the first commission did not contain correct particulars and therefore, he had agreed to appointment of second commissioner by the court offer eschewing the first report from consideration, he cannot later be allowed to a take a contrary stand before the appellate court that reliance ought to have been placed on the first report. A party to the litigation cannot be allowed to take contradictory or inconsistent pleas one at the trial stage and another of the appellate stage [*Balakrishna Menon v. Padmavathy Amma*, A 1993 Ker 218, 223]

It appears that under the present rule of pleading, facts raising estoppels of any kind, should be pleaded [see Or 6, rr 2, 4, Or 8, r 2 C P Code 1908: Odgers' Pleading, 8th Ed 236*n*; Tay s 92]. Estoppels must be specially pleaded, unless there is no opportunity to do so [*Coppinger v. Norton*, 1902, 2 IR 241, 245]. It is absolutely necessary to plead estoppel if it is necessary to rely upon it [*Chandi v. Somla*, 22 CWN 179; see also *Ram Sarup v. Maya*, 46 PR 1918: 43 IC 556; *Puran v. Dhanpat*, 52 IC 739; *Shk Abdul v. Baria*, 6 Pat LJ 273: 61 IC 807; *Basirul v. Ajimuddin*, 3 Pat LW 231: 43 IC 857]. The plea of promissory estoppel is a mixed question of fact and law. For obtaining relief under such a plea, foundation is required to be laid down in the pleadings. [*Association Cement Companies Ltd, v. State of Rajasthan*, A 1981 Raj 133, 138]. Estoppel is eminently a matter of pleadings. If not set up in pleadings or issues, it cannot be availed of later [*Pappammal v. Alamelu*, A 1928 M 467; *Gobindbhai v. Dahyabhai*, A 1937 B 326; *Ramgopal v. Mohanlal*, A 1960 Pu 226]. Estoppel being a mixed question of fact and law; a party should not be allowed to resort to the plea without definite allegations in the pleadings [*Associated Pub Ltd v. Bashyam*, A 1961 M 114]. A plea of estoppel not only not raised in written statement but actually contrary to defendant's case, cannot be allowed to be pleaded [*Shera v. Ghana*, 28 PLR 303; *Dwarka v. Sankatha*, 94 IC 307]. However, if all necessary facts are pleaded or proved or admitted, the defence of estoppel can always be taken even if not specifically pleaded as it is for

the court to draw the legal inference [*Co-operative T Bank v. Shanmugan*, 8 R 223: A 1930 R 265; *Somnath v Ambika*, A 1950 A 121].

There can be no estoppel against a statute. If a question of estoppel were dependent on the determination of some facts, a party may certainly be estopped from pleading it. But if it is patent and apparent on the record, even if there were estoppel against a party, a court would not be estopped from considering the point [*Mahabir v. Narain*, A 1931 A 490 FB: 1931 ALJ 715]. A plea of estoppel which depends on question of fact should be put clearly in issue [*Safar v. Mohesh*, 23 CLJ 122]. A plea of estoppel is a plea of mixed fact and law and has to be urged in trial court. It cannot be entertained for the first time in revision [*Hiralal v. Tulsiram*, 80 IC 946 (N)], or in appeal [*Fakir v. Ismail*, 14 L 218: 141 IC 264]. A question of estoppel based on facts on record can be entertained in second appeal [*Abdullah v. Md Yakub*, A 1938 L 558]. Where the issue raised in the suit is broad enough to cover the plea of estoppel and that plea has been argued and considered by the lower court without any objection it cannot be contended in an appeal by special leave that the specific plea of estoppel has not been taken [*Krishna v. Gulabchand*, A 1971 SC 1041].

—Estoppel Can be Pleaded By Both Plaintiff and Defendant.—It makes no difference whether the persons against whom the estoppel is urged happen to be the defendants or the plaintiffs. If the title of a plaintiff in a cause in respect of property has been admitted by the defendant, or if the defendant's title has been admitted by the plaintiff and either of the parties to the case is estopped from denying the title of the other, it is difficult to perceive any difference between the two cases [*Tej Bahadur v. Nakko*, A 1927 O 97: 99 IC 472. See *Bhagwan v. Razza*, 9 IC 415; *Sheoambar v. Balbhaddar*, 28 IC 357: 18 OC 51]. A plea of estoppel affecting only one of the plaintiffs, does not affect the others, [*Jethibai v. Chabildas*, A 1935 S 142].

Onus of Proof.—The onus of establishing the fact and circumstances from which estoppel arises rests upon the person pleading it [*Mitra Sen v. Janki*, 51 IA 326: 46 A 728, 732: A 1924 PC 213: 26 Bom LR 1134; *Birendra v. Baikuntha*, 46 IC 474; *Ahmed Azim v. Safijan*, 97 IC 897 (O); *Bennett Coleman & Co v. Punya Priya*, A 1970 SC 426]. To apply the principle of estoppel, there must be allegation and evidence to establish that *A* made a representation to *B* acting thereupon *B* altered his position to his prejudice. [*Baburam v. Basdeo*, 1982 A11 414, 418].

Estoppels Must be Clear, Unambiguous and Certain.—In should always be borne in mind when dealing with a question of estoppel by representation, that the representation must be plain, not doubtful or a matter of questionable inference. Estoppel can only arise from a clear definite statement and a statement in order to found an estoppel, should be clear and unambiguous; not necessarily susceptible of only one interpretation, but such as will resonably be understood in the senses contended for and for this purpose the whole of the representation must be looked at. Certainty is essential to all estoppels. These principles have been recognised in *Kuwari Mewa v. Hulas*, 13 BLR 312 PC; *Tweedie v. Poorna*, 8 WR 1225; *Rivett Carnac v. New Mofussil Co.*, 26 B 75: 3 Bom LR 846; *Whitechurch v. Cavanagh*, 1902 AC 117, 145; *Dawson Bank Ltd v. Nippon M K Kaisha*, 62 IA 100: A 1935 PC 79: 39 CWN 657: 13 R 256; *S v. Agarwalla*, A 1966 P 410; *Bennett Coleman & Co v. Punya Priya, sup.*

> BOWEN LJ, in *Low v. Bouverie*, 1891, 3 Ch D 82 p 106 when deciding against the estoppel pleaded: "Now an estoppel that is to say the language upon which an estoppel if founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed".

To create an estoppel against a party, his declaration, act or omission must be of an unequivocal character [*Gajanan v. Nilo*, 6 Bom LR 864; see also *Abadin v. Sonabai*, 9 Bom LR 832]. The evidence of representation should be clear and unambiguous. It must be certain to every intent. The statements that are made by ministers at meeting—in this case by the cashew manufactures such as, 'let us see', 'we shall consider the question of granting exemption sympathetically', 'we shall get the matter examined, 'you have a good case for exemption' etc even if true cannot form the basis for a plea of estoppel [*Bakul Cashew Co v. Sales Tax Officer Quilon*, A 1987 SC 2239, 2242 (1987) Tax LR 2000]. If the representation is qualified by certain other circumstances, it must be read with those qualifications; but when there is no such qualification but merely an independent subsidiary objection to action being taken in a certain manner, such a statement cannot deprive the representation of its ordinary effect [*Asthamoorthi v. Rama Mudali*, 96 IC 915 (M)]. An estoppel must be free, voluntary, and without any artifice [*Mowji v. National Bank*, 25 B 409: 2 Bom LR 1041]. In *Onward B Society v. Smithson*, 1893, 1 Ch 1, 14 BOWEN LJ, said:—"It would be very dangerous to extract a proposition from the statement of a deed. Estoppel can only arise from a clear definite statement". An ambiguous document or an ambiguous act cannot create an estoppel [*Masusa v. Sallaijjee*, 46 IC 809]. For instance the letter OK in a contract are capable of various meanings [*Dawson Bank v. Nippon M K Kaisha, sup*]. Application for reference stating that compensation for land should be at least Rs. 5,000/- an acre does not operate as estoppel or admission precluding from showing that land is worth much more [*Anthony v. S*, A 1971 K 51 FB].

An estoppel must be very strictly interpreted and any point in doubt must be decided against the estoppel. Thus when a previous suit by the plaintiff alleged that he was reversioner of *G's* husband and the suit was compromised between *G* and plaintiff, it was an admission by *G* binding on her, but *G's* representatives were not estopped from denying that plaintiff was a reversioner [*Nihal v. Narain*, 80 IC 525: 6 Lah LJ 45].

Estoppel applied.—The rule of issue estoppel relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court at a previous trial. The rule does not prevent the trial of any offence as doer *autrefois acquit*. [*Ramesh Chandra Biswas v. State*, 1994 Cri LJ 1134, 1139 (Cal)]. A person who enters into an agreement to sell immovable property and accepts earnest money is estopped from contending that he is not the owner of the said property [*Ram Sevak v. Subhash Chandra Misra*, A 1996 All 257, 262]. Where in an eviction proceeding the plaintiff pleaded that the relationship between her and the defendant was that of landlord and tenant, she cannot be allowed to resile from her position and plead licence unless the defendant had so pleaded and nonsuited her on that ground so that the principle of estoppel would operate against him [*Ramchandra Sahu v. Pramila Sahu*, A 1992 Ori 183, 189]. Where in pursuance of allotment order the allottee deposited the amount with the Improvement Trust but the possession could not be delivered due to double allotment, therefore, the Improvement Trust offered an alternative plot to the allottee, the trust is estopped from wringling out from its promise by taking recourse to section 20 of the Contract Act [*Urban Improvement Trust, Jodhpur v. Laxmi Chand Bhandari*, A 1992 Raj 153, 160]. The Government offered one acre of land to set-up industrial unit and made provisional allotment with stipulation that it would not give any legal right of allotment to the allottee unless final allotment was made. Subsequently another offer regarding half acre of land was made wherein it was stated that the case will be treated as closed thereafter. The offer was unconditionally accepted by the allottee and, therefore, final allotment of half

acre of land was made. It was held that the allottee was estopped from claiming additional half acre of land. [***H.S. Industrial Development Corpn. Ltd. v. Indrajeet Sawhney***, A 1996 SC 2244, 2246].

The Govt. cannot take a unilateral action by issuing a circular denying the benefits which had already accrued to the petitioner in an Export Policy retrospectively. [See *Garments International Pvt. Ltd. v. Union of India*, A 1991 Kar 52 and *Nath Bros Exim International v. Union of India*, A 1995 Del 280, 288]. Where the defendant consented to examine the plaintiff's witnesses and then cross-examining those witnesses, producing own evidence without any objection, he thereby was estopped challenging the authority and jurisdiction of the court in recording the statement of the witnesses and the admissibility of those statements in the evidence in the suit. [*Mani v. Kishan Lal*, A 1997 Raj 19, 24]. Where the erstwhile owners of the land from whom the petitioner society claimed title never raised the question of notice of award under s.12 of the Land Acquisition Act in their writ petition or elsewhere, the society was estopped from raising that question [*Jagjeevan Cooperative House Building Society Ltd. v. Union of India*, 1998 AIHC 1047, 1049 (Delhi)].

When there was no objection to the judgment of the court by one of the parties (appellant) to the arbitration wherein it was held that the objections of both the parties as regards the arbitration award were time barred, then even if the observations were factually incorrect, recourse to section 114 read with Or. 47 Rule 1 CPC having not been taken, the appellant would be estopped from challenging the concluded finding of the court that the objections filed by the parties were time barred. [*Shiv Lal v. Food Corporation of India*, A 1997 Raj 93, 98]. Date of birth of a person recorded in his application for appointment may be a relevant consideration to assess his suitability and therefore, when he seeks to alter his date of birth, the principle of estoppel would apply and the authorities concerned would be justified in declining to alter the date of birth. [*Union of India v. C. Ramaswamy*, A 1997 SC 2055]. A person, having participated in the selection for appointment to a *post*, is estopped to challenge the correctness of the procedure for selection [*University of Cochin v. N.S. Kanjojauma*, A 1997 SC 2083]. When the serial of the petitioner and others had been provisionally accepted by Doordarshan with the condition that each serial must be of 13 episodes duration only and the petitioner, though expressing his difficulty, accepted the provisional order, he later was estopped from contending that the Doordarshan had already approved the script submitted by him for 26 episodes and that no justice could be done if the serial was reduced to 13 serial only. [*Gopichand Television v. Director, Doordarshan Kendra, Hyderabad*, A 1995 AP 199, 202]. When the petitioner himself obtained, an order preventing the Municipal Corporation from issuing necessary, publication in newspapers to warn the public, including the purchasers and builders to be cautious and if any investment of their, monies in the disputed structure, a high rise building will be at their own risk and peril, it cannot be contended by the petitioner that in respect of the high rise buildings when third party interests are involved, the same should be taken note of and their interest should not be affected and that in such cases power of demolition of the building should not be resorted to [*3 ACES, Hyderabad v. Municipal Corporation of Hyderabad (FB)*, A 1995 AP 17, 25].

When sale deed of property executed by father was attested by his son, and no objection to the sale had been made by the son though it was against his interest, he is estopped by conduct and record to assail the sale or to claim any interest in the lands [*Mahboob Sahab v. Syed Ismail*, A 1995 SC 1205, 1208]. Where speeches made at the election meeting were not recorded verbatim but gist of the portions of the speeches were noted, such notings or 'tipans' became very relevant because on

the basis of the notings reports were prepared and published in newspapers and therefore, in case of non-production of such notings, court should draw adverse inference against the authenticity of the gist of speeches published in the newspapers. [*Vimal v. Bhagiyi*, A 1995 SC 1836, 1845].

In a suit by the purchaser for specific performance of agreement of sale the seller pleaded that the execution of such agreement was only as a security for repayment of loan advanced by the purchaser. No such plea was raised by the seller in earlier suit for permanent injuction restraining her from alienating the suit property it was held that she would be estopped from raising it in the suit for specific performance of agreement of sale [*L L Karthiayani Amma v. T V G Nambordiri*, 1996 AIHC 5291 (Ker)]. Where the notification issued under clause 16 of the Textile Control Order, 1986 directing the manufacturers to pack yarn in bank form was in public interest and under the Industrial Licence granted to the appellant-manufacturer are of the conditions was that the packing of yarn in hank form and count wise production shall be in accordance with the policy in force and the directions issued by the Textile Commissioner in this regard from time to time, the appellant having accepted the said condition while taking the licence, cannot later turn round and say that it was not bound by the same. [*G T N Textiles Ltd. v. Astt. Director, R O T Commr.*, A 1993 SC 1596, 1600, 1601]. Where the state by demanding 'judicial inquiry' in fact proved for appointment of a Commission of Inquiry under the Commissions of Inquiry Act and the entire case was thereafter agreed on that basis and relevant submissions were made, but having found that the order of the court had gone against the State, it was not open to the State to advance a submission that the State, had not prayed for appointment of a Commissioner of Inquiry. [*State v. Janamohan Das*, A 1993 Ori 180, 186].

Where the respondent State Govt. Corpn. had authorised and permitted the petitoner-firm to hold exhibition in the outdoor premises of the petitioner's hotel, the respondents by its conduct made a clear and unequivocal promise to the petitioner intending to create legal relationship authorising the petitioner to hold the exhibition and when acting on such promise the petitioner incurred considerable expenditure for bringing machinery and other necessary equipment for making proper arrangements for holding the exhibition, it would be inequitable to allow the respondents to retract their steps to the disadvantage of the petitioner. [*Indo American Hybrid Seeds v. Chandigarh I & T.D. Corp.*, A 1995 P&H 134, 137].

An agreement or compromise upon which the court fixed maintenance under section 127 Cr PC will not operate as estoppel or waiver in case of subsequent application for enhancement of maintenance under changed circumstances [*Joydel Kumar Biswas v. Maduri Biswas*, 1994 Cri LJ 3342, 3344 (Cal)]. Where the Housing Board itself by its conduct admitted non-existence of relevant factual data for invoking the powers under s.32 (v)(c) of Payment of Bonus Act it would amount to estoppel on facts and not on law [*State of T.N. v. K. Sabanayagam*, A 1998 SC 344]. Admission made by a party in previous suit binds his successors in interest in subsequent suit. [*Modgi Krishna v. Modgi Krishna Bai*, A 1994 AP 16, 21]. Doctrine of estoppel cannot be pressed into service when the representation made by the officer or authority is beyond its powers [*Bajrang Industries v. General Manager D.I.C. Vizianagaram*, A 1994 AP 10, 13]. The court cannot go into the question of estoppel while deciding the application under order 7, Rule 11 C P C. [*Jagat Singh v. Bhawani Singh*, A 1996 Del 14, 20]. When order of removal was passed after holding departmental proceedings and hearing the workmen the fact that the employees continued in service for a number of years cannot create equity in their favour nor can they plead estoppel against the employer [*Onion of India v. M. Bhaskaran*, A 1996 SC 686, 688].

A particular officer for various reasons may pass a rule on multi state basis or a contractor may be able to get one of his bills passed at a rate other than the rate given in written contract in connivance with the passing authority. But when a dispute arises no decree can be granted on that basis unless it is established that the defendant in written contract agreed to grant the rate on multi state basis [*T N Electricity Board v. N Raju Reddiar*, A 1996 SC 2025, 2028], Certain Government department after paying some amount to the enterpreneur sent draft agreement for signing and sending it back for countersigning by the Government authority. The draft was not accepted by the Government authority. The authority suggested certain modifications. The enterpreneur was not informed that the agreement was concluded, finalised and copy thereof was being sent to the enterpreneur. It was held that the enterpreneur was not estopped by the principle of estoppel from withdrawing the agreement [*State of Haryana v. Bharat Steel Tubes Ltd.*, A 1996 Del 198, 204].

Where cast certificate was obtained by playing fraud and was false, plea of estoppel was not available. The principle of estoppel arises only when a lawful promise was made and acted upon to his detriment, the party making promise is estopped to resile from the promise, there is no promise made by the State that the State would protect perpetration of fraud defeating the constitutional objective; no promise was made that the false certificate will be respected and accepted by the State. [*State of Tamil Nadu v. A Guruswamy*, A 1997 SC 1199, 1200]. When a candidate was not having the minimum qualification for admission, to class XI, he cannot derive any benefit by pressing into service the principle of estoppel [*Surendra Kumar v. Board of Secondary Education*, A 1995 Raj 115, 116]. Where the appointment of a govt. servant was against the statutory regulations, it was liable to be set aside and no question of estoppel would arise in such a case [*Ravinder Sharma v. State of Punjab*, A 1995 SC 277, 279, 280]. When telephone charges for the subscriber could be changed by the Govt. the rate of commission of pay phone holders who act as operating agent of the department could, also be revised. The Govt had jurisdiction to revise the rate of commission and/or to make demand for additional security and/or to change the billing period. [*Binani Consultant (P) Ltd. v. Union of India*, A 1995 Cal 234, 244]. Where a private complaint filed by Advocate Commissioner under sections 228 and 342 IPC on being restrained from executing search warrant, was entirely different from the contempt proceedings initiated by the High Court to vindicate the dignity of the court but not to satisfy grievance or grudge of any private individual, in case of dismissal of the private complaint doctrine of estoppel would not apply to the contempt proceedings [*Advocate General of AP v. Chemari Setty Chakrapani*, 1997 Cri LJ 3333 (AP)]. Even if the Govt. decided to grant exemption from payment of minimum consumption guarantee charges for a period of five years, that policy decision of the Govt. would not be binding on the State Electricity Board and the Board cannot be estopped by Rule of Estoppel from charging the minimum consumption charges. [*Hindustan Ferro Alloy Ltd. v. Executive Engineer U.P.S.E.B.*, A 1995 All 209, 210].

There can be no estoppel against the constitution. [*Ammini E.J. v. Union of India (SB)*, A 1995 Ker 252, 271]. There cannot be a plea of estoppel against something which is done by statutory body which is *ultra vires* [See *RHYL UDC v. RHYL Amusements Ltd.*, (1959) 1 All ER 257]. When levy of royalty on the basis of installed capacity of mills was found to be tax, not authorised by law, the principle of estoppel cannot be made available merely because there was some discussion between the Govt. and the mill owners followed by the impugned order of realisation of royalty. [*S. Veneer and Sawmill, Dimapur v. State of Nagaland*, A 1995 Gau 37, 40]. Doctrine of estoppel cannot be invoked to legitimate act in which is *ultra vires*. Robertson's case does not lay down the correct law [*P.V. Balakrishnan Nair v. State of Kerala*, A 1994 Ker 6, 10]. The

principle laid down in Robertson's case has been rejected in England. See in this connection [*Howell v. Falmouth Construction Co. Ltd.*, 1951 AC 837; *A.G. for Ceylon v. A.D. Silva*, 1953 AC 461; *Western Fish Products v. Penwith*, (1981) 2 All ER 204]. There is no estoppel, in so far as the duty of all concerned to enforce and comply with the directions of the Supreme Court is concerned. *Managing Secy. D M C & Hospital v. State of Punjab*, A 1995 P&H 225, 233].

The legal representatives after prosecuting the appeal without filing an application to be impleaded and their appeal after being dismissed could not have raised a point that appellate court's decree is unenforceable. [*Mini Devi Kedia v. Sita Devi Kedia*, 1996 AIHC 5313, 5314 (Cal)].

In a matter of renewal of mining lease, one of the lessees, TISCO, had challenged the renewal of less area in its favour for the purpose of allotting the area to another company also. The reallocation was done on the basis of a Committee Report, which was accepted by the other company (FACOR). This company got its need assessed by the Central Government and also the Committee. The Committee was constituted on the direction of the High Court which accepted the Committee Report. FACOR did not challenge this acceptance of the Committee Report, nor raised any dispute about the share of TISCO. Thus the company had by its conduct waived any objections regarding correct assessment of its need and acquiesced in the assessment made in its favour. This created a representation by conduct that everything was alright and the Central Government and the State Government acted on this apparent posture of satisfaction. FACOR was estopped from challenging the assessment. *Ferro Alloys Corporation Ltd. v. Union of India*, AIR 1999 SC 1236.

No Estoppel, When Both Parties Are Equally Acquainted With True Facts.—On the part of the person claiming the benefit of estoppel there must be mistake or ignorance as to the real state of things. He must show that he was ignorant of the truth regarding the representation. When both parties are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel [*Honappa v. Narsappa*, 23 B 406, 409; **folld** in *Ranchodlal v. Secy of S*, 35 B 182, 188; *Jacks & Co v. Joosab*, 48 B 38: 82 IC 791; *Jagdip v. Rajokuar*, 2 P 585: 14 PLT 531. See *Oodey Koomer v. Ladoo*, 13 MIA 585, 598; *Narayan v. Raoji*, 28 B 393, 397: 6 Bom LR 417; *Kamal v. Thake*, 15 CWN 152n; *Swaminaddha v. S*, A 1927 M 458: 99 IC 772; *Bansidhar v. Hazari*, A 1933 P 210; *Lachman v. Collr*, A 1933 A 641; *Rajib v. Bindeshwari*, 15 PLT 596: *Mohini v. Radha*, 39 CWN 1014; *Lorind v. Punjab N Bank*, A 1940 L 254; *Kanik v. Medni*, A 1942 P 317; *Shiv v. Kidar*, A 1972 HP 20]. There can be no estoppel arising out of legal proceedings when the truth of the matter appears on the fact of the proceedings [*Taralal v. Sarobar*, 27 IA 33: 27 C 407: 4 CWN 533; *Bai Mokand v. S T Committee*, A 1935 L 960; *Sridhar v. Mohant*, 12 OC 236: 3 IC 549], or from ignorance of law which both parties must be presumed to know [*Gurulingaswami v. Kamalsakshmma*, 18 M 58], or when both parties have equal means of knowledge both of the facts and of the law [*Teckchand v. Gopal*, 46 PR 1912: 12 IC 482], or where party was put on notice and could by reasonable diligence have discovered the true facts [*Sarada v. Ananda*, 46 IC 228], or where truth was accessible to a party [*Md Shafi v. Md Said*, 52 A 248].

Where one makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel, if that other person knew the true state of facts and must consequently not have been misled by the misrepresentation [*Maddanappa v. Chandramma*, A 1965 SC 1812]. S 115 does not apply to a case when the statement relied upon is made to a person, who knows real facts, and is not misled by the untrue statement. There can be no estoppel, where the truth of the matter is known to both parties [*Mohori v. Dharamadas*, 30 IA 114: 30 C 539, 546: 7 CWN 441: 5 Bom LR 421; (**folld** in *Sitaram v. Harku*, 4 NLR 28); see also *Sarat Ch v. Rajani*, 12 CWN 481, 484; *Prasanna v. Srikantha*, 40 C 173; *Jagannath v. Jaikishen*, 1 Pat LJ 16; *Mehra v. Devi*, 2 L 88; *Rajambal v. Shanmuga*, 1922 MWN 481: 70 IC 653; *Jairam v. Bal Krishna*, 3 NLR 72; *Venkatachala v. Arunthavachi*, 72 IC 548 (M); *Tulloo v. Indra*, 93 IC 873 (O); *Shankar Lal v. Narendra*, A 1967 A 405]. Where both parties were aware of the facts and merely make a temporary

arrangement for mutual convenience, no estoppel arises [*Deota v. Raj Narain*, A 1934 A 75]. If two people with the same source of information assert the same truth or agree to assert the same falsehood at the same time, neither can be estopped as against the other from asserting differently at another time [*Square v. S*, 1935 P 120: 153 LT 79].

If a person takes a mortgage with the knowledge that it is unlawful for the mor-tgagors to mortgage, the plea of estoppel cannot be raised [*Kidar v. Naipal*, 8 ALJ 1308]. A gift by *A* in favour of his daughter *M* for life provided that the property should go to her male issue, and in default to donor's heirs. One of *A's* two sons induced a purchaser to buy his sister's property and the sale deed was attested by the other son. In a suit by the attestor's sons to recover the property after the death of the daughter there being no male issue—*Held* that plaintiffs were not estopped as the defendant knew the *M* had life interest [*Swaminatha v. S*, 99 IC 772 (M)]. The defendant in possession of suit property and knowing its market value cannot be misled by its undervaluation in plaint and plaintiff is not estopped from claiming compensation at market rate [*Shrinivas v. Narayan*, A 1971 My 174].

Where Both Parties Are Under a Misapprehension or Mistake of Law.—Where both parties acted under a mistaken apprehension as to their respective rights, the court should scrutinize the connection between representation and alleged course of conduct [*Rama Kulangare v. Pilavil*, A 1937 M 158]. No question of estoppel can ever arise when both parties are labouring under the mistake of law [*Sales Tax Officer v. Kanhaiyalal*, 1959 SCR 1350: A 1959 SC 135]. When both parties were acting under a common misapprehension, until the position is cleared up there can be no estoppel [*Stewart & Co v. Mackertich*, A 1963 C 198]. When both the abkari contractors and the excise authorities were under a mutual mistakes that transit permits are required to take the liquor from any state to make passing through Kerala State, and the Contractor realise this mistake, he is not estopped from challenging the order insisting on such a permit since the demand of the authorities was illegal [*Thirumal Wines v. State*, A 1990 Ker (NOC) 61]. Where both parties are under a common error on a point of construction of a will on account of erroneous advice of lawyers and not by any representation of the beneficiary under the will, the beneficiary is not estopped from claiming under the will [*Ventannes v. Robinson*, 102 IC 639: A 1927 PC 151]. Where vendor and vendee are both advised by the same solicitor and they shared the same mistake as to the vendor's title due to solicitor's advice, the vendee is not estopped from claiming back purchase money as vendor did not act on the faith of vendee's representation [*Meghraj v. Tyeballi*, A 1925 B 64]. Admissions made under a mistake as to the true legal character of *Sthanam* estate by which no one was misled into doing anything to his detriment do not operate as estoppel [*Kochunni v. Kuttanunni*, A 1948 PC 47: 1948 Mad 672]. A statement made due to misconception or misapprehension can be allowed to be withdrawn especially when the other side has not changed its position to its disadvantage in any way [*Rai & Sons Pvt Ltd. v. Phelps & Co Pvt Ltd*, A 1990 Del (NOC) 27]. A statement made under misapprehension of legal rights is not estoppel [*Sukumar Chakraborty v. Assistant Assessor-Collector*, A 1991 Cal 181, 185].

Representation Must Be of Existing Facts. [Effect of Undertaking or Promises de Futuro].—In order to operate as estoppel a representation must be of some acts alleged to be at the time actually in *existence*, not of promise *de futuro* or intention which might or might not be enforceable in contract. The foundation of the doctrine is that the representation must be of existing fact and not of mere intentions [see *Dawson's Bank Ltd v. Nippon M K Kaisha*, 62 IA 100: 39 CWN 657; *Bibhuti v. Maya*, 65 CLJ 590: A 1938 C 172; *Citizen's Bank v. Bank of N O*, LR 6 HL 352, 360 cited in *Amulya v. Tarini*, 42 C 254; *Whitechurch Ltd v. Cavanagh*, 1902 AC 117; *Jorden v. Money*, 5 HLC 185; *Kelson v. Imp Tobacco Co*, 1957, 2 All ER 343]. Representation by the plaintiff that he would not object to the sign in future does not give rise to an estoppel [*Kelson v. Imp Tobacco Co, sup*]. The doctrine of estoppel by representation only applies to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro* which, if binding at all, must generally be binding as contracts [*per* SELBORNE LC, in *Maddison v. Alderson*,

1883, 8 App Cas 467, 473; see Hals 3rd Ed Vol 15 para 424]. Existing facts may refer to present or past but not to future [*Ma Pau v. Mg Po*, 39 IC 385]. There must be a statement of fact and not a mere promise to do something in future, *eg* a payment of a certain sum on the understanding that a mortgage would be released [*Totaram v. Haris*, A 1937 N 402]. The principle is thus stated by STEPHEN J, in *Maddison v. Alderson*, LR 5 Ex D 293, 296:

> "Besides these there is a class of false representation which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as for instance, where a person leads another to believe that he intends to make him his heir and then leave his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites the expectation that it will be fulfilled, but legally binds himself to fullfil it, in which case he must, as it seems to me contract to fulful it".

To create an estoppel the representation must be as to some state of facts alleged to be at the time actually in existence [*Jathabai v. Nathabai*, 28 B 399; *Gaura v. Md Yasin*, A 1935 O 121]. An admission though not a conclusive proof, raised a presumption that it is true until the contrary is shown. If such an admission is accepted and acted upon by the person to whom it is made the matter of the admission subsequently cannot be permitted to show that the admission he made was false [*Bhajan Lal v. Madan Lal*, A 1983 Del 555, 557]. When the Branch Manager of a Bank was instrumental in effecting the sale of property hypothecated to the Bank and represented to the parties that the liability would be transferred to third parties, the Bank is estopped from proceeding against the debtors, sureties and the hypothecated properties [*Syndicate Bank v. Sudhir Surgical & Allied Industries*, A 1992 Kant 146, 153]. Mere intention to make a gift does not create estoppel [*Ma Pya v. Mg Po*, 30 IC 385]. A mere representation of an intention cannot amount to an estoppel. An estoppel must be a representation of an existing fact. If binding at all, a representation *de futuro* must amount to a promise [*Dhondo v. Keshna*, 7 Bom LR 179, 194]. Some plots abutting on certain land were sold which was described in the conveyance as "land kept for the proposed drainage road of Trust". The purchaser claimed right of way over the land by reason of estoppel—*held*, that the representation was a mere statement of what the trust intended to do and did not confer any title on the purchaser of the plot [*Hindusthan Ins Society v. Secy of S*, 56 C 989: A 1930 C 230]. A promise not being a representation as to an existing fact, cannot by itself be the foundation of an estoppel [*Bajrang v. Bhagwan*, 11 OC 301].

It has however been held that an undertaking may operate as an estoppel though in the absence of consideration it cannot amount to a contract [see *Fairfield S & E Co v. Gardner*, (1911) 104 LT 288 p 289; *In re Wickham*, (1917) 34 TLR 159]. Where there was an order for delivery of goods to a person signed by the agent of the defendant company and the plaintiffs were induced to pay money to the purchaser of the goods on the faith of that order, it was held that the defendants were estopped from setting up a *lien* and refusing delivery of the goods [*Ganges Mfg Co v. Sauraimal*, 5 C 669. See remarks of GARTH CJ, in this case (*ante*: "*Rules of Estoppel in this Act whether exhaustive*")]. So, where the would-be purchaser of the equity of redemption goes to the mortgagee to ascertain the amount due under the mortgage and a certain agreement is arrived at as to the money payable, he would be estopped from going behind the contract [*Sailesh v. Bechai*, 40 CLJ 67. In this case the following extract from Bigelow's Estoppel 6th Edition pp 639-49 was quoted:— "Situations may arise indeed in which a contract should be held an estoppel, as in

certain cases where only an inadequate right to action would, if estoppel were not allowed, exist in favour of the injured party. In such a case estoppel may sometimes be available to prevent fraud"]. (See also *Century Spinning v. U Mun Council*, 1970, 1 SCC 582: A 1971 SC 1021).

Intentional misleading refers to present existence of a right or fact and not to future metaphysical possibility. Future inheritance cannot be relinquished under the Mahomedan law. A declaration as to present or furture intention about a mere chance of succession cannot be relied upon as an act of estoppel. Persons thus relinquishing their interest are not estopped from claiming property when succession opens [*Asa Beevi v. Karuppan*, 41 M 365: 34 MLJ 460; *Sulaiman v. Kader*, A 1953 M 161]; so also the bare relinquishment of the chance of an heir apparent [*Shah Nawaz v. Ghulam*, 24 L 161]. But a presumptive reversioner whose interest is nothing better than a *spes successionis*, joining in an alienation by a widow and having the full benefit of the transaction has been held to be estopped from claiming the property when reversion falls to him, on the ground that he could not pass any title at the time of alienation [*Shunmugha v. Koyappa*, 1920 MWN 679: 60 IC 635; *Shah Nawaz v. Ghulam, sup*; see also *Post*: "*Estoppel Under Family Arrangement*"].

Doctrine of promissory estoppel.—The doctrine of promissory estoppel is by now well recognised in India. It is an evolving doctrine, the contours of which are not yet fully and finally demarcated. LORD HAILSHAM said in *Woodhouse Ltd. v. Nigerian Produce Ltd.*, 1972 AC 741.

> "I desire to add that the time may soon come when the whole sequence of cases based upon promissory estoppel since the war, begining with *Central London Property Trust Ltd. v. High Trees House Ltd.*, (1947 (1) K.B. 130) may need to be reviewed and reduced to a coherent body of doctrine by the Courts. I do not mean to say that they are to be regarded with suspicion. But as is common with an expanding doctrine, they do raise problems of coherent exposition which have never been systematically explored."

Though the above view was expressed as far back as 1972, it is not less valid today. The view expended in *Motilal Padampat Sugar Mills Ltd. v. State of U.P.*, A 1979 SC 621 was departed from in certain respects in *Jit Ram Shiv Kumar v. State of Haryana*, A 1980 SC 1285 which was in turn criticised in *Union of India v. Godfrey Philips India Ltd.*, A 1986 SC 806. The divergence of approach adopted in *Shri Bakul Oil Industries v. State of Gujarat*, A 1987 SC 142 and *Pournami Oil mills v. State of Kerala*, A 1987 SC 590 is another instance. The doctrine has been formulated in the following words in *Motilal Padampat Sugar Mills case (supra)* :

> "The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Govt. would be held bound by the promise and the promise would be enforceable against the Govt. at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Art 299 of the Constitution."

The rule of promissory estoppel being an equitable doctrine, has to be moulded to suit the particular situation. It is not a hard and fast rule but an elastic one, the objective of which is to do justice between the parties and to extend an equitable treatment to them. If it is more just from the point of view of both promissor and promisee that the latter is compensated appropriately and allow the promissor to go

back on his promise, that should be done; but if the Court is of the opinion that the interests of justice and equity demand that the promissor should not be allowed to resile from his representation in the facts and circumstances of that case, it will do so. This , in our respectful opinion, is the proper way of understanding the words "promisee altering his position". Altering his position should mean such alteration in the position of the promisee as it makes it appear to the Court that holding the promissor to his representation is necessary to do justice between the parties. The doctrine should not be reduced to a rule of thumb. Being an equitable doctrine it should be kept elastic enough in the hands of the Court to do complete justice between the parties anything and everything done by the promisee on the faith of the representation does not necessarily amount to altering his position so as to preclude the promissor from resiling from his representation. If the equity demands that the promissor is allowed to resile and the promisee is compensated appropriately, that ought to be done. If, however, equity demands, in the light of the things done by the promisee on the faith of the representation, that the promissor should be precluded from resiling and that he should be held fast to his representation, that should be done. To repeat, it is a matter of holding the scales even between the parties—to do justice between them. This is the equity implicit in the doctrine. [*State of H P v. Ganesh Wood Products*, A 1996 SC 149, 165].

It may be appropriate to point out that what has been said in *Ganesh Wood Product* case is consistent with the doctrine as stated in *Motilal Padampat Sugar Mills* case wherein it has been posited:

"But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the fact as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts which have transpired since the making of the promise, public interest would be prejudiced if the government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies." and then it is observed:

> "But when where there is no such overriding public interest, it may still be competent to the Government to resile from the promise 'on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position' provided of course it is possible for the promisee to restore the *status quo ante*. If, however, the promisee cannot resume his position, the promise could become final and irrevocable. *Vide Ajayi v. Briscoe*, (1964) 3 All ER 556."

The doctrine is a principle evolved by equity, to avoid injustice and though commonly named "promissory estoppel", it is neither in the realm of contract, nor in the realm of estoppel. The true principle of promissory estoppel is that where one party has by his words or conduct made to the other, a clear and unequivocal promise which is intended to create a legal relationship to arise in the future, knowing or intending that it would be acted upon the other party to whom the promise is made,

and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if that would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and, this would be so irrespective of whether there is any pre-existing relationship between the parties or not. Though the doctrine has been variously described as "equitable estoppel". "*quasi*-estoppel" and "new estoppel", it is a doctrine evolved by equity in order to prevent injustice. [*Intrans System Pvt. Ltd. v. State of Kerala*, A 1996 Ker 161, 163]. The principle of promissory estoppel is applicable to administrative law and not between the private parties. [*Hamir Ram v. Varisng Raimal*, A 1998 Guj 165, 166].

For application of doctrine of promissory estoppel the promisee must establish that he suffered any detriment or altered his position by reliance on the promise. [*Union of India v. Property and Finance Pvt. Ltd.*, A 1996 Kant 264, 272]. Doctrine of promissory estoppel does not provide a cause of action for a plaintiff relying on a gratuitous promise [*Cheng Hang Guan v. Perumahan*, (1993) 3 Malayan LJ 352 (Penang HC)]. Doctrine of promissory estoppel being an equitable principle evolved by the courts for doing justice, it is not inhibited by the same limitations as estoppel in the strict sense of the term [*Mangalam Timber Products Ltd. v. State*, A 1996 Ori 13, 16]. Before the doctrine of promissory estoppel can be clamped on an authority or a public body, it must be shown that there was an unambiguous promise [*Ude Ram v. State of Haryana*, A 1994 P&H 175, 179]. A promise by a public authority should not be contrary to any provision of law and the promisee should have altered his position pursuant to the promise. These are the essential ingredients of promissory estoppel. [*Chaitnya Charan Das v. State of W.B.*, A 1995 Cal 336, 359]. Promissory estoppel proceeds on the footing that when on the representation of a promissor, a promisee alters his position, then the former must keep his word and is not allowed to recede from his promise as otherwise it will work injustice on the latter. Where the policy decision of the Govt. indicated that no representation was made by the defendant (Delhi Industrial Development Corporation Ltd.) with regard to the price at which the sheds in question were to be sold on hire purchase basis to the plaintiffs and the policy was not definite and immutable and was liable to change and it was not shown that the plaintiffs who were already in possession of the sheds as lessees, were induceed by the defendant to alter their position on the basis of the alleged policy decision to make over the ownership of the sheds to them an hire purchase basis, such inchoate policy can neither attract the doctrine of promissory estoppel nor confer any rights and impose any duties on the parties. [*Kimti Lal Hahi v. Union of India*, A 1993 Del 211, 217]. In Anson's Law of Contract, 25th Edn page 114 it has been stated that for an estoppel to arise, the promise must be clear and unequivocal and no estoppel can arise if the language of the promise is indefinite or imprecise. If the changed situation is brought about on the mere whim of the officer on some undefined and undisclosed grounds of necessity, the party falling back can be bound by promissory estoppel. [*Rabishankar v. Orissa State Financial Corporation*, A 1992 Ori 93, 95].

Applicability of doctrine of promissory estoppel against Government.—The doctrine of promissory estoppel has also been applied against the Government and defence based on executive necessity has been categorically negatived. Where the Government makes a promise knowing or intending that it would be acted upon by the promisee and, in fact, the promisee acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promise, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Art 299 of the Constitution. But since the doctrine of promissory estoppel is an equitable doctrine, it

must yield when the equity so requires. [*Intrans Systems Pvt. Ltd. v. State of Kerala*, A 1996 Ker 161, 164].

If it can be shown by the Government that having regard to the facts as they have subsequently transpired, 'it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it, as the public interest would be prejudiced if the Government were required to carry out the promise and the Court would have to balance the public interest in the Government carrying out the promise made to a citizen. At the same time the Government cannot claim to be exempt from the liability to carry out the promise on some indefinite and undisclosed ground of necessity or expediency, nor can the Government claim to be the sole Judge of its liability and repudiate it on an *ex parte* appraisal of the circumstances. In this context a mere claim of change of policy would not be sufficient to exonerate the Government from the liability. The Court would not act on the mere *ipse dixit* of the Government. Where the Government owes a duty to the public to act in a particular manner, a duty meaning a course of conduct enjoined by law, the doctrine cannot be invoked for preventing the Government from acting in discharge of duty under the law and as such the doctrine cannot be applied to compel anyone to do an act prohibited by law. Legislature cannot be precluded from exercise of legislative functions by a resort to the doctrine. The Government like any other individual is bound by its promises knowing the intent that it would be acted upon by the promisee. [*Steel Brackers v. M S T C*, A 1992 Cal 86, 91]. Principle of promissory estoppel is applicable to the Government in exercise of its executive functions. Government cannot invoke defence of executive necessity or freedom of future executive action. [See also *Jeet Ram v. State of Haryana*, A 1980 SC 1285; *Union of India v. Godfrey Philips India Ltd.*, A 1986 SC 806; *Motilal Sugar Mills v. State of U P*, A 1979 SC 621. *K M L Narasimhan, Larson and Toubro, Ltd. v. Union of India*, A 1994 Mad 83, 92].

A writ may issue to enforce the promise made by the State relying on which the petitioner has altered his position to his prejudice [*Shakti Tubes Ltd. v. State of Bihar*, A 1994 Pat 162, 166]. Food Corporation of India being a statutory corporation cannot be allowed to resile from its promise so as to cause harm or injury to others [*Food Corporation of India v. Babulal Agarwal*, A 1998 Mad 23]. Where no promise was held out by the Govt. the principle of promissory estoppel would not be attracted [*Becharbhai v. State of Gujarat*, A 1988 Guj 1]. The principle of promissory estoppel is equally attracted to the Government and its instrumentalities who are no longer immune from its applicability and the state agencies have to work within the framework of the legal system [*National Engineering Industries Ltd. v. State of Rajasthan*, A 1998 Raj 229].

Change in Govt. Policy.—Where public interest warrants, the principles of promissory estoppel cannot be invoked. [*National Oxygen Ltd. v. T.N. Electricity Board*, A 1996 Mad 229, 236]. Government can change policy in public interest [*STO v. Shree Durga Oil Mills*, A 1998 SC 591]. Where as an incentive, additional import licence was granted against "admissible exports" The words "admissible exports" being meant only exports which were admissible as per the policy in force during the period when the exports were made—the doctrine of equitable estoppel would apply unless a change in the policy was clearly intended in public interest, the burden of establishing which lay heavily on the authorities concerned. [*Sanjaya Sales Corpn. v. National Mineral Development Corpn. Ltd.*, A 1993 AP 62, 74, 75]. Since the export and import policy issued under section 3 of the Imports and Exports Act has to be taken as a legislative action, the new policy issued in exercise of the power under Section 3 of that Act, whether such policy is considered as a governmental action taken in exercise of the statutory power, or as subordinate or

legislation, the doctrine of promissory estoppel can be applied against the enforce-ment of the new policy on the facts and circumstances of a given case. [*Rizwan International v. Union of India*, A 1993 Mad 336, 342]. Where on the basis of export and import policy announced for musical instruments the exporter incurred heavy loan and the musical instruments were made ready for export, subsequent change in government policy is not permissible [*Rizwan International v. Union of India*, 1994 Mad 112, 118]. Where the petitioner had paid full price of the plot and a plot had been earmarked in his favour the Government was bound to issue letter of allotment to the petitioner. Allotment cannot be refused on the plea of subsequent change of policy. [*Anokh Singh v. State of Punjab*, A 1994 P&H 157].

No Promissory estoppel against law.—Taking cue of this doctrine the authority cannot be compelled to do something which is not allowed by law or prohibited by law [*Management of Bajrangpur Tea Estate v. State of Assam*, 1998 AIHC 178, 180 (Gau)]. There is no promissory estoppel against the settled proposition of law. The proposition of promissory estoppel shall not bind other person or saddle liability on other persons because statement of a third person. *Doctor and Company Ltd. v. B S Mills Ltd.*, A 1995 All 19, 20. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law [*Ashok Kumar Maheshwari v. State of U.P.*, A 1998 SC 966 : *S. Shashidhara Rao v. Dr. Ambedkar Institute of Technology*, A 1998 Kant 294, 296]. None can be compelled to act against the statute, the Govt or the public authority cannot be compelled to make a provision which is contrary to law [*Anop Singh v. Maharshi Dayanand Saraswati University*, A 1998 Raj 54].

Promissory estoppel not applicable against Legislature.—The principle of promissory estoppel cannot be applied against the legislature when it exercises the legislative power, nor can it be used to compel the Government or public authority to carry out its promise, which in contrary to law or which is outside its power. [*Ram Nath Sahu v. Union of India*, A 1996 All 19]. See also *Motilal Padampat Sugar Mills case*, A 1979 SC 621 : 1979 All LJ 368. There can be no promissory estoppel against any legislation. [*Vidharba Veneer Industries Ltd. v. State of Maharashtra*, A 1994 Bom 155, 159].

Criminal cases.—Doctrine of promissory estoppel does not apply to criminal cases [*State of Maharashtra v. Jethmal Himatmal Jain*, 1994 Cri LJ 2613, 2627 (Bom)].

—New Estoppel in Regard to Representation as to the Future.—Plaintiff granted to the defendants the sole right of exploiting his invention concerning gas lighters in return for royalties. Plaintiff retained the right to determine the agreement and to exploit his inventions elsewhere if the royalties did not realise more than £2000 a year. After a few years defendants' statement showed a sum of over £7000 as royalties due to the plaintiff, but they repudiated their liability to pay it on the ground (among others) that their lighters and refills did not embody—the plaintiff's inventions—*Held* that the defendants were estopped from denying that the lighters embodied plaintiff's inventions because they had by their conduct represented so and they intended the plaintiff to act on the representation which he did to his detriment since he refrained from ending the agreement and exploiting his invention elsewhere. DENNING LJ, called it a new estoppel affecting legal relations. An estoppel in common law is strictly confined to an existing fact, but the defendants by their conduct gave an assurance that the lighters embodied plaintiff's invention and that they were liable to pay royalties thereon. This new estoppel therefore applied to representation as to the future [*Lyle-Mellor v. A Lewis & Co Ltd*, 1956, 1 All ER 247: 1956, 1 WLR 29]. See also *Central London Property Trust v. High Trees House*, 1947 KB 130, 134: 1956, 1 All ER 256, 258; *Tool Metal Manfg Co Ltd v. Tungsten E*

Co Ltd, 1954 2 All ER 28; *Tool Metal Manfg Co Ld v. Tungsten E Co Ld*, 1955, 2 All ER 657]. When a person requested the State to withdraw the appeal and it was withdrawn and no assurance by words or conduct can be said to have been given by the State that no legal action would be taken to recover the amount from him. In such a case the principle of promissory estoppel cannot be applied [*P C Wadhwa v. State of Punjab*, A 1987 P&H 117, 122].

Promissory estoppel [An equitable doctrine].—Being an equitable doctrine, the doctrine must yield when equity so require. If the authority can show from the facts and circumstances that it would be inequitable to hold the Govt. by its promises the court would not raise equity in favour of promisee. Secondly the court, also would not enforce the promisee if the public interest suffers in fulfilling the promise made by the Govt. It is only when the court is satisfied that the overriding public interest requires that the authorities should not be bound by the promise and that the authority should be freed from it that the court would refuse to enforce the promise. [*Sanjiv Textiles Pvt.Ltd. v. State Bank of India*, A 1993 Guj 132, 140]. The doctrine of promissory estoppel must yield if it is shown that equity demands otherwise. [*K M L Narasimhan Larsen and Toubro, Ltd. v. Union of India*, A 1994 Mad 83, 92]. Where admission of the father clearly showed that there was some arrangement between him and his daughter's father-in-law for the benefit of the daughter pursuant to which her marriage had taken place, it was found to be a fit case for invoking the Supreme Court's power under Article 142 of the Constitution for giving equitable relief to the said daughter (plaintiff), on ground of promissory estoppel, equity and fair play. [*N A Mohammod Kasim v. Sulochana*, A 1995 SC 1624, 1627]. Rule of promissory estoppel can be moulded by courts making it suitable to the facts and circumstances of the case [*Kalu Chand v. State*, A 1998 Raj 33].

Concession made by Advocate General.—It is true that a concession made by a counsel on a point of law does not bind the client and the client is not estopped from contending otherwise. Where however a concession was made by the Advocate General on behalf of the Govt. in previous writ petition that a GO had been superseded by another GO, it was on a mixed question of law and fact and not on a pure question of law, the representation made by the Advocate General was only pursuant to the instructions obtained from the concerned authorities of the State Govt. and did not go against any provision of law. The resultant judgment of the court remained unchallenged and the authorities concerned acted in accordance with the judgment for at least two years after it was rendered. At a later stage, in the course of subsequent litigation, it was not open to the respondent authorities to take a somersault and contend that the concession of the Advocate General was of no consequence and could simply be ignored. [*Amali English Medium H. School v. Govt. of A P*, A 1993 AP 338, 349, 350].

Promissory estoppel [Statutory Bar].—Where the legislature enacted A P Interest Free Sales Tax Loan for Industries (Imposition of Ceiling) Act 20 of 1987 giving retrospectivity whereunder a ceiling was imposed on the maximum Interest Free Sales Tax Loan that can be granted, the principle of promissory estoppel cannot be invoked in the face of the statutory bar to compelling the Govt. to act contrary to the provisions of the said Act, [*Sree Rayalaseema Alkalies & Allied Chemicals, Ltd. v. Govt. of A P*, A 1993 A P 278, 289].

—Promissory Estoppel. [Its Effect on Contract].—(See also the heading immediately above). Rule of estoppel has gained new dimensions in recent years. A new class of estoppel, *ie*, 'promissory estoppel' has come to be recognised by the courts is India as well as in England' the full implication of promissory estoppel is

yet to be spelled out [*Turner Morrison v. Hungerford &c*, A 1972 SC 1311]. This doctrine has been variously called 'Promissory estoppel', 'equitable estoppel', '*quasi* estoppel" and 'new estoppel'. It is a principle evolved by equity to avoid injustice and though commonly named 'promissory estoppel', it is, neither in the realm of contract nor in the realm of estoppel. The true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not. It is an equitable principle evolved by the courts for doing justice and in India not only has the doctrine of promissory estoppel been adopted in its fullness but it has been recognised as affording a cause of action. It has also been applied against the Govt and the defence based on executive necessity has been negatived. But since the doctrine is an equitable doctrine if the Govt is able to show that in view of the facts which have subsequently transpired public interest would be prejudiced the court could have to balance the public interest in the Govt in carrying out the promise made to a citizen which has induced him to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out and determine which way the equity lies. It is only if the court is satisfied, on proper and adequate material placed by the Govt, that overriding public interest requires that the Govt should not be held bound by the promise, that the court would refuse to enforce the promise. But even where there is no such overriding public interest, it may still be competent to the Govt to resile from the promise "on giving reasonable notice, which need not be formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore *status quo ante*, and if the promisee cannot resume his position, the promise would become final and irrevocable. It may also be noted that promissory estoppel cannot be invoked to compel the Govt or even a private citizen to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative power [*Motilal Padampat &c v. S*, A 1979 SC 621 (All English and Indian cases discussed in details; *Central London Property Trust v. High Trees House*, 1956 1 All ER 256 and *Union v. Anglo-Afgan Agencies*, A 1968 SC 716 **rel** on)].

The Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it [*Union of Anglo-Afghan Agencies*, A 1968 SC 718, 728]. This doctrine has no application when the State is acting in its public, Governmental or sovereign capacity except when it is necessary to prevent fraud or mainfest injustice [*Malhotra & Sons v. Union*, A 1976 J&K 41]. The Central Government and the State Government had promised to grant subsidy to the extent of 25% on investment in goods carriage. The petitioner purchased goods carriage in pursuance of that scheme for transport of its goods when it was in force. Withdrawal of such concession with retrospective effect is illegal [*Arya Durga Industries v. General Manager, District Industries*, A 1998 Ker 311, 312].

Its nature and scope has been summarised: (*1*) The modern doctrine of promissory estoppel has become the most powerful and flexible instrument in the realm of administrative law; (2) The Govt cannot claim immunity from its operation which is available both against the Govt and their delegates or agents; (*3*) Estoppel is founded on a representation as to an existing fact, promissory estoppel is founded on a representation with regard to an assurance as to future conduct. The latter enlarges the scope of the former and subsumes within its ambit not merely statements of fact but also promises as well; (*4*) Unlike its counterpart viewed merely as a rule of evidence, it will have the effect

evidence, it will have the effect of creating substantive rights against the representee thus being viewed as a rule or substantive law; (*5*) A representation of fact or intention on which the doctrine is founded if intended to be acted upon and acted upon becomes actionable. The claim for relief depends upon that representation, which constitutes the cause of action; (*6*) The representation, be it of promise, or intention or future conduct, on which this doctrine is founded is susceptible of gen-erating enforceable promises and binding contractual obligations even where there is no consideration; (*7*) The doctrine clothes the representee with the needed interest to maintain an application under art 226 of the Constn; (*8*) The representation sought to be enforced must be clear, unequivocal, unambiguous and sufficient to found the doctrine [*Boda Subramanyam v. S*, A 1975 AP 126]. The principle of promissory estoppel can be used as a weapon of offence as well as shield of defence [*R.K. Kawatra v. D.S.I.D.C.*, A 1992 Del 28, 41].

Where the plaintiff's property was requisitioned under the D I Rules, but on the promise of the plaintiff not to demand any compensation if it is released and handed over to him and the Government upon that promise derequisitioned the property, the plaintiff is estopped from claiming compensation [*Sat Narain v. Union*, A 1961 Pu 314]. Land was allotted to a Housing Society and they were directed to deposit the price. They did not deposit, so there is no agreement or concluded contract between the Society and the Government. As such the principle of promissory estoppel cannot be invoked to challenge the action of the Government using the land for some other purpose. [*Postal Co-operative Housing Construction Society Ltd v. Secretary to Govt of Bihar, Patna*, A 1984 Pat 133, 139: 1984 Pat LJR 1]. When a layout plan was prepared two plots were marked as reserved for a school and community centre. Later they were given for setting up church and convent, and Shri Radhaswami Satsang Bhawan which are religions institutions. In such circumstances since the Director of Housing and Urban Development has power to decide user of the sites the rule of promissory estoppel would not apply [*S Sukhden Singh Gill v. State of Punjab*, A 1986 P&H 167, 172: 1986 Pun LJ 126]. When the Government acquired a land for a Developing-Authority, the resolution of that authority denotifying the land is void and the resolution does not attract the principle of promissory estoppel [*B Venkataswamy Reddy v. State of Karnataka*, A 1989 NOC 100 (Kant)]. An allotment of land to a person migrated from Pakistan was cancelled by the Rehabilitation Authorities. Later that person took the land in lease and was paying the lease amount to the Authorities. In a subsequent auction of the same property that person was an unsuccessful bidder. Under such circumstances, he cannot question the auction and cannot contend that the successful bidder did not act in good faith [*Andhare Singh v. Union of India*, A 1984 P&H 51, 54].

The university was estopped from pleading non-compliance with the statutes when it had conferred degree upon the students. [*Shanti Chaturvedi v. Allahabad University*, A 1998 All 291, 295]. Where the petitioners participated in the proceeding after restoration of the revision and took chance of success they cannot be allowed to raise any objection to the jurisdiction. [*Chandrika Singh v. Addl Member, Board of Revenue*, A 1998 Pat 118, 122].

In respect of allotment of flats, the conditions of allotment permitted the authority to vary terms of allotment. In such a case, the allottee cannot question the authority from varying the terms of allotment [*Ajai Pal Singh v. Barcilly Development Authority*, A 1986 362, 365 (DB): (1986) 12 All LR 350]. If it is has never been represented to the petitioners that the land in question would be resumed or that they would not be evicted there is no question or any promissory estoppel [*Anchar Ali, v. State of Assam*, A 1989 Gau 12, 15]. When an earlier notification under S. 4 of the Land Acquisition Act was cancelled for some technical defect and there is no promise by the Government that particular land covered by the said notification will not be acquired, the principle of promissory estoppel does not apply and the Government is not estopped from issuing a fresh notification [*Pramodbhai Bhulabhai Desai v. Officer on Special Duty, No 2 (Land Acquisition) Ahmedabad*, A 1989 Guj 187, 199 (DB)]. In view of acquisition of a person's land, allotment of a plot in some

other development scheme was made and the person put up a building. Under such circumstances, this allotment cannot be subsequently cancelled for any reason on the principle of promissory estoppel [*Sh Subhash Chandra Goel v. The Secretary Delhi Development Authority Vikar Minar I P Estate, N. Delhi*, A 1985 Del 466, 468]. Under a Town Development Scheme plots were offerred to the public under a Map which showed certain plots as open plots. The authorities are not entitled to lease out such open plots on the principle of estoppel [*Kantilal v. Chairman Town Improvement Trust*, A 1986 MP 134, 138].

The state government which earlier promised to assignment of lands for the construction of Central Government employees, is barred on the principle of promissory estoppel from contending that they have to prefer the State Government employees for the assignment of the very same land [*Actonaties Employees Co-op Housing Society Ltd v. The Govt of A.P., Hyderabad*, A 1990 AP 331, 336]. A promise was held out by the Delhi Development Authority to Rose Educational Society, that the land will be allotted to them at a rate fixed on 'no profit no loss' basis, and the society paid the amount demanded and also incurred further expenditure is establishing educational institutions. The Authority is not entitled to claim higher value for the land allotted on the principle of promissory estoppel [*Rose Educational Scientific and Cultural Society (Regd) v. Union of India*, A 1990 Del, 75, 79]. When the allotment letters were issued to the Education Society for the construction of school buildings by the Delhi Development Authority within the authority given under the law and the societies changed their respective position after making payment and taking possession of their respective lands, there is no impediment in any way invoking the principle of promissory estoppel [*Delhi Development Authority v. Lala Amarnath Education And Human Society*, A 1991 Del 96, 101]. Both the Contracters and the Government understood a clause in an agreement as arbitration clause and the matter was referred to arbitration by the Superintending Engineer. In such a case the Government is not entitled to resile and direct the superintending engineer not to act as an arbitrator and terminate the proceedings [*State of Maharashtra v. Ranjet Construction*, A 1986 Bom 76, 81: 1986 Mah LJ 401].

Where a creditor accepts a smaller sum in full satisfaction of the debt he would not be estopped from suing for the balance when he had only agreed to that on being intimidated by the debtor. He would only be estopped from enforcing his rights when it would be inequitable for him to do so [*D & C Builders Ltd v. Rees*, 1965, 3 All ER 837 CA]. A representation that something will be done in the future may involve an existing intention to act in the manner represented. It may result in an enforceable agreement if another acts upon it. Even if it does not because of some statutory requirement as to the form the obligation may be enforced in appropriate cases in equity [*Century Spinning v. U Mun Council*, 1970, 1 SCC 582: A 1971 SC 1021]. A notification was issued by the Government changing the strength of country liquor so as to effect the existing licenses. The declaration of strength was made in exercise of the legislative function of the State Government. So the doctrine of promissory estoppel is inapplicable to it [*Jawahar Lal v. State of U P*, A 1981 All 292, 299 (FB)]. The completion of a contract work for the railways was delayed due to Railways. The contractor who made additional claim for damages due to rise in the cost occasioned by the Railways but later withdrew that claim when final payment was made. The final payment was only in discharge of contractual liability and that will not estop the contractor from urging that the claim for damages may be referred to arbitration [*S.C Konda Reddy v. Union of India*, A 1982 Kant 50, 53]. The Government which handed over Moti Sahai Bang Palace to Sardar Vallabhai Patel

Memorial Society cannot resile from its promise and get back possession of the property [*Sardar Vallabhai Patel Memorial Society v. State of Gujarat*, A 1984 NOC 16 (Guj)]. The Government passed an order directing the market committees not to collect the market fee from the traders. The market committee is estopped from collecting the market fee though the order was addressed only to the market committee and not to the traders. [*Bonthu Nagabhushanam & Co. v. Secretary Agricultural Market Committee, East Godavari District*, A 1984 NOC (AP) 312]. Assurance by the Government to withdraw all cases against the detetnue does not bar institution of new cases [*Mrs. Chong Tham Ongli Sabita Devi v. State of Manipur*, 1985 Cri LJ 693, 695: (1984)1 Gauh L R 115 (DB) (Gauh)].

Where an opportunity was given to the plaintiff to amend the plaint and plead that there was concluded contract at second meeting between the parties but the same was not accepted by the plaintiff's counsel, the plaintiff cannot be given any relief on the basis of such second agreement. [*Ganesh Shet v. C.S.G.K. Setty*, A 1998 SC 2216, 2219].

When a person under the impression and *bona fide* belief that the Commission, Tribal Area Development had already issued to him administrative as well as financial sanction for the projects undertaken by him and continued his activities, the Government is estopped from stopping the grants in the middle of the financial year [*Social Work & Research Centre Banswara v. State of Rajasthan*, A 1987 Raj 26, 32: 1986 Raj LW 179]. The grant of Sales Tax concessions to new industries cannot be withdrawn by the Government and the principle of promissary estoppel will come into operation unless the Government satisfies the Court about the reason for withdrawal of the concessions, that the concessions were being misused or undue advantage was being taken of the concessions. [*Asst Commissioner of Commercial Taxes, Dharwar v. Dharmendra Trading Co*, A 1988 SC 1247, 1249]. When permission under S. 27 of the Urban Land (Ceiling and Regulation) Act is granted to sell a property and the property is sold on the basis of such permission the innocent and *bona fide* purchaser could not be made to suffer for any lapse or negligence on the part of the competent authority [*Rama Debi v. Union of India*, A 1988 Cal 38, 44: (1987)1 Cal LJ 143].

The necessary fact to found any promissory estoppel, namely that in view of the various notifications of the Government of India, the Government was estopped from levying any export duty, on certain products, have to be put forward before the assessing or appellate authorities as otherwise such a plea cannot be allowed to be raised at a late stage before the Supreme Court [*Milak Brothers v. Union of India*, A 1990 SC 2256, 2260]. When the recognition granted to a travel Agent by the Passport office was cancelled and this cancellation order was subsequently withdrawn, the withdrawal does not mean that the recognition originally granted will not be disturbed even if a new policy is evolved by the Government of India since the withdrawal order does not spell out any such promise [*Admin A.D v. Union of India, New Delhi*, A 1990 Guj 167, 169]. Merely because an industry is allowed to be set up in the State by grant of an industrial licence and/or certain other concessions, it does not follow that it becomes entitled to a captive mine to cater to its needs [*Indian Metals & Ferro Alloys Ltd v. Union of India*, A 1991 SC 818, 853]. The letter from the Secretary Industries contained an assurance for refund of sales-tax in respect of new industries. This promise is opposed to public policy and so the principle of promissory estoppel is not applicable. [*Amrit Banaspati Co. Ltd v. State of Punjab*, A 1992 SC 1075, 1083. The Government was granting licences for liquor shops for period of years. Later it changed its policy and adopted a new policy of auction-*cum*-tender. When the change in policy is in the interest of public, it cannot be challenged on the ground of promissory estoppel [*Mohd Fida Arim v. State of Bihar*, A 1992 SC 1191, 1194]. The authority brought out a scheme for giving cash subsidy for setting up new industriues and for expansion of the same. A subsidy was given to a cooperative society for setting up an industry. The society spent more money and expanded the industry. The authority is estopped from refusing additional subsidy for

hions Ltd. v. Liverpool Victoria Co Ltd., (1981) 1 All ER 897 Ch D and *Old and Campbell Ltd. v. Liverpool Victoria Trustees Ltd.*, (1981) 1 All ER 897 Ch D].

Thus the doctrine of estoppel by acquiescence is not restricted to cases where the representor was aware both of what his legal rights were and that the representee was acting under the belief that those rights would not be enforced against him. Instead, the court is required to ascertain whether in the particular circumstances it would be unconscionable for the party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment. Accordingly, the principle can apply where, at the time when the representation was encouraged, both parties (and not just the representee) were acting under a mistake of law as to their rights. Whether the representor knew of the true position was merely one of the factors, relevant to determining whether it would be unconscionable for him to take advantage of the mistake. Thus estoppel would apply to a representor who gave the impression to the other party that the document executed by them had certain legal effects which in fact it did not have [*Amalgamated Investment & Property Co Ltd. v. Texas Commerce International Bank Ltd*, (1981) 1 All ER 923 QBD].

Buyer's representation not to exercise his right.—Where a buyer who had the right to reject goods or documents of title so conducted himself as to lead the seller reasonably to believe that he would not rely on that right, whether he knew of it or not, he cannot afterwards assert that right when it would be unjust or unfair to allow him to do so [*Cerealmangimi Spa v. Alfred C Toepfer, The Eurometal*, (1981) 3 All ER 533 QBD].

Guarantee based on convention, estoppel.—Where the conduct of the parties took place on the basis of a state of affairs, namely, that the guarantee given by the English company would cover repayment of the Nassan loan by the company's Bahamian subsidiary, which was agreed and assumed by both parties to be true and on the basis of which they had entered into the loan transaction and the guarantee, that gave rise to an estoppel by convention which estopped each party as against the other from questioning the truth of the facts assumed by them to be true. The English company was, therefore, estopped from denying that by the contract relating to the Nassan loan it had undertaken to repay the loan [*Amalgamated Investment and Property Co Ltd. v. Texas Commerce International Bank Ltd*, (1981) 3 All ER 577 CA].

Estoppel of landlord promising tenant to remain in house for life.—The assurances given by the landlords that the defendant could remain in the house for as long as she wished raised an equity in the defendant's favour. This would create a presumption that the defendant had acted on the faith of those assurances and also that she was not to be required to prove any detriment. The burden of proof would be on the plaintiffs to establish that the defendant had not acted to her detriment or her prejudice by remaining there [*Greasley v. Cooke*, (1980) 3 All ER 710 CA].

Estoppel on permitting sub-tenant.—There was a previous subsisting permission of competent authority for sub-letting. The tenant indicated at the time of allotment that his brother and brother's wife would be occupying the premises. This was accepted by the authority. It was held that the subsequent cancellation because of subtenancy and regularisation of the allotment in favour of the brother was illegal. *Dattaram S. Vichare v. Thukaram S. Vichare*, AIR 2000 SC 103.

Estoppel on representation that the house belonged to the woman with whom the representor lived.—The defendant and plaintiff were living as wife and husband in a house paid for by the man. The man left telling the woman that the house was hers. The gift was not completed. The woman spent her capital on maintenance and improvement. The man subsequently claimed possession and the woman resisted his claim by setting forth estoppel. The court had to see what was the minimum equity to do justice to her, having regard to the way in which she had changed her position for the worse with the acquiescence and encouragement of the plaintiff. In the

circumstances equity required the defendant to be granted a remedy assuring her security of tenure, quiet enjoyment and freedom of action in respect of repairs and improvements without interference from the plaintiff. The plaintiff would, therefore, be required to give effect to his promise and the defendant's expectations and to perfect the gift [*Pascoe v. Turner*, (1979) 2 All ER 945 CA].

Estoppel by affirmation of contract.—Where a party, by an unequivocal act or statement, demonstrates to the other that he still intends to proceed with the contract notwithstanding the defendant's breach, and if such conduct is adverse to the other or causes him to act to his detriment, the plaintiff would be deemed to have elected to affirm the contract, or, more strictly, would be estopped from denying that he had affirmed the contract. This statement of law occurs in *Peyman v. Lanjani*, (1984) 3 All ER 703 Ch D. The plaintiff here came to know that the lease-hold property which he purchased from the defendant was sold to him under a defective title but he was not aware of his right to rescind. He paid a part of price and took possession as the vendor's licencee, but subsequently he purported to rescind. He was allowed to do so. The plaintiff's action after he had learnt of the deception of the landlords by the impersonation could not be construed as an unequivocal representation to the defendant that he was affirming the contract, nor were they adverse to the adverse to the defendant, nor did the defendant act on them to his detriment. The defence of estoppel by conduct, therefore, failed. The court followed [*China National Foreign Trade Transportation City v. Evlogia Shipping Co SA of Panama*, (1979) 2 All ER 1044].

Promissory estoppel against educational institution.—The principles of legitimate expectation or promissory estoppel cannot be made applicable in strict sense to the academic courses particularly in the field of education [*Nupur v. Punjab University Chandigarh*, A 1996 P&H 132, 142]. When the respondents themselves had permitted the petitioner-candidate to pursue the course of Physical Training Instructor for full one year on the basis of his application form and the sport certi-ficate etc. accompanying the said application, it was the bounden duty of the respondents to have carefully secrutinised the said documents in the beginning at the tune of admission itself rather than punishing the petitioner for no fault of his, at a belated stage by cancelling his admission. [*Randhir Singh v. State*, A 1995 Raj 44, 46]. Where the petitioner was declared by the University to have passed in the examination and on that basis he applied to different institutions for job pursuant to which he received two call letters, the mere application for job cannot bring about change or alteration of the position of the petitioner and therefore, in case of subsequent cancellation of the results by the university, the principle of promissory estoppel is not attracted. [*Reeta v. Behrampur University*, A 1993 Ori 27, 30]. If the rule does not postulate such conversion a mere declaration by the college of its intention to convert Diploma Course into Degree Course would not bind the authorities concerned specially when no such document had been issued by any of the authorities prior to the publication of the advertisement in the brochure [*Varinder Singh v. State of Punjab*, 1998 AIHC 1109, 1123 (P&H)]. Where there was no representation on the part of the Govt. that grace marks would be taken into consi-deration for the purpose of admission to professional courses, a candidate cannot invoke the principle of promissory estoppel. [*S R BhupeshKar v. Secy. Selection Committee Sabarmathi, Hostel (FB)*, A 1995 Mad 383, 399]. Where a student was allotted seat in medical college due to mistake of the selection committee cancellation of admission four months after her joining the college is illegal. She could invoke the principle of equitable estoppel when based upon her admission she gave up her course of study in the Agricultural College. [*B. Jaya Lakshmi v. S.C. University of H S Vijayawada*, A 1994 A P 297, 300].

A student appeared in M.Sc. Part I and in one of the papers she secured lesser marks. She was allowed to appear in the improvement test in the said paper. Simultaneously she was permitted to join M.Sc. Part II and she appeared in M.Sc Part II examination

also. Her result could not be with held on the basis of resolution prohibiting the students from taking two exams in a year when such resolution was never communicated to the candidate [*Ruchira Chauhan v. Pehilkhand University Bareilly*, A 1996 All 12]. *K* was offered and accepted a place on an Arts course in a university for the academic year in 1966. She later applied to have the place offer deferred until the following year. An agent for the registrar acceded to the request but indicated that *K's* reasons would have to be set out in writing. Before this was done the registrar informed *K's* father that it was too late to consider deferral *K* failed to secure a place in the following year. *K* applied for judicial review to quash the registrar's decision to refuse to register her for the following academic year. It was held that the registrar was estopped from denying his grant of deferral, in that *K* did not exercise her immediate entitlement to a place in the following year because of the legitimate expectation created by the registrar that the offer of the place would be duly honoured [*Kenny v. Kelly*, (1988) JR 457]. A candidate who secures admission in the university by producing bogus marks card, cannot claim that because once the university has admitted the candidate, the admission should not be cancelled even when it has been established to the hist that the marks card was not a genuine one. [*P N Bhadra v. Registrar, University of Agri-Science, Bangalore*, A 1997 Kant 100, 105].

Though certain Rules for admission in educational institution were framed under Article 162 of the Constitution in exercise of the executive powers of the State and thus were not statutory rules, but such rules would be binding. It is well settled that when once the policy is known and acted upon, it canot be arbitrarily departed from without formulating other policy and making that policy known to the all concerned. Therefore, the Govt. is estopped from denying admission on the basis of a GO which was not in conformity with the said Rules. [*Rajkumar Gadpayle v. State*, A 1997 MP 85, 89]. Where the process of admission relied on by the petitioner was found illegal at its inception the plea based on equity or estoppel is not sustainable [*Lalitha E P v. State*, A 1996 Ker 133, 137]. A student who obtains admission to M B B S course on the basis of misrepresentation cannot be permitted to take advantage and plead estoppel against the authorities. [*Prabhjot Wahi v. Guru Nanak Dev University, Amritsar*, A 1995 P&H 269, 273].

Proprietary estoppel.—The principle of proprietary estoppel applies where the plaintiff, encouraged by the defendant, acts to his detriment in relation to his own land in the expectation of acquiring a right over the defendant's land. Accordingly, this principle was held to be not applicable where the plaintiffs had to their detriment spent money on their own land at the encouragement of the defendant council that their planning would be approved because they had not done so in the expectation of acquiring any rights in relation to the council's or any other person's land. In any event, an estoppel cannot be raised to prevent a statutory body exercising its statutory discretion or performing its statutory duty and, therefore, even if the council's officers while acting in the apparent scope of their authority had purported to determine the plaintiffs' planning applications in advance, that was not binding on the council. For an estoppel to arise in such circumstances there has to be some evidence, over and above the mere fact of the officer's position, on which the applicant is justified in thinking that the officer's statements would bind the council [*Western Fish Products Ltd. v. Penwith District Council*, 1981 2 All ER 204 CA].

Representation May Include Representation of Law.—A representation may be a representation of fact, although it involves and includes that which is also matter of law [*Algar v. Middlessex &c*, 1945, 2 All ER 243 DC at p 251; *Lyle Mellor v. A Lewis (W) Ld*, 1956, 1 All ER 247, 253 *per* HODSON LJ]..... While a true

statement of facts, accompanied by an erroneous inference of law, will not estop the person who made it from afterwards denying the correctness of that inference [*Morgan v. Couchman*, 1853, 14 CB 100], it has been held that representation as to the legal effect of a document will create an estoppel, if there is no qualification in the representation suggesting that the document, and not its effect as represented, is to govern the relationship of the parties [*Do Tchihatchef v. Salerni Coupling Ld*, 1932, 1 Ch 330, 342; *Sidney &c v. E Karmios &c*, 1956, 1 All ER 536, 539]. One who has by a fraudulent statement of the legal effect of an instrument obtained some advantage will not be allowed to retain it [*Hirschfeld v. L, B & S C Rail Co*, 1876, 2 QBD 1, 4, 5; *Molloy v. M R Life Ins Co*, 1906, 94 LT 756, 760 CA], although it would appear that a mere misrepresentation of a matter of legal inference from facts which are known to both parties is not a ground of estoppel [Hals 3rd ED Vol 15 para 425 p 225]. Before any promissory estoppel can be raised, there must be a promise or representation to act in a certain way [*Moti Ram v. New Delhi Municipal Committee*, A 1988 Del 57, 58 (DB)].

There can be no estoppel on a mixed question of law and fact [*S v. Bundi Electric Supply Co*, A 1970 Raj 36].

Admission On a Point of Law or in Ignorance of Legal Rights Creates No Estoppel.—Representation or admission on matters of law or in ignorance of legal rights cannot constitute any basis for estoppel [*Muthuswami v. Loganatha*, A 1935 M 404; *Nachiappa v. Muthu*, A 1946 M 398; *Munnia v. Manohar*, A 1941 O 429]. Any act done under a misapprehension of legal rights does not create an estoppel [*Shankar Lal v. Narendra*, A 1967 A 405]. When the facts are fully set out and admitted, a party's opinion as to the legal effect of those facts is of no consequence. No estoppel arises by such admission [*Kalidas v. S*, 1955 SCR 887: A 1955 SC 62]. A representation repudiating title by certain properties under the influence of an erroneous view of legal rights and legal effects of certain clause in a will cannot create an estoppel [*Sankaran v. Nangeeli*, A 1935 M 1062]. Where a person who is entitled to one-fourth share under the HIndu law is under wrong belief recognised as entitled to one-half share by another, the latter is not estopped from claiming his legal share subsequently [*Jagat v. Salik*, A 1938 O 110]. Estoppel refers to a belief in a fact and not in a porposition of law. A person cannot be estopped for a misrepresentation on a point of law. An admission on a point of law is not an admission of a "thing" so as to make the admission a matter of estoppel within the meaning of s 115 [*Jagwant v. Silan*, 21 A 285. See *Jatindra v. Ganendra*, 9 BLR 337 PC: 18 WR 357; *Gopee Lall v. Chandrabali*, 11 BLR 391: 19 WR 12; *Raj Narain v. Universal L A Co*, 7 C 549: 10 CLR 561; *Wungaria v. Nand Lal*, 3 ALJ 535; *Jairam v. Balkrishna*, 3 NLR 72; *Rajambal v. Shanmuga*, 1922 MWN 481: 70 IC 653; *Jugal v. Bhatu*, 2 P 720; *Bimala v. Deb*, A 1932 P 267; *Sumitramma v. Subbada*, A 1943 M 22; *Chinto v. Narinjan*, A 1957 Pu 317; *I T Officer v. Shambhoo Dayal & Co*, A 1968 A 203].

There can be no estoppel on a statement of law relating to the validity of nomination of a person as *chela* under a will [*Kartar v. Dayal*, 43 CWN 1037: A 1939 PC 201] or on a point of law going to the jurisdiction of a court [*Ram v. Imp Bank of India*, A 1928 L 802]. In a case it has been said that the grantor of a lease may possibly be estopped from questioning the permanent character of the lease by reason of misrepresentation even on a point of law which is not clear and free from doubt [*Narsingh v. Ramnarain*, 30 C 883]. There can be no estoppel in respect of transactions expressly declared void by Legislature [*Mir Md v. Khubomal*, 7 SLR 58 (28 B 399, 407 refd to]. The rule that estoppel by *res judicata* does not apply to questions of law, will not apply to decrees based on compromise [*Venkata v. Thatha*, 35 M 75]. See also *post*: "*No Estoppel Against Law or Statute*".

The law on the point is thus stated in Halsbury:—A representation may be representation of fact, although it involves and includes that which is also a matter of law. Thus the directors of a company, by drawing a bill in the company's name, may represent that there is a private Act of Parliament giving the company the requisite powers, or by issuing debentures that the company's powers are not exhausted. While a true statement of facts, accompanised by an erroneous inference of law, will not estop the person who made it from afterwards denying the correctness of that inference, it has been held that a representation as to the legal effect of a document will create an estoppel, if there is no qualification in the representation suggesting that the document, and not its effect as represented, is to govern the relationship of the parties. One who has by a fraudulent statement of the legal effect of an instrument obtained some advantage will not, be allowed to retain it, although it would appear that a mere representation of a matter of legal inference from facts which are known to both parties is not a ground of estoppel [Hals 3rd Ed Vol 15 para 425]. It has been pointed out before that there can be no estoppel when both parties are acquainted with the true fact (*ante*).

Under the Hindu law, simultaneous adoptions are invalid. *A* first adopted *B* and then *C*. On *A's* death *B* and *C* divided the property equally in a suit—*Held B* or his representatives are not estopped from denying the validity of the adoption of *C*. Opinion on the legal effect of an adoption is not a "thing" within s 115 [*Teckchand v. Gopal*, 46 PR 1912: 13 IC 482; *Govind v. Chandrabhaga*, 12 NLR 100; see also *Dharam v. Kalawati*, A 1928 A 459].

Where two persons, not eligible for marriage (*eg* Brahmin and Sudra) marry and live as husband and wife, the marriage not being valid in law cannot be supported by an estoppel [*Baikashi v. Jamnadas*, 14 Bom LR 547]. There can be no estoppel when a man misconceived the legal effect of an order which was of no legal force. Where a suit by next friend of minor was dismissed on the ground of abatement after the next friend's death, a second suit on the attainment of majority will lie [*Venkatateshwara v. Cherussri*, 27 MLJ 405]. Tenant not raising plea of want of notice under s 106 T P Act because of High Court decision that no such notice was necessary cannot raise the plea for the first time in revision after there had been a change in the law and say that the failure to plead was due to a misunderstanding of the position of law regarding the rights of parties [*Ramakrishnan v. Keral*, A 1971 SC 150]. Opinion of counsel or paras regards the provision of law under which an order passed should be deemed to have been made cannot be the basis of an estoppel [*Ashfaq v. Moharram*, A 1948 O 220]. A representation as to the allotment of a property in an unregistered partition does not create an estoppel, as the question of the effectiveness of the partition for want of registration is a question of law [*Nainsukhdas v. Gowardhandas*, A 1948 N 110]. The question of the proper construction to be placed on a deed is a question of law. There can be no estoppel by pleading of law as the other side must be presumed to know what the law is [*Abdul Qavi v. Mahbooz*, A 1931 O 133]. An action taken by the Government in land acquistion proceedings under a misapprehension of their legal rights cannot make the law one way or the other nor could it affect Government's title [*Secy of S v. Srinivasa*, 48 IA 56: 44 M 421: 25 CWN 818: A 1921 PC 1].

It is well established that a party is not bound by the lawyer's admission or erroneous statement on a question of law [see *Rameswar v. Khakan*, 11 CWN 341; *Krishnaji v. Rajmal*, 24 B 360; *All Bank v. P N Bank*, A 1939 L 303; *Shiv Singh v. S T A Tribunal*, A 1969 A 214, *State of Bihar v. Simranjit Singh Mann*, 1987 Cri LJ 999, 1002; 1987 Pat LJR (HC) 417 (Pat) (DB) and other cases cited under s 17: "*Effect of admission on a point of law*"]. The concession made by a counsel on a

pure question of law, will not estop him or his client from withdrawing from such concession at a later stage of the same proceedings or in an appeal or revision therefrom (*S v. Chikkavenkatappa*, A 1965 Mys 253). The concession made by the A.P.P on a point of law is not binding on the complainant [*Chief Wild Life Warden, A & N Island v. N.K. Joshi*, 1987 Cri LJ 1506, 1508 (Cal)]. It appears that it would create an estoppel if the other party has acted on that representation to his prejudice which cannot be compensated by costs [*Clarke Ltd v. Wilkinson*, (1965) 1 Ch 694, 703 *per* LORD DENNING MR; **folld** in *Abdul Hameed v. CIT*, A 1967 AP 211].

The question of valuation of a suit (under Or 21 r 63[2]) is a question of law and person who has acted on one basis is not precluded from maintaining the contrary in appeal [*Moolchand v. Ram*, 55 A 315]. So a person not pleading s 47 in a proceeding under Or 21 r 58 is not estopped from pleading it in a defence in suit under Or 21 r 63[1] [*Padam v. Sambhu*, A 1934 A 699].

A transfer which is void under the law cannot be validated by recourse to the doctrine of estoppel [*Sham Sundar v. Achankunnasar*, 25 IA 183: 2 CWN 729 O 21 A 71; *Janaki v. Narayanasami*, 43 IA 207: A 1916 PC 117: 39 M 634; *Harnath v. Indar*, 50 IA 69: A 1922 PC 403: 27 CWN 949: 45 A 179; *Ananda v. Gour*, 50 IA 239: A 1923 PC 189: 50 C 929; *Amrit v. Gaya*, 45 IA 25: A 1917 PC 179: 45 C 590: *Gur Narayan v. Sheo Lal*, 46 IA 1: A 1918 PC 140: 46 C 566; *Maroti v. Raywant*, A 1928 N 262].

Estoppel by Representation [Change of Position Brought About by it].—As already stated, the term 'representation' covers a "declaration, act or omission". It may be express or implied and may be made in any form (*ante*: "*Representation [Declaration, Act or Omission*"].

If the representation is like a promise and not with regard to the existence of a fact and nobody was misled by the representation or was induced to change his position by the representation, there is no question of estoppel. [*Givinda Nath Mukhrjee v. Soumen Mukherjee*, A 1988 Cal 375, 388 (DB). Estoppel can arise only if a party has altered his position on the faith of a representation or promise made by the other [*Mahindra & Mahindra v. Union*, A 1979 SC 798]. The main question in determining whether estoppel has been occasioned, is *whether the representation has caused the person to whom it has been made to act on the faith of it*. In other words estoppel can come into play when there has been a *change of position in consequence of the representation of conduct* of the other party.

S 115 implies that no declaration, act or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position and to do this he must both believe in the facts stated or suggested by it and must act upon such belief [*Jhinguri v. Durga*, 7 A 877; *Ameer Ali v. Syed Ali*, 5 WR 289; *Banee Pd v. Maun Singh*, 8 WR 67; *Venkatarama v. Angathayammal*, A 1933 M 471; *Fakir v. Ismail*, 14 L 218; *Md Mura v. Qasim*, A 1935 A 739; *Bennett Colemon & Co v. Punya Priya*, A 1970 SC 426]. To bring a case within s 115 the following findings are necessary: (*1*) That the plaintiff believed, that the judgment-debtor whose rights and interests were sold, was the owner of the whole 16 annas; (2) that acting upon that belief he purchased the property at the sale; (*3*) that belief, and the plaintiff's so acting upon that belief, were brought about by some declaration, act or omission on the part of the defendant which declaration, act or omission was intentionally made in order to produce the result [*Solomon v. Ramlal*, 7 CIR 481; see *ante*: "*Things*

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2. See now Or 21, r 58.

necessary to bring a case within the section"]. Unless the act which the plaintiff did to his own prejudice is referable to the defendant's representation, no estoppel arises [*Hurst v. Khandelwal*, 61 C 64; *Sankaran v. Nangeeli*, A 1935 M 1062]. Where a person makes a certain representation as regards his title, to certain property, he is not estopped from showing that the representation was due to mistake, till the other party establishes that he acted upon such representation and changed his position to his prejudice [*Thakur v. Jaikishen*, A 1938 L 448: 40 PLR 763]. Estoppel can only arise when the opposite party changes his position on the representation of another party [*Humayun Properties v. Ferrazzinis*, A 1963 C 473]. The plaintiff filed a suit against the Government and valued the suit at Rs. 188/- being ten times the annual land revenue & paid court fees. The Union of India represented that the value of the property is Rs. 20/- lakhs. The plaintiff accepted this and paid the court-fee on this valuation. The Government is estopped from contending at a later point of time that the value was not that much or that the property is not a valuable property. [*Abdul Wahid v. Union of India*, A 1982 Delhi 290, 296]. The Government extended the lease of fishing right granted to a society and acting on that, the society deposited the revenue and incurred expenditure in making fishing arrangements. The Government cannot resile from its order granting extension of lease on the principle of promissory estoppel [*Ikop Laidakal Fishing Cooperative Society Ltd. v. State of Manipur*, A 1982 Gau 14, 17]. The petitioners have shown that they have spent nearly Rs. 43,00,000/- in the setting up of the cotton delinting plant after Feb, 1978, relying on the schemes set out in the two notifications of Dec, 22, 1977, it is now not permissible to the State authorities to back out of the schemes and to say that the petitioners will not be entitled to the benefits of the schemes set out in the said two resolutions under which they are eligible to obtain the benefits. [*Kothari Oil Products Co. Rajkot v. Govt. of Gujarat*, A 1982 Guj 107, 111].

A person was appointed Vice Chancellor of a University with a promise that the appointment will be extended for another term also. On that promise that person resigned his seat in the State Legislative Assembly. The University chancellor is estopped from refusing to extend the term of the Vice Chancellor. [*Hardwari Lal Rohtak v. G.D. Tapase Chandigarh*, A 1982 Punj 439, 455 (FB)]. The long silence and/or inaction on the part of the licensing authority to take steps for the cancellation of the licence creates an estoppel against the licensing authority when the party not only altered its position to its prejudice and such an inaction had encouraged the party to make such importation after spending huge sums of money. [*Chemi Colour Agency v. Chief Controllr of Imports & Exports*, A 1985 Cal 358, 362: (1985) (2) Cal H N 122]. The sugar industry was promised that the new licensing policy will ensure greater freedom and opportunity for entrepreneurs. There was a delay in granting the registration. To permit the Government after such an inordinate and unexplained delay, to withdraw registration on the ground that the policy was rescinded would be contrary to equity and law. [*Dhanour Sugar Mills Ltd v. Union of India*, A 1985 Delhi 344, 348].

The express newspapers (Pvt) Ltd acted upon the grant of permission by the then minister for Works and Housing and constructed the New Express Building with an increased FAR of 360 and a double basement in conformity with the permission granted by the lessor *ie* the Union of India. The lessor is clearly precluded from contending that the order of the Minister was illegal, improper or invalid by application of the doctrine of promissory estoppel. [*Express New Papers Pvt Ltd. v. Union of India*, A 1986 SC 872, 946: (1986) 1 SCC 133]. The State Government gave exemption from levy of octroi on plant and machinery for setting up new industrial units for a period of 5 years. The subsequent revision of the policy denying the exemption to a certain unit is

hit by the principle of promissory estoppel [*Jaganath Roller v. State of Orissa*, A 1986 Ori 163, 168 :(1986) 61 Cut LT 369]. If the Government grants exemption to a new industry and if on the basis of the representation made by the Government an industry is established in order to avail the benefit of exemption, it may then follow that the new industry can legitimately raise a grievance that the exemption could not be withdrawn except by means of legislation having regard to the fact that promissory Estoppel cannot be claimed against a statute. [*Shri Bakul Oil Industries v. State of Gujarat*, A 1987 SC 142, 147: 1986 JT 801].

When a Housing Society got a licence and permission was granted for establishment of a colony and the society incurred huge expenditure in establishing the colony and a period of two years passed, the collector is estopped from taking steps to cancel the licence. [*Janki Grah Nirman Co-operative Housing Society Jabalput v. Collector Jabalpur*, A 1987 MP 271, 273 (DB)]. An incentive scheme was declared by the Government in 1975 in respect of sugar production as applicable to those units completing licensed expansion programme during the period 1-11-75 to 31-10-80. Merely because a company started the expansion programme even before the announcement of the incentive scheme does not mean that the company is not entitled to the benefits of that scheme. [*Tungbhadra Sugar Works (P) Ltd v. Union of India*, A 1989 NOC 35 (Del) : (1988) 1 Comp LJ 143(DB)]. When a person is granted a licence to start a saw mill and that person invests huge sum of money for that business, the Government cannot cancel the licence on any policy not to grant new licences which policy decision was taken after the above said issue of licence. [*Joyjit Das v. State*, A 1990 Gau 24, 26].

When a person has acted upon the earlier circulars, issued by the Union of India, assuring cash assistance in respect of their items of export to the authorised countries and particularly when they have already concluded their contractual obligations to the foreign buyers at a reduced price the Union of India cannot take a unilateral action by issuing a circular restrospectively denying the cash benefit on the principle of promissory estoppel. [*Garments International Pvt Ltd. v. Union of India*, A 1991 Kant 52, 55]. When in pursuance of a notification granting certain concessions in excise, a company took all necessary steps to expand its unit in production of tyres by getting letter of indent as well as sanction of loan, that notification cannot be cancelled merely stating that same industrialists were taking undue advantage of this concession and the principle of promissory estoppel is applicable to such a case. [*Union of India v. JK Industries Ltd.*,A 1991 Raj 45, 54, 55, 56]. Where in lieu of assessment of property tax, a person agreed to pay Rs 5 lacs per year and also Rs 3 lacs as development charges and he thereby altered his position, the Development Authority is estopped from levying property tax. [*Bhilai Steel Plant v. Special Area Development Authority*, A 1991 M.P, 332, 340]. The council of Ministers of the State of Bihar in its decision took a decision that no levy shall be charged on rice and paddy which is imported from other states. This was published in the daily newspaper. On this assurance, the dealers imported rice from other States and they were required to pay levy in view of a later order. There is no estoppel since the statements made by the Minister, either in the meeting or otherwise, cannot be said to be the statement of the State Government, so as to be binding on it. [*Sah Mahadeo Lal Mohallal v. State of Bihar*, A 1982 Pat 158, 162].

When some representations are made by the State Government that unless a manufacturing unit complied with the conditions specified in the scheme, it would not be entitled to certain exemptions or certain benefits, the manufacturing unit or a person interested is entitled to take these premises and representations at their face value and act upon it. If a person acting on the representations made in the

scheme incur expenditure, set up a manufacturing unit in the hope that the State Government will abide by its word and act according to its representations, the State Government cannot be compelled to abide by the representations made by it. [*Tapti Oil Industries v. State of Maharashtra*, A 1984 Bom 161, 171 (FB) (1983 Mah LR (Bom) 305, **Overruled**). The Government agreed to make available the power at concessional rates for industries newly established in the State. The period for which the concessional rate was agreed has expired. The supply was there given to the H T Consumers in terms of agreements binding them to pay such tariffs, as may be determined by the Board from time to time. In such circumstances, the principle of promissory estoppel could not at all be invoked against the Board. [*Nava Bharat Ferro Allyos Ltd Hyd v. A P State Electricity Board Hyd*, A 1985 AP 299, 320 (DB). A cement permit was earlier granted. But due to change in the policy of the Government cement was not supplied. This cannot be challenged on the principle of promissory estoppel since there is no question of estoppel against statutory orders issued by competent authorities having the force of law. [*Jacab Philip v. Union of India*, A 1985 Ker 255, 259: 1985 Ker LT 244].

Where after issue of a notification granting tax exemption for Small Scale Industries, certain industries are started, they can put forward the plea of estoppel when these tax exemptions are proposed to be curtailed by a subsequent notification. [*Pournami Oil Mills v. State of Kerala*, A 1987 SC 590, 593: 1986 JT 1112]. Where a Government or a Governmental agency makes a promise knowing or intending that it would be acted upon by the promise and if the promiser acting in accordance therewith and thereby alters his position, the Government of the Governmental agency would be held to be bound by the promise and the promise would be enforceable against the Government or the Governmental agency at the instance of the promisee, notwithstanding that there is no consideration for the promise or that the promise has not been reduced to writing in the form of a contract [*Surendra Prasad Misra v. Oil and Natural Gas Commission*, A 1987 Cal 1, 7: (1986) W Cal HN 210].

In the case of auction of forest coupes, after acceptance and ratification of the bids by the State Government, agreements were to be executed both by the State Governments and the successful bidders. Until that is done, the successful bidders could not be said to have altered their position to their prejudice and so the doctrine or promissory estoppel cannot be pleased against the State Government. [*Adinarayan Naik v. State of Orissa*, A 1987 Orissa 115, 118 (DB): (1987) 63 Cut LT 339]. The district industries centre granted a provisional certificate to a person to start a factory for manufacture of Hydrated and burnt lime and granted lease of land also. Since the District Industries centre is only a subordinate agent of the State and could not have granted the licence against the Direction of the Divisional Commissioner, the refusal of no objection certificate was proper there is no question of promissory estoppel. [*Chhatisgarh Hydrade Lime Industries, Bilaspur v. Special Area Development Authority, Bilaspur*, A 1989 M.P 82, 90: 1989 M P L J 63]. If the decision to start a caustic soda unit was taken and the required licences have been secured very much earlier to the so-called representation to give exemption from or waiver of the metropolitan levy, there is no promissory estoppel, [*S. Ramabhadran v. State of Tamil Nadu*, A 1991 Mad 371, 382]. Where a person in her application for letters of administration of a will alleged that certain property belonged to the testator, she could be estopped from subsequently showing that the testator was not the owner only if it was established she intentionally caused or permitted the opposite party to believe that thing to be true and to act on that behalf. When the other party had not acted on the basis of that statement, no estoppel could arise [*Hem Nalani v. Sarojbashini*, A 1962 SC 471].

It is by no means necessary that the intention of the persons whose declaration, act or omission has induced another to act or to abstain from acting, *should have been fraudulent* or that he should not have been under a mistake or misapprehension. The determining element is the *effect* of the representation. What the law mainly regards is position of the person who was induced to act. The facts of the case were: A widow had held *benami*, for her husband during his life, property as to which he had executed a *hibanama* in her favour. After his death she mortgaged the property, her son representing her in the transaction. After her death, in a suit between rival purchasers of part of the property comprised in the *hibanama*, and in the mortgage, the plaintiff derived his title from the son having purchased his inherited share of the estate, while the defendants relied on a purchase at a sale in execution of a decree obtained by the mortgagee—*held* that s 115 was applicable. The son had represented that the *hiba* gave a right to the mother to mortgage. His acts amounted to a distinct declaration to the lender that the *hiba* in favour of his mother was a valid deed and consequently neither he nor his representative in estates could be allowed to deny the truth of what was intentionally represented, believed and acted on, and which also had been acted on by the morgagee, and it made no difference that the son had not had a fraudulent intention. As a result of the estoppel upon the son, any purchaser of the morgagee's interest, at a sale regularly carried out, would have acquired a valid title, although such purchaser might have been fully aware of all the circumstaces [*Sarat Ch v. Gopal Ch*, 19 IA 203: 20 C 296]. This case contains a lucid exposition of estoppel by representation.

In the course of the judgement the Judicial Committee observed:—

> "The section (115) of the Evidence Act by which the question must be determined, does not make it a condition of estoppel that the person, who by his declaration or act has induced the belief on which another has acted, was either committing or seeking to commit a fraud or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The court is not warranted or entitled to add any such qualifying condition to the language of the Act; but even if they had the power of thus virtually interpolating words in the statute which are not to be found there, their lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this.....
>
> The law of this country gives no countenance to the doctine ..... as it was intended that he should do (quoted *ante* p 1040)..... There is no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention, to be found either in the case just referred to (*Cairncross v. Lorimer, sup*), or in the leading authorities of *Pickard v. Sears; Freeman v. Cooke, and Cornish v. Abington*", (*Sup*).

These principles were restated and applied in various cases [see *Helan Dasi v. Durga Das*, 4 CLJ 323; *Swaranamoyee v. Probodh*, 36 CWN 758]. To create an estoppel it is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendatns had acted. It must be found that the plaintiff would not have acted as he did. It must be found that the defendants by the "declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief" [*Narsingdas v. Rahimanbhai*, 28 B 440: 6 Bom LR 440]. Where at the time of sale of property the vendee took a letter from the minor stating the necessity of the sale, the minor in a suit for possession of the property is not estopped from denying the

existence of necessity, as he did not cause the belief that necessity existed [*Sitaram v. Mulchand*, A 1929 N 221].

N M Co issued to the ***London Co*** seven marine insurance policies upon each of which a claim arose. In winding up *N M Co* a small dividend was paid thereon. Upon top of each policy was an indorsement printed in red that "the due fulfilment of the liabilities under this policy is guaranteed by the *N B Co*". There was no evidence of any guarantee of any policies of *N M Co* having been given by *N B Co*. But the *N B Co held a large majority of shares in N M Co* and both had the same chairman, managing director and the same underwriter—*held*, *N B Co* was estopped from asserting that the liabilities were not in fact guaranteed by it [*In re National Benefit Ass Co Ltd*, 1932 2 Ch 184: 101 LJ Ch 339 (*Greenwood v. Martin's Bank*, 45 TLR 607 **applied**)].

A tenant holding over after the expiry of a lease got a month's notice from the plaintiff to quit and wrote saying that plaintiff's "position was also that of a monthly tenant". In the suit that followed, defendant pleaded that he was entitled to six months notice under s 106 T P Act—*Held* that he was not estopped as: (*i*) both parties knew that the lease was for manufacturing purposes and (*ii*) it cannot be said that plaintiffs "acted upon the belief" in consequence of the letter. Mere filing of a suit does not alter their position [*Vack v. Co v. Joosab*, 48 B 38: 25 Bom LR 1170: 82 IC 791]. Plaintiff gave a lease expressly giving the defendants the status of a *raiyat*. In a suit by the plaintiff on the ground that defendants are under-raiyats, the doctrine of estoppel applied [*Iswar v. Gour*, 39 CLJ 337:82 IC 90; *Dhanu v. Sono*, 15 P 589]. When the lease purporting to be of a permanent character, is granted by a person who, on the face of the document confesses to have a higher status than that of a raiyat, the grantee may invoke the doctrine of estoppel when his title as permanent lessee is challenged by the lessor [*Chandra v. Amjad*, 48 C 783 FB: 25 CWN 4; *Jogendra v. Monmohini*, A 1928 C 156].

In order that a tenant may raise the plea of estoppel as against the landlord it must be a case consistent with the document under which the tenancy was created [*Sarada v. Rajani*, 37 CWN 643]. If in a suit for eviction a mortgagor-lessee asserted that the lease was part of the mortgage transaction executed simultaneously he could not later contend that the morgagee-lessor would have to bring a separate suit for rent and could not claim interest on the principal sum due under the mortgage [*Puttananjamma v. Channabasavanna*, A 1067 Mys 41]. Under S. 21 of the Delhi Rent Control Act (58 of 1959) a statement is made by the landlord that he does not require the premises and the tenants agree to it. In such a case there is a presumption of the regularity of the proceedings in the absence of fraud or collusion. [*Inder Mohan Lal v. Ramesh Khanna*, A 1987 SC 1986, 1991 :(1987) 2 Rent CR 238]. Merely because the retired government employee who is a landlord of a special category did not file an eviction application under S 23-I M.P Accommodation Control Act immediatlely after retirement, does not estop him from filing the application after some delay. [*Kailash Narayan Deewan v. Baboolal Sursh Chand*, A 1990 Madh Pra 262, 268].

The landlord having taken recourse to invalidate the leases on the ground that they are contrary to the Fragmentation Act, could not be allowed to turn round and say that the leases were not invalid and so the notice of the tenant was not proper. [*Pundalik Vishram Patil v. Bandu Chintaman Sonar*, A 1991 SC 486, 487]. When a ground of eviction is created in public interest, there is no estoppel against statute. But when the ground is created for the benefit of landlord so that premises which are not occupied by tenant for six months immediately before the filing of the application a right accrues to the landlord to claim eviction but where the landlord

himself creates the situation which forces the tenant not to live in the disputed premises for particular length of time such a landlord cannot be permitted to take advantage of his own wrong and will be estopped from filing the petition for eviction. [*Pardaman Kumar Schgal v. Smt Gulshan Malhotra*, A 1986 Del 23, 26: (1983) 1 Rat LR 476]. When the erstwhile lessee of a restaurant situated in the bus stand belonging to a panchayat participated in the auctions of the said premises held thrice and made his tender, he is estopped from contending at a later point of time that there has been a violation of the rules to his prejudice. [*Murali Krishnan v. Nagarajan*, A 1991 Mad 108, 109].

A landlord claimed rent at Rs. 10/8 and the defendant who had purchased the holding in execution sale pleaded that Rs. 8/- was the rent stated in the sale certificate—*Held* there was no estoppel to establish which it is necessary to prove a statement anterior to his purchase which may have influenced his conduct [*Aman Ali v. Mir Hossain*, 10 CLJ 605]. Where on the expiry of the terms of a *theka*, the lessor applied for mutation but subsequently came to an agreement with the *thekadar* which stated that the *theka* had expired and lessor thereupon got his mutation application struck off and allowed the *thekadar* to continue in possession under a different title—*Held* that the *thekadar* was estopped from pleading any right as *thekadar* or tenant of the lessor [*Makund v. Kishan*, A 1935 A 332].

Where a vendee under a contract for sale stated to the vendor that his (vendee's) money was ready and that the title was being engrossed and where those two matters were alone wanting to complete the sale, and where the vendor gave five days' notice to the vendee to complete the sale—*Held* that the vendee was estopped from denying the truth of his statements [*Motilal v. Haji Moosa*, 30 CWN 410: 88 IC 440: 27 Bom LR 814: A 1925 PC 124].

Where prior vendee induced the subsequent vendee to believe that notwithstanding his sale-deed the vendor remained owner of the property and attested the agreement to sell with the subsequent vendee, the prior vendee is estopped from claiming priority under the sale deed [*Md Bacha v. Arunachellum*, 90 IC 875: 49 MLJ 396]. A man who represented to an intending purchaser that he had no security on the property to be sold, and induced him under the belief to buy, cannot, as against that purchaser, subsequenly attempt to put his security in force [*Munno v. Chunni*, 1 IA 44: 21 WR 21; **follld** in *Jia Lal v. Saera*, 99 IC 2: A 1927 O 106].

Where a son who ought to have been sued conducted a suit wrongly brought against his mother, and there was nothing to show that it was by reason of any representation or conduct of the son that the plaintiff was misled to think that the mother was the right person to be sued, the decree in the suit did not estop the son, in a subsequent suit against him, for contesting the validity of that decree [*Mohunt v. Nil Komal*, 4 CWN 283]. A Hindu widow executed a motgage as guardian of her adopted son. Subsequently she sold the property to the plaintiff as her own. The plaintiff who sued to redeem the mortgage is not estopped from denying that the adopted son and not the widow was the owner [*Rangayya v. Basanta*, 94 IC 639: A 1926 M 694].

Where a party signs an award and his doing so leads the party to believe that he is not going to contest and to allow a pending suit to be dismissed, he is estopped [*Manohar Lal v. Amano*, 77 IC 41 (N)]. A judgment-debtor having procured his release from arrest on the express undertaking that he would not prefer an appeal, would be estopped from acting contrary to the deliberate undertaking [*Pratap Ch v. Arathoon*, 8 C 455: 10 CLR 443]. The principle of this case was applied where the parties agreeing to refer certain issues of fact to abide by his decisions, impliedly agreed not to appeal against the decree passed in accordance with the commissioer's

report [*Bahirdas v. Nobin*, 29 C 306: 6 CWN 121]. A judgment-debtor is estopped from contesting the legality of a sale, when in a proceeding for setting it aside he obtained under a compromise, time to pay the decretal amount within a certain time for setting aside the sale, binding himself not to contest the validity of the sale [*Uttam v. Khettra*, 29 C 577; *Bata Kr v. Apurba*, A 1938 P 199; *Baidyanath v. Satya Narain*, A 1960 P 36; see *Coventry v. Tulshi*, 31 C 822: 8 CWN 672; *Harak v. Saheb*, 6 CLJ 176; *Chandrabala v. Probodh*, 36 C 422: 9 CLJ 251; *Ananta Das v. Ashburner & Co*, 1 A 267, where a judgment-debtor agreed not to appeal in consideration of the judgment creditor allowing him time to satisfy the decree. See also *Amir Ali v. Indrajit*, 9 BLR 460; *Raj Mohan v. Gour Mohun*, 4 WR 47: 8 MIA 91; *Kedarnath v. Sitaram*, A 1969 B 221]. This sort of estoppel springs from the taking of inconsistent position (see *post*: "*Waiver and estoppel*" and "*Estoppel by inconsistent position*".

C took an oral lease of certain land from *A* and erected a house thereon. *B* purchased the house from *C* after getting *A's* permission to purchase. In a suit by *A* to eject *B* after service of notice, *A* was not in any way estopped as it was merely a permission to purchase [*Munshi v. Jugeswari*, A 1936 P 133].

Where a court's order for execution made on decree-holder's application was set aside on appeal for want of jurisdiction, the decree-holder having invoked the jurisdiction was estopped from calling in question an order subsequently passed directing him to refund the sum realised under execution [*Govind Vaman v. Sukharam*, 3 B 42].

A purchase by a mortgagee at a sale in execution of his mortgage decree, of the right, title and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties does not place such mortgagee in a better position as regards the estoppel, which notwithstanding the purchase is binding upon him [*Paresh v. Amar*, 9 C 265 PC (4 Cal 783 affirmed); *Kishory v. Md Muzaffar*, 18 C 188].

Where a person advanced money on a mortgage of land by another relying upon the extracts from the records of the Collector showing that the land held under Government was of quit and ground rent tenure, it did not estop the Government from asserting the true nature of the tenure [*Merwanji v. Secy of S*, 14 Bom LR 654 (on appeal, 42 IA 185: 19 CWN 1056: 39 B 664].

Plaintiff's suit to eject a tenant *D* was dismissed on the ground that *D* was a raiyat and no valid notice had been given. Pending an appeal to the Privy Council *D* sold the land to defendants. Plaintiffs did not admit the validity of the sale, but brought the defendants on record before the Privy Council and the appeal was dismissed. In a subsequent suit to eject the defendants—*held* that the plaintiffs were not estopped as there was no representation of the existence of occupancy right in *D* [*Damodar v. Miller*, 27 CWN 461: 44 MLJ 723:21 ALJ 365 PC]. Defendant having objected that a plot of his tenancy was not included in the plaint, plaintiff included it stating that the plot was not within the tenancy. In a suit for ejectment by the plaintiff, there was no estoppel by reason of his previous application [*Ram Pd v. Ram Ch*, 81 IC 324: 4 PLT 730].

A ship-owner who issues a clean bill of lading is bound by the statement in it that goods are shipped in good or in apparent good order and condition: if the statement turns out to be untrue, the ship-owner is estopped from alleging its falsity as against a purchaser who relies on the statement at its face value and acts upon it to his detriment. But if the statement at the head of the bill, "Received in good order and condition", which is a clean bill, is also accompanied by the qualifying words, "Signed under guarantee to produce ships's clean receipts", the estoppel fails [*C D*

Sugar Co v. C N Steamship, 1947 AC 46: A 1947 PC 40]. Plaintiff Bank made advance to one B & Co against some bills for goods supplied to the Railway Co who before the advance told that the bills were in order. The Railway Co issued a cheque to the Bank but finding that certain representations by B & Co about the goods were untrue stopped the cheque—*held* that the Railway Co was estopped from denying that the bills were in order [*B N R Co v. H Bank Ltd*, 53 C 622: 67 IC 606].

In plaintiff's suit for recovery of property he stated that *B* and *P* two widows, who were the lessors of defendants did not inherit any share. The suit was dismissed on the ground of limitation and in a subsequent suit by plaintiff for recovery of that property on the death of the widows as their reversioner; there was no estoppel because there had been no change in the position of the defendant by reason of the plaintiff's inconsistent statement [*Nripendra v. Basanta*, 29 CWN 86].

The owner of a property acquired under the Land Acquisition Act entered into a contract with the acquiring party as to its value and the compensation paybale to the owner. The Collector having made his award on the basis of the contract, the owner was estopped from giving evidence relating to the market value of the property [*Ananta Ram v. Secy of S*, 1938, 1 Cal 231].

A prospectus issued by a company contained a statement that it had entered into favourable contracts with a well known foreign firm. The foreign firm having acquiesced in the insertion of the statement, it was estopped from setting up any other construction of the agreement with them than that set out in the prospectus [*De Tchihatchef v. Salerni Coupling Co*, 1932, 1 Ch 330].

Where in the Consolidation of Holdings proceedings *A* did not take certain land but knowingly allowed *B* to make improvements on the representation that no complaint or appeal shall be made in the future against the order passed. *A* would be estopped from agitating the question later [*Gurdial v. S*, A 1968 Pu 267 FB].

The principal of a college having called for applications for admission into it of a certain number of candidates if they satisfied a certain standard, cannot retract from it when a candidate satisfied the test [*Akhtar v. Osmania College*, A 1959 AP 493]. When a candidate was declared successful in the B.A examination and the candidate had taken steps for getting admission for higher studies or employment, the University is estopped from declaring him unsuccessful at a later point of time on the ground that additional marks were given by mistake exceeding the permissible five per cent. [*Raj Kishore Senapati v. Utkal University*, A 1982 Orissa 188, 190]. In the information to candidates for admission to B. Arch Course, the requirement was only a pass in intermediate examination and it did not mention that they should have obtained 55% marks. In such a case the admission cannot be cancelled at a later point of time on the ground that the candidate had not obtained 55% marks in the intermediate examination. [*Manoj Kumar Gupta v. Coordinator Admission Committee Motilal Nehru Regional Engg College Allahabad*, A 1985 All 257, 258 (DB)]. Both in the provisional certificate and the college leaving certificate a candidate was stated to have passed in the intermediate examination. She got admission to the degree course. Later the university informed her that she could not continue the course and she had to complete the intermediate examination since she had earlier obtained only 56% in Economics as against 60% marks required for a pass. In such a case the University is estopped from asking the candidate to complete the intermediate examination [*Miss Swapna Rani Dass v. Utkal*, A 1985 Ori 37, 40: (1984) 58 Cut LT 221]. The Government of Haryana had recognised the certificates in Physical Education issued by a institution in Maharashtra for appointment of Physical Training Instructor. Certain students joined such courses and obtained

certificates. The Haryana Government cannot derecognise such certificates to the detriment of such students [*Suresh Pal v. State of Haryana*, A 1987 Supreme Court 2027: (1987) 2 SCC 445].

When a candidate was offerred admission in M Tech in Hydraulics & Water Resources Engineering and it was stated that he may be considered for Higher preferences if any vacancy arises and in fact such a vacancy arises, he must be given admission for that course on the principle of promissory estoppel [*R Manjunath v. Indian Institute of Technology*, A 1987 Mad 22, 24 : 1985 Court LR 757]. Though a candidate was underaged, if her application giving that age was accepted by the authorities and she was permitted to sit for the entrance examination and she secured high marks and she did not apply for any other course, the acceptance of the application amounts to a promise intended to be acted upon and the authorities are estopped from cancelling the admission [*K Narmada v. Secy, Medical & Health Dept A.P*, A 1988 AP 2, 9]. A Candidate for admission to M.B.B.S. course against the quota for *bona fide* students of the degree course in the college, produced the required certificate issued by the college authorities. The authorities who accepted her application and allowed her to appear for the Pre-Medical test cannot turn round and refuse admission stating that she was not a *bona fide* student of the degree course [*Leena Gupta v. Institute of Medical Sciences, Banaras Hindu University, Varanasi*, A 1989 All 35, 37 (DB)]. When a candidate complied with all the requirements and on the representation made by the authorities intimating that he had been selected for admission to the Medical College, he acted to his gross detriment resigning from Government Service, the refusal of admission on a new ground that he was a scheduled caste belonging to West Bengal and not Orissa is improper and the principle of promissory estoppel applies [*Dr. Ashutosh Biswas v. State of Ori*, A 1989 Ori 120, 124 (DB)].

The mistake of the State of Bihar in issuing an order prescribing that a candidate for admission to post-graduate medical course must complete his or her house-job of 12 months on or before 31st May 1989 which is before the cut-off date fixed by the Supreme Court was condoned and it was ordered that on the basis of the result of the selection examination with 31st May 1989, as the cut-off date, admissions should be permitted [*State of Bihar v. Dr Sanjay Kumar Singh*, A 1990 SC 749, 751]. When at the time a candidate sought transfer from Aligarh University to KGMC Lucknow for her M.B.B.S. course was not informed that a candidate will not be entitled to get admission to Post Graduate Course in a transferee course, the authorities are estopped from denying her such admission on the principle of promissory estoppel [*Kundan v. 1st Addl District Judge Bulandshahr*, A 1990 All 179, 181].

If the students were admitted though provisionally by the admission committee of the college or principal of the college even contrary to the instruction and/or regulations prescribed from time to time by the West Bengal Higher Secondary Council, the students cannot be held responsible for such omission and commission [*Jaisree Pal v. State of West Bengal*, A 1990 Cal 253, 262]. When candidates are admitted to B. Ed Course after passing a Pre-B.Ed examination, paid the fees, continued the studies and training, their admission cannot be cancelled on the principle of promissory estoppel on the ground that they had not passed their degree courses with any of the 2 subjects mentioned in the rules since they are not better than mere executive instructions which cannot be allowed to have an overriding effect on the statutory provisions as incorporated in the University Ordinance [*Shyamlal Shrungi v. State of Madh Pra*, A 1990 Madh Pra 15, 17 (DB)]. While according to rules a failed candidate in a Higher Secondary Examination has to appear in all the failed subjects at the same time, on account of same acts of omission

and commission on the part of the authorities he was permitted to appear for those subjects in compartment. Under such circumstances, the authorities are estopped from cancelling the result in which the candidate was found successful [*Tripureshwar Malik v. Council of Higher Secondary Education*, A 1990 Orissa 228, 231]. Where admission was made to Medical College entertaining nomination by Govt in breach of College prospectus promissory estoppel could be enforced [*Gladson v. Dean*, A 1981, Goa 21]. The prospectus for admission to B.E. Course prescribed certain conditions including possessing of minimum marks.

If a candidate's application is rejected for not possessing minimum marks, he cannot challenge that mark rule since he gave the application knowing that rule also [*S Muthumanicakam v. State of Tamil Nadu*, A 1986 Mad 179]. When a candidate was declared successful though he secured less than minimum marks for a pass in practical examination, the University is not estopped from declaring him unsuccessful subsequnetly unless the candidate shows that he was not aware of the true state of things. If he was aware of the real state of affiairs or had means of knowledge of it, there can be no estoppel [*Suresh Chandra Choudhury v. Berhampur University*, A 1987 Ori 38, 41]. When a candidate was not entitled to admission on merits in any Government Medical College not having obtained the qualifying marks, his nomination to a particular college will not create any estoppel [*State of Tamil Nadu v. N Hari Prasad*, A 1966 Mad 212, 223 (DB): 1987 writ LR 343]. When a candidate got only 39.1% as against 40% required for admission to Law course and thus patently ineligible he cannot rely on the principle of promissory estoppel merely because, he was issued admission card earlier and fees was also collected [*Mukesh Kumar Tiwari v. Rani Durgawati Vishwavidyalaya*, A 1989 Madh Pra 292, 301 (DB)]. A student was declared to have passed I. Com and admitted to B. Com course. When he was not misled by the marksheet, the University is not estopped in declaring him as failed after the lapse of five months [*Bisweswar Behera v. Utkal University*, A 1989 NOC 29 (Ori) (DB)]. When the mark sheet and the printed booklet were first issued to the student, in view of the variation in the marks found in them, the student could easily have found out the mistake and he was not misled by the marks mentioned in the marksheet. So he cannot contend that the authorities have no right to issue a mark sheet again containing the correct marks and the principle of estoppel will not come to his assistance. [*Reetanjai Pati v. Board of Secondary Education*, A 1990 Ori 90]. When between the date of the earlier announcement of the result and the issuance of the correction slip, time lapse is hardly two and a half months, the University is not estopped from issuing the correction slip correcting the grave mistake which has occurred in the Tabulators misreading the Grace marks rules of the University under the rule of equitable estoppel [*N. E. Krishna Murthy v. Universitty of Mysore*, A 1991 Kant 35, 38].

A candidate got admission to the Polytechnic in the reserve quota simply because of fraud by producing a false certificate that he belongs to Scheduled caste and therefore, there lies no equity in his favour to debar the authorities from cancelling his admission [*Issar Ahmed Mansuri v. State of M.P.*, A 1982 MP 205, 206]. In the case of admission to professional colleges, there was a relaxation of the percentage of qualifying marks in the case of SC and ST candidates subsequent to declaration of the result in the entrance test. Unless it is shown or at least averred that the writ petitioner who challenged this relaxation would not have appeared for the entrance examination if there had been a rule empowering such relaxation or that the position has been altered to their detriment there is no question of promissory estoppel [*Awadeesh Nema v. State of Madhya Pradesh*, A 1989 Madh Pra 61, 70 (DB)]. When a candidate did not challange a merit list published for house jobs, he is estopped on

equitable grounds from challenging the list, when the same list is published regarding admission to M.D. Course. [*Nilofar Insaf v. State of M P*, A 1991 SC 1872, 1879]. When certain students were admitted to the First M.B.B.S. course, no promise can be said to have been made by the University that the same rules which were then governing the admissions to post-graduate medical courses would continue to apply to them when they seek admission to the post-graduate courses. The principle of promissory estoppel is not applicable to such cases [*Shri Prashant Pravinbhai Kanabar v. The Gujarat University*, A 1991 Guj 23, 30]. A letter by the University inviting applications from affiliated colleges which wish to be considered for autonomous status, does not contain any assurance that the autonomous status will be conferred and the doctrine of promissory estoppel is not applicable [*Meenakshi College For women v. University of Madras*, A 1991 Mad 32, 41].

Registration Rules enacted by the University in exercise of its statutory powers pursuant to the direction given by High Court, sought to effect change in the earlier Residency Rules. This power is legislative in character, and so it cannot be challenged on the principle of promissory estoppel [*Dr Himonshu Purush Ottamdos Bavis v. State of Gujarat*, A 1984 NOC 65 (GUJ): (1983) 24 Guj LR 1414]. Revaluation of marks is a part of examination and is a fresh appraisal of the performance of a student by another examiner. The result of revaluation—whatever it is—has to be accepted as correct and final by all concerned and for all purposes. The student who gives an undertaking that he shall accept the result of revaluation is estopped from contending that such an undertaking is not binding on him. [*Lalit Taori v. Nagpur University*, A 1986 Bom 255, 258: 1985 Mah LJ 705]. On the basis of mark sheet issued by the University, a candidate got admission in B.A. and then she joined LL.B. course.

When the candidate has improved her position, the University is estopped from saying that on account of mistake in the marksheet the examination result is cancelled. [*Maxey Charan v. Rohilkhand University, Bareilly*, A 1992 All 122, 125]. The extreme position that a prospectus once issued by the Government cannot be altered at all at a subsequent stage has not been canvassed by anyone so far. The Government which has the competence to issue rules or regulations, has, as a corrollary, powers to amend or alter or even repeal and reissue such rules and regulations. [*Ashwin Prabulla Pimpalwar v. State*, A 1992 Bom 233, 241 (FB)]. When a candidate who did not possess the required qualification, was provisionally admitted, and he paid the fees and attended classes and in all communications he was shown as provisionally admitted, the University is estopped from cancelling the admission. [*Kanishka Aggarwal v. University of Delhi*, A 1992 Del 105, 117]. In the provisional certificate issued by the University it was stated that the candidate passed the B.A. Degree exam with second class Honours in Statistics. In the degree certificate issued later the fact of the candidate passing the exam with Honours was omitted since a mistake had crept in the provisional certificate. There is no estoppel against the authorities. [*Prabhat Kishor Sabu v. Sambalpur University*, A 1992 Ori 83, 85]. See also *Abodha v. S*, A 1969 Or 80, where the government directed the authorities to alter the basis of selection and both were estopped from doing so.

Where a consignee acted on a representation by the Railway Authorities that the consignment had not arrived the Railway Authorities cannot establish that the consignment had arrived earlier [*Union v. Rasul*, A 1970 Or 157].

In a suit for declaration that the sale deeds caused to be executed by the plaintiff during his minority was null and void, there was nothing to show that after the

plaintiff became major he made representations that the sale deeds were valid, he could not be estopped from impeaching its validity. The fact that with the consideration received he purchased another property and upon its partition disposed of his share cannot amount to representation [*Varghese v. Iype*, A 1973 K 267].

Estoppel by Conduct. [Change of postition].—As estoppel relates to acts prior to litigation, the conduct of a party in the course of the litigation is wholly irrelevant [*Abdul Shakur v. Kotwaleshwar*, A 1958 A 54]. No actual verbal representation is necessary, but it is quite enough that the conduct of the party leads another to act in the belief that he asserts no claim to the property [*Azizullah v. Ghulam*, 80 IC 994: A 1924 S 97]. When Government acquired a land and paid compensation for it, they are afterwards estopped from claiming title to it on their own account [*Secy of S v. Tatyasaheb*, 56 B 501: A 1932 B 386]. The government will also be estopped from pleading ownership by adverse possession [*S v. Sanna Ullah*, A 1966 J&K 45]. The doctrine of estoppel by conduct does not apply where the party claiming that the other side is bound by the estoppel had express notice of the fact which he says was not represented to him by the other side as the true fact [*Sarat v. Rajendra*, 18 CWN 420]. Where a portion of *dharmasala* land belonging to Government was sold to the Local Funds Committee with the consent of Government at a time when the question of ownership did not arise and the Government's only concern was the comfort of travellers, Government were not estopped from claiming ownership when the question of ownership regarding the remaining portion and the Dharmasala arose between the Committee and the Government [*Dist Local Board v. Secy of S*, A 1938 PC 87]. Acceptance of rent at uniform rate does not by itself raise any estoppel against the landlord because it is no representation of conferment of permanent tenancy [*Datto v. Babasaheb*, 58 B 419]. It cannot be said that the conduct of a Mahomedan tenant-in-common estops the others. The doctine of representaion does not apply merely because their interests are identical. The rule applies with great force in Hindu families [*Karim v. Wahajuddin*, 46 214:•78 IC 1035]. There was a difference of 13 years between the date of birth given at the time of entering service and the date now claimed in the suit. As such by the conduct the plaintiff is estopped from contending that the date of birth given while entering service is wrong [*Devi Dayal v. Secretary to Govt*, A 1985 P&H (NOC) 223]. Where the plaintiff claiming possession of land in suit allowed the opposite party to continue with the construction despite his knowledge, he is estopped from claiming possession by his own act and conduct [*New Bharat Chemical Industry v. Om Prakash*, 1998 AIHC 614 (P&H)].

Where a person used a document in a suit and disclaimed all rights under it as a will, on the ground that it was not of a testamentary nature, he cannot again use it as a will, though for different purpose [*Raghoonadha v. Kattama*, 10 WR 1 PC: 11 MIA 50]. Where plaintiffs allowed one *S* to join with them in a suit against another person and to obtain a decree as the son of a particular man, they are estopped from disputing his property in a suit by them for possession against paternity [*Sundar v. Sham*, A 1923 L 630]. Where persons who are statutorily entrusted with the duty of making disbursements pay a certain person a sum of money more than he is entitled to and the latter misled into belief spends it, plaintiffs are estopped from recovering the excess under a plea of mistake of fact [*Holt v. Murkham*, 1923, 1 KB 504]. Where a party to a bill of sale described the goods as his own though they belonged to his wife and she too made a statutory declaration to that effect she is estopped from denying afterwards that the goods are those of her husband [*Weston v. Fairbridge*, 1923 KB 667]. A tenant having vacated premises governed by the Rent Control Act at the request of the landlord by a letter which provided that the tenant could live in the new premises, exempt from the

operation of Rent Control Act, as long as he desired, the landlord's suit for ejectment is barred by estoppel [*B P Sinha v. Somnath*, A 1971 A 297].

Suit by the second husband *ES* for a decree of nullity of his marriage with *B* on the ground that her first husband *C* was living—In a prior petition for divorce by *C* on the ground of *B's* adultery with *ES* both *ES* and *B* denied lawful marriage between *B* and *C*. In a subsequent proceeding by *B* with the concurrence of *ES* against *C* there was a compromise in which *C* admitted that there was no marriage between him and *B* and that both parties mutually undertook not to assert a marriage in future. Relying on these facts *C* married another woman. The court now found that *C's* marriage with *B* was lawful—Question of estoppel discussed [*Square v. S*, 153 LT 79: (1935) P 120].

The service of a notice of ejectment is a conclusive admission of the existence of the relation of the landlord and tenant, and the person serving cannot afterwards sue to eject the same tenant on the ground that he is a mere trespasser [*Baldeo v. Imdad*, 15 A 189. But see *Zubeda Bibee v. Sheo Churn*, 22 A 83; Follld in *Hamid v. Wilayat*, 22 A 93].

When a defendant with full knowledge of the circumstances bearing on his rights as the testator's son, accepted the office of the executor, obtained probate, and under its authority, collected assets and otherwise so acted as to cause the plaintiffs to alter their position, the defendant is estopped from impeaching the will, repudiating his fiduciary position or setting up in respect of the property dealt with by the will, any rights inconsistent with the disposition and conditions therein [*Srinivasa v. Venkata*, 29 M 239: 16 MLJ 238, **affirmed** in 38 IA 129: 14 CLJ 65: 15 CWN 741: 34 M 257]. A person accepting a position under a will cannot at the same time repudiate so much of the will as conveys an interest to another person [*Durga v. Ishan*, 44 C 145]. A Hindu coparcener who takes property under the will of another coparcener and acts up to terms of the will is estopped from subsequently contending that the will is invalid. His transferees who take with notice of his title under the will are also estopped [*Lakshmamma v. Sreeramulu*, 104 IC 650: A 1927 M 1066]. Person taking benefit under a will and administering the testator's estate cannot dispute that the testator had no capacity to dispose of by will [*Subashini v. Ahibhusan*, A 1963 C 520].

A person mortgaged to plaintiff an undefined one *biswa* share out of three *biswas* owned by him. Subsequently in execution of a money-decree against the mortgagor, two out of those three *biswas* were sold and purchased by the defendant. The plaintiff having accepted part of the sale proceeds in part satisfaction of his mortgage, he was estopped by his previous conduct from suing the auction purchaser to bring to sale one *biswa* under his mortgage [*Jhinka v. Baldeo*, 14 A 509]. The *zemindary* rights in a village were mortgaged and the mortgage right was purchased in auction sale by a third person. Subsequently the mortgagee himself took a lease of the properties from the third person. In a suit for redemption, the mortgagee was estopped from setting up the plea of tenancy [*Gauri v. Mangala*, 94 IC 442: A 1926 A 463]. Defendant's omission to set up his title to the property in suit at the execution sale and his acceptance of the surplus proceeds did not estop him from impeaching the sale and setting up his title, where there was nothing to show that he took any part in the execution proceedings or stood by so as to induce bidders to suppose that he claimed to interest other than as representative of the original judgment-debtor or that his silence misled bidders at the sale [*Gurupadappa v. Irapa*, 14 B 558]. A trustee mortgaged trust property alleging it as his own. The mortgagee who in good faith and without notice took mortgage, obtained a decree and the property was sold. In a subsequent suit to recover the property from the puchaser as

trust property, he (trustee) was estopped by his conduct [*Gulzer v. Fida*, 6 A 24: 3 AWN 182]. Where in the former suit, the defendant No 1 was a witness for another defendant, and he did not then or before the execution sale bring his *mulgani* interest into the court, this conduct, to create an estoppel, must be found to have misled the plaintiff [*Sashappaya v. Venkataramah*, 5 MLT 37].

Where a non-transferable holding is sold by a tenant by a *kabala*, he is estopped from setting up the invalidity of the sale by him [*Bhagirath v. Haffizuddin*, 4 CWN 679: *Ramcharan v. Tilku*, 12 PLT 35; see also *Daymoyi v. Ananda*, 18 CWN 971 FB: 42 C 172 modified by *Chandra v. Shk Alla*, 48 C 184: 24 CWN FB]. See also in the case of a mortgagor [*Krishna v. Bhairab*, 2 CLJ 19 *n*]. The transferee is also estopped from saying that the transferor has no right to transfer [*Shk Jamahar v. Shk Nazir*, 18 CLJ 512]. Where the mortgage of a non-transferable occupancy holding purchased the same with the consent of the landlord and then took a fresh lease of it from him, he was estopped from pleading that the mortgage to him was invalid, as the holding was non-transferrable [*Radhakanta v. Ramananda*, 39 C 513]. Where a person purchased a holding by a *kobala* in which there was no mention of fixity of rent and paid the landlord's fee, he is not estopped from bringing a suit that he was a tenant at a fixed rate of rent [*Perier v. Krishna*, A 1936 C 582]. When a raiyat representing himself as a tenure holder induced the defendant on his land as a *raiyat* and then sued to eject him as an *under-raiyat*, he was estopped from proving that he was really a raiyat [*Dhanu v. Sona*, 15 P 589].

An agreement between the preliminary and final decrees under which mortgagor agreed to pay a higher rate of interest in consideration of mortgagee giving extension of time to pay, estops the mortgagor by his conduct from objecting to the agreement in execution [*Subramani v. Corera*, 48 MLJ 121: 86 IC 723]. Where a mortgagee on enquiry by an intending vendee informs him the amount due on the mortgage and the vendee acts on it and retains the amount from the purchase money, the mortgagee is estopped from claiming a larger amount [*Secy C K D Amritsar v. Punjab N Bank*, 141 PR 1919: 55 IC 492; *Saliesh v. Bechai*, 40 CLJ 67 *ante*]. Where the mortgagee's agent raised no objection to sale of part of the mortgaged property for its full value and accepted the whole of the proceeds in reduction of the indebtendness of the mortgagor and then furnished a list of debts by mortgagor in which the mortgage was not mentioned, the mortgagee was estopped from denying that the vendee had purchased the land free from mortgage [*Chettyar Firm v. Ko Maung*, A 1935 R 191; see *Chetyyar Firm v. Mg Po*, A 1935 R 279].

Where some of the mortgagees led a subsequent purchaser of a portion of the mortgaged property to believe and a puisne mortgagee of the reminder to believe that the whole was unencumbered, they were estopped from setting up their rights under the prior mortgage and their rights were postponed [*Sakhiuddin v. Sonaulla*, 22 CWN 641: 27 CLJ 453]. When a person holding three mortgages on the same property, assigns the second mortgage to the plaintiff who sues on the mortgage making the assignor *proforma* defendant and the latter does not disclose the third mortgage, hs is estopped from suiting the assignee's auction purchaser in the suit on his third mortgage [*Pitambar v. Purna*, A 1929 A 511]. Where a prior mortgagee attested the deed mortgaging the property a second time, and being aware of its contents kept silence and thus led the second mortgagee to think that the property was not encumbered, and to advance his money on the security of it, the first mortgagee was estopped by his conduct from setting up his right of priority [*Salamat v. Budh*, 1 A 303].

If a man takes an active part in carrying out a mortgage on behalf of another, and signs the deed, he may be estopped from asserting his own interest in the properpty

[*Basso v. Mir Md*, 20 IC 291: 278 PLR 1913]. A person executing a mortgage as *mutwali* is estopped from denying its validity [*Afzal v. Cheddi*, A 1935 A 792]. A sale deed was executed by a father with court's sanction and the son joined in it. In spite of the fact that the plaintiff was not fully aware of his legal rights he was estopped by his conduct [*Mata Dayal v. Lalji*, 25 ALJ 878].

A person alleged to be a minor was represented by his brother with whom he had a common interest and took an active part in the prosecution of a suit. He is estopped from pleading in a subsequent suit that the decree in the previous suit was invalid as he was then a minor [*Binda v. Mangala*, 48 A 661: 96 IC 606; *Gangaram v. Mihin*, 28 A 416]. the fact that *G* omitted in a previous suit (in which he was acting merely as guardian of *S*) to mention that he is heir of *B*, did not estop him from subsequently urging his claim as heir [*Ganga v. Narain*, 1 PR 1914: 22 IC 955].

Where the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade mark, and the defendant adopted it as his own and secured a wide popularity for it, the plaintiffs were estopped from denying the defendant's right to the use of the trade mark [*Lavergne v. Hooper*, 8 M 149]. Where defendant company cause plaintiff to believe that the cash in respect of goods covered by the delivery order had been paid, they cannot be allowed to deny it [*Anglo-India J M Co v. Omademull*, 38 C 127].

Where an assessee does not raise any objection to assessment after service of notice, he cannot object to the validity of assessment when he is prosecuted [*In re Jayram*, A 1932 M 564]. Where a person entitled to challenge an alienation is present at the mutation proceedings and does not object he cannot challenge it subsequently [*Ram Sarup v. Ram Saran*, 96 IC 915: A 1926 L 650]. But in such mutation proceedings there must be evidence of positive consent or acknowledgement to raise an estoppel [*S v. Giani Bir Singh*, A 1968 Pu 479, 485].

Where a suit is compounded by execution of a deed clearly admitting defendant's title, plaintiff is estopped from raising his claim in a subsequent suit [*Ram Krishna v. Tirunarayana*, 55 M 40]. A compromise petition in a mutation proceeding agreeing to the substitution of defendants' names does not estop the plaintiff from suing the defendants for recovery of the property, because it did not purport to convey any title to the defendants, or to induce them to change their position on the strength of the mutation [*Kali Pd v. Thakur*, 23 IC 965]. Where a person gets another's name recorded as owner of moiety of the property and on the faith of that another purchases it at an auction sale, the former cannot later on claim ownership of the same [*Mathura v. Anadi*, 74 IC 911: 21 ALJ 498]. Statement in the court of Assistance Collector during mutation proceeding that plaintiff and two others were in possession of property in equal shares does not prevent the plaintiff from asserting his title to the entire property in a subsequent suit [*Ramratan v. Binda*, 72 IC 832 (O)]. Where land stood in the revenue register in the name of husband and wife, she is not estopped from showing that it was her sole property [*Meyappa v. Ma Yeik*, 8 Bur LT 244: 30 IC 692]. Plaintiff's suit for partition was decreed. During an appeal to the privy Council by defendant, the parties entere into an *ekrarnama* and a partition was effected. Plaintiff relying upon the *ekrarnama* did not appear in the appeal which was prosecuted by defendant and dismissed. In view of defendant's conduct he was *held* estopped from applying to have the *ekrarnama* filed for an order of the court [*Lokenarain v. Jeolal*, 24 IC 675]. Where a party takes advantage under previous partition, he is estopped from setting up impartibility and primogeniture [*Narendra v. Nagendra*, A 1929 C 577]. A grantee under a *sanada* accepting lands as *kadim inam* and obtaining the benefit of a lower *judi* is estopped from contending that the lands were not *kadim* [*Secy of S v. Rajaram*, 36 Bom LR 1055].

Where in a partition decree some lands liable to be sold for revenue due on another estate are allotted to one party, without knowledge of the fact, and such lands are sold in revenue sale and purchased by the other party, such party is not estopped from enforcing his rights against the prior party. There is no difference whether the lands are purchased by the other party or by a stranger [*Krishna v. Dhirendra*, 56 IA 74: A 1929 PC 50: 33 CWN 289: 49 CLJ 112: 56 C 813]. Where during a previous litigation plaintiff's predecessor gave up his share in the disputed property and represented that he would not participate in the costs of litigation and the defendants on that representation carried on the litigation and secured the property, the plaintiff is estopped from putting forward any claim to that property [*Tilak v. Pargash*, A 1935 P 21].

Compromise entered into in a case under s 145 Cr P Code as to possession does not create any title as to estop either of the parties from denying the title of another in a subsequent civil suit [*Gopidas v. Madho*, 76 IC 527: 45 A 162]. Where in a mutation proceeding arising out of a disputed succession, a party offered to be bound by the oath of his opponent and a decree was passed against him on such oath being taken, it did not operate as an estoppel in suit subsequently filed by him in a civil court [*Abbas v. Md Ali*, A 1934 A 300]. A decree-holder inducing the judgement-debtor to pay the decretal amount is estopped from questioning that decree [*Bhirgunath v. Annapurna*, A 1943 P 644]. Where a co-sharer permits another person to continue recorded as a co-sharer in respect of property which belongs to the former and to participate in partition proceedings as a co-sharer, he is estopped from objecting to the proceedings on the ground that he was not a party to them [*Karim v. Wahajuddin*, 78 IC 1035 : A 1924 A 427].

In 1908 the property in dispute was at first mortgaged and then sold by its owners to *NP* from whom the equity of redumption passed to *A*. *A* purchased the property at the Court sale in 1911. Meanwhile, in 1907, the owners again sold the property to *N D* from whom the plaintiff derived his title and possession. The original owners disputed the auction sale of 1911 but a compromise was arrived at in 1913 under which the property was sold (with the assent of *N D*) to defendant No. 1 and *A*. *A* was paid on from the sale proceeds. The plaintiff having been dispossessed by defendants sued for possession—*Held* dismissing the suit that it could not be said that the property got back into hands of the original owners so that an estoppel arose in case they wished to dispute the transfer to *N D* [*Ramkrishna v. Anusuyabai*, 26 Bom LR 173: 86 IC 265]. Defendant Municipality took possession of plaintiff's land, who first protested and then made an oral gift of it to the defendant. Plantiff is not estopped from subsequently suing to recover the land, as there being no registered deed mere consent and acting of parties did not estop [*Kuverji v. Mun of Lonavela*, 45 B 164: 22 Bom 654].

If a previous purchaser of a non-transferable holding deposits the purchase money under Or 21, r 89 and the landlord withdraws it and agrees to have the sale set aside, he is estopped from questioning the transfer [*Godadhar v. Midnapur Z co*, 27 CLJ 385; *Ahmed v. Roshan*, 9 IC 619 (6 CLJ 601 **folld**); see *Barhmdeo v. Sheo Pd*, 2 PLJ 561; *Asharfi v. Ramkhelawan*, 4 PLJ 115 FB]. But where the landlord objected to the deposit and on the court over-ruling the objection withdrew the money, no estoppel can arise by following court's order [*Bhara v. Kshitish*, 30 IC 83: see however *Jugal Mohini v. Srinath*, 12 CLJ 609]. Withdrawal under protest of deposit does not amount to recognition [*Sheo Pd v. Brahamdeo*, 38 IC 366]. Where the landlord withdraws the money deposited by previous purchaser, there being nothing more to indicate the transferee's claim to the non-transferable holding that his name in the *chalan*, the landlord is not estopped [*Bharat v. Pramatha*, 34 IC 337].

the expansion [*Sabarkantha J.R. Utpadakoni Coop Spinning Mills Ltd. v. General Manager*, A 1992 Guj 82, 93]. A notification was issued giving remission of electricity duty for new industries and a person invested huge amounts and started an industry. At a later point of time the government cannot raise the plea of financial distress and drought conditions to avoid the liability of doctrine of promissory estoppel [*Modi Alkales And Chemicals Ltd. v. State*, A 1992 Raj 51, 56].

Subsequent policy changes made by Govt could not be given retrospecitve effect so as to deprive the importers, who had already imported palm oil specifically for the purpose of refining, of their right to carry on the trade of manufacture and refining of imported palm oil and to market the same in accordance with law [*Jain Sindh Vanaspathi Ld v. Union*, A 1979 D 122 (*Union v. Anglo-Afghan Agencies*, A 1971 SC 1021 rel on)]. To meet the plea of promissory estoppel arising on account of a change in the policy of the Government, the Government is required to show what exactly that policy was, what were the reasons for bringing about the change and how far was the change justified [*RB Jodhamal Bishen Lal v. State of Jammu & Kashmir*, A 1984 J&K 10, 25]. The principle of estoppel does not operate at the level of Government policy. Where there is a change of Government policy, the statement is applicable but not in a case where there is neither a change in the government policy nor a replacement of the earlier policy by a new one [*K Ram Mohan Rao v. Endowments Commissioner In Karnataka, Bangalore*, A 1989 Kant 192, 203]. The Government must disclose to the Court all the necessary material for the subsequent conduct on account of which the exemption from the earlier decision is sought for and mere claim of change of policy would not be sufficient and the Government should establish that the public interest would be prejudiced if the Government is bound by the promise [*American Dey Stores v. Union of India*, A 1990 Bom 376, 389 (A 1979 SC 621 followed)]. An exception to the doctrine of promissory estoppel is that the doctrine does not operate at the level of Government policy, [*R. K. Deka v. Union of India*, A 1992 Del 53]. When a person agreed to purchase a house at an enhanced price which was mentioned in the brouchure and accordingly applied for allotment of the house and got possession of the house and thus there is a concluded contract, he cannot challenge the increase on the ground of estoppel [*Shiv Palkaran Kholi v. State of U P*, A 1988 All 268, 270: 1988 All WC 1047 (DB)]. A person was appointed by the Government as a permanent telugu poet laureate of the State. When a new Government came into power, this post was abolished. This action cannot be questioned since the doctrine of Promissory estoppel will have no application to the abolition of a Government post [*Dr Dasarathi v. State of Andhra Pradesh*, A 1985 AP 136, 144]. Applicability of principles of promissory estoppel in cases of cancellation of examinations stated [*Balkrishna v. Rewa Univ*, A 1978 MP 86 FB].

Failure to comply with the provisions of art 299 of Constn nullifies the contract and renders it void and unenforceable and there is no question of estoppel or ratification [*Bihar Eastern &c v. Sipahi*, A 1977 SC 2149, (*S v. Karamchand*, A 1961 SC 110; *Bikhraj v. Union*, A 1962 SC 163; *S v. B K Mondol*, A 1962 SC 779 and *Mulamchand v. S*, A 1968 SC 1218 **folld**)]. (See also *post Estoppel against Government*). For application of this principle in cases under s 92 see *Hughes v. Metropolitan Rly*, 1877, 2 AC 439, 448 HL and *Dominion v. Ram Rakha*, A 1957 Pu 141]. When certain persons selected for the posts of Junior Electrical Engineers were given lower posts for want of vacancies and at that time undertakings were taken from them that they will not lay any claim for the posts for which they were selected, that undertaking cannot estop them from being considered for the future vacancies of posts of junior electrical Engineers [*Rakesh Rajan Verma v. State of Bihar*, A 1992 SC 1348, 1352]. When the letter sanctioning a loan stated that the Corporation had

agreed in principle to provide a term loan and the latter ended by saying that the intimation did not constitute a commitment on the part of the corporation, there is no question of promissory estoppel [*Abishankar Choudhury v. Orissa State Financial Corporation*, A 1992 Ori 93, 97], cited under heading "*Modification or variation of written contract by equitable principles in s 92*".

Where a party purported to acquire lease interest in certain business premises but the minister, whose approval was necessary, refused approval, and the contract could have been avoided, but the purported buyer paid deposit and led the vendor to believe that the purchase would be completed, it was held that since in the circumstances the defendant's action had led the plaintiff to suppose that the defendant regarded itself as bound by the contract and intended to complete it as soon as the administrative difficulties were overcome, there was a sufficient representation and a sufficient detriment to the plaintiff for the defendant to be estopped from denying that it was bound by the agreement [*Janred Properties Ltd. v. Enit*, (1989) 2 All ER 444 CA]. The Railway authorities invited tender for setting a cycle stand at the Railway station. The petitioner's tender was accepted and a contract for 3 years was entered into between the Union of India and the petitioner. The petitioner was made to understand that only one cycle stand would operate for the entire Railway station. The Railway authorities were estopped from setting up second cycle stand [*Md Eshan v. Union of India*, 1998 AIHC 2477, 2478 (Cal)].

Similarly where a house was acquired by the defendant for the declared purpose of providing a permanent residence to his wife, who shifted there with her children leaving her own flat, it was held that he was no longer in a position to demand the vacant possession of the premises. Their Lordships of the Privy Council said that the defendant (the wife) had such a personal right against the plaintiff because at the time of the acquisition of the land and the building of the house he had represented to her that it would be a permanent home for her and the children and she would be treated as living there as his wife; she had acted to her detriment in reasonable reliance on that representation by giving up her own flat, she had supported the application to housing authority, she had used her earnings to pay for household needs and she had looked after the children and the plaintiff as mother and wife. Accordingly, it would be inequitable for the plaintiff to evict her [*Maharaj v. Chand*, (1986) 3 All ER 107 PC, on appeal from Fiji. Their Lordships applied the principles of law laid down in [*Kulamma v. Manadan*, 1968 AC 1062].

Mere negotiations may not have the effect of estopping a party from moving out of negotiations even if an agreement to make a formal contract had taken some shape. In this case an agreement was entered into by the Government with a group of companies under which the group was to transfer its flats to the Government in exchange for Government land and that the agreement would not be binding until the necessary documents were executed and registered. The group walked out of the agreement. Their Lordships of the Privy Council said that although the Government had acted on the agreement to its detriment in making some expenditure under the deal, it would not be unfair or unjust to allow the group to withdraw from the transaction and no estoppel arose against the group [*A.G. of Hong Kong v. Humphreys Estate Ltd.*, (1987) 2 All ER 387 PC].

Another case in which there was no unequivocal representation so as to constitute an estoppel is [*China-Pacific Sa v. Food Corpn of India*, (1980) 3 All ER 556 CA]. The plaintiffs relied on the advice of the defendants' solicitor to the effect that the defendants were liable to the plaintiffs. They also relied on a discussion between the counsels of the two parties prior to arbitration. It was held that the salvors could not

succeed on the issue of estoppel, one of the essential attributes of which is the unequivocality of the promise or assurance relied on, but since the matters relied on by the salvors as constituting the promise were not unequivocal and at best were an indication that the cargo owners had been advised by their solicitors that they were liable in law to the salvors for expenses claimed, the cargo owners were not estopped from denying liability.

Promissory estoppel outside s. 115.—The doctrine of promissory estoppel can come into play on the basis of the promise itself and it is not necessary that the requirements of s. 115 should also be satisfied. Here in this case the promise on the part of the Government was not recorded in the shape of a formal contract, but even so it contained representations which were acted upon by the other party. The Government became bound to carry out the promise. *Ashok Kumar Maheshwari (Dr.) v. State of U.P.*, AIR 1998 SC 966 : (1998) 2 SCC 502.

Promissory estoppel when invoked.—For application of the doctrine of promi-ssory estoppel all that is required is that the party asserting the estoppel must have relied upon representation made to him and must have "changed or altered the position" by relying on that representation. It is not necessary to prove further any detriment or prejudice to the party asserting the estoppel. [*Reeta v. Behrampur University*, A 1993 Ori 27, 30. See also *Delhi Cloth and General Mills v. Union of India*, A 1987 SC 2414, Para 18]. The cancellation of examination/result based on mass copying may be a factor to be borne in mind when called upon to decide whether in such case benefit of promissory estoppel should be made available or not. [*Reeta v. Behrampur University*, A 1993 Ori 27, 33]. In a land acquisition case when the collector while making the award of compensation relied upon the agreement between the landowner and the improvement Trust and fixed the compensation of the entire area, it must be held that having, taken advantage of the agreement in part and having repeatedly agreed to the terms of the compromise between the landlord and the Trust, the State Govt. cannot later be permitted to back out. [*Akhara Brahm Buta v. State of Punjab*, A 1993 SC 366]. Where the Government sanctioned loan for reconstruction of a cinema theatre which was damaged due to cyclonic storm and the petitioner acted on that promise, the Government was not justified in withholding the amount. [*B. Sanjeeva Reddy v. Govt of A P*, 1996 AIHC 2426 (AP)].

A notification for grant of exemption from levy of rice issued under s. 24 of the Rice Levy Order, 1985, which is a piece of legislation, when withdrawn in public interest, no person can be permitted to assail the withdrawal on ground of promissory estoppel. [*Himalaya Rice Mills Motinagar v. State*, A 1997 All 155, 157]. Where relying on the promise held out by the Govt. of India that cash assistance will be available to the exporters on the export of readymade garments that would be exported by them in pursuance of the policy laid down by Govt. of India, the petitioner exporter priced its goods for export and entered into firm contract with various foreign buyers, withdrawal of the cash assistance by the Govt. with retrospective effect, the petitioner would be entitled to invoke the principle of promissory estoppel. [*Old Village Industries Ltd. v. Union of India*, A 1993 Del 321]. A candidate at the time of applying for admission is bound by the stipulations made in the advertisement notice and also the statutes/brochure of the organisation and he cannot be allowed to resile from the stand taken by him in his application form which he is supposed to have filled up after going through the relevant stipulations and conditions contained in the advertisement notice and the statutes/brochure. [*Arshad Iqbal v. State*, A 1997 J&K 100].

A person to whom the Department has provided a telephone line to operate STD/ PCOs cannot wriggle out their obligation to abide by the rates of commission fixed or revised by the Govt. from time to time. [*K A S Senthi Lnathan v. Union of India*, A 1997 Mad 208, 214]. Where a private enterpreneur raised construction of hotel on the basis of State subsidy, State loan through State Industrial Development Corporation, State Financial Corporation and J&K Bank besides its own promotion share capital, but after huge

investments and before completion of the hotel compled, the State industrial Development Corporation resiled from its promise of advancing the sanctioned loan, the principle of promissory estoppel would come into play by estop-ping the SIDCO from backing out of its obligation from the promise made by it [*Kranti Hotels Pvt. Ltd. v. State of J and K*, A 1997 J&K 91, 99]. Where the colleges were started on the basis of permission granted subject to the conditions mentioned in the Govt order and the management invested huge amount of fund on the basis of such permission, the executive order by the Govt. making 50% seats as Govt seats and taking right of admission of students to that extent is hit by doctrine of promissory estoppel [*Association of Management of Private Colleges v. State of T.N.*, A 1998 Mad 34]. A candidate applying for admission to a particular course in terms of prospectus is not estopped from challenging any particular clause of the prospectus later on [*Dr. V. Ramalakshmi v. Director of Medical Education*, A 1998 Mad 55. See also *Union of India v. Raja Ram*, A 1993 SC 1679; *Miss Mohini Jain v. State of Karnataka*, A 1992 SC 1]. When the petitioner accepted loan on the basis of the letter signed by the Branch Manager he is estopped from challenging the authority of the Branch Manager [*Kshudiram Pal v. W.B. Financial Corporation*, A 1998 Cal 52]. Where the promoter of a company, being encouraged by a Govt. scheme and acting on the basis thereof, decided to set up an industry within the State and took all the effective 'initial' and 'final' steps in setting up the industrial unit in the most backward district, placed firm orders in crores with suppliers, obtained necessary clearance certificate from the pollution Board and other State and central bodies, made expenditure of at least 25% of the capital cost, there is no justification for the State Govt. to refuse to issue eligibility certificate under the scheme [*Vinay Cements Ltd. v. State of Assam*, 1997 Gau 34, 41].

When there was no evidence to show that any promise at any time was held out by the respondent Administrator, Union Territory of Chandigarh that the allotment made by it for one year of sites to appellants for running PCO booths on the basis of licences granted by a separate authority for five years under the Telegraph Act, would be renewed so as to run parallel to the period of the licences, it cannot be contended that the appellants had put up costly booths relying upon the promise of the Administrator, Union Territory that in all probability they will get renewal of the allotments to run parallel to the period of the original licences and therefore, on the doctrine of promissory estoppel, the Administrator cannot take a contrary stand [*Ashok Kumar v. Union Territory, Chandigarh*, A 1996 SC 461].

Where the railway authorities promised that freight for goods would be charged by shortest route, they are estopped from rationalising longest route on ground that shortest route is an uncontrolled section with primitive signalling arrangement. [*Gujarat Ambuja Cement Ltd. v. Union of India*, A 1994 Guj 104, 118]. In the year 1982-83, the DDA had floated a special Housing Registration Scheme for out of turn allotment of houses for retired/retiring public servants who intended to purchase flats/houses to be constructed by the DDA and the said scheme was made applicable to all these persons who were already registered under various housing registration schemes announced by DDA. It was stipulated in the agreement that 50% of the flats will be disposed of on cash down and 50% on hire purchase basis. In the year 1993 the DDA again issued an advertisement inviting applications from the retired/retiring govt. servants for out of turn allotment on the same basis as was done under the scheme of 1982. The petitioners availed of the scheme and applied for out of turn allotment. However, when the members of the petitioner association of retired/ retiring public servants required letters of demand, all of them were required to make payment on cash down basis. Thus no fresh scheme was announced in the year 1993 and the registrants under various schemes had been invited to apply for out of turn allotment on the basis of the scheme of 1982, which had provided for 50% allotment on hire purchase basis. The members of the petitoner association having acted to their detriment on the basis of the original scheme of 1982, the DDA cannot by a Unilateral Action, without notice abandon the

scheme originally announced. Therefore, the DDA is estopped from acting contrary to the 'promise made to the registrants under the scheme, who acted on the said promise and doctrine of promissory estoppel was applicable [*Sheela Wanti v. D.D.A. (FB)*, A 1995 Del 212, 223]. Breach of promise by a corporation invites the application of promissory estoppel [*Bharat Explosives Ltd. v. Pradeshiya Industrial Ltd. Corpn. of U P Ltd.*, A 1994 All 123, 124].

Promissory Estoppel when not Invocable.—No question of promissory estoppel would arise in a case when Sarpanch of a local Gram Panchayat who is personally interested participated in a meeting which passes a resolution recommending exchange of land. [*M. Pyarali v. M. Sarifbhai*, 1996 AIHC 716, 179 (Guj)]. Where concession in payment of royalty granted by the Govt. for five years to a company was extendible for ten years subject to review of the policy by the Govt. withdrawal of the concession after five years would not entitle the company to invoke the principle of promissory estoppel. [*Andhra Pradesh Rayons Ltd. v. Govt. of A P*, A 1997 AP 23, 27;. *Kasinka Trading v. Union of India*, A 1995 SC 874, **relied** on]. Where though the offer of the lowest tenderer was provisionally accepted but the contractor himself knew that the matter was under consideration by the Govt., the plea that he had spent huge amounts under the expectation that the work would be entrusted to him could not be accepted and as such the principle of promissory estoppel was not applicable. [*Y. Konda Reddy v. State of A P*, A 1997 AP 121, 135]. Even if the Govt. had made any representation by framing rules providing for grant of licences for selling liquor in bars attached to liquor shops, later the Govt. can change its policy in larger public interest pursuant to which it can rescined the licences and the doctrine of promissory estoppel will not apply. [*A J Joy v. Govt. of Tamil Nadu*, A 1993 Mad 282, 299, 300]. Where the State Electricity Board granted a rebate in the demand and energy charges for High Tension Industries like the respondent from the date of going into regular production and withdrew the rebate before commencement of production on commercial basis by the respondent, the respondent was not entitled to the concession and the doctrine of promissory estoppel was not attracted as the respondent failed to act upon the representation made by the Board. [*A P State Electricity Board v. Sarada Ferro Alloys Ltd.*, A 1993 SC 1521, 1523].

Where the candidates, though did not possess even the basic minimum qualification for Radiographer Training course, secured admission for the said course on basis of fraud, cancellation of their admission was illegal and the respondents were not estopped from doing so because promissory estoppel does not operate in such case. [*Dinesh v. State*, A 1993 Raj 187, 193]. The right of the applicant for allotment of house to be considered for allotment does not subsist or is rather extinguished the day the process of allotment is completed. The announcement made by the Housing Commissioner to the effect that the unsuccessful applicants will be given priority in allotment in any of the future scheme, can at the best be treated as extraordinary concession given to the unsuccessful applicants that they may be considered in future. The announcement cannot be equated with a promise made by a competent authority under the statute. [*Kabul Singh v. Punjab Urban Planning & Development Authority*, 1997 AIHC 1719, 1725 (P&H)]. When on default in repayment of loan, the Bank obtained a decree against the petitioners and though a compromise proposal was given by the petitioner—judgment debtors, the same were never accepted by the Bank, the mere deposit of a part of the amount due by the petitioners during the period of negotiation with the Bank would in no way create an estoppel against the Bank to reject the proposal of the petitioners and to proceed to execute the decree obtained by it. [*Thakur Steel Tubes Ltd. v. State Bank of India,*

Chandigarh, A 1997 P&H 215]. In case of a concluded commercial contract between the private party on the one hand and the State on the other hand, the principles of promissory estoppel which are the domain of ligtimate expectation have no application. [*Trident Tubes Ltd. v. Govt. of Bihar*, A 1995 Pat 50, 53].

Where the petitioner's admission to the first year MBBS course was only provisional and his social status claim had yet to be cleared, as long as the social status claim was not cleared, the petitioner was not entitled to seek continuation in the MBBS course. In this situation the principle of promissory estoppel cannot be made applicable [*B. Seenaiah v. Health University Vijaywada*, A 1995 AP 181, 188]. When an industry was not envisaged, established or commenced, only due to the incentive scheme offered by the Govt. and it did not even register its application within the period during which the registration of applications were permitted under the incentive scheme, the doctrine of promissory estoppel was not invocable by it. [*Sree Rayalaseema Alkalies & Allied Chemicals v. Govt. of A P*, A 1993 AP 278, 291].

In order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. An exemption notification under section 25 of the Customs Act issued in public interest cannot be said to be holding out any such inequivocal promise by the Govt. which was intended to create any legal relationship between the Govt. and the party drawing benefit flowing from the said notification. Therefore, if the public interest so demands and the Govt. is satisfied that the exemption does not require to be extended any further, it can withdraw the exemption. The doctrine of promissory estoppel is not attracted in such case. [*Kasinka Trading v. Union of India*, A 1995 SC 874, 882]. Govt. circular and memo stating that full efforts should be made to provide the apprentice trainees with service, fall-short of any promise of employment. [*U P S R T Corpn. v. U P Parivahan N S B Sangh*, A 1995 SC 1115, 1118]. Where under the loan agreement with the Bank was entitled to terminate the agreement, the unilateral exercise of the contractual power cannot be challenged on the basis of the doctrine of promissory estoppel. [*Gwalior Ispat Pvt. Ltd. v. State Bank of India*, A 1995 Del 199, 203].

Where the Govt. accepted the proposal of the petitioner for development of tourism of certain area, held negatiation with the petitioner as regards the period of lease but ultimately withdraw the entire schemes in public interest, the principle of promissory estoppel cannot be applied to compel the State to enter into contract with the petitioner. [*Lotus Constructions v. Govt. of A P*, A 1997 AP 200]. Where after the employee attained age of superannuation, an order granting extension of service was issued but before the order could become operative it was cancelled, there was no statutory estoppel in favour of the employee when it was not his contention that he had altered his position in any way on account of the extension order and hence the subsequent order of cancellation would not have prejudiced him in any way. [*State of U P v. Girish Behari*, A 1997 SC 1354, 1356]. When impressing cinema tickets with the official seal of Entertainment Tax Officer was not by way of certifying the correctness of the Entertainment Tax and the Additional Tax on the tickets but for the purposes returns and neither the authorities were obliged to make any representation to determine the tax component in the maximum rate of payment for admission, nor did the authorities make any such representation, the doctrine of promissory estoppel cannot be invoked to estop the authority from demanding tax more than that specified on the ticket. [*Theatre, Sangamesh v. Entertainment Tax, Dy. Commr., Kurnool (FB)*, A 1993 AP 137, 143]. Where the incentives granted to new industries were not available to any new industrial unit which had been set up by transferring, shifting

the existing unit, when the new unit of respondent set up at place 'D' was sought to be shifted to another place 'M' against the original industrial licence, the respondent was not entitled to the incentives. Principle of promissory estoppel cannot be invoked against the Govt. [*State of M P v. Bindal Agro Chemicals Ltd.*, A 1997 SC 367, 369].

In absence of any promise by the Oil Selection Board that retail outlet dealership in petroleum products will be awarded to the petitioner, when several other claimants were awarded higher marks by the Board, the petitioner unsuccessful claimant cannot invoke the plea of promissory estoppel for grant of dealership. [*Silen Kumar Mondal v. Hindustan Petroleum Corp. Ltd.*, A 1995 Cal 327, 331]. The Govt is entitled to grant exemption to industries having regard to its industrial policy and it is equally free to modify the industrial policy and grant withdraw or modify fiscal benefits from time to time. When the notification granting certain concession to new industries did not contain any promise that the benefits so given would not be altered from time to time, subsequent withdrawal of the concession would not attract the doctrine of promissory estoppel. [*Arvind Industries v. State of Gujrat*, A 1995 SC 2477, 2479]. Where no contract was entered into between the petitioner and the Housing Commissioner on behalf of the Housing Board in the prescribed manner and in the prescribed form, such contract shall not be binding on the Board and cannot be enforced. The plea of promissory estoppel would not be available to the petitioner as there can be no estoppel against the statute and there can be no direction to the Board to act contrary to the legislative mandate and to give effect to the contract. [*B C Raju v. Kant. Housing Board*, A 1995 Kant 356, 360]. Where lease of land was got renewed under a false statement of the lessee and fraud was played, the doctrine of promissory estoppel cannot be invoked. [*Ganpati Salt Works v. State of Gujarat*, A 1995 Guj 61, 66]. Where direction was passed by the Tribunal for deemed retirement of the employee from the date when the punishment of censure was imposed on him in disciplinary proceedings and dues were paid to him from the date of his deemed retirement as directed by the Tribunal, the employee cannot claim that he should be treated to have continued in service till the age of superannuation. [*General Manager Telephones, Ahmedabad v. V G Desai*, A 1996 SC 2062, 2065]. Where the Government invited application for allotment of plot but did not hold out any promise to the petitioner that it would necessarily allot a plot to it, the promissory estoppel cannot in such circumstances be applied to debar the Government to take a decision in the larger public interest. [*Bharat Wools Ludhiana v. State of Punjab*, A 1996 P&H 215, 227].

Where the party incurred heavy investment for modernisation of rice mill prior to the introduction of the Government scheme giving incentives to the rice mill industries and no approval to the existing unit was obtained subsequent withdrawal of scheme by the Government would not make the party entitled to the benefit of the scheme by applying the doctrine of promissory estoppel [*Mahalaxmi Rice Mills v. State of W B*, A 1996 Cal 162, 166]. Dehors the terms of the contract the principle of promissory estoppel and legitimate expectation cannot be invoked [*Nagappa v. State*, A 1994 Kant 77, 94].

The fact that the Corporation merely sought confirmation from the tenderer as to whether she was agreeable to pay the bid amount within a certain period cannot be considered a ground for accepting the tender on principle of promissory estoppel [*C. Jayasree v. Commissioner, M C M*, A 1994, AP 312, 314]. Where the Govt. order inequivocally and unambiguously notified that the benefit of grant-in-aid by way of exemption from entertainment tax would be available only to such cinema houses who apply for licence for exhibition of cinematograph films during the period between 1-1-1984 and 31-3-1990, but the cinema house of the petitioner was not

complete till 31-3-1990, the last date for making application for licence and it came to be completed some where in september 1991, the petitioner would not be eligible for the benefit of grant-in-aid and no reliance can be placed on the doctrine of promissory estopped. [*Tilak Chitra Mandir v. State*, A 1993 All 30, 31]. When a plea was put forth for social status showing person belonging to scheduled caste or scheduled tribe recognised by the Constitution (SC/ST) Order, 1950, as amended by SC and ST Amendment Act, 1976 which was later found to be false, there is no promissory estoppel as no promise of social status is made by the State when a false plea is made. Nor a plea of estoppel is germane to the beneficial constitutional concessions and opportunities given to the genuine tribes or castes. [*Madhuri Patil v. Addl. Comnr. Tribal Development*, A 1995 SC 94, 105].

Estoppel and acceptance of late payment.—The owners of a ship accepted late payment for the hire of the ship, though they ahd the right to withdraw the ship on such default but they did not do so. The question arose whether they were estopped from withdrawing the ship on a subsequent such default. It was held that they had not lost their contractual right by accepting one late payment. The court said: In order successfully to raise the defence of promissory estoppel, the charterers had to establish, first, that the owners had represented unequivocally, or had acted in such a way that a reasonable man would infer that they had so represented, that they would not enforce their strict legal right under the contract between the parties to withdraw the vessel from the charterer's service in the event of a default in payment of a hire instalment by the due date and, second, that having regard to the dealings which had taken place between them it was inequitable to allow the owners to enforce their strict legal right without having previously given the charterers notice that the right to withdraw the vessel for non-payment would be relied on in the future. On the facts, the owners could not be taken by their words or conduct to have made any such representation and in any event it was not inequitable to permit reliance on the clause since the owners' conduct had not in any way influenced the charterer's decision to fail to pay the relevant hire instalment on time [*Scandinavian Trading Tanker Co AB v. Flota Petrolera Ecuatoriana, The Scaptrade*, (1983) 1 All ER 301 Ch D].

Estoppel by over-payment to employee.—An employer over-paid his employee under a mistake in circumstances in which a belief was created in the mind of the employee that he was entitled to treat the money as his own and he spent portions of it under that impression. Rejecting the employer's right to recover back the money the court said that the payment having been made under a mistake of fact and not of law, the employer was *prima facie* entitled to recover the money, but that the doctrine of estoppel would prevent that claim. Estoppel by representation, being a rule of evidence which preclude a representor from averring facts which were contrary to his own representations, could not operate *pro tanto* and therefore since, on the facts, all the conditions for the application of that estoppel had been satisfied, it followed that the plaintiffs were prevented from recovering any part of the overpayment [*Avon County Council v. Howlett*, (1983) 1 All ER 1073 CA].

Estoppel and option under lease.—Both lessor and lessee were under a mistake as to the validity of the option granted to the lessee for the renewal of his lease. In that state of ignorance, the lessors encouraged the lessee to believe that the option was valid and to spend money on the faith of that belief. The defendants were accordingly estopped from asserting the invalidity of the option. The plaintiffs were encouraged to incur expenditure and alter their position irrevocably by taking addition premises on the faith of the supposition that the option was valid. In these circumstances it would be inequitable and unconscionable for the defendants to frustrate the plaintiff's expectations which they had themselves created [*Taylor Fas-*

Withdrwal by the vendee of the money paid in the lower court under its decree by the pre-emptor, does not debar the vendee from appealing against the decree [*Sundardas v. Dhanpat*, 16 PR 1907; *Iftikhar v. Thakar*, 83 PR 1912; *Quadat-unnissa v. Abdul Rashid*, 48 A 616; *Mehdi v. Nadran*, 111 IC 814: A 1929 L 137; see also *Raghumal v. Bandu*, 31 PR 1907 FB]. Similarly a vendee filing an appeal by special leave is not precluded from proceeding with it merely because he has withdrawn the money deposited in the court below (*Bhau Ram v. Baijnath*, A 1961 SC 1327: 1962, 1 SCR 358). Pre-emptor party to suit by village landlords challenging sale to the pre-empted.—Sale was confirmed by a compromise decree. Plaintiff's claim to pre-empt cannot be entertained [*Rikhi v. Dhanpat*, 55 IA 266: 33 CWN 90: A 1928 PC 190]. Pre-emptor's reply to vendee before purchase and issue of notice that he had no objection to his purchase, does not amount to an estoppel [*Bhagat v. Hukam*, A 1947 L 299].

After the right to get either rescission or reformation of the contract is barred, it is not competent to a party enjoying its benefit to say that he is not bound by its terms [*Sashikanta v. Genda*, 82 IC 970: A 1925 C 389]. A creditor who is a consenting party to a deed of arrangment by a debtor is estopped from filing a petition for adjudicating the debtor an insolvent alleging the very deed as an act of insolvency [*Rugmoni v. Rajagopala*, 48 M 294].

Under the article of association the meeting of policy-holders was to be held in the registered office of the company, but the directors having refused permission, the meeting was held at another place—*Held*, that a person who has deliberately brought about a state of affairs, should not be allowed to take exception to that state of affairs and use that changed state for his own advantage [*Subramania v. U I Life Ass Co*, 55 MLJ 385: A 1928 M 1215]. So also, when the share-holders held a meeting elsewhere as the managing director had locked up the registered office of the company [*Rathnavelusami v. Manickavelu*, A 1951 M 542]. "It is principle of law that no one can in such case take advantage of the existence of a state of things which he has himself produced" [*per* LORD FINDLAY in *New Zealand S Co. v. Societe de France*, 1919 AC 1, 6; see also *Quesnel F G M Co v. Ward*, 1920 AC 222].

When plaintiff applies for substitution of a nominee in the order of reference to arbitration, defendant is entitled to object, but if the defendant adduces evidence and objects to the award only when it has gone against him, he is estopped from questioning the appointment [*Gajadhar v. Chunni*, A 1929 A 559: 117 IC 344].

When a person has alternative remedies open, *eg* either under Or 21 r 58 or Or 21 r 100 and chooses the latter course, there is no estoppel [*Md Hayat v. Gulam*, A 1931 L 598]. In law where a person having two alternative courses of actions mutually exclusive chooses to adopt one and rejects the other expressly or impliedly then he is said to have elected to choose one. He is subsequently precluded from adopting the course which he intended to reject. It is known as doctrine of election. Like estoppel it is also a child of equity [*Purshottam Dass Tando v. State of U P*, A 1987 All 56, 63 (DB): (1986) All Ren CJ 218]. Where some of the goods were not in accordance with the contract, but the purchasers took delivery and exercised acts of ownership, they are estopped from resisting the seller's claim for price [*Pravlal v. Maneckji*, 34 Bom LR 1252: 140 IC 610]. In a suit by plaintiff challenging the legitimacy of the defendant, the fact that the defendant had been treated as or admitted to be member of the family on various occasions does not create estoppel [*Sukhlal v. Mathra*, A 1933 L 412]. If in a suit for specific performance with an alternate prayer for refund of earnest money, the primary relief is refused and the alternate relief is granted. In such a case if the plaintiff has acted or conducted himself in such a manner as to

approbate the benefit thereunder, he cannot be premitted to reprobate the judgement by appealing against it. [*Annapoorani Ammal v. Ramaswamy Naicker*, A 1990 Mad 361, 363 (FB)].

When the owner of a railway allows its manager to deal with third persons and to enter into a contract, the railway administration cannot repudiate its liability to be sued [*Gaekwar Baroda S Ry v. Habibullah*, A 1934 A 740]. Where in a voidable contract there is an arbitration clause, but the contract is treated as valid and a reference is made to an arbitration, the party agreeing is estopped [*Ramdas v. Kodammal*, A 1933 S 207].

Correction of land register by Registrar on representation of owner of land creates no estoppel against Registrar or Government from asserting title to land [*P K A B Co-operative Soc v. Govt*, A 1948 PC 207: 52 CWN 719].

Plaintiff claimed damages against a railway company who sent a cheque for a lesser amount in full and final settlement. After encashing the cheque the plaintiff sued for the balance of the claim—*Held* that the retention of the cheque did not amount to estoppel [*Union v. Jethabhai*, A 1960 P 30 (*Firm Basdeo v. Dilsukhrai*, 44 A 718: A 1922 A 461 **relied** on)].

Estoppel in Arbitration Proceedings.—If a party allowed an arbitrator to proceed without objecting to his jurisdiction or competence he cannot subsequently ask for the award to be set aside on that ground [*See New India Assurance Co v. Dalmia Iron and Steel Ltd*, A 1965 C 42 and the cases cited there; *Dhar v. Union*, A 1965 C 424]. When a party to a contract expressly agreed with the reference of the dispute to the sole arbitrator appointed by the company, who may even be an employee of the company, there is a waiver of the right to complain of [*Vijay Singh Amar Singh & Co. v. Hindustan Zinc Ltd.*, A 1992 Raj 82, 88; *Mohindar Pal Mohindra v. Delhi Admn*, A 1989 Delhi 270, 273; *Union of India v. Sohan Singh*, A 1989 J&K 14, 17 (DB), *Rosily Mathew v. Joseph*, A 1987 Kerala 42, 46]. He cannot later allege any want of formality in the appointment of the arbitrator and the order of reference [*Assadullah v. Lassa Baba*, A 1966 J & K 1]. When a party agreed to submit to an arbitration without prejudice to his right to contend to the contrary, there is no question of any estoppel from contending that the arbitrator had no jurisdiction to entertain the dispute. [*Tarapore & Company v. Cochin Ship Yard Ltd*, A 1984 SC 1072, 1086 (ILR) (1961) 1 Ker 130 Reversed)]. When in an arbitration proceeding, the petitioner applied to recall the appointement of *A* and prayed for appointment of a fresh arbitrator and supplied the name of *B* which prayer was accepted, it is not open to the petitioner to assail the second appointment on the ground that the Court had no jurisdiction in view of the arbitration clause in the agreement [*Food Corporation of India v. Ramchandra Agrawala*, A 1990 Orissa 116, 123]. On arbitrator's failing to make award within time a consent order by the court directed Umpire to act as sole arbitrator. Party acquiescing in proceeding before Umpire is precluded for challenging award for lack of jurisdiction [*N Vhellapan v. Kerala Electricity &c*, A 1975 SC 230]. When in a suit for damages, a special referee appointed with the consent of both parties gave a report, the application by the Food Corporation of India to set aside that report was rejected, and no appeal was filed against that. In such circumstances, in the appeal against the order enhancing the damages, the Food Corporation of India is estopped from attacking the entire report of the referee [*Food Corporation of India v. Birendranath Dhar*, A 1989 NOC 119 (Cal) (DB)].

In a dispute regarding assets and liabilities of a firm and division of the same the objectors' having argued the matter at length regarding the question in issue and having participated in the proceedings of division of assets and liabilities of the said

firm, cannot be allowed to say that the assets and liabilities of the said firm was not a part of reference or the division was beyond the scope of the arbitration. [*R C Bhalla v. N C Bhalla*, A 1996 Del. 24, 32]. Merely because the plaintiff had earlier filed application under Sections 5, 12 and 20 of the Arbitration Act, it does not amount to the plaintiff's admission about existence of arbitration agreement. There is no estoppel against law. [*Garg Builders & Engineers v. U P Rajkiya Nirman Nigam Ltd.*, A 1995 Del 111, 113]. Where in an arbitattion clause in a contract both the parties fully knowing that the arbitrator does not correspond to the description of the officer referred in the arbitration agreement and is not competent to make an award, appear before such arbitrator, lead evidence and take other parts, they are estopped from challenging the award [*Union v. Mandal*, A 1958 C 415; *Union v. Sen*, A 1963 C 456]. If the parties to the reference either agreed beforehand to the method of appointment or afterwards acquiesced in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant facts will amount to such acquiescence. [*National Research Development Corpn of India v. Vrititile Carbons Ltd.*, A 1987 Delhi 317, 319 (A 1986 Punj 376 **Dissented**)].

In proceedings under the Arbitration Act a party having taken a willing part in the proceedings cannot challenge the award on the ground of it having been made beyond time [*Bokaro & Ramgur Ltd. v. Prasun Kumar*, A 1968 P 150 FB; *S v. Sahay*, A 1971 P 37; *Neel Kantan and Bros Construction v. Superintending Engineer National Highways Salem*, A 1988 SC 2045, 2046; *Prasum Roy v. Calcutta Metropolitan Development Authority*, A 1988 SC 205, 208L (1987) 4 SCC 217 From 1987 1 Cal LJ 20 **Reversed**; *Kishandas v. Bhagchand*, A 1991 MP 309, 311]. Once parties appearing before the arbitrator under the Arbitration Act object to his jurisdiction, they do not waive their right merely by participating in the arbitration proceeding. [*Food Corporation of India v. A Mohammed Yunus*, A 1987 Ker 231, 233; *Hindustan Cables Ltd. v. Bombay Metal Co*, A 1991 Cal 350, 355; *Dodsai Pvt. Ltd. v. Delhi Electric Supply Undertaking*, A 1984 NOC 111 (Del)].

When a decree was passed on the basis of award and the decree was put in execution on more than one occasion, and no objection was raised by the judgment-debtor till a very late stage that the decree on the basis of the award could not be passed as it was in contravention of S. 13 of the CP & Berar Letting of Houses and Rent Control Order 1949, the judgement-debtor by not raising the objection earlier has lost his right to raise this objection and he is estopped [*Smt Kamlabai v. Mangilal Dulichand*, A 1988 SC 375, 384: (1987) 4 SCC 585]. An arbitrator has no jurisdiction to make an award after the fixed time and so it is invalid. The parties are not estopped by their conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after the expiry of the prescribed period [*State of Punjab v. Hardyal*, A 1985 SC 920, 923].

Persons who act on the general award and accept benefit under it are precluded from challenging it on the ground that the award was beyond the authority of the arbitrator [*Khub Chand v. Jethanand*, A 1929 S 168]. Where the applicant fully participates in arbitration porceedings without protest, he cannot make an objection afterwards that the arbitration proceedings are without jurisdiction on the ground of a known disability of the other party [*Jupiter &c v. Corpn of Calcutta*, A 1956 C 470]. Mere fact that the party objecting had appeared before the arbitrator at earlier stages or proceedings and had even filed objections would not operate as estoppel in challenging the jurisdiction to give award [*Jagannath v. Premier Credit &c*, A 1973

A 49 (*Ramkinkar v. Tufani*, A 1931 A 35; *Omprakash v. Union*, A 1963 A 242; *Khardah Co v. Raymon*, A 1962 SC 1810; *Waverly Jute v. Raymon*, A 1963 SC 90; *Ajit v. Fateh*, A 1962 Pu 412 **rel on**)]. A person taking share of properties in an arbitration on the footing that they were self-acquired, is estopped from setting up joint acquisition. In this case, two brothers referred it to arbitrators to divide the estate of their father ignoring the fact that the father's widow was entitled to a share. One of the brothers predeceased the widow and the surviving brother, who was heir to his mother's property then sued to recover from his deceased brother's family half the share to which she should have succeeded on her husband's death [*Md Wali v. Mohiuddin*, 24 CWN 321: 58 IC 843: A 1919 PC 47].

Where one of two plaintiffs joined with defendant in an application for referring the case to arbitration and the other plaintiff made an oral application accepting the arbitration and the arbitration took place, the plaintiff is estopped from denying its legality [*Gauri v. Ganga*, 77 PR 1919: 52 IC 859: see also *Brijmohan v. Shiam*, 24A 164]. Where a party agreed for an umpire to participate in an arbitration proceedings, they cannot complain anything about such a procedure after the award had gone against them [*Oil and Natural Gas Commission of India v. Western Company of North America*, A 1990 Bom 276, 280]. The statutory right of appeal vested in a party under sec 39 of the Arbitration Act cannot be forfeited by the mere fact that the second Arbitrator passed an award in compliance with the order against which the appeal was filed. There cannot be any estoppel against a statutory appeal [*Sultan A.M.A v. Seydu Bohara Beevi*, A 1990 Ker 42, 46, 47].

Land Acquisition Cases.—Once permission was granted for change of land use within the provisions of the scheme of the Govt. and the land in question was excluded from the acquisition proceedings and consequently the landowner spent lacs of rupees in setting up factory and expansion of building, plant and machinery, relying upon such exclusion and permission for change in land use, the principle of estoppel would come into play and the Govt. have to be restrained from acquiring the land. Once sanction is given under the law, it could not be recalled after the landowners had changed their position to their deteriment by investing huge amounts on the basis of assurances given by the Govt. [*Busching Schmitz Pvt. Ltd. v. State of Haryana*, 1997 AIHC 1560, 1565, 1566 (P&H)]. In a Madras case it was held that the collector having exercised his alternative power either to exclude the land or to proceed to acquire the lands and as a matter of fact proceeded to acquire the lands, it is no longer open to the collector to exclude the land. [*N S V Ramanuja Jeer Swamigal v. State of T N*, 1996 AIHC 204, 214 (Mad)]. Where the petitioner had participated in the award proceedings under the Land Acquisition Act and had not challenged the legality of the notifications issued under the said Act before the making of the award, he cannot later be permitted to question the validity of the said notifications belatedly *Sarbati Devi v. Union of India*, A 1995 Del 102, 103. Where the commissioner fixed valuation of the property after taking evidence from the parties and the petitioner participated in the enquiry, he should not be allowed to turn round and say that the enquiry was biased and prejudicial [*Amena Bibi v. Sk. Abdul Haque*, A 1997 Cal 59, 62]. Where in the earlier petition the petitioner did not take the plea that the acquisition had lopsed on account of delay in taking possession he is estopped from taking such plea in the subsequent petition [*Raj Kumar v. Union of India*, 1998 AIHC 1419, 1421 (Delhi)].

Estoppel in Criminal Cases.—The evidence of approver cannot be rejected on the basis of estoppel [*Ram Lal Narang v. State*, 1981 Cri LJ NOC 225 (Delhi)]. A conviction cannot be based on the evidence of the handwriting expert alone which is not substantive evidence [*Muthusamy Asari Jayamohan v. State of Kerala*, 1982 Cri

LJ NOC (Ker): (1982) Ker LT 372]. The accused is entitled to put forth inconsistent pleas [*Gnanasekaran v. The State*, 1984 Cri LJ NOC 149 : 1984 Mad LW (Cri) 44 (Mad)]. The evidence of an Inspector of Police who only assisted the Dy. Supdt of Police in the investigation was dispensed with. When some comment was made on his non-examine, the prosecution offered him for cross-examination by the accused. But the defence counsel said that he did not want to cross-examine. After this it is not open to the accused to comment upon the so-called failure of the prosecution to examine that Inspector. [*State of Gujarat v. Raghunath Vamanrao Baxi*, 1985 Cri LJ 1357: A 1985 SC 1092, 1095]. An order for search was made on a petition filed under sec. 94 Criminal Pro. code. After search, the articles were produced in court. Both parties filed claims. Later a petition to quash the search order was filed. A challenge to the subsequent proceeding regarding the disposal of property is not a condition precedent to his exercise of the right to get the order for search quashed. [*Gangadharan v. Kochappi Chellappan*, 1985 Cri LJ 1517, 1518: (1985) Ker LJ 718, (Ker)]. There is no theory of estoppel in the matter of defence taken by the accused in the trial [*Daungarshi v. Deviprasad Omprakash Bajoria*, 1985 Cri LJ 1943, 1947 (Bom)].

It will not be unreasonable to presume that all the records including the deposition of the defence witness were before the confirming authority under the COFEPOSA Act. It will be a mere surmise to hold that the confirming authority had not applied his mind to the deposition of the defence witness [*Smt Madhu Khanna v. Administrator, Union Territory of Delhi*, 1987 Cri LJ 318 : A 1987 SC 48, 51]. When the detaining authority promised to supply the necessary documents to the detenue which is in accordance with law, they cannot turn round and say that the documents need not be supplied on the ground that the documents had not been relied upon or were casually mentioned or referred to [*Sukhdev Singh v. Union of India*, 1989 Cri LJ 1340, 1343: (1988) 36 DLT 320 (Del)]. The Doctor who recorded the dying declaration of the deceased was not examined. The prosecution examined the second clerk who gave evidence that the Doctor had left the service and his whereabouts are not known and the medico-legal report was proved through him. The prosecution cannot turn round and say that the dying declaration cannot be relied on since the Doctor who recorded it has not been examined [*Edward John v. State*, 1991 Cri LJ 310, 314 (Del)]. The operation of issue estoppel is not linked with the outcome in the proceedings and the bar is confined to re-agitate or adjudicate when a finding is already on identical issue as distinct from *antrefois acquit* applicable to the interdiction of a trial in succession in respect of the same offence ending in acquittal [*D R Rao v. G. Somi Reddy*, 1987 Cri LJ 1629, 1632 (AP)]. The prosecution has to succeed on the basis of its own evidence and it cannot rely on the absence of defence to sustain the guilt [*Harendra Narain Singh v. State of Bihar*, A 1991 SC 1842, 1847].

Estoppel in Execution proceedings.—A decree-holder by mistake entered in the sale proclamation one parcel of land twice as items No. 7 and 40. No. 7 was purchased by the decree-holder and No. 40 was purchased by a third party. In a suit by the third paty against the decree-holder in respect of the parcel of land, the decree-holder was estopped by his conduct from setting up his title as purchaser as against the third party [*Tumappa v. Murugappa*, 7 M 107]. The decree-holder by gross neglect described a whole field as belonging to his judgment-debtor and auction purchaser was subsequently deprived of half the field as it did not belong to the judgment-debtor.—*Held*, that the decree-holder is estopped from proving that he intended to sell only half the field and auction purchaser is entitled to a refund of half his money [*Dayal v. Shankar*, A 1931 N 116]. Decree-holder creditors applying for rateable distribution of assets held by executing court in respect of another decree

cannot challenge that decree on the ground that the court had no territorial jurisdiction to pass that [*Abdul Jabbar v. Venkata Sastri*, A 1969 SC 1147]. Judgment-debtors objecting that the attached property was ancestral, cannot in a subsequent suit for possession by purchase plead that the property was not ancestral [*Mahabir v. Raghunath*, A 1934 A 430].

Landlords having described a holding as *Mokrari* in sale proclamation is estopped from pleading that it is not *mokrari*. But the estoppel would not affect those landlords who were not parties to the suit, though the entry would be strong evidence under s 13 [*Khirod v. Janki*, 20 IC 753]. Plaintiff and defendant jointly agreed to purchase six annas and ten annas respectively of a property in execution sale and paid 25 per cent deposit according to their shares. Subsequently plaintiff failed to contribute his share and defendant paid the whole amount. In a suit by plaintiff for declaration to six annas share—*Held* there was no question of estoppel under s 115 [*Bhavatgaran v. Durgesnandini*, 51 C 992: 81 IC 1029]. Where execution of the decree was kept alive while the objection under section 47 CPC was allowed to be dismissed for non prosecution, the execution can be objected to by the judgment-debtor. There cannot be any question of estoppel as against the judgment-debtor [*Kanta Prasad v. IInd Addl. Dist. Judge Mainpuri*, A 1997 All 201, 203].

Where in execution of a money decree, the landlord of a non-transferable occupancy holding purchased it after it had been mortgaged by the tenants—*Held*, in a suit by the mortgagee that the landlord was not estopped from setting up the defence that the holding was not transferable as the execution sale by him did not amount to a representation that it was transferable with their consent [*Asmatunnessa v. Harendra*, 12 CWN 721: 8 CLJ 29]. In such a case the other party cannot plead that he was misled by any act or conduct of the landlord. Subsequent conduct or word cannot operate as estoppel [*Jnanendra v. Dukhiram*, 28 CWN 865: 49 CLJ 90: 82 IC 386]. Where a judgment-debtor having full knowledge of the execution proceedings failed to object that the holding was not transferable, he cannot on that ground resist the purchaser after confirmation of the sale [*Dwarka v. Tarini*, 34 C 119: 11 CWN 513; see also *Umed v. Jasram*, 29 A 612; *Pandurang v. Krishnaji*, 28 B 125; *Lalaram v. Thakur*, 40 A 680; *Mukat v. Misra*, 79 IC 106: A 1924 A 706. See however *Bochai v. Isri*, 47 IC 29]. Where a judgment-debtor had notice under Or 21 r 66 knowledge of the contents of the sale proclamation and neglects to take any objection as to valuation, misdescription, inaccuracy &c he is estopped from raising such objection at the sale or afterwards [*Arunachallam v. A*, 15 IA 171: 12 M 19; *Maharaj Bahadur v. Sachindra*, A 1928 C 328: 32 CWN 309; *Behari v. Mukat*, 28 A 273: 3 ALJ 140; *Raja of Kalahasti v. Maharaja*, 38 M 387: 25 MLJ 198; *Mahadeo v. Dhobi*, 2 P 916: 74 IC 838; *Girdhari v. Hardeo*, 3 IA 230; 26 WR 44; *Ramanathan v. R*, A 1929 M 275: 117 IC 705]. He is not estopped if he applies for adjournment without the notice and without knowledge [*Rajagopal v. Muthulakshmi*, A 1969 M 5].

Mere submission to prior execution proceedings without raising a certain plea does not estop a party from raising it as a bar to subsequent execution proceedings [*Lakshmikutti v. Mariathumma*, 47 MLJ 708: A 1925 M 127]. A Judgment-debtor not objecting to execution after service of notice, is estopped from subsequently raising any objection that there was no personal decree under Or 34 r 6 [*Madhusudan v. Kailash*, 2 CWN 254]. Where the judgement-debtor does not object to sale of his house in execution, he is in a subsequent suit for possession estopped from pleading exemption under s 60(*1*)(*c*) C P Code [*Lalaram v. Thakur*, 16 ALJ 691; see *Sabha v. Kishan*, A 1931 A 112]. Where in a proceeding under Or 21 r 90 on the ground of invalidity of attachment the objector by a compromise got time to have the sale set

aside on payment of the full decretal amount within a certain time but failed to pay, the objector was estopped from contesting the legality of the sale or the validity of the attachment [*Baidyanath v. Satyanarain*, A 1960 P 36; *Uttam v. Khettra*, 29 C 577; *Bata Kr v. Apurba*, A 1938 P 199].

Where a judgment-debtor mortgages his house he is afterwards estopped from pleading under s 60(*1*)(*c*) C P Code that the house is not saleable [*Gangabishun v. Gajadhar*, 6 P 254: 102 IC 616; disstd from in *Firm Parkash v. Mohan*, A 1943 L 268]. The judgment-debtor cannot waive the privilege conferred on him by s 51 C P Code [*Jogendra v. Ramanandan*, A 1968 P 218]. Where the owner of a property keeps quiet when his property is being sold as that of judgment-debtor, though he was aware of attachment and sale, he is estopped from impeaching the sale [*Jhanda v. Harnam*, 94 IC 75: 27 PLR 260].A person putting in a claim under Or 21 r 58[3] is not estopped from showing in a suit under Or 21 r 63[3] that there was no attachment or there was an invalid attachment [*Venkatappayya v. Venkatachalapathi*, A 1927 M 450: 99 IC 989]. A person being present at attachment but no objecting under Or 21 r 58 and subsequently raising objection under Or 21 r 100[4] is not estopped from bringing a suit under s 103[4] [*Md Hayat v. Ghulam*, A 1931 L 598].

A person who purchases property in execution of his own decree subject to a *lien* declared by the court, under Or 21 r 62[5] without acquiescing in that order, is not estopped from questioning the validity and *bona fide* of the mortgage [*Shdh Ziauddin v. Kailash*, 2 CLJ 599; see also *Ganesh Moreshwar v. Purshottam*, 33 B 311: 11 Bom LR 26: 5 MLT 228; and *Shib Kumar v. Sheo Pd*, 28 A 418: 3 ALJ 200 (**folld** in 35 A 257)]. Where in plaintiff's suit to establish their right of residence in a property, the impending sale was not stayed, but the court ordered the sale subject to plaintiff's right of residence—*Held*, that the auction purchaser is not estopped from contesting the factum and validity of the incumbrance [*Man Kuar v. Ishar*, 11 L 90: A 1930 L 40; see *Izatunnissa v. Partab*, 31 A 583; *Agha Sultan v. Mohabbat*, 43 A 489; *Narayan v. Umbar*, 35 B 275]. A person purchasing a property in execution sale subject to a mortgage cannot challenge validity of the mortgage in mortgagee's suit [*Govindrao v. Hirchand*, 95 IC 563 (N)]. A man who has represented to an intending purchaser that he has not a security and induces him under that belief to buy, cannot, as against the purchaser, subsequently attempt to put his security in force [*Jia Lal v. Saera Bibi*, 99 IC 2 :A 1927 O 104]. A purchaser of mortgaged property in execution of a decree is a representative of the mortgagor and is estopped from denying the validity of the mortgage [*Totaram v. Hargovind*, 36 A 141].

Where a decree-holder at first took objection to the sale but then allowed it to proceed and took part in it by binding and then shared in the proceeds of the sale, he is not permitted afterwards to say that the sale was void [*Bonagiri v.Karumuri*, A 1938 M 1004]. When a decree-holder sells in execution a property as his judgement-debtors', he is estopped from saying afterwards that his own property was sold by mistake [*Chitra v. Badri*, 89 CLJ 209].

Estoppel by Reason of Contract.—"Situations may arise in which a contract should be held an estoppel, as in certain cases where only an inadequate right of action would, if the estoppel were not allowed, exist in favour of the injured party. In such a case the estoppel may sometimes be available to prevent fraud and a circuity of action" (*Bigelow*, 6th Ed pp 639-640). Applying this principle it has been held by

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3. See now Or 21, r 58.
4. See now Or 21, rr 99 and 101.
5. See now Or 21, r 58.

the Supreme Court that even though the matter may have passed from the stage of a representation into an agreement, there are cases where the courts are entitled to entertain a plea of estoppel to prevent fraud or circuity of action. Thus, under a previous compromise decree the present plaintiff (who was adopted as son by *G*) and *G* having for a consideration of Rs. 8,000 paid by the defendant agreed to relinquish all their rights to the disputed property and deemed to have agreed that *G* would not adopt in future, it was held that *G* was estopped from adopting the plaintiff against as that would be encouraging fraud [*Sunderabai v. Devaji*, A 1954 SC 82: 1953 SCJ 693]. There is no question of any promissory estoppel in respect of a contract which stands concluded, it applies only in the case where there is no concluded contract, but a promise has been made by one party intending to create legal relations or affect legal relationship to arise in the future and the other party has acted upon and changed its position [*C V Enterprises v. Braithwaite & Co Ltd*, A 1984 Cal 306, 310]. In respect of a contract to execute certain works, *A* paid money by way of mobilisation advance to *B* and *B* instructed a Bank to issue a Bank guarantee in favour of *A*. Since *B* is not a party to this guarantee the question of estoppel does not arise when the Bank tried to enforce that guarantee. [*G S Atwal & Co Engineers Pvt Ltd v. Hindustan Steel Works Construction Ltd*, A 1989 Cal 184, 188].

Estoppel by Conduct of Court.—There can be no estoppel against a litigant arising out of the wrongful acts of the court permitted or performed by its own officials. In this case a decree for foreclosure was drawn up in complicity with the officers of the court, although the decree passed was one for sale [*Balgobind v. Sheo Kumar*, 82 IC 184: 22 ALJ 79]. It is incumbent on the court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud is found in the conduct of its ministers [*Kalamea v. Harperink*, 36 IA 32: 13 CWN 249; 36 C 323, 324: 19 MLJ 115]. Where in an execution the widow of a judgment-debtor claimed the attached property as her own under Or 21 r 58 and s 47 and the court referred her to a regular suit, it does not estop the other party from contending that the suit was barred under s 47 and that the widow's only remedy was by way of an appeal against the dismissal of the application [*Manchamma v. Kanakamma*, A 1935 923].

"Intentionally Caused or Permitted Another Person to Believe".—The term "intentionally" has be fully explained in *Sarat v. Gopal*, 20 C 296 PC (*ante*: "*Principle and Scope*" and "*Intentionally*"). The word "wilfully" in the rule laid down in *Pickard v. Sears* (*ante*) has been replaced by "intentionally".

By the words "permitted .....a thing, etc" the section contemplates that not merely may there be active inducement on the part of the declarant for a belief in the mind of another person, but it is enough if the declaration is such by which the declarant in the ordinary course permits somebody else to believe in the truth of the declaration and to act on that behalf [*Barkat v. Prasanna*, 33 CWN 873: A 1929 C 819]. To petition for the postponement of a sale in execution is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed, and occasions no estoppel within s 115. The judgment-debtor can, notwithstanding his having filed such a petition, maintain, that execution is barred by lapse of time [*Mina Kunwari v. Jaggat Sethani*, 10 C 196 PC: 13 CLR 385]. A person without title obtained mutation of an under-proprietary right and remained in possession paying rent for eight years, and obtaining receipt in which he was described as *pukhtadar*. In a suit for recovery of possession and mesne-profits it was held that the taking of rent estopped the plaintiff from claiming mesne-profits; but it did not estop him from denying that defendant had an under-proprietary right, nor is he to be taken to have waived his right. The court of wards

which mistakenly granted mutation did not intentionally cause or permit the defendant to believe it to be true and to act upon the belief that she was a *talukdar* [*Mitrasen v. Janki*, 51 IA 326: 46 A 728: A 1924 PC CWN 533].

"To Believe a Thing to be True And to Act Upon Such Belief".—There can be no estoppel, if the party to whom the representation is made does not believe it to be true, for in such a case the resulting conduct is in no sense the effect of the preceding declaration [*Jagarnath v. Jaikishen*, 1 PLJ 16: 34 IC 375]. What s 115 mainly regards is the position of the person, who was induced to act. Unless the representation of the party to be estopped has been really acted upon, the other party acting differently from the way in which he would otherwise have acted, no estoppel arises. The person deceived must not only believe the thing to be true, but he must also act upon such belief, so as to alter his own previous position, and where there has been no such belief, and no such action, there can be no estoppel [*Collier v. Baron*, 2 NLR 34; see *Sarat v. Gopal*, 19 IA 203: 20 C 296; *Ameer Ali v. Syed Ali*, 5 WR 289; *Solomon v. Ramlal*, 7 CLR 481; *Janginath v. Janakinath*, 8 ALJ 225; *Md Samiuddin v. Mannu*, 11 A 386; *Mohunt v. Nilkamal*, 4 CWN 283; *Beni Pd v. Mukteswar*, 21 A 316; *Tekchand v. Gopal*, 46 PR 1912]. S 115 does not apply to a case, in which a belief, otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised [*Joy Ch v. Sreenath*, 32 C 457: 1 CLJ 23].

To create an estoppel it is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did for the way in which the defendants had acted. It must be found that the plaintiff would not have acted as he did and that the defendants by the declaration, act or omission intentionally, caused or permitted another person to believe a thing to be true and to act upon that belief [*Narsingdas v. Rahimanbhai*, 28 B 440; *Ralli v. Forbes*, 67 IC 744]. It must be established that it was not reasonably possible to know the true state of affairs by pursuing enquiries reasonably and diligently [*Md Shafi v. Md Said*, A 1930 A 847]. The mere fact that the defendant described himself in the instrument on which the suit was brought, as a trader, would not of itself estop him from pleading that he was an agriculturist and entitled to protection of the Dekkhan Agriculturist's Relief Act (17 of 1879). There must be evidence to show that by describing himself as a "trader" he represented himself as a trader and intended that the representation should be acted upon by the plaintiff [*Kadappa v. Martanda*, 17 B 227]. An usufructuary mortgagee of houses let the property to the mortgagor, obtained a decree for rent in arrears, and put them up for sale. Defendant purchased the houses and although the existence of the mortgage was not disclosed defendant knew it. In a mortgage suit held that there was no estoppel against the mortgagee inasmuch as defendant did not act upon the belief that there was no mortgage and knew of the mortgage [*Nanak v. Chameli*, 17 ALJ 288: 50 IC 777]. A manufacturer sent one sample of woolen belt and got exemption from Sales Tax. Late he sent 26 samples of different varieties and claimed exemption. The principle of equitable estoppel cannot be invoked in respect of grant of exemption for these 26 samples [*Fitterco v. Commr of Sales Tax (MP)*, A 1986 SC 626, 631 (1986) 2 SCC 103].

Estoppel may yet arise where a person acts upon a representation in a way different from the way intended by the maker of the representation [*Satibhusan v. Corpn*, A 1949 C 20, 22 (*Maritime Elec Co v. Genl Dairies Ltd*, 1937 AC 610 *post* **refd** to)].

"Thing". [What is a Fact?].—A mere view or opinion on the legal effect of an adoption is not a "thing" within s 115 [*Tekchand v. Gopal*, 46 PR 1912; *Rajambal v. Shanmugha*, 70 IC 653], nor is a proposition of law [*Mo Pau v. Mg Po*, 39 IC 385].

Sec 115 does not estop any person from denying the legal effect of a transaction, but only the truth of a "thing" which he intentionally caused the other party to believe. The thing does not mean the legal validity of the agreement to relinquish *spes successionis* [*Asa Beevi v. Karuppan*, 41 M 365]. A representation that the interest of a deceased had devolved upon the person making the representation is a "thing" as it is not a question of law but is a mixed question of law and fact [*Barkat v. Prasanna*, A 1929 C 819: 33 CWN 873]. It has been held that a representation as to the legal effect of a document may be a representation of fact [*De Tehihatchef v. Salerni, Coupling, Ltd*, 1932, 1 Ch 320]. See *ante*: "*Representation may include representation of law*".

Estoppel by Acquiescence. [Doctrine of "Standing by"].—(See also *post*: *Acquiescence and Abandonment*). The principle has been thus enunciated :—

> LORD CAMPBELL in *Cairncross v. Lorrimer*, 3 LT 130: "Generally speaking if a party having an interest to prevent an act being done has full notice of its being done, and acquiesce in it, so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license".
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> COTTENHAM LC, in *Duke of Leeds v. Amherst*, 1846, 78 RR 47: 2 Phillips 117: If party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence".

If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon the right, stands by on such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed he cannot afterwards be heard to complain of the act [*De Bussche v. Alt*, (1878) 8 Ch D 286: 38 LT 379; *Sailala v. Ngurtarvelt*, A 1980 Gau 70]. In order to constitute acquiescence not only (*1*) full knowledge of one's rights is required, but (2) there must be some lying by him to the detriment of the other side. For it is elementary that there can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement [*Shyama Churn v. Prafulla*, 21 CLJ 557, 563; *Bhonu Lal v. Vincent*, A 1922 P 619: 3 PLT 653. See further next heading]. As TUENER LJ, observed in *Life Assen of Scotland v. Siddal*, 130 RR 28 p 38:—

> "Acquiescence as I conceive imports knowledge, for I do not see, how a man can be said to have acquiesced in what he did not know, and in cases of this sort I think that acquiescence imports full knowledge". See also the observation of TURNER VC, in *Marker v. Marker*, 1851, 9 Hare 1.

Acquiescence implies that a person who is said to have acquiesced did so with knowledge of his rights and the other person acted in the *bona fide* belief that he was acting within his rights. The absence of either of these elements makes the doctrine inapplicable [*Suchit v. Habibullah*, 99 IC 199; *Ram Kishan v. Karan*, A 1949 A 673]. When both parties are unaware of their rights in the disputed property and both are labouring under some mistake, there can be no acquiescence [*Abdul Khair v. James*, A 1957 P 308]. Acquiescence does not simply mean standing by. It does not mean acquiscence only. It means assent after the party has come to know of his right [*Chaitanya v. Ranjit*, A 1938 C 263]. There can be no acquiescence unless the plaintiff knows that position at the time of acquiescence

[*Sayers v. Collyer*, 28 Ch D 103; *Cowasjee v. C*, A 1937 R 387]. Acquiescence in ignorance of legal rights cannot amount to an estoppel [*Chettyar Firm v. Kaliamma*, A 1935 R 423; *Sankaran v. Nangeeti*, A 1935 M 1062]. "As regards knowledge, persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their rights to dispute them. But it is not necessary that the plaintiff should have known the exact relief to which he was entitled: it is enough that he knew that fact constituting his title to relief" [Hals Vol 13 p 169]. Where the dispute was settled before the High Court by the intervention of the advocates and the concerned main parties, it was not open for other defendants to show their ignorance with regard to the order passed on the basis of the joint memo. Their silence from the date of the order till they filed the appeal demonstrate their acquiescence. [*Shanimahatma Swami v. C. Gangaiah*, A 1994 Kant 302, 306]. The conduct of a person in acquiesceing in the renewal of the permits over a long period cannot create or constitute an estoppel from informing his rights under the scheme framed under the Motor Vehicles Act and from objecting against the renewal of the stage carriage permit in view of the subsistence of a valid scheme [*K S R T Corp. Bangalore v. K S T Appellate Tribunal*, A 1995 Kant 103].

Acquiescence is no more than an instance of the law of estoppel by words or by conduct; in other words acquiescence does not mean simply an active, intelligent consent, but may be implied, if a person is content not to oppose irregular acts which he knows are being done [*Ananda v. Parbati*, 4 CLJ 198]. There is a distinction between acquiescence occurring while the act is in progress, and acquiescence taking place after the act has been completed. In the former case the acquiescence is acquiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case when the act is completed without any knowledge to without any assent of the person whose right is infringed, the matter is to be considered on very different legal considerations. A right of action has then vested in him, and mere delay by itself does not constitute a bar to legal proceedings, unless the delay, after he had acquired full knowledge, has affected or altered the position of his opponent [*Shyama Charan v. Profulla, sup*; *Shyamlal v. Rameshwari*, 23 CLJ 82; *Ghasia v. Thakur*, A 1927 N 180]. Mere delay in bringing suit could not amount to acquiescence [*Mohidden v. Rigaud &c*, A 1932 R 114].

There cannot be acquiescence to a position which is patently against the provisions of law [*Ambala Good &c v. RTA*, A 1977 HP 46]. Acquiescence by party would not prevent it from challenging the order of authority lacking inherent jurisdiction [*Nabir v. Mala*, A 1976 J&K 25].

In the case of estoppel, the material representations are active in form while in the case of acquiescence the representations are to be inferred from silence. But mere silence, mere inaction cannot be construed to be a representation; it must be inaction or silence in circumstances which require a duty to speak and therefore amounting to fraud or deception [*Abdul Kader v. Upendra*, 40 CWN 1370. As to acquiescence amounting to fraud, see *Wilmott v. Barber*, 43 LT 95 *post*]. The plea of waiver or acquiescence cannot stand before the mandate of the statute. According to Punjab Gram Panchayat Election Rules, if there is a tie between two candidates, that can be resolved by lot which gives an additional vote in favour of that person. So the mere fact that a person consented to have a draw of their lots would not stand in his way to seek protection of the law as it stands [*Harbans Singh v. State of Punjab*, A 1982 Punj 402, 406].

There may be representation by an attitude or a state of mind. An arbitration clause in a contract between *A* and the Government provided that all disputes would

be referred to the Superintending Engineer. When disputes arose, the Government appointed one *M* as arbitrator (who was the Superintending Engineer) and *A* not only submitted to the arbitration of *M* but also put in a counter claim against the Government. *Held* that although there was no representation by *A* as to the actual competency of *M*, the rule of estoppel will still bind him [*Union v. Mandal*, A 1958 S 415].

—Acquiescence Whether Equitable Estoppel.—In *Ramsden v. Dyson*, LR 1 HL App 129, 140: 14 WR 926, LORD CRANWORTH said:—

> "If a stranger begins to build on my land supposing it to be his and I (the real owner) perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert any title to the land, on which he has expended money on the supposition that the land was his own. It considers that when I saw the mistake in which he had fallen, it was my duty to be active and to state his adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented".

In *Munpl Corpn of Bombay v. Secy of S*, 29 B 580, 607, 610, JENKINS CJ, said: "The doctrine involved (in *Ramsden's case*) is often treated as one of estoppel, but I doubt whether this is correct, though it may be a convenient name to apply. It differs essentially from the doctrine embodied in s 115, which is not a rule of equity, but is a rule of evidence ..... I do not think that it is any objection to that equity that the interest the Municipality was to have in the land was not originally moulded in a form recognised by the law: that does not prevent us from now imposing such terms as will prevent that which a court of equity would regard as a fraud". *Ramsden v. Dyson*, has been explained and commented on in *Beni v. Kundun*, 26 IA 58: 21 A 496: 3 CWN 502; follld in *Asthamoorthi v. Rama*, 96 IC 915: A 1926 M 1052; *Forbes v. Ralli*, 52 IA 178: 4 P 707: 49 MLJ 48: 30 CWN 49; *Md Umardaraz v. Maru*, 6 ALJ 57: AWN (1908) 282; *Ramsden's case* was referred to in *Stocking v. Tata I &c Co*, 2 PLJ 600; *Syed Ali v. Manik*, 27 CWN 969; *Union v. Anglo-Afghan Agencies*, A 1968 SC 718. In *Narasayya v. Venkatagiri*, 37 M 1, 15 has been discussed how far the rule in *Ramsden v. Dyson* can be applied where a tenant built upon his land with the passive connivance of his landlord.

When a landowner encourages me to do something on his land (*eg* to spend money on it or to waive some claim against it) the "equitable estoppel" which then arises then in my favour will preclude him from exercising his own legal rights [See *Inwards v. Baker*, 1965, 2 QB 29; *Ward v. Kirkland*, 1967 Ch 194; *Ives v. High*, 1967, 2 QB 379: 1968 Camb LJ 26].

It is settled law that in order that a defendant erecting permanent structures might avail himself of the doctrine of acquiescence (in *Ramsden v. Dyson, ante*) it is necessary for him to show that in spending money on the buildings he was acting in an honest belief that he had a permanent right in the land and that the landlord knowing that he was acting in that belief stood by and allowed the construction [*Syed Ali v. Manik*, 27 CWN 969: 80 IC 580; See also *Venkataraman v. Bullemma*, A 1965 AP 163, which points out that in *Ariff v. Jadunath, inf*, there was no representation so as to raise an estoppel]. Where there is no mistaken belief as to the ownership of the land, still less was any mistaken belief, known to the other side, there is no basis for the equitable doctrine of estoppel [*Canadian Pacific Rly Co v. King*, 61 MLJ 958: A 1932 PC 108]. In this case LORD RUSSELL of Killowen said:—

"Whether there can be any estoppel which is equitable as distinct from legal and whether equitable estoppel is an accurate phrase, their Lordships do not pause to enquire. The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying".

A similar statement of law was made by LORD RUSSELL in an earlier case (see *Ariff v. Jadunath*, 35 CWN 550, 558). The doctrine of equitable estoppel is not the same thing as the equitable doctrine of part performance (*ante*, s 91: "*Doctrine of part performance and s 53-A T P Act*". The former arises from mere conduct, while the latter is the result of acts done on the basis of a contract valid but not provable at law and which have caused a change of position. Equitable estoppel applies where a person has by his conduct led another person to believe in the existence of a fact and the latter has in such belief, acted so as to alter his postion. This equitable doctrine has been explained in *Ramsden v. Dyson, ante*. Thus, where in pursuance of an oral agreement to grant permanent lease defendant entered upon the land and erected permanent structures and the plaintiff encouraged him to do so, but the plaintiff after expiry of the period of limitation for a suit for specific performance of the contract sued the defendant in ejectment, *held* that the defendant cannot rely upon the doctrine of part performance or of equitable estoppel by representation [*Subodh v. Bhagwandas*, 50 CWN 851, 864 (46 CWN 483 reversed); see *Ariff v. Jadunath*, A 1931 PC 79]. So where a plot of land was leased out by Government for building purposes apparently on no fixed term, the fact that the lessee obtained a loan from Government for purpose of building by mortgage of the land was neither an implied representation founding an estoppel nor a circumstance sufficient to justify the legal inference that Government had contracted that the right of tenancy should be permanent [*Secy of S v. Sarat*, A 1937 P 399].

Where a lessor's agent stated in a letter to the lessee that "the lease is a permanent lease, and gives you the right to erect buildings, but it does not entitle you to hold at a fixed rate, and the rent is liable to enhancement after proper legal notice", and the lessee acting on it built a structure, the lessor was estopped from questioning the permanency of the lease [*Forbes v. Ralli*, 52 IA 178: 27 Bom LR 860: 30 CWN 49: A 1925 PC 146]. When the constructions put up by the tenant were all done with the knowledge of the landlord and the landlord himself was supervising some of the repairs and alterations, the landlord must be deemed to have waived his right and after lapse of several years he cannot ask for eviction on the ground that the tenant has done all these repairs. [*Ramachandra Dattaraya Gandhi v. Sou Pushpabai Manoher Sheth*, A 1990 Bom 182, 186]. The fact that some of earlier grantees of the land (forming part of the foreshore of tidal water) acquiesced in former and different accretions being settled by the grantor without claiming them does not estop subsequent grantees from claiming accretions [*Secy of S v. Foucar & Co*, 61 IA 18 : 38 CWN 337: A 1934 PC 17].

Sec 115 applies if the owner causes a person aware of his ownership to believe that he has been given licence to build and to act on such belief [*Shk Dhunnoo v. Seth Sheolal*, A 1931 N 158]. It is of the essence of the acquiescence that the party acquiescing should be aware of and by words and conduct should represent that he assents to what is a violation of his rights and that the person to whom such representation is made should be ignorant of the other party's rights and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party [*Moolji Sicca & Co v. Ramjan*, 129 IC 612: A 1930 C 678].

Rule in Wilmott v. Barber.—The laws as to equitable estoppel by acquiescence have been very clearly stated by FRY J, *Wilmott v. Barber*, 1880, 15 Ch D 96, 105: 43 LT 95 thus:—

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description?
>
> *In the first place*, the plaintiff (*ie* the party pleading acquiescence) must have made a mistake as to his legal rights;
>
> *secondly*, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of the mistaken belief;
>
> *thirdly*, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position, as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights;
>
> *fourthly*, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights;
>
> *lastly*, the defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising, it, but in my judgment nothing short of this will do".

In order that the rule may apply all the above conditions must exist. The principles above were followed and applied in many cases [*Ahmed Yar v. Secy of S*, 28 IA 211: 28 C 693; *Abdul Kader v. Upendra*, 41 CWN 1370; *Hemangini v. Bejoy*, A 1924 C 438: 73 IC 223; *Ali Kazemini v. Manik*, 27 CWN 969; *Jainarain v. Jafar*, 48 A 353: 92 IC 1017; *Masooma v. Md Said*, A 1942 A 7; *Mustafa v. Saidul*, 99 IC 225: A 1927 O 66; *Dan Bahadur v. Talewand*, A 1937 O 226; *Mapal v. Rana*, A 1938 L 88; *Suchit v. Md Habibullah*, 99 IC 199: A 1927 O 89; *Amritsaraya v. Diwan*, A 1929 L 625: 114 IC 70; *Kazim v. Ramsarup*, A 1929 A 877; *Kanhaiya v. Syed Hamid*, A 1930 O 235; *Ram Avadh v. Ghisa*, A 1942 O 611; *Lalta v. Brahmanand*, A 1953 A 449]. In order to establish acquiescence, *all* the above five elements must be present [*Abdul Kader v. Upendra, sup*]. "It is necessary that the person who alleges this lying-by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentiond, his own title" [*per* COTTON LJ, in *Proctor v. Bennis*, 36 Ch D 760]. But acquiescence cannot rehabilitate or render valid a transaction which is *ultra vires* and illegal. Further, it must be borne in mind that estoppel by acquiescence connotes, among other things, that the person estopped in effect has represented to the person who is infringing his right that he is not entitled to complain that his right is being invaded and that the party relying upon this representation has altered his position to his detriment under a mistaken impression that he was legally justified in acting as he has done [*Govinda v. Ramcharan*, 29 CWN 931, 938: 52 C 748]. Licenses were issued by the District Board to bus

owners for two months which the latter accepted knowing that the period was two months—*Held* that the bus owners were estopped from contending that the District Board had authority to issue licenses for one year and not two months. The *ultra vires* nature of the order issuing the licence did not affect the question of estoppel [*President D B v. Keneru*, A 1938 M 227].

In respect of a contract by tenders, a company wanted refund of the earnest money and the Forest Corporation took a stand due to orders passed by the High Court in certain other writ petitions filed by other parties, they cannot do anything the principle of estoppel bars the corporation from taking any other stand *ie* they would finalise the contract after the disposal of the writ petitions [*Shyam Biri Works (P) Ltd v. U.P Forest Corporation*, A 1990 All 205, 213]. If the first auction of forest coupe in favour of a person is cancelled and a second auction is held in which that person also participates then he is estopped from challenging the order cancelling the first auction [*Rahmanbhai v. State of Orissa*, A 1989 Ori 233, 235 (DB)].

Doctrine of Acquiescence.—If a party interested in preventing an act being done has full notice of its being done and acquiesces in it, he will be estopped. Though mere acquiescence is not equivalent to consent, yet consent need not be by word and may be by act, and if consent can be intimated by conduct as well as by act, it is clear that the acquiescence may, under certain circumstances be taken to be consent [*Umaram v. Puruk*, A 1925 C 993: 85 IC 540; *Mulraj v. Janeshvar*, 41 PLR 573]. Mere non-interference is not enough. Acquiescence with full notice in act prejudicial to one's self so as to induce reasonable belief of his consent, followed by consequent alteration of other's position is necessary [*Baneshwar v. Amulya*, A 1925 C 288]. Where knowledge on the part of the person to be estopped is not proved, the doctrine of acquiescence does not apply [*Mubarak v. Md*, 97 IC 268: A 1926 A 721]; nor does it apply where there is fraud [*Mooiji Sicca & Co v. Ramjan*, A 1930 C 678], or acquiescence under a mistake [*Gour Ch v. Secy of S*, 32 IA 53: 28 M 130: 9 CWN 553]. Where a person not in mistaken belief of his rights but in assertion of his rights builds, the person entitled to possession is not estopped [*Sarjug v. Dulphin*, A 1960 P 474]. Acquiescence is not a question of fact,, but a legal inference from fact found. This principle also applies to estoppel [*Narsingdas v. Rahimbai*, 28 B 440; *Beniram v. Kundan*, 26 IA 58: 21 A 496; *Ananda v. Parbati*, 4 CLJ 198, 204; *Baneswar v. Amulya*, 82 IC 309: A 1925 C 288].

Mere silence is not acquiescence. Where the defendant kept silent on a claim by the plaintiff for storage charges it did not mean that there was an implied undertaking to pay [*Union v. Watkins & Co.*, A 1966 SC 275]. The mere inactivity of the person concerned for a number of years apart from anything else does not amount to acquiescene [*Nand Kishore v. Damodar*, A 1942 N 59; *Bakharia v. Manak*, A 1954 N 97]. Where a lease was for construction of a tiled or thatched roof, the mere fact that the lessee constructed a pucca structure without reference by the lessor does not create estoppel [*Ramlal v. Zohra*, A 1941 P 228]. Where in pursuance of a building lease for ten years the defendant erects and the lease is not renewed, the plaintiff is not estopped from taking *khas* possession [*Tarak v. Jagdish*, A 1954 P 41]. When the landlord did not raise any objection for 7 years for the tenant cutting the building for a different use, he cannot make use of the fact of different use as one of the grounds for eviction [*D C Oswal v. V K Subbiah*, A 1992 SC 184, 185]. Where defendants openly sunk a well in the plaintiffs' land in the *bona fide* belief that they had a right to do so and the plaintiffs had knowledge of the construction—*Held* that defendants having failed to prove that the plaintiffs had encouraged the defendants by abstaining from asserting legal rights, the plaintiffs were not estopped [*Mapal v. Rana*, 19 L 296: A 1938 L 88]. But where the landlord admitted knowledge of the sub-tenancy for four years but did not bring a suit within that period there would be a presumption of acquiescence [*Mahabir v. Anant Ram*, A 1966 A 214].

Two brothers *B* and *V* were tenants-in-common in respect of some property. *B* by will gave his share to his daughter *M* and after her death to his grandson *P*. *V* died leaving behind *D*. In a suit by *M* against *D* for recovery of her share there was a compromise in the handwriting of *P* under which *M* got all her share in all lands except one which was wholly given to *D*. In a subsequent suit by *P* on the will for recovery of his half share in the land wholly given to *D*, it was admitted that *D* knew of the contents of the will—*Held*, that there was no act infringing upon *P's* rights as remainder-man and the case of estoppel did not arise [*Nidamarthu v. Changati*, A 1931 M 354].

Where the action of elder to the younger brother of a Mitakshara family who had been born deaf and dumb, was such as to recognize for some years that the latter had a joint interest in the family property, the proper inference was that the elder treated his brother as a member of the family, and entitled to equal rights until it has become clear that his disqualification would never be removed by his being cured. The acts of the elder showed no intention to waive the rights accruing to him in consequence of the disqualification, nor would his acts operate to create a new tile in the younger [*Lala Kundan v. Secy of S*, 18 IA 9 : 18 C 34].

Where a person in *bona fide* belief that a property belongs to him spends money upon it and the true owner stands by and allows him to build or make improvements he is estopped, but where the owner gives notice to desist from building structure but does not at once take legal proceedings, he is not estopped [*Haribhusan v. Shk Abdul*, A 1927 C 54; *Venkateswami v. Muniappa*, A 1950 M 53; *Mahadeo v. Narain*, A 1927 N 348; *Imami v. Ibrahim*, A 1929 O 292]. So a lessee from Government allowing third person to occupy the land and construct building thereon is estopped [*Madan v. Sundaram*, A 1940 R 172]. Where the defendant raised permanent structures under the belief that he had a permanent tenancy and the plaintiff encouraged the defendant's acts, he was held to be equitably estopped from recovering the property except upon payment of the value of the structures [*Badal v. Debendra*, 37 CWN 473; see *Secy of S v. Itwari*, A 1937 A 512]. Where a road was constructed on plaintiff's land in the *bona fide* belief that defendant had plaintiff's permission and the plaintiff kept quiet all the time he was estopped [*Mahmudul v. Waqful*, A 1943 O 178].

The real issue to be kept in mind is whether the person who acted in contravention of his right had a *bona fide* belief or not that he did possess the right to erect [*Bibi Ramji v. Karim*, A 1927 A 544: 100 IC 630]. So if a son spends in making substantial additions upon ancestral lands knowing fully that it belongs to his father, the latter is not estopped from asserting his legal rights [*Dharma v. Amulya*, 33 C 1119: 10 CWN 765]. The vigilance required of and the duty cast upon a co-owner with regard to an infringment of right is greater and of different description from what is expected of a neighbouring owner when he finds an act being done by the other on his own property. The onus of proving acquiescence is on the person alleging it [*Baneswar v. Amulya*, 82 IC 309: A 1925 C 228]. The rule that one who knowing his own title, stands by and encourages a purchase of property as another's will not be allowed to dispute the validity of the sale, implies a wilful misleading of the purchaser by some breach of duty on the owner's part [*Baswantapa v. Ramu*, 8 B 86]. Vague evidence that tenants of the estate had in the past been selling the lands as if they had some interest in the lands higher than that of a mere tenancy-at-will will not entitle to the benefit of the rule of estoppel [*Devji v. Bhoja*, A 1935 B 219]. Where a person objected before a Municipality to putting a structure on his land which refused to go into question of title, he cannot be said to have acquiesced [*Kokla v. Kalian*, 76 IC 585: A 1923 A 452; see *Maola v. Bahoru*, A 1923 A 567].

Defendants having been given use of land for certain purpose used it for other purposes by digging a *baoji*,—the doctrine of 'standing by' did not apply [*Maulvi Md v. Mahabir*, 70 IC 836 (A)]. Where a tenant without heritable right constructs a house on his land, the rule of standing by does not apply [*Jogesh v. Maqbul*, A 1936 P 384]. Where a tenant without zamindar's knowledge makes a grave on an *abadi*, the mere fact that his servants stood by, does not amount to acquiescence [*Khuda Baksh v. Jai Shankar*, A 1929 A 386].

Plaintiff sued for possession of land of his tenancy under the defendants' landlord who had induced him to give up possession upon a promise to pay consideration or in exchange of other land, neither of which was given. *Held*, that mere quiescence is not acquiescence [*Jaharaddi v. Debnath*, 20 CWN 657]. Where one of three brothers sold ancestral property and the others with knowledge of the sale kept quiet while the vendee was spending money in building on the land, plaintiffs' long silence coupled with their conduct estopped them [*Dhanpat v. Guranditta*, 2 L 258: 64 IC 520]. Where a property was sold in execution as that of one of the judgment debtors and the others allowed the sale to be held and confirmed with knowledge of all fact *held* that they were estopped by conduct from asserting their rights [*Abdul Razzaq v. Md Hajian*, 67 IC 797: 9 OLJ 131]. Where an administrator *pendente lite* ratained as his remuneration more than he was entitled to claim and his accounts were passed by the Court with the knowledge of plaintiffs, a subsequent suit to recover the excess was not barred by estoppel, acquiescence or laches [*Beeby v. Kshitish*, 41 C 771].

The rule of estoppel by acquiescence applies in Oudh to cases of pre-emption. The want of notice under s 10 Oudh Laws Act is not bar [*Hanuman v. Adiya*, 54 IC 520: 22 OC 323; *Jagannath v. Chandi*, 93 IC 640: A 1927 O 86; *Maryam v. Tika*, 1 OC 254; *Bhagwat v. Saiyid*, 5 OC 395; *Bank of U I v. Alopi*, 10 OC 257]. The mere fact that a co-pre-emptor has acquiesced in a sale before the pre-emption suit and is consequently estopped from pre-empting does not disqualify the other pre-emptor [*Suraj v. Oudh*, A 1931 A 216].

Acquiescence and Abandonment.—Mere waiver or acquiescence not amounting to abandonment of right or an estoppel cannot disentitle from claiming relief in equity in respect of executed and not merely executory contracts [*Sha Mulchand v. Jawahir Mills*, A 1953 SC 98: 1953 SCR 351]. "A man who has a vested interest and in whom the legal title lies does not and cannot lose that title by 'mere' laches, or 'mere' standing by or even by saying that he has abandoned his right, unless there is something more, namely inducing another party to act to his detriment relying upon his statement [*per* BOSE J in *Sha Mulamchand v. Jawahir Mills, sup* folld in *Humayun Properties Ltd v. Ferrazzinis*, A 1963 C 473]. Relinquishment of future possible right of inheritence by the muslim heir, for a consideration, may debar him from setting up his right when it actually comes into being [*Gulam Abbas v. Haji Kayam*, A 1973 SC 554]. The plaintiff had earlier written a letter to a Bank Manager stating that she had become a nun and had no claim to her paternal properties. Since this is not a valid relinquishment, it will not estop her from claiming a share in her father's properties [*GK Kempegowda v. Smt Lucinda*, A 1985 Kant 231, 234 : (1985) 1 Kant LJ 83].

Concession.—Earlier decision on the basis of concession made by the counsel would not estop a party from reagitating the same *Jayannuther Swamy Varu v. Vana Venugopalanaidu*, 1996 AIHC 1397 (APHC).

Estoppel in Matrimonial Cases.—The fact that the wife filed an affidavit offering herself for medical examination in respect of an allegation of adultry, will not amount to an estoppel since the husband will not be prejudiced on her going

back the allegation [*R P Ulaganambi v. K C Loganayaki*, 1986 Cri LJ 1522, 1527 (Mad): 1986 Mal LW (Cri) 122]. A woman whose marriage is a nullity cannot rely on the principle of estoppel to defeat the provisions of the Hindu Marriage Act stating that her husband treated her as wife and she was not informed of the first marriage. [*Smt Yamunabai Anantrao v. Anantrao Shivram*, A 1988 SC 644, 648]. When the wife alleges that the physical defects were disclosed to the father of the husband who actually negotiated for the settlement of the marriage, if the father of the husband is not examined for no satisfactory reason, a presumption can be made that the physical defects were duly disclosed to the father [*Ruby Roy v. Sudarshan Roy*, A 1988 Cal 210, 212: (1988) 92 Cal WN 709 (DB)]. Estoppels of all kinds are subject to one general rule, namely, they cannot override the law of the land and cannot be invoked to defeat the clear provisions of the statute. Since S. 4(*c*) read with S. 23 of the Special Marriage Act, under-age renders the marriage null and void no amount of estoppel against the husband for his false representation as to age would render it valid. [*Narendra Nath Burman v. Sm Suprova Burman*, A 1989 Cal 120, 123 (DB)]. A petition for divorce by the wife is not barred by principles of estoppel merely because she had accepted maintenance under a foreign judgment which is a nullity [*Veena Kalia v. Jatinder Nath Kalia*, A 1996 Del 54, 57].

Estoppel by Ratification.—Akin to estoppel by acquiescence is estoppel by ratification. "It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel at best" (Bigelow). An alienation by a widow is not void but only voidable. In all cases of voidable contracts, he who has the right to complain must do so when the right of action is properly open to him. If he did something which showed that he treated alienation as good, he is bound by the equitable doctrine of estoppel [*Rangasami v. Nachiappa*, A 1918 PC 196: 46 IA 72: 42 M 523; see *post*: "*Estoppel by Conduct Against Members of a Hindu Family*"]. So, when a mohunt grants a *mokrari* lease and his successor accepts rent from defendant, the former is estopped from denying that the lease was not binding on him, though he is not precluded from seeking enhancement of rent [*Sheo Narain v. Jugeshwar*, A 1950 p 9]. Although one partner has no implied authority to refer a dispute to arbitration, if the other partner ratifies such act by conduct or otherwise, and estoppel arises [*Hanuman v. Jassaram*, A 1949 Pu 46; *Parmeshwar v. Jainarain*, A 1952 Pu 373]. There can be no question of ratification where the contract is void and not voidable not can there be a ratification of an illegal act without knowledge of the illegality [*Sudhansu v. Manindra*, A 1965 P 144].

Estoppel by Silence [There Must Be a Duty to Speak].—Mere silence may not operate as estoppel, but silence in the face of duty to speak may create an erroneous impression inducing another to act on it to his prejudice. As LORD MACNAGHTEN said in *Chadwick v. Manning*, 1896 AC 231, 238: "Silence is innocent and safe where there is no duty to speak". But silence may be sufficient where there is a duty to speak [*Lewis v. Lewis*, 1904, 2 Ch 656]. The principle in *Chadwick's case* has been explained in *Nihar v. Sasadhar*, 58 C 358 *post*. Conduct by negligence or omission also will create estoppel where there is a duty to disclose the truth [see *Greenwood v. Martin's Bank Ltd; Mercantile Bank Ltd v. Central Bank Ld*, and other cases *post*]. Where notice of a meeting to pass a no-confidence resolution against the President of a Municipal Board is not sent to him but he does come to know about it he is under an equitable duty to inform the authorities of the non-service. If he keeps quiet and deliberately avoids the meeting he will be estopped from questioning the resolution passed [*Sarin v. S*, A 1967 A 465].

Where no duty is cast by law on a person to speak or act, silence does not amount to estoppel [*Kanchan v. Kamala*, 21 CLJ 441; *Umaram v. Puruk*, A 1925 C 993: 85 IC 540; *Surendra v. Jabed*, 85 IC 747 (C); *Chaudhury v. Maymo Munply*, A 1940 R 187]. But the doctrine would apply when silence or inaction in circumstances which require a duty to speak amounts to fraud or deception [*Abdul Kader v. Upendra*, 40 CWN 1370; *Jokhmull v. Saroda*, 7 CLJ 604; *Joy Ch v. Sreenath*, 32 C 357]. Where there is no evidence of any detriment to the appellants as a consequence of the silence of the respondents or which had caused the appellants to alter their position in any way and there was no conduct amounting to representation intended to induce a course of conduct on the part of the appellants, there is no question of estoppel [*Imp Bank of Canada v. Begley*, 163 IC 295: A 1936 PC 193]. In *Fox v. Mackreth*, 2 Br CC 440; 2 RR 55 THURLOW LC, observed:—"It is essentially necessary that there should be some obligation, on the party sought to be made liable, to make the discovery, so as to bring his silence within some definition of fraud". In order to create an estoppel there must be a duty to speak or to act. Where under an execution the sheriff seizes goods let out on hire-purchase system, there is no duty on the owner to tell the sheriff anything and if the goods are mistakenly sold, the owner is not in any way estopped [*Jones Bros Ltd v. Woodhouse*, 1923, 2 KB 117]. When permission is granted to a landlord to file a suit for eviction of the tenant inaction of the landlord and acceptance of rent by him cannot amount to a waiver [*Ram Raksh v. Brij Nandan*, A 1967 A 325].

The following is an interesting case: A husband and wife had a joint account in a Bank and cheques had to be signed by both. The husband had also a separate account. The wife drew out moneys from the Bank by forging her husband's signature. In 1929 the husband came to know of it but kept quiet without informing the Bank of it at his wife's request. Some months later the husband threatened to inform the Bank whereupon the wife committed suicide. Thereupon the husband sued the Bank for the amount they debited him on the forged cheques—*Held* that the husband owed a duty to the Bank to disclose the forgeries as he came to know of them and that by silence till his wife's death he deprived the Bank of their right to sue the wife in tort on which the husband himself would have been responsible for his wife's tort. The silence until after his wife's death amounted to a representation that the cheques were not forgeries and deprived the respondents of their remedy [*Greenwood v. Martin's Bank Ltd*, 1933 AC 51: 101 LJKB 623; see *M Kenzies v. Br Linen Co*, 6 App Cas 82, 109]. In the case of forged cheques, a bank can escape liability only if it can establish knowledge to the customer of the forgery in the cheques. Inaction for continuously long period cannot by itself afford a satisfactory ground for the bank to escape the liability [*Canara Bank v. Canara Sales Corporation*, A 1987 SC 1603, 1612 (1987)2 SCC 666]. When the selling of demand drafts is not at all a statutory obligation on the part of a commercial bank and is merely an ancillary service which the bank renders in its normal condition to its customers to facilitate their remittance of funds, from one place to another through it, no customer can claim this facility as a matter of right and the doctrine of promissory estoppel cannot be invoked in such a case [*Nagarmal Mahavir Prasad v. Manager United Bank of India*, A 1987 Cal 88, 92 (DB)]. When a bank makes payment on a forged cheque, even if the customer was negligent in not keeping the cheque book in proper custody and he did not ratify the payment by the Bank, there is no estoppel as against the customer [*Babulal Agarwalla v. State Bank of Bikaner and Jaipur*, A 1989 Cal 92, 97].

In a case where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel is not available against a

positive legislative enactment [*Paramu Radhakrishnan v. Bharathan*, A 1990 Ker 146, 149]. The Selection Committee selected gram sevaks without holding written test as required by rules. Some failed candidates who had appeared for the oral interview challenged the selection. Their claim cannot be resisted on the ground of estoppel since there cannot be any estoppel where the grievance is that statutory rules have been violated [*C J Takor v. Ahmedabad Dit Panchayat*, A 1982 Guj 183, 188]. A person who is a member of a Panchayat who is supposed to know the rules and procedure, had convened a meeting on Sunday and was present in the meeting. He is estopped from contending that the meeting having been convened on a holiday the entire proceedings must be deemed to be null and void [*Satya Narain Singh v. State of Bihar*, A 1984 Pat 26, 28: 1983 Pat LJR 656]. When some of the members of the Managing Committee of a society brought a suit for a declaration that the Managing Committee was a validly constituted body, other members of the Committee could not be prevented by the plea of estoppel to contend that the governing council (Managing Committee) of which they were the members and the general body meeting at which the said governing council was elected were not in accordance with law [*Sajjan K Sanyasi v. Padmavathi Montessori School*, A 1985 Kant (NOC) 97].

An extension of the equitable doctrine of estoppel is to be found in the Canadian case of *Ewing v. Dominion Bank* (10 CWN 90*n* quoted from an article in the Harvard Law Review) where *W* a managing clerk of a company finding the company in sore need of money forged the name of Ewing & Co to a pronote at four months payable to the company at the Dominion Bank and obtained payment. The Bank intimated Ewing & Co that the note would fall due on a certain date. In the meantime *W* explained to Ewing & Co the facts and entreated them not to let the Bank know of the forgery promising to return the note. He failed to pay up and the Bank sued Ewing & Co—*Held* that the silence of Ewing & Co operated as an estoppel and they were precluded from denying it.

No general rule can be formulated as to when silence may operate as estoppel. The presence of the silent party, when the transaction takes place, makes a more clear case of estoppel than when he is absent. When a party fails to make his rights known, where fairness and good conscience require that he should do so to protect the interests of others he cannot be said as against them to assert such rights [*Barclay v. Syed Hossein*, 6 CLJ 601; *Rajlakshmi v. Susila*, A 1950 C 351]. A man is bound to speak out in certain cases and his very silence becomes as expressive as if he had openly consented to what is said or done and had become a party to the transaction [*Gheran v. Kunj Behari*, 9 A 413, 419]. Where a co-sharer landlord has been impleaded in a suit under s 148-A B T Act and has taken no part in the proceedings, there is no room for the application of the doctrine of estoppel in s 115, or for the doctrine of equitable estoppel by standing by [*Nihar v. Sasadhar*, 58 C 358].

A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest in property in ignorance of his title to it [*Stroud v. S*, 7 Man & C 417]. A candidate was present at the meeting in which it was decided to introduce electronic machines for counting of votes. If the introduction of electronic machine is not permissible or authorised by law, he cannot be estopped from challenging the same [*A C Jose v. Sivan Pillai*, A 1984 SC 921, 929]. A person filed a suit to succeed to the Office of Sajadanashin to Durgah Khawaja Saheb Ajmer. The Durgah Committee did not say that the right is not governed by the rule of primogeniture or that it is not bound to follow the customary rule of succession and it maintained the golden rule of silence in the Courts below. Under such circumstances, it is not open to the committee to contend before the Supreme Court

that it is not bound by the decision of the courts [*Syed Saulat Hussain v. Syed Illamuddin*, A 1987 SC 2213, 2218].

The silence must be a true cause of the change of position of the other party. A person conducting as pleader the defence on behalf of a defendant is under no obligation to disclose to the plaintiff the fact that defendant had, prior to the suit, transferred the subject-matter of the suit to him. S 115 does not apply to a case, in which a belief otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised [*Joy Ch v. Sreenath*, 32 C 357: 1 CLJ 23; see *Mohunt v. Nilkamal*, 4 CWN 283]. In considering the effect of silence it has to be seen whether there was any occasion for word, and any reasonable explanation of the silence. This ought to be done before relying on the silence as a legitimate ground of inference [*Chabildas v. Dayal Mowji*, 6 Bom LR 557 on appeal 34 IA 197: 31 B 566: 11 CWN 1109]. Where a Collector sends a letter intimating the mortgagee that the entire debt has been paid off, omission of mortgagee to inform that a portion of the debt remained unpaid does not create an estoppel [*Kishori v. Collr of Etah*, 38 CWN 344: A 1934 PC 83: 148 IC 546]. A mortgagee who is present at an auction sale under a decree to which he was not a party has no duty to speak out that he had an outstanding title in the land about to be sold in the shape of a mortgage and he is not estopped from suing on his mortgage [*Radhe v. Kishore*, A 1935 L 527]. Where a minor defendant was present with his mother at the time of execution of a mortgage by her, the mere omission of the defendant to raise any objection at the time does not create an estoppel [*Venkatarama v. Ballaya*, A 1936 M 595]. A sale of holding in execution of a decree for rent by certain co-sharer landlords, does not estop the other co-sharers who did not appear in the execution case from contending that the previous decree was a money-decree [*Bhagwan v. Lachmi*, A 1930 P 150]. The power of the University to approve or reject an application for admission is a power coupled with a duty and accordingly silence will constitute an estoppel [*Delhi University v. Ashok*, A 1968 D 131]. Merely because plaintiff had claimed storage charges at the rate of Rs. 4 per ton per month and the defendant was silent, there was no acquiescence and implied undertaking to pay godown rent at that rate [*Union v. Watkins*, A 1966 SC 275, 278; **follld** in *S v. Motiram*, A 1973 Raj 223].

Estoppel by Omission or Mistake.—An omission to give information may estop, but this can only be in cases where the party setting up estoppel had no information of the real facts [*Jagannath v. Jaikishan*, 1 PLJ 16]. A mortgagee who causes the mortgaged property to be sold in execution of a decree other than decree upon the mortgage, without notifying to the intending purchasers the existence of his mortgage *lien*, is estopped for ever from setting up that *lien* against the title of a *bona fide* purchaser [*Md Hamiduddin v. Shib Sahai*, 21 A 309; *Kalidas v. Prasanna*, 24 CWN 269; see also *Agar Chand v. Rakhma*, 12 B 678: *Ram Ch v. Jairam*, 22 B 686; *Dullab v. Krishna*, 3 BLR 407 and 14 CLR 17; *Deolee Chand v. Oomda Beyum*, 24 WR 263: *McConnell v. Mayer*, 2 NWP 315; 55 IC 189]. So, where the plaintiff had previously attached and brought to sale the mortgaged premises in execution of a decree against defendant No. 1 (mortgagor), and defendants Nos. 2 and 3 had purchased the property without notice of the plaintiff's mortgage, which was not referred to in the sale proclamation, the plaintiff was estopped from setting up his claim on the mortgage [*Jagannath v. Gangi Reddi*, 15 M 303. See also *Kasturi v. Venkatachalapathi*, 15 M 412. So, where decree-holder who fails to state in the sale proclamation that rent for subsequent years had accrued due is estopped from claiming the arrears from a person in a subsequent suit [*Giriya v. Ananthamma*, 100 IC 493: 52 MLJ 222; see however, *Bunwari Das v. Md Moshiat*, 9 A 690 and *Gheran*

v. Kunja, 9 A 413; *Dhondo v. Raoji*, 20 B 290]. A subsequent mortgagee obtained a decree without making prior mortgagee a party. The property was advertised for sale as without any incumbrance. Prior mortgagee who was present at the sale and bid for the property, but did not notify his own claim, was estopped from disputing the claim of the purchaser in execution of the subsequent mortgage decree [*Mauji Ram v. Mohan Singh*, 4 ALJ 709: 1907 AWN 278].

A having sold a certain property *X* to *B*, later executed a mortgage in his favour including that property also. *A* then sold the mortgaged property to *C*. In *C's* suit for redemption, he admitted that he knew that *B* was in possession of the *X* property but thought that *B* was a possessory mortgagee and made no other enquiries by search about any other encumbrances. *Held* that *C* was estopped by his omission and negligence [*Rangappa v. Marappa*, A 1958 M 515; *Parvathathammal v. Sivasankara*, A 1952 M 265].

One who has caused the property of his judgment-debtor to be sold in execution, cannot afterwards set up any claim of his own against it, unless he shows that he purchased with notice of his claim [*Nursing v. Raghoobur*, 10 C 609. See also *Tukaram v. Ram Ch*, 1 B 314]. 'Omission' does not mean only an omission to perform such a duty as is prescribed by law [*Manik v. Ram*, 27 IC 611]. In the case of a mere omission, no intention on the part of a person to cause or permit a belief in the mind of another, can well be imputed unless the true facts are known to the person whose omission is in question; but where there is deliberate declaration or act it must be presumed that it was intended to have its ordinary and natural effect upon the mind and actions of the other party [*Ralli v. Forbes*, 67 IC 744: 1 P 717].

The respondents were liable for consumption of electricity. By mistake the calculation was based on the actual dial reading of the meter whereas the correct amount of the energy should have been arrived at by multiplying the dial reading by 10. The respondents were therefore charged only 1/10th of the correct amount and their plea of estoppel was negatived as a mistake in computation does not relieve the debtor from his obligation to pay the true amount. Further there cannot be any estoppel against the provisions of a statute [*Maritime Elec Co v. General Daires*, 1937 AC 619 (relied on in *Corpn of Calcutta v. Sashi*, 50 CWN 263; **affirmed** in A 1949 C 20 *post*); see also *R v. Blenkinsop*, (1892) 1 QB 43]. In respect of electric supply, there was under recording in the meter due to wrong wiring. Under such circumstances, the Board is not estopped from issuing revised bills after the mistake is rectified [*Quality Steels and Forgings Ltd v. Gujarat Electricity Board*, A 1988 Gujarat 121, 135: (1988)1 Guj LH 36]. When a consumer challenged any bill for supply of electricity as soon as it was issued but went on paying the charges, it does not mean he must be deemed to have waived his right or that he is guilty of lacks in filing the writ petition [*D C M Ltd v. Assistant Engineer Electricity Board Kota*, A 1988 Raj 64, 69 (DB)]. Similarly where a Municipality omitted to levy terminal tax on Ammonium Sulphate for some time, the defendant's plea of estoppel was negatived [*Kamruddin v. Munpl. Commrs of K*, A 1939 N 195]. See *post*: "*Estoppel Against Corporations*".

Bazar dues were shown under *siwai* income in *jamabandi* and they were included in the total income upon which revenue was assessed—*Held* that Government was not estopped from disputing the claim of the zemindar to levy bazar dues and this is so even if it assumed that the assessment was upon charges actually though illegally levied in the past [*Ranshah v. Govt*, A 1949 PC 140: 1949 Nag 263].

Where a person who has not been appointed an executor described himself as an executor under a mistake about his legal position there is no estoppel [*Atisukhlal v. Natvarlal*, A 1939 PC 238: 183 IC 885]. If a person in a suit claims a status on the

strength of the interpretation put by him on a certain document, he cannot be said to have led the other party to believe a thing or to act on that belief, for it was open to the latter to examine the document and decide for himself whether the interpretation was correct or not [*Makkar v. Ganga*, 1940 OWN 1233].

Estoppel by Negligent conduct or By Holding out Ostensible Authority.—The circumstances under which negligent conduct may operate as estoppel, will appear from the 4th proposition in *Carr v. L & N W Ry Co* (*ante*). Before neglect may be made the basis of an estoppel, there must be duty to use reasonable care. A man making a statement in the course of business with the knowledge or under circumstances from which it is apparent, that it may be acted on, must take due care that his statement is correct. Further, the negligence must be the *proximate or real cause* of the mistaken belief, and the negligence must be *in the transaction* [*Carr v. L & N W Ry Co, sup*; *Morrison v. Verschogle*, 6 CWN 429; *Re Lewis*, (1904) 2 Ch 656 CA; *Baxendale v. Bennett, infra*; *Staple of England v. Bank of England*, 21 QBD 160; *Swan v. N B Australasian Co, infra*]. Defendants (warehousemen) made the erroneous statement to plaintiff that some goods which were not really delivered, were lying in the warehouse, and were liable to be sold for charges. Plaintiff bought the warrant for the goods and defendants were estopped from saying that they had not got the goods when they made the statement [*Seton v. Lafone*, 19 QBD 68]. In this case LORD ESHER explained the principle thus:—

> "It is alleged that there was no negligence, because there was no duty. I protest that, if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act, there is a duty which arises towards the persons to whom he makes the statement. There is clearly a duty not to state a thing which is false to his knowledge, and further than that I think there is a duty to take reasonable care that the statement shall be correct".

The rule as to estoppel by negligence was thus stated by BLACKBURN J: "The neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake (into which he has fallen); and also, it must be the neglect of some duty that is owing to the person led into that belief, or what come to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect of the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy" [in *Swan v. N B Australasian Co*, 2 H & C 175: see also *Jones Ltd v. Waring & Gillow*, 1926 AC 70 693; the observation of LORD LINDLEY in *Farquaharson Bros & Co v. King & Co*, 1902 AC 325, 342; *Johnson v. Credit Lyonnais*, 3 CPD 32 and *London J S Bank v. Mac Millan & Arthur*, 1918, AC 777, 836]. Where in a suit under s 80 C P Code filed in a wrong court defendant takes no objection to the notice, but objects only to jurisdiction, he is not estopped from taking objection as to proper notice when subsequently the suit is instituted in a proper court. Negligence cannot give rise to an estoppel unless there is a duty of care [*Vekayan v. Madras Prov.*, A 1947 PC 197: 74 IA 223: 1948 Mad 214].

In *Lickbarrow v. Mason*, 1787, 2 TR 63, 70: 100 ER 35 ASHURST J, however said 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". This principle found expression in a later case. There, a grower of cocoa had consigned by railway cocoa to a merchant at the port in expectation of his buying the cocoa. The merchant instead of concluding the purchase purported to sell the cocoa as for himself to a third party, who purchased in good faith and paid the full price to the

merchant as seller. In an action by the grower for conversion it was held that property had passed and he was not entitled to succeed. The Board said: "To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given, and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason*, 2 TR 63, 70" [*The Commonwealth Trust Co v. Akotey*, 1926 AC 72].

The question of estoppel by negligence, or by conduct, or by a holding out of ostensible authority was again considered fully by the Board in a later case and disapproving of *Lickbarrow v. Mason* and *The Commonwealth Trust Co v. Akotey*, *ante* it was held that it was impossible to accept the law broadly laid down in *Commonwealth Trust Co v. Akotey* as a true statement of the principles without qualification [*Mercantile Bank of India Ltd v. Central Bank of India Ltd*, *infra*]. The facts of the case were that a firm of merchants had an extensive business as buyers and exporters of groundnuts. Both the Mercantile Bank of India Ltd and the Central Bank of India Ltd, were in the habit of making loans to the merchants on the security of the railway receipts for consignment of goods despatched to the merchants. The practice was that the merchants delivered the relevant railway receipts to the bank by way of pledge giving to the bank at the same time a promissory note for the amount advanced and a letter of lien. The bank passed the railway receipts on to their own godown-keeper to enable him to obtain possession of the goods, and he, in accordance with the usual practice adopted by the bank, and in order to avail himself of the merchants' services handed the receipts back to the merchants for the specific purpose of clearing the goods from the railway authorities and storing them in the Bank's godown. It was the practice of the appellant bank to put their stamps on the receipts pledged but the same practice was not adopted by the respondent bank till about the end of the period covered by the transaction in suit. A series of frauds were committed by the merchants in this way. The merchants after getting back the railway receipts from one bank for the purpose of obtaining delivery of goods for storage in the bank's godown, pledged them with the other bank and fraudulently obtained an advance and *vice versa*. In due course the fraud became known and the merchants were declared insolvents. Thereupon the respondent bank brought a suit for damages for conversion against the appellant bank who had obtained delivery of the goods covered by the railway receipts and had disposed of them. The appellants claimed that they were entitled to succeed on the ground that the plaintiff bank having placed the merchants in possession of the railway receipts without anything therein to indicate that the plaintiff bank had any interest therein, enabled the merchants to hold themselves out as the owners thereof and was therefore estopped from setting up title against the defendant who acted in good faith by taking a pledge of the railway receipts for value. It was held that the contention that estoppel did not depend on the existence of a duty was too wide a proposition. The existence of a duty is essential and that is peculiarly so in the case of an omission. This is so, even if the cases were put on representation or holding out. The respondents owed no duty to the appellants in the matter—there was no relationship of contract or agency, and they had no reason to think that the receipts would ever be handed over to the appellants—and they were therefore not estopped by their conduct in returning the receipts to the merchants for the specific purpose of clearing the goods from denying as against the appellants that the merchants had the right of pledging the goods as owners, or from setting up their title as against the appellants to the goods. In the present case not only was there an absence both of any duty, or of anything amounting to a neglect of usual precautions, but there was no ground for finding any

representation on which an estoppel would be found. The merchants could not transfer a better title than they possessed—a title subject to the pledge to the respondents. The railway receipts were not dangerous things. Their possession no more conveyed a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. They are not like negotiable instruments [*Mercantile Bank of India Ltd v. Central Bank of India Ltd*, 1938 AC 287: 54 TLR 208: 42 CWN 321: A 1938 PC 52 (*Lickbarrow v. Mason*, 2 TR 63 and *The Commonwealth Trust Co v. Akotey*, 1926 AC 72 dissented from; *Swan v. North Br Australasian Co*, 2 H & C 175, 182; *Jones Ltd v. Karing & Gillow*, 1926 AC 670, 693 and other cases follld)].

Where a plea of estoppel on the ground of negligence is raised, such a plea is not the negligence as is understood in the popular language; it has a technical connotation. In support of a plea of negligence, it must be shown that the party against whom the plea is raised owed a duty to the party concerned or towards the general public of which he is one. Negligence must be established in this technical sense. Another requirement before a plea of estoppel by negligence can be upheld is that the negligence on which it is based should not be indirectly or remotely connected with the misleading effect assigned to it, but must be the proximate and real cause of that result [*New Marine Coal Co v. Union*, A 1964 SC 152 reversing 65 CWN 44]. In this case also the dictum of ASHURST J, in *Lickbarrow v. Mason, sup* was doubted as too wide].

It appears to have been hardly sufficiently noted that the conditions to be complied with before conduct can be made the foundation of the estoppel by reason of its being negligent, are of such a character as to well-nigh eliminate "estoppel by negligence" as a separate head; or, in other words, that negligent conduct is only allowed to give rise to an estoppel, in case in which the conduct would give rise to the estoppel, even though it were not negligent. Yet this is clearly the case. If it be true that for conduct to be *proximate* cause of leading a party to believe in the existence of a state of facts, such conduct must amount to a representation of those facts [Cababe pp 100-01]. Illustration of what is and what is not estoppel by negligence will be found in many English decisions. [See for instance *Arnold v. Cheque Bank*, 1 CPD 578; *Coventry v. G E Ry Co*, 11 QBD 776; *Carr v. L & N W Ry Co*, LR 10 CP 307; *Patent S G Cotton Co v. Wilson*, 49 LJQB 713; *Kepitigalla R Estates Ltd v. National Bank of India Ltd*, 1909, 2 KB 1010; *Longman v. Bath E T Ld*, (1905) 1 Ch 646 CA; *Imp Bank of Canada v. Bank of Hamilton*, 1903 AC 49; *Lewes S S L Co v. Barclay & Co*, 95 LT 444; *London Bank v. Mac Millan & Arthur*, 1918 AC 777; See also *Purshotton v. Union*, A 1967 A 549].

Swan executed and handed to his broker two blank transfers to be filled up and used for the purpose of transferring his shares in company A. This conduct did not amount to a representation that he had executed transfers of his shares in company B. [*Swan v. N B Australasian Co*, 2 H & C 175]. The plaintiffs placed in a letterbox at their office in New York, for transmission to England, a letter addressed to Williams & Co. of Bradford, and containing a draft payable to the plaintiffs' own order, and specially endorsed by them to Williams & Co. Plaintiff's conduct did not amount to a representation that Williams & Co. had endorsed the draft [*Arnold v. Cheque Bank*, 1 CPD 578]. Bennet left a stamped piece of paper, with his name written across it, in the place where an acceptor's name would be, in an unlocked drawer of his writing table at his chambers. This did not amount to a representation that he had issued the document as a bill accepted by him [*Baxendale v. Bennett*, LR 3 QBD 525 CA; Cababe p 98]. The keeping of shares with respective blank transfer deeds in possession of a mercantile agent who had given them to another, *D*, amounts to negligence

and the plaintiff would be estopped from asserting his title against a *bona fide* purchaser from *D* for value without notice [*Sumitra v. Satya Narayana*, A 1965 C 355]. If a man signs a document without troubling to read it and it comes into the hands of an innocent third person who acts on the faith of it the signatory is bound by the document [*Gallie v. Lee*, (1969) 1 All ER 1062].

With regard to *Coventry v. G E Ry Co*, and *Seton v. Lajone, up* Cababe remarks: "The judgements, however, proceeded on the assumption that it was *essential* to bring the case within the rule laid down, as to negligence, by BLACKBURN J, in the Exchequer Chamber in *Swan v. N B Australasian Co* (*ante* p 1068). Now, what that rule requires is (*inter alia*) that the act of negligence must be the proximate cause of leading the party into the mistake (*ie* mistaken belief) into which he has fallen: and not, as the learned judges appear to have thought, that the act of negligence must be proximate cause *of the loss sustained*, BRETT J, in his 4th proposition in *Carr v. London & N W Ry Co*, (*ante* p 1038) seems to have similarly misapprehended the rule in *Swan's Case*" [Cababe 144-45].

To create estoppel mere negligence is not enough. Negligence must be serious enough to amount to a breach of duty owing by the owner to the party defrauded or to the general public. *B* sold a car to *P* for Rs. 4,000 and immediately took hire of it from the buyer. Transfer in *P's* favour was not registered as required by law and the insurance and registration continued in *B's* name, *B* sold the car to *D* for consideration. In a suit by *P* for the car it was held that as *P* held out *B* as owner she was estopped [*Parbati v. Lachminarayan*, A 1957 C 551].

A was the owner of several G P Notes. *A's* agent on a false representation of *B* handed over the notes to *B* who forged the signature of *A* purporting to transfer them to a fictitious person *T*. This fictitious person purported to endorse the notes in favour of *B* who again endorsed them in favour of a Bank who got new promissory notes in thier favour by cancellation of the old notes. *A* then sued the Secretary of State who pleaded estoppel on account of his agent's negligence in handing over the notes to *B*. The Secretary of State was liable and it was *held* that in order to succeed on the plea of estoppel, the defendant must establish that there was a duty on the part of the plaintiff and his agent to use due care towards *B* or towards the general public of which he was one. Further, the negligence must be in the transaction itself, and the negligence must not only be calculated to have the misleading effect attributed to it but must be the proximate or real cause of that result. It was not the negligence but the subsequent forgery which was the immediate cause of the loss [*Purshottam v. Secy of S*, 1938 Bom 139: A 1938 B 93: 39 Bom LR 1152].

Waiver and Estoppel.—The connection between estoppel and waiver is very close. Between the two there is this broad ground in common, *viz* the object and operation of both is to insure *bona fides*, and to safeguard transactions [Cababe p 104]. Whenever a party having a right to insist upon something or other being done, does not insist upon that being done, and with a knowledge that it has been done, *goes* on dealing in the matter, just as though everything had been duly done, the natural inference from his conduct is that he has waived or dispensed with the doing of it; in which case of course, he cannot afterwards raise the objection that it was not done [Cababe p 105]. As regards cases of waiver, Bigelow observes: "It appears to be little, if anything, more than giving them a new name to call them estoppels" [Bigelow p 660]. "Delay is not waiver, inaction is not waiver though it may be evidence of waiver" [*per* LORD BOWEN in *Selwyn v. Garfit*, 1887, 38 Ch D 273, 284; *Dawood v. Q Ins Co*, (1945) 1 Cal 638]. If certain requirements or conditions are provided by a statute, in the interest of a particular person, then the requirements or

conditions, even if mandatory, may be waived by that person, if no public interest is involved, in such a case, the act done will be valid even if the requirement or condition has not been performed. [*Municipal Corpn. Ahmedabad v. Oriental F&G Insurance Co. Ltd.*, A 1994 Guj 167, 197; See also *Dhirendra Nath v. Sudhir Chandra*, A 1964 SC 1300; *Indian Electric Work v. James Mantosh*, A 1971 SC 2213 and Supdt of *Taxes v. Onkarmal*, A 1975 SC 2065]. If a particular plea is not taken in the written statement with regard to prior issuance of notice, then the objection would be deemed to have been waived [*Auto Trade and Transport v. National Insurance Co.*, A 1998 MP 147, 148; *Vellayan v. Madras Province*, A 1947 PC 197; *Union of India v. Tej Narain*, A 1957 MB 108]. Where the party seeking setting aside of auction sale was present on all dates of hearing including the date on which the sale was confirmed but no objection was raised on his behalf the doctrine of waiver is attracted [*S.M. Manjunatha Gupta v. M.G. Shivanagouda*, 1998 AIHC 102 (Kant)].

For waiver there must be intentional or voluntary abandoment of a known right [*Shrikrishnadas v. S*, A 1977 SC 1691]. It may be either express or implied from conduct, but its basic requirement is that it must be an intentional act being fully informed as to his rights and with full knowledge of such right [*Motilal Padampat &c v. S*, A 1979 SC 621]. It may be intentional or due to inaction or gross carelessness or absence of diligence. The party having such a right or privilege has a discretion to exercise the same [*Chotalal v. Ram*, A 1975 C 436]. Waiver means abandonment of a right and may be either express or implied from conduct, but its basic requirement is that it must be an intentional act with knowledge [*MP Sugar Mills v. S*, A 1979 SC 621, *Amna Khatun v. Zahir*, A 1981 P 1 FB, *Bibi Amna Khatun v. Zahir Hussain*, A 1981 Pat 1, 5 (RB), *Rameshwar Prasad Sinha v. State of Bihar*, A 1984 Pat 61, 64]. The principle of waiver connotes issuance of notice and non-response thereto. If a notice is issued and no representation was made by opposite party, it would amount to waive the opportunity. [*Jaswant Singh Mathura Singh v. Ahmedabad Municipal Corporation*, A 1991 SC 2130, 2136]. Party can waive even a mandatory provision in his favour [*Chotalal v. Ram*, A 1975 C 436].

An objection to jurisdiction cannot however be waived, for consent cannot give the court jurisdiction where there is none. In the case of a body assuming jurisdiction over a matter there can be no question of a waiver of the condition precedent (a proper notice by the IT authorities) [*Gooyee v. Comm of IT*, A 1966 C 438] or the power to assume jurisdiction [*Dilawar v. Andhra Pradesh Muslim Wakf Board*, A 1967 AP 291]. When a person who raised an objection regarding the jurisdiction of the court, did not press this question, it has to be presumed that he had waived his right to object to the same and he is estopped from raising the question at a later stage [*Iswari Prasad Munuri v. Shib Narayan Banerjee*, A 1984 Cal 213, 215: (1984) 88 Cal WN 453]. A judgment-debtor raised objection before the Bombay High Court challenging its jurisdiction to entertain a suit. The objection was overruled and a decree was passed. That judgment was not set aside in appeal or revision. So the judgment-debtor is estopped from raising the same objection about the jurisdiction in a later proceeding [*Life Insurance Corporation of India v. Parmeshwar Prasad Bhadani*, A 1985 Pat 98, 102: 1984 BBCJ (HC) 849]. But territorial jurisdiction does not proceed to the root of the jurisdiction and the C P Code recognizes that a party can acquiesce in it [*Insurance Controller v. Vanguard Insurance Co*, A 1966 M 437; see *ante* s 44: "*Incompetency or want of jurisdiction*"]. Where, however, wife obtains an *ex parte* decree under the Hindu Marriage Act which is later set aside on appeal and the case remanded to the trial court the husband is not to be taken to have waived

the objection to the territorial jurisdiction merely because he did not raise it in the former appeal [*Janak v. Raji*, A 1970 J&K 19].

Estoppel is not a cause of action; it is a rule of evidence. On the other hand waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right [*Dawson Bank Ltd v. Nippon M K Kaisha*, 62 IA 100: A 1935 PC 79, 82: 39 CWN 657; **folld** in *Satyanarayana v. Yelloji*, A 1965 SC 1405; see *Basheshar Nath v. Commr of I T*, A 1959 SC 149; *Ganesh v. Ramlakhan*, A 1981 P 36 FB]. If an agent with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question as to consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver [*Dawson Bank Ltd v. Nippon M K Kaisha, sup*; folld in *Metal Press Works v. Guntur Merchants &c*, A 1976 AP 205]. The waiver must clearly amount to an agreement, express or implied, between the parties. It must be made out that a party fully knowing of its rights has agreed to give it up for a consideration [*Humayun Properties v. Ferrazzinis*, A 1963 C 473, 476]. There is however nothing to prevent any litigant waiving any right he may have under the C P Code or under any other statute for the matter, unless the waiver of the right or the absence of the right makes any particular matter illegal [*Sashi Bhusan v. Dalip*, A 1936, P 75] or where the benefit is conferred by a statute which has public policy for its object [*Abdul Waheed v. Reny Charles*, A 1965 Mys 303]. Rules of procedure are not rules of public policy and parties are not precluded from waiving the benefit of such provision [*Dalim v. Nandarani*, A 1970 C 292; see *post*: "*No Estoppel Against Law or Statute*"].

Whenever a waiver is pleaded, it should be shown by the party pleading the same an agreement waiving the right in consideration of some compromise [*R C Thakkar v. Gujarat Housing &c*, A 1973 G 34]. A party by its own conduct may waive the objection about the production of secondary evidence by not raising the relevant contention at the time when the secondary evidence of the original is sought to be tendered before the trial court [*Patel Maganbhai Bapujibhai v. Patel Ishwarbhai Motibhai*, A 1984 Gujarat 69, 73].

There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on, the party making it cannot plead ignorance unless it is induced by the other party, for, if he does not choose to enquire beforehand, he takes the risk of errors [*Shyam Sunder v. Kaluram*, 42 CWN 1041: A 1938 PC 230: 48 MLW 199: 176 IC 2]. Acquiescence is in itself not sufficient to base a plea of waiver. There must be knowledge of all the facts [*Jorawar Khan v. Mukhram*, A 1952 N 40]. Distinction between waiver and estoppel—Waiver is created by knowledge of all the facts by both parties; but in case of estoppel by representation, the fact that the representee has knowledge of the facts destroys the plea of estoppel [*Chinoy & Co v. Anjiah*, A 1958 AP 384]. A waiver is an intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. Hence there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which would enable him to take an effectual action for the enforcement of such rights. In order to claim a right by acquiescence, a person must show that he had been mistaken as to his legal right and that he had expended some money or done some act on the faith or his mistaken belief, that the other side knew of the existence of his own right which was inconsistent with the right claimed by him and that the plaintiff knew of the person's mistaken belief in his right and that the plaint must have encouraged the defendants in their expenditure of money directly or by abstai-

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ning from asserting his legal right. [*K V. Narayan v. Sharana Gowda*, A 1986 Kant 77, 85: ILR 1986 Kant 1130]. When the previous landlord clearly waived the so-called breaches on the part of the tenant and so it is not open to the successors-in-interest to maintain an action on the ground of nuisance and annoyance [*Kumari Parvati Kevalram Moorjani v. Madanlal Anraj Pormal*, A 1988 Bom 354, 360: 1988 Mah LR 103].

Where the precise nature of the grant was never communicated to the landlord mere visits by him to the premises did not constitute a waiver of the requirement of consent to sub-letting [*Associated Hotels v. Ranjit*, A 1968 SC 933]. Landlord accepting rent from tenant knowing fully well that the tenant has sublet the premises without his previous consent does not waive his right to get a decree of ejectment under s 13(*1*) (*a*) of W.B. Premises Tenancy Act, 1965 [*Pulin v. Mahadeb*, A 1981 C 61]. In respect of the requirement of the statute to get the written consent of the landlord for subletting, is in the public interest there cannot be any question of waiver of a right, dealing with the rights of the tenants or the landlord [*Shalimar Tar Products Ltd v. H C Sharma*, A 1988 SC 145, 149: (1988) 1 SCC 70]. When there is a finding by the executing Court that the sub-tenant had become the direct tenant this order was not challenged in appeal or revision, the tenant cannot question the validity of this order in a subsequent eviction proceeding by him against the sub-tenant [*Gopalkrishan v. Ram Lal*, A 1989 Raj 24, 29]. The fact that a landlord on a previous occasion condoned a breach of covenant on receipt of consideration or otherwise and did not exercise his rights of re-entry does not create any estoppel against his right to enforce the covenant on a later occasion [*Thakur v. Pramatha*, 15 P 673]. An acceptance of rent, to operate as a waiver of forfeiture, must be in respect of rent which had accrued since the breach of the covenant which resulted in the forfeiture. There is no waiver, if rent due before is accepted. Difference between waiver by receipt of rent and distress pointed out [*Rajmohan v. Matilal*, 22 CLJ 546].

In a small cause court suit for rent, defendant pleaded that he never paid rents to plaintiff and that plaintiff and another person were both claiming rent. There was a decree. Subsequently plaintiff served defendant with a notice to vacate and then sued in ejectment on the ground (*1*) that defendant's denial of title in the previous suit amounted to a forfeiture and (2) that if it is not established, the notice terminated the tenancy—*Held*, that the plaintiff was estopped from pleading forfeiture, and that his claim that the notice terminated the tenancy amounted to waiver of the forfeiture [*Rukmini v. Rayaji*, 48 B 451]. In an earlier suit a tenant took a stand that in respect of the tenancy agreement dated 8-10-1974, the tenancy should be terminated by the end of 7th and succeeded. In a later suit he cannot be heard to contend that the date of lease agreement should be excluded in computing the period and that the termination should be on the 8th and he could be asked to vacate only on the 9th [*Krishnan Nair Sreedharan Nair v. Oommommen Abraham*, A 1984 Ker 164, 167, 169: 1983 Ker LT 504]. After the defence against eviction is struck out an advantage of a law becomes available which the landlord can waive [*Shree Ram v. Hua Bai*, A 1984 NOC 24 (Raj) (DB)].

A tenant got satisfied with the title of the landlord on seeing the documents namely a Will and a relinquishment deed and then he started paying rent. The will cannot be disputed by the tenant at a later point of time and he is estopped from questioning the same [*International Building & Furnishing Co Ltd v. J S Rikhy*, A 1985 Del 338, 341: (1984) 2 Rent CJ 705]. When a notice to quit given by the tenant under the West Bengal Premises Tenancy Act was accepted by the landlord though that notice to quit is defective, it is not open to the tenant to contend that the notice to quit is defective [*Dipak Kumar Ghosh v. Mrs Mira Sen*, A 1987 SC 759, 762: 1987

JT 241]. The tenant has given up his plea that a premises was let out both for running a clinic and for residential purposes. If so, he cannot take advantage of the amended definition in the Act regarding the term 'non-residential building' to mean a building let under a single tenancy for use for the purpose of business or trade and also for the purpose of residence [*Vinod Kumar Arora v. Smt Surjit Karu*, A 1987 SC 2179, 2184: (1987) 3 SCC 711]. When a tenant did not object to a decree for eviction being passed against him in spite of the fact that the landlord had changed, he would be estopped in law from challenging the validity of a decree for want of jurisdiction in the Rent Controller [*Om Prakash v. Kanshi Nath Sham Lal*, A 1987 Delhi 1, 3]. Once the lease by the Municipal Corporation comes to a lawful end, the question of invoking doctrine of promissory estoppel in aid of the tenant does not arise [*V P Shopkeepers' Association v. Corporation of The City of Bangalore*, A 1987 Kant 159, 161].

When a person a lessee was made to pay a transfer levy under pain of refusal of permission for sale and then sues for recovery of that amount, there is no question of any estoppel. There cannot be any estoppel against a statute which prohibited the changing of any amount at the time of giving permission for sale, under S. 3 of the Government Grants Act, 1895 [*Sunil Vasudeva v. Delhi Development Authority*, A 1988 Delhi 184, 188 : (1988) 34 DLT 37]. When a person took premises on lease under a document executed by the father of the landlady and the landlady's father filed the eviction petition as power of attorney of his daughter, the tenant is estopped from taking a plea that the landlady's father was not duly constituted power of attorney. [*Rajesh Wadhwa v. Dr (Mrs) Sushma Govil*, A 1989 Delhi 144, 148]. The tenant who took a specific plea in the pleadings that the landlord had been refusing to receive the rent and so the arrears got accumulated, cannot take a stand at the time of evidence that she was permitted to pay rent in the same manner in which she was paying the prior landlord *ie* allowing the rent to get accumulated and then paying it [*Thayammal v. K Subramanian*, A 1989 Mad 317, 319]. The receipt of 3rd, 4th & 5th premium as also the defaulted 2nd premium with interest by the Life Insurance Corporation, estops the Corporation from asserting that the policy lapsed on account of non-payment of 2nd premium in time. [*Life Insurance Corporation of India v. O P Bhallah*, A 1989 Pat 269, 272]. The fact that a tenant sent a reply to a telegraphic notice to quit sent by the landlord does not estop him from questioning the validity of the notice on the ground that it did not contain the signatures of the landlord [*Maduri Satyanarana v. Singametti Veerabhadraswamy*, A 1990 Andh Pra 169, 171]. When on an earlier occasion, a person had taken a lease of a well for 10 years from Gram Panchayat with the permission of the Collector, he cannot contend at the time of the extension of lease that the Panchayat had no authority to deal with the well [*Chandrakant Bhailal Patel v. T V Krishnamurthy*, A 1991 Guj 63, 64]. If there was no evidence to show that the rent was accepted at any time after the notice of termination was given and if the rent was accepted under protest, it could not amount to waiver because there was no intention on the part of the lessor to treat the lease as subsisting [*Basant Lal (Dead) By Lrs v. State of U P*, A 1981 SC 170, 171: 1980 Cri LJ 1280, *Jagdish Prasad v. Union of India*, A 1990 (Madh Pra) NOC 64; *Devassia V. D v. Micheal Joseph*, A 1990 Ker 261, 262]. Where under a court order under s 11A of Bihar Buildings (Lease, Rent and Eviction Control) Act, 1947 to deposit rent in court the tenant deposits the same beyond the time limit, the landlord withdrawing such amount disentitles himself to claim his right to get the defence struck off [*Amna Khatun v. Zahir*, A 1981 P 1 FB—*per* majority].

In a suit for injunction filed by the tenant he was directed to deposit money as damages for use and occupation. The landlord withdraw those amounts without pre-

judice to his contentions. When the withdrawal is without prejudice, there cannot be any estoppel against the landlord preventing him from putting forward his contentions [*D R Punjab Montogomery Transport Co. v. Raghuvanshi (P) Ltd*, A 1983 Cal 343, 352]. A tenant deposited arrears of rent and damages for staying execution of eviction proceedings. The landlord accepted the amount. Such acceptance will not amount to waiver by the landlord of his right to file fresh eviction proceedings on the ground of default in the payment of rent [*Sugam Chand Agrawal v. Jivt Shah*, A 1984 Pat 184, 186: 1984 Pat LJ 135]. When an enquiry was conducted by a committee of outsiders which was constituted at the request of the affected person and he did not raise any objection to the jurisdiction of that committee in conducting the enquiry he is estopped from raising the objection as to the jurisdiction of the committee. [*National High School, Madras v. Education Tribunal*, A 1992 SC 717, 718]. The right to claim enhanced compensation is a personal right. This right can be waived by the terms of the agreement before the land acquisition is made. [*R F Charitable Trust v. Spl Dy. Collector, Land Acquisition*, A 1992 AP 130, 140]. When an application for amendment was allowed subject to payment of costs and the costs was received under protest, there is no estoppel in challenging the order allowing the amendment. [*Cudise Trinath Rao v. Sudhansu Prasad*, A 1992 Ori 168, 169]

Estoppel must be certain to every intent and not to be taken by argument or inference and only deliberate intention on the judgment-debtor's part to waive his right to object to irregularity in proclamation could constitute waiver [*Rajagopal v. Muthulakshmi*, A 1969 M 5]. When a judgment-debtor only waived objections to an execution sale on the ground of (*1*) non-issue of fresh sale-proclamation after adjournment and (2) inadequacy of price,—*Held* this did not prevent him from attacking the sale on the ground that (*i*) sale proclamation had never been issued and had been fraudulently suppressed and (*ii*) that the price was inadequate by reason of decree-holder's fraud [*Dhanuk Dhari v. Nathima*, 11 CWN 848: 6 CLJ 62 (**folld** in *Ambika v. Whitewall*, 6 CLJ 111); *Nripati v. Jatindra*, A 1926 C 577: 91 IC 407]. The waiver of a fresh sale proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation [*Ramdasjee v. Tirupathi*, A 1965 AP 334].

But such waiver would not imply a waiver of the right to object to any irregularities in the attachment [*Shyam Sunder v. Kaluram, sup*], or waiver of the right to apply for setting aside the sale on the ground that proclamation was not served on each of the properties [*Preo Lall v. Radhika*, 6 CWN 42], or waiver of non-specification of the hour of the day to which sale is adjourned [*Bhikari v. Surajmoni*, 6 CWN 48]. Non publication of sale proclamation being an irregularity and not illegality can be waived [*Nripati v. Jatindra, sup*]. But it has been held in a case that where by the express terms of the petition, the judgment-debtor waived all irrgularities in execution sale, he is estopped from impugning the validity of the sale on the ground that the sale proclamation was not served in accordance with the provisions of the law [*Raja Thakur v. Anant*, 2 CLJ 584; see also *Potta v. Karupa*, A 1935 M 150].

So, when judgment-debtor took adjournment waiving all objections about undervaluation, he is estopped [*Nageshwar v. Ambika*, A 1935 P 483]. Where a judgment-debtor accepts the position that no notice of valuation is required and the valuation given by him is noted in the sale proclamation he must be deemed to have waived his right to raise the objection [*Mahabir v. Motibhai*, A 1971 P 27]. So also when a judgment-debtor obtained a postponement of sale on an undertaking not to raise any objection on the ground of illegality or irregularity, he was held estopped from applying to set aside the sale on the ground of an illegality of which he was not cognisant when he gave the undertaking [*Lakhmi v. Rajindar*, 47 IC 831; see *Sesh-*

ayya v. Sattiraju, A 1930 M 414]. Judgment-debtor making the decree holder agree to an adjournment of sale in order to pay the decretal amount cannot afterwards raise an objection against the execution [*Fateh v. Kishen*, A 1935 C 816; see however *Harendra v. Gopal*, 62 C 421]. A judgment-debtor obtaining time to pay up in an execution proceeding is not estopped from objecting that the property attached came to him from another source and is not liable [*Ram Ch v. Puttu*, 8 ALJ 844]. The fact that a judgment-debtor, who petitions to have a sale set aside on the ground of fraud and irregularity, has in a petition made previous to the sale, asking for its adjournment made no mention of the irregularities relied on, does not create an estoppel [*Mahatap v. Leelanund*, 7 C 613; **folld** in *Raman v. Kunhayan*, 17 M 304. See however, *Girdhari v. Hurdeo*, 26 WR 44 PC: 3 IA 230; folld in *Raja Thakur v. Anant*, 2 CLJ 584]. A judgment-debtor raising no objection as to jurisdiction after notice had been served cannot do so on a second application the former having been dismissed for non-prosecution [*Ram Dayal v. Kisturi*, A 1970 Raj 246]. When during the pendency of the execution petition against the tenant and his one son, the tenant died and the one son did not pray for substitution of all of the deceased as parties, he cannot take out another application at a later stage, that in the absence of the other legal representatives, the execution proceeding is liable to be dismissed [*Radheshyam Modi v. Jadunath Mohapatra*, A 1991 Ori 88, 92].

If the provisions of the law are waived, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon the footing of a waiver [*Manindra v. Secy of S*, 34 C 257: 5 CLJ 148]. If the waiver is supported by an agreement founded on valuable consideration or is of such a character as to estop the party from insisting on the right claimed to have relinquished, the party waiving his right cannot subsequently turn round and claim to enforce the right he has deliberately waived [*Jahandar v. Ram Lall*, 11 CLJ 364, 370: 37 C 440].

Non-compliance with Or 21 r 22, if waived, cannot be objected in [*Bimalanandan v. United Refineries Ltd*, 11 R 79; *Bandu Hari v. Bhagra Laxman*, A 1954 B 114]. It is the same for Cl 2 of the First Schedule Arbitration Act 1940 [*Modern Builders v. Hukmatrai*, A 1967 B 373].

Where the judgment-debtor's act is not objecting to the statement of *peishcush* and its value as stated by the decree-holder was due to a mistake of fact, he is estopped from objecting to the sale on the ground of material irregularity [*Umadi v. Velogoti*, 38 M 387]. Parties cannot waive the statute by agreement or contract themselves out of the law of limitation [*Sitharama v. Krishnaswami*, 38 M 374, 381].

The judgment-debtor cannot waive the privilege conferred on him by s 51 C P Code [*Jogendra Misir v. Ramanandan*, A 1968 P 218] or by s 60 C P Code [*Gowranna v. Basavana*, A 1975 Knt 84 (*Subramaniam v. Satyanadham*, A 1942 M 391; *M &S M Rly v. Rupchand*, A 1950 B 155; *Ramnaresh v. Ganesh*, A 1952 A 680 **rel** on)]. Decree-holder and judgment-debtor by a writing agreed to settle the decree in full on payment of Rs. 350/- within 3 months subject to a default clause. In execution proceedings for default judgment-debtor can claim protection as an agriculturist as by the compromise there was no conscious waiver of the right under the statute [*Eyyakku v. Unnalachan*, A 1974 K 139]. The requirement of notice under s 106 T P Act [*Batoo v. Rameshwar*, A 1971 D 99; *Boota v. Roshan*, A 1971 P&H 269) or under s 80 CPC (*S v. Jiwan*, A 1971 P 141) may be waived although impossibility of compliance cannot attract principle of waiver].

Where demand was made in respect of three successive yearly instalments, but plaintiff consented not to sue for the whole for default on the first two occasions, but refused to consent to the third, it was waiver [*Ram Ch v. Rawatmull*, 19 CWN 1172].

Instalment bond or decree—The circumstances which constitute waiver of default—Two useful tests may be applied to determine whether there has been an actual waiver, *viz* (*1*) whether the payment subsequently accepted may be looked upon as a valuable consideration for the renunciation of the decree-holder's right; (2) whether the decree-holder has by his conduct intentionally caused the judgment-debtor to believe that he has renounced his right. The question of waiver is a mixed question of law and fact [*Easin Khan v. Abdul Wahab*, 15 CWN 10].

When vendors left certain money with vendees for payment to a creditor, the plaintiff, a co-sharer in the village, who withdrew the money and brought a suit to pre-empt the property—*Held*, that the withdrawal of money could not operate as a waiver of pre-emptive right [*Ajudhia v. Chattarpal*, 4 ALJ 210: 1907 AWN 88].

Where in a bond the creditor stipulated to accept a lower rate of interest and gave an extended period for payment, if interest was paid "punctually" on specified dates, the mere fact that he accepted payments of interest at the lesser rate in respect of two instalments not paid in time does not estop him from insisting on his strict rights in case of subsequent default [*Maclaine v. Gahhy*, (1921) 1 AC 376]. Plaintiff's husband sued *C* and *N* to set aside the adoption of *N* by the former, and it was decided that the question should remain open till the death of *C*. Afterwards an application was made to the District Judge under s 31 (Act 8 of 1890) for leave to raise certain moneys to pay off debts due from the son of *N*, then a minor, by granting a *Putni* lease for the estate and plaintiff's husband offered to take the lease—*Held* it was a case of waiver and plaintiff claimed through her husband [*Kiranbala v. Kali*, 30 IC 29].

Where a stipulation in a contract is for the exclusive benefit of one contracting party and does not create liabilities against him, he can waive it unilaterally [*Jiwanlal v. Brij*, A 1973 SC 559 (*Dalsukh v. Guarantee Life &c*, A 1947 PC 182 **folld**)].

Where a candidate for selection voluntarily appeared for interview before the selection board, it was not open to him to turn round and question the constitution of the board when the decision was unfavourable to him [*G Sharma v. Lucknow Univ*, A 1976 SC 2428]. A student appearing in the examination held by the West Bengal Board of Examination for admission to medical, engineering and other technological colleges is not estopped from challenging the arbitrary and capricious manner in which answer scripts were examined, evalued and assessed [*Jitendra Nath v. W B Board of Examination*, A 1983 Cal 275, 287].

Where premises constructed after 26-8-57 were exempted from operation of Rent Control Act, the dismissal of suit by landlord for eviction by Rent Controller for want of jurisdiction does not preclude him in claiming relief in subsequent civil suit by principle of waiver [*P Dasa Muni v. P Appa Rao*, A 1974 SC 2089].

Quaere.—Whether the doctrine of waiver can validate an attachment made without jurisdiction of court [*Arumuga v. Yagamba*, 17 IC 323]. Where the plaintiff sets up complete jurisdiction in the court to try the case and the defendant is called upon to plead to this, if it turns out that the court had not complete jurisdiction, the defendant cannot be held bound on the doctrine of estoppel on the ground that he waived the objection of want of jurisdiction [*Shamakanta v. Kusum*, 44 C 10]. If a party appears before arbitrators under protest that they have no jurisdiction and cross-examines witnesses, he does not waive his objection, nor he is estopped from saying that the arbitrators had exceeded their authority [*Chetandas v. Radhakisson*, 104 IC 174: A 1927 B 553: 29 Bom LR 1087]. Where a party agreed to a decree on certain

condition and the compromise fell through, the admission made for the purpose of the compromise do not amount to a waiver [*Tikaya v. Wassu*, 50 IC 564].

See *post*, "*Estoppel by Inconsistent Position*".

Waiver and Estoppel in cases involving constitutional rights.—It has not only been held that the rule of estoppel cannot apply in respect of fundamental rights [*Behram v. S*, A 1955 SC 123; **folld** in *Sakharkherda Education Society v. S*, A 1968 B 91], but the Supreme Court has gone further to hold that it is not open to a citizen to waive his fundamental rights conferred by Part III of the Constitution [*Basheshar Nath v. I T Commnr*, A 1959 SC 149; **folld** in *Ram Gopal v. Asstt Housing Commr*, A 1959 A 278 FB]. The distinction drawn in the United States between the fundamental rights enacted for the benefit of the individual and those enacted in public interest or on grounds of public policy as regarding waiver of such rights will not apply in the case of our Constitution [*Basheshar Nath's* case *sup*; S K DAS J dissented and it is submitted rightly so]. It is submitted that a waiver of a fundamental right ought to be possible as a person is certainly free to choose whether he wants to exercise such right or not. It is different in the case of estoppel which does not require voluntary relinquishment as waiver does. It is naturally otherwise in the contingency of a section of the public being involved and hence the distinction drawn in the United States. A step has been taken in the right direction. The court, restricting the application of the general principle enunciated in *Basheshar's case* to Art 14 of the Constitution which was actually under consideration there, held that in order that a plea of waiver of fundamental right (under Art 30 here) may succeed it must be proved that the person was aware of the right waived and deliberately abandoned it. It is not sufficient to show that he failed to exercise the right [*Varkey v. S*, A 1969 K 191]. It is, of course another matter if one subscribes to the view taken by MAHAJAN CJ, while sitting in the constitutional Bench in *Behram v. S, sup* that the fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual right but they have been put there as a matter of public policy. The doctrine of waiver obviously cannot have any application then. There can be no estoppel against the constitution notwithstanding the fact that certain persons had conceded before the High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after a certain date, they are entitled to assert that any such action on the part of the public authorities will be in violation of their fundamental rights [*Olge Tells v. Bombay Municipal Corporation*, A 1986 SC 180, 192, 193: (1985) 3 SCC 545].

A plea of guilty involves the waiver of several constitutional rights (*a*) privilege against compulsory self-incrimination, (*b*) right to trial by jury, and (*c*) right to confront one's accusers. The court cannot presume a waiver of these important rights from a silent record [*Boykin v. S*, A 1970 USSC 10; *McCarthy v. US*, 394 US 459]. There can be no estoppel against deprivation of fundamental rights conferred on shareholders by the Companies Act, by their omission to object to amendment of Articles of Association [*Mohanlal v. Punjab Co Ltd*, A 1961 Pu 485].

The plea, however, does not constitute a waiver of a previous claim of the privilege against self incrimination. There does not seem to be a waiver of the privilege against self-incrimination for the mere performance of an unlawful act even if there exists a statutory condition to that effect [*Haynes v. US*, 390 US 85].

Estoppel By Recital in Deeds.—[See *ante*: "*Estoppel by Deed*"]. Although all parties to a deed are bound by the recitals in it legitimately appertaining to the subject-matter of it, the estoppel is limited by the intention of the parties as mani-

fested by the deed. The doctrine of estoppel does not extend to mere descriptive matter or statements or recitals which are immaterial and not contractual or essential to the purposes of the instrument; to give a recital that effect, it must be shown that the object of the parties suit to make the matter recited a fixed fact as the basis of their action. The description in a deed, of land excepted from the conveyance, as having been conveyed to another, does not estop the grantor nor one to whom he shall convey the excepted lands, from alleging that no such conveyance as recited had been made. Where a plaintiff with full knowledge, that the defendant was in occupation as a cultivating tenant, took a settlement from the superior landlord, in contravention of the recital in his conveyance, he is not entitled to eject the defendant as a trespasser [*Bepin v. Tin Couri*, 13 CLJ 271: 15 CWN 976; *Lachman v. Munshi*, A 1933 P 708]. Where a contract is made with reference to a particular fact stated in the recital of a bond, the party making the statement would not be estopped from disputing the fact so admitted in an action not founded on the deed but wholly collateral to it [*Bajrang v. Bhagwan*, 11 OC 301].

A deed of conveyance of land recited that the vendor was "seized of, or otherwise well entitled" to the property intended to be sold "for estate of inheritance in fee-simple", and it purported to convey such an estate. In a suit for dower by the vendor's widow, against the heirs of the purchaser—*Held* that although as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants, from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *prima facie* evidence against the purchaser and persons claiming through him, that the estate conveyed was what it purported to be, it being an admission by conduct of parties which amounted to evidence against them [*Sarkies v. Prosonnomoyi*, 6 C 794: 8 CLR 79]. No such principle can be laid down that a person who states that any portion of a document is true and binding should not be allowed to state that any other recital in the document is false [*Govindoss v. Muthiah*, 48 MLJ 721: A 1925, M 660]. Where a sale deed recited that vendor had no more *jagir* plot and it is found that he has one such plot, the recital does not estop the vendor as vendee's position is not changed in any way [*Sampat v. Ramlal*, A 1937, P 598].

As to the value of recital of legal necessity in old documents, when independent evidence is difficult to obtain on account of lapse of time, see *Nandalal v. Jagat Kishore*, 43 IA 249: 44 C 186: Bom LR 868: 21 CWN 225: 31 MLJ 563; **follld** in *Sitaram v. Rewaram*, 71 IC 390; *Tarachand v. Rahman*, 75 IC 674 (L); *Md Nuh v. Brij Behari*, 82 IC 5 (A). Recital of legal necessity in a document executed by one member of a Hindu family is not evidence against another member who alleged that he has been defrauded [*Tribeni v. Ramanarain*, 11 ALJ 713].

A party who puts forward a recital and induces another to act on it cannot afterwards be heard to say that the recital is not accurate [*Bhubaneshwari v. Haradhan*, 12 CWN 728]. A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence, as against the parties who make it. But it is no more evidence as against third persons, than any other statement would be [*Brajesware v. Budhanuddi*, 6 C 268: 7 CLR 6; *Monohar v. Sumitra*, 17 A 428; *Ghurphekni v. Parmeswar*, 5 CLJ 653; *Bank of Bengal v. Lucas*, 28 CWN 497; see however, 6 A 417 and 3 BLR 57 PC]. An executant of a document is not necessarily estopped from denying the facts stated therein, but the burden of proving the non-existence of such facts is on him [*Shiwala v. Lachhman*, 96 IC 440: 27 PLR 581].

Recital of receipt of consideration contained in a mortgage deed is admissible in evidence against the representatives in interest of the original mortgagors [*Behari v.*

Mukhdum, 35 A 194; *Bakshi v. Liladhar*, 35 A 353], or of indebtedness [*Birbal v. Behari*, 76 IC 815 (A)]. A recital of receipt of consideration in a deed does not operate as an estoppel [*Baz Bahadur v. Raghubir*, 49 A 707: 100 IC 1037]. A registered sale deed recited receipt of full consideration and there was also an acknowledgment of the vendor at the foot to the same effect. The vendor subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration was not paid, though he knew that the vendor was in possession of a portion of the property—*Held* that the defendant was estopped from contending that she had a lien for unpaid purchase money by her acknowledgment of the receipt of the amount of consideration money [*Tehilram v. Kashibai*, 10 Bom LR 403].

In a suit for possession of land, the plaintiff is not estopped by the recital in the *kobala* as to his vendor's title to the land, but can prove such title differently, that is, not bound down by the recital [*Gourmonee v. Krishna*, 4 C 397]. Where a person entrusts his own man with a blank stamped paper signed and sealed by himself, in order that an instrument may be drawn up and money raised upon it, it must be taken that the instrument was drawn up in accordance with the obligor's wishes and instructions and he is estopped from disputing its validity [*Wahidunnessa v. Surgadas*, 5 C 39]. A stipulation in a bond that all payments should be endorsed on the back thereof and that all other pleas of payment would be futile, does not estop the defendant from proving by other means, that the debt or part of it has been satisfied [*Kali Das v. Tarachand*, 8 WR 316; *Girdharee v. Laloo*, 3 WR Mis 23: *Narayan v. Moti Lal*, 1 B 45]. A strip of land was shown as a passage in the document and there was a specific representation by the vendor of the plaintiff that the said strip of land was set apart as the common passage of the prospective buyers. When the plaintiff acted in that representation and purchased the land, the defendant who claims through the original vendor is estopped from challenging the implied grant of user of the disputed land [*Alo Rani Banerjee v. Malati Roy*, A 1992 Cal 302, 305].

[*As to recitals, see also notes to ss 101-104 under "Recital in a deed or other instrument"*].

Estoppel By Attestation and Consent.—Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor offer him with notice of its provisions. It can at the best, be used for the purpose of cross-examination, but by itself, it will neither create estoppel nor imply consent [*Nandalal v. Jagat*, 43 IA 249: 21 CWN 225: A 1916, PC 110. See *Upendra v. Bindeshri*, 20 CWN 210: 22 CLJ 452: *Panchkauri v. Ram Khelawan*, 29 IC 749; *Lakhpati v. Rambodh*, 37 A 350; *Harikishen v. Kashi*, 19 CWN 370: 42 C 876: 1914 PC 90 : 42 IA 64; *Kanhu v. Paul*, 5 PLJ 521: 57 IC 353; *Dhira v. Moti*, 63 IC 266; *Udai v. Gajendra*, 70 IC 815 (A); *Abdul Aziz v. Abdulla*, 87 IC 652 (L); *Ahmed v. R*, 42 CLJ 215; *Fazal v. Jiwan*, 14 L 369 : A 1933, L 551; *Chuni v. Amar*, A 1938, A 97]. Attestation, by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication, any knowledge of the contents of the documents. To operate as estoppel, the signature must be shown by independent evidence to have meant to involve consent to the transaction [*Pandurang v. Markendegya*, 49 IA 16 : 26 CWN 201: A 1922, PC 20: 49 C 334; *Haveli v. Kailan*, A 1933, L 703]. When a deed is void, there is no question of any election to affirm or disaffirm it by the attestation of the person affected by it [*Rangaswami v. Marappa*, A 1953, M 230].

Where it is shown by other evidence that, when becoming an attesting witness he must have fully understood what the transaction was, his attestation may support the

inference that he was a consenting party. The question is a question of fact and should be determined with reference to the circumstances of each case [*Chunder v. Bhagwat*, 3 CWN 207; *Denonath v. Kotiswar*, 21 IC 367; see also *Ram Ch v. Haridas*, 9 C 463; *Imam Ali v. Baijnath*, 33 C 613: 10 CWN 551; *Hari Kishen v. Bajrang*, 9 CLJ 453: 13 CWN 544; *Rup Narain v. Gopal*, 36 C 780: 36 IA 103 : 13 CWN 920: 11 Bom LR 833; *Rajlakhee v. Gocool*, 13 MIA 209: 3 BLR 57, 63; *Gopal Ch v. Gourmonee*, 6 WR 52; *Madhub v. Gobind*, 9 WR 350; *Mahadevi v. Neelamoney*, 20 M 269; *Collier v. Baron*, 2 NLR 34, 3 OC 252; 19 AWN 218; *Mg Tha v. Mg Shwe*, 12 IC 891; *Lakhpati v. Rambodhi*, 37 A 250; *Ismail v. Jagannath*, 19 IC 225; *Ram Adhar v. Bhagwan*, 85 IC 580 (A); *Bhagwat v. Gorakh*, A 1934, P 93; *Chandra v. Dasarath*, A 1935, O 257; *Ma Shin v. Firm*, A 1935, R 17; *Krishna v. Chinnamma*, A 1959 K 237; *Sarkar Barnard & Co v. Alakmanjari*, A 1925 PC 89: 26 Bom LR 737; *Gangadhara v. Gangarao*, A 1968 AP 291; *Ramaswami v. Anantha Padamanabha*, 84 MLW 176; *Jaganatham v. Kunjithapadam*, A 1972 M 390; *Damodaran v. Leelavathi*, A 1975 M 278]. Thus, where a co-sharer mortgaged certain houses alleging them to be his self-acquisition and the other co-sharers being aware of the contents stood by and attested the document, they were estopped from challenging the title of the mortgagee who purchased the property in execution of his mortgage decree [*Jankiram v. Chota Nagpur B Assen*, 15 P 721]. So where in addition the attestor who was managing member of the family consented to and acquiesced in a mortgage by the widow and took an active part in the mortgage and entered into an agreement with the mortgagee and obtained an option to have the mortgage transferred to him, he is estopped [*Bhagwan v. Ujagar*, 32 CWN 538: A 1928, PC 20 : 30 Bom LR 267; *Jasodar v. Sukurmani*, A 1937, P 353].

The principle has no application where the executant himself could not be estopped from urging real nature of the transaction [*Jagarnath v. Butto*, A 1947, P 345]. Where purchase is *benami* and moneys have to be raised, the person who lends the money would require a recital as to ownership and it is the invariable practice in such cases to get the attestation of the real owner, so that he may be bound by it. Parties hardly realise the effect of the recent Privy Council decision that attestation does not by itself import consent to or knowledge of the contents of the document [*Mallaya v. Krishnaswami*, 85 IC 855 : A 1925, C 95]. A person may sign a document in order to evidence his approval to the transaction. He is then not an attesting witness [*Alakmanjari v. Sircar*, 6 PLJ 473: 62 IC 668]. Where a wife refused to sign a mortgage as an executant but was willing to sign it as a witness—*Held* that she signed it as an attesting witness [*Mya Bu v. Ma E*, A 1937 R 293]. Where persons attesting, asserts the facts stated in the documents attested, he is charged with knowledge of the documents [*Bhamba v. Ram Pyara*, A 1930, L 217].

Attestation may in many cases operate as estoppels against reversioners. A reversioner attesting alienation by a childless proprietor, was held estopped from contesting the validity of the alienation [*Ganda v. Gulab*, 159 PLR 1914. See *post*: "*Estoppel by conduct against members of a Hindu family*". In the absence of any representation to the assignee, mere attestation of a deed of assignment by a Hindu widow and scribing receipt of consideration by the reversioner does not create an estoppel [*Hazarilal v. Choudhury*, A 1948, N 236]. Attestation by reversioner is not presumptive proof of necessity where the document does not contain any recital of it [*Satyanarayana v. Venkanna*, A 1933, M 637: 145 IC 862]. Attestation by a reversioner of a deed of alienation executed by a widow implies only necessity and does not create estoppel [*Namasivayam v. Kuthalalingam*, 21 MLT 30]. As to presumption of legal necessity in such cases, see *ante* s 114 under "*Reversioner*".

Property of *B* was purchased in auction sale by *A*, *benami* for *B* who continued in possession. *B* sold it to plaintiff and *A* his son, attested the deed—*held*, there was estoppel by conduct. It was observed that having regard to the ordinary course of conduct of persons in the Madras presidency, attestation by a person who has or claims any interest in the property dealt with in the document, must be treated *prima facie* as a representation by him that the title and other facts recited in it are true and will not be disputed as against the obligee [*Kandasami v. Rangaswami*, 36 M 564: 23 MLJ 301; *Azizullah v. Ghulam*, 80 IC 994 (S)]. The same view was expressed in another case where SADASIVA IYER, J, drew a distinction between an attestor having an interest in the property conveyed by the deed and a casual attestor having no such interest. The latter is not estopped for all time [*Narayana v. Ram Iyer*, 25 MLJ 210: 38 M 396]. Title cannot pass by attestation as a witness when the statute requires a deed [*Baldeo v. Sundar*, 7 ALJ 664: 7 IC 264]. When title can be acquired only in a particular way, there is no room for the application of the doctrine of estoppel [*Ramanathan v. Ramaswami*, 30 MLJ 1].

If the alienation by a Hindy widow was in fact made, and the then reversioners in fact consented to it and received consideration thereof, the actual reversioners are estopped from denying its validity [*Muthuveera Mudaliar v. Vythilinga*, 32 M 206: 19 MLJ 88]. As to estoppel against reversioner who was a witness to a deed of family arrangement and took a prominent part in making it, see *Sia Dasi v. Gur Sahai*, 3 A 362. Where in a will, a condition restraining alienation by legatee is void, attestation by the legatee does not operate as estoppel [*Ram Kuar v. Atma*, 8 L 181: 103 IC 506: A 1927, L 404].

Equitable Estoppel.—The principle of equitable estoppel presupposes that the person claiming the benefit has been put into some disadvantageous position by the act of other sides. Where there was no such plea taken in the petition and the petitioner enjoyed the benefit of admission to the medical college only for a short duration for three days, he was lower in merit, was wrongly given admission, and had nowhere stated in the petition that on account of this admission, he had lost his chance to join some other institution and had not indicated in what manner he had been prejudiced, the doctrine of equitable estoppel would not apply to the case. [*Brajendra Singh Chouhan v. State*, A 1995 MP 23, 26]. In equity a person drawing benefit from a transaction is not permitted to escape from the disadvantage if any flowing from it. He cannot take stand "Heads I win, tails you lose". [*Bakshi Ram v. Brij Lal*, A 1995 SC 395, 396, 397]. When petitioner's eligibility for selection/ admission in medical college was subject to fresh scrutiny by the competent authority, it was for him to satisfy the requirements and if he failed he could not invoke the doctrine of equitable estoppel to make up his shortfall. [*Vinod Kumar Rasdon v. State*, A 1995 J&K 68, 72]. Where the University had communicated its specific stand, positive policy and anxious attitude as regards admission to principal of the institution, but the principal admitted students in disregard of the same, the concept of equitable estoppel is not attracted. [*Sitam Seshanka v. Principal, College of Pharmaceutical Studies*, A 1997 Ori 62, 66; *Rajendra Prasad Mathur v. Karnataka University*, A 1986 SC 1448, **relied** on].

Equitable Estoppel. [Part Performance].—Under English law, equity will not fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. The law in India is not otherwise [*Md. Musa v. Aghore*, 42 IA 1: A 1914 PC 27 : 19 CWN 250: 42 C 801]. In this case the Judicial Committee quoted the dictum in *Potter v. P*, 1750, 3 Atk 719: "If confessed or in part carried into execution, it will be binding on the parties and carried into further execution as such in equity." The doctrine of part performance is an extension

of the rule of estoppel which may form a valid plea to resist an action in which the title of the defendant was not found upon a completed contract. In between the stages of executory contract and completed contract, comes part performance [*Hiramani v. Ammol*, A 1928 A 699 : 26 ALJ 944].

The doctrine of part performance was formerly applied in a large number of cases (*ante*, s 91 : "*Doctrine of part performance and s 53-A TP Act*") and it has now been partially adopted in s 53-A T P Act. Cases are now governed not by the English equitable doctrine of part performance as before, but by the aforesaid statutory provision. S 53-A, *ibid*, creates no real right. It merely creates rights of estoppel between the proposed transferee and transferor which have no operation against third persons not claiming under those persons [*Banerji v. K L & S Co*, A 1941, PC 128 : 46 CWN 374: 21 Pat 243]. There is a difference between the equitable doctrine of part performance and the doctrine of equitable estoppel (see *ante*: "*Acquiescence Whether Equitable Estoppel*").

Doctrine of part performance cannot be applied to a gift by way of *sankalap* at the time of marriage, which is a sacrament and not the outcome of a contract [*Hiramani v. Ammol*, A 1928 A 699: 26 ALJ 944]. Plaintiff gifted a property to defendant. A suit was brought by plaintiff's wife and daughter against plaintiff and defendant for cancellation of the gift on the ground of unsoundness of mind and they both successfully contested it—*Held*, the plaintiff was not equitably estopped from bringing a subsequent suit against defendant for cancellation on the same ground [*Kampta v. Bhulai*, A 1927 A 365: 100 IC 527]. In a suit for pre-emption, the plaintiffs having acquiesced in the transaction were held equitably estopped from maintaining the suit [*Rikhi Ram v. Dhanpat*, 55 IA 266: 33 CWN 90: 110 IC 1] Where in execution of a decree of an Indian State the judgment-debtor deposited a certain sum and took time and then raised an objection to the validity of the decree he was not estopped [*Sheo Tahal v. Binayak*, A 1931 A 689].

Where a student got himself admitted into a college on the strength of a certificate issued by the Secretary, Secondary Education Board on behalf of the University declaring him eligible for admission to university course, but his name was removed from the college rolls after more than a year on the ground that his name did not appear in the list of successful candidates published in the Gazette—*Held* that it was a case of equitable estoppel and the student was allowed to complete his college course [*Registrar v. Sundara*, A 1956 M 309; *Sangeeta v. U N Singh*, A 1980 D 27"]. On the basis of marks-sheet for B.Sc Part I a student was admitted to B.Sc Part II. Later the University had withheld the result of B.Sc Part I on the ground that on account of some mistake the student was wrongly declared to have passed the B.Sc Part I examination. The University had the opportunity of checking its records and discover the mistake. Not having done so, the University is estopped from withholding the result of B.Sc part II examination. [*Bundelkhand University v. Laxmi Narain Yadava*, A 1983 All 378, 381]. On the basis of the result of the Board of Secondary Education a candidate was given admission in the college. This admission cannot be cancelled on the basis that the Board later declared him as failed since the marks allotted to him were wrong. [*David Jhan v. Principal Ispat College Rourkela*, A 1984 Orissa 215, 216 : 1984-1 Ori Law Rev 447]. A candidate was wrongly declared to have passed B.A. first year Examination. When a special resolution enabling the failed students to take the examination in the failed subjects before they sit for the Final year examination was not communicated to this candidate, the university is estopped from refusing permission to this candidate to appear for the Final Year Examination. [*Ku. Bharati Shrivastava v. Jiwaji University*, Gwalior, A 1989 MP 197, 198 (DB)].

Though eligibility of minimum marks in the qualifying examination is laid down as 50 per cent, the same has been made flexible giving the Director of Admission to take cultural, atheletic and other achievments into account. When taking all the facts into consideration certain candidates were given admission, that admission cannot be cancelled on the ground that the qualifying marks fell short by just one per cent. [*Ambika Prasad Mohanty v. Orissa Engineering College*, A 1989 Ori 173, 179 (DB)].

When the student seeking admission to the Law course submitted his marks-sheet in M.A degree, the Law college admitted him and he pursued his studies for two years & finally he was admitted to the final course also. The University is estopped from refusing to declare the results of the appellant's examination or from preventing him from pursuing his final year course. [*Sanatan Gauda v. Berhampur University*, A 1990 SC 1075, 1078]. When the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule. [*District Recruit Class II Engineering Officers' Association v. State of Maharashtra*, A 1990 SC 1607, 1627]. When the University gave the candidate a marks-sheet wherein he was shown to have passed, after the lapse of 5 years the university is estopped from taking up a plea that the candidate had in fact failed in the examination. [*Basanta Kumar Mohanty v. Utkal University*, A 1990 Orissa 10, 13]. There is, however, no equitable estoppel where the name is struck off the rolls on the very next day after the student begins to attend the college [*Manjunath v. University of Delhi*, A 1967 Mys 119; *Jagannadhan v. District Collector*, A 1966 AP 59]. Certain candidates were admitted to B.Sc (Agriculture) course by the Principal without regard to the criteria and the norms laid down by the Admissions Committee of the University. On enquiry by the Committee appointed by the University, the names of these candidates were removed and they were not permitted to write the examination. Since the University did not acquiesce in the admission of these candidates there is no question of any estoppel. [*Achchey Lal v. The Vice Chancellor*, A 1985 All 1 5 (DB)].

A candidate who got admitted to IIT Bombay wanted a transfer to M G Science institute Ahmedabad on health ground. After the course, the candidate appeared for the theory examination. But he was not permitted for the practical examination on the ground that his attendance at IIT Bombay cannot be taken into consideration in calculating the term at M G Science Institute Ahmedabad. This can't be challenged on the principle of estoppel since he had to still appear for the practical examination. [*Pradip Rasiklal Shukla v. Gujrat University*, A 1985 Guj 99, 102]. A candidate who got a letter for admission in B.A.M.S. Course contacted the office and was told that he could not be admitted since he did not take *Sanskrit* in the intermediate examination. Since he did not have the requisite qualification for admission there is no question of estoppel. [*Dilip Singh Yadav v. Pracharya And Adhikshak*, A 1986 All 158, 159 (DB)]. When the State Government had really intended that 100 seats in the Medical Colleges should go to the reserved category and since according to the percentage of marks fixed at 35% for that category there were only 32 qualified candidates available, the Government issued an order reducing the percentage of qualifying marks to 25% to that category of candidates to bring in more number of candidates to fill up the 100 seats originally reserved. There is no question of any estoppel. [*Aarti Gupta v. State of Punjab*, A 1988 SC 481, 484 : (1988) 1 SC J 44]. When the result of the previous year was cancelled at a time when the candidate will have sufficient time to prepare for that examination there is no question of estoppel. [*Km. Safina Rani v. Vice Chancellor, Rohilkhand University Bareilly*, A 1988 Allahabad 234, 236]. When a candidate who did not have the requisite minimum of 40% marks was admitted on the recommendation of the Education Minister, the

subsequent cancellation of the admission cannot be challenged on the ground of promissory estoppel since the cancellation would not result in any prejudice or injustice since the candidate was not eligible for such admission. [*Rajesh Namdeo v. Awadhesh Ptratap Singh Vishwavidyalaya*, A 1988 MP 138, 141 : 1988 MPLJ 9 (DB)]. If the University's transitory regulation only enables the candidates who have passed M.A examination to improve their class but appearing again for the examination, a failed candidate cannot claim to take the examination merely because the authorities issued the admit card by mistake. A distinction must be drawn between the infractions of the Statutes in the matter of procedure and infractions in regard to substantive right of the candidates against whom there is a complete bar. [*Anant Kumar v. Vice-Chancellor Magadh University Body Gaya*, A 1990 Pat 205, 208].

Estoppel Under Compromise Decree.—It is extremely unfortunate that the highest court in the country, without considering any of the earlier authorities, went forward to hold that a compromise decree is not a decision of the court, nor can it be said that a decision of the court is implied in it. It is the acceptance by the court of something to which the parties had agreed. Accordingly, the principle of *res judicata* cannot operate [*Subba Rao v. Jagannadha*, A 1967 SC 591; **follld** in *Autar Singh v. Sohan Lal*, A 1970 J&K 26 (FB) and *Bhanwarlal v. Raja Babu*, A 1970 Raj 104; *Baldevdas v. Filmistan Distributors*, A 1970 SC 406].

In the case of decrees by consent although there has no doubt been a dispute as to whether s 11 C P Code applied it has not been decided that one of the essential requirements for the application of the doctrine of *res judicata* is not satisfied [See *Sunderabai v. Devaji*, A 1954 SC 82; *Kailash v. Kulamoni*, A 1956 Or 210; for the contrary view see *Chandi Charan v. Nabagopal*, A 1957 P 365 following *Shankar v. Balkrishna*, A 1954 SC 352 and pointing out that this issue in *Sunderabai's* case was obiter). Spencer Bower and Turner writes "Any judgment or order which in other respects answers to the description of a *res judicata* is none the less so because it was made in pursuance of the consent and agreement of parties. It is true that, in such cases the court is discharged from the duty of investigating, or (where the consent is given at a late stage in the proceedings) further investigating the matters in controversy, and is not asked to, and does not, pronounce a judicial opinion upon any of such matters; but it is none the less true also that, at the joint request of the parties, the tribunal gives judicial sanction and coercive authority to what those parties have settled between themselves, and in that way converts a mere agreement into a *judicial decision* on which a plea of *res judicata* may be founded (Res Judicata, 2nd Ed p 37). There are numerous authorities to the effect that a judgment by consent is as effective an estoppel between the parties as a judgment on a contested case [*In re South America & Mexican Co*, 1895 1 Ch 37; *Kinch v. Walcott*, A 1929 PC 289; *Secy of S v. Ateendra*, 63 C 550; *Sailendra v. S*, A 1956 SC 346; *Kesavan v. Padmanabhan*, A 1971 K 234; *Ibrahim v. Dy Director*, A 1973 A 379; the cases cited *sup* and Spencer Bower *sup* p 37 for more cases]. The only difference seems to be that an order by consent can be set aside in proceedings constituted for that purpose [see *Kinch v. Walcott, sup*]. "Though doubts have been occasionally expressed whether, strictly, the foundation of the estoppel in such cases is not representation by conduct, rather than *res judicata*" (Spencer Bower and Turner sup p 38); see *Subba Rao v. Jagannadha*, A 1967 SC 591, it is now well-settled that it would operate as estoppel by judgment [*Kailash v. Kulamani, sup*; see also *Bhima v. Abdul Rahid*, A 1968 Mys 184; *Shivadas v. Divakar*, A 1969 My 73; *Indira v. B A Patel*, A 1974 AP 303 which hold that there can be estoppel and *res judicata* in compromise decrees]. Bar of *res judicata* is not attracted to a compromise decree but principle of estoppel can be invoked to prevent fraud or circuity of action [*Gangnarain v. Babulal*, A 1975 P 59].

The test for determining whether there is any estoppel in consequence of a compromise decree must depend upon the answer to the question: "Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree passed or was it necessarily involved in, or was the basis of, what was embodied in the decree?" [*Kumara v. Ramaswamy*, 35 M 75: 21 MLJ 709]. Where in a suit on an instalment bond there was a compromise decree for two instalments, defendant was held not debarred from pleading want of full consideration in a subsequent suit [*Ata Md v. Lachhman*, A 1941 L 116]. Under a compromise decree, the son got certain properties and some properties retained by the father were to go to the sons of another after the death of father. The son is barred in attacking the decree at a later date on the ground that under the Muslim law the father could not bequeth the property to a non-heir without the consent of the heir [*Mohd. Maheez v. Mohammed Akbar*, A 1984 NOC 8 (AP)]. In a compromise in a suit for dissolution of partnership, the plaintiff represented that he had no connection with any property belonging to the firm. In the compromise particulars of such properties were not given. Plaintiff is not estopped from filing a suit for partition of partnership properties [*Bindraban v. Atma Rama*, A 1984 NOC Del 305].

Estoppel in cases of judgment by default.—'A judgment or order by default is *prima facie* just as much a judicial decision in favour of the plaintiff as any other judgment or order" (Spencer Bower and Turner on Res Judicata 2nd Ed p 42). A default judgment has been treated on the same footing as one by consent for the purposes of estoppel [*Re South American and Mexican Co*, 1895 1 Ch 37; **approved** in *Sailendra v S*, A 1956 SC 346; *Kesavan v. Padmanabhan*, A 1971 K 234]. But it has been said and approved that in the case of a judgment in default of appearance a defendant is only "estopped from setting up in a subsequent action a defence which was necessarily and with complete precision, decided by the previous judgment, in other words, by the *res judicata* in the accurate sense" [*per* LORD MAUGHAM LC in *New Bounswick Railway Co v. British and French Trust Corporation*, 1939 AC 1, 21 HL; see *per* VISCOUNT RADCLIFFE in *Kok Hoong v. Leon Sheong Kweng Mines Ltd*, 1964 AC 993, 1012 PC; *per* LORD UPJOHN in *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd*, (1966) 2 All ER 546, 572 HL]. Default judgments though capable of giving rise to estoppels must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and they could estop only for what must necessarily and with complete precision have been thereby determined [*per* VISCOUNT RADCLIFFE in *Kok Hoong's* case *sup* at 1010, 1012]. In the execution of a mortgage decree by sale of mortgaged property, reserve price had to be indicated the value indicated by the decree holder was adopted by the court though it was less than the amount due under the decree. The judgment debtor made no objection. It was held that from this conduct of the judgment debtor, it could be inferred that he waived his right of objection [*Anto Nitto v. South Indian Bank Ltd*, A 1998 Ker 219].

Estoppel by *res judicata* could not be maintained merely by reason of the dismissal of an action for want of prosecution [*Pople v. Evans*, (1968) 2 All ER 743].

Estoppel Under Family Arrangement.—A family arrangement has been defined as "an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour [Hals. 3rd Ed. Vol 17, para 356]. Agreements are constantly made between the members of a family for the sake of peace by adjustment of disputes and for preservation of property, and parties agreeing to the arrangements and acting upon them are estopped from questioning their

validity or legality. Thus, where devisees under a will had, on attaining majority, made no objection to the will, but had on the contrary, impliedly adopted the acts of their mother and guardian, and had by their conduct and acts agreed to treat the will as a valid will, they are held to be estopped from disputing its provisions [*Lakshamibas v. Gunput*, 5 B.H.C.R. 128. In this case COUCH, CJ, citing *Williams v. Williams*, LR 2 Ch App 294 and other cases observed: "In order to constitute a binding family arrangement, it is not necessary that there should be any formal contract between the parties, and if a sufficient motive for the arrangement is proved, the court will not consider the *quantum* of consideration. The fact that by their agreement, the parties have avoided the necessity for legal proceedings is a sufficient consideration to support it"]. It has been always the policy of courts of equity to uphold family arrangements even when they are not in legal form [*Baldeo v. Udai*, 43 A 1; *Md Musa v. Aghore*, 42 IA 1: A 1914 PC 27: 42 C 801: 19 CWN 250; *Manohar v. Amano*, 77 IC 41]. When the dominant idea is to settle the various disputes, the transaction is not void though it might incidentally have set up a rule of succession different from that in the Hindu Law [*Shriniwas v. Chandrabhagabai*, A 1958 P 420; (*Chinnathayi v. Pandiya*, A 1952 SC 29 : 1952 SCR 241 reld on)].

A settlement of a disputed or doubtful claim has in many cases been held to be binding between the parties or persons claiming through them [*Rajendra v. Bijoy*, 2 MIA 181; *Hetnarain v. Modenarain*, 7 MIA 311; *Gajapathi v. G*, 13 MIA 497; *Mantappa v. Baswantrao*, 14 MIA 24; *Greender v. Troylukha*, 21 IA 35 : 20 C 373; *Md Imam v. Hussaini*, 25 IA 161: 2 CWN 737 : 26 C 81; *Khuni v. Gobinda*, 38 IA 87 : 15 CWN 545 : 33 A 356; *Ichhun v. Banwari*, A 1929 L 16]. When such mutual promises are carried into execution, original contract becomes an executed contract. It is binding though no legal document has been executed [*Kunti v. Gajraj*, 46 A 947]. For the application of the doctrine, one of the requisites is that the parties should have been parties to the settlement or should claim under or through such parties or who though may not have been parties thereto or have derived their interest from such parties, have acted upon it or have derived some benefit under it [*Khantamoyee v. Hridayananda*, 48 CLJ 489: A 1929 C 149]. In the case of execution of a settlement deed, the settlee cannot invoke the doctrine of estoppel since there is no question on the part of the settlee to believe the thing to be true and to act upon such belief [*Rai Sunil Kumar Mitra v. Thakur Singh*, A 1984 Pat 80, 84]. In the case of a family arrangement the principle of estoppel will apply if relinquishment was made any one of the parties of his right to inherit in future for a consideration [*Damodharan Kavirajan v. T.D. Rajappan*, A 1992 Ker 397, 401]. A plea of estoppel can be invoked in support of a family arrangement where the court finds that the parties should not be allowed to resile from a particular arrangement under which they have taken some benefit. [*P G Hariharan v. Padaril*, A 1994 Ker 36, 48].

The parties should *bona fide* consider that there is question to be decided [*Lucy's* case, 22 LJCH 732]. There must be either a dispute or at least an apprehension of a dispute. *Bona fides* is the essence of validity [*Basanta v. Ramsankar*, 59 C 859 : 55 CLJ 206; *Jogesh v. Prasanna*, 55 CLJ 283]. Bare relinquishment or renunciation of the chance of an heir apparent may be illegal and unenforceable, but if the relinquishment and renunciation, proceeds on a settlement of conflicting claims or *bona fide* dispute, the arrangement is binding and creates an estoppel [*Shah Nawaz v. Ghulam*, 24 L 161]. In order to be operative there must be a *bona fide* dispute among the members of the family. Where a person puts forward a baseless claim to a property and there was a settlement under threat of litigation, there was no binding family settlement [*Himmat v. Dhanpat*, 35 IC 148 : 38 A 335; *Mitter Sani v. Datta Ram*, 24 ALJ 205]. A family arrangement pre-supposes that there are *bona fide* claims on

either side. Where one party secretly obtained probate and the other party wanted to have it revoked, the former agreed to pay a large annuity and obtained an admission of the genuineness of the will which might be used against the reversioners—*Held* that the principle of family settlement did not apply [*Shyam Lal v. Rameshwari*, 23 CLJ 82; see *Krishna v. Hemaja*, 22 CWN 463]. Existence of a *bona fide* dispute is a good consideration for a family settlement, though the claim which caused the dispute may turn out to have no foundation [*Chahlu v. Parmal*, 41 A 611]. Existing dispute is not necessary. Avoiding possible or anticipated dispute is sufficient consideration [*Ameer v. Md Ejaz*, A 1929 O 134 : 6 CWN 51]. Existence of a doubtful claim is essential but the existence of a dispute or controversy in *praesenti* is not [*Raghubir v. Narain*, A 1930 A 498]. It has however been held in a case that for a family arrangement to be good, it was not necessary that there should be a family dispute which had to be settled or compromised [*Pokhar v. Dulari*, A 1930 A 687, **following** *Williams v. W*, (1867) 2 Ch 294].

When it is sought to bind the reversioners by a family arrangement entered into by a widow or other reversioner, an arrangement not in settlement of a *bona fide* dispute or which is not for the benefit of the estate as a whole cannot bind the reversioners [*Dosidia v. Gaya Pd*, A 1943 A 101 FB; *Chanderjit v. Debidas*,A 1951 A 522].

A Hindu widow in possession of her husband's separate property, her deceased husband's mistress and his illegitimate daughter with the concurrence of her next reversioner, entered into an arrangement by an instrument in writing with the object of adjusting family disputes. A remoter reversioner was a witness to such an instrument, and took a prominent part in making the arrangement and consented to it—*Held* that he was estopped by such conduct from afterwards questioning the legality and validity of such arrangement [*Sia Dasi v. Gur Sahai*, 3 A 362; see *Damodar v. Mahoram*, 13 CLR 96]. The circumstance that a party to a settlement was a limited owner at the time would not make it any the less binding if the other requisites of validity are present [*Khantamoyee v. Hridavanandu*, 48 CLJ 489]. A widow claiming through her husband cannot impeach a settlement come to her by her husband with other members of the family whereby he released by necessary implication the interest which he had in the property [*Dadabhoy v. Cowasji*, 94 IC 535: A 1925 PC 306].

Family arrangement being binding on the parties to it would operate as an estoppel by preventing the parties after having taken advantage under the arrangement to resile from the same or try to revoke it [*Kale v. Dy Director*, A 1976 SC 807]. When there is a family arrangement binding on the parties, it would operate as an estoppel by preventing the parties, after having taken advantage under the arrangement, from resiling from the same, or trying to revoke it [*Thayullathil Kunhi Kannan v. Thayullathis Kalyani*, A 1990 Ker 226, 235].

As to family arrangement by partition and adjustment of other kind, see *Ananta v. Damodar*, 13 B 25: *Ganpatrao v. Vamanrao*, 10 Bom LR 210; *Sukhimani v. Mahendra*, 13 WR 14 PC; *Helan Dasi v. Durga*, 4 CLJ 323; *Khunnilal v. Gobind*, 38 IA 87 : 15 CWN 545 : 33 A 356; *Kokla v. Peary*, 35 A 502; *Ramnaresh v. Sadhu*, 28 IC 385; *Hardei v. Bhagwan*, 24 CWN 105 PC; *Srinath v. Nibaran*, 53 IC 945; *Baldeo v. Udai*, 43 A 1 : 18 ALJ 877; *Bhagwati v. Jugdam*, 62 IC 933 : 2 PLT 471; *Rajendra v. Nibaran*, 26 CWN 859; *Budh Sagar v. Md Chatar*, 47 A 327. Family arrangement on account of partition, alienation &c, by father; see *Kandasami v. Doraiswami*, 2 M 317; *Moro v. Ganesh*, 10 BHCR 444; *Ganpat v. Gopalrali*, 23 B 636; *Yekeyamian v. Agniswarian*, 4 MHCR 307; *Ramdas v.*

Chabildas, 12 Bom LR 621. A deed of lease may be operative as family arrangement [*Muthuswami v. Govindaswami*, 9 MLT 342].

Family arrangement by adult members binds the minors represented by their guardian [*Chettiyatath v. Koron*, 14 IC 295; *Daya Shankar v. Hublal*, 37 A 105]. Even in the case of a Mohamedan family, if the arrangement is a fair and equitable one it should not be rejected simply on the ground that the minors were not represented by a properly constituted guardian. Where in pursuance of a family settlement, the members relinquish properties not falling to their share, it is not a transfer but a family arrangement [*Ameer v. Md Ejaz*, A 1929 O 134]. A family arrangement under which a Mahomedan wife renounces her claim to dower and inheritance is binding [*Abdul Bari v. Nasir*, A 1933 O 142]. As to when a family arrangement is not binding on a minor, see *Abdul Hussain v. Ibrahim*, 35 IC 243; *Keramatulla v. Keamatulla*, 23 CWN 118.

Agreement of family arrangement executed under a wrong view of the rights of parties and law is not binding [*Lakshmi v. Durga*, 40 A 619]; nor is a family settlement founded on fraud, undue influence, inequality of position, or mistake of either party or concealment of material things. The court should not scan with nicety the *quantum* of consideration in a deed of family settlement [*Satish v. Kalidasi*, 34 CLJ 529; *Kusum v. Dasarathi*, 34 CLJ 323]. An agreement between only two members of the family either to convey or to relinquish the future reversionary right is a mere *spes successionis* and is unenforceable. Such agreement when not acted upon when the succession opens on the death of the widow, does not estop a party from bringing an action for his share in the property [*Joti v. Beni*, A 1937 P 280]. As to arrangement among interested parties for holding office in turn to conduct the management of temple, see *Ramanathan v. Murugappa*, 33 IA 139 : 29 M 283 : 8 Bom LR 498 : 10 CWN 825 : 16 MLJ 265. A family settlement between mother and daughter, does not bind a posthumous son [*Kusum v. Dasarothi*, 34 CLJ 323]. In order to make a family arrangement binding it is not necessary that all members of the family must be parties to it [*Tej Bahadur v. Nakko*, A 1927 O 97 : 99 IC 472]. Conduct amounting to waiver may create an estoppel precluding a person from insisting upon giving effect to a family arrangement [*Janaki Ammal v. Kamalathammal*, 7 MHCR 263]. In the case of family arrangements and partition deeds arrived at in arbitration proceedings, persons who are not legally entitled to any share but who are given some benefit, are entitled to retain it even though they were not parties to the submission [*Dada Sahib v. Kollapuram*, 85 IC 258 : A 1925 M 204].

See *post*, "*Estoppel by Conduct against members of a Hindu family.* [*Reversioners*]",

Estoppel in Cases of Adoption.—Estoppel by conduct may in some cases arise when an adoption which has been recognized by the members of the family for a very long time, and which has altered the position of the person adopted, is questioned as invalid after a long lapse of time [*Rajendra v. Jogendra*, 14 MIA 67 (**follld** in *Umaram v. Puruk*, 85 IC 540: A 1925 C 993); *Ramkrishna v. Tirunarayana*, A 1932 M 198]. The view taken in *Vishnu v. Krishna*, 7 M 3 FB that the rule of estoppel by conduct is not applicable where an invalid adoption is made under the belief that it was valid, has been expressly negatived by the Judicial Committee, in *Sarat v. Gopal*, 20 C 296 PC. In *Kannammal v. Viraswami*, 15 M 486 2 MLJ 114 the court said : "We have been referred to the decision in *Chitko v. Janaki*, (11 BHCR 199) and *Ravji Vinayak v. Lakshmimai*,(11 B 281) in both of which it was held that the conduct of the person who actively participated in the adoption estopped him from disputing the validity of the adoption. It seems to us that this is just such a case

as sec 115 was framed to meet". The rule does not confer status. It merely shuts the mouth of the person who tries to deny the adoption [***Fullamoni v. Netrananda***, A 1967 Or 103].

Where an adoption is consistently denied for a long time it cannot be said that he was concluded by any rule of law from questioning the adoption [*Dwarka v. Lalchand*, A 1965 SC 1949]. But in order that an estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must have become so altered that it would be impossible to restore him to it [*Parvatibayamma v. Rama Krishna*, 18 M 145; *Yeshavant v. Radhabai*, 14 B 312; *Gurulinga v. Ramalakshmamma*, 18 M 53; *Kurverji v. Bahai*, 19 B 374]. An invalid adoption does not *per se* change the adoptee's rights in his natural family. No estoppel arises in such a case unless as a consequence, the position of the party setting up the estoppel is changed to his advantage [*Vaithilingam v. Natesa*, 37 M 529: 23 MLJ 189]. It is not cast upon the invalidly adopted son who sets up the estoppel against the adoptive father to prove conclusively that he was in fact damnified by the father resiling from the story of the adoption; but it is enough if he proves that the likelihood of his being prejudiced by the alteration of position was so great that the court will presume that the plaintiff must have been so damnified. The estoppel will only operate against the adoptive father and in no way against the *aurasa* son of the adoptive father [*Josyam v. J*, A 1927 M 777 : 103 IC 855].

Long recognition and acquiescence by members of the family, co-operation with or concurrence in the funeral and other ceremonies of the adoptive father performed by the person adopted and such other acts, raise an estoppel in favour of the adopted son [see *Sadashiv v. Hari Moreshvar*, 11 BHC 190; *Chintu v. Dhondu*, 11 BHC 193 note; *Gopalyyan v. Raghupatiyyan*, 7 MHCR 250; *Parbhu v. Mylne*, 14 C 401; *Santappāya v. Rangappayya*, 18 M 397; *Bhagatram v. Gokul Chand*, 150 PR 1908; *Moman v. Dhanni*, 1 L 31 : 55 IC 869; *Chhotalal v. Chandra*, 45 A 59; *Laxman v. Bayabai*, A 1955 N 241]; when the facts are once ascertained, presumption arising from conduct cannot establish a right which the facts themselves disprove [*Kishorilal v. Chaltibai*, A 1959 SC 504: 1959 SCJ 560 (*Tayammaul v. Sashachella*, 10 MIA 429 refd to); *Gundicha v. Eswara*, A 1965 Or 96]. *S* widow of *R* sued *D* who had taken possession of *R's* property claiming to be the adopted son of *J*, a deceased brother of *R* who was joint in estate with *R*. *J* was adopted by a deed of 1908 but no giving or taking in adoption was referred to in the deed or proved. *D* contended that *R* and consequently *S* was estopped from questioning the validity of the adoption in that he had brought *D* from his village and been a witness to the deed, had allowed him to perform the cremation of *J*, and at the time of his (*D's*) marriage had represented that he was the adopted son of *J*, It is the practice of Agarwallas to make adoptions of a purely temporary character—*Held*, that there was no estoppel under s 115 [*Dhanraj v. Chunarabalee*, 32 IA 231: A 1925 PC 118: 52 C 482: 30 CWN 601]. If an adoption is invalid under the Hindu Law, the fact that plaintiff was present at the adoption and acquiesced in it cannot estop him. Even if plaintiff represented that the defendant could be validly given in adoption there would be no estoppel [*Tirkangauda v. Chivappa*, 1943 Bom 706; *Ram Ch v. Muralidhar*, A 1938 B 20].

Where the plaintiff represented that she had authority to adopt and this representation was acted on by the defendant whose ceremony of adoption was carried out on the faith of this representation; and the marriage of the defendant was likewise celebrated on the strength of it and the defendant performed the *Sradh* ceremony of his adoptive father; and the plaintiff also executed a document which is a deed of adoption—*Held* that the plaintiff was by her acts and conduct estopped from denying

the validity of the defendant's adoption. The estoppel was personal and would not bind any one claiming an independent title [*Dharam v. Balwant*, 39 IA 142: 16 CWN 675: 34 A 398 (on appeal from 30 A 549); *Vedia Venkatasubbamania v. Vedla*, 77 IC 214: 46 MLJ 52; *Ramachari v. Saraswati*, 60 IC 246; see *Ichhnun v. Banwari*, 114 IC 711: A 1929 L 16]. Though a document conferring the power to adopt was declared by the Privy Council invalid as a will, yet if the widow acting in pursuance of the power adopted a person and for several years treated him as an adopted son, she is estopped [*Sudarsana v. Seetharamamma*, 1933 MWN 1148]. Where adoption by widow was concurred to by the collaterals of her husband who did not object to the adopted son getting his share partitioned, they are estopped from challenging the adoption [*Md Yasin v. Ghulam*, 96 IC 777].

The facts that more than one plaintiff had on several occasions prior to the suit admitted the adoption, give rise to the inference that they had acquiesced in it and led the adopted son to believe that his status was accepted by them [*Chuhar v. Jaskuar*, 69 PR 1917]. Where a person executed a registered document declaring he has adopted another and described himself as guardian of the adopted son in mutation proceeding, he is estopped [*Udit Narain v. Randhir*, 20 ALJ 945: 69 IC 971]. A mistaken impression of law regarding the validity of an adoption is not a ground for an estoppel [*Aiyanachariar v. Lakshmi*, 2 MLJ 500]. An adoption by a minor widow of 12 years who has not sufficient maturity of understanding cannot be held binding on the basis of a personal estoppel [*Seshayyar v. Saraswati*, 1920 MWN 721: 61 IC 246]. Where *A* was the adopted son of *B* whose consent, it was alleged, was corruptly given—*Held* that *A* who had claimed through *B* was estopped from denying the fact that his adoptive father did consent [*Parthasarathy v. Kandaswami*, A 1923 M 711]. If a satisfactory explanation is offered, a representation to the revenue authorities by a widow as to an adoption made by her does not create an estoppel [*Veeraraghava v. Kamalamma*, 1950, 2 MLJ 575].

Meaning of "Person". [Estoppel Against Infants].—It has been held in Calcutta that there can be no estoppel against an infant on account of his inability to contract. In *Dharmadas v. Brahmo Dutt*, 25 C 616: 2 CWN 330, JENKINS J, held that the law of estoppel in s 115 will not apply to an infant unless he has practised fraud operating to deceive. This decision was upheld in appeal (MACLEAN CJ, PRINSEP & AMEER ALI JJ) and it was held that s 115 has no application to contracts by infants and the term "person" in that section is amply satisfied by holding it to apply to one who is of full age and competent to enter into a contract (see s 11 Contract Act) [*Brahmo Dutt v. Dharmadas*, 26 C 381: 3 CWN 468 (*Ganesh v. Bapu*, 21 B 198 **dissented**)]. The Privy Council decided the case on an altogether different ground, *viz.*, that the lender being fully aware at the time of the loan that the defendant was an infant, no question of estoppel arose. It therefore did neither affirm nor disagree with the view of the High Court. It was observed: "But their Lordships do not think it necessary to deal with that question now. They consider it clear that s 115 does not apply to case like the present where the statement relied on is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties" [*Mohori Bibee v. Dharmadas*, 30 IA 114: 30 C 539, 545, 546: 7 CWN 441; (see *ante*: "*No estoppel when both parties are equally acquainted with true facts*"].

The principle in *Dharmadas' case* was **affirmed** in a later case holding that the law of estoppel must be read subject to other laws such as the Contract Act and when a minor cannot be made liable upon a contract, he cannot be made liable on the same contract by means of an estoppel under s 115 [*Golam Abdin v. Hem Ch*, 20 CWN 418] and subsequent decisions are also to the effect that a minor is not estopped by

false and fraudulent representation as to his age [*Manmatha v. Exchange Loan Co. Ltd*, (1937) 1 Cal 283; *Saroda v. Binay*, 58 C 224].

[In *Thurston v. Nottingham, P B Society*, 1903 AC 6 a female infant obtained money from a Society with which some property was purchased. She also got advances from the Society to complete certain buildings on the land. On attaining majority she sued under the Infants Relief Act to have the mortgage declared void. It was *held* that as regards the purchase-money paid to the vendor of the land, the Society stood in her place and had a lien on the property; but that the mortgage being by an infant it was void and the Society was not entitled to recover the advances, there being no debt in law. LORD ROMER said: "The short answer is that a court of equity cannot say that it is equitable to compel a person to pay moneys in respect of transaction which as against that person the Legislature has declared void." (Approved in *Sales Tax Officer v. Kanhaiydlal*, A 1959 SC 135). In *Cannam v. Farmer*, 3 Ex 698, the contention was that the defendant a married woman, was precluded from relying on her coverture on account of her representation and PARKE B, said: "The law throws protection round infants and feme coverts, and you cannot make them liable to contract by their own representations. The defendant's incapacity to contract by reason of her converture was not removed by her representation. It is not an estoppel in any way'. An infant applied for share in a company and on the same being allotted, paid a certain number of calls and then brought a suit repudiating the contract and for return for money paid—*held* that the infant was entitled to repudiate the contract in so far as future liability was concerned. But he was not entitled to return of money paid unless he shows that consideration has wholly failed; *Steinberg v. Scala Ltd*, (1923) 2 Ch 452].

The former view in Bombay that "person" in s 115 included a minor [*Dadasaheb v. Bai Nathari*, 41 B 480: 19 Bom LR 61; see also *Ganesh v. Bapur*, 21 B 198; *Josrup v. Sadashiv*, 46 B 137: 23 Bom LR 975; *In re Companies Act*, 39 B 331: 16 Bom LR 730] was negatived by a FB holding that a minor who represents fraudulently or otherwise that he is of age and induces another to enter into a contract is not estopped from pleading infancy in an action founded on the contract [*Gadigeppa v. Balangowda*, 55 B 741 FB: A 1921 B 561].

In the Punjab also the earlier cases were to the effect that s 115 applied to minors [*Wasinda v. Sitaram*, 1 L 389: 59 IC 393; *Harjimal v. Abdul Halim*, 60 IC 261 (L); *Lunidomal v. Ghanumal*, 14 SLR 104: 62 IC 237] but a later Full Bench decided that an infant who has induced a person to contract with him by means of a false representation that he was of full age is not estopped from pleading minority [*Khan Gul v. Lakha*, A 1928 L 609 FB: 111 IC 175].

The view above that a minor is not estopped from pleading minority on account of fraudulent misrepresentation as to age, if the contract is void, has also been taken in other jurisdictions [see *Kanhai Lal v. Baburam*, 8 ALJ 1058; *Kanhyalal v. Giridhari*, 139 IC 956: 9 ALJ 103; *Liladhar v. Peary*, 19 ALJ 578: 62 IC 258; *Jaganath v. Lalta*, 31 A 21; *Ajudhia v. Chandan, sup*; *Koduri v. Thumuluri*, 94 IC 853: A 1926 M 607; *Ranga Row v. Salt Chowgmal*, A 1934 M 560; *Kundan v. Magan*, A 1932 A 710; *Gadigeppa v. Balangowda, sup*; *Vaikuntharama v. Authimoolam*, 38 M 1071 *post*; *Khan Gul v. Lakha, supra*; *Gulab Chand v. Seth Chunni*, A 1929 N 156; *Mulaibhai v. Gurud*, 15 NLR 149; *Gokuldas v. Gulabrao*, 89 IC 143; *Hari v. Roshan*, 71 IC 161 FB: *Mg Tin v. Ma Dun*, A 1927 R 108: 99 IC 148; *Pundlik v. Bhagwantrao*, A 1926 N 49]. The Judicial Committee also held that a deed executed by minors though represented as majors, is a nullity and incapable of founding a plea of estoppel

[*Sadiq Ali v. Jaikishori*, A 1928 PC 152: 47 CLJ 628: 32 CWN 874]. S 115 which is the law of proprocedure cannot override s 11 of the Contract Act, the substantive law [*Nakul v. Sasadhat*, 45 CWN 906].

An infant cannot be estopped by the acts or admissions of other persons, *eg* his mother and natural guardian [*Ramcharan v. Joyram*, 17 CWN 10: 16 CLJ 185; *Debidas v. Tulsi*, 11 ALJ 202]. Minor's property was mortgaged by certificated guardian but without permission of the District Judge and was subsequently sold with his permission. The vendees were not estopped from challenging the validity of the mortgage as representatives of the minors [*Maksud v. Shk Abdullah*, A 1928 A 77]. But where the representation was made on behalf of the infant by his guardian or next friend legally competent to bind him, *eg* a certificated guardian, he is liable to be estopped [*Somnath v. Ambika*, A 1950 A 121]. The powers of the next friend are limited to the particular legal proceedings and acceptance of *A* as next friend in a partition suit creates no estoppel from raising objections to his competency in a subsequent disposal of property [*Narain v. Sapurna*, A 1968 P 318].

Same.—*Brahmo Dutt v. Dharmadas*, 26 C 381 (*sup*), however, should not be taken as laying down an absolute rule that the doctrine of estoppel *in pais* would in no case apply to infants. That would be too broad a proposition. (see *Mohan Bibee v. Saral*, 2 CWN 1 *post*, where qualification was made in the case of money obtained by minor by fraudulent representation). It is conceived that all that was meant is that a person who on account of under-age (s 11 Contract Act) is incompetent to contract, cannot be indirectly made liable on the same contract by invoking the aid of the doctrine of estoppel. The unrestricted language of s 115 is comprehensive enough to include a minor. But the rule of estoppel being a rule of evidence has to be read along with and subject to other laws in force. It cannot be so applied as to nullify the express provisions of another statute. "An estoppel cannot override the plain provision of law. The statutory provision that a minor is incompetent to incur a contractual debt cannot be over-ruled by an estoppel" [*per* SADASIVA AYYAR J, in *Vaikuntarama v. Authimoolam*, 38 M 1072: see *Goiam v. Hem Ch*, 20 CWN 418; *Ganganand v. Rameshwar*, A 1927 P 271]. No person can by application of the law of estoppel acquire or have assigned to him a status or legal capacity which the substantive law denies to him, and it makes no difference whether the misrepresentation is made fraudulently or innocently [*Gadigeppa v. Balangowda, sup*; *Ajudhia v. Chandan*, 1937 All 860: A 1937 A 610 FB].

When the law definitely lays down that an infant cannot bind himself by a promise, to make him liable on such promise by the doctrine of estoppel, would be tantamount to overriding the provisions of statute. Cababe says: However plainly, therefore, all the elements that go to constitute an estoppel present themselves, still the admission cannot be exacted, if its exaction would result in subjecting any of such persons to an objection which the law says they cannot incur. If it were otherwise then the whole of the law as to the status and capacity of parties would be indirectly frittered away by means of the doctrine of estoppel [*Cababe*, pp 124-25]. Bigelow says: "It is clear that an action cannot be maintained at common law on a contract with a married woman for falsely representing herself to be sole at the time, the representation in such a case not operating as an estoppel, nor could an action *ex delicto* be maintained in such a case. And a similar doctrine prevails by weight of authority in regard to the false representations of a minor concerning his age, though another has been induced to contract with him on the faith of them" [Bigelow 6th Ed pp 625-27]. Thus, where an infant obtained a loan upon the representation which he knew to be false; that he was of age, he was held not estopped from pleading minority and that no suit to recover the money could be obtained against him there

being no obligation binding upon the infant which could be enforced upon the contract either at law or in equity [*Dhanmull v. Ram Ch*, 24 C 265]. On the same principle it has been held that an infant is not estopped by his fraudulent misrepresentation that he is of full age; and he is not bound to refund money obtained thereby [*Leslie Ltd v. Sheill*, 1914, 3 KB 607 CA: 83 LJKB 1145: 30 TLR 460; see (1916) 2 AC 57]. These cases were referred to in *Guruswami v. Lall*, 53 IC 14: 26 MLT 245, where it was held that a minor mortgagor who enters into the transaction misrepresenting his age is under no equitable obligation to refund the money when the transaction turns out to be void.

In *Derry v. Peek*, 1889, 14 AC 337, LORD HERSCHELL said that "fraud is proved when it is shown that a false representation has been made: (*1*) knowingly, or (*2*) without belief in its truth, or (*3*) recklessly, careless whether it be true or false." In *Md Syedol v. Veohoolyark*, 21 CWN 257: 86 LJ PC 15: 115 LT 564, the Judicial Committee observed: "A case of fraud by the appellant on the subject of age was set up but it cannot be doubted that the principle given effect to in the case of *Leslie Ltd v. Sheill* (*sup*) would apply and such a case would fall."

If s 115 does not apply to any contract or transaction with a minor, no distinction can be drawn between innocent and fraudulent representation by the minor and there can be no estoppel in any case. But where a minor obtained money by fraudulent misrepresentation as to his age and the other party acted in good faith, courts have in some cases held that the minor may in equity be required to restore the benefit obtained by him under the contract. A contrary view has been taken in other cases in accordance with the principle in *Leslie Ltd v. Sheill, sup*, that when a contract is found to be void in law, there is no equity to refund money.

It has been held in Calcutta that though a minor is not estopped from pleading minority and though not liable on the contract, the Court has a discretion in equity to direct the minor to return the benefit he had received by false representation to the person deceived. The observation of the Judicial Committee in *Md Syedol's* case, *ante*, was treated as obiter [*Manmatha v. Exchange Loan Co Ltd*, 1937, 1 Cal 283: *Vaikuntharaman v. Authimoolam*, 38 M 1071]. This principle of equity was also involved in *Khan Gul v. Lakha*, 9 L 701 FB. A later Full Bench in Allahabad, however, held that there is no rule in equity upon which the minor can be liable to repay the money. It is not equitable to compel a person to pay any money in respect of a transaction which as against that person the law declared void. In this case relevant decisions have been discussed at length and it has been pointed out that *Leslie Ld v. Sheill*, 1903 AC 6 was clearly approved by the Judicial Committee in *Md Syedol's* case, *ante* [*Ajudhia v. Chandan*, A 1937 A 610 *sup*; relied on in *Kalaram v. Fazal*, A 1941 Pesh 38].

Different considerations apply when dealing with the question of fraudulent infant's liability to decree for sale or foreclosure on a mortgage or secured debt. Where an infant by fraudulent representation as to his age induced the plaintiff to advance money on the security of a mortgage, it was *held* that plaintiff was entitled to a mortgage decree without interest, to be realised only from the mortgaged property. JENKINS J, upon a review of authorities pointed out that in a court of equity, the disability of a party arising from infancy or coverture cannot be successfully used in defence of fraud [*Mohan Bibee v. Saral*, 2 CWN 18 (*Savage v. Foster*, 9 Mod Rep 35 follld)]. On appeal, (MACLEAN CJ, & MACPHERSON & TREVELYAN JJ) the decision was affirmed and it was held that in cases of fraud by an infant, the protection of law is taken away [*Saral v. Mohun Bibee*, 2 CWN 201 : 25 C 371]. *Dhanmull v. Ram Ch*, 24 C 24 C 265 was **distinguished** by MACLEAN CJ, in *Saral Chand v. Mohan Bibee*,

2 CWN 201: 25 C 271 and it was dissented from in *Manmatha v. Exchange Loan Co Ltd*, 1937, 1 Cal 283. But as pointed out by JENKINS J, in *Mohum Bibee v. Saral*, 2 CWN 18, in *Dhanmull's* case there was an admission at the hearing by the plaintiff that if minority was established he could not get a mortgage-decree and the sole question determined was defendant's *personal liability* to a money decree.

When a person between 18 and 21 years of age executes a conveyance, with the knowledge that his minority has been extended by reason of an order under s 7 of the Guardian and Wards Act, in favour of vendees who are not aware of that fact, there is misrepresentation and legal fraud on his part, and he is estopped from taking advantage of his minority to show that the conveyance by him is inoperative [*Surendra v. Krishna*, 15 CWN 239: 13 CLJ 228].

So far, fraudulent representation by an infant with regard to contract, has been dealt with. But there may be fraud or misrepresentation by an infant in transaction other than contracts involving the application of the doctrine of estoppel. Courts of equity would not permit an owner of property who had knowingly allowed another person to enter into a contract for its purchase or for the advance of money upon it, in ignorance of the former's title, afterwards to set up that title to the prejudice of the purchaser; and, because it was founded on fraud, the rule applied equally when the person guilty of it was under the disability of infancy or coverture [*Savage v. Foster*, 9 Mod Rep 35 and other cases (Hals 3rd Ed Vol 14 para 1180]. *Savage v. Foster* was approved in *Mohan Bibi v. Saral*, 2 CWN 18.

When an infant of the age of discretion induces a person to part with money by fraudulent misrepresentation as to his age, the doctrine that really applies is not of estoppel but of equity. As GARTH CJ, expressed himself in *Ganges Mfg Co v. Sauraimull*, 5 C 669. "the fallacy is in supposing that all rules of estoppel are also rules of evidence." It is on equitable grounds that ss 30 and 33 of the Specific Relief Act, 1963 make provision of award of compensation on rescission of a minor's contract so that the parties may as nearly as possible be restored to their original position. The ground on which equity interferes and orders a person of full age to refund property obtained during minority, is fraudulent representation [see *Levene v. Brougham*, 25 TLR 265; *Stocks v. Wilson*, 1913, 2 KB 235 and author's Specific Relief Act 12th Ed pp 261, 274]. But in order that the equitable doctrine may apply, a person must come with clean hands, the maxim being that "he who seeks equity must do equity." A person dealing with a minor with full knowledge of his infancy, cannot claim equity [*Brahmo Dutt v. Dharmodas*, 26 C 381 PC; *Indar v. Narindar*, 33 PR 1904].

A contract by a minor is void and not voidable [*Mohori v. Dhormodas*, 30 IA 114: 7 CWN 441: 30 C 539; *Ma Hnit v. Hashim*, 32 CLJ 214 PC : 55 IC 793]. But this does not affect contracts permissible under the personal law. So, if a Mahomedan minor who is a major under his personal law, but a minor under the Majority Act enters into a contract for dower it is valid. S 11 Contract Act does not militate against this view [*Mozaharul v. Abdul Gani*, 80 IC 915 (C) (*Abidunnessa v. Fathiuddin*, 41 M 1026 **not folld**)]. On the principle that a contract by minor is void and not voidable, it has been held that if a minor on attaining majority executes a mortgage in favour of his creditor for sums advanced during minority and also a fresh advance, the mortgage was enforceable only to the extent of the fresh advance [*Narendra v. Hrishikesh*, 46 IC 765]. Contract by minor being void, it cannot be ratified [*Amar v. Khuda*, 53 IC 123; *Bhana v. Bela*, 38 PR 1919; *Lachmi v. Bhagot*, 99 IC 318 (L)]. A lease executed in favour of a minor is null and void [*Promilla v. Jogeshwar*, 3 Pat LJ 518 : 46 IC 670].

A minor who representing himself to be a major and competent to manage his own affairs, collects rents, would be estopped by his conduct, from recovering again the same rent by filing a suit through his guardian [*Ramranjan v. Shew Nandan*, 29 C 126: 6 CWN 132]. In *Jagar Nath v. Lalta*, 31 A 21: 5 ALJ 674, it was held *per* RICHARDS J, that the ordinary law of estoppel does not apply to infants, BANERJI J, observed:—"I do not deem it necessary to express any opinion on the point, although it seems to me to be difficult to hold that in no case would the doctrine of estoppel be applicable to infants." In a sale for arrears of Government revenue it was found that the arrears by a minor's agent had been intentional with a view to oust the other co-sharers and purchase the property on his behalf—It was held that he had a duty to perform and the purchase was in trust for all the co-sharers [*Deonandan v. Janki*, 21 CWN 73 PC: 44 C 573].

In *Mohori Bibee v. Dharmadas*, 30, C 539 PC it was decided that a minor cannot bind himself by a promise. But whether the converse holds, *ie* whether transfers to minor are void? It has been held that a mortgage executed in favour of a minor who has advanced the whole of the mortgage money, is enforceable by him or any other person on his behalf. The same principle applies to sale [*Raghavachariar v. Srinivasa*, 40 M 308 FB : 31 MLJ 575; *Thakar v. Putli*, 5 L 317]. The same view has been taken in Calcutta [*Harimohan v. Mohini*, 22 CWN 130: 33 IC 994 (39 C 292: 16 CWN 74 PC dist)], it Patna [*Madhab v. Baikunta*, 4 Pat LJ 682: 52 IC 338] and in Allahabad [*Collr of Meerut v. Haridan*, A 1945 A 156]. There is nothing in the T P Act which prevents a minor from purchasing property [*Naraindas v. Dhania*, 38 A 154 (*Muniva v. Perumal*, 37 M 390: 24 MLJ 352 **follD**); *Ulfat v. Gauri*, 33 A 657; *Munni v. Madan*, 38 A 62; see also *Maghan v. Pran*, 30 A 63; *Zafar v. Zubadia*, A 1929 A 604; *Bahaluddin v. Refakat*, 1 IC 451]. So a promissory note executed in favour of a minor is not void when he did not subject himself to any detriment by accepting it and he may sue on it [*Sathrurazu v. Basappai*, 24 MLJ 363 18 IC 968].

Where a minor attested a sale deed executed by his wife of property obtained by gift from her husband, it did not estop the minor from proceeding with his claim to set aside the sale [*Subramanian v. Doraisinga*, 24 CLJ 49: 16 IC 943].

Where a Mahomedan mother enters into an *ekrarnama* on behalf of her minor son who is a *mutwali* and the minor on attaining majority accepts certain benefits under the *ekrarnama*, such *quondam* minor would be estopped from questioning the validity of the *ekrarnama* in his personal capacity, but it does not preclude him from questioning in his capacity of a *mutwali* to sue for recovery of the endowment property wrongfully disposed of under the *ekrarnama* [*Syed Zainuddin v. Md Abdur*, 36 CWN 972]. Transfer by a *de facto* guardian of a Mahomedan minor being altogether void, there can be no valid ratification by the minor on attaining majority and consequently there can be no estoppel against him or his transferees on account of any ratification [*Anto v. Reoti*, 1937 All 195].

Estoppel Against *Pardanashin* Women.—A *pardanashin* woman is not exempt from the effect of estoppel even though it is found as a fact that she did make the declarations and representations relied upon with a full knowledge of their nature and effect [*Sunder v. Udey*, A 1944 A 42]. As to the burden of proof in transaction with *pardanashin* women, see *ante* s 111.

Estoppel Arising out of *Benami* Transactions.—The system of holding property benami is inveterate in India and is one of the recognised institutions of the country [*Buzloor v. Shumsoonissa*, 11 MIA 551: *Gopee Kristo v. Gunga*, 6 MIA 53; *Jeebunnissa v. Umul*, 18 WR 151]. In *Ram Coomar v. Moqueen*, 11 BLR 46 PC: 18 WR 166; the defendant bought a property from a woman who though in fact a

benamdar treated the property as if she was owner and to all appearances was owner. There was nothing to put the purchaser on enquiry. After the purchase he erected costly buildings on the land. The Judicial Committee held that the real owner could not after this assert his title against the purchaser, and observed that "where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice of something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon inquiry that, if prosecuted, would have led to a discovery of it." This case has been followed in *Md Mozuffer v. Kishori*, 22 IA 129: 22 C 909 where it has been held that the equitable principle of estoppel laid down in 11 BLR 46 PC which applies to any person, is equally binding on the purchaser of his right, title and interest, at a sale in execution of a decree. Estoppel alone can prevent the true owner from disputing the acts of his *benamdar* (*Annada v. Prasannamayi*, 34 C 711: 34 IA 138 relied on). A *benamdar* is his trustee for the beneficial owner and the latter is bound by even fraudulent acts of the *benamdar*, unless it is proved that the third party concerned was privy to the fraud, or had direct or constructive notice, or that circumstances existed which ought to have put such third party on an enquiry which, if prosecuted would have led to the discovery of the true title [*Bindu Balshinee v. Kashinath*, 58 C 1371].

The heir of the person who creates a *benami* may be bound as between himself and a purchaser from the *benamdar*, by his ancestor's act, irrespective of any act or omission of his own, and even although he was a minor at the time of the purchase, there being a continuing misrepresentation by the ancestor by which the heir is bound [*Luchman v. Kalli Churn*, 19 WR 292 PC. See also *Chupder v. Hurbuns*, 16 C 137]. Where the plaintiff had taken an active part in carrying out a mortgage transaction on behalf of his mother, signing the deed and receiving consideration money, he was held to the estopped from denying the validity of the mortgage in a suit to recover his share of the property as part of his father's estate [*Sarat v. Gopal*, 19 IA 203: 20 C 296]. A father in a joint family entered into several *benami* transactions for saving property from the hands of a mortgagee execution-purchaser. The sons, the plaintiffs, accepted the transactions and they were held bound [*Sadhan v. Nanda*, 55 IC 222]. Where the son of true owner mortgaged the property to the plaintiff, and the defendant purchased the same property in execution of a decree against the owner; it was held that there could be no estoppel against the defendant who held adversely to the owner. The contest must be between the true owner of the property and a person claiming under the *benamdar* [*Bashi Ch v. Enayet*, 20 C 236]. *A* purchased immovable property in the name of *B* and allowed *B* to occupy and retain possession of the property. *B* mortgaged the property for a valuable consideration—*Held* that *A* and those claiming through him were estopped from asserting, against *C*, his or their title to the property, and that the mortgage was valid [*Kally Dass v. Gobind*, Marsh 569; see also *Rakhaldas v. Bindu Bashini*, Marsn 293: 2 Hay 157; *Ram Mohinee v. Pran Kumaree*, 3 WR 88; *Smith v. Mokhum*, 18 WR 526; *Bhugwands v. Upooch*, 10 WR 85; *Nundun v. Taylor*, 5 WR 36; *Nidhe v. Bisso Nath*, 24 WR 79; *Brojonath v. Koylash*, 9 WR 593; *Banee Pd v. Maunsingh*, 8 WR 67; *Rennie v. Gunga*, 3 WR 10].

The real owner conveyed some property to his wives under fictitious sale deeds, and then brought about a sale of those properties by his wives in favour of a third party, who purchased the same on the representation made by the real owner and on

the latter attesting the sale deeds—*Held* that the real owner was estopped from setting up his title against the purchaser from the wives [*Tulsi Ram v. Mutsaddi*, 2 ALJ 97]. If a person allows his *benamdar* to sue in his own name and not in a representative character, he cannot come in on his death under O 22 r 3 [*Doraiswami v. Chidambaram*, A 1930 M 221 58 MLJ 57 : 122 IC 175]. In a partition deed in respect of the self-acquired property of the karta, a portion was allotted to his wife also, the other sharers who are parties to the deed are barred from contending that the property is ancestral property and the wife of the karta had only a limited estate [*Kundil Vadakkethil v. Alikunnath*, A 1990 (Ker NOC) 131]. In a redemption suit, defendant pleaded that he was the real owner and the transaction was *benami*.—*Held* there was no question of estoppel [*Fateh v. Cheda*, 22 IC 655]. A *benamdar* defendant in a mortgage suit represents the interest of the person beneficially entitled, and an estoppel created against the *benamdar* by the decree in the suit binds the beneficiary [*Kanailal v. Rasik*, 23 IC 762].

Estoppel In Fraudulent Transactions. [Fraud Attempted and Fraud Effected: Law Recognises No Estoppel as Between Parties in *pari delicto*].—Where property has been conveyed *benami* with the object of placing it beyond the reach of creditors, and the fraudulent purpose has been wholly or partially carried into effect, the real owner is estopped from maintaining an action for the recovery of the property. A distinction exists between such a case and a case where the fraud was only attempted, but was not actually carried into effect [*Goburdhun v. Ritu Roy*, 23 C 962; *Banku v. Raj Kumar*, 27 C 132: 4 CWN 289; *Govinda v. Kishen*, 28 C 370; see *Rupai v. Bamdeb*, A 1953 R 199]. The defrauding party cannot be allowed to disclose his fraud for the purpose of resiling from his position. The party fails who first has to allege the fraud in which he participated [*Ali Md v. Shamsunnessa*, 42 CWN 1059: A 1938 C 602 (*Kamayya v. Mamayya*, A 1918 M 365 **approved**)].

N executed a mortgage in favour of *M*. In a suit by *C* against *M*, plaintiff asked for an injunction restraining *M* from realising the mortgage debt from *N*, but it could not be granted as *N* fraudulently represented that he had paid off the mortgage. *M* subsequently sued *N* on the mortgage who pleaded payment, although it was not true.—*Held* dismissing the suit that the fraud was successful as the injunction was avoided, and a party cannot plead his own fraud [*Md Shafi v. Nanha*, 19 ALJ 454: 63 IC 921]. In an agreement between assignee of a decree and judgment-debtor for the purpose of cheating creditors, the doctrine of *pari delicto* applies [*Kalagora v. K*, 76 IC 845 (M)]. It is not upon to a party to plead his own fraud against another, not a party to the fraud [*Ramlal v. Harpal*, A 1927 A 237].

If a mortgagor puts in the mortgage bond a plot of land situated in another district, in order to work a fraud not on the registration law but upon the mortgagee by persuading the mortgagee to accept so small an item to register the mortgage in the district in which the item is found, he is estopped from giving evidence that he did not intend the document to relate to the plot [*Jageshwar v. Mulchand*, A 1939 N 57 FB: see also *ante* s 92].

Where the fraudulent purpose did not go beyond mere intention, it is always open to a party to show that a document simply executed but not carried into effect, is a *benami* and colourable document, and to recover possession of the property against the party claiming under such document [*Sham Lal v. Amarendra*, 23 C 460; *Subbaraya v. Venkatesa*, A 1934 M 252; see *Raghupati v. Nrisingha*, 71 IC 1; *Quadir v. Halkam*, 13 L 713 FB; *Vilayal v. Misran*, 45 A 396; *Nawab v. Daljit*, 58 A 842; *Jadu Nath v. Rup Lal*, 33 C 967: 10 CWN 650 (20 M 326 and 11 B 708 dissented from and all cases reviewed); *Kalipada v. Kalicharan*, A 1949 C 204]. Where *ben-*

ami sale is effected but no creditor is actually defrauded, a suit for specific performance of a contract to sell made by the transferee can be successfully resisted by the transferor [*Munisami v. Subbarayar*, 31 M 97].

Where *R* one of two co-principals in order to defeat the claim of *S* the other principal absolved the agent from accounting to her and the conspiracy was not carried into effect, in a suit by *R* and *S* jointly, *R* was not estopped from placing the true facts and to claim an account from the agent [*Jagdip v. Rajo Kuar*, 2 P 585]. The law is thus stated in Taylor s 93: "It seems now clearly settled that a party is not estopped by his deed from avoiding it by proving that it was executed for a fraudulent, illegal, or immoral purpose." So, where both parties to a deed know that it was executed for an immoral purpose or in contravention of statute or of public policy, neither of them will be estopped from proving those facts which render the deed void *ab initio*. Thus, where, a sham mortgage deed was executed to prevent a possible attachment, in a suit by the mortgagee, the mortgagor is not estopped from showing the real nature of the transaction [*Arunachalam v. Rangaswami*, 59 M 289 : 159 IC 729; see *Man Singh v. Karan*, A 1924 N 200].

Where a transaction is once made out to be mere *benami*, it is evident that the *benamdar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. When property has been transferred *benami* with a view to effect a fraud, but the fraud is not effected, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederates to carry out the fraudulent scheme, and recovering possession of the property [*Pether Permal v. Muniandy*, 35 IA 198: 35 C 551: 12 CWN 562 : 5 ALJ 290; see also *Rajagopala v. Sundara*, 33 MLJ 696]. It lies upon the plaintiff to prove that no part of the intended fraud had been carried out [*Sweyd Ali v. Esnall*, 7 Bur LT 12 : 23 IC 370]. Where in order to defraud creditors a person executes a mortgage *benami* and sets up the mortgagee to prefer claim which is dismissed, he is not estopped from afterwards setting up the fraudulent nature of the transaction and questioning it on the ground of want of consideration [*Vadavalli v. Kodali*, 1915, MWN 173 : 28 IC 702].

Therefore, to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities be effected. Then, and then alone, does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. But, where the fraudulent or illegal purpose has actually been effected by means of a colourable grant, then the maxim: *In pari delicto potior est conditio possidentis*, applies. The court will help neither party and the estate will lie where it falls.

The question whether a party to the fraud effected, though he cannot seek to recover possession, can set up his own fraud as a defence was discussed in several cases. In Calcutta it has been held that a defendant in a suit for recovery of possession is not debarred from pleading that a transaction is *benami* by reason of his having previously successfully set up the *benami* transaction to defraud creditors, and it is competent for him to show the real nature of the transaction in order to defend his possession [*Preonath v. Kazi Md*, 8 CWN 620; *Raghupati v. Nrisingha*, 36 CLJ 491: 71 IC 1 (law of fraudulent conveyances discussed); see also *Shk Vilayet v. Misran*, 45 A 396: 72 IC 92; *Wazir v. Karam*, 107 IC 110 (L); *Nandlal v. Jethu*, 21 PR 1916 : 33 IC 255; *Radhakishen v. Mulchand*, 76 IC 128 (L); *Ramlal v. Dhian*, A 1933 L 222: *Quadir v. Hakam*, 13 L 713 FB; *Ma Mam v. Ma E*, A 1927 R 86]. Similar view has also been taken in Madras observing that the exception is allowed not for the sake of the wrong-doer, but on grounds of public policy, since the court

ought not to assist a plaintiff to recover property or enforce a contract in respect of which he has no true title, or right. The rule of public policy cannot by applied without allowing the defendant to benefit by it. But the benefit is allowed him by accident, as it were and not in order to secure him any right to which he is entitled [*Raghavalu v. Adinarayana*, 32 M 323 : 5 MLT 77—CONTRA: Defendant cannot plead the *benami* character of the transaction and prove the common fraud by way of defence, *Kotayya v. Mahalakshmamma*, 56 M 646 : A 1933 M 457; see *Kama Row v. Nukamma*, 31 M 485 : 18 MLJ 576; *Panchayammal v. Devanaiammal*, A 1925, M 1016]. The different view taken in Bombay in *Sidlingappa v. Hirsa*, 31 B 405 was overruled by a Full Bench holding that there can be no estoppel in the case of joint fraud and so defendant who was a party to the fraud can defend his possession and prove the common fraud to defeat the plaintiff's claim [*Guddappā v. Balaji*, 1941 Bom 575 : A 1941 B 274, where the law has been summarised. The earlier Bombay cases except *Sidlingappa's* case appear to have been to the same effect (see *Luckmidas v. Mulji*, 5 B 295; *Mahadaji v. Vithal*, 7 B 78; *Babaji v. Krishna*, 18 B 372; *Honappa v. Narsappa*, 23 B 406)].

All jurisdictions appear to be agreed (except Madras) that where there is a joint fraud which has been accomplished, the plaintiff is precluded from setting up his fraud to support his claim, but defendant is not precluded from showing the real nature of the transaction and pleading the common fraud in answer to plaintiff's claim [see *Raghupati v. Nrisingha*, 36 CLJ 491 and cases cited *ante*].

Defence of '*pari delicto*'—case where principle of *pari delicto* does not apply [*Surasribalini v. Phanindra*, A 1965 SC 1364].

A person who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself [*US v. Knox*, A 1970 USSC 78]. The social status certificate produced by a candidate was verified by the Principal of the College and *prima facie*, he concluded that the candidate is a Backward class and he was given admission provisionally. After enquiry, it was found to be false certificate. Under such circumstance, the candidate cannot plead that the Principal is estopped from cancelling the provisional admission [*N Bhuvaneshwar Rao v. Principal*, A 1986 AP 196, 202 : (1986) 2 AP LJ (HC) 183]. When a candidate obtains admit card to sit in an examination in collusion with the Principal of the Institution, he cannot put forward the bar of estoppel against the Principal who has chosen to withhold the result of that candidate [*Amarendra Pratap Singh v. Lalit Narain Mithila University*, A 1987 Patna 259, 263 (FB) : 1987 Pat LJR (HC) 591]. Where a student secured admission in Medical College on Reservation quota by falsely declaring that he belonged to scheduled caste his admission could not be cancelled after 3-4 years [*Harphool v. S*, A 1981 Raj 8]. A candidate secured admission on production of the social status certificate as a scheduled tribe which was found to be a false one by the Director of Tribal Welfare. Though years passed before the falsity of the certificate was found out, the candidate cannot rely on the doctrine of equitable estoppel [*B Venkata Rao v. Principal, Andhra Medical College, Visakhapatnam*, A 1989 AP 159, 165].

Estoppel in Transactions Void For Immoral Purposes or Opposed to Public Policy.—If the object of transfer of property is immoral *e.g.*, for future cohabitation and as a reward for past cohabitation, the transfer is void and the transferor retains the title in himself. But the principle of equity enunciated in *Ayerst v. Jenkins*, LR 16 Eq 275 would prevent the court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy [*Sabava v. Yamanappa*, A 1933 B 209].

The transfer of a hereditary religious office being opposed to public policy, the alienor or his representative is not estopped from contesting its validity [*Nallasami v. Sadasiva*, 67 MLJ 759]. Estoppel cannot be relied upon to defeat a prohibition in law on the ground of public policy [*Ramakrishnamma v. Venkatasubbiah*, 58 M 389; *Adinarayana v. Chengiah*, A 1937 M 918]. When a sale deed is void *ab initio*, there is no question of estoppel [*Biranehi v. B*, A 1953 Or 333]. Where a person seduces a widow, he is estopped from asserting that she has lost her right to property on account of unchastity [*Chinta v. Chando*, A 1951 Pu 202]. Prohibition of sub-letting of premises is in furtherance of public policy and where regulations make written consent of landlord necessary mere oral permission does not estop him from pleading that sub-letting is unlawful [*Thakurani v. Shivnath*, A 1969 MP 130; *Waman v. R B & Co*, A 1959 SC 689]. A plea that an agreement is a nullity being opposed to public policy can be raised even by a person who had earlier consented to the agreement. [*Union Carbide Corp. v. Union of India*, A 1992 SC 248, 283].

Plea of Illegal Act.—"No one is allowed in a court of justice, in order to escape from liability to put forward a plea that that which he is doing is illegal" [*per* BOWEN, LJ, in *Overseers of Putney v. L & S W Rly Co*, 1891, 1 QB 440, 443; see also *Doolan v. Midland R Co*, 1877, 2 App Cas 792, 806-71]. "Wherever it can be done rightfully he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully" [*per* JESSEL, M.R., in *In re Hallet's Estate*, 1880, 13 Ch D 696, 727]. These principles were applied in a case where a father deposited a large sum of money in the post office savings bank in the name of his minor son with a view to save income tax and on the death of the son obtained letters of administration and attempted to evade payment of duty by pleading a trust [*In re Tarun Kumar*, 62 C 114]. If grant of any relief is itself illegal or prohibited by law such prohibition cannot be ignored or relief granted on the basis of promissory estoppel [*Visakhapatnam Port Trust v. Bihar Alloy Steels Ltd.*, A 1991 AP 331, 342].

No Estoppel Against Law or Statute.—There can be no estoppel against the law of the land. If a party is allowed to be the victim of an estoppel, by doing a thing which he is under a legal disability to perform or by forbearing to do something which it is his duty to do, the result would be an enlargement of the contractual or other rights allowed by law or their alteration. It is a fundamental principle of law that a man cannot contract out of his rights. The Court enforces the performance of statutory duty and declines to interfere for the assistance of persons who seek its aid to relieve them against the express statutory provision. [*Workman of Hindustan Lever Ltd v. Management of Hindustan Lever Ltd.*, A 1984 SC 516, 529]. There cannot be any estoppel against a statute [*K M Sheth v. Competent Authority and Addl. Collector (Ceiling). Rajkot*, A 1994 Guj 130, 139; *Jagdish Chandra Mitra v. Dist. Municipal Election Officer*, 1996 AIHC 101, 104; *Ramesh Narang v. Rama Narang*, 1995 Cri LJ 1685, 1693 (Bom); *Vishnu Kumar Khatar v. State (FB)*, A 1995 Pat 168, 171; *Ekta Arvind Kumar Shah v. H S Shah*, A 1993 Guj 90, 94. See also *Olga Telis v. Bombay Municipal Corpn.*, A 1986 SC 180 (Paras 2 & 9)]. No estoppel can be invoked against the State for the action which is contrary to law. [*Harbanslal Mahendra Kumar v. State*, 1996 AIHC 3278, 3282 (Raj)]. A contract in violation of mandatory provisions of law can only be read and enforced in terms of the lawand in no other way. The question of equitable estoppel does not arise [*Union Territory Chandigarh Admn. v. Managing Society, Goswami GDSDC*, A 1996 SC 1759, 1760].

An agreement that rent laws would not apply to the tenancy created by the parties would not constitute any estoppel. The tenant would remain entitled to the protection of the tenancy laws [*Keen v. Holland*, (1984) 1 All ER 75 CA].

It is the settled principle of law that there can be no estoppel against an Act of the Legislature; [see *Madras Hindu Mutual &c Fund v. Ragava*, 19 M 200 (*Barrow's* case, 1880, 14 Ch D 432 and *Fairtitle v. Gilbert*, 1787, 2 TR 169 **relied** on); *Hindusthan Motors v. Union*, A 1954 C 151; *Sunderland v. Priestman*, 1927, 2 Ch 107; *Maritime E Co v. General Dairies*, 1937 AC 610, 621 : A 1937 PC 114; *Puran Singh v. Kehar Singh*, 1939 Malayan LJ 71 (CA Federated Malay States). There is no estoppel against statute or interpretation of document [*Hukum Chand v. Om Chand*, 1998 AIHC 1509 (P&H)]. Where the tenant accepted the co-owner as landlord he is estopped from raising the contention that other co-owners had not joined proceedings and so claim for *bona fide* requirement is not maintainable [*Yashwant Prabhakar Kamble v. Prasad Narhari Karanjikar*, 1998 AIHC 1388, 1391 (Bom)]. A sub-tenant or unauthorised occupant cannot take the aid or principle of estoppel to defeat the claim of the landlord as there can be no estoppel against the Statute [*Savitri Devi v. IInd District and Sessions Judge*, 1998 AIHC 1371, 1379 (All)]. *Gadigeppa v. Balangowda*, 33 Bom LR 1313, 1317; *Jagabandhu v. Radha Krishna*, 36 C 920; the observations of MACLEAN, CJ, in *Jogini Mohan v. Bhoot Nath*, 31 C 146, 149]. There could be no estoppel against a statute. If according to law Tie Bar Nuts falls within tariff Item 52 under the Central Excises and Salt Act (1 of 1944) Sch I the fact that the department earlier approved their classification under tariff Item 69 will not estop it from revising that classification to one under tariff Item 52 [*Plasmac Machine Manufacturing Co (Pvt) Ltd v. Collector of Central Excise Bombay*, A 1991 SC 999, 1001]. Question of estoppel against the Govt in the exercise of legislative power does not arise [*Gone Rajasimha v. S*, A 1973 AP 236; *Madras Race Club v. S*, A 1976 M 238]. Principles of promissory estoppel do not apply to legislative act of the state. [*Vited Pictures v. State of Rajasthan*, A 1982 NOC 187 (Raj)].

There can be no promissory estoppel against exercise of legislative power by the legislature or by its delegate for example issue of a notification by the Central Government in exercise of its power under s 25(1) of the Customs Act [*Indian Rayon Corporation v. Collector of Customs*, A 1988 Cal 228, 237 : (1987) 27 ELT 626]. Surrender by Govt of its legislative powers to be used for public good cannot operate as equitable estoppel against Govt [*Gwalior Rayon v. S*, A 1973 K 36 FB (*C Sankaranarayana v. S*, A 1971 SC 1997; *Achuthan v. S*, A 1972 K 39; *Ramanatha v. S*, 1970 KLT 1008; *Ernakulam Mills v. S*, 1971 KLT 318 **rel** on]. An excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. The court declines to interfere for the assistance of persons to relieve them against express statutory provisions [*K Ramdas v. Udipi Mun*, A 1974 SC 2177]. If a decision of a tribunal suffers from inherent lack of jurisdiction upon interpretation of a constitutional provision it cannot be sustained by invoking doctrine of either *res judicata* or *estoppel* [*Chief Justice v. L V A Dikshitulu*, A 1979 SC 193]. When the question for consideration is when there is an agreement binding on both parties, one party can challenge the Regulations on the ground that the same are void as being violative of Art 14 or 19 of the Constitution, it is held that there can be no estoppel against a statute much less against constitutional provisions [*Air India v. Nergesh Meza*, A 1981 SC 1829, 1849].

A trade licence to hawkers under ss 218, 219 of the Calcutta Municipal Act does not confer any right on them to encroach on public streets and footpaths. Neither the police authorities nor the corporation and not even the Government have any right to declare any part of a public street or public foothpath to be a hawker's corner. There can be no estoppel against any statutory provision [*Biswanath v. Sudhir & Ors*, A 1961 C 389]. Even if a party is tied down or bound by the admission he made in his reply to the rent application to the effect that he was not a tenant under the opposite

party, still he cannot be deprived of the protection of the East Punjab Urban Restriction Act or disentitled to plead that the provisions of the Act protect his possession [*Hansrai Bansal v. Harder Singh*, A 1984 P&H 229, 232]. R. 7 framed by the Bar Council of India is a statutory provision. It prohibits a Judicial Officer to practice in the area to which his jurisdiction extended at the time of retirement. This rule was published long before a particular person got himself enrolled as an Advocate. So the plea of estoppel is not available to him since it is a statutory provision [*Indra Bahadur Singh v. Bar Council of U.P.*, A 1986 All 56, 66 (DB)]. The party invoking the doctrine of estoppel need not prove any detriment as such. It may be sufficient if he has relied upon the assurance made to him. When the authorities cannot give assurance contrary to the statutory rules when they cannot promise to allot any particular site a person while the sites are required to be disposed of by auction, even if they make such a promise or assurance, the doctrine of promissory estoppel cannot be invoked to compel them to carry out the promise or assurance which is contrary to law. [*Paradise Printers v. Union Territory of Chandigarh*, A 1988 SC 354, 359 : (1988) 1 SCC 440].

The agreements and undertakings which are contrary to the provisions of the Essential Commodities Act and as such unenforceable cannot raise a plea of estoppel [*The District Collector, Chittoor v. The Chittoor District Groundnut Traders Association*, A 1988 A P 317, 329 (DB) : (1987) 2 APLJ (HC) 67]. When the term of the office of the nominated member of the local authority is fixed under the Karnataka Town and Country Planning Act, 1961, that period cannot be reduced by a resolution of the Municipal Council and so that resolution can be challenged by the person who was nominated since there is no estoppel against law [*C N Ramaswamy v. Town Municipal Council, Chickmagalur*, A 1988 Kant 168, 169 : (1987) 1 Kant LJ 356].

Defendant after executing a *kabuliat* in favour of plaintiff an unregistered proprietor, attorned to another proprietor whose name was registered. In a suit for rent defendant pleaded payment to the registered proprietor; but plaintiff's contention that defendant was estopped under s 116 Evidence Act to question his title was negatived as estoppel cannot override the provisions of s 78 Land Regn Act or s 60 B T Act [*Abdul Aziz v. Kanthu*, 38 C 512, 515; see *Bangshi v. Kamala*, 26 CLJ 90], or s 29 B T Act [*Jnanendra v. Nalini*, 87 IC 565 (C). See also *Krishnan v. Vellaichami*, 10 MLT 385; *Sridhar v. Babaji*, 38 B 709; *Chidambara v. Vaidilinga*, 38 M 519; *Bolla Pragada v. Thimmanna*, 31 MLJ 231 : 35 IC 575; *Sudhir v. Abdulla*, 22 CWN 894; *Alagappa v. A*, 44 M 187; *Javerbhai v. Gordhan*, 39 B 358 (a case of rent note in contravention of Bhagdari Act); *Ahmed v. Babu*, A 1930 B 135 : 53 B 676; *Mirza v. Jhanda*, A 1930 L 1034 : 12 L 367; *Barisal Co-op Bank v. Binay*, 38 CWN 459; *Uchit v. Raghunandan*, A 1934 P 666 FB (failure to object in a mortgage suit that a transfer was prohibited by s 27 Sonthal Perganas Settlement Regulations, 1872); *Bai Suraj v. Haribhai*, A 1943 B 54]. The plea that land is inalienable under a local law is available in execution even though it was not raised in suit [*Dalchand v. Parshadi*, A 1947 A 400; *Katwari v. Sitaram*, 43 A 547; *Satadhar v. Ram*, 46 A 153]; so also when property is non-saleable under the law [*Sham Sundar v. Dhirendra*, A 1950 P 465]. Estoppel against a party cannot confer jurisdiction on a court when it had none [*Mahabir v. Narain*, A 1931 A 490 FB]. Although the plaintiff has filed a suit in the wrong court, if the judgment goes against him he is not estopped from contending in revision that the court was acting without jurisdiction [*Gopi Krishna v. Anil*, A 1965 C 59]. The plea of equitable estoppel cannot also be taken against the provisions of a statute [*Jai Sri v. Parbhu*, 152 IC 508].

No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be

dispensed by the consent of the parties, or by a failure to plead or argue the point at the outset [*Surajmull v. Triton Ins Co*, 52 IA 126 : 52 C 408 : 29 CWN 893 : A 1925 PC 83]. It is equally settled law that the promissory estoppel cannot be used compelling the Government or a public authority to carry out a representation or a promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public authority to make [*Vasant Kumar Radhakrishnanvora v. Trustee of the Port of Bombay*, A 1991 SC 14, 23]. No one can be precluded from pleading that an order is illegal or invalid as there can be no estoppel against law [*Dinbai v. Dominion*, A 1951 B 72]. Where a statute requires a particular formality, no estoppel will cure the defect [*Hunt v. Wimbledon L Board*, 4 CPD 48]. A party's opinion as to the legal effect of certain facts does not create any estoppel [*Shanti Pd v. Kalinga Tubes Ld*, A 1962 Or 202]. There can be no estoppel against the Government on a point of law and construction of statute. Interpretation of an Act by a Government Officer and the issue of a letter on the basis of such wrong interpretation does not estop the Government from claiming enforcement of the provisions of a statute [*Avari v. S*, 62 CWN 278]. When the Revenue Authorities accepted non-agricultural assessment in respect of a land, they are estopped from saying that the land in question should be treated as agricultural land [*Nilesh Kumar Hargovindbhai v. A.K. Pradhan*, A 1985 Guj (NOC) 210]. When the Commissioner of the Municipal Corporation has sanctioned the plans and in some cases occupancy certificates have also been issued, unless the corporation specifically points out the illegality to the builders or the promoters, as the case may be, within a reasonable time and invite them to set right those illegalities or violations committed by them, it is not open to the corporation to bestir itself now and say that the buildings are violate of the Zonal regulations and Building Bye-laws on the principle of equitable estoppel [*Happy Home Builders (Kant) Pvt Ltd v. Corporation of the City of Bangalore*, A 1990 Kant 56, 78].

In respect of auction held by the Municipal Corporation for collection of the daily fees from persons who are selling flowers inside the market, the auction notice reserved the power with the corporation to cancel any auction. As such the principle of promissory estoppel cannot be applied against the corporation [*P. Raman v. Commr, Madurai City Municipal Corpn.*, A 1982 Mad 56, 57]. The Minister of State for Health asked the villagers of a village to raise money so that a primary health centre can be established. The State Government which is the final authority is not bound by such as assurance [*Vitthalrao Mahale v. State of Madh Pra*, A 1984 MP 70, 74]. The Road Transport Corporation granted permits and routes to educated unemployed and they were running the trucks and buses for period ranging from 2½ years to 6 years. In such circumstances the Corporation is not estopped from calling for fresh tenders from educated unemployed who possess vehicles of later models [*Krishan Gopal Dixit v. M.P. State Road Transport Corp.*, A 1986 MP 103, 105 : 1985 MPLJ 434]. The State is not bound by the doctrine of promissory estoppel for the acts of its subordinates done in violation of its directions or administrative instructions [*Chetlal Sao v. State of Orissa*, A 1986 Pat 267, 276 : 1986 Pat LJR 149 (FB)]. An earlier letter by Additional Secretary to Government of India Ministry of Finance which is in consonance with the subsequent direction regarding import of certain goods would not in any way affect the position or create any estoppel [*Star Diamond Co India v. Union of India*, A 1987 SC 179, 180 : (1986) 4 SCC 246]. The action of the departmental authorities calling for the option of a service personnel for absorption in a particular category, which step is contrary to the statutory rules would not operate as an estoppel nor would confer any right to claim absorption [*Union of India v. Shri R C D'Souza*, A 1987 SC 1172, 1174 : (1987) Cur LR 226].

Any expression or opinion by the Town and Country Planning Authorities prior to the coming into force of a Housing Scheme will not estop the Government from

revoking the scheme. [*The Hind Housing Co-operative Society Ltd. v. State of Madhya Pradesh*, A 1987 MP 193, 202 (DB)]. Statutory rules bind the Government as much as they bind others and the requirement of such rules cannot be waived by the Govt. [*Nookata v. Kotaiah*, A 1970 SC 1354]. Rule of estoppel cannot be invoked against power of Govt under art 309 of Constn to make rules regulating the conditions of service of Govt employees or of teachers under s 12 Kerala Education Act [*C.Sankaranarayanan v. S*, A 1971 SC 1997]. Certain persons were patta-holders and were in possession of the land for over 50 years paying land revenue and local taxes. The principles of promissory estoppel stand in the way of the Revenue authorities from taking summary proceedings to evict them [*Shew Chand Chouhan v. Revenue Officer*, A 1984 NOC 308 : (1984) 1 Gau LR 474]. If there was no representation or conduct amounting to representation on the part of the Government intended to induce a person to believe that he was permitted to occupy the flat in question on payment of normal rent or that he was induced to change his position on the faith of it, there is no question of any estoppel [*Union of India v. R.R. Hingorani*, A 1987 SC 808, 812 : 1987 JT 290].

When in an earlier proceeding before the Supreme Court challenging the abolition of the posts of village officers, the Government gave an undertaking that those officers who possess the requisite qualification will be considered for appointment as village assistant and at the time no age, qualification was prescribed, the Government should not be allowed to get round the undertaking by purporting to prescribe a maximum age limit which would have the effect of eliminating the majority of the erstwhile village officers [*R K Rama Rao v. State of Andhra Pradesh*, A 1987 SC 1467, 1469]. The doctrine of promissory estoppel is applicable against the Government, Public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel [*Navin Chandra & Co, Bombay v. Union of India*, A 1987 SC 1794, 1801 : (1987) 3 SCC 66]. Though a plea of promissory estoppel can be raised in a writ proceeding, it would be better and more appropriate that such a plea is raised before the authority—the Estate Officer under the Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971)—which is competent to determine questions of fact and law [*Baij Natha v. Bank of Maharashtra*, A 1987 Del 231, 235]. An incompetent reference by a Land Acquisition Officer does not estop him from contending as such [*Spl Dy Collr v. Kodandaramacharlu*, A 1965 AP 25]. When the statutory authority for whose benefit acquisition was made accepted the award, that authority cannot assail the correctness of the enhancement made by the Court of Reference [*Krishi Upaj Mandi Samiti v. Ashok Singhal*, A 1991 SC 1320, 1321].

Where a term in a deed is in contravention of a statute and it is separable from the rest estoppel may arise from the part of the deed which is good [*Krishna v. Secy of S*, 63 CLJ 52]. The doctrine of promissory estoppel cannot be used to compel the public bodies or the Government to carry out the representation of promise which is contrary to law or which is outside their authority or power. It is necessary to look into the whole of the representation made. Halsbury's Laws of England 4th Edition Vol 16 p 1071 para 1595. To found an estoppel a representation must be clear and unambiguous not necessarily susceptible of only one interpretation but such as will reasonably understood by the person to whom it is made in the sense contended for and for this purpose the whole of the representation must be looked at [*Delhi Cloth and General Mills Ltd v. Union of India*, A 1987 SC 2414, 2420, 2421]. There can be no estoppel against the precise terms of the provision of a Code, *e.g.*, Or 21, r 2 which requires certification [*Shamlal v. Hazari*, 15 CLJ 451; *Trimbak v. Hari Laxman*, 34 B 575; *Mattomal v. Teoomal*, 79 IC 89 (S), see *Jogendra v. Provath*, 19 CLJ 126; *Humayun*

Properties v. Ferrazzinis, A 1963 C 473]; or s 36 Stamp Act [*Venkatesware v. Ramanatha*, A 1929 M 622]. Or 23, r 4 does not in any way affect the rule of estoppel [*Sriranga v. Naganim*, 13 IC 81]. If a judgment-debtor served under Or 21, r 66 does not raise any objection he is estopped from challenging the sale under Or 21, r 90 [*Mohan Lal v. Kali*, 49 A 788—CONTRA: *Madan v. Ripu*, A 1930 N 191, as there is no estoppel against a statute]. The effect of s 54 of the T P Act cannot be evaded by holding that the plaintiff is estopped from pleading it [*Jagabundoo v. Radha Krishna*, 36 C 920]. If the Secretary of State exceeds his authority, the holder of the office for the time being is entitled to urge the *ultra vires* character of the transaction. The doctrine of estoppel would not apply where the act involves the waiver or renunciation of a right to perform a public duty [*Srinivas v. Kesho Pd*, 15 CWN 475 : 13 CLJ 365].

Even if the Govt gives an undertaking not to resume an estate, it would not be binding where the statute confers no authority to exempt [*Amar v. S*, A 1955 SC 504: 1955, 2 SCR 303]. In a suit against State for enforcement of an agreement, the agreement of parties on conclusion of argument that ss 65 and 70 Contract Act will apply and the furnishing of evidence accordingly does not estop the State from objecting to the grant of relief under s 65 by raising the legal defences that the plaint had not been amended and that in notice under s 80 there is no mention of that relief [*S v. Associated Stone &c*, A 1971 Raj 128].

There can be no estoppel against a statute nor can the parties contract out of it [*Jnanendra v. Nalini*, 87 IC 565 : A 1925 C 1262; *Hakim v. Mushtaq*, A 1933 O 542 FB]. An agriculturist agreeing to have his house sold is not estopped from pleading s 60(*c*) C P Code [*Ramnaresh v. Ganesh*, A 1952 A 680]. Where a pronote is invalid under s 25 Paper Currency Act, even the endorser of the note is not estopped from questioning its validity [*Low & Co v. Sudhanya*, 58 C 1453]. Parties cannot waive or contract themselves out of the law of limitation [*Sitarama v. Cotta*, 25 MLJ 264 : 21 IC 24]. Acknowledgment of debt made beyond limitation cannot act as estoppel [*Tukaram v. Madhorao*, A 1948 N 293]. Estoppel cannot have the effect of validating a void contract [*Dwarka v. Nazir*, 78 IC 850 (O)]; or a void mortgage [*Gaura v. Md Yasin*, A 1935 O 121]. A party going to arbitration under a contract which was void under an Act cannot plead that his opponent having taken part in it could not repudiate it [*Albion Jute &c v. Jute &c Co*, A 1953 C 458 SB; **folld** in *Hiralal v. Dalhousie Jute*, A 1978 C 119]. The chance that future worshippers will give offerings to a temple is a mere possibility under s 6 cl (*a*) T P Act and such a transfer being prohibited, the transferor is not estopped from questioning its validity [*Puncha v. Bindeshri*, 19 CWN 580]. A statutory defence not set up in a prior suit can be set up in subsequent suit [*Nafar v. Bhusi*, 65 IC 581].

The rule that there can be no estoppel whether a statutory requirement is violated would apply if both parties were aware that the property mortgaged is not within the jurisdiction of the sub-registrar to whom the document was presented [*Veerappa v. Vellian*, 24 MLJ 664 : 20 IC 385]. A statement by a subsequent mortgagee that he would not enforce his mortgage cannot estop him from enforcing his legal rights, as a mortgage can only be extinguished by a registered deed [*All Indian Rly B Fund Ltd v. Ramchand*, A 1939 N 179].

A mortgage of impartible property is invalid under Madras Act 1 of 1914. There can be no estoppel against a statute [*Ram Ch v. Venkata*, 37 MLJ 65]. So in the case of a mortgage decree wiped out under s 8(2) C P & Berar Debt Conciliation Act [*Lungya v. Bansilal*, A 1948 N 312]. Whether a suit is bad for partial partition or not is a question of law and accordingly there can be no estoppel [*Amarnath v. Ganesha*, A 1971 Raj 241]. In plaintiff's suit to eject an under-raiyat, the latter pleaded an

estoppel created by a lease granted in contravention of s 85(2) of B T Act—*Held*, there is no estoppel against statute [*Alimuddi v. Chintaharan*, 23 CWN 437; *Rajkumar v. Punchcouri*, 60 IC 507]. In a case the question was considered from a different standpoint. Plaintiff a *raiyat* representing himself a tenure-holder induced the defendant on his land as a *raiyat* and then sued to eject the defendant as an under-*raiyat* on the ground that the lease was void under s 46 of the Chotanagpur Tenancy Act, as a *raiyat* could not grant a permanent right. It was *held* that it being found that the plaintiff had represented himself as a tenure-holder, he was prevented by the doctrine of estoppel from proving that he was a *raiyat* and as he was prevented from proving the fact which is indispensable before the matter of statute can be considered, the question of estoppel against a statute did not arise [*Dhanu v. Sona*, 15 P 589 SB]. The rule that there can be no estoppel against statute does not imply that there can be no estoppel against plea of fact necessary to be established before the statute can be invoked. Thus a man may not estop himself from pleading that an alienation by him contravenes the Punjab Alienation of Land Act, but he may estop himself from pleading that he is a member of a tribe to which protection is afforded by the Act [*Nand v. Rahmat*, A 1946 L 73 : 47 PLR 385].

A permanent tenancy cannot be created by estoppel without a registered document [*Darbari v. Raneeganj Coal Assen.*, A 1944 P 30]. An agreement to lease intended to operate as a present demise is a lease and requires registration. It is inadmissible and there can be no specific performance even though the tenant is delivered possession. There can be no estoppel against statutory prohibition [*Sanjib v. Santosh*, 26 CWN 329 : 49 C 507]. Ignorance of legal rights cannot create estoppel [*Cooper v. Phibbs*, 1867, 2 HL 149; *Appavoo v. S I R*, A 1929 M 177]. Thus if a person in ignorance of his legal rights pays rent to another though the law required a lease, he is not estopped [*Ram Jiwan v. Hanuman*, A 1940 O 409]. An agreement between parties to sell the land cannot act as an estoppel so as to do away with the necessity for a registered deed of transfer where the statute expressly requires it [*Mg Poyin v. Mg Tet*, 2 R 459 : 86 IC 205 (*Dharam v. Marji*, 16 CLJ 436; *Mathura v. Ramkumar*, 20 CWN 370 **folld**)]. A deed was not properly registered not being presented by an authorised agent. It was pleaded that the executants having represented in a power that the person presenting had such authority, they were estopped from disputing the validity of the registration—*Held*, that there could be no estoppel against statute [*Dottie v. Lachmi*, 58 IA 58 : 10 P 481 : 35 CWN 354 : A 1931 PC 52]. When the Legislature has declared an occupancy holding to be non-transferable, a tenant effecting a transfer is not estopped from pleading non-transferability [*Pratap v. Suresh*, 87 IC 1030; *Gopal v. Nand*, A 1930 O 300].

The principle that a party cannot set up an estoppel in the face of a statute is not confined to transactions that had been made the subject of legislation and statutes do not necessarily preclude estoppels. A test to apply, where the laws of money-lending or monetary security are involved, is to ask, whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of it [*per* VISCOUNT RADCLIFFE in *Kok Hoong v. Leon Cheong*, 1964 AC 993 PC at 1015, 1016].

There can be no estoppel in matters relating to the interpretation of a document which is a question of law. Mere pleading that an document is a rent-note does not estop the party from controverting it later [*Sudesh v. Mool*, A 1969 Raj 22].

In the case of a statute enacted for the benefit of a section of the public, where the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the party suing seeks to do, it is not open to the opposite party to set up an estoppel to prevent it [*Maritime Electric Co*

Ltd v. General Dairies Ltd, A 1937 PC 114 *ante*]. So, where the Corporation informed the purchaser of a house that a certain amount was due on account of consolidated rates and it was afterwards found that more arrears were due on account of previous years—*Held* that no estoppel could be pleaded against statutory provision [*Corpn of Calcutta v. Sashi*, 50 CWN 263 : A 1947 C 273; **affirmed** in *Sati Bhusan v. Corpn*, A 1949 C 20]. The rule has no application where the statute provides for exemption from certain conditions and there is non-compliance with those conditions [*Delhi University v. Ashok*, A 1968 D 131]. No assurance by the State that a tax would not be collected would bind the Government whenever it chose to collect it [*Mathra Pd v. S*, A 1962 SC 745]. When an adoption is not legally valid, there can be no estoppel by conduct [*Baburam v. Kishen Dei*, A 1963 A 509].

Failure to comply with the provisions of art 299 Constn. which are mandatory in character nullifies the contract and renders it void and unenforceable. There is no question of estoppel or ratification [*Bihar Eastern &c v. Sipahi*, A 1977 SC 2149]. If rules framed by the Govt are against the statutory powers conferred upon the rule-making body, they cannot bind the Govt as there can never be estoppel against statute [*Phulwasi v. Union*, A 1977 P 33]. Where two States enter into an agreement to impose an *ultra vires* condition in permits granted to public carriers, the receipients of the permits will not be estopped in challenging the validity of the imposition [*Ambala Goods &c v. R T A*, A 1977 HP 46].

An *ultra vires* statute cannot be validated by acquiescence, but an acquiescing party may be estopped [*Madhoo v. Secy of S*, 1938 NLJ 439].

This doctrine has no application where rent of certain premises is fixed through consent of parties who thereby dissuaded the court from discharging its statutory obligations which it would only carry out through relevant evidence being adduced and that was not done [*Autar v. Sohan*, A 1970 J&K 26 FB].

It has been held, however, that where a compromise decree passed by a court of competent jurisdiction contains a term which is opposed to law or public policy and the decree has not been set aside in proper proceedings, it can be pleaded as constituting estoppel and *res judicata* in a subsequent proceeding between the same parties [see *Bhima v. Abdul Rahid*, A 1968 Mys 184 and the cases on both sides discussed there].

The company in question was a lessee of the Central Government land for commercial, industrial or other non-agricultural purposes. It was included in the definition of owner under an amendment of the statute. The company was thus made liable to pay the non-agricultural assessment. It was not permitted to rely on the State Government's letter purporting to exempt it from the assessment. *Electronics Corpn. of India Ltd. v. Secy., Revenue Deptt.*, AIR 1990 SC 1734 : (1999) 97 Comp Cas 470.

An allotment of plots on preferential basis to a person against the intent and purposes of the applicable statute was held to create no estoppel against the allotting authority. The allotment was liable to be cancelled. *Jalandhar Improvement Trust v. Sampuran Singh*, AIR 1999 SC 1347. For another case on the point that there can be no estoppel against a statute see *MI Builders P. Ltd. v. Radhey Shyam Sahu*, AIR 1999 SC 2468, use of a public park allowed by the Municipality for purposes not allowed by the statute, no estoppel against demolition.

No Estoppel Against Person Under Disability.—When a particular act is declared to be void and unlawful (*eg* a contract by a minor) by statute, a party cannot by representation, any more than by other means raise against him an estoppel [*Khan Gul v. Lakha*, A 1928 L 609 FB : 111 IC 175; see *ante*: "*Estoppel against Infants*"]. On the same principle, if a person under disability grants a lease in contravention of a statute [Murshidabad Act 15 of 1891] enacted for his benefit, it is null and void and he cannot be bound by any estoppel [*Nawab of Murshidabad v. Bilas Ray*, 56 C 252 : A 1929 C 433]. "The reason why there can be no such estoppel is, if you were to

hold that the corporation were estopped by the fact of their having granted his lease you would be giving the go-by to the statute which says that they shall not grant the lease when the person to whom it is granted acts upon it. If you say that is estoppel, that estoppel is got rid of by the statute" [*per* CHANNELL J, in *Corpn of Canterbury v. Cooper*, 1908, 99 LT 612]. Where the buyer of immovable property is under disability to buy, there can hardly be any question of his being induced to buy by misrepresentation that he was under no such disability. The vendor, therefore, is not estopped from suing to recover possession of the property on the ground of vendor's incapacity to contract [*Pinnya and Ors v. Mg Law*, A 1929 R 354 FB]. No estoppel can be pleaded against a statute so as to prejudice a minor or a lunatic who enjoys the protection of law [*Johri v. Mahila Draupati*, A 1991 MP 340, 345].

Title to Immovable Property by Estoppel. [Ss 41 and 43 T P Act].—The illustration attached to s 43 is an example of title by estoppel. The case of *Radhey v. Mahesh*, 7 A 864, is almost similar to this illustration. In that case an owner of property made a grant therefrom of an annuity to his sister and her heirs, with a proviso, that in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He subsequently mortgaged the property represen-ting that it was unencumbered. After this he paid the annuity till the death of his sister, whose heir he was. The mortgagees obtained a decree upon their mortgage and in execution the property was sold and the decree-holders obtained possession. The heirs of the mortgagors sued the decree-holders for recovery of possession and for arrears of the annuity under the terms of the grant—*Held* that as the grantor had professed to transfer the property to the mortgagees unencumbered, it would not lie in his mouth or in the mouth of his heirs to set up the charge against the mortgagees and their vendors. See also *Pranjivan v. Baju*, 4 B 24 and *Deoli Chand v. Nirban Singh*, 5 C 253, where it has been held that a mortgagor executing a mortgage at a time when he has no title to the property must make good the contract out of any interest he subsequently acquires.

The rule of title by estoppel is to be found in s 43, T P Act and s 13(*1*)(*a*) Specific Relief Act. See also s 19(*b*) S R Act and s 41, T P Act. The principle is that if a man conveys a property without any title to it, and afterwards acquires the title he is bound to convey it to the transferee. The rule of law underlying s 43 *ibid* is that, as between the transferor and transferee, the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer. It is an extension of the rule of estoppel [*Mokhoda v. Umesh*, 7 CLJ 381]. See *Tilakdhari v. Khedan*, 47 IA 239 : 22 Bom LR 1319 : 48 C 1 : A 1921 PC 112; *Ramkrishna v. Anusuyabai*, 86 IC 265 (B); *Jan Md v. Karam*, A 1947 PC 99 : 1947 Lah 399.

Estoppel does not create title in property except as provided in s 43 T P Act [*Banwarilal v. Sukhdarshan*, A 1973 SC 814]. S 43 T P Act lays down a rule of estoppel which is not the estoppel which is a rule of evidence preventing a party from alleging and proving the truth of facts. It is a kind of estoppel which effects legal relations [*Ramaswamy v. Lakshmi & Co*, A 1962 K 313]. S 43 practically reproduces the rule of "feeding the estoppel" [*Gur Narain v. Sheolal*, 46 A 1 : A 1918 PC 140 : 36 MLJ 68 : 46 C 566, 576 : 23 CWN 521]. The principle of "feeding the grant of estoppel" was thus stated by SWINFEN EADY J, in *Patridge v. Ward*, 1910, 2 Ch D 342: "If an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual even though the defect in title is apparent on the face of assignment." See also *Cuthbertson v. Irvin*, 28 LJ Ex 306; *Universal &c v. Cooke*, 1951, 2 All ER 893 and Hals 3rd Vol 15 paras 418-19]. See *Mohan v. Sewaram*, 75 IC 579 (O). But this estoppel cannot make a transfer forbidden by law good [*Bindeshwari v. Har Narain*, A 1929 O 185; *Tilakdhari v. Khedan, sup*]. The principle of "feeding the estoppel" applies to cases before the passing of Evidence Act [*Krishna v. Rasik*, 21 CWN 218]. It has been observed in a case that it is doubtful whether apart from s 43, T P Act any general equitable doctrine of "feeding the estoppel" taken from the English

law could be applied [*Kabul v. Badri*, 1938 All 63]. S 43 has no application to a charge for earnest money paid on the property agreed to be sold by vendor when he subsequently acquires title to it [*Panchanan v. Nirod*, A 1962 C 12].

The difference between s 43, T P Act and s 115 seems to be that under s 43 mere erroneous representation will apparently suffice and it need not be intentionally false (see *illus* to s 115). Again under s 43 there is nothing said about the belief of the transferee in the truth of the erroneous representation, whereas the *illus* to s 115 implies that transferee must have believed the intentional and false representation and acted on it [*Hattikudur v. Kudar*, 28 MLJ 44 : 27 IC 785]. There must be erroneous representation by the transferor as to the title with or without fraud [*Sarat v. Gopal*, 19 IA 203 : 20 C 296; *Chakrapani v. Gayamani*, A 1918 P 278; *Nurul v. Sheosahai*, 19 IA 221 : 20 C 1; *Rashmoni v. Soorjkant*, 32 C 832; *Pandiri v. Karoomury*, 34 M 159; *Mokhoda v. Umesh*, 7 CLJ 381; *Prasanna v. Srikanta*, 40 C 173 : 17 CWN 137; *Radhey v. Mahesh*, 7 A 864]. It is not legitimate to import the consideration gover-ning personal estoppel under s 115 into s 43 T P Act. To get the benefit of s 43 it is not required that the transferee must have acted in ignorance of true facts and must have believed in the truth of the representation by the transferor [*Veeraswami v. Subbarao*, A 1957 M 288]. The principle underlying s 43 is an extension of the well-known rule of estoppel and it does not apply unless there is a representation by the transferor which is believed by the transferee and the transferee relying on the truth of that representation changed his position to his detriment [*Ladu Narain v. Gobardhan*, 4 P 478 : A 1925 P 104].

Where the transferor transfers an expectancy or property which he has no right to transfer without making any representation that he had such authority, s 43 will not help. Similarly if both the parties knew the truth the section cannot be invoked [*Jumma Masjid v. Kodimani*, A 1953 M 637 FB]. If both the transferor and the transferee knew the true position and colluded to enter into transaction in violation of law, s 43 cannot be availed of [*Parmanand v. Champa*, A 1956 A 225 FB]. A sale without the requisite sanction of the Collector under Sch 3 Para 11 C P Code which is known to both parties, cannot raise any question of estoppel under s 43 T P Act or s 115 Evidence Act [*Deoman v. Atmaram*, A 1948 N 122 : 1947 NLJ 500].

The principle of estoppel in s 41, T P Act is the same as in s 115 Evidence Act. If the owner of a property clothes a third person with an apparent ownership and right of disposition thereof, he is estopped from asserting his title against a person to whom such third party has disposed of the property and took it in good faith and for value (*Li Tse Shi v. Pang Tsoi*, A 1935 PC 208]. As to the principle on which s 41 T P Act is based, see *Ram Coomar v. Mc Queen*, 18 WR 166 PC; *Md Mozuffer v. Kishori*, 22 IA 129 : 22 C 909; *Gholam v. Jogendra*, 43 CLJ 452; *Macneil & Co v. Saroda*, 49 CLJ 874; and as to the conditions necessary for invoking s 41, see *Catholic Mission &c v. Subbanna*, A 1948 M 320. S 41, T P Act is the statutory qualification and restriction of the general law of estoppel contained in s 115 [*Hoorbai v. Aishabai*, 12 Bom LR 457]. That section does not apply when the transferee had not taken reasonable care to ascertain the nature of the transferor's title and where the ostensible owner was not in possession with the consent of the real owner [*Md Shafi v. Md Said*, 52 A 248; *Krishna v. Sarat*, 65 CLJ 347]. A person seeking to create title to real property by estoppel must statisfy the court that he had neither actual nor constructive notice of the title of the real owner. The Evidence Act affords no definition of estoppel to dispense with the necessity of the purchaser making a reasonable enquiry apart from s 41 T P Act [*Venkatarama v. V*, 1919 MWN 180 : 50 IC 969].

The plea of estoppel under s 41 must be specifically pleaded [*Sonur v. Saligram*, 28 P 542; *Sheogobind v. Anwar*, A 1929 P 305; *Ramsaran v. Harihar*, A 1961 P 314]. The success or failure of a plea under s 41 T P Act depends on finding of facts which must be alleged in the pleadings, otherwise the other party is taken by surprise [*Lalmohan v. Govind*, A 1940 P 620; *Parbati v. Kashmirilal*, A 1959 C 69; *Gauri Shankar v. Jwalamukhi*, A 1962 P 392].

S 41 T P Act no doubt deals with a branch of estoppel; but s 115 Evidence Act does not impose on the person acting on the faith of a representation made to him the same duty of making enquiries into the truth of the representation as is imposed on a transferee from an ostensible owner by s 41 [*Shiam v. Matadin*, A 1934 O 460]. If the true owner is minor, he cannot be said to have allowed another person to hold himself out as the true owner [*Dalibai v. Gopibai*, 26 B 433; *Kulsum v. Md Ismail*, 37 PLR 412]. So also in the case of a guardian of a minor [*Damber v. Jawitri*, 29 A 292]. If one partner permits another partner to deal with partnership property as an ostensible owner and the latter mortgages the property, the former is estopped [*Punjab & S Bank Ltd v. Rustomji*, A 1935 L 821].

The rule of estoppel by title applies to sale [*Sheo Pd v. Uddi*, 2 A 718]; mortgage [*Mokhoda v. Umesh*, 7 CLJ 381; *Ajijuddin v. Sheikh Budan*, 18 M 492; *Ramnarain v. Mahanian*, 20 A 82, 86 FB]: Lease [*Lootnarain v. Shewkulal*, 2 CLR 382; *Krishna v. Rasik*, 21 CWN 218; *Protap v. Judhistir*, 19 CLJ 408; *Sulin v. Rajkrishna*, 25 CWN 420 : 33 CLJ 193; *Hattikudur v. Kudur*, 28 MLJ 44]; exchange [*Bhairab v. Jiban*, 33 CLJ 184].

The rule does not apply to a compulsory sale in auction at the instance of an execution creditor [*Alukmonee v. Baney*, 4 C 677]. The case of an execution sale stands on a different footing, as the decree-holder does not guarantee the title of the judgment-debtor. The doctrine of estoppel does not apply where an after-acquired title is taken by the grantor under a conveyance made to him as a conduit and for the purpose of vesting the title in a third person [*Prasanna v. Srikanta*, 40 C 173 : 17 CWN 137]. It has, however, been held that the principle in s 41 applies also to court sale [*Shk Hussain v. Phoolchand*, A 1952 N 64]. The rule does not apply to a purchase of *inam* from the holder who was prohibited by law (Act 6 of 1895 s 5) from alienating it [*Narahari v. Siva Korithan*, 24 MLJ 462]; nor to a transfer which on the date it was made was prohibited by statute [*Sannamma v. Radhabai*, 41 M 418 FB].

Where *A* and *B* convey property to *C* making him believe that they are the sole owners and *C* acting on that representation takes it for consideration. *A* and *B* are estopped from asserting the title of a third person to the property even though *C* has transferred it to *D* who was aware of the title of that third person [*Saroda v. Gosto*, 27 CWN 943 : 70 IC 385].

Title to Goods by Estoppel.—There may be also a good title by estoppel to things which do not require any instrument to transfer them, as for instance, goods: If an action is proceeded upon the ground that the property in goods has passed to the vendor of the plaintiff and if that question depends upon whether a particular parcel of goods has been set apart and appropriated to the contract between the vendor of the plaintiff and the defendant, an admission by the defendant, the owner of the goods, that there had been a setting apart of the goods, will be effectual as against him to pass the plaintiff who has paid for the goods, the defendant is estopped from denying that the goods have been set apart, and the plaintiff is entitled to rely upon the admission of the defendant, which if true, would have given the plaintiff a good title to the goods [*Simm v. Anglo-Ara Tel Co*, 1879, 5 QBD 188, 215, 216]. A Jute Mill sold certain bales of hessian to *B* who sold it to *K*. *K* in his turn sold the goods to the plaintiff. The Jute Mill issued delivery orders to *B*. The delivery orders were ultimately endorsed in favour of the plaintiff. The plaintiff wrote to the Mill that the delivery orders were documents of title and they were sent to the Mill for registering the name of the plaintiff as holder. The Mill in reply did not dispute that the delivery orders were not documents of title, nor did it dispute that the plaintiff had title to the goods. The Mill had withheld delivery and refused registration solely on the ground

of their alleged lien. The plaintiff had paid full price in respect of the goods covered. *Held*, that the Mill was estopped from denying that the plaintiff had title to the goods or was the owner thereof [*Bhagwandas v. Albion Jute Mills Ltd*, A 1957 C 143 (*Simm v. Anglo-Am Tel Co, sup* **reld** on); see *Anglo-India Jute Mills Co v. Omadamull*, 38 C 127, 141-42 and also s 13(*1*)(*d*) and s 19(*b*) Specific Relief Act, 1963].

A railway receipt is a mercantile document of title to goods as the explanation to s 137 T P Act explains. It is a document of title to goods as s 2(4) of the Sale of Goods Act defines the expression. The benefit receivable under railways receipt *qua* a contract of carriage is an actionable claim within s 3 T P Act. The benefit under a railway receipt is therefore assignable in any manner. An endorsement simpliciter on the railway receipt, such as, pay to so and so, would carry the title to the goods represented by the receipt to the endorsee [*Md Safique v. Union*, 67 CWN 279 : A 1963 C 399 (*Shah Mulji v. Union*, A 1957 N 31 and other cases **reld** on)—CONTRA: *Commrs of Port, Calcutta v. G T C Corpn Ltd*, 68 CWN 410].

Estoppel by Agreement: [Grantor and Grantee—Executor and Administrator—Mortgagor and Mortgagee].—The rule of estoppel only exists so long as the grantee claims under the title of the grantor. Where property is taken under an instrument and the taking possession is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived, there is an estoppel on the grantee setting up title adverse to, and independent of, the grantor. But this rule does not prevent a vendee from a vendor who has no title, from perfecting his title by a purchase from the true owners [*Rupchand v. Sarbeshar*, 33 C 915 : 10 CWN 747 : 3 CLJ 629]. Where a person accepts a gift from a number of donors, he is estopped from questioning the right of some of the donors to make the gift [*Keezhanthi v. Govindan*, 85 IC 546 : A 1925 M 990]. A donee is not estopped from contending that the property does not belong to his donor but was all along his own property [*Radhakishen v. Moolchand*, 76 IC 128 : A 1924 L 27]. In the case of a contract between a grantor and grantee, a question of estoppel may arise [*Manik v. Bani*, 13 CLJ 649]. The fact that Government officers put a particular construction on a grant does not work as estoppel against the Government. A grant is to be construed by its terms and not by previous or subsequent conduct [*Secy of S v. Faredoon*, A 1934 B 434 : 36 Bom LR 761; *Prosunno v. Secy of S*, 26 C 792; *Nowranglal v. S*, A 1965 Or 44]. The rule that the grantor cannot derogate from his grant does not operate in a case where the transaction is expressly forbidden by statute [*Kesarbai v. Jamadar*, 20 NLR 162]. Where a grantor has purported to grant interest in land which he did not at the time possessed but subsequently acquires, benefit of subsequent acquisition goes automatically to the earlier guarantee [*Onkar Hge v. Shamrao*, 1996 AIHC 1279 (Bom)].

If a testator devises land to *A* for life with remainder to *B* and *A* conveys the fee to *C* who retains possession, *C* is estopped from denying the validity of the will in a suit in ejectment by the assignee of *B* [*Board v. Board*, LR 1 QB 48 : 29 LT 549]. If a man obtains possession of land claiming under a deed or will which subsequently becomes void or inoperative, he cannot afterwards set up another title to the land against the will or deed, though it did not operate to pass the land in question, and if he remains in possession till 12 years have elapsed, and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed [*Venkata Narasimha v. Suraneni Venkata*, 31 M 321 : 18 MLJ 409 (*Dalton v. Fitzgerald*, 1897 LR 2 Cr 86, 93 **folld**); *Jogeshwar v. Pandurang*, 78 IC 840 : 7 NLJ 82. See *Md Ibrahim v. Abdul*, 37 B 447].

Where a testator having no title or an imperfect title to land devises it, "one who obtains, or accepts, or retains possession of property under the will and who neither has, nor professes to have any title thereto except under the will, is estopped, as against any remainderman or other person claiming under the same will, from asserting that the testator was not entitled to such an estate in the property as he purported to devise or bequeath and, generally, from setting up any title to the property in himself which is independent of, and adverse to, the will, or any interest of a different kind from that which he would have taken if the property had passed by the will as it was impliedly represented by him to have passed. The above formula, it will be observed, is confined to cases where the party not only professes to have, but actually has, no title to the property except under the will." This statement of law in Spencer Bower on Estoppel (p 374) was accepted in *Ganga Din v. Ram Pd*, A 1927 A 642 : 106 IC 20 (*Board v. Board, sup*, **applied**) and *Md Ali v. Nisar Ali*, A 1927 O 67. Property purchased in the name of a woman with her *stridhan* was treated by her husband as his absolute property and he made a will in respect of it appointing his wife as executrix. She accepted office of executrix and waived her right to the property—*Held*, that her heirs were estopped from claiming the property as the *stridhan* of their mother [*Lakshmidevamma v. Keshawarao*, A 1935 M 1066]. Where a person takes under a will which could be repudiated and pays maintenance to testator's widow as provided in the will he cannot repudiate the will so as to defeat the widow's right [*Lakshmamma v. Sreeramulu*, A 1927 M 1066 : 105 IC 650].

In *Munisami v. Maruthammal*, 34 M 211, it has been held, (following 29 M 239, affirmed in *Srinivasa v. Venkata*, 38 IA 129 : 34 M 257 : 15 CWN 741) that an executor under a will who has accepted the office of the executor and acted as such is estopped thereby from setting up an adverse title to the property disposed of by the will. The fact that an executor has not taken out probate (at any rate where the law does not require him to do so) is immaterial. The principle is thus explained by Bigelow, p 554: "It is also a general principle of law that an executor or administrator of property, into possession of which he has been let under the will or letters of administration is, like a tenant, estopped while he continues in possession from disputing the title of his testator or intestate. And this is true even of the widow of such representative of the estate when claiming under a title of her husband. The property must be surrendered and the administration abandoned before the estoppel is removed." Later on under the heading of Quasi-Estoppels the learned author deals with Election and Inconsistent Positions generally and observes at p 683: "Under a principle similar to that applied to persons taking under wills, beneficiaries under a trust estopped, by claiming under it, to attack any of its provisions. The same is to be said, on still stronger grounds, of the trustee; and in general, persons accepting and holding lawful posts of duty are similarly estopped while holding the post, or while retaining the emoluments benefits of it. (Quoted in *Munisami v. Maruthammal, sup*, at p 215). So, a person actually entering upon his duties as executor after securing an order of probate, but for some reasons not taking out a probate is estopped [*Namburumal v. Veeraperumal*, A 1930 M 956 : 69 MLJ 596 : 128 IC 689]. One who has elected to take a legacy under a will is estopped, from setting up a title contrary to the provisions of the will [*Probodh v. Hurrish*, 9 CWN 309, 317]. Where the heirs claim adversely to the will, the grant of the probate does not create any estoppel, so as to prevent them from putting forward their claim as against beneficiary under the will [*Akbari Begam v. Nazahatuddowla*, 32 IA 244 : 33 C 116 : 9 CWN 938 : 15 MLJ 336].

The general rule is that a grantor cannot dispute with his grantee his right to alienate the land to him. In a suit by the mortgagee to recover the mortgage money

by sale of the mortgaged property, the mortgagor contended that the mortgage was illegal, under s 9 of the Khoti Act, as there was no right of transfer—*Held* that the principle of estoppel applied to the case and that the mortgagor was estopped from questioning his own right to mortgage the property [*Narayan v. Kalgauda Birdar*, 14 B 404 and *Jayram v. Narayan*, 5 Bom LR 652; see also *Krishna Lal v. Bhairab Ch*, 2 CLJ 19*n*].

In a suit upon a mortgage deed duly executed by a Hindu widow and her reversioners, it is not open to the mortgagors to deny their title [*Gopal Ch v. Jadu Money*, 15 CWN 915]. A mortgagor is estopped from pleading that his representation on which the mortgagee advanced the money is incorrect. But he is not estopped from objecting to the court selling the property [*Tahir v. Chander*, A 1935 A 678].

"The court never suffers a mortgagor to set up the title of a third person against his mortgagee" [LORD MANSFIELD CJ, in *Roe v. Pegge*, 1785, 99 ER 896]. A mortgagor cannot derogate from his grant so as to defeat the mortgagee's title, nor can the mortgagee deny the title of his mortgagor [*Hillaya v. Narayanappa*, 36 B 185 : 13 Bom LR 1200; *Debendra v. Mirza*, 10 CLJ 150 (many cases discussed); *Jangiram v. Sheoraj*, 30 IC 234; *Nandilal v. Jogendra*, 70 IC 960 : 28 CWN 403; see the remarks of MOOKERJEE J, in *Mahamaya v. Haridas*, 20 CLJ 183, 188 : 19 CWN 208 : 42 C 455; *Surendra v. Khitindra*, 29 CLJ 434; *Faqir v. Ramjan*, A 1927 L 171; *Chokalingam v. Athappa*, 105 IC 525 (M); *Sombhai v. Jagjivan*, A 1928 B 380 : 30 Bom LR 987; *Bengal Coal Co v. Sitaram*, 61 CLJ 560; *Jasoda v. Mangal*, 45 CWN 470; see *Sachitananda v. Balaram*, 24 C 644; *Yad Ram v. Umrao*, 21 A 380; *Subramanian v. Shivalker*, A 1937 R 508]. So, where there is a mortgage in favour of *A* as adopted son of *B*, in a suit by *A* upon it, it cannot be pleaded by the defendants that *A* is not a validly adopted son [*Shanta Bai v. Narayanrao*, A 1949 N 51].

A purchaser of the mortgaged property at an execution sale is estopped from denying the validity of the mortgage [*Sarju v. Kareem*, 139 IC 695]. In *Tasker v. Mall*, 3 My 8 Cr 63 : 5 LJ Ch 321, LORD COTTENHAM said: "To him (mortgagee) it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it any more than a tenant is at liberty to dispute his landlord's title." But the estoppel does not arise in a suit neither based on nor connected with the mortgage [*Deokali v. Ranchoor*, 92 IC 19 (O)]. The rule of estoppel that a mortgagee is not entitled to dispute the title of the mortgagor cannot be invoked in a case where the mortgagor's suit for possession is based not on the mortgage but is one in repudiation of the mortgage [*Rajana v. Mushaeb*, A 1937 O 431]. Even where mortgagors are trustees in public capacity, they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property mortgaged is trust property [*Brijratan v. Raghunandan*, 71 IC 944 : 4 PLT 547]. But if the mortgagee is proved to be well aware of the defect in mortgagor's title, the plea of estoppel is not available to him [*Tulsiram v. Tukaram*, A 1924 N 363]. An usufructuary mortgagee cannot deny the title of his mortgagor and set up adverse possession, unless he actually leaves the holding and re-enters under a different status [*Jainandan v. Umrao*, A 1929 A 305; *Sriram v. Thakur*, A 1965 A 223]. A mortgagee who has been put in possession by the mortgagor is estopped from denying the mortgagor's title to the property. But it is only when the mortgagor's title is in doubt, that there is any scope at all for invoking the aid of the rule of estoppel [*Appa Goundan v. Munusami*, A 1962 M 395].

The estoppel in s 65(*a*) T P Act operates not only personally against the mortgagor, but also against the transferee [*Achaibar v. Rajmati*, A 1929 A 483; *Debendra v. Abdul*, 10 CLJ 150; *Deo v. Stone*, 3 C & B 176]. A mortgagor is *estopped* from denying title to

the property which he professes to mortgage and cannot ask for a personal decree [*Bholanath v. Balaram*, 27 CWN 607 PC : 47 MLJ 258]. If *A* and *B* jointly mortgage a property, *A* or his representative is estopped from pleading that *A* was the sole owner [*Baldeo v. Bhya*, 21 CLJ 635]. If a mortgagee sues to have the rent sale of the mortgaged property set aside, he is not estopped from bringing a suit to enforce his mortgage [*Rasik v. Jagobandhu*, A 1929 C 392 : 113 IC 904].

If a grantor who has no title or a defective title or an estate less than what he assumes to grant, conveys with warranty or covenants of like import and subsequently acquires the title or estate which he purports to convey, or perfects his title, such after-acquired or perfected title will ensure to the grantee or to his benefit by way of estoppel [*Prasanna v. Srikantha*, 17 CWN 137 : 16 CLJ 202. See *ante*, "*Title to Immovable Property by Estoppel*"]. Where a permanent lease is granted by a person who or the face of the document confesses to have a higher status than that of a *raiyat*, the grantee may invoke the doctrine of estoppel [*Chandra v. Amjad*, 25 CWN 4 : 48 C 783 FB; *Jogendra v. Monmohini*, 105 IC 290]. So where an occupancy *raiyat* describing himself as a *raiyat* at fixed rate gives a permanent lease to an under-*raiyat*, he is estopped from pleading that he is a mere occupancy *raiyat* and can eject the under-*raiyat* [*Raijaddi v. Sarajan*, 61 CLJ 9; see *Dhanu v. Sona*, 15 P 589 SB *ante*]. Where the transferee of a holding represented that the tenancy was an occupancy holding and the petitioners on the faith of that representation made the application for pre-emption and it was not pleaded nor was there any proof or a finding that the applicants knew that the tenancy was not an occupancy holding, the opposite party was estopped from pleading that the tenancy was governed by the T P Act [*Mohini v. Radha*, 39 CWN 1014]. Where the lease granted by one co-sharer confers no right upon the lessee, he is not estopped from joining the other co-sharers to eject the lessee [*Panchanan v. Anant*, A 1932 A 457].

The doctrine of estoppel cannot be applied as between donor and donee in every case. There is no estoppel in favour of the executor or legatee as against the testator; consequently, so far as the heir-at-law is concerned he cannot be deemed bound by any derivative estoppel traceable to an estoppel which bound his ancestor. Except under a local usage a non-transferable occupancy holding cannot be disposed of by will. There is no estoppel in favour of the executor of the legatee of an occupancy *raiyat* so as to deprive him of what he is entitled to take by statute [*Amulya v. Tarini*, 18 CWN 1290 : 42 C 254]. Where a tenant transfers a holding by gift, the question of transferability cannot be raised by the heirs of the donor to the prejudice of the donee or his representatives [*Behari v. Sindhubala*, 41 IC 878]. Where even though a clean plea of estoppel arises from the recital in an agreement a party not relying on this plea enters into an issue on the fact so that whole matter becomes open for decision that party cannot estop the opponent from that fact [*Rajendra v. Devendra*, A 1973 SC 268].

Estoppel by Pleadings.—Admissions and statements in pleadings may operate as estoppels. Admissions in judicial proceedings are generally conclusive in the same proceedings in which they are made. Material facts alleged by one party and admitted by the other party expressly or by application of the doctrine of non-traverse (Or 8, r 5, *ante*, pp 343, 584) are generally conclusive. As to admission at or before the trial, and their effect, see s 58. In other proceedings, pleadings though admissible, are not to be taken as allegations of truth of the facts stated therein for all purposes. As to admissions in pleadings, see *ante*, s 17.

Pleadings, although admissible in other actions, to show the institution of the suit and the nature of the case put forward, are regarded merely as the suggestion of

counsel and are not receivable against a party as admissions [*Boileau v. Rutlin*, 2 Ex 665; see *Warner v. Sampson*, 1959, 1 QB 297], unless sworn, signed or otherwise adopted by the party himself [*Marianski v. Cairns*, 1 Macq H L 212; *R v. Walker*, 1 Cox 99; *R v. Simmonds*, 4 Cox 227]. And, *particulars*, can only be taken as admissions in respect of the issues on which they are delivered [*Miller v. Johnson*, 2 Esp 602; *Burkit v. Blanshard*, 3 Ex 89—Phip 11th Ed p 335. Tay ss 821, 823, 1753]. Where one of two courts will have the necessary jurisdiction it is not open to a party to object to the jurisdiction of each court in the other [*Insurance Controller v. Vanguard Insurance Co*, A 1966 M 437].

If the statement or admission in a previous suit found the subject of an issue on which a decision was recorded, it becomes conclusive and the admission would operate as an estoppel. It then resembles *res judicata*, as facts once decided by an issue in a previous case cannot be agitated again. In *Tweedie v. Poorno*, 8 WR 125, PEACOCK, CJ, said: "If a particular issue had been tried in the former suit, and that issue was material, then it might have amounted to an estoppel." In *Civa Rau v. Jevana*, 2 MHC 31 (**approved** in *Vallabh v. Rama*, 9 BHCR 65) the rule has been stated thus: "A statement for the purpose of a judicial proceeding can only be conclusive in another proceedings as to such material facts embodied therein as have been found affirmatively to warrant the judgment of the court upon the issues joined. Such statements are only representations and can only be conclusive, if the other party has acted upon them and has altered his position. They are conclusive, not merely because they are the statements of the parties, but also because for the purpose of present and prospective litigation, they must be taken to be the truth. Admissions which do not come within this description are receivable in evidence against the parties making them and those claiming under them, but do not amount to an estoppel." Mere admissions of an understanding contrary to the terms of a mortgage deed even in depositions and pleadings, do not operate as estoppel or prevent the mortgagor from redeeming his property [*Abdul Rahim v. Madhavram*, 14 B 78, 82].

A plea unnecessarily raised by a party and decided by the court also equally unnecessarily, does not estop the party from putting the same in a later suit [*Sohan v. Jawala*, 73 IC 854 (L)]. A person pleading tenancy in common in a prior litigation can plead joint tenancy in subsequent litigation [*Shyama v. Purushotam*, 90 IC 124 (M)]. Persons relying on estoppel by pleading cannot do so by merely producing a judgment in the previous suit containing a summary of the pleading, but must produce the written statement [*Annada v. Badulla*, 47 IC 985; *Md Kholil v. Mahboob*, A 1942 A 112. See *ante*, s 43: "*Objects for which judgments are admissible*"]. Statements by a defendant in a written statement which are only admissions cannot create an estoppel as against him in a later suit; and when the admissions are sufficiently explained, the doctrine of estoppel cannot be invoked at all [*Gobinda v. Ramcharan*, 62 CLJ 153]. Right of prior mortgagee to compel puisne-mortgagee to redeem the whole.—Redemption of a portion of the mortgaged property where the mortgagee refuses to allow redemption of the whole—Estoppel by defence raised in the previous suit [*Jawahir v. Baldeo*, 12 CWN 515 PC : 6 CLJ 672]. A defendant is not estopped from pleading that the suit is barred by limitation when in fact the claim of the plaintiff clearly appears to be barred by limitation taking into consideration Article 15 of the Limitation Act [*Ajab Enterprises v. Jayant Vegoiles and Chemicals P Ltd*, A 1991 Bom 35, 40].

A defendant in an ejectment suit, who denied the plaintiff's title and the lease, alleging possession of the property in a third party, is estopped from contending that the plaintiff ought to have served him with a notice to quit [*Abdulla Naha v. Moidin*

Kutti, 17 MLJ 287]. The defendants in an ejectment suit, who denied the plaintiff's title to the land and set up an adverse title in themselves, were estopped in the lower court deciding against them, from contending in appeal that they were occupancy raiyats, and had forfeited by their own conduct the rights claimed by them [*Satyabhama v. Krishna*, 6 C 55 : 6 CLR 375]. A plaintiff who had set up in his plaint that a certain mortgage is invalid, would be estopped from subsequently relying on such mortgage as valid, so as to save his suit from being barred by limitation [*Lakshmi v. Rama Ch*, 16 MLJ 5]. When a party in a previous proceeding contended that the petition of objection filed by the opposite party did not come under s 47 but under Or 21, r 58, he is estopped from contending in a subsequent regular suit, that the suit was barred by s 47 [*Haradhan v. Purna*, 11 CWN 145. See also *Gaya v. Randhir*, 28 A 781 : 3 ALJ 456]. The defendants, having in a previous suit set up the defence that *K* was disqualified by insanity and taken the decision of the court on that ground, were estopped now from setting up the defence that he was not so disqualified, and that he was entitled to succeed [*Brijbhookun v. Mahadeo*, 15 BLR 145 note : 17 WR 422].

An admission made by a party in other cases may be taken as evidence against him, but cannot operate against him as an estoppel in a case in which his opponents are persons to whom the admission was not made, and who are not approved to have ever heard of it, or to have been misled by it or to have acted in reliance upon it [*Chunder v. Pearee*, 5 WR 209]. A *raiyat* is estopped from pleading, in a suit for a *kabuliat*, and for determination of rent [*Md Hossein v. Peeroo*, WR 1864, Act X, 115].

A false admission by a *sheristadar* to avoid losing his appointment does not estop his heirs from afterwards setting up the truth [*Md Aziz v. Sugeeroonisa*, 6 WR 38]. When, in answer to a suit two parties combined to make a statement to defeat a third party, it is not an estoppel against either of them when they are opposed to each other in a subsequent suit and it is competent to either to say that the combined statement was false, and intended as a fraud against a third party [*Ram Saran v. Pran Piaree*, 1 WR 156, affirmed in 15 WR 14 PC]. The statement in an application regarding the amount of compensation payable does not estop the party from showing that land is worth more [*Anthony v. S*, A 1971 K 51 FB]. A false statement made in an account submitted in the Income-tax office does not estop the person from proving that he made the false statement to evade the income-tax, though he may be answerable to a criminal prosecution [*Greedhari v. Fooljhuree*, 24 WR 173; *Jawahir v. Pookurum*, 6 WR 252]. A plaintiff is not estopped by an evidently false statement in his plaint as to possession, but the court may look behind the statement and determine upon its truth or otherwise, and affirm or disallow it as may seem right and proper [*Choonee v. Karamat*, WR 1864, 282]. A party is not estopped by erroneous admission in a petition [*Kristo Prea v. Puddo Lochun*, 6 WR 288].

A plaintiff "may rely on several different rights, alternatively, though they may be inconsistent" [*per* BRETT, LJ, in *Phillips v. P*, 4 QBD 127, 134; *Narendra v. Abhay*, 34 C 51 FB : 4 CLJ 437 : 11 CWN 20; *Official Assignee v. Bidyasundari*, 24 CWN 145]. Similarly a defendant may raise as many distinct and separate, and therefore inconsistent defence, as he may think proper [*per* THESEIGER, LJ, in *Berdan v. Greenwood*, 3 Ex 251, 255] subject only to the disqualification, that if the defence is embarrassing, the court may under Or 6, r 16, direct one to two inconsistent defences to be struck out [*Alikjan v. Rambaran*, 7 IC 167; *Sri Janaganti v. Kappajee*, 15 IC 382. See Or 8, r 7, C P Code]. But the plaintiff cannot be permitted to allege two absolutely inconsistent statements of facts, each of which is destructive of the other [*Md Baksh v. Hosseini*, 15 IA 81 : 15 C 684; see also *Matilal v. Judhistir*, 22 CLJ 254, 257; *Nripendra v. Birendra*, 21 CWN 939, 944; *Kalimohan v. Pirendra*, 22 CLJ

309; *Bhubanmohini v. Kumudbala*, 28 CWN 131]. If a surety pleads two alternative defences and abandons one of them and a decree is passed against him, he is estopped from re-agitating on the ground which he has abandoned [*Phillips v. Mitchell*, 59 C 985].

Plaintiff cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing [*Nagendra v. Pyari*, 20 CWN 319]. The defendants denying subrogation and the right of one plaintiff, will be estopped when on appeal against decree in favour of another plaintiff from utilising that point for non-suiting the plaintiff [*Union v. Kalinga Textiles*, A 1969 B 401]. As to whether in a suit on title, a decree based on adverse possession can be given, see *Satyendra v. Sashi*, 48 IC 448. Where plaintiff sues for possession in his own right, he cannot subsequently be allowed to claim the property as manager of *wakf* [*Bawardin v. Daulat*, 18 IC 807]. Plaintiff basing his claim to specific properties on an alleged gift, was not allowed to put forward his claim as arising under an alleged contract not pleaded [*Malraju v. Venkatadri*, A 1921 PC 27(2) : 40 MLJ 114 : 25 CWN 654]. As to when variance between pleading and proof is fatal to suit, see *Haji Umar v. Gustadji*, 20 CWN 297 PC : 34 IC 263 : 30 MLJ 444; *Hiralal v. Giribala*, 23 CLJ 429; *Govinda v. E I R*, 52 IC 47; *Satish v. Satish*, 24 CWN 662 : 30 CLJ 475; *Rees v. Young*, 25 CWN 519 (collision case). Ordinarily a change of case, *ie* making out a case not set up in the pleadings should not be allowed [*Md Shah v. Falta*, 54 IC 43; *Badaruddin v. Herajtullah*, 54 IC 797; *Radhe v. Fakir*, 56 IC 970; *Anant v. Bharat N B*, 56 IC 638]. Change of case cannot be allowed in appeal [*Lokenath v. Harachandra*, 43 IC 29; *Durga Charan v. Kailash*, 54 IC 645; *Malraju v. Venkatadri, sup*; *Chulai v. Surendra*, 1 P 75 : 65 IC 616]. The rule is not inflexible [*Ishan v. Nishi*, 22 CWN 853; *Shk Kasem v. Kasimuddin*, 50 IC 290]. In a suit by a minor without next friend, if the defendant being aware of the minority does not raise any objection he is estopped from raising it in appeal [*Fuli Bibi v. Khokai*, A 1928 C 537 : 55 C 712]. Where in a mortgage suit for recovery of money from the property as well as from person the defendant confessed judgment, he is at the time of passing the personal decree estopped from raising the question of limitation [*Ralia v. Hira*, A 1928 L 653].

Where the statements of case were agreed statements and the findings of the appellate tribunal was also not challenged before the High Court the appellant would not be permitted to challenge them before the Supreme Court [*Commr of I T v. Canara Bank*, A 1967 SC 417]. When affidavits were taken in the High Court as additional evidence in a sales-tax case which was on appeal from the tribunal the appellants not having objected were not free to object in the Supreme Court. The objection must be taken to have been waived and the appellants were not free to say that the High Court acted illegally [*S v. Habibur Rehman*, A 1968 SC 339].

Estoppel by Election.—The common law principle which puts a man to his election between alternative inconsistent courses of conduct (see next heading: "*Estoppel by Inconsistent Position*",) is different from the equitable doctrine of election. An estoppel by election may arise when a party having two inconsistent remedies chooses to elect one, and thereby induces another to alter his position. When he has made his choice he will be held firmly to the remedy adopted [see *Scarf v. Jardine*, 7 App Cas 345, 360; *Streatfield v. S*, 1735, J W & T 9th Ed 373 (quoted in *Ramakatayya v. Veeraraghavayya*, 52 M 556 : A 1929 M 502). *Taylor v. Hallard*, 1902, 1 KB 676; *Jones v. Carter*, 15 M & W 718; *Morel Bros & Co. Ltd v. Westmorland*, 1904 AC 11 : 20 TLR 38; *Moore v. Flanagan*, 1920, 1 KB 919; *United Australia Ltd v. Barclay's Bank Ltd*, 1941 AC 1, 30 : 109 LJKB 919; *Dexters Ltd v. Hill Crest &c*, 1926, 1 KB 348; *Lissenden v. Bosch Ld*, 1940 AC 412 : 109 LJKB 895; *Asia v. Nurjehan*, 59 C 1464]. Where a party has two rights,

the mere exercise of one does not amount of waiver of the other but if there are alternative rights, the exercise of one right might imply that the party has waived the exercise of the other [*Humayun Properties v. Ferrazzinis*, A 1963 C 473]. Election is a principle not peculiar to the English law, but common to all law which is based on the rules of justice, *viz* the principle that a party shall not at the same time affirm and disaffirm the same transaction—affirm it as far as it is for his benefit and disaffirm it, as far as it is for his prejudice [*Rungama v. Atchama*, 4 MIA 1,: 7 WR 57]. This kind of estoppel arises from the principle that a man cannot approbate and reprobate. Silence itself does not constitute election, but it is the duty of the person who is to elect, not to postpone his election for such a long period as might induce another to alter his position in the belief that he has elected to let things remain as they are. In that case he will be estopped from exercising his election in a different way [*Clough v. L & N W Ry Co*, LR 7 Ex 26, 35; *Aaron's Reefs v. Twiss*, 1896 AC 273, 290, 294].

The principle of election does not ratify a void transaction but merely imposes a personal bar on the benefiting party and the fact that an alienation is void does not prevent the application of the doctrine [*Shanmugam v. S.* A 1968 M 207]. The principle of election essentially involves the availability to the plaintiff of two or more distinct judicial routes to compensation for a particular loss attributable to one set of facts. To commence proceedings and pursue them to judgment based on one such route operates as an election to exclude the other available routes [*Lordsvali Finance v. Bank of Zambia*, (1996) 3 All ER 156 (QBD)].

Where an agent delivered goods to the customer contrary to the principal's instructions and the latter obtained a decree against the purchaser, he cannot on non-satisfaction of the decree sue the agent. The reason is that having elected to treat the delivery to him as an authorised delivery, they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act [*Per* BANKES LJ, in *Verschures &c v. Hull &c*, 1921, 2 KB 608].

The doctrine of election is not confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and turn round and say that it is void for the purpose of securing some other advantage [*Bonagiri v. Karumuri*, A 1938 M 1004 : 1938, MWN 1013]. The principle of election does not forbid a party from claiming the same relief in different suits in respect of the same property though the grounds of relief are different and inconsistent [*Nagubai v. Shama Rao*, A 1956 SC 593 : 1956 SCR 451].

To be estopped by election the party should have sufficient information and knowledge to be able to recognize that he has two rights inconsistent with each other. It is not necessary that he should be aware of the implications that may follow upon his election [*Haridas v. Vijaylakshmi*, A 1956 B 721].

A judgment obtained against a person in the belief that he executed a document in his own right does not bar a subsequent suit against the rightful owner when it is subsequently learnt that he executed it on the latter's behalf. Thus, a Hindu widow who consistently denied an adoption, executed a mortgage of her husband's estate in her own capacity and the assignee of the mortgagee alleging that there was no adoption, first sued the widow on the mortgage. He then sued the adopted son—*Held* that the previous suit did not estop him from filing the second suit against the adopted son who claimed the estate [*Ammakannu v. Murugayya*, 47 M 850: 47 MLJ 85. A wrong suit followed by a wrong decree never bars a correct suit—*per* RAMESAM J, in *ibid*].

When a litigant has the right to choose between two remedies, which are not co-existent but alternative, he may elect and adopt one as better adapted than the other to work out his purpose; but once he has made his choice and adopted one of the alternative remedies, his act at once operates as a bar as regards the other and the bar is final and absolute [*Baikuntha v. Salimulla*, 6 CLJ 547; *Beni Madhub v. Jatindra*, 5 CLJ 580: 11 CWN 765; *Samudra v. Srinivasa*, A 1956 M 301]. Where under the Representation of People Act the petitioner is given option by the Tribunal either to amend petition, or to supply particulars, or to strike off the particular para as vague and chooses to amend he loses his right to adopt the alternatives [*Amin v. Hunna*, A 1965 SC 1243]. A person being free to seek alternative remedies for the same relief in two courts and electing to bring an action in one will be estopped from objecting later to the jurisdiction of that court to decide his case [*Lachmanan v. Madras Corporation*, A 1927 M 130 FB; *Maharajdin v. Balbheddar*, A 1925 O 403]. But where the plaintiff has made a misconceived application to the executing court he will not be estopped from bringing a regular suit later [*Municipal Board v. Bir Singh*, A 1965 A 527]. No question of election of remedies arises, unless the remedies are inconsistent and alternative [*Gulab v. Badshah*, 13 CWN 1197: 10 CLJ 420 (2 CLJ 508: 10 CWN 529 doubted]. Where a plaintiff claims a decree against two persons not jointly, but in the alternative, and elects to take a decree against one, he is precluded from appealing against the decree and claiming therein a decree against the other [*U Po v. Bodi*, 13 R 189: 159 IC 167].

Where in execution of a mortgage decree, the mortgagor deposited the amount in court and though the mortgagee was persistently denying the validity of the deposit and in spite of the protest, a creditor of the mortgagee attached and withdrew the deposit—*Held* that the mortgagee was not precluded from disputing the validity of the deposit [*Asia v. Nurjahan*, 59 C 1464: 36 CWN 955].

An alienation was made by defendant *pendente lite* of the subject matter of suit, Plaintiffs presented to the High Court a petition stating that they did not admit the validity of the sale but were nevertheless to add the purchaser as respondents to the appeal pending in the Privy Council. In a subsequent suit by the plaintiffs to eject the purchaser—*Held*, that the plaintiffs had not in the petition or in the presenting of it, made any representation that the purchaser acquired any interest in the lands and were not estopped [*Damodar v. Mitter*, A 1922 PC 439: 44 MLJ 723: 27 CWN 461: 69 IC 134]. When a deed confers on a person certain benefits burdened with certain obligations, if he elects to take the benefits, he must also bear the burdens created thereby [*Lalita v. Vizianagram*, A 1954 M 19]. Though the person who elects to take a legacy under a will may be estopped from setting up a title contrary to its provisions, still if such person be in possession, he cannot be ousted except by one who can prove a better title to the property [*Probodh v. Hurrish*, 9 CWN 309]. A testator bequeathed his property to his nephew in which he included the share of his brother's widow in the ancestral property; but at the same time made a suitable provision for her maintenance and worship. The widow first sued for and obtained the allowance under the will, and afterwards brought a suit for her share in the ancestral property. Having regard to the doctrine of election (s 185 Succession Act) she was precluded from making the second claim [*Pramada v. Lakhi*, 12 C 60].

Doctrine of election applies to wills in India [*Mangaldas v. Ranchoddas*, 14 B 538]. Any one taking possession under a will cannot set up an adverse title. But this doctrine is subject to the qualification that the election must be made with full knowledge of the circumstances. The doctrine is again inapplicable to a person who was in possession from before the execution of the will [*Subodh v. Bhubalika*, 60 C 1406]. There is no justification for limiting the doctrine to cases of alienation by

Hindu widows. It applies to awards as well or to a transaction of exchange [*Anantam v. Valluri*, A 1960 AP 222]. Where the creditors have a double remedy open to them and they intentionally elect remedy against the joint estate of the firm, there is nothing to estop them from re-electing their remedy against the separate estate of the individual partners [*Ahmed v. Mackenzie Stuart & Co*, A 1928 S 40 (*Ex parte Adamson In re Collie*, 1817, 8 Ch 807 98 LT 917 relied on)]. Election by reversioner to stand, by the transaction entered by the widow during her lifetime [*Seetharamayya v. Chandrayya*, A 1955 AP 68].

An illustration of the principle of election is to be found in s 234 Contract Act. As to election in the case of transfer of property, see s 35 T P Act, and as to election under will, see ss 180, 187 and 188 Succession Act.

A statutory right of appeal cannot be presumed to have come to an end because the appellant has in the mean time abided by or taken advantage of something done by the opponent under the decree [*Bahuram v. Baijnath*, A 1961 SC 1327: 1962, 1 SCR 358; *Chennaveriah v. Mysore Revenue &c*, A 1971 My 66]. When the Court of its own choice to go into the merits of the intended amendment and thus the parties had no other alternative but to fall in line with this process adopted by the Court, the parties are not estopped from challenging the order on the amendment petition, before the appellate court [*T P Palaniswami v. Deivanaiammal*, A 1984 Mad 19, 21: (1983) 96 Mad LW 560].

Lease.—Where during pendency of eviction proceedings wherein the lessee denied lessor's title, in another litigation the court held that the lessor had title to the property in question and that decision become final, the lessee would be estopped from denying the lessor's title in the eviction proceeding [*D S Krishna v. Digvijay Industries*, 1997 AIHC 3558 (AP)]. A person who consistently evaded the execution of the lease deed cannot later claim that he is lessee [*Aliakutty Paul v. State*, A 1995 Kant 291, 301].

Estoppel by Inconsistent Position. [Approbation and Reprobation].—"If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralysed, the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the right of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot play fast and loose" [Bigelow]. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*. A party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This doctrine applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up provided that the second suit grows out of the judgment in the first [*Dwipendra v. Jogesh*, 39 CLJ 40: A 1924 C 600; *Hemanta Kumari v. Prasanna*, 56 C 584: A 1930 C 32; see *Udrej v. Ram*, A 1946 R 436; *Bhaja v. Chuni*, 11 CWN 284; *Bama Charan v. Nemai*, 35 CLJ 58; *Annapuram v. Vizianagaram*, A 1935 M 367; *Bindeswari v. Lakpat*, 15 CWN 725, 727: *Girish v. Purna*, A 1944 C 53; *Official Receiver v. Mounnamma*, A 1968 AP 336; *Umrao v. Mansingh*, A 1972 D 1; *Saraswathi v. Lakshmi*, A 1978 M 361]. The law similarly stated in Hals Vol 13 para 512 (3rd Ed Vol 15 para 340) was

adopted in *Nagubai v. Shama Rao*, A 1956 SC 593 : 1956 SCR 451. When a claim for eviction under s 7 of Madras Act 15 of 1946 is rejected on the tenant's plea that the premises did not fall within the definition of building and he was not therefore a tenant within the Act, it is not open to him to turn round and contend in the subsequent civil suit for eviction that the lease related to a building within the Act and the civil court had no jurisdiction [*Amritlal v. Alla Annapurnamma*, A 1959 AP 9; See also *Venigella v. Somasekharaswamy*, A 1970 AP 394]. A mortgagor who obtains possession of property by denying execution of a mortgage, is estopped from raising in a suit for money by the mortgage, a plea that he executed an usufructuary mortgage [*Bachan v. Waryam*, A 1961 Pu 477].

The maxim that a person cannot approbate and reprobate is only one application of the doctrine of election and its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto [*Nagubai v. Shama Rao, sup*; *Kuppanna v. Peruma*, A 1961 M 511 FB]. When a party had admittedly taken a benefit under an agreement, cannot take a stand that the agreement is void [*Pioneer Hy-Bred International Inc., USA v. Pioneer Seed Company Ltd*, A 1989 NOC 120 (Del)]. Before the doctrine of approbation and reprobation applies there has to be estoppel in one form or another. If there is no estoppel there would be no question of the rule coming into operation [*Rulhu Ram v. Than Singh*, A 1967 Pu 328]. The doctrine of approbation and reprobation can apply only to orders passed by a court of competent jurisdiction notwithstanding that it was passed with or without consent of parties [*K R Shankar v. M A Buvanmbal*, A 1971 M 368].

The principle is: *Allegans contraria non est audiendus* ("He is not to be heard who alleges things contradictory to each other"). The doctrine of approbate and reprobate does not apply against the provisions of statute. It applies only to the conduct of the parties [*Ganesh v. Gangabai*, A 1939 B 114: 41 Bom LR 170]. Thus, a party cannot, after taking advantage under an order (*eg* payment of costs), be heard to say that it is invalid and ask to set it aside [*Tinkler v. Hilder*, 4 Ex 187; **refd** to in *Banku v. Marium*, 21 CWN 232; *Jogendra v. Khodabaksh*, 72 IC 554, *post*], or to set up to the prejudice of persons who have relied upon it, a case inconsistent with that upon which it is founded [*Roe v. Mutual L Fund*, 19 QBD 347 CA]; nor will he be allowed to go behind an order made in ignorance of true facts to the prejudice of third parties who have acted on it [*Re Eyton v. Charles*, 45 Ch D 458; Halsbury 3rd Ed Vol 15 para 341]. The rule in *Tinkler's* case "must be confined only to those cases where a person has elected to take a benefit otherwise than on the merits of the claim in the *lis* under an order to which benefit he could not have been entitled except for the order". The existence of a choice between two rights is one of the conditions necessary for the applicability of the doctrine of approbate and reprobate [*Bhau Ram v. Baij Nath*, A 1961 SC 1327 **follo** in *Prafulla v. C B Association*, A 1965 P 502]. When the costs are granted on an unconditional order the benefiting party (who had lost the case here) can have no opportunity to waive his right to question the validity or correctness of the order and accordingly its acceptance cannot operate as estoppel against him in the absence of proof of waiver. The appellant must not be deemed to have waived his right to question the legality of the order [*Devaiah v. Nagappa*, A 1965 Mys 102]. See also *Kennard v. Harris*, 2 V & C 801; *Wilcox v. Odden*, 15 CB; NS 837; *King v. Simmons*, 2 B & C 801; *Pearce v. Chaplain*, 9 QB 802. The principle underlying these decisions is that when an order shows plainly that it is intended to take effect entirely and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. Thus, if the court directs restoration of a suit on plaintiff's paying costs to the opponents, there is no intention to benefit the latter except on the terms mentioned on the order itself. But if a party

receive the benefit reserving his right to object to the order, he will not be precluded from attacking it. The rule of approbation and reprobation does not apply to order or judgment containing independent directions [*Venkatarayudu v. Chinna*, 58 MLJ 137: A 1930 M 268 (*Ramaswami v. Chidambaram*, A 1927 M 1009 not **follld**)]. This principle was distinguished in a case where it was held that the satisfaction of a decree appealed from a judgment-debtor partly by payment in cash and partly by setting off a cross-decree, does not amount to a recognition of the validity of the former decree thus precluding the judgment-debtor from impeaching it in appeal [*Ishar v. Batamal*, A 1929 L 421]. **Relying** on *Lissenden v. Basoh*, 1940 AC 412: 1940, 1 All ER 425, it has been held that the principle of approbate and reprobate cannot be made applicable to the rights of a litigant to an appeal either from a judgment or an award [*Md Ibrahim v. Maricar*, A 1949 M 535].

A party against whom an order of injunction had been passed may choose not to contest the order of injunction and even agree to suffer the interim order but may claim compensation on account of loss suffered by such party on account of interim order obtained by the other party and there is no estoppel against making such a claim for compensation [*Bank of India v. Sital Chandra Das*, A 1986 Cal 313, 327].

So far as the final decree in a suit is concerned, there is no reason for saying that the plaintiff cannot approbate the decree in respect of the sum which it awards to him and reprobate it in respect of the sum which it refuses to him. There is no rule of law that acting in any way on any order necessarily debars a party from appealing against the order. The only principle is that a party cannot challenge an order after accepting the benefit of a term imposed in his favour as a *condition* of that order upon the opposite party at whose instance the order was made [*Hurrybux v. Johurmull*, 33 CWN 711]. So, in order that the right of appeal may be lost—(*a*) the decree should impose a term or condition on the opposite party which is for the benefit of the appellant, and (b) there should be acceptance of the benefit by the appellant [*Gopesh v. Binode*, 40 CWN 553; *Baikuntha v. Salimulla*, 12 CWN 590; *Subbarama v. Chinnaswami*, A 1935 M, 295]. As pointed out by RANKIN CJ, in *Hurrybux's case, ante*, when applying the rule of approbation and reprobation, the language used in the decided cases must be taken with reference to the substance of the matter before the court.

When an order of the court is such that it makes practically obligatory to accept it (here amendment by payment of costs) a party accepting an order under protest, is not debarred from appealing against it [*Mani Lal v. Harendra*, 12 CLJ 556: 18 IC 79]; but he is estopped if he accepts the costs without protest [*Ranendra v. Keshab*, 38 CWN 488; *Prayag v. Perumal*, A 1933 M 410; *Ramcharan v. Custodian*, A 1964 P 275, 277; *Metal Press Works v. Guntur &c*, A 1976 AP 20]. An *ex parte* decree was set aside on application. The plaintiff filed a revision petition against that order. Meantime the trial of the suit went on both parties participating in it and a contested decree was passed. The revision petition is not maintainable on the principle of waiver [*Smt Chapala Debi v. Samar Kumar Ghose*, A 1984 Pat 32, 34]. When the defendant accepted the costs awarded by the Court, though under protest, in allowing a petition for amendment of the plaint, he is estopped from challenging the order allowing the amendment petition [*Amar Singh v. Perhlad*, A 1989 P&H 229, 230]. Where the application for restoration was allowed subject to the payment of the costs of the dependent, the party who accepts either directly or through his counsel the costs awarded in a conditional order, is precluded or barred from attacking the validity of that order [*Ram Naresh Kanoo v. Sardar Harjashbir Singh*, A 1990 Gau 12, 13]. Where the party has accepted the costs that were awarded, which were compensatory costs in relation to the wastage of time that was involved in the procee-

dings that came to be set aside and there cannot be a bar from challenging the correctness of the order on merits on a point of law [*K R Singh v. A G. Thakare*, A 1991 Bom 296, 298]. When payments of professional fees, paid by the State Government after a long delay, have been accepted in full settlement of all his claims without raising any question of payment of interest, he cannot make any claim for interest [*Ram Reddy P v. State*, A 1990 A P 76, 80]. Where however an order is passed without jurisdiction, the mere fact that costs were ordered to be as a condition and accepted by the opponent's *vakil* does not debar him from challenging the order [*Narayanaswami v. Subramania*, 69 MLJ 673: *Amar v. Shiromoni Gurdwara &c*, A 1978 P&H 273]. *In re Massey*, 8 Beav 462, LANGDALE MR, said that the words "under protest" have no distinct meaning by themselves and amount to nothing unless explained by the proceedings and circumstances.

An application under s 174 B T Act having been dismissed on the ground that the deposit was not within time, on an appeal by the judgment-debtors it was held that the court had power to extend time. In second appeal they cannot be allowed to urge that the order of the lower appellate court was made without jurisdiction and although the appeal preferred by them was incompetent, it is not open to the decree-holder to assail the order by appeal [*Raghubar v. Jadunandan*, 16 CWN 736: 15 CLJ 89]. In 1930 the plaintiffs sued the defendants under Or 1, r 8 styling themselves as "Hubli Pinjrapole Samstha". In 1926 the plaintiffs had sued the same defendants in the same name without recourse to Or 1, r 8—*Held* the plaintiffs were estopped [*Gurushiddappa v. G*, 1937 Bom 326: A 1937 B 238]. A party who prevents the issue of adverse possession being decided in a previous suit cannot be allowed to plead in a subsequent suit that adverse possession had become complete [*Chidambarganda v. Channappa*, A 1934 B 329]. Where parties to a suit by mutual agreement make certain terms and inform the court of them, which sanctions the arrangement and makes an order in conformity with it, either party, who has had the benefit of the arrangement and order, is not at liberty to resile from the agreement [*Sheo Golam v. Beni*, 5 C 27: 4 CLR 29]. A consent order raises an estoppel as much as a decree in invitum [*Bhai Shanker v. Morarji*, 36 B 283; *Sailendra v. S*, A 1956 SC 346: 1956 SCR 72; *Rameshwar v. Hitendra*, A 1921 P 131; *Deolal v. Bindeshwari*, A 1929 P 440; *Umrao v. Ram*, A 1932 L 281]. When on Government pleading s 80 C P Code a suit was dismissed with liberty to bring a fresh suit after notice, Government cannot in the later suit contend that the former order was illegal [*Kandasamy v. Prov*, A 1933 M 391].

Where a suit is decided under a special procedure not contemplated by the Code at the invitation of a party, he cannot appeal. The decree has the effect of a consent decree [*Makdum v. Md Sheikh*, A 1936 M 856]. Where plaintiff obtained an *ex parte* decree and on his solicitor demanding payment of the decretal amount the defendant requested him to grant seven days' time for payment to obviate execution, he cannot subsequently apply to have the *ex parte* decree set aside [*Bertam v. Evans*, 1936, 1 KB 202]. Where defendant admits liability in respect of a part of the amount claimed and denies the rest and a decree is passed for the admitted amount, execution of the decree does not preclude the plaintiff from appealing against the claim dismissed [*Jogesh v. Fazar*, 95 IC 10 : A 1926 C 960; see *Jethibai v. Chabildas*, A 1935 S 142]. Trial court refused to decree specific performance but decreed refund of part consideration. The conduct of the plaintiff unequivocally and consistently showing that the plaintiff was not willing to accept Trial court's decree the fact that during the pendency of the appeal he sought execution of the decree cannot disentitle him to obtain decree for specific performance [*Ramesh v. Chunilal*, A 1971 SC 1238].

When a party consented to a remand of the case by the lower court, he was not allowed to contend that the remand was illegal [*Gholam Murtaza v. Goluck*, 3 WR 191]. But the mere fact that defendant in a suit offers to be bound by the decision of the Trial court arrived after a local inspection would not estop him from questioning the correctness of that decision in appeal when it is not shown that plaintiff had also agreed [*Ghulam v. Gonesh*, 75, IC 619 (A)]. Appellants were allowed to adduce further evidence on an issue of fact and the respondents did not take their stand upon the inadmissibility of such evidence but adduced further evidence to rebut it. The respondents could not complain that additional evidence was given by appellants [*Fazarbanoo v. Rahim*, A 1929 C 26].

If parties agree to a court proceeding without jurisdiction, *extra cursam curiae*, they cannot appeal. But where the court has jurisdiction over a cause, a mere agreement that the court may decide it disregarding rules of procedure and evidence without giving up a right of appeal expressly or impliedly, does not deprive the parties of the right of appeal [*Sankaranarayana v. Ramaswamiah*, 47 M 39]. A party submitting voluntarily to the jurisdiction of the High Court on the question of the validity of certain provisions of the UP Sales Tax Act cannot be allowed to take exception to that in the appeal [*Tikaram v. Commnr of S T*, A 1968 SC 1286].

A respondent in an appeal asking for security for costs is not estopped from contending that the court had no jurisdiction to entertain the appeal [*Kupuswami v. Ayyammai*, A 1935 M 723]. The withdrawal of a suit for judicial separation does not estop a party from instituting a subsequent suit for divorce on the same grounds [*Dina v. Dinshaw*, A 1970 B 341]. A party submitting to a reference to arbitration through court can plead that court had no jurisdiction to refer to arbitration [*Wang v. Sona*, 52 C 599: 29 CWN 886: 42 CLJ 26]. It has however been held that a party obtaining a decree on the representation that a court had jurisdiction, cannot subsequently go back upon it and urge want of jurisdiction upon general grounds of equity [*Kondi v. Chunilal*, A 1929 B 1; *Walker v. W*, A 1935 R 284]. A party denying the jurisdiction of a particular tribunal and succeeding in that plea cannot deny the truth of that plea in subsequent proceedings [*Hakim v. Commnr*, A 1955 P 198]. A party taking part in partition proceedings by revenue court can afterwards deny revenue court's jurisdiction to proceed with partition [*Gursahai v. Md Saiyid*, 84 IC 151: A 1925 P 137]. Where a revenue court upholds the plea that it has no jurisdiction and a civil suit is brought, the party putting forward the plea in the revenue court cannot deny its truth in the subsequent suit [*Mahadeo v. Puddi*, A 1931 O 123]. A person not having objected to the presence of a biased member in a tribunal will not be allowed to take the objection later [*Manaklal v. Premchand*, A 1957 SC 425]. A civil servant, having taken part in a departmental enquiry without raising any objection to the enquiry officer's competency to hold the enquiry, cannot after the enquiry is over and has gone against him turn round and contend that the officer had not been properly nominated [*Syed Hassan v. S*, A 1965 Mys 283; *Pannalal v. Union*, A 1957 SC 397 **follld**].

A person successfully opposing an application under s 47 C P Code on the ground that the section did not apply, cannot subsequently raise a plea in a later suit that it is barred by s 47 [*Uttamchand v. Saligram*, A 1929 N 79]. Plaintiff accepting surplus money of property sold in auction cannot challenge the sale [*Somnath v. Ambika*, A 1950 A 121]. When a tenant pleads that an application does not lie under s 105 B T Act and it is withdrawn, he cannot be allowed to say in a subsequent suit that the application operated as a bar to it [*Hemanta Kumari v. Prasanna*, A 1930 C 32]. A person opposing appeal on the ground that it should have been filed in a particular court is estopped from asserting subsequently that it could not be filed in that court

[*Ramkhelawan v. Maharaja of Benares*, A 1930 A 15; *Indermull v. Subordinate Judge*, A 1958 AP 779].

After a compromise that in default of payment of decretal amount, plaintiff will be at liberty to sell defendant's holding the latter is estopped from pleading non-transferability [*Nidhi Parida v. Karunakar*, 87 IC 250 (P)]. Even if a compromise is beneficial to a party, but he has not taken any benefit out of it, the compromise does not constitute an estoppel debarring him from challenging it [*Hriday v. Nirada*, A 1928 C 334]. When a compromise decree provided for full satisfaction if a lesser amount was paid by a certain date, withdrawal of the amount which was paid after that creates no estoppel [*Maruti v. Namdeo*, A 1949 N 385]. But a person taking benefit under a compromise decree cannot impeach it on the ground that all the parties did not join it [*Akbar v. Mt Adar*, A 1931 C 155: 34 CWN 996]. A party entering into a compromise before the settlement officer agreeing to pay under-proprietary rent, cannot turn round and saddle the defendant with such rent [*Manzoor v. Dawar*, A 1935 O 409]. In a suit for recovery of possession and mesne profits, the court first directed payment of additional court-fee which was paid and then directed payment of a higher sum as further court-fee—*Held* that the fact that plaintiffs at first paid some court-fee did not preclude them from disputing the later decision demanding excessive court-fee [*Manilal v. Durga*, 3 P 930: 80 IC 667]. A suit was restored on condition that plaintiff should pay Rs. 10 to defendant within a week. The money not being paid the appeal was dismissed. Subsequently the order was set aside after an explanation of delay and the money was accepted by defendant—*Held* that he was equitably estopped from appealing against the order of remand [*Hazari v. Ganja*, 18 IC 525].

Where a suit was ordered to be restored on payment of defendant's costs, who got the costs taxed—*Held* that having taken advantage of the order they were estopped from appealing against the order [*Banku v. Marium*, 21 CWN 232; *Puvvada v. Gagepathi*, A 1938 M 603]. So also in the case of amendment of plaint by acceptance of costs [*Sohan v. Dhari*, A 1928 L 813: 109 IC 819; *Dist Council v. Anna*, 1942 Nag 294; see also *Ramaswami v. Chidambaram*, A 1927 M 1009]. It has however been held that mere fact of receiving costs does not estop unless the costs are accepted after a conscious decision to abandon the right [*Fedl India Ass Co v. Anandrao*, A 1944 N 161; see *Seth Kunji v. Shankar*, 1943 Nag 492]. This principle of estoppel is not applicable where the benefit accepted would in any case be his, whether the appeal succeeded or failed. Thus where the court awarded decree on a bond with simple interest and disallowed compound interest, an appeal against it is not incompetent by acceptance of costs deposited by judgment-debtor on the basis of simple interest [*Jogendra v. Khodabaksh*, 72 IC 554]. Where after preferring an appeal, the decree-holder withdraws the money deposited under a decree under protest, he is estopped from prosecuting the appeal [*Kaikabad v. Khambatta*, A 1930 L 26 (*Sarat v. Amulyadhan*, 27 CWN 548: A 1923 PC 13 relied on)]. Where an *ex parte* decree was set aside on payment of costs and plaintiff's pleader accepted the costs—*Held* that in the absence of anything on the record to show that the costs were taken in token of the validity of the order, the plaintiff was not estopped [*Puttu v. Vidya*, A 1934 A 10—CONTRA: *Kapura v. Narain*, A 1949 P 491].

In a mortgage suit defendant pleaded that the suit was premature and it was dismissed. On a fresh suit, defendant was not allowed to plead limitation [*Efatoonisa v. Khondekar*, 21 WR 374]. Where a tenant in a rent suit denies relationship of landlord and tenant and sets up another as landlord, in a subsequent ejectment suit, he cannot plead tenancy [*Dubee Misser v. Munger*, 2 CLR 208. See *Sonaoolah v. Imamooden*, 24 WR 273; *Hatimullah v. Md Abju*, A 1928 C 312]. A person successfully suing another

for rent cannot subsequently be heard to impugn that defendant was a tenant [*Jitan v. Bhagwan*, 64 IC 262]. Where a person, twice obtained stay of sale in execution proceedings, on the allegation that he would satisfy it if time was granted, he was held to be estopped from saying afterwards that the decree was incapable of execution against him [*Coventry v. Tulsi*, 31 C 822; *Balbir v. Jugal*, 3 PLJ 454; *Fateh v. Kishen*, A 1935 C 816]. But a petition for stay of sale cannot always be interpreted to be an admission that the decree can be legally executed [*Mina Kumari v. Juggut*, 10 C 197 PC; *Cf Oodey v. Ladoo*, 13 MIA 585]. Obtaining adjournment of sale and payment from time to time in order to avert sale do not amount to a waiver of the judgment-debtor's right to bring a suit for an injunction to restrain the decree-holder from executing the decree. They are involuntary payments made under compulsion of law [*Harendra v. Gopal*, 62 C 421].

In an application for eviction if the landlord specifically states the amount of money on the deposition of which the tenant will exonerate himself he is estopped from contending that the deposit falls short on proper calculation [*Puran v. Mangal*, A 1969 Pu 367].

A person who refused to purchase after being given notice of sale, cannot afterwards claim pre-emption [*Jan Md v. Birit*, 87 IC 414 (A)]. Where the parties have acted upon a decree, as altered by them, for a number of years, and treated it as valid, the judgment-debtors cannot be permitted to take exception to its validity [*Gokhai v. Gonesh*, 17 CWN 565, 570: 16 CLJ 404]. A defendant accepting plaintiff's valuation in an appeal to the High Court, cannot be allowed to object to the valuation for preventing an appeal to the Privy Council [*Kristo v. Huromonee*, 1 IA 84; *Basanta v. Secy of S*, 14 CWN 872]. The fact that plaintiff valued his suit in the court of first instance at Rs. 10,000 does not debar him from contending that the value of the property in dispute in appeal to the Privy Council is more than that sum [*Surendra v. Dwarka*, 44 C 119: 21 CWN 530]. In the matter of jurisdiction there cannot be any estoppel simply because a plaintiff undervalued his previous suit [*Hazari v. Jhunna*, A 1931 A 21].

On the requisition of premises the owners are not estopped from claiming just compensation merely because they had given a low figure of annual rent for purposes of taxation [*Satnarain v. Union*, A 1970 D 232].

A person setting up an exclusive title against another, cannot in a subsequent suit claim as heir of the latter [*Bhagirathi v. Baleshur*, 17 CWN 877]. Where a person claims a certain property by challenging a certain trust deed, he cannot on failure of the claim, claim the property under the trust deed [*Sivarama Krishnaier v. Sivakami*, A 1927 M 498: 100 IC 648]. A person having claimed on basis of investment in commercial speculations cannot claim on another basis when he finds that the first basis is prejudicial to him [*Hariram v. Madan*, 33 CWN 493: 57 MLJ 581: 31 Bom LR 710: A 1929 PC 77].

A decree-holder is not estopped from executing his decree against a property merely because, on some previous occasion his agent endorsed on a notice of sale that the property need not be sold [*Mahboob v. Md Abdul*, 82 IC 434]. As to other instances of estoppel by inconsistent or different position, see *Langat v. Radhakishen*, 7 IC 781; *Gotha v. Sitaram*, 23 MLJ 335; *Girish v. Bepin*, 27 CLJ 535; *Bamacharan v. Nimai*, 35 CLJ 58; 5 CLJ 95; 15 CWN 125; 41 IC 69; 23 MLJ 335; 25 MLJ 324; *Peary Mohan v. Durlavi*, 18 CWN 954. A person giving an undertaking to a criminal court to abstain from certain action cannot avoid it by a civil suit [*Ram Saran v. Sheo Pratap*, 85 IC 586: A 1925 A 605]. A person pleading disqualification

by insanity in a former suit, cannot in a subsequent suit plead that there was no disqualification [*Brij Bhookun v. Mahadeo*, 17 WR 422].

Where a person has impleaded another person as a party to a suit, he cannot escape the effects [*Shamchand v. Dayamoyee*, 9 WR 338]. Where a party has contested a suit, he cannot plead in appeal that he was an unnecessary party, although true [*Kristo Gopal v. Kasheenath*, 6 WR 66]. When a party whose name did not appear in the cause title by mistake, but claiming to be a proper party takes steps for securing some relief from court, he is estopped from setting up afterwards that he was not made a party [*Sutharsana v. Samarapuri*, A 1928 M 690]. Where in a suit under s [6]9 S R Act a person is added as defendant on his own application a year after the date of the suit, he cannot plead limitation [*Bhaudin v. Ibraim*, A 1928 B 586].

A person obtaining and enjoying the benefits of an erroneous order cannot turn round and plead that it is a nullity [*Bepin v. Jatindra*, 6 IC 813]. Plaintiff cannot be allowed to turn round at the final stage and put forward a case inconsistent with the allegation in the plaint [*Kalimohan v. Birendra*, 22 CLJ 309]. Plaintiff objecting to the admissibility of a certain agreement in a previous suit upon which defendants relied and compelling them to withdraw the suit, is estopped from asking the court to grant a declaratory decree upon the basis of that very agreement [*Alam Shah v. Nurzaman*, 114 PLR 1913: 18 IC 804. See also *Rameshwar v. Sikhdar*, 21 IC 64]. But it has been held that when a party after denying the validity of an agreement and taking unsuccessful steps to rescind it, claims specific performance of it, there is not necessarily any inconsistency [*Srish v. Bonomali*, 31 IA 103: 6 Bom LR 501: 8 CWN 504, 600: 31 C 584].

A beneficiary under a will must take the will as a whole; he cannot demand benefit under it freed from the burdens imposed. He cannot both approbate and reprobate [*Balaji v. Sadashiv*, A 1936, B 389]. A party having obtained a benefit under one position cannot be allowed to assume a different and contradictory position while retaining the advantage gained. A party cannot be allowed to defeat his opponent by successive inconsistent position [*Veluswami v. Bommahi*, 25 MLJ 324: 21 IC 219]. Where in a suit for assertion of easement right to light and air, plaintiff applies for an injunction and defendant undertakes to demolish his building in the event of plaintiff's success in the suit, it is not open to plead in appeal that the building having already been erected plaintiff should only be awarded damages [*Bishan v. Behari*, A 1935 L 937]. A co-sharer under a partition decree cannot reprobate it after having obtained an advantage to the detriment of others but if the decree was a nullity, it cannot be affirmed by anything that a co-sharer does, short of obtaining an advantage to the detriment of others [*Jamilan-nessa v. Iffatennesse*, A 1929 C 586: 125 IC 105]. A party taking possession of properties allotted to him under a partition decree is not thereby precluded from preferring an appeal against the decree objecting to the propriety of the division [*Ammiraju v. Kondalarayadu*, A 1935 M 465].

Where a party actually affirms an award by taking benefits under it, he cannot turn round and say that the award is invalid unless he was acting under some misapprehension [*Annantalal v. Jnanada*, A 1920 C 255 : 50 CLJ 323]. There is a distinction between performing an award and accepting a benefit under an award. Where a benefit is accepted he may be precluded. The acceptance of a benefit even under protest might amount to acquiescence. But a party is not precluded by estoppel or acquiescence from challenging the validity of an award merely because certain payments have been made as directed by the award [*Isri Bai v. Pevi Bai*, 121 IC 164: A 1920 S 195].

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6. See now s 6 of Specific Relief Act 43 of 1963.

To a suit filed in the Small Causes Court side of munsif's court, defendant pleaded want of jurisdiction and the plaint was returned for being filed in the ordinary side. There was an appeal and a second appeal. Defendant was estopped from pleading that the suit was of small cause nature and that no appeal lay to the subordinate judge [*Aiyathuria v. Gnanaprakasa*, 52 IC 829; *Maharaja v. Balbhaddar*, 85 IC 481 (O); *Kartar v. Nanda*, 95 IC 864 (A); *Subbiah v. Raja of Venkatagiri*, 122 M 352; *Venavamalai v. Ma Sami*, A 1929 M 525].

A party cannot be allowed to approbate and reprobate in the same transaction. They cannot vary a case set up in the lower court [*Nidha v. Bundah*, 6 WR 289; *Mohima v. Ramkishore*, 15 BLR 142: 23 WR 174; *Devaji v. Godabhai*, 2 BHC 27; *Satyabhama v. Krishna*, 6 C 55; see also *Kristo Indra v. Huromonee*, 1 IA 84, 88; *Rupchand v. Sarbesur*, 10 CWN 747: 33 C 915; *Varajlal v. Bhaiji*, 6 Bom LR 1103; *Gurumukh v. Kanshiram*, 53 PLR 1915; *Basanta v. Secy of S*, 14 CWN 872: 24 C 440. When the parties to a decree come into court with an agreement to alter its terms, and the court passes an order modifying the terms of the decree in accordance therewith, either party is estopped from denying its validity [*Bunwari v. Abdul Ghafur*, 4 PWR 1909: 5 PLR 1909: 1 IC 48; see also *Debi Rani v. Gokul Prasad*, 3 A 585; *Stowell v. Billings*, 1 A 350 and *Ramlakhan v. Bakhtawar*, 6 A 623. But see *Ganga v. Murlidhar*, 4 A 240, and *Darbha v. Rama*, 1 M 387]. Where a person sued two railway companies for loss of goods but gave notice to only one of them who forwarded it to the other company who made enquiries and replied to the plaintiff, the other railway company is estopped from pleading for want of notice [*Dhanpat v. BBCR*, A 1928 L 438]. Approbation of marriage by a party by previous consent in a pervious petition bars a second petition for nullity of marriage [*H v. H*, A 1928 B 279].

Where a person with full knowledge of the facts admitted the *wakf* nature of a house, he cannot be allowed to resile from the position [*Jaidayal v. Ram*, A 1938 L 686; *Bibi v. Onkar*, A 1939 L 63].

Where a director of a company, with clear knowledge that he was interested in the allotment and could not vote, dealt with the shares on the footing that the allottees were holders he was estopped from saying that the allotment was invalid [*Narayandas v. Sangli Bank*, A 1966 SC 170; *York Tramways v. Willows*, (1882) 9 QBD 685 **folld**].

An assessee having induced the Income-tax department to make a provisional assessment subject to the condition that it might be revised when the firm of which he is a partner is finally assessed, cannot turn round when at the final assessment of his firm it is found that he is to pay much more [*Vuppala v. I T Officer*, A 1959 AP 174; *Baroness v. Customs Collr*, A 1958 AP 122]. The doctrine of "approbate and reprobate" is of no application in the assessment of tax [*CIT v. Firm Muar*, A 1965 SC 1216]. Where a party asked for an enquiry about the election of new office bearers of a Union and submitted to the jurisdiction of the Registrar, Trade Unions and took the chance of getting a favourable verdict he is estopped from challenging the jurisdiction [*Mukundram v. Raza*, A 1962 P 338].

Where valuation of suit in High Court is not corrected at the proper stage, the plaintiff is estopped from pleading undervaluation for changing the forum of appeal [*Koshalya v. Shiv Narain*, A 1963 Pu 400].

Where a Government servant, excercising his option to retire, asks for leave preparatory to retirement and the leave is granted permitting him to retire on the expiry of his leave as requested by him, then, even before the passing of final order

accepting his offer to retire, he is not entitled to revoke his offer to retire and request the Government to treat the leave granted as leave on private affairs [*Balmukund v. S*, A 1970 Or 130].

Where in a suit for recovery of money by sale of mortgaged property plaintiff without objection accepts the burden of proving execution of mortgage deed and adduces evidence in lower court it is not open to him to complain that the burden had been wrongly placed on him [*Ramkumar v. Bastu*, A 1971 Raj 124].

No Estoppel By Oral Statements of a Litigant's Witnesses in a Previous Suit.—In a prior litigation, the plaintiff in order to prove a certain contention of his, cited witnesses who gave evidence in his favour. In another action by the same plaintiff against other defendants, the latter claimed to put in the oral evidence in the earlier case as amounting to *prima facie* evidence binding on the plaintiff—*Held*, it was not admissible in evidence. There is a distinction in this respect between oral evidence and written evidence, for in the latter case, a party knows exactly what evidence he is letting in and will be bound by it, while in the former case he does not know exactly what a witness is going to depose to. It was ruled that "a litigant was not prevented from asserting a contention by the fact that in a previous suit against other parties, witnesses called on his behalf had given oral evidence to maintain the opposite contention, nor were the statements made by those witnesses statements for which he was responsible, so as to be admissible as evidence against him in a subsequent proceedings" [*Br Thompson-Houston Co Ld v. Br Insulated & H C Ld*, 1924, 1 Ch 203].

Estoppel Against Estoppel.—LORD COKE has said that "estoppel against estoppel setteth the matter at large." *S* the predecessor-in-title of plaintiff sued as a pauper disclaiming possession of a property and at the instance of defendant's father, who wanted to dispauper *S*, it was decided that *S* was in possession of that property. When plaintiff sued to recover that property, the disclaimer of S was pleaded against him by defendant. It was held that the previous contention of defendant's father was also an estoppel and estoppel against estoppel sets the matter at large [*Civa Rau v. Jevana Rau*, 2 MHCR 31]. In the case of one estoppel against another, the parties are set free and the court has to decide what their original rights are [*Jiwan v. Behari*, 45 IC 68: 152 PWR 1918]. As to estoppel against estoppel by conflicting judgments, see *R v. Hutchings*, 6 QBD 300 CA]. In a a case, however, the judge declined to act on the principle that estoppel against estoppel sets the matter at large, for which he could "find no authority" other than text books [*Poulton v. Adjustable C B B Co*, 1908, 2 Ch 430 CA; see Hals, 3rd Ed, Vol 15, para 394]. Where of two competing estoppels one arises out of the execution of a mortgage and the other arises out of the judgment in the previous suit, the latter estoppel should prevail [*Ram Udit v. Ram Samujh*, A 1931 O 263].

Estoppel Against Government.—Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice [*Century Spinning Co v. U Munl Council*, A 1971 SC 1021]. Like all other individuals the Govt may be brought within the grip of estoppel. There may be estoppels against the Government [see *Toolsemoney v. Maria Cornelius*, 11 BLR 144; *In re Purmanandas*, 7 B 109, 117; *Daboda v. Collr of Bombay*, 25 B 714; *Jethabhoy v. Collr of Bombay*, 25 B 752; *Mun Cor of Bombay v. Secy of S*, 29 B 580; *Vijay Kumari v. H P Admn*, A 1961 HP 32]. "The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has been long exploded" [*per* LORD ATKIN in *Reilly v. R*, 1934 AC 176, 179]. It has been said that estoppels by deed do not bind the Crown,

but that those by conduct do [*A G v. Collum*, 1916, 2 KB 193, 204]. Where an army officer wrote to the War Office regarding a disability and got a reply that it had been accepted as attributable to military service, it was binding on the Minister of Pensions [*Robertson v. Minister of Pensions*, 1949, 1 KB 227; see also articles at 210 LT 338; 212 LT 190; Phip 11th Ed p 927]. Where under an Export Promotion Scheme it was represented to the exporters that they would be entitled to import a certain amount of raw materials such representation was binding on the Government [*Union v Anglo-Afghan Agencies*, A 1968 SC 718].

Even though the promise made by the Government is not recorded in the form of a formal contract as required by Art 299 of the Constitution it is still open to a party who had acted on a representation made by the Govt to claim that the Govt shall be bound by it [*Union v. Anglo-Afghan Agencies, sup*; **folld** in *Century Spinning Co v. U Muni Council, sup*, Improvement Trust promised to give plots to a society under certain scheme but the scheme was scrapped due to the negligence of the trust. Subsequently, when another scheme was formed society was entitled to get plots as the Trust could not have benefit of its own negligence [*Atam Nagar Co-op House Bldg Society v. S*, A 1979 P&H 196]. The Export Control Order is legislative in character since this document was published in the Official Gazette so that everyone knows what the policy is as regards the export of manufactures and products having 50 per cent or less silver contents. The doctrine of estoppel cannot be pleaded as against legislative action [*Bansal Exports (P) Ltd. v. Union of India*, A 1983 Del 445, 454]. Since S 45B of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act gives power to the State Government and the collector to reopen the proceedings which are closed earlier, there is no question of any estoppel [*Harishchandra Singh v. State of Bihar*, A 1984 Pat 337, 340]. Merely because certain persons were permitted to export the cattle by road prior to the passing of the Gujarat Milch and Draught Cattle (Control of Government) Order, 1983, by the State Government and they have purchased trucks for that purpose, will not estop the State Government from enacting that order [*Kakoshi Vibhag Buffalo Salvage Commission Agent v. State of Gujarat*, A 1984 NOC 233 (Guj)]. The representations of either the State Government or of the authorities under the U.P. Sales Tax Act that 'weights and measures' were included in the term 'mill stores and hardware' would not give rise to a situation of estoppel against the statute [*Rishabh Kumar & Sons v. State of U P*, A 1987 SC 1576, 1577 : (1987) 12 I J R 203]. When the clause in an agreement between a bidder and the Government which provides an option for renewal also provides that the Government can refuse renewal without disclosing reasons there is no question of promissory estoppel [*Hari Om v. State of M P*, A 1987 MP 212, 218 (DB) : (1987) 8 IJR 281].

The prohibition against the additions of flavour in the tea for indigenous market was introduced by means of an amendment of Prevention of Food Adulteration Act and so there cannot be estoppel, against the Government in exercise of its sovereign, legislative, or executive functions [*Nilagiri Tea Emporium Mozamjahi Market, Hyd v. Govt of India*, 1990 Cri LJ 155, 160 (AP) : (1989) 2 An LT 260]. When as a matter of policy of the Government, the contracts for collection of terminal tax given by auction, which are yet to be executed have been cancelled as a matter of uniform policy by issue of general orders, the principle of promissory estoppel is not attracted [*Nandkishore v. Nagar Palika, Shajapur*, A 1991 MP 99, 100]. See *"Promissory Estoppel"*, *ante* and the illuminating judgment of Bhagabati, J, in *Motilal Padampat v. S*, A 1979 SC 621 cited therein where the point has been very ably discussed reviewing all Indian and English cases].

Where the Govt issues notification reviving earlier acquisition proceedings and also commences fresh proceedings but represents to the claimant that fresh proceedings will be the basis for compensation and he omits to avail of remedies under the

earlier proceedings relying on such representation, the Govt is estopped from treating the proceedings as revived [*R C Sood & Co Ld v. Union*, A 1971 D 170]. In a writ petition by a State employee the Govt is not bound by any statement made by it in previous writ proceedings between same parties if such statement does not cause change of jural relationship [*Binapani v. S*, A 1971 O 170].

Where the court of wards under the erroneous belief that certain forests belonged to the estate under its management, acquiesced in their possession and spent funds of the estate upon the forests in the public interest, and Government Officials under the same mistake acquiesced in the possession—it was *held* that there was no such representation as could give rise to an estoppel [*Gour Ch v. Secy of S*, 32 IA 53: 9 CWN 553: 28 M 130]. An act of the Deputy Commissioner, who held a person's estate as manager on behalf of the court of wards, in describing persons in possession as under-proprietors or in accepting rents from their mortgagees cannot create a title by estoppel in favour of them [*Jhagoo v. Dy Commr*, 101 IC 803]. Where lands belonging to a *talukdar* were wrongly described as rent-free in the village accounts, but on a reference by the Government, an order was passed that they were not rent-free, but the entries in the accounts continued as before—*Held* that Government were not estopped from giving effect to their previous order [*Sursingji v. Secy of S*, 28 Bom LR 1213: A 1926 B 590]. Any conduct of a Govt. Servant in violation of his duty will not operate as estoppel against Government [*Prosunno v. Secy of S*, 26 C 792; *Secy of S v. Faredoon*, A 1934 B 434; *Nowranglal v. S*, A 1965 Or 44].

In the case of exemption from holding inquiry and giving opportunity under Art 311(2) of the Constitution the Government is not estopped from claiming such exemption after proceeding to hold an inquiry [*Sunil v. S*, A 1970 C 384].

Admissions in Govt's affidavits in earlier similar proceedings and other admissions in Parliament being mere expression of opinion limited to the context and also being rather vague hopes but not specific assurances held not binding so as to create an estoppel [*P C Sethi v. Union*, A 1975 SC 2164]. When the agreement to supply electrical energy at a concessional rate was not the outcome of any unilateral promise or assurance held out by the State or the Board but was the result of negotiations between the parties there is no question of promissory estoppel [*Indian Aluminium Company v. Karnataka Electricity Board*, A 1992 SC 2169, 2185].

Estoppel Against Corporations.—The principle of estoppel by conduct applies to corporations as well as to individuals. A corporation is bound as much as an individual by the wrongful acts of its servants, and the results of misrepresentations by an agent is the same in the case of Corporation as in the case of an individual [see *Eastern Ry Co v. Hawkes*, 5 HL Cas 331; *Houldsworth v. City of Glasgow Bank*, LR 5 Ap Cas 317, and Caspersz's Estoppel 4th Ed Ch VIII, where the subject has been fully dealt with. See also Bigelow on Estoppel, 6th Ed pp 497-508]. The State Financial Corporation by an agreement agreed to advance a loan of Rupees thirty lakhs to a company to set up a 4-star hotel. Relying on that agreement the company incurred heavy expenditure to set up the Hotel. The principle of promissory estoppel would certainly estop the corporation from backing out of its obligation [*Gujarat State Financial Corporation v. Lotus Hotels (P) Ltd*, A 1983 SC 848, 852]. When the State Financial Corporation had filed a suit for recovery of loan with a prayer to sell the hypothecated goods, they cannot pursue the other remedy under sec 29 of the State Financial Corporations Act to seize the same goods under the principle of doctrine of election [*Gulf Fishing & Co v. Orissa State Financial Corporation*, A 1987 Ori 119, 121: (1987) 63 Cut LT 151]. Where a person has treated an association as a Corporation by making contracts with it in its assumed corporate capacity, he

cannot when used on the contract after enjoying the benefit of the contract, give evidence to show that the plaintiff has no corporate existence [*N W Auto Co v. Harmon*, 250 Fed 832]; nor can a company which has executed notes or mortgages or other contracts, while assuming to act in a corporate capacity be allowed to prove in an action against it on such contracts that there has been no legal incorporation [*N W Aute Co v. Harmon, ante*, Jones, s 276]. But as there can be no estoppel against the law of the land, a Corporation like any other individual cannot be estopped from denying that a contract entered into is *ultra vires* and beyond its statutory powers [see *Canterbury Corp v. Cooper*, 1909, 100 LT 597 CA; *Fairtitle v. Gilbert*, 2 Term R 169; *Blackburn & D B B Society v. C B & Co*, 29 Ch D 902 CA; *Br M Banking Co v. C F Rail Co* 18 QBD 714 CA; *Madras Hindu M B P Fund v. Raghava Chetti*, 19 M 200]. A Corporation cannot indirectly do by placing itself under the disability of estoppel, what it would not have directly done by reason of statutory prohibitions [*Maritime Elec Co v. Genl Dairies*, 1937 AC 610; see *Satibhusan v. Corpn*, A 1949 C 20 *ante*]. Unauthorised agreement made by a director does not estop the company from setting up the director's absence of authority [*Rama Corpn Ld v. Proved Tin &c*, 1952, 1 All ER 554].

Where a local authority has a discretion to confer a benefit on a citizen rather than duty to confer a right, a decision exercising that discretion is not irrevocable. Where it has exercised its discretion in favour of a citizen, but subsequently found the decision to have been based on wrong or mistaken facts (in this case transport facility provided to a school child under the mistaken belief that he was living more than 3 miles away) it then comes under a duty to review the decision and to alter it if it is necessary. The doctrine of estoppel cannot be used to prevent a local authority from exercising a discretion which it is required by statute to exercise. Even otherwise in the circumstances of the case the plaintiff had not altered her position to her prejudice so as to enable her to rely on estoppel [*Rootkin v. Kent County Council*, (1981) 2 All ER 227 CA].

Representation by company through agent, estops the company [*Scottish U & N Ins Co v. Roushan Begum*, A 1945 O 152]. The agents of a joint stock company—a joint Hindu family firm—borrowed money on *hundis* executed by the managing member of the Firm in name of the company. There was nothing on the face of the *hundis* to show that the person signed as agent and not in his personal capacity—*Held*, that although the articles of association were not valid, yet the company was estopped from raising the plea of their invalidity against the holders in due course of the *hundis* [*Kunj Kishore v. Offl Liquidator*, 36 A 416]. Although the doctrine of estoppel and part performance apply to corporations yet no sort of part performance or ratification can bind a Corporation to a transaction which the legislature has forbidden it to undertake [*In re A Rasul*, 41 C 518: 18 CWN 430].

A company was held not to be estopped from denying that certain shares were the property of a *mutt* [*Sree Mohant v. Coimbatore S & W Co*, 26 M 79; See *Rivett Carnac v. New Mofussil Co*, 26 B 54; *Ex parte Gilbert*, 16 B 398]. Although a secretary to a joint stock company is not ordinarily a general agent, but is *prima facie* a person invested with authority to give effect to the decision of the directors, yet when the terms of an agreement were approved by the managing director also, it becomes operative against the company [*Khulna Loan Co v. Jahir*, 28 IC 209]. Where a person has acted for many years as director and shareholder, has taken part in meetings without taking exception to his appointment, he is estopped from objecting to the validity of the director's appointment [*Imperial O S Co v. Wazir*, 31 IC 595].

A company is precluded from denying the validity of its own share certificates, even though they have been obtained by means of a forged transfer [*Balkis Co v.*

Tomkinosn, 1893 AC 396; *Re Ottis Kople*, 1893, 1 Ch 618] though this does not apply to a certificate forged by the secretary [*Ruben v. G F Co*, 1906 AC 439]. A certificate that shares are fully paid will estop the company as to that fact, even against an allottee, if he has acted *bona fide* on the faith of the statement [*Bloomenthal v. Ford*, 1897 AC 156]. The execution of a blank transfer by the owner of shares does not, however, estop him from proving his title as against a third party who has advanced money on the shares [*Colonial Bank v. Cady*, 15 App Cas 267—Phip 11th Ed, p 928].

Estoppel Against Principals.—Where a man holds out another as having authority to act for him in a particular transaction or in particular course of business, he will be estopped, as against one who has been innocently induced to negotiate with the supposed agent from disputing the authority of such person to act for him [see Bigelow, 5th Ed, p 665, and Casperz, 4th Ed Ch V, p 96; see *Wing v. Harvey*, 5 De G M & 256 CA; *Holdsworth v. L & Y Ins Co*, 1907 23 TLR 521].

An estoppel against a principal is dealt with in s 237 of the Contract Act. See also the observations of LORD CRANWORTH in *Ramsden v. Dyson*, 1 E & IA 129, p 158 and also the observation of PHEAR J, in *Grant v. Bundhu-Shaw*, 2 Hyde 311. A representation by an agent is as effectual for the purpose of estoppel as if it had been made by a principal [*Kathi-Kumma v. Urothel*, A 1931 M 647].

As to the authority of an agent to bind the principal in his dealings with third parties see *Spink v. Morgan*, 21 WR 161, 177 and *Gendan Singh v. Inder Narain*, 3 CLJ 537. Even when an agent exceeds the extent of his authority, the principal is bound by the contract, if the contracting party has reasonable grounds for believing and in good faith believes, in the authority of the agent [*Ram Protap v. Marshall*, 26 C 701 PC : 3 CWN 313]. But when a person who deals with an agent whose authority he knows to be limited does so at his own peril, there can be estoppel against a principal in respect of any steps in a transaction whereby the customer is deceived by the agent acting beyond his authority [*Russo-Chinese Bank v. Li Yan Sam*, 5 IC 789: 14 CWN 381 PC]. Every act done by agent in the course of his employment on behalf of the principal and within the apparent scope of his authority binds the principal, unless the agent is in fact unauthorised to do particular acts and the person dealing with him has notice of it [*Khulna Loan Co v. Jahir*, 24 IC 209; *Katyarjani v. Port Canning & L I Co*, 19 CWN 56]. As to estoppel against principal for money deposited with his manager of business not in the course of business, see *Divan v. Pool*, 247 PLR 1914. As to whether recognition of status of tenant by agent or *lomastha* of landlord is binding on the landlord; see *Mothihari Concern Ld v. Lachmi*, 35 IC 81 and other cases cited in notes to s 106 *ante*, p 921. Surety pleading payment to plaintiff's creditor in a suit by the creditor is equitably estopped from again pleading payment in a suit for damages by the plaintiff [*Nalappa v. Vridhachala*, 37 M 270]. A lawyer cannot waive the rights of his client without referring the matter to him. If the client does not relinquish his right voluntarily with knowledge of it deliberate inaction by the lawyer would not affect him [*Gooyee v. CIT*, A 1966 C 438].

Estoppel Against Agent.—Generally speaking an agent entrusted by a principal with the management of his business or property is estopped from denying the principal's title. A representation by an agent is of the same effect as the representation of a principal. Where a person induces others to contract with him as the agent of a principal by an unqualified assertion that he is authorized to act as such agent, he is answerable to the person who so contracts for any damages he may sustain by reason of the authority being untrue; and the fact that the professed agent honestly

thinks he has authority in no way assists him [*Collen v. Wright*, 27 LJQB 215, 217]. A similar rule is also to be found in s 235 of the Contract Act. In *Hasonbhay v. Clapham*, 7 B 51 this section is stated to be in accordance with the English case as established by *Collen v. Wright, sup* where WILLES J, said:—"The obligation in such a case is well expressed in saying that the person professing to contract as agent for another, impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorized that the authority he professes to have, does in point of fact exist." [See also *In re Mohendra Nath*, 9 WR 206 and *Lokhee v. Kally Puddo*, 23 WR 358 PC]. In order that the principal may be bound by the representation of the agent, the latter must act within the scope of his authority, actual or ostensible [*Barnett v. S L Tramways Co*, 18 QBD 815 CA; *Spink v. Morgan*, 21 WR 161]. S 78 of the Contract Act should be read subject to the law of estoppel [*Solomon v. National B of India*, 19 Bom LR 789 (1 A 79 **not folld**)].

Estoppel in the Case of Partners.—Where a man holds himself out as a partner, or allows others to use his name, he is estopped from denying his assumed character upon the faith of which creditors may be presumed to have acted, and becomes a partner by estoppel [*Mollwo March v. Court of Wards*, LR 4 CP 419]. Estoppel as to partners has its basis on the law of principal and agent [*Chandee Churn v. Eduljee*, 8 C 678, 684]. See also *Porter v. Incell*, 10 CWN 313, where it has been pointed out that the word "intentionally" is omitted in s 245 of the Contract Act and that it was immaterial whether the defendant acted fraudulently or even negligently. An agreement to refer to arbitration by one partner though not originally binding on other partners might become binding later on by acquiescence or acceptance of benefits thereunder [*Dwarkanath v. Haj Md*, A 1914 PC 33 : 18 CWN 1025 : 24 IC 307 : 17 Bom LR 5].

The rule as to the liability of partners dormant and ostensible continuing or retired, is stated in s 28 of Partnership Act, and the notice requisite to person dealing with the firm sufficient to discharge such liability is referred to in s 45 of that Act [see Casperaz, 4th Ed Ch 6 p 113 *et seq*].

Estoppel in Pre-emption.—Person consenting to the transfer is estopped from claiming pre-emption not only against vendor and vendee but against a rival pre-emptor [*Ram Dawan v. Ram Surat*, 117 IC 345 : A 1929 A 589; *Maruti v. Kisan*, A 1951 N 451]. Right of preemption can be defeated by plea of estoppel based on conduct of the party [*Roopi Bai v. Mahaveer*, A 1994 Raj 133]. A sale of immovable property of Rs. 100 must be by a registered instrument. The mere fact that the name of the supposed vendee has been substituted in place of the supposed vendor does not make a sale. The vendor is not estopped from saying that the property has not been sold [*Bhagwan v. Tasadduq*, 115 IC 642 : A 1929 A 549]. Pre-emptor party to suit by village landlords challenging sale to be pre-empted—Sale was confirmed by a compromise decree—Plaintiff's claim to pre-empt cannot be entertained [*Rikhi v. Dhanpat*, 55 IA 266 : 33 CWN 90 : A 1928 PC 190]. Ss 14 and 15 Agra Pre-emption Act do not lay down exhaustively the rule of estoppel applicable to a pre-emption suit. Where a pre-emptor expressed a clear intention not to pre-empt and waived objection in unequivocal language he is estopped from pre-empting [*Basira v. Shk Ataullah*, A 1929 A 453. See *Ranjit v. Bhagwati*, 48 A 491; *Rameshwar v. Ghisiawan*, A 1929 A 531]. If the right of pre-emption under Partition Act arises only after a suit for partition is filed by the stranger purchaser it cannot be said to have been waived after the sale of a share to a purchaser who is a stranger to the undivided family. Mere fact of disinclination to purchase the share of a co-sharer or non-objection to the possession of a part of the property which are being earlier to the filing of the partition suit by the stranger purchaser do not amount to a waiver of the

right of pre-emption and there is no question of any estoppel [*Sm Nirupomo Basak v. Baidyanath Pramanick*, A 1985 Cal 406, 421]. Purchaser settling his bargain with the vendor on the assurance of the pre-emptor that he will not pre-empt, cannot set up the plea of estoppel in a suit under s 183 Berar L R Code [*Govindsa v. Ismail*, A 1950 N 22]. The plaintiff is not estopped from exercising his right of pre-emption on ground of collusion merely because the vendor who is the father of plaintiff pre-emptor helped him exercise that right [*Sukhnandan v. Jamait*, A 1971 SC 1158]. The right of pre-emption of any person can be extinguished by waiver or abandonment or by conduct [*S Sundaram v. R Damodaraswami*, A 1987 Mad 15, 16 : (1986) 99 Mad LW 56].

Estoppel in Taxation Matters.—There is no estoppel in law against a party in a taxation matter. Where for clearance of goods from Customs Authorities a party may have given the classification in accordance with the wishes of the Customs Authorities or under some misapprehension it cannot be estopped from asking refund on proper appraisement if the law allows [*Dunlop v. Union*, A 1977 SC 597]. The clarifications/circulars issued by Central/State Govt. regarding taxability of certain goods represent merely their understanding of the statutory provisions and even though these circulars/clarifications are communicated to the dealers concerned, nothing prevents the State from recovering the tax, if in truth such tax was leviable according to law. [*Bengal Iron Corpn. v. Commercial Tax Officer*, A 1993 SC 2414, 2420].

Estoppel in Income-Tax Assessment.—Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not. If it is not taxable under the statute it cannot be taxed on the basis of estoppel or any other equitable doctrine [*Commr I T v. Firm Muar*, A 1965 SC 1216]. The assessing officer is not bound to accept the system of accounting regularly employed by the assessee the correctness of which had not been questioned in the past. There is no estoppel in these matters [*Commissioner of Income-Tax, Calcutta v. British Pains India Ltd.*, A 1991 SC 1338, 1343].

Estoppel does not apply in the case of successive assessments. An assessment is complete in itself and the taxing department is not bound by any contention it took up in one assessment when the question arises with regard to a different assessment [*Kantilal v. CIT*, A 1955 B 53; *Gaffoor v. CIT*, 1961 AC 584; see however *Bansidhar v. CIT*, A 1934 P 46]. Failure to object to the place of assessment before the institution of the civil suit amounts to a waiver [*Kamakhya v. Union*, A 1966 P 305].

Estoppel in Industrial Disputes.—It is doubtful whether principles analogous to *res judicata* can properly be applied to industrial disputes. The trend in recent decisions is that application of technical rules such as *res judicata*, acquiescence, estoppel etc, are not appropriate to industrial adjudication [*S S Railway Co v. Worker*, A 1969 SC 573]. Where the retrenched workmen, being in a starving condition, are forced to accept the retrenchment benefit they are not estopped from challenging the legality of the retrenchment [*Hind Ship Mining Corporation v. Raj Kishore*, A 1967 P 12 following *Workmen v. Subong Tea Estate*, 1964, 5 SCR 603]. An employee accepting pension from a company is not estopped from questioning the same before the court through his union. On question of estoppel arises in cases where employees, being pitched against the management are not in an equal position in bargaining [*Namburnadi Tea Co v. The Workmen*, A 1968 As 39].

Where, however, in an industrial dispute an employee alleges absence of an enquiry he cannot be allowed to contend that proper procedure was not followed [*Model Mills v. State Industrial Tribunal*, A 1967 B 147]. Where there was settlement

outside conciliation proceedings between employer and majority Union, acceptance of benefits flowing from the settlement even by workmen who were not signatories to it do not operate as estoppel against minority Union raising same demands [*Tata Chemicals v. Workmen*, A 1978 SC 828]. Where Industrial Tribunal rejected plea of protected workman under s 33 I D Act at the instance of management, it cannot be allowed to raise a plea of ouster of jurisdiction in appeal on the ground that forum of relief is an application under s 33A I D Act [*Remington Rand v. R Jambulingam*, A 1974 SC 1915].

Estoppel Against Licensee of Patent.—See s 117 *post.*

Estoppel in the Case of Trustee And *Cestui que trust*.—A trustee is not an agent: the fact that he has the legal estate is not a representation that he has authority to deal with it by mortgage or sale which will permit the *cestui que trust* from setting up his equitable title against that of a borrower or purchaser without notice of the trust, for trusts are ordinary incidents of life. Such persons can protect themselves by getting in the legal estate, but not on any ground of estoppel. But where a person has been entrusted with title-deeds with authority to raise money on them, the owner of the deeds cannot take advantage of any limitation of amount which he placed upon the authority to raise money, as against a lender who had no notice of it and who has relied on the deeds [Hals Vol 13 para 556]. To raise an estoppel against a cestui que trust either by concurrence or by acquiescence, there must clearly be the fullest knowledge and an active course of conduct on his part. Similarly to raise an estoppel against a trustee, the representation by him must be sufficiently precise, and must have induced a change of position on the part of the cestui *que trust* [*Lewis v. L*, 1904, 2 Ch 656; Caspersz 3rd Ed p 198]. See *Srinivasa v. Venkata*, 29 M 239 : 16 MLJ 238 where Bigelow on Estoppel was referred to by SUBRAMANIA ATYYAR J, (v *ante*: "*Estoppel by agreement*")]. The case in 29 M 239 has been confirmed in 38 IA 129 : 15 CWN 741 : 34 M 257; and **followed** in *Munisami v. Maruthamal*, 34 M 211, 215 where WALLIS J, observed: "As regards trustees the principle is embodied in s 14 of the Indian Trusts Act, and it is well settled that an executor is for most purposes in the position of a trustee as observed by KAY J. *In re Marsden*, LR 26 Ch D 783, 789". See *Newsome v. Flowers*, 30 Beav 461 (**refd** to in *Sidhu v. Gopi*, 17 CLJ 233 : 18 IC 969) where it has been held that a trustee of an endowment may commit a breach of trust and may still be estopped againt a *bona fide* transferee for value without notice of the breach of trust although beneficiaries may not be estopped by the improper conduct of the trustee.

A trustee who had mortgaged trust property alleging it to be his own, afterwards sued to recover it from the purchaser at the auction sale on the ground that it was trust property—*Held*, he could not be allowed to recover upon a title antagonistic to his former representation [*Gulzar v. Fida Ali*, 6 A 24]. But in a case it has been held that though the representatives of a mortgagee are estopped from denying the mortgagor's title, it is open to them as mutwallis to plead that the property was *wakf* and that the mortgage was void [*Nandan v. Jumman*, 34 A 640 : 10 ALJ 278]. A trustee who mortgages temple land for private purposes, which is afterwards sold at the instance of the mortgagee, can sue on behalf of temple to recover landlord's interest and is not estopped from setting up a claim against a *bona fide* purchaser for value [*Yasin v. Ekambara*, 37 MLJ 698 : 54 IC 497]. A person who has always acted as a trustee of a public temple cannot later claim that as his private property [*Venkata Ramana v. Rama Mandiran*, A 1966 AP 197]. In proper cases the acts of former trustees should be binding by estoppel upon succeeding trustees [*Shri Ganesh v. Keshavrao*, 15 B 625].

An implied dedication of land for public use is founded upon the principle of estoppel arising out of acquiescence in an exclusive and continuous user. It may also be said that a relation of trust arises [*Ch of Howrah Mun v. Khettra*, 4 CLJ 343, 348]. A *cestui que trust* concurring in payment of money by administrator is estopped by his conduct [*Ardeshir v. Manchershaw*, 12 Bom LR 53]. Plaintiff's father as trustee of temple granted a *kanom* demise to the defendants' assignor. Plaintiff sued to redeem the *kanom*. *Held*, that defendant would be estopped from denying the title of the temple to the land, but would not be estopped from denying plaintiff's right to redeem on the ground that he was not the trustee at the date of the suit [*Paramathan v. Choorakapathil*, 14 IC 168 : 1912 MWN 445]. A religious trust will not be estopped by any act or conduct of its trustee committed in breach of trust [*Perumal v. Mahammad*, 28 IC 840]. Where a trustee had taken certain proceedings arguing that a particular statute applied, a religious institution is not estopped from contending that it falls outside the purview of the statute [*S v. Kunnakudi*, A 1965 SC 1570].

No person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself [(**affirming** 29 M 239); *Srinivasa v. Venkata Varada*, 38 IA 129 : 34 M 257 : 15 CWN 741]. Where on a previous occasion the claims of reversioners of the person creating the trust were negatived as the persons in possession claimed it to be trust property, the latter were estopped from denying that the trust was a valid one [*Pichal v. Lingam*, A 1928 M 268].

Estoppel by conduct Against Members of a Hindu Family. [Reversioners].— Three classes of estoppels may arise in regard to reversioner : (1) that which is embodied in s 115; (2) election to take a benefit under the transaction and (3) ratification. If the presumptive reversioner is a minor at the time of taking benefit under the transaction the principle of estoppel will be controlled by another rule governing the law of minors [*S Shanmugam v. K Shanmugam*, A 1972 SC 2069]. The common incident of one member of a joint Hindu family selling or purchasing property on behalf of the family does not constitute him their agent so as to make a sale by him binding on the other members [*Bhujonanund v. Radha*, 7 WR 334]. But where they have held out to the world that one of their members was a manager of the joint family and thus induced third persons dealing with him to believe that he had authority to mortgage their whole interest, they may by their conduct be estopped from contending that the mortgage was not binding on their shares [*Krishnaji v. Moro Mahadev*, 15 B 32; see *Damodar v. Maharam*, 13 CLR 96]. A son who is a co-parcener loses his competency under s 115 to contest his father's objectionable alienations of ancestral property if he condones and gains benefit of the transaction [*Dowan Shil v. A B of Simla Ltd*, 215 PLR 1914]. Where an alienee from a Hindu father applied for mutation and the son on being examined did not object, he was estopped [*Sheo Dan v. Habibullah*, A 1924 A 721].

An undivided member of a tarwad executed a sale-deed in respect of his share. In such a case only the incompetence of the undivided member to deal with such interest that vitiates the transfer. There is no scope for invoking the doctrine of estoppel feeding the title even on equitable consideration. [*Achutha Menon v. Jaganatha Menon*, A 1984 Ker 51, 56 : 1983 Ker LT 939]. Pending a suit for partition, a defendant who is stranger purchaser of the homestead filed an application for abatement of suit on the allegation that by virtue of a notification that the disputed land came within the consolidation area. If in such a case, non-traverse of that notification by the plaintiff would not lead to the irresistible conclusion that there is such a notification. [*Narahari Mallik v. Jadumani Mallik*, A 1987 Ori 122, 123 :

(1987) 63 Cut LT 33]. When the mother of the last male owner who had been claiming right in preference to that of the daughters of the male holder was appointed guardian of these minor daughters on the basis of her statement that she will not claim title adverse to that of the minor daughters, she is estopped from making such a claim again. [*Harchand Singh v. Mohinder Kaur*, A 1987 P&H 138 : 1987 Rev LR 35]. If an unregistered partition deed has been acted upon, the question of estoppel would come into play only in favour of a person arrayed as a defendant claiming adverse possession and not in his favour when he is the plaintiff claiming title under the unregistered partition deed. [*Smt. Chandervati v. Lakhmi Chand*, A 1988 Del 13, 20 (DB) : (1987) 5 Reports 507]. Under the Hindu law, there is no presumption that a property standing in the name of a co-sharer is a joint family property [*Raghunath Tiwary v. Ramakant Tiwary*, A 1991 Pat 145, 153].

Where the reversioner of a minor Hindu widow who had a business, took a power-of-attorney from her and induced plaintiff to do business with her, he is estopped from setting up the minority of the widow [*S I E Co v. Visvanatha*, 15 MLT 323]. Where reversioners induced defendants to purchase from widow by representing that the false recital of legal necessity in the recital was true, they were clearly estopped from challenging the sale [*Bhubaneshwari v. Haradhan*, 21 CWN 728]. Sale without legal necessity but with consent of reversioner creates an estoppel whether such reversioner is a male or female [*Akkawa v. Savad Khan*, 102 IC 232 : 29 Bom LR 368 FB : 51 B 475; *Tangeva v. Govindappa*, 113 IC 42 : A 1928 B 495]. A reversioner entering into an agreement with a female life-tenant and recognising her as absolute owner, is estopped from questioning her power to alienate or the title of her transferee [*Satnarain v. Bindeshri*, 87 IC 787]. A Hindu widow alienated most of her husband's property by three deeds among which one was a sale-deed in favour of A, a reversioner. A survived the widow and did not challenge the alienation. In a suit for the recovery of the properties by the heirs of A,—*held* that the three deeds were part and parcel of one transaction, and the plaintiffs were precluded from questioning them [*Ramgowda v. Bhausaheb*, 54 IA 396 : 52 B 1 : A 1927 PC 227 : 29 Bom LR 1380, 1384 : 32 CWN 88].

Where a reversioner expressly subscribed his consent to an alienation by a widow and he was not ignorant of the nature of the transaction, he was estopped [*Venkata v. Tuljaram*, 38 IC 270 : 1917 MWN 30: *Mahadeo v. Mata*, 19 ALJ 199; *Basappa v. Fakirappa*, 23 Bom LR 1040 : 46 B 292; See *Bajrangi v. Manokarnika*, 30 A 1; *Rangasami v. Nachiappa*, 42 M 523; *Bijoy v. Krishna*, 34 C 329; *Bai Parvati v. Dayabhai*, 44 B 488; *Fateh v. Rukmini*, 45 A 339]. Where the ancestors of a reversioner had admitted the execution of a sale-deed by a widow but her knowledge and understanding of the document was nowhere admitted, the reversioner is not estopped [*Rajeshwar v. Harkishen*, A 1933 O 170].

If a reversioner consents to an alienation by a Hindu widow, such consent has to be regarded as an effective election by him and the alienation is binding on him. Where, however, the consenting reversioner who becomes the actual reversioner is a female, the next reversioner will not be bound unless there is proved legal necessity or due enquiries as to its existence [*Kunja v. Rasik*, 3 CWN 474]. See, however, *Mohinder v. Lachhman*, A 1965 Pu 317, which decided that on an alienation by a widow with her daughter's consent the daughter and her sons are all bound by the alienation. The situation is different in the case of a surrender which does not require the consent of the reversioners and accordingly they are not estopped from challenging it [*Ram Prasad v. Sital Prasad*, A 1965 P 47].

Attestation to a widow's mortgage by a reversioner was held consent [*Ram Adhar v. Bhagwan*, 85 IC 580 : A 1925 A 209]. There is not much difference for practical

purposes between a consent given by word of mouth or conduct or by attestation of the document [*Amar v. Rajendra*, 87 IC 790 : A 1925 C 1205; See *ante*, notes to s 114 under 'Reversioner', p 1024]. Document reciting reversioner's consent who also gives thumb-impression, creates estoppel [*Sundar v. Bhan*, 90 IC 1032 (L)].

A reversioner buying half village by same deed, by which the settlor buys the other half for dedication to deities, is not estopped from questioning that dedication [*Bhekdhari v. Ramchandraji*, A 1931 P 275]. The mere fact that reversioners stood by and asked another person to purchase the property from the female would not estop them from claiming the property when the purchaser knew that the holder had only a life-interest [*Swaminatha v. S*, A 1927 M 458 : 99 IC 772]. Daughters taking estate of father under a will from mother are not estopped from claiming subsequently as heir to their father on the ground that the will is invalid [*Alamelu v. Balu*, 26 IC 455 : 16 MLT 592 : 43 M 849]. Where a widow makes a gift of her husband's property as widow to her daughter and her husband jointly, the daughter's acquiescence for less than twelve years in the position that her husband was co-owner, does not constitute estoppel so as to deprive her reversionary right [*Pappammal v. Alamelu*, 119 IC 152 : A 1929 M 467].

The consent of a reversioner in a transaction by a Hindu widow is something more than presumptive evidence of legal necessity. It is further a 'stringent equity' binding on the reversioner [*South I E Co v. Subbier*, 1915 MWN 488; See *Kama Sastri v. Kunnumma*, 48 MLJ 284 : 88 IC 764]. Where a 'stringent equity' arising out of an alleged consent is sought to be enforced against reversioners, such consent must be established by positive evidence to the effect that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests. Such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony [*Harikrishna v. Kashi*, 42 IA 64 : 17 Bom LR 426 : A 1914 PC 90 : 42 C 876 : 19 CWN 370 : 28 MLJ 565]. The words "stringent equity" in the above case do not intend to lay down that the presumptive reversioner's consent render the transaction unimpeachable [*Parasurama v. Malireddi*, 42 IC 496 : 22 MLT 260].

The general principle is that a reversioner relinquishing his rights for consideration cannot be permitted to go back [*Beni v. Shambhu*, 114 IC 908 : A 1929 A 196; *Raghubir v. Narain*, 126 IC 24 : A 1930 A 498]. Where in a dispute between a limited owner and a claimant there was a compromise dividing the property between them which was acted upon for several years and later when succession opened out to the latter as reversioner and he claimed the rest of the estate, *held* that he was estopped [*Kanhai Lal v. Brij Lal*, 45 IA 118 : 40 A 487 : A 1918 PC 70 : 22 CWN 914; *Dhian v. Jugal*, A 1952 SC 145 : 1952 SCR 478 (benefit taken under arbitration); see also *Hardei v. Bhagwan*, 24 CWN 105; *Pokhar v. Dulari*, A 1930 A 687; *Annada v. Gour*, 48 C 536; *Chahlu v. Parmal*, 41 A 611; *Nakched v. Subhdeo*, A 1930 A 430]. Such an agreement is binding even though the party resisting was no party to it [*Bahadur v. Ram Bahadur*, 45 A 277 : 21 ALJ 140 : 71 IC 405]. A person having full knowledge of his rights as a possible reversioner entering into a compromise which settles his claim as well as the claim of the opponent at the relevant time, cannot be permitted to go back on that arrangement when reversion actually opens [*Krishna v. Gulabchand*, A 1971 SC 1041; *Subbu Chetry's &c v. M Raghava*, A 1961 SC 797 : 1961, 3 SCR 624 **folld**]. Where in a suit filed by *A* claiming that *A* and *B* are reversioners but *B* disclaims to be a reversioner and the suit ends in a compromise decree in absence of *B*, *B* is estopped from claiming a share [*Venkatrayudu v. Ramanna*, A 1973 AP 96]. A compromise by a presumptive reversioner under which he takes a benefit, as to the right of his branch to the *spes successionis*, cannot debar his descendants who happen to be the actual reversio-

ners from claiming to succeed to the reversion [*Bindu v. Lalita*, 41 CWN 161 : A 1936 PC 304].

Where various claimants divide the properties by a family arrangement, they are estopped from challenging the validity of the settlement [*Jagdamsahay v. Rupnarain*, 5 PLT 375 : 84 IC 208]. A Hindu reversioner entering into a compromise which amounts to a settlement of a doubtful claim is bound by it. There is nothing to prevent him from so acting as to estop himself by his own conduct from subsequently claiming a property to which he may succeed [*Moti Shah v. Ghandhrab*, 48 A 687 : 96 IC 505]. A reversioner joining a Hindu widow in a mortgage is bound by the recital as to legal necessity, and cannot claim in opposition to the deed [*Shib Ch v. Dulcken*, 28 CLJ 123 : 48 IC 78; see *Jogendra v. Mahindra*, 47 IC 978; *Srinivasaraghabachariar v. Rajagopalachariar*, A 1927 M 438]. Where persons contesting an alienation by a Hindu widow claim not through their father but directly as reversioners of the last male owner, they are not precluded by any rule of estoppel from disputing the alienation [*Ramesh v. Sasibhusan*, 23 CWN 1025 : 30 CLJ 556]. Where a reversioner by receiving some items of property from the widow relinquished his reversionary right to the remainder, the fact that his son himself inherited those items which the father received, does not estop him from questioning the subsequent alienation by the widow in favour of others [*Satyanarayana v. Venkanna*, A 1933 M 637]. If on a surrender the father received the benefit but the son claiming through him did not, the son was not estopped from challenging the surrender [*Ram Prasad v. Sital Prasad*, A 1965 P 47]. *B* widow of deceased brother of *A*, and *C*, daughter of another brother of *A*, were members of a joint Hindu family. *A* and *B* mortgaged joint property representing to the mortgagee that they were entitled to deal with the whole property. On the deaths of *B* and *C*, their shares having come to *A* by inheritance, he set up a claim to them as against the mortgagee—*Held*, that *A* was bound by the estoppel created by the mortgage-deed [*Saroda v. Gosto*, 27 CWN 943 : 70 IC 385].

See *ante*: "*Estoppel Under Family Arrangement*".

Estoppels Are Binding Upon Parties or Privies. [Estoppels Ought to be Mutual].—The general doctrine applicable to estoppels is that "estoppels ought to be mutual" [*Surya Pd v. Raj Mohan*, 8 CLJ 478 : 13 CWN 281] or "reciprocal." It means that estoppels bind the parties or their privies, but strangers cannot take advantage of them nor can they be bound by them. Although estoppel is only a personal matter between the particular parties, yet to really give the parties the benefit of it, and subject them to the burden of it, it is essential that not only they, but those of whom it can be predicated that they are "representatives in interest" should likewise have the benefit of and be subject to the burden of the admission [*per* BRETT LJ, in *Simm v. Anglo-American T Co*, LR 5 QBD, CA p 206; Cababe p 112]. As to the meaning of term "privy," see *ante* s 18 pp 196-97. S 115 says "neither he nor his representative shall be allowed" and therefore both the parties and person claiming under them are precluded from denying the existence of the state of things which form the subject of representation. A stranger to the transaction cannot plead estoppel or be bound by it. The section further says "in any suit or proceeding between himself and such person or his representative". So, the asserter is estopped from denying the truth of his representation in any subsequent suit or proceeding between himself and the person acting on the representation, but he will not be estopped from denying it in any other proceeding.

In the case of estoppel by representation, arising as it does out of a unilateral act, while it is true that a stranger to the representation cannot take advantage of it [*R v.*

Ambergate &c R Co, 1853, 1 E & B 372], the maxim "estoppels ought to be mutual" has no further application, until, at least, the party relying on the representation has elected to treat it as true, after which it would seem upon the principle expressed by it, that he would be conclusively bound by his election [*Scarf v. Jardine*, 1882, 7 App Cas 345; Hals 3rd Ed Vol 15 para 343]. In many of the cases in which an estoppel by conduct exists, the maxim has no application. It is true, indeed, that in cases of estoppel by *agreement*, it will generally be found that both, or all parties are bound by the conventional facts. But in the case of estoppel arising out of misrepresentation, the maxim can have no application. Its very object is to give the party misled a *right* to compel the other party to make good his representations. He may, or may not exercise such right, as he thinks fit; but in no case can the deceiver pin the deceived to an admission of those facts, as to which he has deceived him. The true analogy is to the case of a contract induced by fraud, which renders the contract voidable at the option of the party defrauded [Cababe pp 138-39].

When a person entering into possession under an invalid instrument (a will) has not acquired a good title from another source, his heirs entering into possession after him, is not estopped from questioning the instrument and resisting the next taker thereunder (the remainder of men). He can rely on his own possession as a squatter which is not an interest derived from his predecessor of whom he is thus no privy [*Nisar v. Md Ali*, 59 IA 268 : 36 CWN 937 : A 1932 PC 172].

The classes of privies and their position have been explained in *Hattikudar v. Kudar*, 28 MLJ 44. In a suit on a mortgage by plaintiff, the judgment-debtor pleaded payment to plaintiff's son. There was a decree holding that even if true, the payment would not be a proper discharge. When the son sought to execute the decree as legal representative of his mother, judgment-debtor pleaded that the son was estopped by his prior representations and by receipt of payment from executing the decree—*Held*, that it is open to him to raise any defence such as that of estoppel which is personal to the legal representative [*Arunachela v. Swaminatha*, ¶7 IC 547 : 46 MLJ 240]. Estoppel applies not only in favour of the person induced to change his or her position, but of a transferee from such person, and it binds not only the person whose representation or actings have created it, but all claiming under him by gratuitous title [*Jagannath v. Abdullah*, 45 IA 97 : A 1918 PC 35 : 45 C 909 : 22 CWN 891 : 35 MLJ 46 : 20 Bom LR 851]. Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representation made by any one except that other person [*Ranga Rau v. Bhavayammi*, 17 M 473]. A party deriving interest from a person bound by an estoppel before the date on which the estoppel arises is not bound by that estoppel as his representative [*Kanik v. Medni*, A 1941 P 317]. "Representative" is not limited to a gratuitous transferee or to a subsequent transferee for value without notice. It includes a ***bona fide*** assignee for value without notice of the circumstances making an estoppel [*Shivrao v. Subbarao*, A 1934 M 302].

A privity in law exists between the executor-creditor and the purchaser at a court sale. When the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale, as his representative or as one claiming under him [*Krishnabhaupati v. Vikramal*, 18 M 13; *Swaminatha v. Darmalinga*, 1917 MWN 88; *Md Mozuffer v. Kishory*, 22 IA 129 : 5 MLJ 101 : 22 C 909; *Radhakanta v. Ramnarain*, 16 CWN 475, 480 : 15 CLJ 369]. A purchaser in execution of a money-decree is bound by the estoppel which binds the judgment-debtor, whose interest he has purchased. A judgment-debtor will himself be estopped from denying his liability under a mortgage executed by another on property belonging to the judgment-debtor when the judgment-debtor had himself induced the mortgagee to believe that the property belonged to that other and to advance the loan [*Prayag Rai*

***v. Sidhu Pd*, 35 C 877; *Prodyot v. Isriram*, 16 IC 792; *Kanchan v. Kamala*, 21 CLJ 441]. In a case in Madras it has however been held that an execution creditor is not affected by the estoppel against the judgment-debtor. In this case the sale was held by a court without jurisdiction [*Veerappa v. Ramaswamy*, 37 MLJ 442 : 53 IC 579 (35 C 877 & 7 CLJ 644 **not folld**]. A property was purchased *benami* on behalf of a *zemindar*, and the *benamdar* upon the latter's instructions transferred it to the *zemindar's* illegitimate daughter. The *zemindar* supported her mutation of name by an application-*Held*, that the *zemindar* and those claiming under him were estopped [*Jaganath v. Abdullah, sup*]. The legal representative of a deceased person, though not a party to the suit will be bound by the execution sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or if knowing of the sale he stood by and allowed the purchaser to pay in the belief that he had acquired a good title [*Natha Hari v. Jamni*, 8 BHC 37].

A purchaser at a court sale of attached property believed to be encumbered (Or 21 r 66) is not estopped by the estoppels which would have bound the judgment-debtor. There is nothing to prevent him from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgagee [*Ganesh v. Purshuttam*, 33 B 311 : 11 Bom LR 26 : 5 MLT 228]. The purchaser at the execution sale is bound by the same rule of estoppel as the judgment-debtor, on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of greater advantage. The execution-purchaser of the interest of the mortgagor is as much bound by the rule of estoppel not to dispute the validity of mortgage as the mortgagor himself. The purchaser at an execution sale may take advantage of an estoppel arising from the deed by which the debtor acquired title and is, in his turn, estopped by the deed made by the debtor before the sale; in other words, the levying creditor is bound by an estoppel against the debtor as grantor [*Dehendm v. Mirza Abdul*, 10 CLJ 150; *Nandilell v, Jogendra*, 28 CWN 403 : 39 CW 22 : 82 IC 297; *Radhakanta v. Ramananda*, 16 CWN 475 : 15 CLJ 369; *Sashibhusan v. Debnath*, 60 IC 705; *Ananda v. N L O Ltd*, 26 CWN 436; *Bepin v. Jogeshwar*, 34 CLJ 256; *Jankiram v. Chotanagpur B Assen*, 15 P 721].

An endorsement by an agent of a decree-holder on a notice of sale that a property need not be sold does not estop the decree-holder from executing the decree against the property [*Parthasarathy v. Md Abdul*, 82 IC 434 (M)]. The mortgagee who has purchased at an execution sale of his mortgage decree, is bound by an estoppel that could have bound his mortgagor [*Kulidas v. Prasunnu*, 24 CWN 269 : 30 CLJ 496]. Judgment-debtor mortgagor is bound by the rule of estoppel not to dispute the validity of mortgage. Where a purchaser in execution of a money-decree for arrears of rent wanted to defeat the rights of previous purchaser in execution of a mortgage decree by taking advantage of clerical error in the mortgage deed relating to boundaries—*Held*, that he was not entitled to do so [*Nandilal v. Jogendra*, 28 CWN 403]. A subsequent mortgagee is bound by the representations made by the mortgagor to prior mortgagee and is estopped from challenging the validity of the prior mortgage so far as it affects the share which was subsequently mortgaged [*Gurudayal v. Taid*, 54 IC 766].

Sale under a decree on puisne mortgage notifying prior-incumbrances—Purchase by decree-holder—Prior incumbrances subsequently declared invalid—Suit by mortgagor against purchaser for recovery of the amounts covered by the prior incumbrances as vendor's unpaid purchase-money—*Held*, that the mortgagor was not entitled to recover, and that there was no estoppel against the purchaser [*Izzatunnissa v. Partab Singh*, 36 IA 203 : 31 A 583 : 13 CWN 1143 : 11 Bom LR 1220]. Where

decree holder under a *bona fide* mistake brought to sale certain of his own properties as those of his judgment-debtor, and sale was confirmed and delivery of possession was given to purchaser—*Held*, that the decree-holder is estopped from setting up his own title [*Ramaswami v. Kulandaaivelu*, 1922 MWN 121]. Estoppel is purely a personal bar operating against a person whose conduct constitutes it, and against his privies and representatives. The simple fact of purchase at an execution sale will not make the purchaser the representative of the judgment-debtor within the meaning of s 115; on the contrary the execution-purchaser derives his title, adversely to the judgment-debtor [*Parbhu Lal v. Mylne*, 14 C 401 (**disapproved** in 10 CLJ 150 *sup*)]. Following 14 C 401 it has been held that estoppel is purely personal and will not affect others in so far as they claim a title otherwise than through the person estopped primarily [*Umaram v. Puruk*, 85 IC 540 (A)].

Under Or 21, r 66 if a mortgage-deed is merely notified, it is in way conclusive. Where a sale is effected not subject to a mortgage, but the mortgage is simply notified at the time of the sale, the auction purchaser is not estopped from questioning the validity of the mortgage [*Roshan v. Lallu*, 20 ALJ 722 : 68 IC 790]. A prior donee of property cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the gift [*Abdul Ali v. Miakhan*, 35 B 297]. A purchaser at auction of the right, title and interest of the father alone in joint family property which had been mortgaged by the father was not entitled to raise the plea that the mortgage was made without legal necessity so long as there was yet time for the sons to challenge the purchase [*Bakshi v. Liladhar*, 35 A 353: see *Tottaram v. Hargovind*, 36 A 141]. Admission of indebtedness by mortgagor in mortgage-deed is admissible against a purchaser of the property [*Birbal v. Behari*, 76 IC 815]. Some of the heirs of a deceased person who entered upon possession of the property as valid *wakf* are not, as against the remaining heirs, barred by the rule of estoppel from disputing the validity of the *wakf* [*Alamgir v. Kamarunissa*, 4 CLJ 422]. A *mutwali* in possession is not estopped from contending that he has discovered that the *wakf* settlement is void and that he is entitled to a share of the property as heir [*Rukeya v. Nazira*, A 1928 C 130 : 32 CWN 248].

The official receiver is not bound by the admission of the validity of a mortgage executed by the insolvent, in favour of some of his creditors [*Sundar v. Bakshi*, A 1933 L 354].

Other Cases of Estoppel.—When the principles of the law of estoppel, by which the courts are to be guided are to be found in s 115, there is no need to fall back upon the analogies of the Mahomedan law in a case of pre-emption arising between the Hindus [*Ajudhia v. Chhatrapal*, 4 ALJ 210 : 1907 AWN 88]. Where the Manager of the Bank sent a notice to the bailor to redeem the ornament by payment of amount due and the amount having been paid by the bailor, the Bank is not estopped from claiming any lien over the pledged ornaments. [*State Bank of India, Kanpur v. Deepak Malviya*, A 1996 All 165, 170]. A rule of estoppel applicable to a person taking under an instrument and to his heirs has no bearing on cases where the like is acquired solely by prescription [*Aiyanchariar v. Lakshmi*, 21 MLJ 500]. Where it is alleged between the parties that the claim petition should be allowed but without costs and the plaintiff should in consideration of that refrain from instituting a suit—*Held* s 115 does not apply [*Venkatarama v. Narayana*, 28 IC 536]. Persons purchasing property subject to mortgage is not by that sole fact estopped from disputing the validity of or consideration of the mortgage. But if the mortgagee has been thereby induced to suffer some detriment or if he forgoes a portion of the money, the purchaser may be estopped [*Bala Pd v. Sujah*, 49 IC 997 : 28 PWR 1919]. A right to draw water from plaintiff's well became extinguished by non-user.

Defendant rebuilt the well with the permission of plaintiff—*Held*, that the easement was revived and plaintiff was estopped under s 115 [*Ananta v. Ganu*, 22 Bom LR 415 : 45 B 80]. A decision against the benamdar is fully binding on the beneficial owner, although he is not a party [*Abdul Rakman v. Mohendra*, 54 IC 633; *Gurnarayan v. Sheolal*, 46 IA 1 : A 1918 PC 140 : 36 MLJ 68 : 46 C 566 : 23 CWN 521]. Consignor taking delivery on strength of bill of lading and basing his suit on it, cannot say that he is not bound by its terms [*Ezekeil v. B I S N Co*, A 1929 C 260]. A buyer at an auction sale getting goods at his offered price cannot complain that the sale is invalid [*Coffee Board v. Famous Coffee & Tea Works*, A 1965 M 14]. A person having submitted to execution of decree on a foreign judgment passed without service of summons, cannot prejudice the right of the auction-purchaser by a suit challenging the sale held in execution of the decree [*Malhar v. Vishnu*, 26 Bom LR 392 : A 1924 B 351]. If a caveator agrees to withdraw caveat on condition of payment of some money, it does not estop him from contesting the validity of a will before the passing of a decree [*Pashupati v. Shital*, A 1931 C 587 : 55 C 699]. Where a debtor sends a payment towards debt, he is not estopped from denying that the accompanying letter was in his own handwriting and signed by him, when no case is made out by proper evidence that the creditor would not have accepted the payment but for the belief induced in him that the letter was so written or signed [*Amar Krishna v. Jagat*, 35 CWN 1192 FB]. Where a purchaser from a widow and reversioner retained a portion of the purchase money to pay a decree-holder, he is not precluded from questioning the binding nature of the debt [*Sethurama v. Varadaraja*, 1931 MWN 1282].

There is no estoppel by acquiescence in changed user of premises by tenant [*K Kameshwara v. K Venkata*, A 1972 AP 335]. Where a landlord taking land on condition that the premises on it would be used for residential purpose only lets out for commercial purposes both knowing that it was not permissible, neither the lease can be said to be void ab initio nor the landlord is estopped from claiming possession [*Faqirchand v. Ram*, A 1973 SC 921].

Where sub-lessee in order to avoid losing the land entered into an agreement with Rehabilitation Authorities for purchasing at a rate higher than that he was liable to pay under the law, he cannot be estopped from claiming that he should not be made to pay more than under the law [*Sardha v. Central Govt*, A 1972 P&H 296].

S 115 is not exhaustive. Person in possession of property as guardian and manager for a minor cannot without giving up possession claim to retain the property as a reversioner [*Fattu Bhila v. Bhawaniram*, A 1961 MP 27].

Acceptance by widow as administratrix, of death benefit under pension scheme of company in which her husband was employed, does not estop her from suing for damages for herself and on behalf of her infant children under Fatal Accidents Act [*Smith v. Br E A C &c*, 1951, 2 All ER 737].

A person entitled to realise rent or cess at a certain amount is not estopped from claiming it at that amount although he may have realised it deliberately or mistakenly at a lesser amount for previous periods [*Ramkumari v. Haridas*, A 1952 P 239].

Landlord accepting rent is estopped from denying that successor-in-interest of lessee has no interest in land [*Narendra v. Shankerlal*, A 1980 SC 575]. Admissions in affidavits which are mere expression of opinion limited to the context and not specific assurances, are not binding on the Govt to create any estoppel [*N C Singhal v. Union*, A 1980 SC 1255] Where notice under UP Sales Tax Act was served on an unconcerned person and the assessee participated in the proceedings he is not

estopped from challenging validity of proceedings for non-service of proceedings as service of notice is condition precedent [*Laxminarayan v. CST*, A 1980 A 198 FB]. In a claim under Land Acquisition Act the claimants agreeing to reduced compensation if paid within stipulated time and also agreeing not to make further claim if compensation is paid in time cannot claim interest on compensation [*S v. Jitendra*, A 1981 SC 969]. The record of rights is an important document, to prove the caste and religion of a candidate in an election petition. If the record of rights which is in the possession of a party is withheld by him from the Court, an adverse inference has to be drawn against him [*Nara Raghava Rao v. Nadiabasi Biswas*, A 1986 Orissa 255, 261]. It is upto the party relying on a document executed by an illiterate person to prove, that it was executed with the full knowledge of what it was, before such party can seek to enforce it and such party cannot contend that the illiterate woman being a party to the document is estopped from contending against it [*A Venkappa Bhatta v. Gangamma*, A 1988 Kerala 133, 137 (DB)]. On the date of sale of land, the purchaser executed an unregistered agreement stating that he would not dissipate or alienate the land and if it was violated the vendor is entitled to purchase back the property. When the vendor attempted to revoke the sale on the basis of this agreement there is no estoppel or bar on the purchaser to challenge the validity of the said unregistered agreement [*Brahama Nand v. Smt Roshani Devi*, A 1989 Him Pra 11, 14].

Issue estoppel.—Where the decisions of a higher court showed that the judge in a particular case had erred then it gives a right to the parties to relitigate as the circumstances amounted to an exception to the general principle of issue estoppel. In an action concerning the meaning of a rent review clause in a lease, a particular view was taken. Subsequently to this, decisions of the Court of Appeal in other cases showed that that view was wrong. The landlord in that case applied again for redetermination of the scope of review clause in his case and an attempt was made to estop him under the doctrine of issue estoppel. It was held that although issue estoppel is a complete bar to the relitigation of a decided point between the same parties, there are some special circumstances where the operation of a bar can be prevented. Where further material relevant to the proceeding which could not with reasonable diligence have been available at the first set of proceedings, then an exception to the general rule arises. Such further material is not confined to factual matters. It includes an error by the judge which is subsequently overruled by a higher court. It would not be just to prevent a party who has suffered as a result of the error from reopening that issue at a later stage [*Arnold v. National Westminster Bank*, (1991) 2 WLR 1177 HL].

Issue estoppel and non-parties.—An issue estoppel is capable of binding non-parties also. A water authority authorised engineers to build a pumping system to take water from one river to another. Demonstrations and protests led to an explosion in which several were killed. The judge split liability for negligence between water authority, contractors and engineers. On appeal, the Court of Appeal held the consultant engineers wholly to blame. In a separate action the water authority claimed in negligence against the engineers for damage to the tunnel system. The engineers denied negligence. The authority alleged that the matter was *res judicata*. It was held that where an issue has been decided by a competent court, the court would not allow it to be relitigated by different parties. The engineers were not only estopped from denying negligence, it would be an abuse of process for them to do so [*North West Water v. Binnie (a firm)*, (1990) 3 All ER 547].

When matter may be reopened.—The matter cannot be reopened (trial judge decision on the rights to house property between the wife and the mother) unless

there are circumstances which make it fair and just that the issue should be reopened. Since there were no such circumstances in the facts of this case, the mother was entitled to a declaration that the wife was estopped from claiming that she or the husband had any equitable interest in the house, but without prejudice to the wife's right to claim a charge in respect of money spent by the husband in respect of either the old or the new house [*Tebbutt v. Haynes*, (1981) 2 All ER 238 CA]. The court followed [*Mellkenny v. Chief Constable of West Midlands Police Force*, (1980) 2 All ER 227].

Issue estoppel and jurisdiction.—A party cannot be prevented by issue estoppel from putting before the court evidence to show that the court has no jurisdiction to make the order sought.

An issue estoppel is not prevented from arising merely because the party against whom the finding was made was unable to appeal against the decision [*State of Norway's Application* (No. 2), (1989) 1 All ER 701 CA]. But no issue estoppel would arise from the findings of a court of formal investigation into a shipping casualty [*Speedlink v. Vanguard*, (1986) 3 All ER 554 QBD]. The court applied the *dictum* of LORD BRANDON in *DSV Silo v. Sennar*, (1985) 2 All ER at 110].

The points about jurisdiction in the context of issue estoppel have been restated in [*Crown Estate Commrs v. Dorset County Council*, (1990) 1 All ER 19 Ch D]. There is no reason why the decision of an inferior tribunal with a limited jurisdiction and a strictly limited function to perform should not be capable of creating an issue estoppel, subject always to the constitutional principles that a tribunal of limited jurisdiction could not be permitted conclusively to determine the limits of its own jurisdiction and that a public officer should not be barred by issue estoppel from performing his statutory duty. Since the commissioner in this case had a statutory jurisdiction to decide whether road verges should be registered as common land and for that purpose had to determine whether they formed part of a highway, he had jurisdiction to determine that question also. All the requirements of issue estoppel were therefore satisfied.

Issue estoppel and consent proceedings as to jurisdiction.—Where divorce proceedings were filed by a husband in Switzerland and the wife in England and at the husband's application for stay of English proceedings, they mutually consented to the continuation of English proceedings but subsequently still the wife happened to move to Switzerland, filed proceedings there and sought stay of English proceedings, it was held that the wife was not issue-estopped from seeking stay of English proceedings. The judge had to decide the matter on merits and since the judge had taken into account all the circumstances of the case and had concluded that fairness required that the English proceedings should continue, there were no grounds for disturbing the exercise of discretion by the judge [*Thyssen—Bornemisza v. Thyssen Bornemisza*, (1985) 1 All ER 328 CA].

Issue estoppel and judicial review.—The doctrine of issue estoppel has no relevance to applications for judicial review because in proceedings for judicial review there are no formal pleadings and therefore it is often impossible to identify the particular issues which are decided in earlier proceedings between the parties; further-more, a review proceeding is not 'final' in the sense necessary for issue estoppel to operate because the relief granted is always discretionary and in many cases leaves the matter in dispute to be reconsidered by the person or body making the original decision [*R. v. Secy of State for Environment, ex p Hackney Borough Council*, (1983) 3 All ER 358 QBD, **affirmed**, (1984) 1 All ER 956 CA, **following** *Mills v. Cooper*, (1967) 2 All ER at 104, dicta of Diplock LJ].

Issue estoppel out of criminal verdict.—The accused alleged in criminal proceedings that he was assaulted by police officers to procure confession whilst in custody. But this could not be proved and the accused was convicted. He then commenced civil proceedings against police claiming damages for assault by police officers. This was held to be an abuse of the process of the court because the purpose of the civil action did not seem to be so much to recover damages as to launch a collateral attack on a final criminal court decision against the plaintiff. The fact that the collateral attack was by means of a civil action raising an identical issue decided against the plaintiff in a competent court of criminal jurisdiction was immaterial, since if the issue had been proved against the plaintiff beyond all reasonable doubt in the criminal court, it was not possible for him to believe that it would go in his favour or a balance of probabilities in the civil action. However, where fresh evidence is obtained since the criminal trial which entirely changes the aspect of the case, the plaintiff might be allowed to proceed with his civil action. But that was not the case here [*Hunter v. Chief Constable of West Midlands*, (1981) 3 All ER 727 HL]. Also [*McIlkenny v. Chief Constable of West Midlands Police Force*, (1980) 2 All ER 227 CA; *Breathnach v. Ireland*, (1989) IR 489].

Issue estoppel from dismissal of appeal by consent.—For the purposes of issue estoppel an issue is settled and founded on issue estoppel in subsequent proceedings not only if it is embodied in the terms of the judgment in the action or implied therein because it is embodied in the decision delivered in court but also if it is embodied in an admission made in the face of the court or implied in a consent order. The plaintiff would, therefore, become estopped from relitigating in the second action an issue which it was open to him to have had determined in the first action [*Khan v. Goleecha International Ltd*, (1980) 2 All ER 259 CA].

Issue estoppel under a foreign judgment.—A judgment of a foreign court that because of an exclusive clause in the shipping contract, the court had no jurisdiction to entertain the suit, would constitute an issue estoppel between the parties and others involved in the same cause of action and, therefore, the matter cannot be reopened in any other court [*DSV Silo and Verwaltungs v. Sennar*, (1985) 2 All ER 104 HL].

Estoppel by accepting a particular remedy.—The Lordships of the Privy Council held on the facts of a case that the purchaser's action in demanding and accepting the deposit of the damages awarded to it is consistent with an election on its part to accept the trial judge's award of damages and abandon its right of appeal seeking specific performance. Since the vendor had altered its position to its detriment by raising and paying over the damages when it would not have been required to do so if the purchaser had sought specific performance on appeal. Hence the purchasers were estopped from demanding specific performance. [*Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd*, (1985) 1 All ER 120 PC].

Cause of action estoppel.—'Cause of action estoppel' arises where the casue of action to the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. *C v. Hackney London BC*, (1996) 1 All ER 973 (CA). See *Arnold v National Westminster Bank plc*, (1991) 3 All ER 41 at 46: (1991) 2 AC 93 at 104). A cause of action estoppel was defined by DIPLOCK LJ in *Thoday v. Thoday*, (1964) All ER 341 at 352: (1961) P 181 at 197 as follows:

[A cause of action estoppel is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the

v. B B & C I R Co, 39 CWN 552 : 154 IC 945 : A 1935 PC 59; *Muthuraiyan v. Sinha*, 28 M 526 : 15 MLJ 419; *Md Ibrahim v. Abdul*, 14 Bom LR 987; *Vertannes v. Robinson*, 54 IA 276 : 31 CWN 1078 : A 1927 PC 151]. There is no exception even for the case where the lease itself discloses the defect of title [*Krishna v. Barabani Coal Concern Ltd*, A 1937 PC 251; **folld** in *Laxminarayan v. Durgadevi*, A 1967 Ori 92].

The reason is that a person who took possession should not be allowed to say that the man under whose title he took possession had not a title [*per* JESSEL, MR, in *Shaw v. Ford*, 1877, 6 Ch 1, 9]. In the words of LORD ELLENBOROUGH, "the security of landlords would be infinitely endangered if such a proceeding were allowed" [*Bail v. Westwood*, 2 Camp 12]. The basis of the particular principle being the fact of the letting of the tenant into possession [remarks of TINDAL, CJ, in *Claridge v. Mackenzie*, 4 M & G 143, 152], it applies equally to a licensee or agent [*Ajitulla v. Bilati*, 54 CLJ 151]. Since the basis of the estoppel is the acknowledgment of title the question is what title the licensee had recognised and that depended on the title which the appellant is apparently claiming and not on his true title [*Ternunanuse v. T*, 1968 AC 1086 PC]. Where the claimant admitted of having taken lease of the land from the Cantonment Board, he is estopped from contending that he held the land in his own right [*Jagdish Prasad v. Union of India*, A 1990 Madh Pra (NOC) 64]. In the case of lease of trust property by one of the trustees, it is not open to the tenant to deny the relationship of landlord and tenant [*Kamuthi Madalaichamy v. Thangarathina Nadar*, A 1991 Mad 229, 233].

It is well settled that this section does not deal or profess to deal with all kinds of estoppel which may arise between landlord and tenant [*Madanlal v. Manakchand*, A 1971 Raj 55].

The estoppel is restricted to the denial of the title at the commencement of the tenancy. Therefore, the exception follows that it is open to the tenant even without surrendering possession to show that since the date of tenancy, the title of the landlord came to an end or that he was evicted by a paramount title [*Guruswami v. Ranganathan*, A 1954, M 402]. Nor is the tenant estopped from contending that the landlord had no title before the tenancy commenced or that the title of the lessor has since come to an end]. [*Annamalai v. Molaiyan*, A 1970 M 396; *Chidambara v. Duraiswamy*, 1967, 1 Mad 624]. See *post*: "*At the beginning of Tenancy*" and "*Eviction by Title Paramount*".

As to "*letting into possession*" the estoppel under s 116 applies not only when it is shown that the landlord put the tenant into possession but also where a person already in possession (*eg* as a tenant under one person) becomes tenant to another. Although there is in English case-law strong authority for the view that the tenant is only estopped from denying his landlord's title if, at the time when he took the lease, he was not already in possession of the land, s 116 contains no such condition, and the words "at the beginning of the tenancy" give no ground for it. "Tenant who has occupied but not entered" is a difficult notion to thrust into s 116 and quite impossible to find therein [*Krishna v. Barabani Coal Concern Ltd*, 64 IA 311 : A 1937 PC 251 : 41 CWN 1253 : 1938, 1 Cal 1 PC]. It was held before in several cases that the estoppel in s 116 applies only to cases in which tenants were first put into possession by the landlord and not to cases where the tenant was already in possession at the time of lease or the creation of the new tenancy. The Judicial Committee having now pronounced against such view, those cases should be regarded as superseded in so far as they decided that s 116 applied only to cases where tenants are put into possession. See further *post*: "*At the Beginning of the Tenancy*".

The doctrine of estoppel which operates between landlord and tenant has no appli-cation to the same parties, even while the tenancy exists, when the question of title arises between them not in the relationship of landlord and tenant, but of vendor and purchaser [*Md Hussain v. Abdul Gafoor*, A 1945 M 321 : 1945, 1 MLJ 475 (*Nesbitt v. M U Council*, 1917, 2 KB 568 relied on)]. There is a distinction between suits based upon tenancy and suits based upon title. In the former case the question of title cannot be gone into and the estoppel operates. The tenant cannot defeat the title of the landlord by showing that since the beginning of the tenancy he had acquired title of the property. The position is totally different when the suit is based on title [*Guruswami v. Ranganathan*, A 1954 M 402].

S 116 presupposes that the person affected by the estoppel is a tenant. But where the defendant does not accept the position that he is a tenant and asserts that the lease formed along with a sale of contemporaneous date, the true nature of the transaction between the parties, s 116 cannot come into play [*Lalchand v. Ram*, 1942 NLJ 136; *Shk Rashid v. Hussain*, A 1943 N 265].

Where a tenant raises the plea of denial of title of the landlord, and the court takes a decision on that plea, such a disposal of the plea cannot be taken as a finding on the question of title. *S. Thangappan v. P. Padmavathy*, (1999) 7 SCC 474. It is not a denial of title by a tenant who did not know that there had been change of ownership and who, therefore, merely asserted that the landlord was a co-owner. *C. Chandramohan v. Sengottaiyan*, AIR 2000 SC 568.

Apart from s 116, the doctrine of estoppel applies even to a case where the tenant attorns to the landlord [*Gajadhar v. K M Colliery Co*, A 1959 P 562].

Estoppel of Tenant.—The estoppel binds the tenant "*during the continuance of the tenancy*" (*post*) and the effect of the estoppel is that he is precluded from denying his landlord's title at the time of the creation of the tenancy, *ie* "*at the beginning of the tenancy*" (*post*). Two conditions are essential to the existence of the estoppel:—(*1*) *possession*; (2) *permission*. *Possession* must be given to the tenant, and the tenant must take possession by his landlord's *permission*. When permissive enjoyment is established, the relationship of landlord and tenant is created. Enjoyment by posse-ssion is the foundation of the rule of estoppel of tenant. When these conditions are present, the estoppel arises and the estoppel prevails so long as such possession continues [*Bhaiganta v. Himmat*, 20 CWN 1335; *Bamandas v. Nilmadhav*, 44 C 771, 777 : 20 CWN 1340; *per* JESSEL MR, in *In re Stringer's Estate*, LR 6 Ch D 9 *sup*; Bigelow 6th Ed p 550]. So long as the tenants are in possession in consequence of the tenancy created by the opposite party, they should not be allowed to question the title of the opposite party [*Surajbali v. Dhaniram*, A 1979 Ori 101]. It has however been decided in a case that a tenant who has executed a lease but has not been let into possession, is estopped from denying his lessor's title in the absence of proof of ignorance of flaw in title or fraud [*Venkata v. Aiyanna*, 40 M 561 : 31 MLJ 712: 36 IC 817 FB—(ABDUR RAHIM OCJ, *dissentiente*]. This case was relied on in *Melaram v. Bholi*, 76 IC 47 (L). Mere purchase of landlord's interest does not entitle the purchaser to the benefit of s 116 in the absence of attornment by tenant [*Kailash v. Banarsi*, A 1961 J & K 34]. If a tenant purchases the share of a co-sharer of his landlord, it does not constitute a denial of the title of his landlord on the date of the tenancy [*Raman Ch v. Gour*, A 1962 As 137]. Where the defendant admitted that the plaintiff had been receiving rent and he had been sending such rent to him by postal money order, he is estopped from questioning the right of the plaintiff to maintain a suit as landlord [*Prafulla Kumar Saha v. Ranjit Kumar Saha*, 1998 AIHC 349 (Cal)]. Attornment to purchaser of tenanted premises amounts to estoppel [*Kuldeep Harbans Singh v. Gojer Brothers (P) Ltd.*, 1998 AIHC 144 (Cal)].

Section 116 operates as estoppel against the tenant to challenge the title of the owner of the suit premises after due execution and registration of the lease deed. Where the defendant had deliberately and with ulterior motive had raised the dispute on the question of title to the suit premises, which was duly executed between the parties and was a registered document, it was held that in view of clear and unequi-vocal denial of

title, a ground of eviction under section 13(1) (f) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 had been made out and in view of section 116, it was not open to raise any dispute on the question of title or ownership of the plaintiff and a decree for eviction was rightly passed. [*Janta Travels Pvt. Ltd. v. Raj Kumar Seth*, A 1997 Raj 1, 5]. Once it is found that a landlord and tenant relationship is created under a lease deed the tenant is debarred from disputing the title of the landlord [*N A S Ansari v. M Saṛangan*, 1996 AIHC 1534]. The denial of title in the course of eviction petition constitutes a ground for eviction provided the denial is not *bona fide*. *M Narayanaswami v. Roya Poulle Amola*, 1996 AIHC 2591, see also *K. Appa Rao v. Maragathammal*, ILR 1981 (1) Mad 7; *Majati Subba Rao v. P V K Rao*, A 1989 SC 2187 and 1991(2) Mad LW 197. Doctrine of estoppel will operate only during the continuance of the tenancy [*Tan Chee Lan v. Dr. Tan Yee Beng*, (1997) 4 Malayan LJ 170 (Melaka HC)]. On the question of denial of title of the landlord by the tenant in a suit for eviction, it was held that since the defendants had attorned the plaintiffs by paying monthly rent of the premises during the pendency of the suit, the defendants had attorned the plaintiffs as their Landlords and were estopped from challenging the title of the plaintiffs [*Karachi Wise Store v. Mohd. Rafiq Sitapur*, (1988) 2 Raj LR 632. **Relied** on in *Janta Travels Pvt. Ltd. v. Raj Kumar Seth*, A 1997 Raj].

The disclaimer or the repudiation of the landlord's title must be clear and unequivocal. Unless there is disclaimer or repudiation in clear and unequivocal terms, whether the same be in pleading or in other documents, no forfeiture is incurred [*Raja Mohd. Amir Khan v. Municipal Board of Sitapur*, A 1965 SC 1923. **Relied** on in *Janta Travels Pvt. Ltd. v. Raj Kumar Seth*, A 1997 Raj 1]. A tenant cannot deny title of his landlord however defective it may be, so long as he has not openly restored possession by surrender [*Jamila Khatoon v. Ajodhya Pathak*, 1996 AIHC 2928, 2930 (Gau)]. Merely because the tenant demanded certain documents from the transferee to prove his title, denial of title of landlord cannot be inferred [*Gandabhai Ranchhodji Gandhi v. Nashir Ka Vasji Sabowala*, A 1994 Guj 18, 24]. The tenant is estopped from challenging the title of the landlord to whom the rent was paid by him [*P S Bedi v. Project & Equipment Corpn. of India Ltd.*, A 1994 Del 255, 262].

No tenant of immovable property or person claiming through such tenant shall during the continuance of the tenancy be permitted to deny the title of the owner of such property [*Joginder Singh v. Jogindero*, A 1996 SC 1654, 1656. See also A 1915 PC 96, 98]. Where the tenant surrendered his tenancy right in favour of a registered society without consent of the landlord, mere acceptance of rent tendered by the tenant in the name of the society cannot constitute legal tenancy in favour of the society. The landlord is not estopped from seeking eviction on ground of unauthorised sub-letting [*Ram Sharan v. Pyare Lal*, A 1996 SC 2361]. Once the property has been given on *Theka* for the purpose of cultivation by the Municipal Committee describing itself to be the owner/landlord of the land and the lessees have accepted this relationship it is not open for them to deny the title/ownership of the Municipal Committee [*Charan Singh v. Municipal Committee Rania*, A 1996 P&H 207, 210]. Where the question was not of signature of addressee but was whether it was received or reached at the address mentioned and the correctness of the address mentioned in the cause title of the notice as well as on the acknowledgment was not in dispute, even the applicant had also written same address in the cause title of the applications, despatch of notice by registered post was also not under challenge, that would be relevant fact and presumption that notice letter had reached and delivered to the addressee can be raised under section 116 [*Satish Jayanthilal Shah v. Pankaj Mashruwala*, 1997 (2) Crimes 203, 208]. Lessees under Gram Panchayat cannot dispute title of their landlord, [*Kartar Singh v. Collector, Patiala*, 1996 AIHC 1538 (P&H)].

The rule of estoppel in s 116 was unquestionably the law here before the passing of the Evidence Act [see *Mohesh v. Gooroo*, 1863 Marsh 377; *Jainarain v. Kadambini*, 1869, 7 BLR 723 fn; *Madhab v. Thakoor*, 1866 BLR Sup Vol 588 FB; *Burn & Co v. Bisshomoyee*, 14 WR 85; *Vasudeb v. Babaji*, 8 BHCR 175; *Gouree v. Jagannath*, 7 WR 25; *Bhaiganta v. Himmat*, 20 CWN 1335]. The estoppel binds the tenant as well as his privies or persons claiming under him [*Pasupati v. Narayana*, 13 M 335; *Parattahath v. P*, 16 MLJ 351; *Doe d Bullen v. Mills*, 2 Ad & E 17; *Rennie v. Robinson*, 1 Bing 147]. Tenant can set up his own title against a third person though not against the landlord [*Tikaram v. Moti Lal*, A 1930 A 299]. Where during the currency of a term the tenant by attornment to *A* who claims to have the reversion, or the landlord by acceptance of rent from *B* who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, but they are instances of cases which are outside s 116 altogether [*Krishna v. Barabani Coal Concern Ltd, sup*]. The principle of forfeiture or disclaimer is founded on the rule that a man cannot approbate and reprobate at the same time. Since the consequence of applying the rule is very serious, the denial has to be clear and in unequivocal terms [*Kundan Mal v. Gurudutta*, (1989) 1 SCC 552 **Applied** in *Janta Travels Pvt. Ltd. v. Raj Kumar Seth*, A 1997 Raj 1]. A person in unauthorised possession who converted his possession into that of a tenant by executing rent note is estopped from challenging the title of the landlord [*Ziauddin v. Bansi Lal*, 1996 AIHC 1425 (Del)].

The rule of estoppel in s 116 is subject to the important qualification that a tenant is not estopped either before or after the expiration of the lease from contending that the landlord's title has terminated by transfer or otherwise, or been lost or defeated by title paramount, *eg* by a sale for rent in arrears [see *Ammu v. Rama Krishna*, 2 M 226; *Subbaraya v. Krishnappa*, 12 M 422; *Burn & Co v. Bisshomoyee*, 14 WR 85; *Lodai v. Kallydas*, 8 C 238; *Nakchedi v. Bhagat*, 18 A 329; *Ganpat v. Multan*, 38 A 226; *Mahendra v. M*, A 1948 C 141: 52 CWN 1; *England v. Slade*, 4 Term R 682; *Downs v. Cooper*, 2 QB 256; *Hopcroft v. Keys*, 9 Bing 613; *Serjeant v. Nash*, 1903, 2 KB 304 CA; *Sugga Bai v. Smt Hiralal*, A 1969 MP 32] or by vesting in Govt by an Act [*Raghavendra v. Marhu*, A 1971 MP 142; *Jaikaran v. Sitaram*, A 1974 P 364]. The reason for the rule as stated by ERLE J, in *Mountjoy v. Collier*, 4 M & Gr 143 is that—

> "A tenant is liable to the person who has the real title, and may be forced to pay him, either in an action for use and occupation, if there has been a fresh demise or an arrangement equivalent to one, or in trespass for the mesne profits. It would be unjust, if being so liable, he could not show that as a defence."

It is open to either of us to show that since I let him into possession, my title has determined in any of the different modes in which it is capable of being determined. Such determination may arise from either (*1*) a subsequent voluntary or involuntary act of mine, as, *eg* gift, sale, mortgage, or bankruptcy; or (2) my estate and interest being itself of a kind liable to a premature determination; *eg* a defeasible fee, an estate for life, an *estate pur autre vie*, or that of a mortgagor in possession. Now in whichever way my title may determine, the tenant may set up such determination without previously giving me back possession, if a claim of title to the premises be made by the party, whose title has come into existence, on the determination of mine. Again, even if no such claim be made, still if the circumstances attending the expiration of my title be such as to show that there obviously is a title to the premises in a third person, as where I have given, sold, or mortgaged them (my own voluntary acts), or become bankrupt, and a trustee been appointed, the tenant may set up the expiration of title, without giving up possession. Indeed it would be very like a fraud

on my part, to attempt, under such circumstances to set up my expired title [*Cababe*, pp 18, 19, see *post*: "*At the Beginning of the Tenancy*"]. But s 116 cannot imply that after the expiration of the tenancy, the tenant is free to dispute the title of the landlord although he retains possession which he obtained by permission [*Bhaiganta v. Himmat*, 20 CWN 1225 (see *post*). "*During the Continuance of the Tenancy*"]. The tenant may also plead that he has openly restored possession to the lessor by surrender [*Bilas v. Desraj*, 42 IA 202: A 1915 PC 96: 37 A 557]. In a suit for ejectment, he may of course plead adverse possession giving rise to a limited interest of tenancy or a full owner's right. But a tenant inducted into possession of land by one person cannot alter the character of his possession and make it adverse to the landlord by going over to another person and paying rent to him [*Abdul Hakim v. Pana Mia*, 51 IC 494]. The tenant is concluded for ever from filing a suit on his title if, a suit is filed against him in ejectment during the continuance of the tenancy and is decreed against him [*Vertannes v. Robinson*, A 1928 R 162].

The most ordinary instance of estoppel by *matter in pais*, is the well-established rule that a tenant, during his possession of premises, shall not deny that the landlord, under whom he had entered, or from whom he has taken a renewal of his holding [*Doe v. Wighings*, 4 Q B 367], and to whom he has paid rent, had title at the time of his admission. Thus, whether the landlord brings ejectment, or an action for rent or for use and occupation against his tenant, the defendant can neither set up the superior title of a third person, nor show that the landlord has no title.... The only course which a tenant can pursue, who wishes to set up title in himself superior to that of the landlord under whom he entered, is to yield up the premises, and then bring an action to recover them (*per* COLERIDGE J, in *ibid* p 377). So strict is this rule, that, even should a landlord, while proving his own case in an action against the tenant for use and occupation, disclose the fact that he himself has only an equitable or a joint estate in the premises, the tenant cannot avail himself of that circumstance as a defence to the action. Neither can a lessee, who has once accepted a lease and paid rent under it, dispute the lessor's title, though the deed itself admits upon its face some infirmity in that title [*Duke of Ashby*, 31 LJ Ex 168].... The rule, too, is applicable in an action of trespass, as well as in an action to recover land, and it is binding, not only on the tenant himself, but on all who claim in any way through him. Thus, where a lessee gave up possession of the premises to a party claiming them by a title adverse to that of the lessor, and prior to the lease, that party was held to be estopped as the lessee would have been, from disputing the landlord's title [*Doe v. Mills*, 2 A & E 17]. The principle of this rule extends to the case of a person coming in by permission as a mere lodger, a servant, or other licensee [Tay s 101]. The principle of s 116 can be applied to sub-tenants *vis-a-vis* their principals, but where there is no legal tenancy or sub-tenancy the section is inapplicable [*Shamshar v. S*, 1964 A 395].

A consent decree does not operate as *res judicata*, though a judgment by consent raises an estoppel between the parties [*Suruji v. Gostha*, A 1974 Gau 5 (*Shankar v. Balkrishna*, A 1954 SC 352 **folld**)].

Mutuality of Estoppel. [Section also applies to Landlord].—It has been seen that the tenant is estopped from denying the title of the landlord at the time when he was let into possession. The converse holds, *viz* that a landlord is also estopped from denying that he had title when he brought the lessee on the land. His position is similar to that of a mortgagor or a vendor of immovable property. This follows from the principle that 'estoppels are mutual'. "Similarly the lessor is estopped from repudiating a lease under which possession has been given or a tenancy which he has acknowledged, and the assignee of the lessor's interest is estopped from denying any-

thing which the lessor is estopped from denying" [Hals 3rd Ed Vol 15 para 456]. Though the section does not refer to the landlord and his representatives, it undoubtedly applies even between representatives of the landlord and the tenant or his representatives [*Gurruswami v. Ranganathan*, A 1954 M 402]. Evidently, both the landlord and the person in possession at the time of the contract are within the protection of the provision of law [*Bokka v. Kalipatnapu*, A 1959 AP 92].

A landlord is also estopped from asserting that he had no title to let his tenant in at the time of the creation of the tenancy. Just as it is right that he should not be allowed whilst retaining possession to say as against me that I had no right to let him in, so is it right that I should not be allowed to, whilst he remains lawfully in possession under me, to say, as against him, that I had no right to let him in [Cababe, p 16]. The estoppel on the landlord is thus an application of the maximum that "no man shall derogate from his own grant". It must be taken as against him that he had power to do what he purported to do; and he cannot be allowed to stultify a transaction into which he has entered, or to render nugatory what purports to be a parting with property on his part, setting up that he had no power so to part with. Hence the estoppel upon a vendor, whether of real or personal property, which precludes him from setting up his own want of title to defeat his own grant, or sale; and hence the same estoppel upon the mortgagor of property [Cababe on Estoppel, pp 43, 44]. The principle of estoppel between the mortgagor and mortgagee works in favour of and against both of them [*Ibad v. Inayat*, 80 IC 62: 11 OLJ 722].

[*Ref Tay ss 101-108; Caspersz 4th Ed Ch XII; Bigelow, Ch XVII; Everest and Strode, 2nd Ed pp 267-99; Steph Dig Art 103, Hals 3rd Ed Vol 15 paras 455-463; Phip 8th Ed p 670; Cababe pp 14-29*].

Section is Not Exhaustive.—Ss 115 and 116 are not exhaustive, and there may be rule of estoppel applicable in this country, other than what is contained in them [*Ganges Mif Co v. Saurujmull*, 5 C 609; *Rupchand v. Sarbeshwar*, 10 CWN 747, 751; *Bhaiganta v. Himmat*, 20 CWN 1335; *Ajitulla v. Bilati*, 54 CLJ 157: 35 CWN 652; *Thayelbagam v. Venkatarama*, 1916 MWN 199; *Hiralal v. Jiwanlal*, A 1955 N 234: *Union v. Anglo-Afghan Agencies*, A 1968 SC 718; see *ante*: "*Nature and scope of estoppel*" and "*Rules of estoppel in the Act whether exhaustive*" under s 115]. S 116 does not exclude general principles of estoppel based on justice, equity and good conscience [*Jaikaram v. Sitaram*, A 1974 P 364]. The case of *Dalton v. Fitzgerald*, 1897, 2 Ch D 86 is an instance of estoppel not provided for by the Act [*Rupchand v. Sarbeshwar*, 10 CWN 747, 751]. S 116 does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation [*Krishna v. Baraboni Coal Concern Ltd*, 64 IA 311: A 1937 PC 251 : 1938, 1 Cal 1 : 41 CWN 1253; see *Md Mujibar v. Shk Isab*, 32 CWN 867 PC; *Laxminarayan v. Durgadevi*, A 1967 Or 92].

"Title to Such Immovable Property".—Under s 116 a tenant is precluded from denying the title of the landlord, but it is open to him to question his status. Thus a tenant describing his landlord as a raiyat in a *kabuliat*, is not estopped from pleading that the landlord is a tenure-holder and he has acquired the status of a *raiyat* [*Lokoram v. Bidyaram*, 53 IC 43 : 1920 Pat HCC 15]. A several fishery is an incorporeal hereditament and would be considered real or immovable property, and the rule of estoppel applies to it [*Lakshman v. Ramjit*, 23 Bom LR 939]. A dispute under s 145 Cr P Code relates only to possession and consequently a compromise of

the proceedings does not estop a party from denying the title of the other [*Gopi Dass v. Madho*, 45 A 162: 20 ALJ 932]. S 116 applies to immovable property only. Payment in return for enjoyment of fruit is not immovable property [*Maung Kywe v. Mg Kala*, 4 R 503 : 99 IC 996].

"During the Continuance of the Tenancy." [Estoppel Operates Even After Termination of Tenancy].—The words "continuance of tenancy" apply to the tenancy in question in the same suit in which the estoppel arises and not to any previous tenancy [*Nagindas v. Bapalal*, 54 B 487: A 1930 B 395]. A tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored to possession by surrender to his landlord [*Bilas v. Desraj*, 42 IA 202: 37 A 557: 19 CWN 1207; *Md v. Zahiruddin*, 101 IC 771; *Md Azim v. Raia Saiyid*, A 1931 O 177; *Surajmal v. Rampearaylal*, A 1966 P 8; *Jaikaran v. Sitaram*, A 1974 P 364]. By s 116 a tenant is only precluded "during the continuance of the tenancy" from denying that the landlord had at the "beginning of the tenancy" a title to the property. Though the tenancy be continuing, it does not debar one who has once been a tenant from contending that his landlord had no title at a date previous to the commencement of the tenancy, or that since its commencement the title of his landlord has been lost or defeated or subsequently expired or that his tenancy has terminated, because the bar operates only during the continuance of the tenancy. In a case of eviction by title paramount actual and open surrender of possession to the intermediate landlord is not necessary [*Ramaswami v. Alago*, 79 IC 881 (**confirmed** in *Alaga v. Ramaswami*, 91 IC 1024); *Ammu v. Rama Kr*, 2 M 226; *Subbaraya v. Krishnappa*, 12 M 422; *Burn & Co v. Bisshomoyi*, 14 WR 85; *Mohan Mahtu v. Shamsul*, 21 WR 5; *Gopanund v. Gobind Prasad*, 12 WR 109; *Bala Kushaba v. Abai*, 11 Bom LR 1093; *Ganpat v. Multan*, 38 A 226; *Jogendra v. Mahesh*, 55 C 1013: 47 CLJ 387; *Krishna v. Baraboni C C Ltd*, 64 IA 311: 1938, 1 Cal 1; *Khalil v. Aziz*, A 1960 JK 132].

The doctrine of estoppel does not extend after the discontinuance of tenancy, that is to say, it is open to the tenant to question the title of the landlord who had inducted him, if the tenancy is terminated and possession surrendered; and the tenancy may terminate by having run its prescribed course or by act of parties, *eg* by reason of notice to quit served, or forfeiture, or by act of law, that is to say, the tenant is dispossessed by a person claiming and having a title paramount [*Jogendra v. Mahesh, sup*; see also *Deenabandhu v. Makim*, 63 C 763; *Munia v. Manohar*, A 1941 O 429]. But the preponderance of opinion is in favour of the view that if a tenant has been let into possession by a landlord, he cannot even after expiration of tenancy dispute his title and plead adverse possession, without *first* openly and actually going out of occupation, and thereby making it clear that he intended to dispute the title of his landlord [*Reajuddi v. Chand Baksh*, 24 CLJ 453 (9 Bing 41 **refd to**); see *Doe d Knight v. Smythe*, 4 M & S 347; *Bhaiganta v. Himmat*, 20 CWN 1335: 24 CLJ 103; *Narayana v. Muhammad*, 15 IC 844; *Muthuraiyan v. Sinna*, 28 M 526; *Trimbak v. Shk Ghulam*, 34 B 329; *Makham v. Baisakhi*, 123 PR 1919: 50 IC 591; *Ekoba v. Dayaram*, 22 Bom LR 82: 55 IC 353; *Allah Baksh v. Lakhan*, 2 LLJ 622: 67 IC 269; *Md Mumtaz v. Naurang*, 3 Lah LJ 227: 60 IC 502].

The tenant's estoppel operates even after the termination of the tenancy and even though the defendant is sued as a trespasser [*Charubala v. Gomez*, 59 CLJ 66: A 1934 C 499; *Gajadhar v. K M Colliery Co*, A 1959 P 562]. Landlord's title cannot be disputed by a plea of determination of tenancy without surrendering possession. Thus, where plaintiff entered into possession as tenant of *A* and obtained legal title to the property by a conveyance from *B* the true owner, in a suit by plaintiff for a declaration that *A* had no title to it, he cannot deny *A's* title till he makes over possession

[*Dayalal & Sons v. Ko Lon*, 177 IC 60: A 1929 R 15]. So in a redemption suit also the mortgagee is estopped from pleading the title of a third party so long as he has not handed over possession to the mortgagor [*Rajaram v. Jadunandan*, 88 IC 539: A 1925 A 758]. A person mortgaged the property and the mortgagee leased it to a third person. The lessee while in possession attorned to the Zemindar. The mortgagor after redemption claimed the property—*Held*, that the lessee was estopped from denying the mortgagor's title even after the attornment for there was no change in the nature of his possession [*Gurunaidu v. Venkataraju*, A 1968 M 85: 1937, MWN 1221]. Even where the title rests with a third person, a defendant put into possession by plaintiff cannot deny his title without openly surrendering possession [*Dhaniram v. Maikoo*, A 1925 O 687]. There can be a denial of the title of the landlord without the tenant renouncing his character as such where, for instance, he sets up a plea of *jus-tertii*. If a tenant could not deny the title of a landlord to whom he attorned, he is estopped from denying the title of the purchaser from that landlord [*Tej Bhan Madan v. II Additional District Judge*, A 1988 SC 1413, 1416; *Lawang Chand Sah v. Kedar Ram*, A 1984 Pat 116, 123; *Mahabir Prasad Lohia v. Karamchand Thapar & Bros Ltd*, A 1985 Cal 209, 214]. Even a trespasser landlord can maintain a suit for eviction against the tenant and it would not be open to the tenant to challenge the title of the landlord in any manner whatsoever [*Vithalbhai (Pvt) Ltd. v. Union Bank of India*, A 1992 Cal 283, 285]. When the plaintiff throughout pleaded that the relationship between her and the defendant was one of landlord and tenant, she cannot be allowed to resile from her position and plead license unless the defendant so pleaded [*Ramachandra Saha v. Pramila Sahu*, A 1992 Ori 183, 189].

S 116 does not contain the whole law of estoppel. Even if the tenancy terminates (*eg* by a proper notice to quit or by forfeiture) the estoppel continues to operate although the section speaks of denial of title during the 'continuance of tenancy'. Thus, in a suit for ejectment by a landlord who put the tenant into possession, the latter can show that the title of the former has ceased to exist subsequent to the demise, but he cannot plead that the landlord had no title to the sixteen annas when he granted the lease, and that he (tenant) had acquired an outstanding title adverse to the landlord purchasing a share from the other co-sharers of the landlord [*Md Mujibar v. Shq Isab*, 32 CWN 867: A 1928 C 546; see *Bilas v. Desraj*, 42 IA 202: 19 CWN 1207: 37 A 557; *Vertannes v. Robinson*, A 1928 R 162; *Makhan v. Baisakhi*, A 1919 L 334; *Krishnaswami v. Jayalakshmi*, A 1931 M 300; *Krishna v. Adyanath*, A 1944 P 77: 22 P 513; *Charubala v. Gomez*, A 1934-C 499; *Ganpat v. Multan*, 38 A 226; *Hirabai v. Jiwanlal*, A 1955 N 234]. In the case of a complete eviction it is not quite easy to see the distinction, as the question of continuance of tenancy and the question of eviction by title paramount terminating the liability to payment, go hand in hand. But in the case of a partial eviction demanding not suspension, but abatement of rent, the distinction is quite apparent. Such a plea is available to a tenant [*Jogendra v. Mathesh*, 47 CLJ 387 : 55 C 1013].

Where the true owner ejects the tenant from possession, the tenancy ceases and after eviction the tenant cannot attorn to the true owner and set up title in answer to a suit by the landlord who let him into possession [*Barakatullah v. Kale*, 139 IC 46].

The estoppel operates during the continuance of the tenancy. Determination of tenancy may take place in various ways. "A tenancy determines either by having run its prescribed course or by act of parties whilst it is running or by act of law. Instances of a determination of the first kind are where a lease is made for a certain period and that period expires or where an event happens in itself uncertain (*eg* the death of the lessee or some other person), upon the happening of which the term is expressly limited. A determination of the second kind is brought about by one of the following acts;

determination of the will (in tenancies-at-will), disclaimer and notice to quit (in yearly or other periodical tenancies), surrender, merger, and forfeiture (in tenancies generally). A determination of the third kind, *eg* by act of law only, results from the operation of the statute of limitation" [Foa's Landlord and Tenant, 6th Ed p 649].

Same: [Eviction By Title Paramount].—Meaning and effect of eviction by title paramount [*Jaikarun v. Sitaram*, A 1974 P 364]. In a suit to recover arrears of rent the tenant may raise the following defences:—The execution of the contract may be denied; the tenant admitting the execution, may contend that it was obtained by fraud, force or undue influence: that the plaintiff's title has expired or has been defeated by a title paramount, as for example, that the plaintiff's tenure has been avoided by sale for arrears of revenue. But the defendant cannot deny that the plaintiff had a title at the same time when the defendant was let into possession. See the judgment of FIELD J, who has given a classification of estoppels between a landlord and tenant [*Lodai Mollah v. Kally Das*, 8 C 238 pp 240-41]. Where the mortgagee or tenant is let into possession by the mortgagor or landlord, he is estopped from disputing the title of the latter at the commencement of possession, though he is not debarred from showing that the title of his mortgagor or landlord has since determined [*Nakchedi v. N*, 18 A 829: 16 AWN 90; *Dalip v. Tilak*, A 1927 A 270]. *D* as *dharmakarta* leased some temple property to *M*. During the continuance of the tenancy, *S* was declared rightful *dharmakarta* in a separate suit. In a suit by *D for rent—Held* that the tenancy had not terminated and *M* was estopped from denying *D's* title [*Devalraju v. Md Jaffer*, 36 M 53].

A decree for possession obtained by a third party against the landlord in a former litigation in which the tenant also was a defendant does not have the effect of extinguishing the landlord's rights or of terminating the tenancy in the absence of a new arrangement between the third party or of attornment [*Krishna v. Mungara*, 55 M 601]. In a suit for rent in respect of a *chur*, the defendants are estopped from denying the right of the plaintiff to lease the whole chur to them as they were inducted into possession of the whole chur by the plaintiff. It is open to the tenants to prove a subsequent cessor of title by proving an eviction by title paramount or the equivalent of such eviction [*Ram Ch v. Pramatha*, 35 CLJ 146: 63 IC 754; *In Ganesh Trading Co P Ltd*, A 1985 Cal 37, 39 (DB) : 1984-2 Cal HN 170*n*] and to attorn to the holder of title paramount without actually going out of possession [*Ramaswami v. Alaga*, 79 IC 881 (confirmed in *Alaga v. Ramaswami*, A 1926 M 187 *post*]. Though the renewal of the lease by the paramount landlord was not registered, the absence of a registered lease for the renewal period would make no difference as regards the bar of estoppel [*Quality Cut Pieces v. M Laxmi & Co*, A 1986 Bom 359, 368].

Where the paramount title-holder put an end to landlord's title and the tenant attorned to the former, he is not estopped from denying the title of his landlord [*Ivaturi v. Kandula*, 104 IC 892 (M)]. Defendants were let into possession by an ancestor of plaintiff. Subsequently Government assessed them under Madras Land Encroachment Act and they paid rent and accepted *patta* from Government. Plaintiff sued the defendants in ejectment and the latter pleaded title in Government—*Held* that the payment of rent to Government and acceptance of *patta* amounted to eviction and the original tenancy did not subsist and therefore s 116 did not apply [*Alaga v. Ramaswami*, 49 MLJ 742: A 1926 M 187: 91 IC 1024]. Mere payment of rent to a third party is not enough to determinate the tenancy and discontinuance of tenancy in such circumstances must be satisfactorily proved by the party who alleges it [*Parbati v. Ramchand*, 3 CLJ 576; *Jogendra v. Mahesh*, 47 CLJ 387: 55 C 1013].

A granted a lease to *C* on monthly rent. True owner *B* who has previously obtained a decree for possession against *A*, obtained symbolical possession of the land in execution of his decree in 1928 and *C* remained in possession as licensee of *B* with his permission though he continued to pay rent. Subsequently in 1937 *B* granted a permanent lease to *C*. In a suit by *A* against *C* for possession, ***held*** that *C* was not estopped from disputing *A's* title as the original tenancy between *A* and *C* was terminated in 1928 and the payment to *A* was not payment of rent. Symbolical delivery of possession effectively terminated the possession of both *A* and *C* [*Adyanath v. Krishna*, A 1949 PC 124: 28 P 207 (22 P 513 reversed)].

If a person takes separate leases of the same property from two rival claimants, it may be a good business step, but it involves keeping faith with both. If he fails to pay rent to one and suffers judgment at his hands, merely for the breach of the conditions of the covenant with him, a plea of eviction by title paramount, based on such fact, to a claim for rent by the other lessor is an entirely invalid and untenable plea [*Krishna v. Barabani C C Ltd*, 64 IA 311: 41 CWN 1253 *ante*].

Against the covenant to pay rent, eviction by title paramount is a good defence and it must obviously be established by the party who sets it up. "Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant and with it the corresponding liability for payment of rent, so that mere eviction from, or a deprivation of the use and enjoyment of the demised premises, or part of them, whether such eviction be lawful or unlawful, is insufficient, where the lessor's title is not affected or called in question. To constitute a good defence in this case, three conditions must be fulfilled: (*1*) The eviction must have been from something actually forming part of the premises demised; (2) the party evicting must have a good title, and (*3*) the tenant must have quitted against his will" [Foa's Landlord & Tenant 6th Ed p 194 quoted in *Jegendra v. Mahesh, infra* and in *Gajadhar v. K M Colliery Co*, A 1959 P 562]. To constitute eviction, forcible expulsion is not necessary. Title paramount is title superior to those of the lessor and lessee against which neither is enabled to prove a defence. In a suit filed in August, 1918 for royalty and coal rent from defendants who held under the plaintiffs under a *darpatni* lease, the defendants pleaded that the plaintiffs had no title to the underground and also that they had been evicted by the title paramount, *viz*, the plaintiffs' *zemindar*. On the *zemindar* serving notice on the defendants that they had no title to the underground and asking them to stop work in the underground they had taken a prospecting lease from the *zemindar* in February 1917 which was followed by a regular mining lease in October 1919. Plaintiff's lease from the *zemindar* was found to be a confirmatory lease—*Held*, that as defendants' tenancy was continuing at the date of suit, defendants were estopped from pleading that plaintiff had no title to the underground and that there was no eviction disentitling the plaintiff to recover rent, as what the defendants did, amounted not to an attornment in favour of, but merely an arrangement to pay rent to the *zemindar* [*Jogendra v. Mahesh*, 47 CLJ 387: 55 C 1013 : A 1929 C 22].

To constitute a good defence, the party evicting must have a good title and the tenant must have quitted against his will [*Noorijan v. Bimala*, 18 CWN 552; *Amrit v. Uttam*, 1938, 2 Cal 559]. In order to establish eviction by title paramount, the tenant need not show that he had actually to go out of possession but it is enough if, upon a claim being made by a person with title paramount, he consents by an attornment to such person, to change the title under which he is holding, both parties acting *bona fide* [*Rajkrishna v. Barabani C C Ltd*, 62 C 346]. Dispossession or a suit in ejectment is not necessary. It will be sufficient if as a result of threat of eviction by the para-

mount title holder the tenant attorns to him. When the tenant is under threat of eviction by the title paramount, the rule of estoppel does not apply [*D Satyanarayna v. P Jagadish*, A 1987 SC 2192, 2195]. The rule does not apply if the tenant gives up possession voluntarily [*Guruswami v. Ranganathan*, A 1954 M 402; *Chokalingam v. Ganesha*, A 1951 M 284; *Valia Md v. Savakutti*, A 1934 M 197; *Ram Rakha v. Munnalal*, A 1931 L 243; *Bobbili v. Kottu*, A 1957 AP 961]. Even if not actually evicted, if a judgment of eviction has been passed against the tenant, he can repudiate the title of his immediate landlord. But the mere fact of an apprehension that a suit for eviction might be brought by the paramount landlord does not justify denial of title of landlord and attornment to paramount landlord [*Sain Dar v. Sant Ram*, A 1959 Pu 564].

"At the Beginning of the Tenancy". [What is Meant by "Putting into Possession"].—It was held in several cases that the words "*at the beginning of the tenancy*", only apply to cases in which tenants are *put into possession* of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. A ryot being in possession of certain holding executed a *kabuliat* and paid rent for it to the plaintiff, who claimed the land under a derivative title from the last owner, it was held that the tenant was not estopped from disputing the plaintiff's title [*Lal Md v. Kallanus*, 11 C 519; see also *Rahimannissa v. Mahadeb*, 12 CLJ 428, 431; *Rishikesh v. Melaram*, 73 IC 450; *Veeraguntula v. Mukkumela*, 25 IC 721; *Laxmibai v. Devi*, 72 IC 855; *Suganchand v. Chabilram*, 18 NLR 11; *Faqir v. Bhaggu*, A 1925 A 244]. If through ignorance or mistake a tenant has executed a rent notice and has not been put into possession by lessor, he can dispute the latter's title [*Laxmibai v. Devi, sup*]. Where after the execution of lease but before the lease is to take effect, the lessee knows that the lessor had no good title and therefore takes up a new lease from the real owner and enters into possession, he is not estopped from denying first lessee's title [*Arumugham v. Subramaniam*, A 1937 M 882 FB]. Where persons were already in possession long before they executed the lease, they are not estopped from showing that they signed the lease under pressure, mistake or ignorance of facts relating to title [*U Po Shin v. Edward*, A 1934 R 139].

As to what constitutes a letting into possession, some doubt exists. In one case, where a party was in possession of premises without leave obtained from any one, and a person came to him and said, "You have no right to the premises," upon which he acquiesced and took a lease from this person, the court held that the relation of landlord and tenant was sufficiently created to debar the one from disputing the title of the other [*Doe v. Mills*, 2 A & E 20]. But in a subsequent case, where a tenant, being already in possession of the premises under a demise from a termor, had at the expiration of the termor's right, when his own title also expired, entered into a parol agreement with another party to hold the premises under him; but it appeared that he had done so in ignorance of the real facts of the case, and under the supposition that this party was entitled to the premises; it was held that the agreement was not equivalent to the first letting into possession [*Claridge v. Mackenzie*, 4 M & G 143]. This question may, in certain cases, become highly important, because neither a parol agreement by a tenant to hold premises of a party, by whom he was not *let into possession*, nor an attornment, nor an actual payment of rent to such party, even under a distress will in themselves operate as estoppels; but the tenant may still show that he has acted in ignorance, or under a misapprehension of the real circumstances, or in the case of payment of rent, that some other party was entitled to receive it [Tay s 103].

In *Lal Md v. Kallanus*, and other cases (*ante*) it was held that a tenant who has not been *let into possession* by the person seeking to eject him, is not estopped from

denying the landlord's title, and so if he was already in possession at the time of the creation of the tenancy, the rule of estoppel had no application. In a case, where the tenant denied execution of the *kabuliat* relied on by the landlord and payment of rent under it, denouncing it as forgery,—a plea which he failed to sustain, it was *held* that he could not prove that the plaintiff was not his true landlord, although he had not been inducted into the land by the plaintiff. *Lal Md v. Kallanus, supra*, was explained and the court (BRETT & MITTER JJ,) observed: "We do not suppose that the learned judges (referring to *Lal Md's case*) intended to lay down that a person in occupation of land may select his rent-receiver and execute a solemn agreement promising to pay rent for a time with a full knowledge that he had no right to the land, and thereafter, at any time, decline to pay him rent, pleading want of title in him and without attempting to show any other circumstances (coercion, fraud, mistake or misrepresentation), which would invalidate the contract of tenancy." While holding that the rule that a tenant is estopped from denying the title of his landlord applies only to the title of the landlord who lets the tenant in, it was observed in this case that if the tenant did not obtain possession from a person who was only recognised as landlord either by express agreement, or by attornment, or by formal acknowledgment by payment of rent, he may always show that his conduct was due to mistake or ignorance of facts relating to title, misrepresentation or fraud [*Ketudas v. Surendra*, 7 CWN 569 (*Pratap v. Jogendra*, 4 CLR 168 **folld**)].

But it will appear from the cases below that the rule of estoppel has been extended to cases where the tenant was already in possession at the time of the lease and the landlord pleading estoppel need not show that the tenant was let into possession of the disputed property by him. [In the later case of *Krishna v. Barabani C C Ltd.*, 1938, 1 Cal 1 *post* it has been pointed out by the Judicial Committee that both *Lal Md v. Kallanus and Ketudas v. Surendra, ante* which have sometimes been taken as establishing the doctrine that s 116 applies only where it is shown that the landlord put the tenant into possession "were cases really outside s 116, not being concerned with the title at the beginning of the tenancy, but with the common case of a sitting tenant attorning to a new individual as entitled to claim rent. It is important to notice in such case that neither a new tenant nor a new *kabuliat* necessarily implies a new tenancy"].

After the insolvency of one, three brothers jointly mortgaged their property. A tenant was let into possession by them prior to the insolvency and mortgage, who after the mortgage attorned to the mortgagee and paid him rent. In a suit for ejectment by the mortgagee, the tenant was held estopped from denying the mortgagee's title [*Nagain Das v. Bappulal*, A 1930 B 395: 32 Bom LR 692 (*Lal Md v. Kallaus, ante* **not folld**; *Shankar v. Jagannath*, A 1928 B 265 **folld**)]. Where the tenant is let into possession the estoppel clearly arises on the principle that a person cannot both approbate and reprobate. But it does not necessarily follow that if the tenant is not let into possession by the landlord he is not equally estopped. If once the relation of landlord and tenant is established, the tenant would be estopped from disputing the landlord's title. The words "at the beginning of the tenancy" cannot be construed to mean the time when the tenant was first let into possession. It may be that in some cases the tenant may be in possession before the new tenancy begins and he may attorn to another landlord by executing a lease which constitutes a new tenancy. The question therefore to be decided in each case under s 116 would be whether a new tenancy had arisen and not whether the tenant had been let into possession by the landlord. In support of the contention that there is no relation of landlord and tenant, the tenant may assert that the contract of tenancy is void or voidable on account of misrepresentation of fraud [*Shankar Rana v. Jagannath*, A 1928 B 265: 3 Bom LR

741; see also *Krishnarao v. Ghaman*, 36 Bom LR 1074; *Ramzani v. Bansidhar*, A 1935 O 385; *Ram Ditta v. Charat*, A 1938 Pesh 49].

A tenancy may begin by grant of a lease by the landlord or by the tenant attorning to the new landlord. In the former the estoppel is complete, while in the latter it is not complete in the sense that he can evade it by showing circumstances which would vitiate the agreement, *eg*, that he executed the lease under misapprehension, coercion or fraud [*Badrudddin v. Bhagloo*, A 1934 P 555; *Ramzani v. Bansidhar*, A 1937 O 113]. In *Shankar v. Jagannath, supra* it has been pointed out that the words "at the beginning of the tenancy" have been construed in some cases to mean the time when the tenant was first let into possession and that that view is not accepted by the majority of the FB in *Venkata v. Aiyanna*, 40 M 561 and is not quite consistent with the view in *Vasudev v. Balaji*, 8 BHR 175 and *Trimbak v. Shk Ghulam*, 34 B 329. It has been held that if the existence of a tenancy, *ie* the relation of landlord and tenant be established by payment of rent, execution of lease or otherwise, the tenant cannot ordinarily deny the landlord's title [see *Vasudeb v. Balaji*, 8 BHC 175; *Trimbak v. Shk Ghulam*, 34 B 329; *Shankar v. Jagannath*, A 1928 B 265: 111 IC 911]. Where execution of lease is admitted, the tenant is estopped from questioning the landlord's title [*Rattiram v. Nandlal*, 103 IC 421: A 1927 L 626] even if he was the tenant of some other person before the execution of the lease [*Chandoo v. Purboo*, 59 IC 707]. In relation to the successors-in-interest of the original landlord equally the provisions of s 116 are available if the tenant attorns to them [*Tej Bhan v. 2nd Addl Dist Judge*, A 1980 A 320 (*Sital v. Badri*, A 1923 A 53; *Parameshwar v. Daluram*, A 1957 A 188 **rel on**)]. A tenant who has executed a lease but has not been let into possession, is estopped from denying his lessor's title in the absence of ignorance of defect in title, fraud &c [*Venkata v. Ajyanna*, 40 M 561 : 36 IC 817 FB; *Makham v. Balsakhi*, 123 PR 1919: 50 IC 591; *Bishnunath v. Suraj*, 4 OWN 1037; *Shankar v. Jagannath*, A 1928 B 265: 30 Bom LR 741]. And the mere fact that tenant was in possession prior to the execution of the terms does not also prevent the doctrine of estoppel from being applied [*Melaram v. Bholi*, 76 IC 47 : A 1924 L 60].

Some of the *uralans* for a *devaswom* granted a lease at the expiry of which possession was to be surrendered. Thereafter the same *uralans* executed a *kanom* (which they alone could not execute), with right to recover rent from the lessee and also possession at the expiry of the lease. Due notice was given to the lessee who continued to pay rent to the transferee. At the expiry of the lease the lessee refused to surrender possession on the ground that the *kanom* was invalid as some of the *uralans* had no power to execute it. There was no evidence that the lessee was cognizant of the transferee's defective title during the lease—***held***, that the lessee was not estopped from disputing the transferee's title, as the payment of rent by him might be deemed under a mistake and in ignorance of the defect in title [*Poovankulathil v. Kakkat*, A 1937 M 865].

S 116 applies not only to tenants let into possession at the beginning of the lease, but also to tenants who are already in possession and continue in it [*Adrat v. Dandl*, 25 IC 615 (19 M 260 **folld**)]. Whatever may have been the nature of a person's possession prior to a lease, once he takes a lease-deed from another, he is thereafter estopped from denying his title [*Sital v. Badri*, 20 ALJ 907: 69 IC 647]. The rule that a tenant is estopped to deny his landlord's title has in most jurisdictions in America been applied even where the tenant was in possession of the premises at the time of the lease [*Lucas v. Brooks*, 18 Wall (US) 436; Jones s 284]. A lessee who takes lease from person who have title as well as from those who have no title is precluded from disputing the title of the lessor who put him in possession without first restoring pos-

session [*Rajkrishna v. Barabani Coal Concern Ltd*, A 1935 C 368: 62 C 346: 60 CLJ 477; see *Currimbhoy & Co Ltd v. Creet*, 60 IA 297: A 1933 PC 29: 60 C 980].

—Summary.—It will appear from the above that the better point of the law is that even though a person was in possession before execution of the lease or the creation of the new tenancy, he is estopped from challenging the title of his landlord unless he can prove that he executed the lease or agreed to the new tenancy (by attornment or otherwise) under a fraud, misrepresentation or mistake; nor can he set up any '*jus tertii* in favour of a third person, until and unless he gives up his possession. This view has now been authoritatively affirmed by the Judicial Committee holding that the estoppel under s 116 applies not only where it is shown that the landlord put the tenant into possession but also where a person already in possession (*eg*, as a tenant under one person) becomes tenant to another. In explaining the law embodied in this section SIR GEORGE RANKIN said:—

> "The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise (which is the case before the Board, on this appeal) the section applies against the lessee, any assignee of the terms and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant from disputing the derivative title of one who claims to have since become entitled to the reversion....'The tenancy', under the section, does not begin afresh every time that the interest of the tenant or of the landlord devolves upon a new individual by succession or assignment." [*Krishna v. Barabani Coal Concern Ltd*, 64 IA 311 : 41 CWN 1253 : A 1937 PC 251].

Same.—The words "at the beginning of the tenancy" are expressly inserted in s 116 to show that the tenant is not prevented from showing that after the tenancy commenced the estate of the landlord devolved upon some other person, and the defendant or the person through whom he claims is not entitled to deny that the plaintiff or the person through whom he claims is the owner, during all the time that the relation of landlord and tenant subsists and right up to the time that that relationship ceases to exist [*Ganpat v. Multan*, 38 A 266 : 14 ALJ 263; *Mangat Ram v. Sardar Mehartan Singh*, A 1987 SC 1656, 1660 L (1987) 10 LJ 259]. This has also been ruled by the Judicial Committee in *Krishna v. Barabani C C Ltd, sup*, where it has been observed: "....nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end." The estoppel does not therefore operate if the denial relates to facts subsequent to the commencement of the tenancy [*Luckman v. Peary*, A 1939 A 670]. S 116 does not debar a tenant from challenging the validity of the title of the landlord on the basis of previous events which occurred before the tenant was inducted in the premises and also from proving the subsequent events in relation to the title of the landlord [*Rajeshwar v. Sitaram*, A 1977 P 247]. A tenant inducted on the premises purchased by the decree-holder in execution of a decree against the judgment-debtor, can in an ejectment suit prove that subsequent to the sale the purchaser has lost his title by reason of non-compliance with the requirement of Or 21, r 85 [*Dalchand v. Dadamchand*, A 1963 Raj 209]. Where an ouster by title paramount or attornment is pleaded, it is not the title of the landlord at the beginning of the tenancy which is being impeached by the raising of such a defence and the rule of estoppel laid down in s 116 no longer operates as a bar

[*Ram Rakha v. Mannalal*, A 1931 L 243]. The tenant is not prevented from showing that the landlord had a life-interest and that on his death the property devolved upon some one else [*Madan v. Musst Gur*, A 1928 A 650].

Where a tenant has paid rent to a party who did not let him into possession, though payment of rent is *prima facie* evidence of an attornment, it is open to him nevertheless, without proving mistake or misrepresentation, to show that the title of the party to whom the rent was paid was defective [*Pullayya v. Vedachala*, 10 MLT 44 (Tay 10th Ed p 107 refd to)]. Where a landlord gave his consent to the purchase of a land from another tenant by accepting *salami* and induced the purchaser to enter into possession and pay rent he is estopped [*Gursahai v. Jogeshwari*, A 1937 R 454]. By accepting a deed of conveyance in fee and going into possession, a grantee is not estopped from denying the title or seisin of his grantor, unless he claims under the deed. An estoppel exists only when there is an obligation, express or implied, that the occupant will at some time, or, in some event, surrender the possession, as between landlord and tenant or as between vendor or purchaser before conveyance [*Bepin v. Tincouri*, 13 CLJ 271]. Certain property was mortgaged in 1884. In 1889, the appellant took from the mortgagors and another person a lease of certain lands, which were a portion of the mortgaged property. In a suit by the mortgagee on his mortgage, to which the appellant was made a party defendant—*Held* that the appellant was not owing to the lease taken by him in 1889, estopped from showing that the mortgagors were not entitled to the whole of the mortgaged property at the time the mortgage was executed in 1884, *ie*, five years before the lease taken by the appellant [*Prasanna v. Mahabharat*, 7 CWN 575]. A person accepting a lease under coercion is not bound by such acceptance, nor do payment of rent by him to the person granting the lease estop him from questioning the title of the payee unless the payee lets him into possession. Even then the effect of the payment as an estoppel would be confined to the title of the payee at the time possession was given [*Collr of Allahabad v. Suraj*, 6 NWP 333. See also *Madhab v. Thakoor*, BLR Sup Vol 588 FB; *Pitambar v. Jambussar Municipality*, 17 B 510].

Where the owner of a piece of land exchanges it for another land, but takes a lease of the former land, and pays the rent thereof, and receives and retains the rents of the land he has got by the exchange, he shows such a complete acquiescence in the transaction that he cannot afterwards have it set aside on the ground of undue influence [*Seetha Rama v. Bayana*, 17 M 275, 279].

Interpleader Suit.—As s 116 prevents a tenant from denying the title of the landlord at the commencement of the tenancy, the tenant cannot bring an interpleader suit in which a claim inconsistent with his landlord's title at the time is to be litigated [*Yeshwant v. Sadashiv*, 1940 Bom 842]. See Or 35, r 5, C P Code.

Estoppel as Between Landlord and Tenant.—In a suit for eviction by landlord the tenant is estopped from questioning the title of the landlord under s 116 [*Rampasricha v. Jagannath*, A 1976 SC 2335 *Kishan Gopal Agarwalla v. Ramdulari Sah*, A 1996 Gau 39; *Rajendra Kumar v. Distt. Judge, Jaunpur*, A 1996 All 178]. In an eviction suit, the plaintiff did not establish the relationship of landlord and tenant. The tenant never paid any rent. In such circumstances his admission in the cross-examination, that by purchase the plaintiff became the landlord would not operate as estoppel [*Nepal Kishore Roy v. Baidynath Poddar*, A 1984 NOC 227 : (1984) 1 Cal LJ 393]. The section does not mean that if a tenant repudiates or disputes the title of the landlord by way of defence in an eviction suit, there should be a decree forthwith for eviction. This rule of estoppel only means that a defence of such nature ought to be shut out and rejected by the Court [*Leena Pereira v. Mary Boracho*, A 1992 Bom

93]. In a suit for ejectment and arrears of rent the basis of the claim is the contract of tenancy. The question of title of the landlord is outside the scope of the suit. Evi-dence about title is however relevant for proof or disproof of tenancy [*Lekhraj v. Sawan*, A 1971 MP 172; *Munnalal v. Balchand*, 1961 MPLJ 221]. The rule of estoppel enunciated in *Board v. Board*, LR 9 QB 48, is that where property is taken under an instrument and the taking possession is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom possession was derived there is an estoppel on the grantee setting up a title adverse to and independent of that of the grantor [*Rup Chand v. Sarbessur*, 33 C 915: 10 CWN 747: 3 CLJ 629; **folld** in *Bepin v. Tincowri*, 13 CLJ 271]. Though a tenant can never be estopped from claiming occupancy rights in an estate by reason of the statute, he will be estopped from saying that the land is in an estate if he has previously submitted to a decision that it is not an estate and taken it on that footing, so long as he does not surrender vacant possession [*Ramalinga v. Ramaswami*, A 1929 M 529]. Where the tenant had been through-out paying rent to the landlady and even the documents relied upon by him secured that right to receive rent he cannot subsequently deny her title [*Virendra Sharma v. Ramkatoridevi*, 1998 AIHC 3742, 3747 (MP)].

The estoppel prevents the tenant from pleading absence of title in the landlord as a ground for refusing to deliver up possession or to pay rent [*Patel Kilabhai v. Hargaban*, 19 B 133]. A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment [*Jamsedji v. Lakshmiram*, 13 B 323; *Maung Shwe v. Ma Shwe*, 34 IC 71; *Alimuddin v Ainaddin*, 38 IC 534; see *Vinjamuri v. Jami*, A 1941 M 607]. If the existence of a tenancy be established by payment of rent or otherwise, the tenant cannot ordinarily deny the title of his landlord in a suit brought against him for recovery of possession. He must first give up possession and then, if he has any title aliunde, that title may be tried in a suit of ejectment against the landlord [*Vasudev v. Babaji Ram*, 8 BHC 175 (**folld** in *Trimbak v. Shk Ghulam*; 12 Bom LR 208: 34 B 329]. Payment of rent for several years after dispossession from a part of the land demised does not operate as an estoppel against the defendants and debar them from raising the question of suspension of rent [*Sajjad v. Trailakhya*, 55 C 464]. Where the rule operates any enquiry about the title of a third party would be completely shut out [*U I Trust v. Raj Kumari*, A 1969 Raj 131].

Where defendant No. 1 came into possession of certain lands as a licensee of the plaintiff and subsequently defendant No. 2 as an assignee of and claiming through defendant No. 1 entered into possession of the lands and thereafter obtained a lease of a portion of the lands from a third party professing to be co-sharer—*Held* that the possession of both the defendants to the whole of the lands must be attributed to the original assignment by plaintiff and that they were barred by s 116 from questioning plaintiff's title until they had surrendered possession again to the plaintiff [*Currimbhoy & Co Ltd v. Creet*, 60 IA 297 : A 1933 PC 29 : 60 C 980].

A was granted a *paragana* on condition that if it was sold in auction for *A's* debts the grant would stand cancelled. *A* granted a permanent lease of it to *S* and after-wards the *pargana* was sold in execution of a decree against *A*. In a suit by the grantor for possession, s 116 did not estop *S* from denying that *A* had title to the *pargana* on the date of the lease [*Shiba Pd v. Soekhraj & Co*, 23 P 871: A 1945, P 162]. Where defendant obtained tenancy from *S* manager of charity, he is not estopped from showing that *S* was incapable of disposing of the property by will and that therefore the executors had no title to it [*Naithinada v. Subramania*, 4 LW 349]. In a suit to eject a tenant holding over after the expiration of his lease, it is not competent to the tenant to set up that his landlord, the plaintiff, holds under an invalid *lakheraj* tenure, and that the zemindar and not the plaintiff is entitled to the land [*Mohesh v. Gooroo Pd*, Marsh 377: 2 Hay 473]. Where a tenant has repeatedly

acknowledged that a person in possession of the proprietary right was entitled to receive rent, and has in fact attorned to him, he is estopped from questioning the validity of the title of such person on the ground that the instrument by which possession of the proprietary right had been obtained was unregistered [*Shams Ahmad v. Golam*, 3 NWP 153].

In an ejectment suit in respect of *jalkar* in a navigable river, the defendant, if he has paid rent to the plaintiff or his predecessors is precluded from raising a defence that the plaintiff cannot have an exclusive right of fishing in the navigable river [*Gour Hari v. Amirunnissa*, 51 CLR 9]. A grantee of lands as long as he holds a religious office in a temple is estopped from setting up a title inconsistent with that of his grantor and an alienee from him is similarly estopped [*Thayelbagam v. Venkatarama*, 1916 MWN 119 : 33 IC 858].

A tenant who claims the higher status of a raiyat at fixed rates, may, if unsuccessful, fall back upon and establish, if he can, the lower status of an occupancy raiyat [*Ichhamoyee v. Krishnakamini*, 18 CWN 358]. S 116 does not apply when tenant claims under-proprietary rights because such a claim does not constitute a denial of the taluqdar being a proprietor and the landlord [*Ram Khelawan v. Rampal*, A 1937 O 47].

Where in a suit the defendant admits the execution of the lease, he is estopped from questioning the plaintiff landlord's title [*Ratti Ram v. Nand Lal*, A 1927 L 626 : 103 IC 421]. A lessee entered into possession under the lease granted by the plaintiff; and during the period of his tenancy, nothing occurred, which could be treated by the party, having the title paramount, which amounted to an ouster of the lessee's right as they stood at the date of the lease by him to the lessee defendant—*Held* that the tenant was estopped from denying the title of the landlord who let him into possession and setting up the title of Government, from whom he had accepted *patta* [*Bankala v. Chidriamakkaussa*, 15 MLJ 368, 369]. Where a property is leased to a person without title to it and the lessee is ejected by the true owner, it is not open to the lessee in a suit by a lessor against him, to deny the plaintiff's title [*Moti Lal v. Yar Md*, 47 A 63 : 85 IC 756].

In a suit by the plaintiff to recover rent from defendants who entered into possession by execution of a *kabuliat* but there was no lease, the defendants pleaded that without a lease there was no contract—*Held*, that they could not be heard to say that they were not liable for rent for use and occupation [*Sheo Karan v. Parbhu*, 31 A 276: 6 ALJ 167: 5 MLT 347 FB]. Defendants who are let into possession under a verbal lease cannot plead invalidity of lease when sued for rent [*Alauddin v. Aziz Ahmad*, A 1934 P 369]. A lessee whose lease has expired cannot evict the landlord who is legally in possession of the property even if the landlord had been let into possession by the *quondam* lessee [*Md Mumtaz v. Naurang*, 3 LLJ 227: 60 IC 502]. Where the plaintiff alleging that he bought the land from the defendant and thereafter leased it to him, sued the defendant for rent, and the defendant denied the sale and the lease, it was held that no question of title would arise on the pleadings, because, if the lease were proved, the defendant would be estopped by s 116 [*Maung Hla Pru v. San Paree*, 3 LBR 90]. By accepting a deed of conveyance in fee and going into possession, a grantee is not estopped from denying the title or seisin of his grantor unless he claims under the deed [*Bepin v. Tincowri*, 15 CWN 976].

A tenant mortgaged his holding and subsequently relinquished it in favour of his landlord, who sued for ejectment of the mortgagee. Having accepted rent from the mortgagee, he was estopped from pleading the invalidity of the mortgage [*Jagraj v. Ganga*, 18 IC 383]. The sons of a *benamdar* mortgagor transferred their rights on the

death of their father and the transferee sued for redemption—*Held*, that the mortgagee was estopped from denying the mortgagor's title [*Md Sheriff v. Syed Kasim*, A 1933 M 635]. Where the mortgagors take settlement of their land from the mortgagee in possession and execute a lease, they cannot turn round and say it should not be taken as a lease [*Asa Ram v. Kishna*, A 1930 L 386: 11 L 465]. Where in a rent suit defendant denies relation of landlord and tenant and the plea is accepted, he cannot be allowed to plead tenancy in a subsequent suit against him for recovery of possession [*Sashibhusan v. Ramsebak*, 24 IC 181; *Annada v. Shamsundar*, 13 IC 688 (34 C 922 relied on)]. Where there is merely an oral agreement to lease and not a lease registered, a landlord is not estopped from evicting the lessee in possession [*Gopalkrishna v. Sukirtha*, 24 IC 790].

Where a person acquires a right to hold *bona fide* from one whom he *bona fide* believes to have the right to let into possession, he is a raiyat although the person under whom he holds is found to be a trespasser [*Binode v. Kalo*, 20 C 708 FB]. The principle in 20 C 708 is an encroachment upon the ordinary rule of law and should not be extended [*Krishna v. Mahomed*, 21 CWN 93].

The estoppel applies to all matters connected with or arising out of the contract, by which the relation of landlord and tenant was created. The estoppel could not however, extend further and affect matters quite beyond the contract. There can be no estoppel against an Act of the legislature [*Madras H M Benefit &c Fund v. Raghava Chetti*, 19 M 200 (*per* SUBRAMANIA AYYAR J)].

In a suit for damage by a lessor against a lessee for breach of covenant in a registered lease purporting to have been granted as tenure-holder to lessee as under tenure-holder, it was found that the lessor was an occupancy *raiyat* and the lease being in contravention of s 85 B T Act was void—*Held*, that the lessee was estopped from showing that the lease was void. The B T Act is not a complete Code [*Bamandas v. Nilmadhab*, 20 CWN 1340]. Plaintiff having granted a lease to the predecessors in interest of the defendants reciting that he would have the status of a *raiyat* is estopped from contending that he is as under-*raiyat* and suing for ejectment [*Iswar v. Gour*, 82 IC 90: 92 CLJ 337]. *B* purchased a portion of *A's* occupancy holding in execution of a money decree against *A*, and the representative of the original tenant took sub-lease from *B*. Plaintiff took a settlement of the holding from the superior landlord and claimed rent from the defendant the representative of the original tenant—*Held*, that defendant was not estopped from questioning the title of plaintiff [*Kalim v. Mocham*, 24 CLJ 115].

Opinion given to the lessee to purchase the land within a certain term ensures to the benefit of the legal assignee of the lease [*Ladhabhai v. Jamsetji*, 19 Bom LR 813]. A person entering into a covenant in his *kabuliat* is bound to recognise rights so recorded even if such rights were incorrectly recorded and had no real existence [*Midnapore Z Co v. Nares*, 33 CLJ 317: 49 C 37]. A *ghatwal* who is incompetent to grant a permanent tenure is estopped from alleging that the grant did not create a permanent right, if he really purported to do so [*Kangali v. Suraj*, 6 PLR 687: 65 IC 303]. Where the tenants knew perfectly well what their rights were and were not deceived or encouraged in any way, and built on the land, the mere silence of the landlord does not create an estoppel [*Budhan v. Modan*, 68 IC 656: 3 Pat LT 485. See *ante*: "*Estoppel by Acquiescence*"].

A decree-holder landlord who in execution of a rent decree purchases the holding subject to liability for a second decree is not estopped from proceeding against other properties in execution of the latter decree [*Jugal v. Bhatu*, 2 P 720 : 4 PLR 640]. Though an unregistered lease is inadmissible under s 49 of the Registration Act, it

may be referred to in order to show the nature of defendant's possession and as this showed that his possession was that of a tenant, the other defendants who claimed to be vendors from him could not deny the title of plaintiff, the landlord [*Ata Md v. Shankar*, 6 L 319]. Although a person holding a ganti interest and granting a permanent lease will be estopped from asserting his right as a *ryot*, the purchaser of that interest at an auction sale who obtains a new title from the landlord at an increased rent, will not be so estopped [*Jaladhar v. Amrita*, A 1928 C 87].

A widow conveyed a piece of land of *R* who leased it to *V* one of the four sons of the widow. In a suit for ejectment by *R* against the widow and the four sons all of whom were residing on the land, the Judicial Committee held that the conveyance had passed to *R* only the one-third interest of the widow herself and no interest of the sons, but as regards *V*, they held that being a tenant of *R*, he was estopped from questioning his title under s 116. They accordingly decreed ejectment against the widow and *V* and declared *R's* title to the widow's one-third and one-fourth of the remaining two-thirds, the last being the interest of *V*. After the judgment, *V* presented a petition alleging that he had given over possession to *R* and praying that the Judicial Committee might declare that they were not deciding anything about *V's* right to assert his title as an heir of his father. This was dismissed. *V* then brought a suit on the ground that having terminated his tenancy by giving up possession, he was now entitled to assert his ownership of his share—*Held* that apart from s 116, on the facts he was debarred from obtaining the relief sought by the previous judgment of the Board [*Vertannes v. Robinson*, 57 IA 208: 34 CWN 720: 50 MLJ 296: A 1930 PC 224: 32 Bom LR 1522].

Denial of Lease.—The principle of estoppel between a landlord and tenant does not prevent the alleged lessee to deny the lease and to deny his own status as a lessee. He is not debarred from making out that the alleged lease was never a valid document and to plead such circumstances as may invalidate the lease or otherwise make it null and void [*Shiba v. Nilabji*, A 1947 P 45]. So as person recognising another as landlord through ignorance of facts, mistake, misrepresentation or fraud can challenge his title (see *post*).

Plea of Adverse Possession.—A person who has lawfully come into possession as a tenant cannot by setting up, however, notoriously, during the continuance of this relation, any title adverse to that of the landlord inconsistent with the legal relation between them, acquire by limitation, title as owner or any other title inconsistent with that under which he was let into possession [*Gopal v. Satya*, 92 IC 963: A 1926 C 634; *Srinivasa v. Muthuswami*, 24 M 246; 37 M 1 : 21 M 153; *Sidik Haji v. Md Faruq*, A 1926 S 71; *Surajmal v. Rampearaylal*, A 1966 P 8]. As long as he remains a tenant, he cannot be held to be in possession adversely to the true owner. He can hold adversely only when his character as tenant ceases and he becomes a trespasser. The character ceases only when the tenancy is determined and not before. A tenancy cannot be determined by a mere disclaimer by the tenant that he holds the property as his own even if it be to the knowledge of the landlord, if the landlord does not take any advantage of the disclaimer so as to be entitled to take possession of the land [*Bijoy Chand v. Gurupada*, 32 CWN 720].

A tenant holding over after the expiry of the term cannot be said to be holding adversely to the landlord. So long as he is in possession he cannot deny that it was from the lessor that he got the land [*Dalmir v. Jott*, 85 IC 550: A 1925 A 698; *Balasubramania v. Saraboji*, A 1973 M 305; (*Bilas v. Desraj*, A 1915 PC 96; *Atyam v. Pechetti*, A 1966 SC 629 **rel on**)]. A person entering into possession as a service tenure-holder cannot by a subsequent assertion of title prescribe for a higher title,

even if the landlord did not seek to eject him within 12 years of such assertion [*Jnan Ch v. Satish*, 91 IC 451: A 1926 C 645]. In a suit for possession of land, a mere assertion of tenancy does not deprive the tenants from pleading limitation and they can plead that if tenancy was not established, possession for twelve years extinguished plaintiff's right to recover possession [*Khalemy v. Ram Narain*, 90 IC 617: A 1926 C 364]. Where the rights of the vendors of the plaintiff had become extinguished by adverse possession by defendant, the defendant will not be estopped from pleading it and denying plaintiff's title to the land even though the defendant after purchase of the land by plaintiff had obtained his permission to occupy it [*Ba Than v. Sein Wein*, A 1929 R 170]. No question of estoppel arises where the real contention of the defendant is that the claim of the plaintiff for recovery of possession is barred under art. [1]139 Lim Act [*Sheogobind v. Sujan*, A 1960 P 156]. If a tenant or a licensee consents to give up possession to a third party, he is estopped from setting up an adverse title [*Ajitulla v. Belati*, 35 CWN 652: 54 CLJ 151].

A plea of ownership by adverse possession in an earlier suit estops the party later from raising a plea of tenancy [*Rulhu Ram v. Than*, A 1967 Pu 328].

Tenants' Right to Plead Adverse Possession.—It is open to the defendant to plead tenancy and limitation in the alternative [*Keamuddi v. Hara Mohon*, 7 CWN 294; *Dinomony v. Durga*, 12 BLR 274 FB: 21 WR 70 **folld** in *Moti v. Kalu*, 19 IC 853; *Maidin Saiba v. Nagana*, 7 B 96; *Budesab v. Hamanta*, 21 B 509; *Jonardan v. Sambhunath*, 16 C 806; *Kadir Baksh v. Birendra*, 22 CLJ 119; *Naddiar v. Meajan*, 10 C 820. But see *Watson & Co v. Sarat Sundari*, 7 WR 395]. Adverse possession must be distinctly asserted against the lessor to his knowledge. Failure to pay rent to the lessee, is not enough [*Reajuddi v. Chand*, 24 CLJ 453]. A *Shikami* tenant already in possession acknowledged tenancy to a new *patta*-holder who sold his right to a third person who sued for rent. For setting up adverse possession against the new *patta*-holder, the *shikmi* tenant need not give up possession [*Parmeshwar v. Ramdhari*, A 1937 P 27].

Adverse Possession of Limited Interest.—A tenant in India is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been adverse to the landlord's right to evict. There can be adverse possession of a limited interest of tenancy as well as of the full owner's right [*Thakore v. Bamanji*, 27 B 515 : 5 Bom LR 274; *Bagdu Manji v. Durga Pd*, 9 CWN 292; *Ishan Ch v. Ramnarayan*, 2 CLJ 125; *Icharam v. Nilmony*, 12 CWN 636: 35 C 470 : 7 CLJ 499; *Krishna v. Sakani*, 12 CWN 195n; 27 A 18; *Trimbak v. Shk Ghulam*, 34 B 329; *Prabhabati v. Taibutunnessa*, 17 CWN 1088; *Ujir v. Shadhai*, 68 IC 1003; *Debnarain v. Baidyanath*, 14 CWN 68; *Protap Narain v. Biraj*, 19 CLJ 77; *Bhairabendra v. Rajendra*, 50 C 487].

Sub-lessee Under Lessor.—Where a lessor has obtained a decree for ejectment against his lessee, a sub-lessee although not a party to the suit is bound by the decree under Or 21 r 35. Even when the sub-lessee has an independent title, he would be estopped under s 116 from setting it up in execution proceedings against his lessor, if he was not let into possession by the latter. The position is different in the case of surrender by lessor [*Shk Yusuf v. Jyotish*, 59 C 739: 35 CWN 1132 (*Essa v. Gubbay*, 47 C 907 **dissented from**); see also *Ramkissen v. Binraj*, 50 C 419; *Jairam v. Nowroji*, 46 B 887; *Jafferji v. Miyadin*, 46 B 526; *Appa v. Venkappa*, A 1931 M 534]. A sub-lessee would be bound by a decree for possession against the lessor, whether the sub lease was created before or after the suit, if the eviction

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1. See now art 67 of Limitation Act 36 of 1963.

is based on a ground which determines the sub-lease also, unless the decree is obtained by fraud or collusion [*Sailendra v. Bijan*, 49 CWN 133; *Shk Yusuf v. Jyotish*, 35 CWN 1132 relied on)]. It is not open to a sub-tenant who has executed a *kabuliat* to deny the title of the sub-tenant to lease the land [*Zore v. Siri*, 1942 OWN 381].

Tenant's Right to Dispute the Derivative Title of his Landlord. [Assignment, Succession, Attornment, Mistakes etc].—The doctrine of estoppel applies where the tenant has been *let into possession* by the landlord. But where the landlord did not himself induct the tenant into the land but claims his position under a derivative title, *eg* as assignee, donee, vendee, lessee, heir, &c there is no estoppel against the tenant. So, a tenant already in possession is entitled to show that the plaintiff does not possess the derivative title he claims, but it is in some other person [see *Lodai v. Kallydas*, 8 C 238; *Doe d Higginbotham v. Burten*, 11 Ad & E 307; *Cornish v. Searell*, 8 B & C 471; *Claridge v. Mackenzie*, 4 M & G 143; *Tillessuree v. Asmedh*, 24 WR 101; *Mahomed Golam v. Taranath*, 85 IC 657 (C); *Bhagwati Devi v. Surendrajit*, A 1969 P 257] as long as he has not attorned to him or paid any rent to him [*Sugga Bai v. Smt Hiralal*, A 1969 MP 32]. If there is an admission on the part of the tenant that he attorned to this particular landlord, it would be difficult for the tenant to challenge the right of the landlord to sue in respect of the leasehold [*Jitendra Nath Roy Choudhury v. Marondra Kumar Karforma*, A 1988 Cal 392, 394 (DB) : (1988) 92 Cal WN 956]. When the title in the demised property devolves on a person by virtue of a lawful decree against the landlord, such derivative title cannot be questioned by the lessee so long as the decree stands [*Sudhir v. Jogesh*, A 1970 A & N 102]. The claim of the transferee having derived a good title from the original landlord is concerned, the same does not come under the protection of the doctrine of estoppel and is vulnerable to a challenge. The tenant is entitled to show that the plaintiff has not as a matter of fact secured a transfer from the original landlord or that the alleged transfer is ineffective for some other valid reason, which renders the transfer non-existent in the eye of law [*Subhash Chandra v. Mohd Sariff*, A 1990 SC 636, 639].

Thus, if *A* is the original landlord and *B* claims reversion either as his heir or as donee or as adopted son of *A*, it is open to the tenant to deny the derivative title, that is, he can dispute that he is not the heir or the donee or the adopted son [*Guruswami v. Ranganathan*, A 1954 M 402; *Daulat v. Haveli*, A 1939 L 49]. The tenant is not estopped from denying the right as landlord of a person who was sued on the basis of a title derived from one who inducted the tenant upon the land [*Indranarain v. Sarbasova*, 41 CLJ 341; *Deendabandhu v. Makim*, 63 C 763]. Thus a tenant may question the derivative title of daughters who claim rent as successors to their mother by Stridhan [*Prakash v. Gian*, A 1940 L 341]. The principle in s 116 does not apply to disentitle the tenant from disputing the derivative title of one who claims to have since become entitled to the reversion, although in such cases there may be other grounds of estoppel (*eg* by attornment, acceptance of rent, &c). Nor does the principle prevent the tenant from pleading that the title of the original lessor has since come to an end [*Krishna v. Barabani Coal Concern Ltd*, 1938, 1 Cal 1: 64 IA 311; *Sugga Bai v. Smt Hiralal, sup*].

In the case of an assignee of the lessor, though he is to all intents and purposes in the same situation as the lessor, and takes the benefit of and is bound by a lease by estoppel, the lessee is not estopped from showing that the lessor had no such title as he could pass to the assignee, or that the person claiming to be the assignee is not in fact the true assignee [Hals 3rd Ed Vol 15 para 459].

"The question naturally presents itself, is there any estoppel if the person in possession has recognised the position as landlord of, or agreed to become, tenant to, a person who has neither himself let him into possession, nor is the successor in title of any one who has? Now, if the person who so comes forward claiming to be owner, tells the party *in possession all the facts with reference to his claims*, and the latter with full knowledge, decides to acquiesce in such claim, and to become tenant, notwithstanding any known or suspected defects of title, all this amounts to a readiness to deal on the basis of the claim put forward being a valid one as between them; and whether or not an idle form of first handing back the position, and then having it handed back again, be gone through as a preliminary or not, can make no difference. In such a case, the tenant would be in just the same position, as to the admission of title, as if he had originally received possession from the party whose tenant he has agreed to become; and he would have to give back the possession, before he could controvert the admission. On the other hand, if a party already in possession recognises as landlord, one who neither gave him possession, nor is the successor in title of one who did so, in ignorance of facts which would have shown that the party claiming to be landlord had in fact no title, which facts were either withheld from him by the party so claiming, or were equally unknown to both, such recognition, whether it takes the form of an attornment, a payment of rent or the entering into a new agreement, will not preclude the party in possession, on subsequent discovering the want of title, from refusing to regard the other party any longer, as his landlord; and in such a case, it is not a condition precedent to his right to set up such want of title that he should give possession to a party he had so long been recognising as landlord; for he never received possession from the latter, nor from his predecessor in title, and the restoration of the *status quo ante* does not here require any such giving up of possession. It need scarcely be added that the position of a landlord who did originally give possession, and who, after the expiration of his title induces the tenant to pay him rent, is just the same as that of the party who comes forward and claims to be landlord in the case just put" [Cababe pp 25-27].

Where defendants have been continuously paying rent to the successive lessors including the plaintiff, they are estopped by attornment from disputing plaintiff's title [*Trimbak v. Shk Ghulam*, 34 B 329: 12 Bom LR 208]. Defendant having attorned to plaintiff as tenant is estopped from contending that plaintiff had no right to let out the property on rent [*Devidas v. Shamal*, 22 Bom LR 149: 58 IC 595; *Keshoram v. Banamali*, 45 CLJ 249: 103 IC 93].

An attornment to a third party is a disclaimer; but 'attornment' in the sense in which the word is used and understood in English law is not a mere agreement in favour of a third party to pay rent, but has been defined as "the act of the tenants putting one person in the place of another as his landlord" [*per* HOLROYD J, in *Cornish v. Seqrell*, 8 B & C 471, 476; *Jogendra v. Mohesh*, 55 C 1013: 47 CLJ 387]. A case of mere attornment after previous possession as a proprietor would not raise any estoppel [*Kamakhya v. Surendra*, A 1928 P 284]. A mere attornment does not create a new tenancy, although in particular circumstances it may. A mere attornment does not create an estoppel in favour of the plaintiff, but it still does not prevent the defendant from showing that he attorned tenant in ignorance of the fact that plaintiff had no title [*Nadjarain v. Trist*, A 1945 B 399: 47 Bom LR 209]. If through ignorance of the title of landlord or fraud in the matter of executing a lease, the tenants attorn to a certain person, they are not estopped in the suit by the latter from showing that he had no title either when the lease was executed or attornment was made by payment of rent. But the *onus* of proving want of title is on them [*Chenglu v. Jahiruddin*, 91 IC 669: A 1926 C 720].

The transferee of the share to one of several persons jointly owning an occupancy holding cannot claim joint possession of the holding as against his transferor's co-sharers, there being no room in such a case for the application of the doctrine of estoppel [*Agarjan Bibee v. Panaulla*, 37 C 687: 14 CWN 779]. A house owned by two brothers was sold in execution of a decree against one of them. Defendant a tenant executed a *sarkhat* in favour of the purchaser. In a suit by the purchaser for ejectment, defendant is estopped [*Mathura v. Gokul*, 41 A 654]. The plaintiff purchased property from *D* and inducted *D* as tenant, the Defendant claimed to be a coparcener of *D*, *Held* that *D* and defendant are estopped from denying the title of the plaintiff. [*Harbans Singh v. Smt Tekamani Devi*, A 1990 Pat 26, 30]. Where a tenant has acknowledged the title of a person as landlord by payment of rent for several months, he can subsequently challenge his title only on the ground of mistake, ignorance of facts, misrepresentation of fraud [*Girdhari v. Kaloo*, 22 IC 243]. Mere payment of rent to plaintiff by defendant not made under circumstances which would establish a relationship of landlord and tenant would not entitle the plaintiff to a decree for rent, nor would it estop the defendant from disproving the plaintiff's title [*Abdul Rajak v. Promoda*, 80 IC 22: A 1925 C 487]. The payment of rent operates as attornment. The doctrine of estoppel by attornment can be shown not to have come into operation only by pleading and proving such facts which have vitiating effect on contracts, for example, misrepresentation, coercion, fraud, mistake etc. [*Pahilajrai v. Arunkumar*, A 1982 MP (NOC) 81]. Where the defendants have for some years under erroneous impressions paid to the plaintiffs the amount or part of the amount, levied from them as quit rent by the Government, such payment cannot estop the defendants when better informed of their rights, from contesting the title of the plaintiffs to any further payments [*Jeshingbhai v. Hataji*, 4 B 79].

In *Banee Madhab v. Thakurdas*, BLR Sup Vol 588 FB: 6 WR Act X 71 PEACOCK CL, observed:

> "According to English law if a man takes land from another as his tenant he is estopped from denying the title of that person. But if he takes land from one person and afterwards pays rent to another, believing that other to be representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took; for example, if a man pays rent to another, believing him to be the heir-at-law, or that the landlord left a will, the tenant in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *prima facie* evidence liable to be rebutted."

A tenant is not estopped from questioning the title of the alleged assignee of his admitted landlord [*Tilessuree v. Asmedh*, 24 WR 101]. MITTER J, observed in *ibid*:

"But it has been said that the plaintiff has already recovered a decree for rent against the title to the plaintiff who had thus become *zemindar*. This contention I do not think is correct. If the tenant had been installed in possession by the plaintiff, *ie* if this tenancy had been created by her, no doubt, he would not have been competent to question his admitted landlord's title. But that is not the present case."

Tenant's Right to Question Benami Title of his Landlord.—A executed a *kabuliat* to *B* as *zemindar*. *B* gave a *patni* of the *zemindari* to *C*, who sued *A* for arrears of rent upon the *kabuliat* executed in favour of his superior landlord. *A*, admitting the

execution of the *kabuliat* pleaded that *B* was not the real owner, but was merely *benamdar* for her husband—*Held*, that in India the English doctrine of estoppel did not apply and that it was open to A to prove by parol evidence a different title from that recited in the lease [*Donzelle v. Kedar*, 1871, 7 BLR 720: 16 WR 186; *Indrabuttee v. Shk Mahboob*, 24 WR 44. See *however Jainarain v. Kadambini*, 7 BLR 723*n*]. It is difficult to say that under the strict rule of s 116 a tenant may be allowed to prove that the person from whom he took lease is a *benamdar* for another who is the real owner, the principle being that the lessee shall not be allowed to question the lessor's title and the rule in the section is not different from the English law. But the deviation from rule is possibly due to the fact the *benami* is one of the recognised and popular institutions and the habit of holding land in *benami* is inveterate in India. That is why the doctrine of advancement is not applicable here (*ante* s 114: "*Advancement*"). It may also be explained by saying that the tenant having paid rent to the *benamdar* under the erroneous belief that he is the real owner is not precluded from showing who is the real landlord.

On the question whether a tenant may explain the *benami* title of his landlord, MOOKERJI J, said:—"The District Judge, as we have already stated, had held that it was not open to the defendant to urge that the plaintiff was a mere *benamder* for Makhan Lal and could not consequently claim rent from him. In support of this view, he has not mentioned any judicial decision; but in fact, the view taken by him is opposed to a long series of decisions of this court amongst which reference may be made to the case of *Donzelle v. Kedar*, 16 WR 186; *Kedar v. Donzelle*, 20 WR 352; *Indrabutte v. Shk Mahbood*, 24 WR 44 and *Kailash v. Baroda*, 24 C 711; possibly also reliance may be placed to some extent upon the case of *Jainarayan v. Kadambini*, 7 BLR 723. In some of these cases, there are expressions to be found in the judgments to the effect that the doctrine of estoppel recognised in English law should not be adopted in this country. It is not necessary for us to consider, whether this view is not too widely expressed and whether such position should be maintained in view of the provisions of s 116 of the Indian Evidence Act. It is sufficient for us to hold that in cases where the doctrine of estoppel does not come into play, it is open to the tenant defendant to urge that the plaintiff, as *benamdar* for the beneficial owner, is not entitled to claim rent from him. We may point out that in the case before us no question of estoppel arises" [*Rahimannessa v. Mahadeb*, 12 CLJ 428, 431-32]. In a later case it has been held that a tenant obtaining possession under a *kabuliat* is estopped from denying the title or seisin of his grantor in a suit for rent, on the ground that he is merely a *benamdar* [*Prabhat v. Bijaychand*, 50 C 572 : 75 IC 89; *Krishnarao v. Ghaman*, 36 Bom LR 1074]. A tenant is estopped from raising the question that his lessor is a *benamdar* of some one to whom he has paid rent [*Deenabandhu v. Makim*, 63 C 763: 40 CWN 460].

In the Punjab it has been held that in a suit for rent upon a lease executed by the tenant in favour of his landlord, the tenant is estopped from raising a plea that the ostensible landlord was only a *benamdar* for somebody else [*Bogar v. Karam*, 141 PR 1906: 13 PLR 1907 (7 BLR 720; 24 WR 44 **disstd** from)]. A tenant cannot deny the title of the landlord from whom he has been holding, and to whom he has bound himself to pay rent, either alleging that he is a mere *benamdar*, *ie* an agent or trustee for someone else not mentioned in the lease, or in any other way. S 116 applies to *benami* transaction also [*Meer Jango v. Chote Sahib*, 6 NLR 161].

A contrary view has been taken in Madras. Where a lease is executed by a tenant in favour of *benamdar*, the real owner, rather than the *benamdar*, must be regarded as the landlord for the purpose of s 116. A person having admitted that he is a *benamdar* and not having shown any right to sue under the general law, has no right to sue the tenant

for rent, and if he sues, the tenant can deny his right to sue [*Kuppu Konam v. Thirugana*, 31 M 461]. *Kuppu's Case* was distinguished in a later case on the ground that a distinction exists between a case where the contract is entered into by the real owner but the lease is taken in the name of his *benamdar* and the case where a *benamdar* in possession grants a lease without disclosing his *benami* character. In the former case the tenant's estoppel may operate in favour of the real lessor and not the *benamdar*, but in the later case the *benamdar* and not the real owner must be regarded as the landlord for the purpose of s 116 (see *Venkatanarasimhacharyulu v. Gangaraju*, A 1941 M 607: 1941, 1 MLJ 554; *Bokka v. Kalipatnapu*, A 1959 AP 92; see *Dt Board Tipperah v. Sarafat*, A 1941 C 408 : 73 CLJ 281]. A case similar to *Kuppu, sup.* is where a tenant executed a rent-deed in favour of a *benamdar* and paid rent to his real owner. In a suit for rent by the *benamdar*, it being found that the agreement being entered into at the instance of or on behalf of the real owner, the plea of estoppel was available and the tenant was discharged from liability [*Muthuswamy v. Solai*, 25 IC 679: 26 MLJ 597: A 1915 M 48].

The plaintiff having sued to obtain possession of certain land which the defendant alleged that prior to the time when he became tenant, the plaintiff had, for good consideration, conveyed to him the premises leased, together with other property. This conveyance was found to be a *benami* transaction—*Held* that the plaintiff was not estopped from asserting the tenancy, and under the circumstances, was entitled to recover [*Subucktulla v. Hari*, 10 CLR 199]. The landlord may sue the real tenant for rent, although the lease was in the name of his *benamdar* [see *Debnath v. Gudadhur*, 18 WR 532]. It is not necessary that the plaintiff should be aware at the date of inception of the tenancy of the interest of the beneficial owner in order to maintain his suit against him [*Malik v. Balkuar*, 2 PLT 740]. As to cases where ostensible tenant is a *benamdar*, see *Hira Lal v. Raj Kishore*, WR Sp 58; *Jadu Nath v. Prasunno*, 9 WR 71; *Bepin v. Ram*, 5 BLR 234; *Prasanna v. Koylash*, 8 WR 428 FB.

[2]**Effect of S 60 of the B.T. Act, 1885.**—In a suit brought for rent by a registered proprietor, the defendant cannot plead that the plaintiff is a *benamdar* [*Sadhu v. Radhika*, 8 CWN 695; see *Shk Md v. Hiraman*, 24 IC 118], or that rent is due to a third person [*Nandkuar v. Jadkan*, 61 IC 386 : 1921 Pat HCC 201]. S 60 B T Act and s 78 Ben Land R Act are complementary to each other and in a suit for rent by the registered proprietor, the tenant is estopped from pleading that he is not the true owner [*Debendra v. Nilmony*, 86 IC 865: A 1925 C 1173; see *Abdul Aziz v. Kanthu*, 38 C 413 *ante*]. Irrespective of the operation of sec 116 which is a branch of objective law, the plaintiff in order to get a decree for eviction on the ground mentioned in s 13(*1*)(*ff*) of the West Bengal Premises Tenancy Act for own occupation has to prove that he is the owner of the suit premises [*Satyabrata Bose v. Amiya Bala Bose*, A 1984 Cal 392, 295 : (1984) 88 Cal WN 367].

A tenant cannot as a defence to a suit by a registered proprietor for rent, plead that the rent is due to a mortgagee to whom the landlord has assigned a part of his interest, but whose name has not been registered [*Hem Ch v. Sourindro*, 5 CWN 482]. In *Durgadas v. Samash*, 4 CWN 606, it has however been held that when a tenant in good faith and under the reasonable belief that the land held by him was included in the estate of a third person attorned to him four years prior to the suit, this had the effect of dispossessing the plaintiff and rendering the provisions of s 60, Bengal Tenancy Act inapplicable; so that the rent was due to a third person notwithstanding that the plaintiff was the registered proprietor. In *Girish v. Satish*, 12

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2. B T Act has been repeated.

CWN 622, it has been held that s 60 of the Bengal Tenancy Act does not preclude a tenant from proving that the title under which the plaintiff claims to hold and in respect of which he has been registered under the Land Registration Act has been held by a court properly constituted to be void and of no effect. Where this was proved—*held*, that this was a good defence to the suit. But it is only the registered proprietor and not his lessee who can claim the benefit of s 60 B T Act. In such a case a tenant may plead payment of rent to a third person [*Md Mazhur v. Kadir*, 11 CWN cxxvii : 3 CLJ 93*n*].

Relation of Landlord and Tenant How Created.—The relation of landlord and tenant arises: (*1*) where it has been created by contract valid according to the law in force at the time of executing such contract; (*2*) where it is reasonably implied from the act of the parties; and (*3*) where it has been created or continued by operation of law [Field Rent Law Dig Art 4 p 5]. No statute lays down any rule as to how the relation is created. Its determination depends on the particular facts of each case. Tenancy in this country is created not only by contract but also by occupation of land so far agricultural lands are concerned [*Azim v. Ramlal*, 25 C 324, 327]. The rule that in order that the relation of landlord and tenant may be established, consent of both sides is essential, may be the law in England, but it is not the law here [*Kali Pr v. Bhagaban*, 17 CLJ 431]. If a person enters another's land and is allowed to remain there and cultivate it, a contract of tenancy may be implied. If rent is accepted, if he is sued for rent, a tenancy is clearly established [*Md Azmal v. Chandi*, 7 WR 250; see *Gadadhar v. Khetra*, 7 WR 460; *Chaitan v. Sadhari*, 5 CLJ 62; *Durga v. Jhinguri*, 7 A 511; *Raj Kishore v. Girijakant*, 25 WR 66; *Mohesh v. Ograkant*, 24 WR 127; *Banee Madhab v. Thakurdas*, BLR Sup Vol 588 FB]. Unexplained payment of rent will raise estoppel [*Vasudeb v. Babuji*, BHCR 175]. Acceptance of rent must of course be with knowledge [*Mritunjay v. Gopal*, 2 BLR ACJ 131; *Gour Lal v. Rameshur*, 6 BLR Ap 92]. Acknowledgment of tenancy may arise from submission to distress or from attornment [*Panton v. Jones*, 3 Camp 372; *Lodai v. Kally Dass*, 6 C 238 (In this case FIELD, J, explained the various ways in which the relation is created); *Trimbak v. Shk Gulam*, 34 B 329 *ante*].

It is the liability to pay rent which establishes the relation of landlord and tenant. The actual payment of rent is not necessary to constitute or maintain that relation, and mere non-payment of rent does not determine it [*Rango Lal v. Abdul Ghafur*, 4 C 314 : 3 CLR 119; *Paresh v. Kashi Ch*, 4 C 661; *Masyatulla v. Nurjahan*, 9 C 808 : 12 CLJ 389; *Tiru Churna v. Sangovien*, 3 M 118; *Prem Suk v. Bhupia*, 2 A 517; *Daboda v. Krishna*, 7 B 34; see also *Tatia v. Sadashiv*, 7 B 40; *Sristidhar v. Kalikant*, 1 WR 171; *Watson & Co v. Sarat*, 7 WR 395; *Girish v. Bhagwan*, 13 WR 191; *Duli Chand v. Sham Behari*, 24 WR 113; *Haradhan v. Halodhar*, 25 WR 56: *Lakhu v. Wise*, 18 WR 443; *Troyla v. Mohima*, 7 WR 400]. A mere demand of rent is not sufficient to create the relation. It is at most an offer of tenancy [*Deonandan v. Meghu*, 34 C 57 : 11 CWN 225]. A lease under the T P Act (s 107) for more than a year or from year to year can be made only by a registered instrument. Lease under the B T Act may be by a written or verbal contract.

A tenant may prove his tenancy without proving his lease, if he has any, or if it is inadmissible for want of registration [*Surbah v. Catherine*, 1 CWN 248; *Fazal v. Keramuddi*, 6 CWN 916; *Sitanath v. Kartick*, 8 CWN 434; *Ambika v. Galstaun*, 13 CWN 326; *Yashwadabdi v. Ramchand*, 18 B 66]. It was held in some cases that a *kabuliat* signed by the lessee only is only an undertaking to take a tenancy and is not a lease [see *Nil Md v. Baul*, 14 CWN 73; *Turof Sahib v. Yusuf*, 30 M 322; *Nandlal v. Hanuman*, 26 A 368; *Kashi Gir v. Jogendra*, 27 A 136]. This view has been affirmed in an Allahabad case in which it has been held that a registered *kabuliat* can in no

way be considered as a lease under s 105 T P Act [*Kedar v. Shankar*, 46 A 303; see also *Ahmed v. Sadasheo*, 80 IC (N)]. But a Full Bench in Madras held that the relation of landlord and tenant is created by a registered *kabuliat* alone signed only by the lessee, with a *patta*, if accepted by the lessor and registered [*Syed Ajam v. Ananthanarayana*, 35 M 95 FB : 21 MLJ 202]. The same view was taken in Calcutta [*Raimoni v. Mathura*, 16 CWN 606 : 39 C 1019]. It has been pointed out in a later case,that a *kabuliat* predicates a *patta*. The *patta* is the title-deed of the tenant and the *kabuliat* is a mere acknowledgment, an engagement to carry out the terms of the *patta* [*Srinath v. Protap*, A 1923 PC 217 : 28 CWN 145 : 82 IC 879]. A lessee holding over is in a better position that a tenant at will. The holding over of the land after the expiry of the term of the *kabuliyat* on payment of rent which was accepted by the landlord on the terms and conditions of the *kabuliat* created a renewed tenancy on the same terms and conditions of the earlier *kabuliyat* [*Harihar Paland v. Sudhir Kumar Paland*, A 1988 Cal 68, 74 : (1987) 91 Cal W N 958 (DB)].

A tenant at will does not come within s 107 T P Act and may be created verbally [*Sarat v. Jadav*, 44 C 214 : 21 CWN 206]. Where the relation of landlord and tenant is shown to have existed prior to the specific lease sued upon, it is for the tenant to prove that it has ceased to exist. In the absence of such proof it is presumed to continue, and the tenant's possession is, in that case not adverse [*Krishnaji v. Antaji*, 18 B 256, 258; *Zamorin of Calicut v. Narayan*, 22 M 323]. Payment of rent under erroneous impression does not create relationship of landlord and tenant between the parties. The fact that the defendant had for some years paid to the plaintiffs, part of the amount of quit-rent levied from the plaintiff by Government did not estop the defendants, when better informed of the rights, from contesting the title of the plaintiff to any further payment [*Jeshingbhai v. Hataji*, 4 B 79]. Where a person was in receipt and enjoyment of rents from tenants, the mere discontinuance of the payment of that rent would not constitute a dispossession, without his consent, within the meaning of s 9[3] of the Specific Relief Act [*Tarini v. Ganga*, 14 C 649; see also *Dhunput v. Mahomed*, 24 C 296]. If the substance of the estoppel is pleaded but only the nomonclature remains unpleaded, that much short-coming of the pleading is at least pardonable. There is no statutory bar against two individuals owning leasehold rights treating the leasehold rights to be the assets of the partnership firm, of which they are themselves the partners. *Nagji Vallabhaji & Co. v. Maghji Vijpar & Co.*, A 1987 Bom 142, 152, 153 : (1986) 88 Bom LR 633.

"Or Person Claiming Through Such Tenant."—It has been seen that estoppel binds the tenant's representative or parties (*ante*: "*Estoppels are binding upon parties and privies*." The estoppel binds not only the tenant but every one who claims in any way through him. When the lessors accepted and acted upon the *kabuliat*, the lessors as well as the persons claiming under them are equally estopped from denying the validity of the lease [*Hari Mandal v. Durjodhan*, 94 IC 661 : A 1926 C 882]. It operates against persons claiming through the tenant, as for instance sub-lessees. A party obtaining possession of premises held by a tenant by colluding with him and claiming those premises by a title adverse to that of the lessor, cannot set up his adverse title against the landlord as a valid defence in an action of ejectment, and if he has collected rent from the tenant, he is liable therefor to the lessor [*Pasupati v. Narayana*, 13 M 335, **followed** in *Prattahath v. Prattahath*, 16 MLJ 351].

B the plaintiff's lessor, finding one *W* in possession, induced the latter to take a lease from him. The defendant, having become proprietor of adjoining land, offered

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3. See now s 6 of specific Relief Act 47 of 1963.

W £20 to give up the cottage to him. Plaintiff sued for ejectment in respect of the cottage. Defendant contended that he was entitled to the land upon which the cottage stood under the same title under which he held the adjoining land—*Held*, that the defendant, having come in under *W* who possessed under *B*, was not at liberty to question *B's* title, the defendant being in the position of assignee of the lease [*Deo d Bullen v. Mills*, 2 Ad & E 17; see *Doe d Knight v. Smythe*, 4 M & S 347]. Where the defendant came into possession of land as lessee of the plaintiff's tenant at a time when the plaintiff's title to the land had determined under the Land Clauses Consolidation Act, (8 & 9 Vic c 127), the Court of Common Pleas held that he was in no better position than his lessor, who by holding on as tenant from year to year, was estopped from disputing the plaintiff's title [*London and North-West Ry Co v. West*, LR 2 CP 553]. Defendant hired apartments by the year from *W*, who afterwards let the entire house to the plaintiff. In an action for use and occupation, it was held that the defendant, having used and occupied the premises under a lease from *W* was not competent to impeach either his title or that of the plaintiff who claimed through him [*Rennie v. Robinson*, 1 Bing 147]. Persons not claiming possession of land under the tenant, are not estopped from denying the title of the lessor [*Maharaja of Jaipur v. Surjam*, 44 A 671 : 75 IC 495 (*Tadman v. Henman*, 2 QB 168 **refd** to)].

Whether Denial of Landlord's Title is a Ground of Forfeiture.—The denial by a tenant of his landlord's title is no ground of forfeiture of his tenancy under the Bengal Tenancy Act [*Debiruddin v. Abdur Rahim*, 17 C 196; *Dhora Kairi v. Ram Jewan*, 20 C 101; *Nizamuddin v. Momtajuddin*, 28 C 135 : 5 CWN 263; refd to in 36 C 927 : 13 CWN 949. See however *Nil Madhab v. Anant Ram*, 2 CWN 755 (**folld** in *Ramgati v. Pranhari*, 3 OLJ 201; *Khatar v. Sadraddi*, 34 C 922); *Sheikh Miadhar v. Rajani*, 14 CWN 339 : 35 C 807; *Faiz Dhali v. Aftabuddin*, 6 CWN 575 : 3 CLJ 26*n*. The cases in 2 CWN 755 and 6 CWN 575 were doubted in *Malika v. Makham*, 2 CLJ 389 : 9 CWN 928. The case in 9 CWN 928 was distinguished in *Shk Miadhar v. Rajani*, 14 CWN 339; explained in *Ekabbar v. Hara Bewa*, 15 CWN 353 and followed in *Annada v. Shamsundar*, 13 IC 688]. As to disclaimer of landlord's title, see *Annada v. Mahim*, 26 CLJ 261; *Samundar v. Mekhlal*, 37 IC 935. When the tenant denies the plaintiff's title to recover rent from him *bona fide* on the ground of seeking information of such title or having such title established in a court of law in order to protect himself, he is not to be charged with disclaiming the plaintiff's title. But where the disclaimer is done not with this object but with an express repudiation of the tenancy under the plaintiff, it would operate as forfeiture [*Hatimullah v. Md Abu*, A 1928 C 312 : 32 CWN 391].

Permanent tenancy under the T P Act is determined by denial of landlord's title [*Baidya v. Khikhindra*, 1 Pat LJ 157 (19 C 489 : 24 C 440 **folld**)]. Denial of landlord's title in order to operate as forfeiture must be by matter of record before the institution of any suit for forfeiture and must be in clear and unmistakable terms [*Maharaja of Jeypore v. Rukmini*, 46 IA 109 : A 1919 PC 1 : 23 CWN 889 : 42 M 589]. Denial of landlord's title by the holder of a service tenure works as forfeiture of tenancy [*Annada Moyi v. Lakhi Ch*, 33 C 389 : 3 CLJ 274. See *Venkaji Krishnaji v. Lakshman Devji*, 20 B 354; *Ambadai v. Bhau Bin*, 20 B 759]. Where a case falls within the T P Act, 4 of 1882 denial of landlord's title works as a forfeiture [see s 111(9) of the said Act]. But where a case falls within Bengal Tenancy Act, such denial does not amount to a forfeiture. There is, however, some difference of opinion on the point, as will appear from the rulings quoted above. A mere renunciation of tenancy without denial of title, though it may operate as a surrender, cannot amount to a disclaimer [*Pratap v. Biraj*, 19 CLJ 77].

Other Cases.—A plaintiff alleged a purchase of land from *A* and *B* of which he afterwards granted them a *patta* and retained them in possession and he put in evidence a consent decree obtained against *B* for arrears of rent.—*Held*, in a suit to recover possession on the ground of tenancy having expired, that the decree worked no estoppel against *B* by virtue of s 116 and did not relieve the plaintiff from the necessity of proving his case completely [*Soldar v. Nil Comul*, 1 CLR 528]. It was contended in the appellate court that the Government was estopped under s 116 from denying the plaintiff's title, but must vacate the land and then establish their title, if any, in a separate suit—*Held* that the plea not having been raised in the courts below, should not be allowed on appeal [*Vithal Das v. Secy of S*, 26 B 410, 413]. Where some persons claiming under *M* had obtained possession of the property from the mutwali in the guise of beneficiaries and on the footing that the *wakfnama* was a valid document, they could not under ss 115, 116 be permitted to deny that the person from whom the possession was claimed had a title to such possession when it was handed over [*Md Ismail v. Abdul*, 37 B 447]. In a suit for ejectment on a rent note under which the tenant is in possession, if the rent note forms only a part of other documents forming an illegal transaction, it is open to the tenant to plead that the transaction is illegal [*Bhavan v. Umar*, 51 B 43 : A 1927 B 129 (32 B 449, 38 B 358 **relied** on)].

Licensee's Estoppel.—The rule of estoppel under s 116 extends in terms also to a licensee [*Dwijendra v. Rajendra*, A 1971 A&N 143]. The rule that tenant cannot deny his landlord's title extends to the case of person coming in by permission as a mere lodger, a servant or other licensee. Where a woman who had asked leave to get vegetables in the garden, and obtained the keys for this purpose, fraudulently took possession of the premises and refused to vacate on the ground that the plaintiff had no title, it was held that she could not defend an ejectment, as she held as a mere licensee and had, moreover, obtained possession by fraud [*Doe d Johnson v. Baytup*, 3 Ad & E 188; folld in *Uttam v. Champatrao*, A 1960 B 238]. There is no distinction between a licensee and a tenant in the matter of law of estoppel, and a licensee who has obtained possession on account of the licence, must first surrender possession before he can be allowed to show that his licensor's title has determined. But the rule has no application in dealings between a lessor having no title and a third person. Thus a third person bringing goods on to demised premises by the license of the lessor's tenant is not estopped from disputing the validity of the demise under which the tenant holds [*Tadman v. Hennan*, 1893, 2 QB 168]. S 116 does not state that every license is revocable at the whim of the licensor. When a *pongyi* is installed in a *Kyaung*, the fact that s 116 might prevent him from denying the title to possession of the person who placed him there, would not prevent him from asserting that he has no power to turn him out [*Adhesika v. Ma San Me*, A 1930 R 291]. A person in possession of property in a fiduciary capacity (a *pujari*) is estopped from questioning the title of the person from whom he got possession. His possession is either of bailee or licensee [*Balram v. Durgalal*, A 1968 MP 81].

Plaintiff sued to eject the defendants from a *jalkar*. The defendants had paid rent to the plaintiff and his predecessors. The defence set up was that the defendants, as members of the public community, were entitled to exercise their right to fishery in a navigable river, and that neither the Government nor the plaintiff could claim exclusive rights. *Held* that the defendants being licensees, and having paid rents were precluded from setting up this special defence [*Gour Hari v. Amirunnissa*, 11 CLR 9]. A licensee cannot deny that the licensor had a title to the possession at the time when the licensee was permitted to enter, though there is no relationship of licensor and licensee subsisting during the period sued for [*Dakhimoni v. Tulsi*, 13 IC 512].

Denial of title does not sanction forfeiture of licence as in the case of a lease [*Punnamma v. Venkata*, A 1953 M 456]. A person granting *sanad chitis* permitting tenants to construct embankments to silted up tanks, on which they acted, is estopped from revoking the licence [*Birendra v. Akram*, 16 CWN 304 : 39 C 439, 444]. A licensee in possession of lands is not entitled to a notice to quit [*Gobinda v. Nanda*, 27 CLJ 523]. As to licensees, see also Easements Act (5 of 1882) ss 52-56.

A licensee, however, is not precluded from setting up a claim of adverse possession even though he has not surrendered his possession, provided he has openly denied the permissive nature of his possession and asserted a hostile claim [*Bodhan v. Bhundal*, A 1965 A 309].

Even if the licensor had no right at the time of the grant of the license but acquired it subsequently and the licensee carried on without a demur, a new licence with a new taking of possession must be implied with the estoppel coming into play [*Terunnause v. T*, 1968 AC 1086].

S. *117. Estoppel of acceptor of bill of exchange, bailee or licensee.—No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

SYNOPSIS

COMMENTARY

Principle and Scope.—The estoppels dealt with in this section, *viz* of acceptor of bill of exchange, bailee, licensee, are further instances of estoppel by agreement. The

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* In Ceylon the following section has been substituted:—

"117. No bailee, agent or licensee shall be permitted to deny that the bailor, principal, or licensor, by whom any goods were entrusted to any of them respectively, was entitled to those goods at the time when they were so entrusted:

Provided that any such bailee, agent, or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal or licensor, or that his bailor, principal or licensor wrongfully, and without notice to the bailee, agent, or licensee, obtained the goods from a third person, who has claimed them from such bailee, agent or licensee."

section deals with the estoppel arising out of position or contract created by the drawing, acceptance, or endorsement of bills of exchange or notes. The acceptance of a bill of exchange implies an admission of the existence of the drawer and his capacity and authority to draw the bill; and it amounts to an undertaking by the acceptor to pay the amount specified in the instrument, to the order of the drawer. Having given his consent by acceptance, he is precluded from denying to a holder in due course that the drawer had authority to draw or endorse the bill. Similarly a bailee or licensee cannot deny that his bailor or licensor had at the time of the bailment or license, authority to make it. The rule in s 117 is subject to two qualifications: (*1*) The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn, *ie* he may show that the signature of the drawer is a forgery (*Expl 1*). (2) When a bailee is sued by the bailor in respect of goods delivered by the bailee to a person other than the bailor, the bailee may prove that such other person has a right to the goods against the bailor (*Expl 2*).

Ss 116 and 117 are not exhaustive as to the doctrine of estoppel by agreement [*Rupchand v. Sarbeshar*, 33 C 915 (*ante* s 115: "*Rules of estoppel in the Act whether exhaustive*"). The rule of estoppel which binds landlords and tenants, mortgagors and mortgagees, bailors and bailees, applies to employees and contracting parties generally, who cannot accept the benefit of the contract, and yet when called upon to perform their duties under it, repudiate it as made without right or as otherwise wanting in force, provided the contract is not actually in violation of law or wholly void. The assignee or the licensee of any right (*eg dandibari* right) accepted and acted under, is accordingly estopped from denying the authority from which the right proceeds [*Lakhan v. Arjun*, 18 CWN 1194 : 24 IC 387].

The principle underlying the section will be clear from the following extract from Taylor: The *acceptance* of a bill of exchange is also deemed *conclusive admission* (see s 54 Bills of Exchange Act, 45 & 46 Vic c 61) as against the acceptor, of the existence of the drawer and the genuineness of his signature, and of his capacity to draw [*Sanderson v. Collman*, 1842, 11 LJPC 270]; and if the bill be payable to the order of the drawer, of the capacity to indorse [*Taylor v. Croker*, 1903, 4 Esp 187 &c]; and if it be drawn by procuration of the authority of the agent to draw in the name of the principal; and it matters not in this respect, whether the bill be drawn before or after the acceptance. In the case of a bill payable to the order of a third person, the acceptor is also estopped from denying as against the holder, the existence of the payee and his then capacity to indorse (see s 54(2)(*c*) Bills of Exchange Act, *ibid*). But the acceptance is not an admission on the part of the acceptor either of the signature of the payee, though he may be the same party as the drawer, or of that of any other indorser; and this, too, although, at the time of the acceptance, the indorsements were on the bill. Neither does the acceptance admit, that an agent, who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same; nor is the acceptor of a bill, which a partner has drawn in the partnership name and made payable in the firm's order, estopped from showing that in fact it was not indorsed by the firm nor negotiated for any partnership purpose [*Garland v. Jacomb*, 1873 LR 8 Ex 216]. So, if on a bill payable to the order of the drawer the name of a real person as drawer and indorser be forged, it seems that the mere acceptance of such bill, in ignorance of the forgery, will not preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawer which he is bound to admit; but if the acceptor, with knowledge of the forgery, puts the bill in circulation, he will be estopped from disputing the validity of the indorsement equally with that of the drawing. If a bill be drawn in a wholly fictitious name, and the handwriting of the indorsement be the

same as that of the drawing, the acceptor will be estopped from denying it, because he admits that the bill is drawn by somebody, that is, by the person who indorses in the same handwriting, and the fair construction to be put on his undertaking is, that he will pay to the signature of the same person who signed for the drawer [*Cooper v. Meyer*, 1830, 10 B & C 471, explained and recognised by PARKE B, in *Beeman v. Duck*, 1843, 12 LJ Ex 198; Tay s 85]. The rule in s 117 is the same as in England except as to the first explanation under which the acceptor may show that the signature of the drawer is a forgery. This is not allowed in England, for he is held bound to know his own correspondent's signature [*Sanderson v. Collman, ante*].

This section is supplemented by ss 41, 42 of the N I Act (26 of 1881). By s 41 an acceptor is bound by a forged endorsement, if he knew or had reason to believe the endorsement to be forged. By s 42 an acceptor is liable though the bill is drawn in a fictitious name. By s 120 *ibid*, the maker and drawer and acceptor are estopped from denying the original validity of the instrument. By s 121 the maker and acceptor are estopped from denying the capacity of payee to indorse. By s 122 the indorser is estopped from denying the signature of capacity of prior party (*Cf* ss 54 & 55 of the Bills of Exchange Act, 1882, 45 & 46 Vic c 61). Other sections of the Act define the position of the parties to a negotiable instrument and their duties and liabilities. See ss 32, 37, 88, 118, 119.

Estoppel in Regard to Negotiable Instruments.—A payee of a forged *hundi*, who knowing that it is forged, fraudulently endorses it over to another person cannot in a suit by such person for the recovery of the consideration paid by him for the *hundi*, set up the forgery of it, as a bar to the suit [*Bishen v. Rajendra*, 5 A 302 : 3 AWN 50]. If the holder of negotiable instruments gives them to another, with authority to that other to raise money upon them for his own purpose, he is estopped from setting up his right to the negotiable instruments, adversely to those, who have lent money on the security of the instruments and the authority of the owner [*Raghabji v. Narandas*, 8 Bom LR 821]. Negligence in the custody of a draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds, from one, who has wrongfully obtained possession of it [*Bhupatram v. Hari Pria*, 5 CWN 313]. In order, however, that negligence may amount to an estoppel, it must be in the transaction itself, and be the approximate cause of leading the party into mistake and also it must be neglect of some duty which is owing to such party or to the general public [*Morrison v. Verschogle*, 6 CWN 429].

The specific provision in s 120 N I Act is subject to the general rule in s 26 *ibid* [117 IC 133]. The condition precedent to the application of s 120 is that there must be a property stamped bill of exchange [*Chotey v. Virraj*, 48 A 332 : A 1926 A 359; see also 20 ALJ 729 FB]. An endorser of a negotiable instrument is estopped as against the endorsee from setting up its invalidity [42 M 470 : 36 MLJ 301]. The fact that no consideration actually passed between the drawer and the payee of a cheque does not affect the right of a *bona fide* endorsee of the cheque to sue as a holder in due course [*Abdul Halim v. Abdul Quasim*, 161 IC 818 : 1936 OWN 377]. Where money is advanced after the execution of a pro-note and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability [*Bachan v. Dharam*, A 1933 L 456]. In a suit on a pro-note by the endorsee thereof, the maker or defendant (debtor) is not barred by s 120 N L Act from pleading any defence under Madras Agriculturists' Relief Act [*Karuppa v. Narayanaswami & Co*, 1941, 2 MLJ 808; *Anandam v. Muthukumara-swami*, 1939, 2 MLJ 658].

Where a negotiable instrument bears a forged endorsement, no person can claim a title to the instrument through such endorsement, because a forged endorsement is a nullity and it must be taken as if no such endorsement was on the instrument [*Banku Behari v. Secy of S*, 36 C 239 (*Chandra v. Chapman*, 32 C 799 : 9 CWN 443 **disst** from). See also *Jainarain v. Mahbub*, 28 C 428; *Hansraj v. Ruttonji*, 24 B 65; *Kodumul v. Karachi Bank*, 82 IC 730 (S)]. Where a Government promissory note has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but as against any person who subsequently becomes holder, unless such person can prove, that the instrument had become negotiable at the time it was stolen and that he obtained it *bona fide* without notice of the theft [*Bank of Bengal v. Mendes*, 5 C 654 : 5 CLR 586]. In an action upon bill of exchange or pronote against a person whose name properly appears as party to the instrument, it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal [*Sadasuk v. Kishen*, 46 IA 33 : A 1918 PC 146 : 46 C 663 : 23 CWN 937; *Phoenix Tea Co v. Dewan Chand*, A 1929 S 172]. Where one executes a pronote in his own name and not as agent acting in the name of another, the maker alone is liable. Hence, members of a joint family cannot be held liable on such a note even though the maker of the note may be proved to be the manager of the family. It would be extremely dangerous to permit evidence that the person who signed a negotiable instrument was the agent of an undisclosed principal [*Manchershaw v. Gobind*, A 1930 B 424 : 128 IC 43 : 32 Bom LR 1035; *Sitaram v. Chimandas*, 52 B 640]. Under s 26 Paper Currency Act, a *hundi* made payable to bearer on demand is invalid and an endorser of such a *hundi* is not estopped as against the endorsee from setting up its invalidity. There is no estoppel against statute [*Alagappa v. A*, 44 M 187 : 39 MLJ 573. The contrary observation of SESHAGIRI AIYAR J, in *Arunachalam v. Narayanan* in 42 M 470 is *obiter*].

Estoppel of Bailee and Licensee.—Estoppels in the case of bailee and licensee are similar to the estoppel arising out of the relation of landlord and tenant (s 116). If instead of there being a letting of land, there is a bailment of personal property or goods and chattels, the same rule of estoppel applies and the bailee cannot dispute the title of the bailor at the time of the bailment. "The general rule is that one who has received property from another as his bailee or agent or servant must restore or account for that property to him from whom he received it" [*Biddle v. Bond*, 6 B & S 225, 231—*per* BLACKBURN, J]. Garage owner receiving a car for repairs is estopped from challenging the title of the person from whom the car was received [*Calcutta Credit &c Prince Peter*, A 1964 C 374]. As in the case of a tenant, the bailee can however show that the estoppel has been defeated on account of eviction by title paramount or that the bailor's title to the goods has expired since the bailment; so, in an action by bailor for recovery of goods delivered to a bailee, the bailee may defend himself by setting up the title of a third person to whom the goods have been delivered (*Expt 2*). But he can set up the title of a third person only if he depends upon the right and title and by the authority of the third person [*Biddle v. Bond, sup*]. The rule as to *jus tertii* has also been discussed in *Rogers Sons & Co v. Lambert*, 1891, 1 QB 318 : 34 QBD 573, where the bailees defended the action against them in their own interest and not upon the right and authority of the third party. The suit was decided against the defendants and it was pointed out that a bailee may either institute an inter-pleader suit or prove the title of the third party set up as the real owner, upon the right and title by the authority. As to inter-pleader suit see s 88 and Or 35, rr 1-6 of the C P Code.

As to estoppel of bailee by election, to support either the bailor in an adverse claim by a third person, or to support a title against the bailor, see *Ex parte Davies, In re*

Saddler, LR 19 Ch D 86, where JESSEL, MR, said: "There are no doubt cases in which goods have been taken from a bailee by a third party, who claimed them by the paramount, and if there has been no fault on the part of the bailee, it has been held that this is good excuse to him as against the bailor." The qualification of the general rule that the bailee is estopped from questioning the title of the bailor has been thus stated by Stephen: "Provided that any such bailee, agent or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them, as against his bailor, principal or licensor, or that his bailor, principal or licensor wrongfully and without notice to the bailee, agent or licensee obtained the goods from a third person who has claimed them from such bailee, agent or licensee" [Steph Art 105].

When a government promissory note on which the endorsement was: "Pay to *DE* and *Mrs E* either or survivor or order" is deposited with the Collector of Excise as security for a company (Davidson's Ltd) establishing a private bonded ware house, the Govt becomes a bailee of the note. The company's license was cancelled and a prosecution was started for offences under the Excise Act in which the note was attached. *Mrs E* as a debenture-holder instituted a suit to enforce her security and an Official Receiver of Davidson's Ltd, was appointed. The note had not been endorsed to the company by *DE* at the time of the deposit—*Held* that under s 117, being bailees the Govt were not at liberty to refuse to return the note on the ground of some interest alleged to have subsisted in *DE* [*Ezekiel v. Prov of Bengal*, 1939, 2 Cal 52].

Where by a condition in a contract the defendant characterises himself as the bailee he will be estopped from denying the plaintiff's title even though the plaintiff has only acquired title in the goods after the date of the contract [*Gurdial v. SHP Corporation*, A 1970 P 7].

As to bailment generally and the duties and liabilities of the parties, see as 148-81 of the Contract Act (4 of 1872); as to the right of third person claiming goods bailed, see s 167 *ibid.*

[*Ref Hals, 3rd Ed, Vol 15, paras 464-65 and Title Bailment, Vol 2, paras 263-65; Caspersz, 4th Ed, Ch X; Cababe, pp 29-37*].

Licensee of Patent, etc.—As to licensee see notes to s 116 *ante*, "*Licensee's estoppel*." The principle is the same as in the case of estoppel between landlord and tenant. The licensee of a patent cannot dispute the title of the patentee [*Clarke v. Adie*, 2 App Cas 423]. In this case BLACKBURN, J, compared his position with that of a tenant and said: "The position of a licensee who under a license is working a patent right, for which another has got a patent, is very analogous indeed to the position of a tenant of lands, who has taken a lease of these lands from another. So long as the lease remains in force and the tenant has not been evicted from the land he is estopped from denying that his lessor had a title to the land. When the lease is at an end the man who was formerly the tenant, but who has now ceased to be so, may show that it was altogether a mistake to have taken that lease, and that land really belonged to him; but during the continuance of the lease he cannot show anything of the sort; it must be taken as against him, that the lessor had a title to the land. Now, a person who takes a license from a patentee, is bound upon the same principle and in exactly the same way. The tenant under the lease is at liberty to show that the parcel of land which he and the lessor are disputing about was never comprised in the lease at all. So may a licensee under a patent show that..... the particular thing which he has done was not a part of what was included in the patent at all, but that he has done it as one of the general public might have done it, and therefore is not bound to pay royalty for it. If he (the licensee) has used that which is in the patent and which his

license authorises him to use, without the patentee being able to claim against him for infringement, because the license would include it, then like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty..... Although a stranger might show that the patent was as bad as any one could wish to be, the licensee must not show that" (pp 435, 436 *ibid*). *Clarke v. Adie, sup* was applied in *In re Moses*, 15 C 224 (see the remarks of PETHERAM, CJ, at p 250) and *Jagarnath v. Greswell*, 40 C 814. There is not an absolute estoppel in all cases and in all circumstances on the part of the licensee under which he is prevented from at any time and under any circumstances saying that the patent is invalid, but only an estoppel which is involved in and necessary to the exercise of the license which the licensee has accepted. A licensee is not precluded from discussing the exact extent and boundaries of the patent rights of his licensor [*Fuel Economy Co v. Murray*, 99 LJ Ch 456].

In an action for infringement of patent mere delay causing no prejudice to the defendant does not disentitle the plaintiff to relief by acquiescence or estoppel [*F H & B Corporation v. Unichem Laboratories*, A 1969 B 255].

In a suit for damages by a holder of a monopoly for a certain year against the prior holder for infringement of his rights, the latter is not estopped from contending that the monopoly itself is invalid [*Ramji v. Jaigopal*, 69 IC 431 (L)]. The estoppel does not bind the purchaser of a license [see *Gillette Razor Co v. Gamage Ltd*, 1909, 25 TLR 801]. As to whether a patentee after assignment is estopped from disputing the validity of the patent see *Walton v. Lavater*, 8 CB (n 8) 162. As to estoppel against licensee of patent, see Caspersz, 4th Ed Ch IX; Hals, 3rd Ed, Vol 15, para 472.

The position of a licensee of a trademark is analogous to that of a licensee of a patent [*Lavergne v. Hooper*, 8 M 149 (*ante*)..... See *Ebrahim v. Eassa Abba*, 24 M 163]. In India there is no system of registration nor any provision for statutory title to a trademark, so the rights of the parties must be determined in accordance with the principles of the English common law [*Br Am Tobacco Co v. Mahboob*, 38 C 110; *Hannah v. Jagannath & Co*, 19 CWN 1. Since then the [1]Trade Marks Act, 5 of 1940 has been placed on the statute book]. The fact that the licensee has repudiated the contract, does not put an end to the relation of licensor and licensee, and cannot give him the right to question the title of the licensor, inasmuch as the concurrence of the licensor is also necessary to rescind the contract [*Jagannath v. Creswell*, 40 C 814 (16 QBD 460, 467 refd to)]. A licensee cannot deny that his licensor had, at the time when the license commenced, authority to grant the license. S 117 would at any rate, cast on the defendants the burden of proving their plea, *viz*, that the good-will had lost separate existence by merger and that the plaintiff had not the authority they professed to exercise [*Hannah v. Jagannath & Co*, 19 CWN 1]. A licensee unlike a lessee, does not forfeit his license by merely denying the title of the licensor [*Malik Akbar v. Shah Md*, 39 A 621]. The ground of estoppel in the case of bailees, tenants, licensees and acceptors of bills of exchange has been discussed in *Rupchand v. Sarbeshwar*, 10 CWN 747 : 33 C 915 and it has been held that ss 115, 116, 117, are not exhaustive.

Agency.—This section does not refer to agency. Generally an agent entrusted to deal with property is estopped from disputing the title of his principal [*Dixon v. Hammond*, 2 B & Ald 310]. An agent who has collected a debt for his principal cannot prove as a defence for keeping the proceeds that a debt was not justly due [*Kinsman v. Parkhurst*, 18 How (US) 289; Jones s 285]. As to agency generally, see Contract Act, Ch X

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1. See now Trade & Merchandise Marks Act 43 of 1958.