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THE DOCTRINE OF ESTOPPEL UNDER THE SPANISH AND AMERICAN JURISPRUDENCE

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PRELIMINARY STATEMENT

The absence of any legal writing touching the subject the writer proposes to discuss in this brief work bears much weight in creating a belief that the Spanish law and jurisprudence do not recognize the doctrine of estoppel as it is known in American law and jurisprudence. The writer proposes to show by a comparative study of decided cases that estoppel as a legal doctrine has been recognized and applied by the Supreme Court of Spain under different designations, but with equal force and effect.

The doctrine of estoppel, or, as it is sometimes called, the law of estoppel, is a very old one. Its importance and usefulness in the administration of justice has increased rather than diminished and its application has been extended. In this country it has been invoked and applied by our Supreme Court since the beginning of American occupation, and it is bound to take deeper roots in our jurisprudence. It is in this that this brief work finds its justification. Practical discussion, however, is preferred over philosophical speculation, and the authorities relied on are cited in support of each doctrine or principle discussed, taking as a standard the doctrine as established in American decisions, but omitting such parts as to which the Spanish jurisprudence furnishes no equivalent. Works of legal writers are cited to explain certain passages.

I. DEFINITION AND NATURE OF THE DOCTRINE

Estoppel has been defined in very many decisions of the courts of the United States. Each definition, however, seems to have been confined to a particular kind of estoppel according to the subject matter which called for its application. But in the case of *Williams vs. Supreme Council A. L. of H.* (80 N. Y. App. Div. 402) the following definition is quoted as sufficiently broad and comprehensive to cover the various kinds of estoppel, thus: estoppel "is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, expressed or implied, in pais." Professor Bigelow in the preface to his work "Bigelow on Estoppel" said: "The law deals with facts of two kinds, primary or immediate and secondary or inferential facts. Primary facts, as the term is employed here, may in all cases be subject of dispute; secondary facts—facts to be inferred from the primary ones—may or may not be.

What is called estoppel is an example. The primary facts, from which the inference of estoppel is to be drawn, may have been in dispute: but now that they are not, or if they are not (as for the purpose of the estoppel they no longer are) in dispute, the inference from them, legally speaking, is incontestable. That is to say, those who are legally concerned with the matter are estopped from questioning the inference. And right here is formed the crux of the estoppel, to wit: is the inference necessary or not? In ordinary cases the inference, unless mathematical or of that nature, may be one way or another, according to the judgment of those who have to decide. In the case of estoppel the inference, if the facts required for it are present, is certain, or at least it is necessary in law. And thus an incontestable right is created."

It is called "estoppel" because it stops (or estops) or closes the mouth of a party to plead the truth. (*Gibson vs. Gibson*, 8 Am. Dec. 94). It is not a mere rule in evidence, inasmuch as it is not remedial in its nature, but a part of the substantive law (*Mutual Life Insurance Co. vs. Coney*, 135 N. Y. 326).

From the cases above cited it is seen that the term "estoppel" is purely of English origin applied to a certain state of secondary facts which from long years of judicial experience has been found to be always the result or consequence of definite and known primary facts, and by a constant application the term has eventually come into use in the courts to designate a fixed and settled doctrine in law. As a doctrine, however, it is by no means confined to the common law. The same necessity of inference of a certain state of facts from known facts must have been recognized in the civil law, even among the Romans themselves, inasmuch as this doctrine is found embodied in the different civil law codes, particularly in the Spanish codes. Thus the German civil law contains specific provisions embodying a doctrine "equivalent" to the doctrine of estoppel. (Schurter's *The Principles of German Civil Law*, p. 143). This is especially true in cases of misrepresentations in which the law provides for compensation. (Same, p. 362). Articles 1989 of the French Civil Code and 1719 of our Civil Code are cited as containing doctrines "similar" to the doctrine of estoppel. (6 Phil. 680).

Indeed, the doctrine may easily be detected in very many articles of the Spanish codes, some of which have received interpretation and construction from the Spanish Supreme Court. The various kinds of estoppel established and embodied therein are found, upon analysis of some of the Spanish decisions, to coincide with those well known doctrines of estoppel long since established in American courts. Like the Spanish law of torts the doctrine is undeveloped, due probably to the code system of law. But whatever status it may have, we may safely state that under the Spanish law and jurisprudence the doctrine of estoppel does not exist as a separate and distinct principle of law under a specific name or designation. The doctrine, as we shall see, is known under different designations but predicated upon the same state of facts sufficient to constitute estoppel in common law. The term "estoppel," therefore, finds no equivalent in Spanish law.

II. CLASSIFICATION

The doctrine of estoppel in its various applications is treated under three heads: estoppel by matter of record, estoppel by deed, and estoppel by matter in pais. (Frost vs. The Saratoga Mutual Insurance Co., 49 Am. Dec. 234.) Estoppel by matter of record generally arises from judgments of courts, memorials, entries, judicial admissions, legislative rolls, etc. Estoppel by deed embraces estoppels arising from the contents of deeds, especially conveyances of land or interests therein. Estoppel by matter in pais embraces estoppels arising from contracts of less formal nature and from the acts or conducts of individuals. This classification is acceptable, although a fourth one is sometimes added, namely, quasi-estoppel, which embraces those arising from simple contracts. The separation of deeds from other forms of written contracts, though it may be proper in American law, may appear to be unnecessary under the Spanish law in view of the fact that a contract, be it a deed or a simple contract, once legally established, has the same force and effect on the parties. The American doctrine of estoppel, however, is our standard in this work and we may adopt its classification also. Each of the three heads will be discussed more in detail.

III. ESTOPPEL BY MATTER OF RECORD

A—JUDGMENTS

As a memorial or entry.—Under the Spanish law documents, as means of proof, are sharply divided into two kinds: public and private. The former when duly verified is admissible in evidence (S. 24 Mayo, 1860; S. 26 Febrero, 1867), while the latter does not possess legal efficacy and probative force as a means of proof (S. 3 Diciembre, 1866) unless otherwise legally established (S. 26 Noviembre, 1874). The term "public document" includes, among others, specifically enumerated books of records, statutes, ordinances, entries, registrations, *ejecutorias* and *actuaciones judiciales* of all kinds. (S. 15 Junio, 1864). And *auto* not impeached is law between the parties. (S. 24 Marzo, 1892). Authenticity of the document is, therefore, a very important step toward the admissibility of a document as a means of proof. It must first be legally established in order to acquire a legal efficacy and probative force in the courts. It follows that where that authenticity is not necessary to be established, as where the official or judicial books or records themselves are presented, the documents in themselves are admissible without any further qualification. But whether the contents of an authentic public document, or at least judicial entries or memorials, are conclusive of the facts therein stated, may still be in doubt. The Supreme Court of Spain, however, declared that an authentic *auto* is law (conclusive) between the parties. How far the word "auto" may be construed, it is not necessary to determine in this connection. It is certainly very reasonable to take the view that entries and memorials entered in the books of a court of record for permanent reference as well as for other purposes should be just as conclusive on the parties. Thus, the conclusiveness of such kinds of public document precludes the parties, and the parties only, from proving the contrary.

The American decisions on this point are clear. Though strangers can neither be bound by, nor take advantage of, the facts in the records, the parties are precluded from denying the truth of the facts stated therein. (*Dahlman vs. Foster*, 55 Wis. 382; *Floyd vs Ritter*, 56 Ala. 356; *Morgan vs. Muldoon*, 82 Ind. 347).

In both the Spanish and American decisions the facts contained in the books of a court of record are made conclusive on the parties. In *Rogers vs. Beauchamp* (102 Ind. 33) it is added that the record itself may be directly attacked for the purpose of correcting or annulling it. As a rule the facts related in the record, such as dates, appearances, etc. estop the parties.

As res judicata.—Before we enter into the discussion of this subject, it may not be amiss to insert a short explanatory statement regarding the meaning of the term. *Res judicata* is purely a Roman nomenclature. It has been adopted and used by the common law courts to denote the effect of a judgment, which has a different meaning. The meaning of *res judicata* under the common law is different from its Roman prototype. Under the Roman law an adjudication *in rem* is generally “*res judicata inter partes*” and not “*inter omnes*.” Excepted from this rule are judgment regarding the validity of testaments, judgment in an indictment, judgment on the status of a person, judgment in cases of servitudes, judgment in joint ownership, and judgment in other similar cases. In all these exceptions a judgment is “*res judicata inter omnes*,” also. (Bigelow on Estoppel, 5th Edition, p. 43 *et seq.*, citing Tomkins & Lehmons’ Gaius.) A judgment *in rem* under the common law, however, is generally conclusive not only “*inter partes*” but also “*inter omnes*,” while those that bind only certain defined parties (including those who derived title under them) are judgments *in personam*. (Bigelow on Estoppel, 5th Edition, p. 45 *et seq.*)

This radical difference finds its origin in the fact that what is called real action or action *in rem* under the Roman law corresponds to the right *in rem* under the common law. An action *in rem* under the Roman law denotes a claim in movables as well as in immovables, and an action *in personam* denotes a claim to an obligation of a person. The result of an action *in rem* does not bind all the world any more than does the result of an action *in personam*. (Gaius’ Institutes of Roman Law, by Poste & Whittuck, 4th ed., vol. I, p. 445 *et seq.*) On the other hand, a judgment *in rem* under the common law rendered in an action to recover a right *in rem*, binds not only the parties who litigated, but also those who were not parties. While a judgment *in personam* binds only those who were parties in the litigation. This difference is said to have been established by law as a matter of convenience. (*Bingham vs. Fayerweather*, 140 Mass. 411).

The Spanish law being a close derivative of the Roman law still retains the Roman conception of *res judicata*. A final judgment under the Spanish law is binding only on the parties to the suit, their successors and assigns, and can not be extended to those who were not parties. (S. 14 Diciembre, 1877; S. 25 Mayo, 1903.) The fact that the judgment was rendered by voluntary default does not lose its character of *res judicata* (S. 27 Mayo, 1864).

Thus it will be seen that a judgment *in personam* under the common law, which binds only the parties and their successors, is identical in the extent of its effect to a judgment under the Spanish law whether such a judgment is the result of an action *in rem* or *in personam*. Indeed, the same rules and requirements which govern the force and effect of either is the same; that is, in order that this judgment may be binding and estop the parties and those who claim a right under it, there must be identity of parties, issues, and causes of action. (S. 11 Mayo, 1865; S. 14 Diciembre, 1877; S. 8 Enero, 1902; when these elements are present, a judgment has the force of *res judicata*, and as such it operates on the parties as a bar to another action derogative of the question already settled in the judgment). In order that estoppel by judgment may be effective, both the Spanish and the American decisions agree in the following requisites irrespective of whether it is one *in rem* or *in personam*:

1. The judgment must be rendered on the merits of the case. (*Hanchey vs. Coskrey*, 81 Ala. 149; S. 23 Febrero, 1867; S. 26 Mayo, 1868). It must be clear and explicit (S. 4 Enero, 1858), but judgments in possessory actions and *interdictos* do not have the force of *res judicata*. (*Phelps vs Harris*, 101 U. S. 370; *Scherst vs. People*, 105 Ill. 27).
2. The judgment must be final. (*Webb vs. Bucklew*, 82 N. Y. 555; S. 11 Enero, 1876). In the latter case it was held that if the judgment is appealed even in some of its parts, it does not have the force of *res judicata* even as to parts not appealed.
3. The judgment must be in force at the time. (*Smith vs. Fairchild*, 77 N. Y., 414; S. 14 Diciembre, 1877; see also S. 11 Mayo, 1867).
4. The subject matter must be definite. (*Russel vs. Place*, 94 U. S. 606; see S. 5 Febrero, 1905).

B. JUDICIAL ADMISSIONS

Judicial admissions include judicial allegations made by a party in his pleadings, admission in court, agreed statement of facts, stipulations, and sworn statements generally, such as affidavits. Whether the contents of these are or are not conclusive between the parties or the party making them is, strictly speaking, not a question of estoppel. (16 Cyc. 685.) Nevertheless, we may insert some types of rules laid down by the Supreme Court of Spain for illustration.

Formerly, confessions made out of court had no value. By article 1231 of the Civil Code, however, confessions out of court are given weight in evidence against the confessor provided the subject of the confessions are his personal acts and he is competent to make them. The former rule was that only confessions made in court could bind the confessor. This is the rule provided in the *Partidas*. (S. Mayo, 1876) Confessions and acknowledgments made by parties before a justice of the peace in an act of conciliation, even if this act is not strictly considered as a judicial trial, are, nevertheless, binding. (S. 19 Octubre, 1868.) In like manner, a husband who has alleged in a prior action that his wife brought property to the marriage can not deny said property in a proceeding for partition, subsequently instituted after the

death of the wife. (S. 8 Noviembre, 1893.) The reason for this may be gathered from the doctrine of a decision, rendered by the Supreme Court of Spain, that nobody is permitted to gainsay his acts and words made in solemn manner. (S. 13 Julio, 1894).

IV. ESTOPPEL BY DEED

PRELIMINARY VIEW

Before entering into the discussion of the doctrine of estoppel by deed and its essential requisites, a brief statement regarding the nature of a deed and its equivalent under the Spanish law may be of value in this connection. A deed as understood in the common law implies a certain degree of solemnity in its making by the presence of the seal. Formerly only the king and the high officials of the state had a seal, and it was considered rather ridiculous that the common people attached seals to their written undertakings. By the twelfth century, however, the seal was no longer confined to the high dignitaries, but it found its way among the common people and was freely used by them in all kinds of written engagement. Its use became so anomalous that some states (notably Tennessee) enacted laws in order to obliterate the distinction between a sealed and an unsealed writing. In all the stages of its life, however, the seal has not completely lost its effect upon the writing to which it used to be attached, especially in conveyances of real property. It is partly due to the seal that a person is not permitted to deny his obligation set forth in his deed. Even in times when the seal was no longer in use deeds still retained a dignity not otherwise given to simple contracts. (Bigelow on Estoppel, 5th Ed., p. 329, et seq.).

On the other hand, the Spanish law does not seem to have ever accorded any more dignity and solemnity to a sealed than it has to an unsealed document. In fact, its conception of a document is a close derivative of that of the Roman law. Among the Romans the seal was never used to add to the binding force of a written undertaking. Instead, a particular verbal formula was employed. An obligation executed in accordance with the formula of questions and answers became a "stipulatio." The "stipulatio" is said to have been invented by Aquilius during the fifth century. The critics are at variance as to its origin, but all admit that the word imports such an extreme solemnity of covenant and verity that an action lay on a "stipulatio" even in the absence of consideration. Formerly it applied only to unilateral contracts. It became the complement of every engagement which, without it rested only on good faith and, with it, took the force of law. Unilateral as it was at first, it became adaptable to almost every conceivable undertaking by one man in favor of another, although it was still rather formal than substantial (Muirhead's Roman Law, 2nd Ed., p. 213 *et seq.*), and it may concern anything. (Sandar's Justinian, by Hammond, p. 474.). This Roman conception of an obligation descended to, and became embodied in, the Spanish law, and it is not strange to find the decisions of the Supreme Court of Spain declaring that whatever is agreed upon in a contract is law between the parties irrespective of the subject matter.

While the Roman law enforced the "stipulatio," the common law enforces a contract under seal. In neither is it necessary to look behind the contract and inquire into the equitableness or motives which caused it to be made, although both may be impeached on account of fraud, mistake, or duress. The parties are not permitted to deny the truth of their statements. (Holland's Elements of Jurisprudence, 11th Ed., p. 277.—)

The influence of the seal on written undertakings caused a great difference in the degree of faith accorded to simple contracts and deeds. It is a complement that imports truth and verity, and it is mainly due to it that deeds and contracts of less formal character are set apart. On the other hand, the Spanish conception of a contract (being an outcome of the solemn "stipulatio") does not make any distinction to alter the binding force of the different forms of contract. In fact, there is no more difference in the binding force between a contract involving real property and a contract involving personal property than there would be if both contracts involved personal property only. In either case the origin is the same "stipulatio," and though the formula has long disappeared, its spirit pervades all contractual obligations. This uniform regard of all contracts has evoked our remark in passing over this subject under the heading "classification." The distinction made between public and private documents created by law, if it has any other purpose, is created mainly for authentication of documents.

With the above statement we now proceed to the discussion of the doctrine of estoppel under this head. It must be noted, however, that only public instruments and contracts affecting real property as considered under the Spanish law are included under this heading, while simple contracts are treated under a separate title.

A. PARTIES AND PRIVITIES

What we have just said of the binding force of judicial records is, as a general rule, the same as the binding force of a deed between the parties and their privities. Only the parties and their privities can be bound by, or take advantage of, that binding force created by their deed. In other words, only the parties and their privities are bound by, or take advantage of, the estoppel created thereby. (Millard *vs.* McMullin, 68 N. Y. 346). Thus, a person who executes a deed in favor of another is bound by the terms of such deed. (Wright *vs.* DeGroff, 14 Mich. 164; Smith *vs.* Penny, 44 Cal. 162; S. 1 Junio, 1897; S. 19 Enero, 1898; S. 13 Febrero, 1897.). If a piece of land subject to a lease is sold, the new owner is not bound to pay prior improvements thereon unless there is an agreement to the contrary. (S. 7 Enero, 1889.) But how far the word "parties" is to be construed is difficult to ascertain. Under the American law, an administratrix who sells her husband's estate with warranty as against the world in such capacity is not precluded from asserting her own right to the estate in her capacity as widow. (Wright *vs.* DeGroff, 14 Mich. 164). It must be noted that she does not assert her claim in the capacity in which she conveyed the estate, and she bases the claim on a different right. So that this decision of the

Supreme Court of Spain may be pertinent, namely, that where a person buys a piece of land from another subject to the condition that the former respect some temporary encumbrance thereon, the buyer can not subsequently bring an action for the recovery thereof so as to ignore the condition in the deed of sale, unless he does so under a different deed. (S. 6. Abril, 1906). In other words, the buyer is considered as a third person under a different deed but a party under the same deed of sale.

In like manner, the force of the deed on the parties operates also on their privities. (*Bates vs. Norcross*, 17 Pick. 14; S. 1 Junio, 1897; S. 19 Enero, 1898). The children as heirs can not annul the sale of reservable property made by their parents. (S. 4 Julio, 1896).

B. LIMITATIONS OF THE DOCTRINE

We have seen from the preceding who are bound by the deed on whom the estoppel operates. We are now to see what are the requisites in order that the deed may bind (estop) the parties and their privities. Both the Spanish and the American decisions substantially agree that the binding force of a deed, or the doctrine of estoppel by deed, is subject to the following limitations:

1. *Validity of the deed.*—In order that a deed may be binding, that is, estop, it must be valid (*Merriam vs. Boston R. Co.*, 117 Mass. 247, or as it is sometimes said, it must conform to the conditions and requisites provided by law. (S. 38 Noviembre, 1898; S. 19 Noviembre, 1891; S. 10 Diciembre, 1895.

2. *Limited to questions directly affecting the deed.*—The binding effect of the terms of a deed is conclusive only when the deed itself is the basis of the litigation (*Linney vs. Wood*, 66 Texas 22; *Fisher vs. Mining Co.*, 97 N. Car. 895; S. 1 Junio, 1897; S. 19 Enero, 1898.)

3. *In case of grantee in deed-poll: indenture: mutuality.*—In deed-poll where the deed contains a promise or obligation of one party only, the deed binds the grantor only, but not the grantee, and the estoppel operates only against the grantor. (*Gardner vs. Greene*, 5 R. I. 104; S. 24 Marzo, 1903). But where the grantor and the grantee agree upon an obligation which they bind themselves to observe, the deed binds them both. (S. 20 Marzo, 1896). Where the grantee binds himself alone to observe an obligation in the deed, he is bound by such obligation. (S. 6 Abril, 1906.)

4. *Estoppel against estoppel.*—If a piece of land is sold under a covenant of warranty, the covenant does not include an encumbrance which the grantee himself undertook to discharge. (*Watts vs. Welman*, 2 N. H. 458). There is no Spanish decision touching this particular point directly unless an inference may be properly made from a decision cited above (S. 7 Enero, 1889), in which it was held that the grantee of a piece of land under a previous contract of lease is not bound to pay for improvements made prior to the sale unless there is an agreement to the contrary. The inference, if proper, would be that if the grantee undertook to pay for the improvements which may eventually become a lien on the land, he could not deny his liability.

5. *No estoppel if truth appears.*—Where the truth appears on the face of the deed there is generally no estoppel. (16' Cyc. 709). Under the Civil Code the vendor of a thing is bound to deliver and warrant same. But the vendor is not responsible for encumbrances that are not hidden. (S. 8 Abril, 1903).

C. RECITALS

We are now to consider the binding effect on the parties of general and particular recitals. Article 1218 of our Civil Code provides that public documents are proof even as against third persons of the object which gave rise to their execution and their dates. This provision is repeated in article 1227 as between the parties to a private document. There is no decision bearing directly on this point, however, although we can see in the above cited articles the effect of the date of a public document on the parties. In S. 13 Octubre, 1898, it was held that when it appears on the bill of sale that a larger amount was collected than what was remitted by the agent to his principal, the bill of sale can prove only the fact of payment but not the difference between the amount collected and the amount remitted. This view seems to be contrary to the doctrine that if the deed recites the amount of rent, no proof can be accepted in order to prove that a lesser amount was in fact paid. Manresa, however, has this to say: that the declarations of the parties to a deed do not bind them, except those that are dispositive. Thus a grantor who declares in the deed that he owned the property long before the sale is not bound by the declaration. (2 Manresa 468, citing S. 24 Marzo, 1903). Beyond these authorities the binding force of recitals can not be determined.

V. ESTOPPEL IN PAIS

PRELIMINARY STATEMENT

The third main division into which the doctrine under discussion is divided is known as estoppel in pais. Under this head are included such estoppels as arise from simple written contracts or contracts of less formal nature, those that arise from misrepresentations, waiver, and election and inconsistent positions in general. In this connection we must bear in mind the Roman conception of a contractual obligation, discussed elsewhere in this work, in order to obtain a better appreciation of the basis of liability. Aside from this we need not detain ourselves but proceed to the details.

A. ESTOPPEL BY CONTRACT

1. *Facts agreed or assumed*

In order to prove a contractual obligation the contract itself must first be established. (S. 27 Abril, 1896). The form is immaterial; it need not be made in a public document provided it has the conditions and requisites established by law (S. 4 Julio, 1899; S. 19 Octubre, 1901; S. 16 Junio, 1903). A private contract has the same force and effect as a public document on the parties and their successors and assigns. (S. 19 Noviembre, 1891). From these decisions it will be seen that once a contract is admitted the liability follows. Whatever is agreed upon is law between the parties

(S. 13 Febrero, 1904). The contractual obligation, that is, whatever is agreed upon as the basis of the agreement and taken to be true by the parties, is law between them. As such law, it precludes the parties from denying the truth. It is immaterial whether the contract is made in a public or private document; the liability of the parties and their successors and assigns with respect to the object which gave rise to the obligation is the same. In fact article 1225 of our Civil Code establishes no degree of liability or binding force, as far as the parties are concerned, between a public and a private document. This view finds its counterpart in *Brightman vs. Hicks* (108 Mass. 246), *Oregonian Ry. Co. vs. Oregon Ry. Co.* (10 Sawy 464), and *Klenk vs. Knobel* (37 Ark. 304), in which it was held that neither party is permitted to deny the truth of the basis of the contract which he has assumed to be true unless he has impeached the contract itself.

The doctrine is equally applicable to contracts by a corporation. Under the American law a corporation assuming to act as such can not subsequently allege want of capacity by reason of defect in its organization for the purpose of defeating its liability on the contract. (*Lehmon vs. Warner*, 61 Ala. 455; *Sherwood vs. Aivis*, 83 Ala. 115). This same view is sustained by the Supreme Court of Spain. (S. 2 Diciembre, 1896). It must be noted that the existence of the corporation or association is not attacked directly but its non-existence is set up as a defense. Even admitting that an association does not exist in law because of its failure to properly organize or comply with mandatory legal requirements, it cannot allege want of capacity so as to defeat its liability on a contract entered into by it in its corporate capacity. The general and prevailing view of the Spanish Supreme Court on this point is slightly different. A *sociedad anonima* cannot have a legal personality in any proceeding unless its articles of association are registered. It follows that a contract entered into by a *sociedad anonima* which is not registered cannot be enforced against it in law. The want of personality is always available as a defense. But the liability on the contract is not defeated for that reason, because it may be enforced against the *sociedad anonima* in fact. Its existence as a *de facto* association cannot be denied for the purpose of defeating that liability. Those who are in charge of the management shall answer for that liability. They can turn, however, to the members for indemnity, under the unregistered articles of association, which are held to be just as binding among themselves as if they were registered. (S. 10 Noviembre, 1890.) The difference is rather a matter of procedure in arriving at the remedy than a matter of defence to avoid the liability on the contract. So that the estoppel that may be applied to a corporation at common law is shifted from the *sociedad anonima* in law to the *sociedad anonima* in fact by making the managers of the latter liable on the contract. Neither the corporation nor the *sociedad anonima* in fact can allege non-existence in order to defeat the liability. Finally, if the association sues on a contract of sale, it cannot be alleged that it has no personality for failure to register. (S. 29 Abril, 1901). This conclusion is due perhaps to an implied admission by the defendant in becoming a party to the contract.

2. *Acknowledgment of Receipts*

Under the Spanish law the acknowledgment of a document is essential to prove the authenticity of the same. (S. 18 Marzo, 1867). The acknowledgment of the signature by the signer is enough. (S. 13 Octubre, 1896). But the authenticity of the document or receipt is not indubitable proof of the obligation itself and proof may be produced to annul it. (S. 18 Marzo 1867.) In the payment of debts, a *carta de pago* is a means of proving the fact but this does not exclude other lawful means of proof (S. 7 Enero, 1897; S. 27 Enero, 1897). We find that the same view is maintained by the American courts. In *Megargel vs. Megargel*, (105 Penn. St. 475) it was held that receipts, though authentic on their face, do not furnish conclusive evidence between the parties of the fact stated in them. The party sought to be bound by the receipts is entitled to show that they were given by mistake, especially where their soundness is doubtful. (*Hale vs. Milwaukee Dock Co.*, 29 Wis. 482; *Williams vs. Wilmington R. Co.*, 93 N. C. 42).

3. *Commercial Papers*

In case of commercial papers, such as notes and bills of exchange, the genuineness of the note or bill of exchange may be established by indorsement or acceptance. Thus the acceptance of a bill of exchange or the indorsement of a note constitutes a conclusive proof of genuineness. If a person accepts and pays a bill of exchange, he is precluded from denying its genuineness and cannot recover its value even if the bill turned out to be forged. (See *Bigelow on Estoppel*, citing *Price vs. Neal*, 3 Burr 1354.) The same is true under the Spanish law. A bill of exchange duly accepted constitutes a title in itself and the acceptor can not excuse himself from the payment of the same except when he bases his objection upon legal grounds. (S. 13 Junio, 1894; S. 21 Agosto, 1890; S. 15 Junio, 1997; S. 5 Diciembre, 1901; S. 12 Junio, 1899). This principle of admission applies also to notes. Thus, if a note has been paid to holder or bearer, such payment cannot be revoked even if it is proved that one of the prior indorsements was forged (S. 6 Octubre, 1904, and the holder of a check cannot recover what he has paid therefor at the time of making same, simply because the payer has subsequently become insolvent (S. 5 Mayo, 1897).

4. *Landlord and Tenant*

Formerly the relation of landlord and tenant was evidenced by means of a sealed contract of lease. At present the contract of lease may be a verbal one and it is just as binding on the landlord as on the tenant.

Under the American law a tenant cannot deny the title of the landlord to the premises by setting up a title of his own while he occupies the premises. (*Helena vs. Turner*, 36 Ark. 577; *Baker vs. Barclift*, 76 Ala. 157; *Benton vs. Benton*, 95 N. C. 120.) Under the Spanish law the same view is maintained. The tenants who by letters recognize the tenancy cannot oppose an action of ejectment. (S. 17 Marzo, 1859.) Where they wrote to the supposed landlord and asked for postponement of

the action of ejectment, or asked for the postponement of the date of renewing the contract of lease, they cannot oppose ejectment proceedings or deny the fact of the expiration of the lease. (S. 20 Mayo, 1876.)

Full title to the premises is not necessary in order to maintain an action of ejectment. An administrator by will who is charged therein to devote the estate to a certain object can maintain an action of ejectment against the tenant. He is considered as possessor of the property for life. (S. 10 Mayo, 1893). The receiver or administrator duly appointed by a court can maintain an action of ejectment to recover possession of the property attached against the owner thereof (S. 9 Marzo, 1894).

5. *Bailor and Bailee*

The estoppel arising from contracts of deposits is placed under the same theory as that arising under landlord and tenant. In order to hold a party to the consequences of the deposit, that contract must be proved first. In order that the depositary may be excused from returning the thing deposited, he must allege a title outside of the contract of deposit. (*Pulliam vs. Burlinghame*, 81 Mo. 111; S. 28 Noviembre, 1896. The payment of money by one person to another when there is no debt, but made by mistake, gives right to the former to recover same from the latter. (S. 28 Febrero, 1896). In this case the ground of recovery may be based on the relation of bailor and bailee for the reason that the contract of debtor and creditor is impeached as not existing. It can not be said that a contract of loan has been created for the reason that there has been no request for a loan or an assent to make it. The contract of deposit is created, however, by the mere fact of delivery and acceptance.

B. ESTOPPEL BY MISREPRESENTATION

The doctrine of estoppel by misrepresentation seems to have a very limited application under the Spanish law. Aside from the cases cited below, there is not a case that falls exactly within the rule.

Under the American law, in order that an act may give rise to an estoppel by misrepresentation the following requisites must be present: (1) the representation must be false; (2) it must be actual or virtual; (3) the other party must be ignorant of the truth of the fact represented; (4) the representation must have been made so that others acted on it; and (5) the other party was induced to act and did act on the representation.

In several decisions of the Supreme Court of Spain it is held that a man who lives with a woman, promising to marry her afterwards, and children being subsequently born to the union, and that he, by means of letters, cards, etc. called them his children and stated in the hearing of others that he is the father of such children, cannot afterwards deny his paternity to defeat an action for recognition. S. 7 Noviembre, 1896; S. 26 Junio, 1903; S. 13 Febrero, 1907). If we examine the doctrine laid down in these cases, we will see that it will not exactly fall under the doctrine of estoppel by misrep-

resentation, inasmuch as some of the elements constituting the doctrine are not present. The action, if any, is between the parties to the act, who are aware of all the facts in connection therewith. But if the supposed parent under these facts induced a third person to trust or to contract with the supposed children, such supposed parent cannot deny the relation he has created to defeat any consequent liability against him by reason of the relation. But, as it is, the doctrine can hardly be called estoppel, but a mere legal presumption based on public policy.

C. WAIVER

Another kind of estoppel to be considered under the heading "estoppel in pais," is that which is known as waiver. Strictly speaking, waiver is not estoppel. Estoppel may, nevertheless, be predicated upon the waiver of a person when by so doing he induces another to believe that he has waived or will waive a right over, or objection to, a thing and the innocent party is led to act to his prejudice. (16 Cyc. 805). In such a case estoppel may arise. It is not estoppel by silence or misrepresentation, because in estoppel by waiver both parties are aware of the circumstances of the case and their rights, while in estoppel by silence or misrepresentation the facts are concealed by the acts, conduct, or silence of the party against whom the doctrine is alleged. (*Allen vs. Kellam*, 69 Ala. 442; *McLain vs. Buliner*, 49 Ark, 218). An example of this form of estoppel was laid down by the Supreme Court of Spain in *S. Abril*, 1894. In this case an agent of a life insurance company was in the habit of collecting back payment on the policies of the company from insured persons with the knowledge of the company. On many previous occasions the company itself sent to the agent receipts long due and unpaid for collection. This act constitutes a derogation of the provisions or terms of the policy that payments must be made in advance. The agent in this case collected back payment to the company a day after the insured had died. The court held that the agent is not liable to pay the indemnity, but the principal is. The act constituted a waiver of the terms of the policy, and the insured was led to believe it.

A mere waiver of a right is not estoppel if the characteristics of the doctrine are not present. Thus a person who submits to the jurisdiction of a court waives his right to contest its competency unless it is in fact wholly without jurisdiction. (*S. 29 Diciembre*, 1871). This is also true where a person, party to a case or action, without due notice, was present at the trial (*S. 6 Abril*, 1868), or appears spontaneously. (*S. 18 Septiembre*, 1867). In either case the notice is considered as a waiver and after judgment no question of competency can be raised. (*S. 20 Agosto*, 1864). Where an insurer pays the indemnity knowing that the insured did not comply with some external requisites affecting the validity of a contract of insurance, it is understood that he waived his right. (*S. 13 Octubre*, 1902). In all these cases the waiver does not constitute estoppel.

D. ELECTION AND INCONSISTENT POSITIONS GENERALLY

Estoppel may arise from the election of two alternative rights. In a given state of facts where a person is entitled to prosecute a claim under two separate courses the law permits him to elect one and bars him from the use of the other. Neither does the law permit him to occupy two inconsistent positions to enforce his rights. The rule is said to be that no person is permitted to "approve and reprobate." In an action where there are two different remedies a party can elect one of them and forego the other; he can not elect one and then, if he fails, take advantage of the other. (*Sterisbach vs. Relief Insurance Co.*, 77 N. Y. 498; *Rodermund vs. Clark*, 46 N. Y. 354 S. 14 Septiembre, 1858; S. 15 Julio, 1858; see also S. 19 Enero, 1904).

The doctrine of estoppel applies also to a beneficiary receiving under a will. He can not repudiate the will unless he does so as to render it inoperative as a whole (*Jacobs vs. Miller*, 50 Mich. 119; S. 26 Noviembre, 1901). If the transit of goods by a common carrier is retarded, the consignee may elect to abandon the goods and collect their value as may be agreed upon or ask for damages. But once abandonment is made no damages can be asked. (S. 28 Septiembre, 1889). The husband who admitted in a previous action that his wife had brought property to the marriage can not in a subsequent one for a partition deny such property. (S. 8 Noviembre, 1893)

The doctrine is equally applicable to a deed. A party who accepts a deed under a condition, can not repudiate the condition and sue on the deed. (*Du Bose vs. Ball*, 54 Ga. 350; S. 6 Abril, 1906).

CONCLUSION

The foregoing is the result of months of labor on the subject. Admitting that it is not the best that can be obtained, it is sufficiently comprehensible, however, to serve our purpose; namely, to show that the doctrine known in the common law as estoppel is not confined to American jurisprudence; it is also a well recognized principle in Spanish jurisprudence, known under different names. After a reading of the above discussion we can see at once that in a great number of decisions rendered by the Supreme Court of Spain the doctrine has been applied in many ways just as it has been applied by the American courts. The word "estoppel", however, as it is used, does not find its equivalent. The doctrine is treated in the Spanish law under *res judicata*, presumptions, admissions, waivers, etc.

Indeed, estoppel partakes of the nature of a presumption, but to say that estoppel is presumption is misleading. It has been the constant endeavor of the writer to analyze each decision and then find its equivalent among the estoppels already laid down in the American courts. The task, it is true, is not an easy one. It often times appears to be discouraging. But the writer finds his consolation in the fact that the subject is unexplored and the writer a pioneer.