OWNING AND OWING†
IN WHAT CIRCUMSTANCES WILL THE RESPONSIBILITIES OF OWNERSHIP PRECLUDE OR POSTPONE THE ASSERTION OF THE RIGHTS OF AN OWNER?

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[*For over two hundred years courts have been called upon to allocate the loss as between two or more innocent parties, in priorities disputes concerning real property and the sale of goods. The article demonstrates that in many cases the outcome is uncertain and dependent on the legal tool selected. Given the underlying factual similarities the author finds that these uncertainties are undesirable and the differences anomalous. The article suggests that an adaptation of the arming or enabling doctrine for use in the sale of goods cases would ensure a greater responsibility on an interest holder to protect his own interests and accord greater protection to the bona fide third party.*]

'We may lay it down as a broad general principle, 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.'[1] Thus spoke Ashurst J. in 1787 attempting to resolve a dispute between an unpaid consignor, bankrupt consignee and a *bona fide* purchaser from the latter, as to title to a cargo of corn.

Few people would quarrel with such a statement as the desired aim of a legal system, but the means of its achievement in disputes concerning title to property have been the subject of no little difficulty. The selection of the appropriate legal tool has been under discussion by judges in both common law and equitable jurisdictions for more than two centuries. Use has been made of the concept of ownership, contract,[2] responsibility to others, the exigencies of the commercial market[3] and a judicious mixture of all four. Even today, particularly with respect to title to personal property, there is considerable uncertainty.

The purpose of this article is to examine the resolution of some title disputes where the litigants themselves have not entered into any legal relationship. A classic illustration arises where the owner hands documents to an intermediary which enable him to dispose of the goods or an interest in real property, wrongfully to a third party.

The overall approach has been to determine the legal tools in use with respect to both personal and real property in the resolution of these disputes. The analysis shows considerable uncertainty with respect to the principles applied in the

† A phrase of Roman origin. For recent usage see Donahue, Kauper and Martin, *Cases and Materials on Property: An Introduction to the Concept and the Institution* (2nd ed. 1983) 61.

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1 *Lickbarrow v. Mason* (1787) 2 Term. Rep., 70.

2 The common law contractual doctrines of mistake as to identity and *non est factum*, both of which effectively resolve disputes as to title to property, are not discussed in this article.

3 It is a widely held view that commercial efficiency requires speedy transactions in which it may be difficult to verify the title of the vendor. To achieve such efficiency the legal system should grant protection to the *bona fide* third party. See n. 95, *infra* 799.

cases involving the sale of goods. Further, it shows that, possibly for historical reasons, real and personal property are treated differently. Ironically, it demonstrates that the law established for resolving disputes concerning multiple interests in real property provides more protection to the *bona fide* third party than is accorded by the principles applied in the sale of goods cases. As a result the concluding section suggests a possible re-formulation of the principles applied in the sale of goods cases in order to achieve a stated objective of the commercial law.

Technical legal expressions have been kept to a minimum. In the writer's view such expressions of themselves tend to obscure the underlying similarity of the factual problems involved. As this article demonstrates it is customary to treat as separate issues the conduct which precludes an owner from asserting title to goods, and that by which an interest holder is postponed in a real property dispute. Yet in each case it is through conduct that the owner/interest holder is denied the full exercise of his rights.

In the case of personal property the conduct is questioned most often in commercial transactions when the owner seeks to exploit the value of the property by outright sale or the creation of a lesser interest for security purposes. Where legal interests in goods are used as security, conflicts between inconsistent interests are normally resolved by the Bills of Sale legislation.[4] The principles regulating conduct in sales, however, were developed initially in the common law and later codified.[5]

In so far as real property is concerned, its value is often exploited commercially by the creation of multiple interests. For historical reasons the principles regulating conduct in the creation of mortgages of real property and the few mortgages of personality not covered by the Bills of Sale legislation were developed in equity.[6] The material to be discussed thus seems to fall conveniently into two sections: the common law approach to the sale of goods; and the equitable approach to competing interests in real property.

The cases treated in depth have been selected for their exemplary nature in order that full attention can be given to the operation of broad principles. The deliberate effect has been to reduce the detailed discussion of case law.

COMMON LAW — THE SALE OF GOODS[7]

In many circumstances the owner of goods uses an intermediary in a dealing with a third party. The owner may be experienced or inexperienced; the intermediary honest, negligent or fraudulent; a commercial agent appointed as such, or a helpful friend. The dealing may be an outright sale, a credit sale or a security

4 The form of this legislation puts such conflicts outside the scope of this article.

5 See *infra*. Equity's concern for conduct in the disposition of personal property is also referred to *infra*.

6 For historical reasons most of the law concerning dispositions in intangible personalty (choses in action) was also developed in equity. The development of this law has been such that it falls outside the scope of this article. See *infra*.

7 The cases discussed in the first part of this article are described later as the sale of goods cases. Technically, two of them, *Mercantile Bank of India Ltd v. Central Bank of India Ltd* [1938] A.C. 287 and *Swan v. North British Australasian Co.* (1863) 2 H.&C. 175, do not concern sales. They have been included in the general phrase for ease of expression.

transaction. In most cases which come before the courts the intermediary has acted wrongfully and then, usually, either disappeared or gone bankrupt. A dispute ensues between the owner and the third party as to entitlement to the property. There is no perfect solution, one of two 'innocent' parties must suffer a loss.[8]

The common law starts from the premise that one cannot give away what one does not have, expressed in the latin maxim *nemo dat quod non habet*.[9] Thus an intermediary who does not have title to goods cannot pass title to a third party. If he attempts to do so the owner will normally be able to recover either compensation for loss in an action in conversion, or the goods themselves in an action in detinue,[10] or specific restitution.

It has long been recognized that there may be a nexus between an owner's conduct and the attempted acquisition by the third party such that the owner may be precluded from asserting his title. The legal tools for assessing conduct used in such cases have been estoppel by representation and negligence.

The earliest decisions were based on common law estoppel by representation.[11] As Lord Denman said in 1837:

> [w]here 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 concluded from averring against the latter a different state of things as existing at the same time.[12]

This was further explained by Baron Parke in 1848:

> By the term 'wilfully', however, in that 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, and that it is 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.[13]

The stated elements of such an estoppel are a representation followed by reliance and detriment, or, conduct by negligence or omission where there is a duty to disclose, followed by reliance and detriment.[14]

Later the Sale of Goods Act 1893 (U.K.) s. 21(1)[15] provided that 'subject to

[8] 'This case raises the ever recurring question: which of two innocent persons is to suffer by the fraud of a third? It is the familiar contest between the original owner who has been deceived into parting with his property, and the innocent purchaser who has been deceived into buying it.' *Central Newbury Car Auctions Ltd v. Unity Finance Ltd and Another* [1957] 1 Q.B. 371, 379 *per* Denning L.J.

[9] 'At common law, a man who had no title himself could give no title to another. *Nemo dat quod non habet*' *per* Scrutton L.J., *Banque Belge pour L'Etranger v. Hambrouck and Others* [1921] 1 K.B. 321, 329.

[10] See, however, the changes made in this regard in England by the Torts (Interference with Goods) Act 1977 (U.K.).

[11] See Pickering, A.L., 'Estoppel By Conduct' (1939) 55 *Law Quarterly Review* 400, 401-5.

[12] *Pickard v. Seares* (1837) 6 Ad. & E. 469, 474.

[13] *Freeman v. Cooke* (1848) 2 Ex. 654, 663.

[14] See Bower, G.S. and Turner, A.K., *Estoppel By Representation* (3rd ed. 1977) 4-5. See *infra* the detailed discussion of the extent to which a duty is required in cases of omission or negligent conduct.

[15] Now re-enacted in Sale of Goods Act 1979 (U.K.) s. 21(1). This provision has been repeated in substantially the same form in the following jurisdictions: Sale of Goods Act 1923 (N.S.W.) s. 26; Goods Act 1958 (Vic.) s. 27; Sale of Goods Act 1896 (Qld) s. 24; Sale of Goods Act 1895-1952 (S.A.) s. 21; Sale of Goods Act 1895 (W.A.) s. 21; Sale of Goods Act 1896 (Tas.) s. 26; Sale of Goods Ordinance 1975 (A.C.T.) s. 26; Sale of Goods Ordinance 1972 (N.T.) s. 25; Sale of Goods Act 1908 (N.Z.) s. 23.

this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell'.

This section does not use the term estoppel nor any of the terminology (representation, reliance, detriment) associated with it. It merely states that certain conduct may preclude an owner and leaves the nature of that conduct to be determined by the courts. One is therefore faced with the relationship of s. 21(1) to the common law doctrine of estoppel. A widely held view is that s. 21(1) creates a statutory estoppel 'redolent of, if not synonymous with, [common law] estoppel.'[16] It has been suggested that the terminology used may have been intended to render the principle intelligible in Scots Law where the specific term 'estoppel is unknown'.[17] In the majority of cases no distinction has been, nor need be made between the two;[18] the conduct required for s. 21(1) or estoppel by representation has been assumed to be identical.[19]

ESTOPPEL BY REPRESENTATION — S.21(1) SALE OF GOODS ACT

In the rare cases where an owner has handed documents to an intermediary containing an alleged representation as to his title or has acted in an unequivocal manner the situation is relatively straightforward. The owner is either estopped by his representation or precluded under s. 21(1).

Henderson and Co. v. Williams[20] provides a good example. G and Co., sugar merchants, were fraudulently induced by F (the intermediary) to instruct the defendant warehouseman Williams to place sugar at F's disposal. During negotiations for the sale of the sugar by F to the plaintiff, Henderson and Co., Williams confirmed that he held the goods at the plaintiff's order. When the fraud was discovered, G and Co. directed Williams to refuse to deliver the goods to the plaintiff. The decision of the Court of Appeal was based on estoppel rather than s. 21(1). It was held that both G and Co., because they instructed Williams to place the sugar at F's disposal, and Williams, because he confirmed he held the goods at the plaintiff's order, were estopped.

As Lord Halsbury stated it is a 'question of whether the owner of goods has by his conduct allowed the person who has either cheated him or to whom he has

[16] McHugh J.A., *Thomas Australia Wholesale Vehicle Trading Co. Pty Ltd v. Marac Finance Australia Ltd* [1985] 3 N.S.W.L.R. 452, 470. See also *Associated Midland Corporation v. Sanderson Motors Pty Ltd and Another* [1983] 3 N.S.W.L.R. 395, 408. As stated by Atiyah, P.S., *The Sale of Goods* (7th ed. 1985) 269: 'This provision merely throws us back on the common law doctrine of estoppel, for it gives no indication when the owner is by his conduct precluded from denying the seller's authority to sell.' For a contrary view see Kirby P., in *Thomas Australia* at 459. For a more detailed discussion see Sutton, K.C.T., *Sales and Consumer Law in Australia and New Zealand*, (3rd ed. 1983) 277-80.

[17] *Benjamin's Sale of Goods*, (2nd ed. 1983) 232-3.

[18] It may be important where the transaction impugned is not a sale, the *Indian Banks* case [1938] A.C. 287; also, where the person seeking to establish title through an estoppel was not a party to it. *Eastern Distributors Ltd v. Goldring* [1957] 2 Q.B. 600. See also Sutton, *op. cit.* 279-80.

[19] See *Farquharson Bros & Co. v. C. King & Co.* [1902] A.C. 325, judgment of Lord Halsbury; the *Newbury Car Auctions* case [1957] 1 Q.B. 371, judgment of Denning, L.J. (dissenting); *Mercantile Credit Co. Ltd v. Hamblin* [1965] 2 Q.B. 242, judgments of Sellers L.J. (with whom Pearson L.J. concurred) and Salmon L.J.

[20] [1895] 1 Q.B. 521.

entrusted goods to hold himself out as the owner so as to give a good title to a bona fide purchaser for value.'[21] Earlier in his judgment Lord Halsbury refers to those cases 'in which a person has given the indicia of title to another so as to enable him to pass as the true owner.'[22]

The result of many of the cases decided after *Henderson* hinges on the importance attached to the handing to the intermediary of particular documents in a given case. Bills of lading and negotiable instruments apart, neither the holding of documents nor possession alone of goods suffices to establish title. Hence many decisions turn on the importance to be attached to the possession by the intermediary of such documents as consignment notes,[23] railway receipts,[24] and car and registration books.[25] In these cases containing an alleged representation in documents the decisions have focused on the nature of the acts or documents and the recognized commercial practice. There has been little, if any, explicit discussion of the owner's obligations to the third parties to whom the intermediary may have disposed of the goods.

OBLIGATIONS

There are, however, two situations where the owner's obligations are more in issue: (i) where he omits to take some optional step which, if taken, would have protected his interests; and (ii) where he executes documents and circulates them without due care in the conservation of his interests. The question which must be then addressed is whether this lack of care on the part of the owner is, of itself, sufficient to prevent him asserting his title.

In such situations it is no longer sufficient or helpful to talk only of ownership or the exigencies of commercial transactions. Obligations to third parties raise a number of policy issues often unrecognized or, at best, partly recognized. Is the purpose of the estoppel to protect the owner unless *his* conduct precludes such protection[26], or to protect innocent purchasers,[27] or is it to facilitate commercial transactions?[28] To what extent does the legal system oblige an owner to protect his own interests in his own property, in order that his careless conduct may not have a detrimental effect upon the position of others? Lord Macnaghten gave a robust answer in 1902:

> The right of the true owner is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been. If I lose a valuable dog and find it afterwards in the possession of a gentleman who bought it from somebody whom he believed to be the owner, it is no answer to

21 *Ibid.* 527.
22 *Ibid.*
23 *Commonwealth Trust v. Akotey* [1926] A.C. 72.
24 The *Indian Banks* case [1938] A.C. 287, a case concerning priority of pledges.
25 The *Newbury Car Auctions* case [1957] 1 Q.B. 371.
26 *Henderson & Co. v. Williams* [1895] 1 Q.B. 521; 525-7 *per* Lord Halsbury.
27 'Where the legislative provision has a beneficial purpose, protective of innocent purchasers . . .', the *Thomas Australia* case [1985] 3 N.S.W.L.R. 452, 461 *per* Kirby P.
28 'In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title.' *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd* [1949] 1 K.B. 322, 336-7 *per* Denning L.J.

> me to say that he would never have been cheated into buying the dog if I had chained it up or put a collar on it or kept it under proper control. . . . If that be so, how can carelessness, however extreme, in the conduct of a man's own business preclude him from recovering his own property which has been stolen from him?[29]

In contrast to these views based on nineteenth century notions of the sanctity of property are twentieth century views on one's duty to one's neighbour. It may be appropriate to cite, in yet another context, Lord Atkin's famous passage from *Donoghue v. Stevenson*: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'[30]

This theme is taken up in the *Twitchings* case in the dissenting judgment of Lord Wilberforce. Discussing in estoppel terms those circumstances in which an omission may preclude the owner because there was a duty to speak he stated:

> What I think we are looking for here is an answer to the question whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known to, and discoverable by, the 'acquirer' and whether, in the face of an omission to do so, the 'acquirer' could reasonably assume that no such title was claimed.[31]

So far those who have imposed some obligation, albeit slight, on the owner have found themselves for the most part in the dissent. But the trend in other areas of law is towards neighbourliness which shifts the focus to the third party. Is he entitled to expect an owner to take some care in protecting his goods? In what circumstances? How much? Is the owner obliged to know or foresee that certain consequences may flow from his acts or omissions? These issues are not new. They have been resolved in other contexts, for example in realty cases by means of estoppel,[32] and, more generally, by the tort of negligence.[33] Equity has established principles to determine priority of dealings.[34] What is new is their appearance in cases concerning commercial transactions and in particular the sale of goods. It is perhaps for this reason that the law is so uncertain.

Before attempting a detailed analysis of the recent cases in which the owner's obligations have been considered, a statement of the law of estoppel by conduct (which, it is claimed, encompasses estoppel by negligence) may be of assistance.

[29] *Farquharson Brothers & Co. v. C. King & Co.* [1902] A.C. 325, 335. 'It cannot be that ownership is lost on the basis of enduring punishment for carelessness': the *Newbury Car Auctions* case [1957] 1 Q.B. 371, 394 *per* Morris L.J. See also the *Twitchings* case [1977] A.C. 890, 902 *per* Lord Wilberforce; 925 *per* Lord Fraser.

[30] *Donogue v. Stevenson* [1932] A.C. 562, 580-1.

[31] *Moorgate Mercantile Co. Ltd v. Twitchings* [1977] A.C. 890, 903. See also the *Newbury Car Auctions* case [1957] 1 Q.B. 371, 385 *per* Denning L.J. (dissenting).

[32] See for example the cases cited at n. 76, *infra* 796.

[33] In particular the tort of economic loss.

[34] Discussed in detail *infra*. See *Oliver v. Hinton* [1899] 2 Ch. 264, 273-4; *Hudston v. Viney* [1921] 1 Ch. 98, 103-5; *Heid v. Reliance Finance Corporation Pty Ltd and Another* (1983) 57 A.L.J.R. 683, 688-9; *I.A.C. (Finance) Pty Ltd v. Courtenay and Others* (1962) 110 C.L.R. 550, 579.

ESTOPPEL BY CONDUCT

An oft quoted authoritative statement is that of Dixon J. of the High Court of Australia in *Thompson v. Palmer*.

> The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, . . .; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted.[35]

On Dixon J.'s analysis the phrase estoppel by conduct thus covers those cases where there has been: (i) an omission to act in circumstances when there was a duty to do so and, (ii) imprudent conduct when care was required. Commentators are agreed that estoppel by negligence, if it can be said to exist at all, is only a form of estoppel by conduct. However, Spencer Bower[36] would regard that term as encompassing the omission and the imprudent conduct cases whilst Ewart, who prefers the phrase estoppel by carelessness, or 'assisted misrepresentation',[37] confines it to imprudence cases, and still others[38] do not distinguish between the two. There are thus many opportunities for confusion.

(i) *The Omission Cases*

If the person against whom an estoppel is alleged is silent in circumstances where there is a positive duty to alert others to the existence of a mistaken assumption, classic estoppel doctrine regards such silence as an implied representation. As such, followed by reliance and loss, it will lead to an estoppel. The existence of a positive duty to act is crucial for this form of estoppel.[39]

There are few decided omission cases and apart from those involving contracting parties, in particular customer and banker, or fiduciary relationships, the circumstances requiring the imposition of such a positive duty have been difficult to determine.[40]

(ii) *Imprudent Conduct — 'Assisted Misrepresentation'* [41]

Imprudence when care is required is an ambiguous concept capable of meaning: (a) imprudent conduct when care is required *vis-a-vis* another, that is, encompassing a positive duty to another; or, (b) imprudence in the conservation

35 (1933) 49 C.L.R. 507, 547.
36 *Op. cit.* 72.
37 *An Exposition of the Principles of Estoppel by Misrepresentation*, (1900) 98-102.
38 Sutton, *op. cit.* 290-5, Borrie, W.J., *Commercial Law* (2nd ed. 1978) 137-40.
39 See Bower, *op. cit.* 48-50.
40 *Ibid.* 50-69 for a more detailed discussion.
41 See Ewart, *op. cit.* 101-3 and Pickering, *op. cit.* 408-15.

of one's own interests, but with *no* positive duty to another. In either case the imprudent conduct by the owner provides an opportunity for another to make a representation, and is thus said to give rise to an implied representation by the owner and an estoppel.

Hence, if an estoppel is sought to be raised because of the imprudent conduct it is essential to determine whether 'imprudent conduct' has meaning (a) or (b). The strict requirement of a duty to another in (a) may lead to a limiting of the circumstances in which an estoppel will be imposed.[42] In addition the differing foci of (a) (duty to another) and (b) (failure to conserve one's own interests) may result in emphasis on different factors and hence a different outcome. Despite this, the sale of goods cases relying on estoppel show little evidence of care in the use of precedents when discussing the need for a duty. Nor has there been any discussion of whether the duty postulated is a positive duty to another or simply a requirement to protect one's own interests.[43]

The decision of *Swan v. North British Australasian Co.*[44] provides an excellent illustration. An owner executed ten share transfer forms in blank and handed them to his broker who used eight of the transfers for the agreed purpose. With the remaining two he fraudulently transferred shares in another company having previously stolen the relevant share certificates from a box deposited by the owner at the bank for safe custody. In an action by the owner against the company for the restoration of the owner's name to the company register it was argued on behalf of the company that there had been such negligence on the part of the plaintiff/owner as to estop him from setting up his right against *bona fide* purchasers of the shares.[45] These arguments were not accepted by the court who found in favour of the owner. In an oft cited passage Blackburn J. stated:

> Now I agree that a party may be precluded from denying against another the existence of a particular state of things, but then I think it must be by conduct on the part of that party such as to come within the limits so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Freeman v. Cooke*. It is pointed out by Parke, B., in the course of the argument in that case, that in the majority of cases in which an estoppel exists, 'the party must have induced the other so to alter his position that the former would be responsible to him in an action for it;' and he had before pointed out that 'negligence,' to have the effect of estopping the party, must be 'neglect of some duty cast upon the person who is guilty of it.' And this, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, unless it be in market overt.
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> And in the considered judgment of the Court, Parke, B., lays down very carefully what are the limits. He says, that to make an estoppel it is essential '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, and that it is 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

42 See, for example, *Hamblin*'s case [1965] 2 Q.B. 242.

43 See, by way of contrast, the cases concerning failure to care for title deeds, *infra*.

44 (1863) 2 H.&C. 175.

45 The arguments are set out in the court below. See (1862) 7 H.&N. 603, 625. Some of the authorities cited at 625-8 concerned cases of cheques in which it had long been accepted that a banker could successfully raise an estoppel against a negligent customer who sought damages for loss caused by forgery.

> 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' (2 Exch. 663).
>
> What I consider the fallacy of my brother Wilde's judgment is this: he lays down the rule in general terms 'that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on the belief to their prejudice, he shall not be heard afterwards, as against such persons to show that state of facts did not exist.' This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person let into that belief, or, what comes 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 to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy; and these distinctions make in the present case all the difference.[46]

This judgment establishes the need for a duty in cases of imprudent conduct and assumes that the duty is *vis-a-vis* a third party. Ewart[47] makes a number of criticisms. First he points out that the passage cited from the judgment of Baron Parke in *Freeman v. Cook*[48] (an imprudent conduct case) is a discussion of *Pickard v. Sears*[49] (itself an omission case). Thus a finding of a duty was essential for the successful plea of estoppel in *Pickard v. Sears* but not necessarily so in *Freeman v. Cook* or *Swan*. In addition some of the authorities cited in *Swan* which appeared to establish the need for a duty concerned the alleged negligence of a customer of a bank in drawing a cheque. The authorities establish that a customer is under a duty to his bank. He will therefore be estopped because of his imprudent conduct. It does not necessarily follow that other people must be under a duty before an estoppel can arise through imprudent conduct. These points have never been taken up and *Swan's* case is now cited as an authority for the need for a duty generally in both omission and imprudent conduct cases,[50] and possibly even in cases of actual representation.[51] Secondly, he argues, that in cases of imprudent conduct, the conduct is never in the transaction itself, but is that of the owner *prior to* the later dishonest actions of the intermediary.[52] Finally, he contends that the imprudent conduct is never the 'only proximate' cause.[53] Ewart would prefer to think in terms of 'two proximate causes,'[54] the imprudent conduct *and* the dishonesty of the intermediary. Any other analysis leads to the dishonesty of the intermediary being treated as a *novus actus interveniens*[55] and hence no estoppel is established.

Despite this critical analysis, *Swan's* case was given much prominence by the Privy Council in the *Indian Banks* case.[56] In that case the standard commercial practice entitled merchants to delivery of goods from growers on production of railway receipts. It was also standard practice for banks to grant loans to merchants on the sighting of such receipts. The receipts were then returned to the

46 (1863) 2 H.&C. 175, 181-2.
47 *Op. cit.* 93-4, 108-10 and 112-22.
48 (1848) 2 Exch. 654.
49 (1837) 6 Ad. & E. 469.
50 See the *Indian Banks* case [1938] A.C. 287, *Hamblin*'s case [1965] 2 Q.B. 242.
51 See the *Indian Banks* case [1938] A.C. 287.
52 Ewart, *op. cit.* see especially 113-4.
53 *Ibid.* 119-21.
54 *Ibid.* 120.
55 See *Hamblin*'s case [1965] 2 Q.B. 242.
56 *Mercantile Bank of India Ltd v. Central Bank of India Ltd* [1938] A.C. 287.

merchants for the specific purpose of obtaining possession of the goods and storing them in the bank's warehouse. The question at issue was whether the return of a railway receipt by the pledgor bank, the Central Bank, to the pledgee merchant (with which the latter then re-pledged the goods to the Mercantile Bank) amounted to a representation that the goods were free from any outstanding security interest. Thus it was not a case of an omission to act, and having regard to accepted commercial practice, there was no imprudent conduct. The question at issue was the representation, if any, made by the Central Bank, in returning the receipt. Counsel for the Mercantile Bank, however, sought to raise an estoppel against the Central Bank on the grounds that the latter had 'enabled' the merchants[57] to act in that way and must therefore sustain the loss. The Privy Council therefore discussed the need for a duty in estoppel cases in the context of limiting the breadth of the postulated 'enabling' doctrine. Some of the authorities cited in support of the need for a duty again concerned the special relationship of customer and banker in which the existence of a duty in the customer not to cause loss to his banker through negligence is well established.[58]

The judgment of Lord Wright on behalf of the Privy Council can be read as requiring a duty in all cases of estoppel:

> As already pointed out, the existence of a duty is essential, and this is peculiarly so in the case of an omission. This is so even if the case were put on representation or holding out. The duty may be, in the words of Blackburn J. 'to the general public of whom the person is one.' There is a breach of the duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority.[59]

Thus the *Indian Banks* case confirms the need for a positive duty in the omission cases and suggests the need for a similar duty in the imprudent conduct cases and possibly even the representation cases. The duty is seen in an estoppel context. Beyond contract and agency its ambit is uncertain.

It is apparently a positive duty owed to another, not merely an obligation to conserve one's own interests.

We are now in a position to analyse in detail two controversial English decisions: one, where the owner by failure to act omitted to conserve his own interests; the other, where the owner by imprudent conduct 'enabled' an intermediary to make a representation which resulted in loss.

THE CASES

(i) *An Owner, by Failure to Act, Omits to Conserve his Own Interests*

In the *Twitchings* case[60] the appellant finance company was a member of Hire Purchase Information Ltd (H.P.I.) which kept a register of hire purchase agree-

57 Citing Ashurst J. in *Lickbarrow v. Mason* (1787) 2 T.R. 63, 70.

58 See, for example, *London Joint Stock Bank Ltd v. Macmillan and Another* [1918] A.C. 777, *Slingsby & Others v. District Bank Ltd* [1932] 1 K.B. 544 and Bower, *op. cit.* 55-9.

59 The *Indian Banks* case [1938] A.C. 287, 304. See also the *Newbury Car Auctions* case [1957] 1 Q.B. 371, 385 *per* Denning L.J.

60 *Moorgate Mercantile Co. Ltd v. Twitchings* [1977] A.C. 890, followed in *Cadogan Finance Ltd v. Keith Lavery and Peter Murray Fox* [1982] Com.L.R. 248; see also *Moorgate Mercantile Co. Ltd v. Twitchings* [1976] Q.B. 225 (the *Twitchings* case in the Court of Appeal), the *Thomas Australia* case [1985] 3 N.S.W.L.R. 452, and the *Associated Midland Corporation* case [1983]3 N.S.W.L.R. 395.

ments with the object of providing information concerning security interests in motor vehicles to members, associate members and in limited circumstances members of the public. Any finance company or dealer wishing to finance or purchase a vehicle, could ascertain from H.P.I. whether an inconsistent agreement was registered with it. Although at the time of the action membership of H.P.I. was voluntary, all major finance companies were members, most dealers were associate members and 98% of hire purchase agreements were registered with it. Moorgate Mercantile let out a car on hire purchase to McLorg. It was its custom to register hire purchase agreements with H.P.I. but in this particular case it had not done so. In offering to sell the car to Twitchings, McLorg stated that it was free from hire purchase commitments. When this was verified by H.P.I., Twitchings purchased the car. Moorgate Mercantile sued Twitchings in conversion.[61]

The majority of the House of Lords[62] held that the finance company was under no duty to register the hire purchase agreement. As Lord Edmund-Davies stated:

> It is, of course, *desirable* that finance companies who are members of H.P.I. should promptly and accurately notify H.P.I. of any new agreement entered into, and this both in their own interest and in that of dealer-members of that organisation. But they are, as I think, under no sort of obligation to join it at all, though Lord Denning M.R. goes so far as to say that they abstain at their peril, for even non-members may find themselves estopped by their failure to join from asserting title against an innocent buyer or seller. I have to say respectfully that such an approach illustrates the risk of creating legal duties where none were ever contemplated. In most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort. Liability has to be based on a legal duty not to be careless, and I can find none in this case.[63]

Had a duty to register been established, however, at least Lord Edmund-Davies and Lord Fraser would have found the finance company in breach. Their decisions therefore phrased in terms of estoppel by negligence were based on the elements of the tort of negligence.

Analysis of the two minority judgments shows that it is possible to accept a basic premise of obligation and arrive by two differing paths to the conclusion that a duty is owed. Lord Salmon stated that in his view 'All the members of H.P.I. are in such close business propinquity . . . that they are in my view clearly 'neighbours' within the meaning of that word as used by Lord Atkin.'[64] He continued:

> I am deciding no more than that, because of this close association and these common business interests, the finance houses who are members of H.P.I. owe a duty to their fellow members and associate members to use reasonable care to supply H.P.I. with particulars of any hire purchase agreement into which they enter.[65]

In his view the finance company was clearly in breach of that duty.[66] This is a conclusion reached by the path of the *tort* of negligence; duty, breach and proximate loss.

61 It was held by the majority of the House of Lords, Lord Salmon dissenting, that H.P.I. had made no representation when supplying Twitchings with the information.

62 Lord Edmund-Davies, Lord Fraser, Lord Russell (Lord Wilberforce and Lord Salmon dissenting).

63 *Ibid.* 919. See also Lord Fraser at 925-6, Lord Russell at 930, and in the Court of Appeal [1976] Q.B. 225, 252 *per* Geoffrey Lane L.J. (dissenting).

64 *Ibid.* 908. See Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580-1.

65 *Ibid.* 909.

66 *Ibid.* 910.

Later in his judgment he turns to estoppel by negligence:

> From a practical point of view it does not much matter whether he is treated as being entitled to damages for negligence, which are equivalent to and will extinguish the damages for which the appellants recovered judgment, or whether he is treated as entitled to rely on what is sometimes called estoppel by negligence, which is only a form of estoppel by conduct. This kind of estoppel would apply to the present case as follows: (1) The appellants owed the respondent a duty of care. (2) In breach of that duty the appellants were negligent. (3) The appellants' negligence was the real cause of the respondent innocently buying the appellants' car and thereby converting it. (4) The appellants are therefore precluded from claiming damages from the respondent for the conversion which in reality was caused by their own negligence in failing to register their hire purchase agreement with H.P.I. who would then have warned the respondent of this agreement and thereby saved him from being defrauded by Mr. McLorg: *Mercantile Bank of India Ltd v. Central Bank of India Ltd* [1938] A.C. 287.[67]

As seen above few experts on the law of estoppel would question that estoppel by negligence is other than a form of estoppel by conduct. Many however would question the elements of such an estoppel as set out in Lord Salmon's points (1) to (4). These elements simply re-state the basis of the tort of negligence and then reach a conclusion, based on estoppel, that the owner is precluded.

Lord Wilberforce, on the other hand, focusses from the beginning on the estoppel which may arise from 'inaction or silence rather than positive conduct.'[68]

> English law has generally taken the robust line that a man who owns property is not under any general duty to safeguard it and that he may sue for its recovery any person into whose hands it has come: see *Farquharson Brothers and Co. v. King and Co.* [1902] A.C. 325 *per* Earl of Halsbury, p. 332 and *piu andante* Lord Macnaghten, p. 336. He is not estopped from asserting his title by mere inaction or silence, because inaction or silence, by contrast with positive conduct or statement, is colourless: it cannot influence a person to act to his detriment unless it acquires a positive content such that that person is entitled to rely on it. In order that silence or inaction may acquire a positive content it is usually said that there must be a duty to speak or to act in a particular way, owed to the person prejudiced, or to the public or to a class of the public of which he in the event turns out to be one.[69]

Duty therefore is an element in omission cases. However, it may not necessarily carry the same connotations as it would in the tort of negligence. He continued:

> My Lords, I think that the test of duty is one which can safely be applied so long as it is understood what we mean. I have no wish to denigrate a word which, to modern lawyers, has become so talismanic, so much a universal solvent of all problems, as the word 'duty', but I think that there is a danger in some contexts, of which this may be one, of bringing in with it some of the accretions which it has gained — proximity, propinquity, foreseeability — which may be useful, or at least unavoidable in other contexts. What I think we are looking for here is an answer to the question whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known to, and discoverable by, the 'acquirer' and whether, in the face of an omission to do so, the 'acquirer' could reasonably assume that no such title was claimed.[70]

Given that 'the registration system was extremely comprehensive',[71] and that 'very great reliance to the knowledge of finance companies is placed by dealers on the operation of this system',[72] he concluded that the finance company was under 'a duty towards dealers, members of H.P.I., to take reasonable care to register any hire purchase agreement to which it is a party.'[73]

67 *Ibid.* 911-2.
68 *Ibid.* 902.
69 *Ibid.* 902-3.
70 *Ibid.* 903.
71 *Ibid.* 904.
72 *Ibid.*
73 *Ibid.* 906.

It is at this point that the judgment diverges from that of Lord Salmon. Once a duty to speak or act has been identified followed by a *reliance* on that silence or omission and consequential loss the owner will be precluded. The reasoning in this judgment accords with the classical approach to estoppel by omission.

All members of the House of Lords discussed the need for a duty. The divergences in the judgments concerned the existence of a duty on the facts and whether an established duty was fulfilling a classic estoppel, or estoppel by negligence/tort of negligence, role.

Three final points should be made. First, although the facts in the *Twitchings* case concerned an omission to act, only Lord Wiberforce specifically limited his dicussion of duty to that context. Lords Edmund-Davies and Fraser in discussing the need for duty in an estoppel context made no distinction between omission and imprudent conduct. Lord Salmon's discussion of duty was in the context of the tort of negligence, hence no distinction was necessary. Thus the case appears to be persuasive authority for the proposition that a duty to another is required in cases of imprudent conduct. This will be discussed further after the analysis of *Hamblin's* case.[74]

Secondly, as the judgments in the *Twitchings* case disclose, the difficulty in all omission cases is to prescribe those circumstances in which a duty exists. In classic estoppel terms the duty is imposed because of the relationship between the parties or because the person sought to be estopped knew of the reliance. As Lord Wilberforce stated 'A man who knows that others rely on a particular source of information, which derives that information from him, may surely be under a duty to supply that information if he has it . . .'[75] Similarly, in the proprietary estoppel cases concerning real property, it is the silent standing by or acquiescence in the knowledge that another is acting to his detriment which gives rise to the duty to speak.[76] Knowledge of reliance is thus a key factor in the omission cases; and it is knowledge which provides the means of distinguishing the oft cited example of the man who is under no duty because a thief has stolen goods from his house. The owner of the house has no knowledge of the intended burglary and no knowledge of the later reliance.[77]

Thirdly, in the *Twitchings* case it was correct to state, as did Lord Salmon in the passage quoted above, that from a practical point of view the outcome between the parties did not depend on whether the judgment was based on estoppel or the tort of negligence. However, this will not always be so. Should an owner, after the transaction which allegedly gives rise to the estoppel in favour of the third party, sell the goods to a fourth party, the outcome between all these parties will be radically different depending on whether the third party is relying

74 [1965] 2 Q.B. 242.

75 [1977] A.C. 890, 905. See also the *Associated Midland Corporation* case [1983] 3 N.S.W.L.R. 395, 413, the *Thomas Australia* case [1985] 3 N.S.W.L.R. 452, 473, and generally Bower, *op. cit.*, 48-50.

76 See, for example, *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129, 141 *per* Lord Cranworth, *Crabb v. Arun District Council* [1976] Ch. 179, 189 *per* Denning M.R. *Taylor Fashions v. Liverpool Trustee Co.* [1982] 2 Q.B. 133, 147, 153. See generally Bower *op. cit.* 283-8.

77 See, *infra*, the discussion in the real property cases concerning the obligation on the owner if the reliance is foreseeable.

on estoppel or negligence. Should the third party succeed in estoppel, the owner's title will pass to him, the owner will have had no title to pass to the fourth party and will therefore be liable to him in damages for breach of warranty of title. On the other hand, should the third party rely solely on damages for negligence as a counter claim to damages for conversion, title will remain with the owner who will have had title to pass it to the fourth party. It should be remembered that estoppel affects title which can affect people who are not parties to the current dispute.[78]

(ii) *An Owner, by Imprudent Conduct, Fails to Conserve his Own Interests*

In the omission cases once a duty to speak or act has been established judgment based on the criteria of estoppel by conduct or the tort of negligence will, in most cases (subject to the comments in the preceding paragraph) give an identical result.[79] However, this will not necessarily be so in those cases where an owner by imprudent conduct fails to conserve his own interests. In such cases the tort of negligence focusses on the foreseeability of the consequences of the imprudent conduct and if there has been no breach because it was reasonable to trust the intermediary, it ignores the ultimate reliance. In estoppel terms reliance is an essential factor.

In *Hamblin's*[80] case Mrs Hamblin wished to borrow money on the security of her car. A dealer (the intermediary), apparently both respectable and prosperous with whom she had had previous dealings and whom she had met socially, agreed to arrange a loan for her and asked her to sign incomplete documents. She signed the documents believing they related to a mortgage of the car, whereas they related to a hire purchase transaction. The dealer then fraudulently completed the hire purchase forms so that they comprised an offer by himself to sell the car to the plaintiff finance company and an offer by Mrs Hamblin to buy the car on hire purchase terms from that company. Mrs Hamblin retained possession of the car. The finance company accepted both offers and paid the dealer for the car. He did not account to Mrs Hamblin. The finance company sought to enforce the hire purchase agreement against Mrs Hamblin who refused to pay the instalments owing. The finance company brought alternative actions in detinue and conversion.[81] The Court of Appeal[82] held unanimously that Mrs Hamblin was not estopped from denying the dealer's authority to sell.

All three judges discussed the behaviour of Mrs Hamblin in terms of estoppel by negligence and found a duty of reasonable care in Mrs Hamblin to the person to whom the documents would ultimately go. As was stated by Pearson L.J.:

> In my judgment, there was a sufficient relationship of proximity between the defendant and any persons who might contract to provide her with the money that she was seeking, to impose upon

78 See, in particular, *Eastern Distributors Ltd v. Goldring* [1957] 2 Q.B. 600.

79 See the dissenting judgments of Lord Wilberforce and Lord Salmon in the *Twitchings* case [1977] A.C. 890.

80 *Mercantile Credit Co. Ltd v. Hamblin* [1965] 2 Q.B. 242.

81 The case was also argued on the basis of *non est factum*, 267-88, *per* Pearson L.J. and no ostensible authority, 265 *per* Sellers L.J. See also *Eastern Distributors Ltd v. Goldring* [1957] 2 Q.B. 600, distinguished on the facts.

82 Sellers, Pearson and Salmon L.JJ.

her a duty of care with regard to the preparation and custody of the contractual documents. The duty was owing to those persons, whoever they might eventually be found to be. They were in fact the finance company.[83]

Estoppel by negligence was once again discussed in terms of the tort of negligence.[84] It was stated that in the circumstances of the case there had been no breach of duty by Mrs Hamblin since she was 'well acquainted with the dealer, who was apparently respectable, solvent and prosperous'.[85] Even on the supposition that she had been negligent she would still not have been precluded since the proximate or real cause of the loss was the conduct of the dealer.[86]

A classic estoppel analysis of the situation in *Hamblin's* case would be, that by signing the documents, unread and incomplete, she either permitted the dealer to represent to the finance company that he was the owner of the car,[87] or impliedly represented that she was not already the owner of the car and was seeking to purchase it through hire purchase.[88] The finance company relied on the representation, paid the dealer for the car, suffered loss and therefore Mrs Hamblin should be precluded from asserting her title. Alternatively the analysis could be based on the need for an alleged duty. It would see a duty on the part of Mrs Hamblin, with respect to the documents, as stated by Lord Pearson.[89] However once it was clear that the owner owed a duty regarding the documents the succeeding issues would be (i) can they be interpreted to contain a misrepresentation which could mislead the third party (ii) has he relied on the misrepresentation and (iii) has he suffered loss as a result of his reliance? In either case the focus is on the reliance of the third party and not the reasonable foreseeability of the consequence of the conduct of the owner. In *Hamblin's* case the result would have been very different.

The decision in *Hamblin's* case, based on estoppel by negligence discussed in terms of the elements of the tort of negligence, raises two main points. First, it suggests the need for a positive duty in imprudent conduct cases, relying upon *Swan's* case[90] and the *Indian Banks* case.[91] As has been argued above these decisions rely heavily on precedents involving the special situation of a customer and his banker concerning bills of exchange. In these cases it is well established that the customer has a duty to his banker. To say that therefore there must be a positive duty to another in all cases before there can be estoppel is to apply the rules developed for the special customer banker relationship to all situations. It will be suggested later that what should be required in these cases is not a positive duty to another but an imprudent failure to conserve one's own interests.[92] It should not be overlooked that the question at issue is conduct of an

83 *Ibid.* 275; 265 *per* Sellers L.J.

84 See Pearson L.J. at 271, '[t]he finance company *has* to show (i) that the defendant owed it a duty to be careful, (ii) that in breach of that duty she was negligent, (iii) that her negligence was the proximate or real cause of it being induced to part with the £800 to the dealer'.

85 *Ibid.* 275, *per* Pearson L.J.

86 *Ibid.*

87 *Ibid.* 266, *per* Sellers L.J.

88 *Ibid.* 270, *per* Pearson L.J.

89 *Ibid.*

90 (1863) 2 H. & C. 175.

91 [1938] A.C. 287.

92 See *infra.*

owner which precludes that owner. It does not seem inequitable or unjust that an owner who acts imprudently with respect to the conservation of his own interests should be denied the right to assert those interests over third parties.[93] As Kirby P. of the New South Wales Court of Appeal suggests, the effect of requiring a positive duty to another and the difficulty of determining the circumstances in which it should be imposed may result in the greater protection of imprudent owners at the expense of *bona fide* purchasers.[94] Yet the stated aim of law in a commercial setting is said to be speedy transactions and the protection of the *bona fide* purchaser who may not be able to make thorough searches as to title.[95]

The second point which is so clearly demonstrated in *Hamblin's* case[96] is the role of the intermediary. As Ewart argues cogently,[97] in cases of imprudent conduct, which he calls 'assisted representation', the conduct of the intermediary is crucial. Yet if the conduct is treated as a *novus actus* for purposes of the tort of negligence it will not be foreseeable and an owner will rarely if ever be held responsible for the loss to the third party.

These comments on *Hamblin's* case provide a useful link with the real property cases. Interestingly the latter address the two issues mentioned: (i) the failure to conserve one's own interests; and (ii) the foreseeable nature of the consequences of the imprudent conduct. It is thus proposed to discuss the approach of equity to priorities disputes between competing interests in real property before attempting a resolution of the problems raised in the sale of goods cases.

EQUITY — COMPETING INTERESTS IN REAL PROPERTY

As already stated the purpose of this article is to compare the conduct of owners/interest holders in two areas of the commercial exploitation of property; the sale of goods, and the creation of multiple security interests in real property. An examination of the statute and common law applied to the resolution of disputes concerning an owner's conduct on the sale of goods, revealed two legal tools in use: estoppel by representation, and a confusing mixture of the elements of the tort of negligence and estoppel. It is now proposed to consider the tools adopted by equity in the resolution of disputes concerning competing interests in real property.

In some security transactions, title deeds are deposited as security for an advance; in others, an apparent sale is in reality, wholly or partly, a security transaction. In either case, the multiple interests created, and the form of documentation or lack thereof, provide opportunities for the creation of further inconsistent interests in *bona fide* third parties by a dishonest intermediary. The cases concern, for the most part, the ranking of these lesser interests, be they mortgages, either legal or equitable, or equitable liens. Success on the part of one

[93] Subject to such requirements as to the state of mind of the owner, as may be considered appropriate. See the discussion, *infra*.

[94] See the *Thomas Australia* case [1985] 3 N.S.W.L.R. 452, 459.

[95] See *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd* [1949] 1 KB 322, 336-7, *per* Denning L.J. See also Goode, R.M., *Commercial Law* (1982) 36-7, 52, 392-3.

[96] [1965] 2 Q.B. 243.

[97] Ewart, *op. cit.*, especially at 113-4.

interest holder does not necessarily destroy the claim of the other, although ranking will be important if one piece of property is incapable of fulfilling all the demands made upon it. Hence, although the terminology is of priorities and conduct leading to postponement, the question remains, which of one or more innocent parties should suffer the loss. Both the mortgagor's equity of redemption and the vendor's lien for unpaid purchase monies are equitable interests and disputes as to their ranking with other interests both legal and equitable are heard in courts exercising equitable jurisdiction. Thus the cases to be considered concern disputes as to the priority of interests in real property decided in accordance with established equitable principles.[98]

The variety of dishonest dealings and the difficulties of dispute resolution have led to greater statutory intervention with respect to land, than with respect to the sale of goods. Initially this took the form of encouraging the registration of deeds disposing of interests in land by the award of priority according to the date of registration,[99] so that a prior interest holder who did not register the deed by which he acquired his interest would lose priority.[1] Later schemes provide for registration itself as a source of title (usually called title by registration). Such schemes require the registration of documents to create or pass title to certain interests. Subject to exceptions based on fraud, these interests then become indefeasible. The schemes also provide for the notification on the register of the existence of unregistrable interests.[2] It can be seen that this legislation imposes on a person dealing with an interest in land an obligation to protect his own interests in the manner provided. If he fails to do so he will either lose priority or be defeated altogether by the acquirer of a later inconsistent interest.

This statutory intervention has theoretically reduced the number of possible occasions for the use by judges of the common law tools. In Australia, however, all unregistered interests have been treated as equitable for the purposes of determining priority.[3] Hence the rules developed in equity remain relevant.

Equity resolves priorities disputes by reference to one of two equitable maxims: 'where the equities are equal the law prevails'; and 'where the equities are equal the first in time shall prevail'.[4] At first glance a layman could be excused

98 It is not proposed to cover in this article the law developed by equity dealing with assignments or mortgages of intangible personalty known as the rule in *Dearle v. Hall* (1823) 38 E.R. 475. This has since been extended in England, but not Australia, by s. 137 Law of Property Act 1925 to cover equitable interests in both realty and personalty. Under this rule priority of dealing is obtained or lost solely by giving or failing to give notice to the debtor/trustee. Various explanations of the origin of the rule have been given, only one of which involves the conduct of the assignor. See *Ward v. Duncombe* [1893] A.C. 369 especially the judgment of Lord Macnaghten at 383-95. Later cases focus solely on whether it is appropriate to apply *Dearle v. Hall* at all (*B. S. Lyle Ltd v. Rosher* [1959] 1 W.L.R. 8) and to whom notice must be given in order to be effective (*Re Phillips' Trusts* [1903] 1 Ch. 183). Hence they add nothing to the discussion of the standard of conduct to be applied to the assignor.

99 Beginning with the Statute of Enrolments in 1535. For current provisions see, for example, Conveyancing Act 1919 (N.S.W.) Part XXIII, Property Law Act 1958 (Vic.) Part I.

1 A different approach has been adopted in England under the Land Charges Act 1925 as amended and consolidated by the Land Charges Act 1972. If an encumbrance is registrable and registered under the Act the encumbrancer is protected; if not, a later purchase taken free from the encumbrance and the encumbrancer's rights will be defeated. Land Charges Act 1972 s. 4.

2 See for example, the Real Property Act 1900 (N.S.W.), the Transfer of Land Act 1958 (Vic.), and the Land Registration Act 1925 (Eng.).

3 See *Barry v. Heider and Another* (1914) 19 C.L.R. 197.

4 Meagher, R.P. Gummow, W.M.C., and Lehane, J.R., *Equity Doctrines and Remedies* (1975), 216. *Snell's Principles of Equity* (28th ed. 1982), 46-7.

for thinking these inconsistent. However the apparent inconsistency is overcome by another factor relevant in determining priorities, namely, the classification of the conflicting interests. The possible categories are: prior legal/inconsistent subsequent legal (very rare), prior equitable/subsequent legal, prior legal/subsequent equitable, and prior equitable/subsequent equitable. The maxims favour legal over equitable interests and that which is first in time where they are of the same status.[5] For the purposes of this article only conflicts arising from prior legal/subsequent equitable and prior equitable/subsequent equitable interests will be discussed.[6] In the case of the conflict between a prior legal and subsequent equitable interest where the equities are equal, the prior legal interest will prevail. In the case of a conflict between a prior equitable and a subsequent equitable interest where the equities are equal, the first in time will prevail. So, the common question is, when are the equities equal?

The cases, again selected for their exemplary nature, fall into two clear categories: imprudence in the handling and execution of documents, and failure to take an optional step, the taking of which would protect the interest holder. In the case of real property the first category requires a further division: imprudence in the acquisition and/or retention of the title deeds themselves, and imprudence in the execution of documents creating the interests involved.

IMPRUDENCE IN FAILING TO ACQUIRE OR RETAIN TITLE DEEDS

(i) *Negligence*

The cases concerning imprudence with deeds arise largely, but not exclusively, with respect to land, the title to which is not registered.[7] For such land the documents comprising the chain of title, known collectively as the title deeds, are of paramount importance.[8] They are normally held by the owner of the fee simple, handed to a mortgagee on the creation of legal mortgage[9] or merely deposited with an equitable mortgagee to create an equitable mortgage. Thus

[5] There is debate as to the operation of the maxim 'where the equities are equal the first in time shall prevail'. The issue is whether the court may search for the better equity or whether there is prima facie priority in favour of the first interest holder which can be displaced only by the better rights of the subsequent interest holder. *Heid's* case (1983) 57 A.L.J.R. 683, the most recent decision of the High Court on this issue, does little to clarify the point. The precise operation of the maxim, however, in no way affects the arguments in this article. For further discussion of the relevant case law see Meagher, Gummow and Lehane, *op. cit.* 216-7 and Sykes, *The Law of Securities*, (4th ed. 1986) 401-2.

[6] The prior equitable/subsequent legal conflict raises the classic case of the possible defeat of an equitable interest holder by a *bona fide* puchaser of the legal estate for value without notice; Although fundamentally based on the conscience related behaviour of the purchaser, a wealth of specialized law has developed as to what constitutes notice: actual, constructive or imputed. In addition, the focus is solely on the conduct and knowledge of the acquirer of the later interest and therefore adds nothing to this discussion.

[7] Known as 'land the subject of old conveyancing' in England and 'old system' (N.S.W.) or 'general law' (Vic.) land in Australia.

[8] Both in England and Australia the great majority of titles are now registered; in England under the Land Registration Act of 1925, and in the Australian States under the various statutes incorporating the Torrens Scheme of registration of title. See for example the Real Property Act 1900 (N.S.W.), the Transfer of Land Act 1958 (Vic.). Since title once registered is indefeasible, the possession of title deeds is of less importance.

[9] Still one of the methods of creating a legal mortgage in England under the Land Charges Act 1972.

possession of the title deeds although consistent with ownership is not necessarily synonymous with it. However, such possession can be a vital means of protecting the interests of a fee simple holder or mortgagee. The issue thus becomes the point at which they may be postponed through failure to acquire or retain title deeds.

Walker v. Linom[10] illustrates the problem. Walker conveyed land to trustees under a marriage settlement by the terms of which he acquired an equitable life interest determinable on alienation. The trustees omitted to obtain from Walker the deeds by which the property was conveyed to him and those by which he conveyed it to them. It was thus possible for Walker to execute a legal mortgage of the property, inconsistent with the terms of the trust, to a third party, which he did. In a priorities dispute between the mortgagee and the beneficiaries under the trust it was held that the trustees had been negligent in relation to the acquisition of the title deeds and should therefore be postponed to the mortgagee.[11]

The decision is interesting in that it went beyond the earlier authority[12] and established negligence, as well as fraud, or 'that gross negligence, that amounts to evidence of a fraudulent intention',[13] as a ground for postponement.[14] Parker J. stated that it was clear that a 'purchaser obtaining the legal estate, but making no inquiry for the title deeds, or making inquiry and failing to take reasonable means to verify the truth of the excuse made for not producing them or handing them over, is, although perfectly honest, guilty of such negligence as to make it inequitable for him to rely on his legal estate . . .'[15]

Unlike the sale of goods cases, *Walker v. Linom* contains neither discussion of the elements of the tort of negligence nor of any breach of duty. The question which therefore comes immediately to mind is what is meant by negligence in this context. Lord Justice Fry speaking for the Court of Appeal in *Northern Counties of England Fire Insurance Company v. Whipp* rejected any notion that 'the legal owner of land owed a duty to all other of Her Majesty's subjects to keep his title deeds secure.'[16] So it is not a breach of a duty to some or all members of the public.

Lord Selborne provides clarification in *Agra Bank Limited v. Barry*:

> It has been said in argument that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of

[10] [1907] 2 Ch. 104.

[11] In consequence the beneficiaries were also postponed, as they could be in no better position than the trustees. The headnote and the decision proceed on the basis that the mortgagee acquired an equitable interest. In fact Walker had nothing to convey, and at most the mortgagee acquired a possible right in equity to postpone the interests of the beneficiaries under the settlement as a result of the conduct of the trustees. A more accurate analysis of the case would therefore be that of two inconsistent legal interests. See Maitland, F.W., *Equity* (2nd ed. 1936) 137-8. Sykes, *op. cit.* 396-7.

[12] *Northern Counties of England Fire Insurance Co v. Whipp* (1884) 26 Ch. D. 482.

[13] *Evans v. Bicknell* (1801) 6 Ves. 174, 190; 31 E.R. 998, 1006.

[14] The issues of the standard applicable, negligence or gross negligence, and the precise meaning of the latter phrase, remain unresolved. It is not proposed to enter into this debate since the concern of this article is to explore nature of the obligation imposed, not to determine the standard for ascertaining breach. For reference to and discussion of the relevant case law see Waldock, C.H.M., *The Law of Mortgages* (2nd ed. 1956) 392-401 and Sykes, *op. cit.* 396-403.

[15] [1907] 2 Ch. 104, 113. See also the Court of Appeal decision in *Oliver v. Hinton* [1899] 2 Ch. 264. Later cases expressly or impliedly adopt negligence as a basis for postponement. See *Hudston v. Viney* [1921] 1 Ch. 98, and the Privy Council decision in *Tsang Chuen v. Li Po Kwai* [1932] A.C. 715, 732-3.

[16] (1884) 26 Ch. D 482, 493.

> registry) which do use that language. But this, if it can properly be called a duty is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing bona fide in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained.[17]

The negligence required then, is a failure to conserve one's own interests 'as a matter of prudence, having regard to what is usually done by men of business under similar circumstances.'[18]

(ii) *Estoppel*

Dixon v. Muckleston is one case involving a failure to acquire the relevant title deeds in which the conduct is discussed in terms of estoppel. It was said by Lord Selborne:

> There may be omission or negligence equivalent in practical effect to acts; because when there is something which a person ought to do, and must be presumed to know that he ought to do, but does not do, the consequence is that the omission may be regarded as due to what is called gross or wilful negligence, which is equivalent to an act. But it must be something which raises a positive equity against him, upon the principle which in equity, as distinct from law, is conveniently designated by the term 'estoppel.' In other words, the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations if it be a case of express representation — he is not entitled to deny being bound by the natural consequences of his own acts, if it be a case of positive acts — he is not entitled to refuse to abide by the consequences of his own wilful and unjustifiable neglect, if that is the nature of the case. By one or other of those means he may have armed another person with the power of going into the world under false colours . . .[19]

Thus the cases dealing with imprudence in the acquisition or retention of title deeds have focussed on negligence as the legal tool for postponing a prior interest holder. The negligence, however, is not expressed in terms of a breach of a positive duty to another followed by foreseeable and proximate loss. Rather, it is expressed in terms of the justice and equity of postponing an interest holder who has failed to conserve his own interests.

If estoppel has played a minor role in establishing whether failure to acquire or retain title deeds warrants postponement, what of the situation where the conduct amounts to imprudence in the execution of documents?

IMPRUDENCE IN THE EXECUTION OF DOCUMENTS

(i) *Estoppel or Arming/Enabling*

In this section the cases selected concern land under the various Torrens Acts in Australia for which legal title requires registration. As stated above it has been held that all unregistered and unregistrable instruments are equitable for the

[17] (1874) 7 H.L. 135, 157. Cited with approval by Lord Justice Fry in *Whipp's* case (1884) 26 Ch. D. 482, 493 and *Abigail v. Lapin and Another* [1934] A.C. 491, 506. See also the judgment of Romer J. at first instance in *Oliver v. Hinton* [1899] 2 Ch. 264, 268 and that of Eve J. in *Hudston v. Viney* [1921] 1 Ch. 98, 104-5: 'The purchaser's adviser not only neglected the precaution which any reasonable man would have taken of asking for production of the deeds, but, as it seems to me, he by abstaining from so doing showed himself indifferent to the obvious risk that the vendor's statements as to the possession and contents of the deeds were untrue.'

[18] *Bailey v. Barnes* [1894] 1 Ch. 25, 35 *per* Lindley L.J.

[19] (1872) 8 Ch. App 155, 160. Other cases in which the language of estoppel is used concern the intentional handing over of title deeds to the mortgagor or to an agent to permit the raising of further funds. See *Perry Herrick v. Attwood* (1857) 2 De G & J 18; 44 E.R. 895 (a mortgagor) and *Brocklesby v. The Temperance Permanent Building Society and Joseph Corke: ex parte Joseph Corke* [1895] A.C. 173 (an agent). In both cases the handing over the deeds was a ground for postponement.

purposes of establishing priority.[20] The cases raise two central issues. (i) Is there a difference between estoppel, and arming or enabling a person to make a representation? (ii) If a person is estopped from denying the natural consequences of his act what are those consequences when there is a dishonest middleman?

It is surprising how many people sign documents which belie the true nature of the transaction. In real property this manifests itself most frequently as a conveyance or transfer which states that the full purchase price has been paid when it has not; or that the transfer is outright when in fact it is by way of security.[21]

Barry v. Heider[22] is a good illustration. Barry executed a transfer of real property to Schmidt in consideration of £1200, of which the document acknowledged receipt, although in fact it had not been paid. The transfer was handed to Schmidt, as was also, later, a letter authorising the Registrar General to deliver the relevant certificate of title to Schmidt's solicitors. Schmidt used these documents to obtain a mortgage over the land from Mrs Heider, which was not registered. It was held that as against Schmidt, Barry had the right to have the transfer set aside for fraud. The question then was as to his rights against Mrs Heider. All members of the High Court found that Barry was estopped and therefore postponed to Mrs Heider.[23]

The judgment of Chief Justice Griffith is based on estoppel. The transfer was a representation that Schmidt had an interest he could assign, as was the letter authorising the delivery of the certificate of title. Isaacs J. probing more deeply into the law governing Barry's conduct, stated that a distinction had previously been drawn between the doctrine of estoppel and 'the doctrine that, where one of two innocent persons has to suffer by the fraud of a third, he who, by what Lord Halsbury, in adopting the language of an American Judge, calls "an indiscretion" has enabled the third person to commit the fraud, shall bear the loss'.[24] Isaacs J. rejected the distinction:

> I call them both estoppel, because the second principle simply compels the person who enabled the fraud to be committed to stand by the consequences of his own conduct and precludes him from asserting his really superior title. And I am strengthened in that view by the fact that the doctrine of estoppel in pais does not rest on the fraud or moral misconduct of the person estopped, but on the effects of his conduct upon the party claiming the estoppel.[25]

Turning to the facts he found that the transfer amounted both to a declaration that Schmidt was the full legal owner of the land, that is a representation for purposes of estoppel, and that it 'armed', that is, enabled Schmidt to sell or mortgage the property. Therefore Barry should be postponed.

Since the transfer from Barry to Schmidt was seen by Heider there was no difficulty in regarding it both as a representation which had been relied on and as

[20] *Barry v. Heider and Another* (1914) 19 C.L.R. 197.

[21] See, for example, *Rice v. Rice* (1853) 2 Drew 73; 61 E.R. 646, *Barry v. Heider and Another* (1914) 19 C.L.R. 197, *Tsang Chuen v. Li Po Kwai* [1932] A.C. 715, *Heid v. Reliance Finance Corporation Pty Ltd and Another* (1983) 57 A.L.J.R. 683, *Abigail v. Lapin and Another* [1934] A.C. 491.

[22] *Ibid.*

[23] *Ibid.* 208 *per* Griffith C.J. (with whom Barton J concurred) 216-8 *per* Isaacs J.

[24] *Ibid.* 216.

[25] *Ibid.* 216-7.

arming/enabling Schmidt to dispose of his interest. Also no difficulty was apparently felt in stating that Barry must be bound by the natural consequences of his act.

Later cases have had to face further issues. First, what if the documents are made use of by the dishonest middleman but never actually seen by the third party? Here is a possible distinction between estoppel and enabling. Secondly, what attention if any, is to be given to knowledge or foreseeability of the consequences? Where does the law draw the line in stating that the consequences flow naturally from the conduct particularly where there is an active, dishonest, middleman involved?

The Privy Council faced the first of these problems in 1934 in the case of *Abigail v. Lapin and Another*.[26] Mr and Mrs Lapin transferred property outright to Mrs Heavener although, in fact, the transfer was as security for an unpaid debt. Mrs Heavener's title was registered and she subsequently mortgaged the land to Abigail. Abigail did not search the register and there are conflicting views as to whether he ever saw the transfer.[27] It is clear that he accepted the certificate of title as mortgagee. To the Privy Council the precise form of the representation was irrelevant. As stated by Lord Wright:

> It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed, as for instance in *King v. King*. But it is seldom that the conduct of the person whose equity is postponed takes or can take the form of a direct representation to the person whose equity is preferred: the actual representation is in general, as in the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often, as here, because that party has vested in him a legal estate or has given him the indicia of a legal estate in excess of the interest which he was entitled in fact to have, so that he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate.[28]

The inadequacies of estoppel were taken up again in a recent High Court decision.[29] Mason and Deane JJ. considering the difficulties involved in bringing all the cases of postponement 'under the umbrella of estoppel'[30] stated that:

> [i]t is preferable to avoid the contortions and convolutions associated with basing the postponement of the first to the second equity exclusively on the doctrine of estoppel and to accept a more general and flexible principle that preference should be given to what is the better equity in an examination of the relevant circumstances. It will always be necessary to characterize the conduct of the holder of the earlier interest in order to determine whether, in all the circumstances, that conduct is such that, in fairness and in justice, the earlier interest should be postponed to the later interest.[31]

Gibbs C.J. (with whom Wilson J. concurred) based his judgment more squarely on the doctrine of estoppel.[32]

These real property cases demonstrate, as did the sale of goods cases previously discussed, that the estoppel doctrine is least satisfactory in those circumstances where imprudent conduct in the execution of documents permits another to make a misrepresentation. The cases show two possible attitudes: (i) to resolve

26 [1934] A.C. 491.
27 *Ibid.* 497 *per* Lord Wright. *Contra* Knox C.J. in the High Court of Australia, (1930) 44 C.L.R. 166, 183.
28 *Ibid.* 507.
29 *Heid's* case (1983) 57 A.L.J.R. 683.
30 *Ibid.* 688.
31 *Ibid.* 688. See also Sykes, *op. cit.* 403, cited with approval in *Heid's* case 688.
32 *Ibid.* 686.

the disputes on the basis of estoppel such that the imprudent conduct which permits the representation is deemed to be an implied representation;[33] or (ii) to acknowledge the reality and treat the imprudent conduct as enabling the 'misrepresentation',[34] or as Ewart so accurately describes it, an 'assisted misrepresentation'.[35] Treated in this manner, enabling is a more accurate statement of the operation of the estoppel doctrine where imprudent conduct has assisted another to make a misrepresentation. Mason and Deane JJ.,[36] on the other hand, would prefer to move right away from estoppel in order to assess whether in fairness and justice the earlier interest should be postponed. Given the artificiality of 'implied representation' such a view should attract support and yet it leaves the nature of the appropriate legal tool uncertain.

One further comment should be made. None of the judgments in the real property priorities cases dealing with imprudent execution discusses postponement solely in terms of the elements of the tort of negligence or estoppel by negligence.[37]

(ii) *Natural Consequences*

A further issue addressed by this group of real property cases is the extent to which the loss suffered by the later interest holder can be seen as the natural consequences of the misrepresentation, be it implied or assisted, of the earlier interest holder. This raises issues such as whether the earlier interest holder intended, knew of, or should have foreseen the consequences of his imprudent conduct.

In *Barry v. Heider*[38] Isaacs J. took a robust view. A person who by his conduct had caused another to believe in a state of affairs must be held to have done so intentionally if a reasonable man would have so believed.[39] Later judgments have taken this a little further. They have faced the issue whether the loss can be said to be the natural consequence of the act if brought about by the unforeseeable conduct of a dishonest middle man.[40]

The facts of *Heid's*[41] case provide an excellent illustration. Heid sold land to Connell Investments for $165,000, $50,000 of which was to be secured by a mortgage back. Gibby, an employee of the company, was introduced as the company solicitor and it was agreed he would act for both parties. Gibby was in fact not a solicitor although he was an employee of the company. Heid received only $15,000 of the purchase price but signed a transfer acknowledging receipt of the full amount and the relevant mortgage documents. Thus Heid had a vendor's lien for $100,000. The certificate of title and all documents were then

33 As, for example, the judgment of Griffith C.J. In *Barry v. Heider* and that of Gibbs C.J. in *Heid's* case.

34 See, for example, the judgment of Lord Wright for the Privy Council in *Abigail v. Lapin and Another* [1934] A.C. 491.

35 See Ewart, *op. cit.*, 101-3.

36 See note 31, *supra* 789.

37 See, however, the judgment of Gibbs C.J. in *Heid's* case.

38 (1914) 19 C.L.R. 197.

39 *Ibid.* 217. See also Murphy J. in *Heid's* case, 690.

40 See *I.A.C. (Finance) Pty Ltd v. Courtenay and Others* (1962) 110 C.L.R. 550, 578-9 *per* Kitto J.

41 (1983) 57 A.L.J.R. 683.

handed to Gibby. The company later re-mortgaged the property by an unregistered equitable mortgage to Reliance Finance who relied on the company's possession of the certificate of title and the executed transfer. A priorities dispute arose between Heid and Reliance Finance.

It was argued on behalf of Heid that the loss occasioned by the fraudulent conduct of Gibby (and Connell Investments) was not a natural consequence of his acts. He had no reason to believe that Gibby was not a solicitor and, had he been so, would not have been negligent in entrusting him with the memorandum of transfer and certificate of title. Thus the court had to face the issue of the importance to be attached to the foreseeability of the consequences of Heid's conduct. The notion of duty was raised in this context both in the judgments of Gibbs C.J. and the joint judgment of Mason and Deane JJ.

Gibbs C.J. based his judgment on estoppel by representation and required a duty only in the omission cases.[42] However, when addressing the specific issue of the foreseeable consequences of Heid's conduct he discussed liability in terms of a breach by Heid of a possible duty to those who might subsequently act on the faith of the documents.[43] If such a breach was necessary he found it in the failure to inquire whether Gibby was a solicitor and imprudence in handing over the documents when the agreed portion of the purchase price had not been paid.[44] Thus there was a breach of duty followed by foreseeable loss.

In the joint judgment of Mason and Deane JJ. it was stated that the holder of an earlier interest would not be postponed:

> merely because there is a causal nexus between an act or omission on the part of the prior equitable owner and an assumption on the part of the later equitable owner as to the non-existence of the prior equity. Fairness and justice demand that we be primarily concerned with acts of a certain kind — those acts during the carrying out of which it is reasonably foreseeable that a later equitable interest will be created and that the holder of that later interest will assume the non-existence of the earlier interest.[45]

It follows that in their view:

> in some situations a person may be under a duty to take care to avoid or minimize the risk of fraudulent or deceptive conduct by others or that a person may be negligent in placing another in a position in which he can readily misrepresent to a third party that he is the owner of property.[46]

Their finding on the facts was that Heid had been negligent and should be postponed in that being an unpaid vendor he had handed documents 'in effect to the purchaser'[47] thus arming him with the capacity to engage in the sort of conduct which had taken place.[48]

The judgments in *Heid's* case have thus raised two new issues in the real property cases: duty and foreseeability of consequences. In the judgment of Gibbs C.J. the duty discussed is one owed to a third party. Loss is discussed in terms of breach of that duty.[49] This is in contrast with the real property cases

42 *Ibid.* 686.
43 *Ibid.* 686-7.
44 *Ibid.*
45 *Ibid.* 688. See also *I.A.C. (Finance) Pty Ltd v. Courtenay and Others* (1963) 110 C.L.R. 550, 578-9 *per* Kitto J.
46 *Ibid.* 689.
47 *Ibid.* 690.
48 *Ibid. Contra* Murphy J. at 690. In his view once Heid 'armed' a third party his interest should not prevail irrespective of the foreseeability of the consequences.
49 On this point the judgment is reminiscent of those in *Hamblin* and *Twitchings* containing elements of estoppel and the tort of negligence.

concerning imprudence with title deeds. In those cases, as stated above, the imprudence is a failure to conserve one's own interests. The imposition of a duty to a third party carries with it the now familiar problem of when such a duty is owed and to whom.

In the judgment of Mason and Deane JJ. however, duty is raised generally. Negligence is the standard used but, neither explicitly in the sense of the tort of negligence, nor in the sense of failure to conserve one's own interests. In the judgment on the facts the implication is that Heid was negligent in the conservation of his own interests. The new point raised in the judgment is that of equating the natural consequences with the reasonably foreseeable consequences of the acts.

AN OWNER, BY FAILURE TO ACT, OMITS TO CONSERVE HIS OWN INTERESTS

Finally, we need to consider the approach in the real property cases to the owner who fails to take optional measures to conserve his own interests.[50] An illustration is provided by the various Acts in the Australian states dealing with title by registration. In accordance with the provisions of these Acts an equitable (and thus unregistrable) interest holder may lodge a caveat with the Registrar-General. The administrative practices vary in the different jurisdictions but the substantive effect of the law in each is identical. There is no statutory penalty of loss of interest or loss of priority of interest as a result of failure to lodge a caveat.[51] Being optional, if a prior interest holder does not caveat, can it be said that his conduct is such that he ought to be postponed either by reason of estoppel, negligence or arming/enabling.

As in the sale of goods cases[52] one line of reasoning has relied on the alleged purpose of the legislation. An early judgment of Griffith C.J. in the High Court saw the purpose as protective of the equitable interest. He thus postponed an interest holder who had not lodged a caveat.[53] Later judgments have seen the purpose in terms of alerting the Registrar-General to the existence of possible claims which require resolution between the claimants prior to registration.[54] Thus expressed, the purpose does not require loss of priority as a penalty for a failure to caveat. In some of the cases already discussed where imprudent conduct additional to the failure to lodge a caveat caused loss of priority there is an incidental consideration of the caveating issue.[55] In this section it is proposed to

[50] See the *Twitchings* case and other sale of goods cases cited *supra* at n. 60. In *Twitchings* the optional protective measures had been established by the finance companies and dealers themselves for their mutual benefit. In some areas, however, such optional protective measures have been introduced by legislation. See the Registration of Interests in Goods Act 1986 (N.S.W.), the operation of which is confined to 'prescribed' goods (currently motor vehicles); see also the Chattel Securities Act 1987 (Vic.), which applies to the very broad range of goods defined in s. 53(1). Both Acts provide for loss of priority of the registrable, but unregistered, interest should the goods pass into the hands of a *bona fide* purchaser for value.

[51] *Cf.* Land Registration Act (U.K.) 1925.

[52] See the *Thomas Australia* case [1985] 3 N.S.W.L.R. 452, 461 *per* Kirby P. *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd* [1949] 1 K.B. 322, 336-7 *per* Denning L.J.

[53] *Butler v. Fairclough* (1917) 23 C.L.R. 78, 84-85.

[54] *J. & H. Just (Holdings) Pty Ltd v. Bank of New South Wales and Others* (1971) 125 C.L.R. 546, 552-4 *per* Barwick C.J.; 557 *per* Windeyer J.

[55] See *Abigail v. Lapin and Another* [1934] A.C. 491 and *Heid's* case (1983) 57 A.L.J.R. 683.

consider those cases where the only imprudent conduct was the failure to lodge a caveat.

The *Just (Holdings)* case[56] provides an illustration. Josephson, the registered proprietor, gave a mortgage to the Bank by the execution of a memorandum of mortgage in registrable form and the deposit of the relevant certificate of title. The Bank could have registered the mortgage or lodged a caveat. It did neither. Subsequently Josephson executed a mortgage over the same land to Just (Holdings). He stated the land was unencumbered and the certificate of title was with the Bank for safe custody. Just (Holdings') solicitor searched the title at the office of the Registrar-General and found it unencumbered. No enquiry was made of the Bank. On the death of the mortgagor bankrupt a priorities dispute arose between the Bank and Just (Holdings). The argument for Just (Holdings) was that the Bank had not lodged a caveat; that they had searched for and relied on the clear title found; and that therefore the Bank should be postponed. This argument found no favour at first instance in the Supreme Court of New South Wales, nor on appeal to the Court of Appeal in that State,[57] nor in the High Court of Australia.

In the High Court the principal judgment is that of Barwick C.J.[58] This judgment contains elements of estoppel,[59] arming,[60] and the need of a mortgagee to protect his own interests in an adequate manner.[61] The separate judgment of Windeyer J. adopted the statement of Jacobs J.A. of the New South Wales Court of Appeal that:

> The particular way of protecting his interest and giving notice which was dealt with by Griffith C.J. [in *Butler v. Fairclough*] was the lodging of a caveat but I cannot take his words to mean that that is the only way. His words did not touch the long-established practice of equitable mortgage or charge by deposit of that document or those documents without which no reasonable person dealing with an owner of land would proceed to the completion of the conveyancing transaction.[62]

This judgment then is based on the necessity of the prior interest holder to conserve his own interests by an appropriate means. It is interesting to speculate on the response of the High Court, had the subsequent dealing in *Just (Holdings)* been an equitable interest under a specifically enforceable contract of sale. Such an interest comes into existence after entry into contract but without a request to the vendor to produce the certificate of title. Should it then be said that a prior interest holder who has not lodged a caveat has adequately protected his interests?

[56] (1971) 125 C.L.R. 546. See also *Butler v. Fairclough* (1917) 23 C.L.R. 78, *Osmanoski v. Rose* [1974] V.R. 523 and *Person-To-Person Financial Services Pty Ltd v. Sharari* [1984] 1 N.S.W.L.R. 745.

[57] *J. & H. Just (Holdings) Pty Ltd v. Bank of New South Wales and Others* (1970) N.S.W.W.N. 803.

[58] With whom McTiernan and Owens JJ. concurred.

[59] (1971) 125 C.L.R. 546, 556, 'The holder of the subsequent equity in my opinion could not properly rely upon the absence of any notification . . . of the lodgement of a caveat as a representation . . . '

[60] *Ibid.* 554-5 in discussing the High Court judgments in *Lapin and Another v. Abigail* (1930) 44 C.L.R. 166.

[61] *Ibid.* 553-4 in discussing and distinguishing the Privy Council decision in *Abigail v. Lapin and Another* [1934] A.C. 491 and again at 555.

[62] *Ibid.* 558-9. The factor which distinguishes *Butler v. Fairclough* and *Osmanoski v. Rose* is that in both of these cases the prior interest holder did not hold the certificate of title. Thus the lodging of a caveat was the *only* means available to protect the prior interests.

The implication from *Just (Holdings)* is that each dispute will be resolved according to the particular nature of the inconsistent transactions. In some cases it will be sufficient to lodge the relevant documents for registration together with the duplicate certificate of title (*I.A.C. (Finance) Pty Ltd v. Courtenay*), in others (*Just (Holdings)*) it may be sufficient to retain the title deeds, and again in others a caveat may be required (*Butler v. Fairclough*, *Osmanoski v. Rose*).

The caveating cases add two further points to the general discussion. First, in contrast to the sale of goods cases the holder of an equitable interest in real property is apparently required to take such steps as may be available to him to conserve his own interest if he does not wish to be postponed. Secondly, the basis for this requirement is unclear; the cases advert variously to estoppel, arming and failure to protect one's own interests which raises in another guise the law concerning negligence as developed with respect to title deeds.

CONCLUSION

As stated in the introductory paragraphs the aim of this article is to identify the legal tools used to determine which one of two 'innocent persons' must sustain the loss caused by an intermediary, always a rogue and often a man of straw. The scope of the inquiry has been limited to cases dealing with transfer of title on the sale of goods and priorities disputes affecting real property. It has been suggested that the concept of ownership, principles of contract law, the notion of obligation or responsibility to others and the exigencies of commercial transactions have all had some role to play in the resolution of these disputes.[63]

It is clear that the mere establishment of prior title is not sufficient of itself to permit the owner[64] to recover the goods or maintain priority in all circumstances. The cases selected demonstrate an underlying tension between a desire to protect ownership and the view that in some circumstances owners have acted so imprudently that not only do they no longer merit protection but, to the extent of their interest in the property, they should also be held responsible for the consequential loss to third parties. The tension between ownership and responsibility has been viewed in two ways to determine: (i) the circumstances in which an owner is precluded and therefore bears the loss and (ii) the legal tools used. The legal tool selected has determined the circumstances and therefore the responsibility for the loss.

For ease of comparison two categories of circumstances, common to real and personal property, where the owner has been precluded or postponed were identified: (i) where, by imprudent conduct, he fails to conserve his own interests; and (ii) where, by failure to act, he omits to conserve his own interests. The decisions of the common law concerning sale of goods show that in either set of circumstances there are two possible bases for precluding the owner from asserting his title. First, common law estoppel by representation either as such, or as

[63] Although only principles of ownership and notions of responsibility have been the subject of detailed treatment.

[64] It is proposed to include the holder of a prior interest in realty within the phrase 'owner' to avoid cumbersome repetition.

incorporated in the Sale of Goods Acts.[65] Secondly, a confusing mixture of the tort of negligence and, so called, estoppel by negligence. The latter, unacknowledged by writers on estoppel, is said by them to be a form of estoppel by conduct, which in turn is one branch of estoppel by representation.[66]

In the real property priorities cases decided in courts exercising equitable jurisdiction it is necessary to subdivide the imprudent conduct cases into (i) imprudence with respect to the acquisition or retention of title deeds and (ii) imprudence in the execution of documents. Once again two possible bases emerge for postponing the owner. First, negligence which is used where there has been imprudence in the acquisition or retention of deeds and again where the owner fails to take an optional step to conserve his own interests.[67] Second, a doctrine of arming or enabling the middleman in such a way as to permit him to act in a manner inconsistent with the prior interests of the owner. This latter is used where there has been imprudence in the execution of documents and also in some of the judgments involving failure to take an optional step. Thus the two bases are used in any of the circumstances except imprudence with deeds where negligence is the sole tool.[68]

There is thus a seeming superficial similarity in the legal tools used for real and personal property. Further analysis, however, has shown considerable divergence between the two. First, negligence, as discussed in some of the sale of goods cases, encompasses the elements of the tort of negligence, that is; positive duty to a third party, breach and foreseeable proximate loss. This is the case even if the discussion is of estoppel by negligence. By contrast, in the real property cases, the phrase negligence imports a failure to act prudently in the conservation of one's own interests. Prudence has been established by reference to the conduct which should be followed generally, by a purchaser or mortgagee in accordance with standard conveyancing practices[69] and, specifically, in order to avoid constructive notice of earlier equitable interests for the purposes of the *bona fide* purchaser rule.

Secondly, owing to the manner in which the case law has developed there is now considerable divergence between estoppel as used in the sale of goods cases and estoppel or arming/enabling in the real property cases. It is no longer possible to say as did Isaacs J. in 1914 that there was no distinction between 'enabling' and estoppel *in pais* since both rest 'on the effects of his conduct upon the party claiming the estoppel.'[70] The judgments in *Hamblin's* case[71] and the majority judgments in the *Twitchings* case[72] have reinforced the need for a positive duty of care to a third party not only where the estoppel is based on

65 See n. 15, *supra* 786.

66 See nn. 36 and 37, *supra* 790.

67 And even in the imprudent execution cases by implication in the joint judgment of Mason and Deane JJ. in *Heid's* case (1983) 57 A.L.J.R. 683, 687.

68 See the few cases where estoppel was used cited at n. 19 *supra* 803.

69 See, for example, the cases cited above concerning imprudence in the acquisition and retention of title deeds. See also the discussion of the appropriate conveyancing practice in *Heid's* case (1983) 57 A.L.J.R. 683, especially 686 *per* Gibbs C.J.; 686 *per* Mason and Deane JJ. and in the *Just (Holdings)* case (1971) 125 C.L.R. 546, 559 *per* Windeyer J.

70 *Barry v. Heider and Another* (1914) 19 C.L.R. 197, 217.

71 [1965] 2 Q.B. 242.

72 [1977] A.C. 890.

omission, but also where it is based on imprudent conduct. The additional requirements that the owner must be in breach of that duty with foreseeable, consequential loss ensure that estoppel in the sale of goods cases precludes an owner in a more limited range of circumstances than the arming/enabling doctrine. This restriction results from a combination of the requirement of duty to a third party and foreseeable consequential loss. The cases illustrate that it is either difficult to establish the duty,[73] or difficult to establish that the loss is foreseeable[74] or consequential.[75]

It appears to the writer that had Barry[76] been subject to the doctrine of estoppel as expounded in *Hamblin's* case[77] he would probably, but not necessarily,[78] have been found to be under a duty to those who might rely on the documents he had signed. The loss would not have been foreseeable, however, because he had no reason not to trust Schmidt, and not consequential, because it arose out of the fraudulent conduct of Schmidt. Hence he would not have been postponed. Conversely had Mrs Hamblin been subject to the doctrine of arming/enabling as expounded in the real property cases her imprudent conduct[79] would have been found to have armed or enabled the middleman to make the representation, with the consequential loss. She would therefore have been precluded. The one factor which might affect this conclusion is the emphasis to be attached to the foreseeability of the consequences following the joint judgment of Mason and Deane JJ. in *Heid's* case.[80]

This brings us to the emphasis which is placed, or should be placed, on the state of mind of the owner in these cases. This is rarely an issue where estoppel is sought for an actual representation. Where however, the estoppel is raised because of an omission or imprudent conduct, the state of mind of the person sought to be estopped becomes relevant. In the omission cases, a duty to act or speak arises because the owner knows or should have known of the mistaken assumption of the person seeking to raise the estoppel.[81] In the imprudent conduct cases, where the imprudence has given rise to an implied representation, this of itself, followed by reliance and proximate loss, has raised an estoppel.[82] The establishment of the need for a duty to another, however, brought with it the requirement of foreseeable loss.[83] A similar pattern is evident in the real property cases; the early emphasis is on whether the conduct armed another and whether the loss was the result of the conduct.[84] Foreseeability was not an issue. Now the

73 The *Twitchings* case [1977] A.C. 890.
74 *Hamblin's* case [1965] 2 Q.B. 242.
75 *Ibid.*
76 Of *Barry v. Heider and Another* (1914) 19 C.L.R. 197.
77 [1965] 2 Q.B. 242.
78 Whether property can be lost as a result of carelessness is still an unresolved issue in the common law. See the cases cited at n. 29, *supra* 789.
79 In the conservation of her own interests, signing incompleted documents unread.
80 See n. 45, *supra* 791.
81 See the cases cited at n. 75 and n. 76, *supra* 796.
82 See *Bell v. March* [1903] 1 Ch. 528, 541, no estoppel found on the facts since there was no reliance.
83 See *Hamblin's* case [1965] 2 Q.B. 242.
84 See *Barry v. Heider and Another* (1914) 19 C.L.R. 197.

trend in the joint judgment of Mason and Deane JJ. in *Heid's* case leads to the requirement of more than a mere causal nexus.[85]

In the writer's view it is important to realize that the phrase 'the loss is a natural consequence of arming' does not determine whether non-foreseeable consequences will, or will not, postpone the owner. The legal system may define the natural consequences to include or exclude the conduct of the dishonest middleman. It can be said that a natural consequence of stating that the full purchase price has been paid when it has not, is that a dishonest middleman may take advantage of the statement; that is, the natural consequences include the dishonest conduct. Or, it can be said the action of the middleman is an independent act which breaks the causal nexus; that is, the natural consequences do not include the dishonest conduct.

What is essential is a clear realization of the difference in result. Where the dishonest conduct is said to form part of the natural consequences the effect is to impose strict liability on the owner with consequential protection for the subsequent transaction. Where the dishonest conduct is said not to form part of the natural consequences the effect is that the owner is only postponed for foreseeable loss with a consequential diminution in protection for the subsequent transaction. Essentially what is in issue is the extent of the protection to be offered to the subsequent transaction. This is a policy issue which should be addressed.

It is clear that the law as expounded in the sale of goods cases is confusing and uncertain; it is much less so in the real property cases. The final question then is whether a judicious blend of failing to conserve one's own interests and thus arming/enabling the intermediary to act dishonestly (with either strict liability or liability for foreseeable loss as determined) is appropriate for the sale of goods. As has been demonstrated, precluding from protection an owner who fails to conserve his own interests, provides greater protection for the *bona fide* purchaser, than does the requirement of a positive duty to another. Combined with strict liability for consequences, the protection of the later purchaser would be further increased. Speedy transactions and the protection of the *bona fide* purchaser are constantly said to be an important objective of law in a commercial setting. Yet there are possible difficulties.

Interests in real property are well known and well established; title transfers are relatively slow, with time for verification; documentation and conveyancing practices have been standardised over centuries. It is therefore not difficult to measure the prudence of the owner's conduct by reference to established practices. By contrast, in a consumer oriented society varieties of 'goods' change constantly; title may pass quickly with little time for verification; documentation is varied and to establish agreed commercial practices is a difficult, though not impossible task.[86]

The issue is whether difficulties in establishing appropriate commercial practices should be overcome in the interests of greater certainty of outcome and

[85] (1983) 57 A.L.J.R. 683, 688.

[86] See, for example, the discussion of the accepted practice in the *Indian Banks* case [1938] A.C. 287. When laying the foundations of English commercial law it was apparently the custom of Lord Mansfield to inquire extensively into commercial practice. See Fifoot, C.H.S., *Lord Mansfield* (1936) 105-7.

greater protection for the *bona fide* purchaser. It is perhaps fitting to conclude with two observations of Lord Mansfield. Giving judgment on a question of marine insurance in 1761 he stated: 'The daily negociations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case';[87] and again in 1774, 'in all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon'.[88]

[87] *Hamilton v. Mendes* (1761) 2 Bur. 1199, 1214.
[88] *Vallego v. Wheeler* (1774) 1 Cow. 143, 153.