A NOTE ON ESTOPPEL BY CONDUCT.

By The Honourable MR. JUSTICE FULLAGAR of the High Court of Australia.

On the title-page of Mr. John William Smith's famous *Leading Cases* there has appeared in successive editions a quotation from Coke's *Institutes*, which contains the phrase "Many times *compendia sunt dispendia.*" It has probably puzzled generations of law students even in days when some small Latin was considered an essential part of a lawyer's equipment. It is one of those characteristic phrases by which the Latin tongue manages to convey a very great deal in a very few words. It is, therefore, practically untranslateable: its real meaning or meanings can only be conveyed in English by expansion or exposition. It can be rendered literally as "Savings are spendings," and expanded heavily as meaning "What was thought to have been saved is found to have been expended and wasted." So understood, the significance of the words in their context is clear, although Coke was probably using the word "*compendia*" in a double sense and making something almost in the nature of a rather solemn pun. But there is another sense in which "savings are spendings," and the truth of the epigram is occasionally well illustrated by an attempt to over-simplify the law and confine within a rigid formula a great and prevading principle. Simplicity is, of course, one of the greatest of all the virtues, but the instinct of the common law has generally led it to avoid very sweeping generalisations, so that, "when the thing that couldn't has occurred," there may be found a little room in which to move about.

Estoppels have had a very natural fascination for English lawyers ever since Coke discovered in them "an excellent and curious kind of learning." It has been a temptation, not always resisted, to treat as cases of estoppel cases which are better referred to some other rule, and the word has at times been very loosely used. In 1923 Mr. G. Spencer Bower K.C. of the Inner Temple published a book entitled "*The Law Relating to Estoppel by Representation.*" It is a learned and scholarly work, written in a lucid and attractive style, and useful for many ancient and modern instances. From the lawyer's point of view, however, it has a fundamental defect. It is a conspicuous example of what I have just been saying. It is a *compendium* which turns out to be a *dispendium*. It treats the whole law of estoppel, other than estoppel by record, as reducible to a simple formula. It simply cannot be done. Mr. Spencer Bower is a kind-hearted and well-meaning Procrustes, but the inevitable result of his work is distortion.

The formula is as follows: "Where one person (the representor) has made a representation to another person (the representee) in words or by acts or conduct or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result of inducing the representee, on the faith of such representation to alter his position to his detriment, the representor is estopped as against the representee from making, or attempting to establish by evidence, any averment substantially at variance with his former representation."

As a statement of the principle of estoppel by representation the formula is perhaps not open to any serious objection, though one could be pardoned for preferring the simpler language of Lord Denman's famous statement of the principle in *Pickard v. Sears*[1]. The word " wilfully " in that statement was perhaps, until *Freeman v. Cooke*[2], capable of being misunderstood, but one might well prefer it to the reference to " intention actual or presumptive." The important point to observe, however, is that the formula is put forward by the author of the book not merely as a statement of the principle of estoppel by representation as commonly understood but a statement of the principle of all estoppels other than estoppel by record. He does not even confine it to estoppel *in pais*. He maintains that it is the basis of estoppel by deed and of such " special " estoppels as that which affect a tenant in respect of his landlord's title. One feels that, if he had really tried hard enough, he could easily have referred estoppel by record to the same formula !

To treat estoppel by deed and " special " estoppels as resting on a mythical representation seems absurd enough, and the suggestion that they should be so treated is not likely to deceive anybody or to do any harm. But to treat even all estoppels *in pais* as estoppels by representation and reducible to the representation formula is, it is submitted, quite wrong, and here there *is* a certain speciousness about the suggestion, which is capable of misleading. Even in the *Laws of England* (the first edition of which was published some years before Mr. Spencer Bower's book) the term " estoppel by representation " seems to be used as covering much more than true estoppels by representation.

Nobody would deny that there is a large class of estoppels *in pais* which it is quite sound and convenient to describe as estoppels by representation. Nor would anybody deny that the representation may be by express words or by conduct (as in *Pickard v. Sears* itself). But this fact must not cause us to overlook the fact that there are many estoppels *in pais* which cannot be analysed so as to fall within the principle stated by Lord Denman in *Pickard v. Sears* or within Mr. Spencer Bower's more elaborate formula. In particular there is an estoppel by conduct which is in no sense an estoppel by representation, and in which no estopping representation can be found. An extremely clear illustration of this kind of estoppel is found in the well-known case of *Yorkshire Insurance Co. Ltd. v. Craine*[3].

Craine had insured certain goods with the defendant company against fire. It was a condition of liability under the policy that, if a fire occurred, the insured should give full particulars in writing of his loss or damage within a specified time. The policy also provided that, if a fire occurred, the company should be at liberty to enter into possession of the goods and of the building in which they were kept. The goods were destroyed by fire. The insured did not give the particulars required by the policy within the specified time, but the company went into possession under the other clause in the policy and continued to demand

1. (1837) 6 A. & E. 469, at p. 474.
2. (1848) 2 Ex. 654.
3. (1920) 28 C.L.R. 305 (Reported *sub nom. Craine v. Colonial Fire Assurance Company Limited and Another*); [1922] 2 A.C. 541; (1922) 31 C.L.R. 27.

the particulars, which were ultimately supplied. The company finally refused to pay, and in an action on the policy relied on non-delivery of the particulars within time. The plaintiff by his reply alleged (*inter alia*) that the defendant was estopped from relying on non-delivery of the particulars. The action was tried by Irvine C.J. with a jury. The jury were asked to answer certain questions, the only question relevant to estoppel being :—" Did the defendants represent to the plaintiff that they did not intend to rely upon the claims being put in too late ? " This question the jury answered in the affirmative with an *addendum* which is not material for present purposes. On a submission made in pursuance of leave reserved Irvine C.J. gave judgment for the defendant. He held that there was no evidence to support an estoppel.

The plaintiff appealed successfully to the High Court. The relevant ground of the decision was that, in view of the jury's finding, there must be held to have been an estoppel by representation. The representation was a representation of an intention to pay notwithstanding non-delivery of particulars within time. Isaacs J., who delivered the judgment of the Court, dealing with the argument that the finding was not of an existing fact but of an intention for the future, said[4]:—" The principle that a representation to raise estoppel must be of an existing fact is firmly established . . . But a presently existing intention must be an existing fact." Yielding to a temptation which none of us could possibly have resisted at this point, His Honour cites *Edgington v. Fitzmaurice*[5]. The passage quoted seems to give the real basis of the decision of the High Court on estoppel. There is a reference later to " estoppel by conduct "[6] but it is only in the course of distinguishing estoppel from waiver. The headnote refers to two distinct grounds of estoppel, but the judgment does not distinguish estoppel by representation from estoppel by conduct. The conduct of the defendant in going into possession seems to be regarded as part of the evidence of the representation.

Now, it is difficult to see how a representation of intention as such can found an estoppel in such a case as *Craine's Case*. A man's intention may be a fact, but it is not a relevant fact. At the time of the representation the intention of the representor may be exactly as represented. A change of intention does not involve any departure from the representation. We cannot say that he represented that he would not change his mind, because that is clearly not a representation of an existing fact : it is a promise or nothing.

This position was clearly recognised in *Craine's Case* by the Privy Council, and Lord Atkinson made very plain the true nature of the estoppel which arose in *Craine's Case*. His Lordship said[7]:—"It has been well established by a long line of authority that in order to support a plea of estoppel by representation, the representation must be a representation of an existing fact, a promise or a representation of an intention to do something in the future is entirely insufficient, and this, though

4. (1920) 28 C.L.R., at p. 324.
5. (1885) 29 Ch. D. 459, at p. 483.
6. (1920) 28 C.L.R., at p. 327.
7. [1922] 2 A.C., at p. 553.

Lord Bowen said in *Edgington v. Fitzmaurice*[8], that the state of a man's mind was as much a fact as the state of his digestion. In their Lordships' view it is impossible to say with any confidence whether the representation found by the jury to have been made—namely, that the defendants did not intend to rely upon the claims having been put in late—is a representation of an existing fact, a present existing resolve, or a promise or representation of an intention to do something in the future. Under those circumstances their Lordships think it is more desirable to dispose of the appeal on the ground of estoppel by conduct in going into possession, if that course be under the circumstances permissible, which they think it is." The question whether " that course " was " under the circumstances permissible " had reference to the pleadings and to the course of the trial.

Lord Atkinson was speaking for himself, Lord Buckmaster, Lord Sumner, Lord Parmoor and Lord Wrenbury. Nothing could make it more plain that there is a class of estoppel in pais which has nothing whatever to do with any representation, and which no Procrustes should be allowed to rack or lop to fit his representation bed. The sole basis of the estoppel was the act done under the contract, an act which could only be done lawfully if the contract were subsisting and binding. The principle is no more and no less than that " no person can accept and reject the same instrument " (per Lord Eldon in *Ker v. Wauchope*[9]). There are, of course, other cases of estoppel *in pais* which have nothing to do with any representation, real or imaginary, natural or manufactured. Other instances of " estoppel by conduct " parallel to *Craine's Case*, and other instances of estoppels *in pais* which are not analysable in the terms of Mr. Spencer Bower's formula, are cited in the judgment of Dixon J. in *Thompson v. Palmer*[10]. Estoppel by representation is a *species* and not a *genus*.

Craine's Case was decided before the publication of Mr. Spencer Bower's book, but only just before its publication and presumably after the learned author had written most of it. It must have given him a shock, but he does not mention it. In a footnote[11], after referring to the case of *Hough v. The Guardian Fire and Life Assurance Company (Limited)*[12] (which is so imperfectly reported that it cannot be authority for anything, and which is probably not properly regarded as a true case of estoppel at all) he says :—" There was held to be a somewhat similar estoppel in *Yorkshire Insurance Co. v. Craine.*" The words " somewhat similar " are somewhat lacking in definition, and you may, if you are interested, compare this brief saying with the author's severe condemnation[13] of Bramwell L.J. for a passage in his judgment in *Simm and Others v. Anglo-American Telegraph Company*[14].

Due and careful generalisation with a view to simplification is, of course, a good thing. And the perception of analogies, where they are not obvious, is one of the means by which the law lives and grows. But in truth " many times *compendia sunt dispendia.*"

8. (1885) 29 Ch. D. 459, at p. 483.
9. (1819) 1 Bli. 1, at p. 21.
10. (1933) 49 C.L.R. 507, at p. 547.
11. *op. cit.*, p. 373.
12. (1902) 18 T.L.R. 273.
13. *op. cit.*, pp. 10-11.
14. (1879) 5 Q.B.D. 188, at p. 202.