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HER MAJESTY THE QUEEN (PLAINTIFF) ..... APPELLANT;

AND

THOMAS W. CHESLEY (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Surety—Execution of bond—Evidence of execution—Weight of evidence—Acceptance of bond—Proximate cause—Estoppel.

In an action by the crown against C. on a bond of suretyship for the faithful discharge by a government official of his duties as such, the defendant, under a plea of *non est factum*, swore that he signed the bond in blank—that he made no affidavit of justification—and that the certificate of the magistrate of the execution of the bond, as required by the statute, was irregular and unauthorized. The attesting witness to C.'s execution of the bond, and the magistrate, each swore to the correctness of his own action, and that C. must have properly executed the bond or the affidavit would not have been made or the certificate given.

Held Per Ritchie C. J., Strong, Fournier and Gwynne JJ., reversing the judgment of the court below, that the weight of evidence was in favor of the due execution of the bond by C.

Per Patterson J., that C. was estopped from denying that he had executed the bond.

Held also, Per Patterson J., reversing the judgment of the court below, that the execution of the bond, and not the certificate of the magistrate, was the proximate, or real, cause of its acceptance by the crown.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining a verdict for the defendant at the trial.

The action in this case was on a bond given by one VanBlarcom as principal, and the defendant and another as sureties in the sum of $2,000 each, as security for the faithful discharge by VanBlarcom of

* PRESENT.—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

(1) 6 Russ. & Geld. 313.

his duties as agent of the government savings bank at Annapolis, N. S.

By 31 V. c. 37, as amended by 33 V. c. 5, certain officers of the Dominion Government are required to give security for the proper discharge of their duties, by means of an approved bond with sureties. The sureties are required to make affidavit that they are respectively possessed of real or personal estate, or both, of double the value of the amount for which they become surety, and the attesting witness to the execution of the bond must make affidavit of such execution before a justice of the peace. The bond, with the affidavits attached, is filed in the department of the Secretary of State.

The defendant, Chesley, gave the following account of the manner in which he executed the bond, having set out the same in one of his pleas :—

"I live in Granville, 18 miles from Annapolis, by way of Bridgetown. In the winter of 1881 I was in Annapolis, and about leaving in the morning. On the previous evening VanBlarcom requested me to become surety on a bond to the extent of $500 or $1,000 with another person and himself. I refused. Next morning early I was in VanBlarcom's office; he again solicited me. Upon further persuasion I consented to his request. He then took from his desk a blank bond and laid it before me, and asked me to sign it, and he would fill it out as he had explained, that I should be responsible with himself and another for $1,000, and I could inspect it when called on to swear the affidavit attached. I placed my name where it is on the bond, hastily, and went by the train. There was no seal on it. There was no date, and nothing but the printed matter in the paper A. W. (affidavit of VanBlarcom for faithful service). VanBlarcom followed with the bond from his office, and said we must get a witness. Mr. Hall was a postal clerk on the train, and

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I said, "Mr. Hall, that is my signature." I put my name to the blank affidavit, and never swore to it, and from the day I put my name there till VanBlarcom absconded I never saw the bond or affidavit. VanBlarcom agreed not to use the bond till filled up and shown to me.

"Cross-examined—I often saw VanBlarcom and never asked him about the bond. I am a barrister of this court. I put the name on the condition that it would be filled up for $1,000. I did not read the printed matter. I may have read the affidavit—the blank. I knew I would be required to swear the affidavit, and then I would have an opportunity of further examination. I am sure there were no seals."

The attesting witness proved his signature to the bond and to the affidavit of its execution, and testified as follows:—

"I swore to the affidavit. I must have been present and saw the execution. I should say so. I should say that the affidavit was made at a time when the facts were fresh. I have no doubt about the matter.

"Cross-examined—I have no recollection and I do not know where I saw Chesley sign. I only know from what I see on the paper. I live at Annapolis, and at the time of bond was mail clerk."

The justice before whom the affidavits were sworn gave the following evidence:—

"These signatures, "A. W. Corbett, J.P.," to the four affidavits, to papers A. W. and B. W. (the affidavit of VanBlarcom and the bond) are mine. It has been so long since the thing was done, and I kept no minute, that I have no recollection, but my name would not be there unless the parties affirmed or swore, and acknowledged their signatures, or made those signatures. I can't tell who wrote the affidavits.

"Cross-examined—I have no recollection of the facts at all, and had none till I saw this paper last night.

Sometimes, if parties came in and acknowledged that they affirmed, that would do. Some parties swore, and some, if they acknowledged that they had sworn, I would sign.

"Re-examined—To my knowledge, I have never so done it without the parties being present. I would not sign unless I saw the signature made, or it was certified that it had been made."

It was agreed at the trial that the question as to whether or not the defendant executed the bond should be first tried, and that of the breach of the conditions and amount due (if any) should be postponed.

On the above evidence the learned judge who tried the case, Mr. Justice Weatherbee, found as follows:—

"That the printed form of bond and affidavit were signed in blank by defendant, the bond being at the time without seals, date or amount; and that the affidavit was never sworn; and that defendant only authorized the filling in of the sum of one thousand dollars."

"That the defendant was negligent in his conduct in so signing, and in neglecting to make enquiries afterwards as to the disposal of those papers."

"That the bond would not have been received by the officers of the crown without the certificate of the justice."

"That from defendant's conduct there is to be implied authority to VanBlarcom to affix a seal to the bond to plaintiff."

"That the careless and illegal act of the justice (though without fraudulent intent) in signing the certificate to the affidavit was promoted by reason of the name of the defendant, a barrister, being attached thereto."

"That the defendant was culpably negligent in not withholding his name from the affidavit till the same

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was ready for attestation, so as to guard against the possibility of illegal or fraudulent use of the affidavit form, especially as there was no object whatever in attaching his name until such attestation could be made before the justice."

Upon these findings, Mr. Justice Weatherbee gave a verdict or judgment for the defendant, deciding that negligence might estop the party from denying that he executed a deed, but that such negligence must be the proximate and not the remote cause of the acceptance by the other party of such deed.

The Supreme Court of Nova Scotia, the Chief Justice dissenting, sustained this verdict. The plaintiff then appealed to the Supreme Court of Canada.

Borden for the appellant referred to *Coventry* v. *The Great Eastern Railway Co.* (1)

Harrington Q.C. for the respondent. The facts have been found in our favor by the trial court and the appeal court of Nova Scotia, and will not be questioned by this court. *Ungley* v. *Ungley* (2); *Gray* v. *Turnbull* (3); *Allen* v. *Quebec Warehouse Co.* (4); *Metropolitan Railway Co.* v. *Wright*.(5); *Webster* v. *Friedeberg* (6).

The negligence was not the proximate cause of the bond being accepted. *Swan* v. *North British Australasian Co.* (7).

On the question of estoppel the learned counsel cited *Taylor* v. *The Great Indian Peninsular Ry. Co.* (; *The Bank of Ireland* v. *The Trustees of Evans' Charities* (9).

Borden in reply cited, as to the findings on the facts,

(1) 11 Q. B. D. 776.
(2) 5 Ch. D. 890.
(3) 2 Sc. App. 53.
(4) 12 App. Cas. 101.
(5) 11 App. Cas. 156.
(6) 17 Q. B. D. 736
(7) 7 H. & N. 603; 2 H. & C. 175.
(8) 4 DeG. & J. 559.
(9) 5 H. L. Cas. 410.

Cross v. *Cross* (1); *Bigsby* v. *Dickinson* (2); *Jones* v. *Hough* (3); *The Glannibanta* (4); *Sovereign Fire Insurance Co.* v. *Moir* (5).

As to estoppel. *Re North of England Joint Stock Banking Co.* (6); *Stewart* v. *Boak* (7); *Seton* v. *Lafone* (8); *Easton* v. *London Joint Stock Bank* (9); *Williams* v. *Colonial Bank* (10).

And on the facts see *Hunter* v. *Walters* (11).

SIR W. J. RITCHIE C.J. concurred in the judgments allowing the appeal.

STRONG J.—I am of opinion that we must allow this appeal. The bond is regularly proved by Samuel Hall, the subscribing witness. His evidence is short, and is as follows:—

Samuel Hall—Proves his signature to bond B. and to the affidavit on the back. I swore to the affidavit. I must have been present and saw the execution. I should say so. I should say that the affidavit was made at a time when the facts were fresh. I have no doubt about the matter.

Cross-examined—I have no recollection, and I do not know where I saw Chesley sign. I only know from what I see on the paper. I live at Annapolis, and at the time of bond was mail clerk.

Then the deposition of Mr. Corbett, the justice of the peace whose signature is appended to the jurats of the affidavit of execution purporting to have been sworn to by Hall, and to the affidavit of justification purporting to have been sworn to by the defendant, is to the following effect:—

A. W. Corbett—I reside at Annapolis, and am a justice of the peace. Have been so for twenty years. (Proves the signature of H. H. Van Blarcom to paper A. W.; also signatures of H. H. VanBlarcom, Law-

(1) 3 Sw. & Tr. 292.
(2) 4 Ch. D. 24.
(3) 5 Ex. D. 122.
(4) 1 P. D. 287.
(5) 14 Can. S. C. R. 612.
(6) 1 DeG. M. & G. 576.
(7) N. S. Eq. Rep. 469.
(8) 19 Q. B. D. 68.
(9) 34 Ch. D. 95.
(10) 36 Ch. D. 659; Reversed on appeal 38 Ch. D. 388.
(11) L. R. 11 Eq. 292; 7 Ch. App. 75.

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rence Delap and T. W. Chesley to paper B. W. and the signatures of Lawrence Delap and T. W. Chesley an affidavit annexed to B. W.). These signatures "A. W. Corbett, J. P." to the four affidavits to papers A.W. and B.W. are mine. It has been so long since the thing was done, and I kept no minute, that I have no recollection ; but my name would not be there unless the parties affirmed or swore, and acknowledged their signatures or made those signatures. I can't tell who wrote the affidavits.

Cross-examined.—I have no recollection of the facts at all, and had none till I saw this paper last night. Sometimes if parties came in and acknowledged that they affirmed that would do. Some parties swore, and some, if they acknowledged that they had sworn, I would sign.

Re-examined.—To my knowledge I have never so done it without the parties being present. I would not sign unless I saw the signature made, or it was certified that it had been made.

The signatures of the defendant and Hall to the bond and affidavits are thus proved and not disputed. This constituted regular and entirely sufficient proof of the making of the bond on the issue of "*non est factum.*"

Against this we have nothing but the evidence of the defendant himself, who says he signed the bond in blank; that he authorized VanBlarcom to fill it up for $1,000 only, instead of the actual amount of $2,000 now appearing on its face; that the bond was in blank when Hall attested it—and further, that neither of the affidavits were ever sworn to, and that Corbett must consequently have signed the jurats irregularly and have falsely certified that the respective deponents swore to the affidavits before him.

Although the learned judge who tried the case has found for the defendant I am unable to acquiesce in this finding. The defence depends wholly and exclusively on the direct testimony of the defendant himself, and I cannot agree that a party, who admits that his signature appended to a solemn instrument like this bond is in his own handwriting, can discharge himself in the way attempted here in the face of such proof as we have from the subscribing witness and the magistrate who took the affidavit of execution and justification. Had there been any circumstantial evi-

dence confirmatory of the defendant's account the case might have been different but there is no such proof. Are we then, upon the mere denial and statement of the defendant, the party interested, and without the least circumstance confirming it,—to conclude that Mr. Hall, the witness, who swears that he must have been present and have seen the execution, and who says he swore to the execution when the matter was fresh, and Mr. Corbett who says his name would not appear affixed to the affidavits if the parties had not sworn them in his presence, and also either signed or acknowledged their signatures in his presence—are we to conclude on the mere oath of the defendant himself that these two gentlemen, who it is not pretended had any interest in the matter, were each of them parties not merely to what would be a deliberate fraud upon the crown, but also to what would amount, at least in the case of one of them—Mr. Corbett, the magistrate, and probably in the case of both—to an indictable offence? I think sound public policy requires us to say that a party who admits his signature to a deed or bond cannot be permitted to exonerate himself in this way on his own unsupported oath, by swearing to its irregular and insufficient execution, in the face of the evidence of disinterested parties sufficiently proving that execution.

I think it, too, more consistent with probability, and altogether a more just inference from the evidence, to conclude that the defendant is mistaken in his recollection of the circumstances attending the execution of the bond, than that Mr. Hall and Mr. Corbett were guilty of the gross irregularities which the defendant imputes to them. I say nothing about estoppel. I proceed entirely on the weight of evidence, which, in my opinion, is overwhelming.

The appeal must be allowed with costs, and judgment entered in the court below for the crown with costs,

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FOURNIER J.—Concurred.

GWYNNE J.—The proper conclusion to arrive at upon the evidence, in my opinion, is that when the bond was acknowledged by the respondent in the presence of the witness Hall it was in the condition in which it now is. Hall, immediately after such acknowledgment testified upon his oath to the due execution of it by the respondent, and he has no doubt whatever upon the subject—that the bond was originally signed in blank by the respondent, as he swears it was; but, as he admits, VanBlarcom followed him to the train for the express purpose of getting the bond acknowledged in the presence of a witness; for this purpose I can entertain no doubt that VanBlarcom had in the meantime filled in the blanks in the instrument and made it perfect, and followed the respondent to the train to get him to re-execute the bond in the presence of a witness who could swear to such execution, and that thereupon the respondent went before the witness Hall and acknowledged the signature now at the foot of a perfected instrument to be his signature. The time as to which the respondent speaks of the instrument not having been perfected, no doubt must be when he first set his signature to the incompleted instrument, for there would be no sense whatever in acknowledging his signature before a witness unless the instrument was then complete, and the witness before whom he acknowledged the instrument has no doubt that it was. It would be senseless in the extreme that the respondent, himself a lawyer, should go through the form of acknowledging before a person called upon to assume the position of a subscribing witness to the execution of an instrument, that a signature to a paper with a number of blanks in it not filled up, and so utterly defective, was his signature. If the respondent executed the bond, as I have no doubt, upon the evidence, that he did, that is all that is necessary to decide.

The appeal must be allowed with costs, and judgment be rendered for the crown in the action.

PATTERSON J.—This is an action against the defendant as one of the sureties for one VanBlarcom in a bond dated the 25th day of January, 1881, made in the form given in 35 Vic. ch. 19, to secure the due performance of VanBlarcom's duties as saving's bank agent at Annapolis.

The security was given in pursuance of 31 Vic. ch. 37, the 3rd section of which had been twice amended with regard to the affidavit of execution and the affidavits of justification to be made by the sureties, and the registration and custody of the bond, and was to be read from 43 Vic. ch. 3, at the time of the execution of this bond.

The parties to the bond were VanBlarcom, the principal, and the defendant and one Lawrence Delap as sureties, each of the three parties being bound in the sum of $2,000, for the payment of which sums they bound themselves severally, and not jointly or each for the other.

The statute required the bond to be proved as to the due execution and delivery of the same by an affidavit of an attesting witness made before a justice of the peace, and also required every surety to make an affidavit of justification in the form given or to the effect thereof; and that the bond, with the several affidavits, should be recorded at full length in the department of the Secretary of State of Canada, and the original bond and affidavits to be deposited, after registration, in the same department.

It is the duty of the Secretary of State, under section 15, to cause to be prepared, for the information of parliament, within fifteen days after the opening of every session, a detailed statement of all bonds and securities registered at his office, and of any changes and entries

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that have been made in reference to the names and residence of any sureties, and of the amounts in which they have become severally liable, since the period of the previous return submitted to parliament.

The act under which the savings banks were established, 34 Vic. ch. 6, required every agent to promise on oath to faithfully perform his duties.

The bond in this case is on a printed form, which gave also blank affidavits for the principal, subscribing witness and sureties.

The four affidavits purport to have been made on the day of the date of the bond, the 25th of January, 1881, before A. W. Corbett, J.P., at Annapolis.

It is unnecessary to refer to the pleadings, because it was agreed at the trial that the question to be tried was Mr. Chesley's execution of the bond or his liability to pay anything under it in case the breach of the condition should be proved, the trial of that issue being postponed.

For the crown the bond and affidavits were produced. Mr. C. J. Anderson, the chief of the savings bank branch of the Finance department, spoke of the bond only from the entries he looked at and not from recollection of the particular paper. He says he sent the blank form to VanBlarcom and received the bond through the post. He says it was received by him on the 22nd February, 1881, but I do not feel clear, from reading the note of his evidence, whether that, which he read from an indorsement on the bond, was the first receipt of it, or the receipt of it for filing after it had been registered in the department of the Secretary of State. By the act of 1880 it ought to have remained in that department, though I should gather from what Mr. Anderson is reported to have said that the former statutes, which required the securities after registration to be deposited in the finance department continued to be acted on.

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The other witnesses for the crown were Mr. Corbett, the J.P., and Mr. Hall, the attesting witness. I shall read their evidence, which is short:—(See pp. 308 & 309).

Opposed to this there is only the testimony of the defendant himself. The main question is whether it should be taken to rebut the case made for the crown. (His Lordship read defendant's evidence set out on page 307)

The learned judge who tried the issue without a jury gave credence to the defendant's account, and after discussing the question whether the defendant was estopped by his conduct from denying that the bond was his deed, and answering that question in the negative, he gave judgment for the defendant, which judgment was affirmed by a majority of the court, the Chief Justice dissenting.

The following are the trial judge's findings of fact:—(See p. 309).

I do not understand the dissent of the learned Chief Justice to have involved any difference in opinion from the trial judge upon the facts found,—on the contrary, he says the findings were not attacked—but to have turned on the question of estoppel. The majority of the court, whose opinions were expressed by Mr. Justice Smith, appear to have inclined to the opinion that the defendant would be estopped if the negligence imputed to him had been the proximate cause of the acceptance of the bond by the government, but they considered the proximate cause to have been the magistrate's false certificate that the defendant had been sworn before him. The Chief Justice, dissenting from that understanding of the part played by the certificate, and agreeing with the other members of the court on the general doctrine of estoppel, was of opinion against the defendant.

My impression is that, had I been trying the case, I should have given more weight than seems to have

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been given to the intrinsic improbabilities and other considerations, some of which I may allude to further on, which appear to me to tell against the defendant's version of the making of the bond. Still, it is proper to bear in mind that there are sometimes matters of local knowledge understood by the persons concerned in the trial which influence the verdict without finding their way into the notes of the evidence.

For example, the fact stated by the Chief Justice to be admitted that the condition of the bond was violated by the misconduct of the officer does not appear in any formal manner, nor does the fact, freely spoken of, that VanBlarcom absconded. He is alleged in the declaration to have held office till the 12th of May, 1881. Mr. Anderson says that he was at Annapolis in May, 1881, and had the bond there. We may fairly infer that he was there in consequence of the absconding of VanBlarcom, and, that being at so early a date, less than three months from the time the bond first reached his hands, it is somewhat remarkable that we hear nothing of any communication at that time with the defendant, because his repudiation of liability would naturally have led to some reference to Mr. Hall and Mr. Corbett, whose recollection could scarcely have failed them so much as it did when in the witness box three years and a half later. Under all the circumstances it cannot be said that any sufficiently clear ground has been made to appear for disturbing the findings of fact. The decision of the appeal must therefore turn, as did the judgments in the court below, on the question of estoppel.

There are two propositions formulated by Lord Esher in *Carr* v. *London and N. W. Ry. Co.* (1) one or both of which will furnish the test of the application of the doctrine to the facts as found by the judge and as admitted by the defendant.

(1) L. R. 10 C. P. 307.

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One proposition, which is found at p. 307, is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented; and the other (1.) that if, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.

See also *The Mayor, Constables and Company of the Merchants of the Staple of England* v. *The Bank of England* (2) for a very late judgment of Lord Esher.

It has to be assumed for the purpose of the branch of the case involved in this appeal, which is, by arrangement, to be decided before the investigation of VanBlarcom's dealings in his office is entered upon, that VanBlarcom is a defaulter, and that the government was prejudiced by accrediting him as agent.

The difference of opinion in the court below arose from the different views taken of what was the proximate cause of that action of the government.

The majority of the court held it to be the affidavits of justification attached to the bond and falsely certified by the magistrate to have been sworn before him, while the Chief Justice considered it was the bond itself, the proof of the pecuniary responsibility of the sureties being a collateral matter not affecting the legal validity of the security, and which might have been dispensed

(1) P. 318.

(2) 21 Q.B.D. 160.

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with without prejudicing any remedy on the bond, although the departmental officials would have failed in their duty if they had accepted the bond without the affidavits.

I think the view of the Chief Justice is the correct view. That of the majority of the court seems to have been influenced by attaching too literal a significance to the word "proximate" as used in one of the propositions I have quoted.

Lord Esher explained in *Seton* v. *Lafone* (1) that he had taken the word from the judgment in the case of *Swan* v. *N. B. Australasian Co.* (2), and that the word was there used as meaning the real cause, and he expressed his preference, in which Bowen L. J. joined him, for the word "real" as more accurate than the word "proximate," while Fry L.J. said that he did not feel sure that the term "real" was any more free from difficulty than the word "proximate."

What was to be done here was to obtain from VanBlarcom a bond with two sureties for the prescribed amounts. It might have afforded some assistance upon the issue of fact relating to the actual execution of the bond to have known the terms of the order fixing the amount of security required from VanBlarcom, perhaps as a means of checking the defendant's statement that $500 or $1,000 was the amount named to him.

That is one particular in which there seems to have been slackness in bringing out all that might have thrown light on the investigation. We must for our present purpose assume that the bond required was the bond that was furnished. The real cause of the accrediting of VanBlarcom as agent was the furnishing of that bond, and, taking that to be so, the question is whether under the evidence the defendant can be heard to deny that it is his deed.

(1) 19 Q. B. D. 68. (2) 2 H. & C. 175.

On this form of the question the unanimous opinion of the court below is against him.

I think we should give effect to that opinion by allowing the appeal and reversing the judgment which proceeded upon the erroneous conception of the proximate cause.

I assume of course that the affidavit of execution was untrue as well as the magistrate's certificate to the other affidavit, but I do not assume that Hall did not swear before the magistrate to the execution of the bond. His affidavit as produced to the department conformed to the requirement of the statute respecting proof of the execution, and I take the true effect of the defendant's own statement to be that Hall, in making the affidavit, did precisely what the defendant intended that he should do.

The defendant is a barrister and must be credited with the knowledge of the mode in which these things are done. When he acknowledged his signature before Hall in order that Hall should attest the bond as witness, he did an act which I should, if trying the case, have considered so inconsistent with his statement that there was no seal to the paper as to make a strong demand on my credulity when asked to find that there was no seal. But, at all events, he said in effect to Hall: "I have executed this paper which requires an attesting witness who shall swear to its due execution. You are to be the witness and to make the affidavit."

His signature of the affidavit of justification, at the time and under the circumstances, is nearly as hard to reconcile with his denial, implied if not expressed, of connivance at the irregularity of Corbett's proceeding, or even of procuring Corbett to act as he did. It is true that he says he relied upon having an opportunity of seeing that the blanks had been filled up as he had agreed that they should be filled up, when he should

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have the bond before him for the purpose of swearing to the affidavits. But that theory gives no reasonable explanation of his signing the affidavit, or even of his signing the deed itself, at the time. Confining ourselves, however, to Hall and his affidavit, there can be no other conclusion than that nothing further was intended to be done towards the more complete execution of the deed, in the presence of Hall, and that Hall was intended to make affidavit of the due execution of a completed instrument—in fact to make the affidavit which he did make as the statutable proof of the execution.

The case of *Awde* v. *Dixon* (1) was mentioned during the argument, I think, by one of my learned brothers. In that case an agent had exceeded his authority by filling up a promissory note for too large an amount. The court did not say whether or not a forgery had been committed, but dealt with the case on the question of authority, not, however, ignoring the liability of the principal to be estopped from denying the authority of the agent.

A party who takes such an incomplete instrument, Parke B. observed, "cannot recover upon it unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give."

It was argued for the defendant that the principle of estoppel *in pais* does not apply to preclude a man from denying the execution of a deed.

The argument overlooks the essential principle of estoppel which is to prevent the assertion that the fact is contrary to the party's representation in reliance on which another has changed his position to his preju-

(1) 6 Ex. 869.

dice, and the fact of the execution of a deed does not differ, in view of this principle, from any other fact.

The authority mainly relied upon in support of the argument was *Swan* v. *N. B. Australasian Co.* (1). That case may not inaccurately be said to contain all the law upon the subject, but I understand it to discredit, in place of supporting, the wide proposition for which it is appealed to.

It is undoubted law that authority to execute a deed for another cannot be conferred by parol, and that a deed executed with blanks left for material parts which are afterwards filled up by an agent whose authority has not been conferred by deed is void. But that doctrine must not be confounded, as I think has been done in the argument, with the principle of estoppel. The doctrine was firmly settled by *Hibblewhite* v. *McMorine* (2), which was approved in the House of Lords in the recent case of *Société Générale de Paris* v. *Walker* (3); but when the same deed which was in question in *Hibblewhite* v. *McMorine* was attacked on the same ground of imperfect execution in *Sheffield Railway Co.* v. *Woodcock* (4), which was an action for calls, it was held binding by estoppel. The court refused a rule *nisi* on the point of the invalidity of the deed, Parke B. observing (5):

> The defendant held out false colours to induce the company to register him as a proprietor, and therefore to bring this action against him. It is a universal rule of law, that when a party makes a representation to another whereby the situation of the latter is altered he is bound thereby.

In Everest and Strode on Estoppel (6) Swan's case is discussed at some length, and it is said that the majority of the judges who gave opinions held that the doctrine of estoppel by executing instruments in

(1) 7 H. & N. 603.
(2) 6 M. & W. 200.
(3) 11 App. Cas. 20.
(4) 7 M. & W. 574.
(5) P. 583.
(6) At p. 358.

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blank is confined to negotiable instruments and does not apply to deeds.

The general form in which the learned authors express this proposition may, perhaps, be misleading. The opinions on which it is founded do not go farther than to hold that the fact of executing a deed in blank is not by itself such a representation as will work an estoppel, while all the judges without exception concede that the principle of estoppel applies to deeds.

The case came first before the courts on an application to the Common Pleas to rectify the company's register; *Ex parte Swan* (1). The subject of estoppel was touched upon by all the judges who delivered opinions. Erle C.J. said (2):—

> Now although the deeds of transfer as between Swan and Oliver were null and void, yet as between Swan and a purchaser for value on the faith that they were valid, they may be valid to pass the property, if not directly, yet indirectly by estopping Swan from setting up his right against such purchaser.

Again (3):

> The principal whose negligence has enabled his agent to cheat a third party acting with ordinary caution is universally estopped from denying the authority of the agent.

Further on, referring to the case of the *Bank of Ireland* v. *Evans' Charities* (4), he said:

> Lord Cranworth, in giving judgment, explains the case of *Young* v. *Grote* (5) by the estoppel of a principal from denying his authority to an agent, where his negligence has enabled the agent to cheat a person acting with ordinary caution. In Ireland and in the House of Lords this rule of law was treated as applicable to deeds as well as to negotiable instruments; and the judgment of the House of Lords, holding that the negligence was not proximate, by implication holds that if it had been so between these parties the false deed would have been valid.

Keating J. made observations to the same effect. Williams J. and Willes J. took a different view, but, as

(1) 7 C. B. N. S. 400.
(2) P. 431.
(3) At p. 432.
(4) 5 H. L. Cas. 389.
(5) 4 Bing. 253.

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I understand the judgments, only as to the signature in blank being itself sufficient to estop. They thought it would be inconvenient to carry the principle of *Young* v. *Grote* (1) beyond negotiable instruments, Williams J. using this illustration :

If a man were induced to sign, seal, and deliver to his attorney a deed of conveyance with the parcels in blank upon the understanding that it should be filled up by a description of estate A, it would surely be difficult to contend that if the attorney were fraudulently to fill up the blank by a description of estate B, the latter would pass to a *bonâ fide* purchaser who paid for the estate on the supposition that he was buying the latter estate.

Willes J. said :

As a general rule no one can found a title upon a forgery. The doctrine adopted in *Young* v. *Grote* (1) as to negotiable instruments which form part of the currency has never yet been extended to conveyances by deed of land or other property. I am unwilling to be the first to do so.

In the Exchequer in *Swan* v. *N. B. Australasian Co.* (2), Wilde B. said (3) :

It has been further contended by some that the doctrine of estoppel does not apply to the case of instruments under seal. I have great difficulty in appreciating this as applied to the case in hand. Greater effect and more solemn sanction has always been yielded by the law to deeds than to parol instruments—notably so in ancient times. Whether in the present day there is any practical benefit in preserving this distinction I do not stop to inquire, for there is no question here of invalidating or impeaching a deed by estoppel. The case sets out with a deed of transfer by the plaintiff. It is the plaintiff who avers it to be void ; and the doctrine of estoppel, so far as it intervenes at all, is called in aid to support the deed, not to impeach it. Whatever the superior sanction or extra force of a deed may be, the estoppel in this case, so far from coming into conflict with it, is in harmony with it ; and it is difficult to see why, if a man is restrained or estopped from repudiating a parol transfer, he should be less restrained by the same estoppel from repudiating a solemn transfer by deed.

Pollock C.B. concurred with the judgment of Wilde B. Martin B. and Channell B. held that there was no

(1) 4 Bing. 253.

(2) 7 H. & N. 603.

(3) P. 634.

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estoppel in the case, but on the ground that it would be worked only by some representation made by statement or by conduct of what was untrue, and not by negligence only. This will appear from a short extract from each of their judgments. Martin B. (1):

> Those are the cases which have been cited, and I think it may be said with certainty that there is not one of them, which is an authority for the proposition, that when a deed is not the deed of the party he may be estopped by negligence or carelessness on his part from being permitted to aver that it is not.

And Channell B. (2):

> In all cases of the kind of estoppel we are now called upon to consider, the party has, I conceive, either himself made, or authorized to be made, a statement of fact, untrue, or he has conducted himself so as to give rise to the belief of a fact not true.

I call attention to this dictum as very closely applicable to the conduct of the present defendant.

In the Exchequer Chamber (3) Mellor J., referring to the judgment delivered by Wilde B. in the court below, said (4):

> There are also cases in which "when a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion." Whilst I and my brother Wilde entirely assent to that proposition, I hesitate as to the next, "that if a man 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 that belief to their prejudice, he shall not be heard afterwards, as against such persons, to shew that that state of facts did not exist." Assuming for the purposes of this case both these propositions to be true, I agree that they extend to transactions in which a deed is required to transfer an interest or a right, not by validating a void deed, as was supposed on the argument, but by holding that parties shall not be permitted to aver, against equity and good faith, the invalidity of a deed which, either by words or conduct, they have asserted to be valid, and upon which the others have acted: (5)

(1) P. 649.
(2) P. 657.
(3) 2 H. & C. 175.
(4) P. 176.
(5) *Sheffield and Manchester Railway Company* v. *Woodcock*, 7 M. & W. 574.

He then examined the facts and held that the judgment below should be affirmed on the ground that negligence in the particular transaction had not been shown to have caused the loss. Keating J. holding that the negligence had been established, said:

That a party may so estop himself, even in the case of a deed, although denied in the courts below, has not been argued in this court, and I shall therefore content myself by referring to the judgment of the Chief Justice in *ex parte Swan*, and of my brother Wilde in this case in the Court of Exchequer in support of that position, merely adding that I am not aware of any decision which counteracts it.

Blackburn J. held (1) that to preclude a party from denying that a document is his deed, his conduct must

Come within the limits so carefully laid down by Parke B. in delivering the judgment of the Court of Exchequer in *Freeman* v. *Cooke* (2).

And Byles J. said (3) that the position that mere negligence of an alleged grantor may estop him from showing that an instrument purporting to be his deed, is not his deed, is both novel and dangerous. Willes J. merely expressed his concurrence in the judgment of the majority of the court which was against the existence of the negligence relied on in the case. Crompton J. was of opinion that the conduct of the plaintiff was not such as to prevent him from setting up the truth according to the rule laid down in *Freeman* v. *Cooke* (2); and Cockburn C. J. also discussed the subject of the estoppel with reference to the principle of the decisions in *Pickard* v. *Sears* (4) and *Freeman* v. *Cooke* (2) coming to the conclusion that negligence alone, although it may have afforded an opportunity for the perpetration of a forgery by means of which another party has been damnified, is not of itself a ground of estoppel, and being also of opinion that negligence had not been established.

(1) P. 181.
(2) 2 Ex. 654
(3) P. 184.
(4) 6 A. & E. 469.

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I have gone to the trouble of making these extracts, not only for the purpose of demonstrating the consensus of opinion in favor of the appicability of the ordinary doctrine of estoppel to the fact of the execution of a deed in the same way as to any other fact ; but also to show that a majority of the judges who took part in the decision cannot with accuracy be said to have held opinions opposed to such estoppel being capable of being worked by culpable negligence.

On that side of the question, there are no doubt the names of Cockburn C.J., of Blackburn J. and of Martin and Channell BB. Perhaps Crompton J. should also be counted. On the other side, we must place Erle C.J., Pollock C.B., Keating and Mellor JJ. and Wilde B. I think we should add to these Williams and Willes JJ. for they went no farther, as I understand their utterances, than to hold that the mere fact of executing a deed in blank is not such negligence as will estop.

Some American cases were also relied on. They could of course have little influence if opposed to what I have shown to be the course of English opinion, but they do not in themselves bring much aid to the defendant's argument.

The case that seems most in point, as far as regards its leading facts, is *United States* v. *Nelson* (1) decided in 1822 by Chief Justice Marshall in Virginia. A surety for a paymaster there had executed his bond in blank, and was held not bound by it though it had been filled up exactly as he intended it to be. The facts are not so strong as in this case, but would nevertheless have been quite sufficient, as one would think, to estop the party who certainly executed the bond with the intention of its being used to procure credit for his principal. The principles of estoppel, though of course familiar at the time, had not been so systema-

(1) 2 Brock. 64.

tically stated as they have been in the series of cases beginning with *Pickard* v. *Sears* (1) which was decided in 1837. The case was not decided by Chief Justice Marshall with reference to those principles, and it is opposed to the judgment of Chief Justice Parsons in the earlier case of *Smith* v. *Crooker* (2.)

Preston v. *Hull* (3) decided in Virginia in 1873, which was also much relied on, was the case of a bond executed with a blank for the name of the obligee which was intended to be filled up with the name of a person from whom the obligor's agent expected to obtain a loan of money for the obligor. He did not get the money from that person, but got it from another and inserted the lender's name in the blank. It was simply a question of authority. Staples J. concluded his judgment by saying :—

> In truth the doctrine of estoppel has no application to the case. The party advancing the money is put on his guard by the face of the paper. He sees that it is not a deed and he is bound at his peril to inquire into the authority of the agent to make it a deed. It cannot be justly said that he has been deceived by the party whose signature is attached to the writing.

The result is that both of the propositions which I have quoted from *Carr* v. *London & N. W. Ry. Co.* (4) apply to the allegation of estoppel with regard to the execution of deeds, and the evidence brings the defendant within them both.

I have not dwelt upon the evidence as establishing culpable negligence, because that aspect of it was fully and properly dealt with in the court below. I add to the observations there made what I have said as to the active conduct of the defendant in procuring, as in effect he did, the attesting witness to make the affidavit of execution. He directly led to

(1) 6 A & E. 469
(2) 5 Mass. 538.
(3) 14 Am. Rep. 153; 23 Grattan 600.
(4) L. R. 10 C. P. 307.

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the acceptance of the bond by the department and cannot now be heard to deny its validity.

The appeal should be allowed with costs and the rule made absolute for judgment for the crown on the question debated at the trial.

The costs below, both of the trial and of the proceedings before the court *in banco*, should follow the result of the action, but that result will not be known until the conduct of VanBlarcom has been inquired into.

Appeal allowed with costs.

Solicitor for appellant: *Wallace Graham.*

Solicitor for respondent: *C. S. Harrington.*