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# Pleading Estoppel

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## PLEADING ESTOPPEL.

### I.

**N**O subject is fraught with more difficulties for the pleader than that of estoppel. The problems of "when" and "how" to plead seem never so perplexing as when they arise in connection with this subject. That these problems are not confined to any day or age is evidenced by the reports from the time of Lord Coke down to the latest advance sheets of the present day reporter systems, and the lawyers of no generation have been wholly agreed on their solution. No system of pleading yet established has been free from these questions and with each general change in system they seem to spring up with their usual, if not added, perplexity. Conceding this to be the situation, one who attacks the subject with the avowed purpose and intention of clearing up all of the difficulties in it, at the outset, convicts himself of inexperience and temerity. It is with no such expectation that the writer has undertaken this article; he does hope, however, to bring the matter before his readers in such a way by the collection of, and some comment on, the authorities, especially the later ones, as to present and in a small way assist in a solution of, some of the problems as they arise today in pleading cases involving estoppel either as a part of the plaintiff's case or as a defense thereto.

As preliminary to taking up the questions of how and when to plead it seems desirable first to consider the definition and classification of the various kinds of estoppel. Lord Coke defined it as follows: "Estoppel cometh of the French word *estoupe*, from whence the English word stopped; and it is called an estoppel or conclusion because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."<sup>1</sup> This graphic definition or description conveys a forcible if somewhat misleading idea of estoppel, the real nature of which is shown in less striking terms by the following excellent statement: "An estoppel \* \* \* is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it—though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself but to incapacitate the other from taking advantage of it."<sup>2</sup> Estoppels were classified by Lord Coke as

<sup>1</sup> 3 Coke's Institutes, p. 430.

<sup>2</sup> 2Smith's Leading Cases, Ed. 11 (note), p. 744.

estoppel (1) by matter of record, (2) by matter in writing, now generally known as estoppel by deed, and (3) by matter in pais.<sup>3</sup> This classification is still quite generally followed.

There seems to have been different rules at common law as to pleading these various kinds of estoppel. The early English cases which take up the question of the necessity of pleading estoppel are usually cases involving estoppel by matter of record or estoppel by matter in writing, i. e., estoppel by deed. One of the earliest reported cases on this subject is known as *Goddard's case*,<sup>4</sup> decided in the twenty-sixth year of the reign of Queen Elizabeth, 1586-7. This was an action by an administrator on a bond made to his intestate, dated 4 April, 24 Elizabeth. The defendant pleaded that the intestate died before the date of the bond, and so concluded, that the said writing was not his deed, upon which the plaintiff took issue. The jury found specially that the defendant delivered the bond, as his deed, on 30 July, 23 Elizabeth, in the lifetime of the intestate, bearing date 4 April, 24 Elizabeth, before which date the intestate died; the court gave judgment for the plaintiff. In his report of this case Lord COKE said: "The reason of this judgment was, that although the obligee in pleading cannot allege the delivery before the date as it was adjudged in 12 Hen. 6, 1, which case was affirmed to be good law, because he is estopped to take an averment against anything expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth and therefore jurors cannot be estopped, because they are sworn to say the truth. \* \* \* But if the estoppel or admittance be within the same record in which the issue is joined, upon which the jurors shall give their verdict, there they cannot find anything against that which the parties have affirmed and admitted of record, although the truth be contrary; for the court may give judgment upon a thing confessed by the parties, and jurors are not to be charged with any such thing, but only with things in which the parties differ."

In order to thoroughly understand the reasons set forth by COKE in his report of this case it must be kept in mind that in the early days of its existence as an institution the jury found a verdict from their own knowledge and they were sworn to speak the truth in answer to a certain question or questions submitted to them.<sup>5</sup> It is probable that in COKE's time the transition into the modern jury had not gone so far as to alter the oath and the jurors were even

<sup>3</sup> Coke's Institutes, p. 430.

<sup>4</sup> 2 Coke 4.

<sup>5</sup> 1 Pollock & Maitland, History of English Law, p. 117.

Forsyth's History of Trial by Jury, pp. 158-167; 3 Blackstone's Comm., p. 374; 2 Reeves' Hist. Eng. Law, 164; 1 Holdworth's Hist. Eng. Law, 156, 157.

then sworn simply to speak the truth as to a certain issue and not to find a verdict according to the law and evidence as is required today; indeed, this would seem of necessity to be true if Lord Coke's statement of this case is to be taken as correct. The doctrine of *Godard's Case* was again enunciated in the case of *Speake v. Richards*,<sup>6</sup> decided in 1618.

A case<sup>7</sup> in the court of the Queen's Bench decided early in the eighteenth century seems to modify the broad doctrine as it is stated in the foregoing cases. In an action of ejectment the jury found a special verdict stating that in a former proceeding in scire facias against ter-tenants, of which the defendant was one, the writ reciting the judgment of a wrong term, as the record produced in evidence showed, and a plea of nul tiel record being filed and issue joined thereon, judgment was rendered for the plaintiff in the present suit, execution taken on the land in question and the same extended. The defendants in the suit in ejectment sought to take advantage of the variance between the judgment recited in the writ and that given in evidence. The jury submitted to the court the question whether this should be allowed. After mature deliberation the court decided that the defendants were estopped by the judgment in scire facias to say that there was no judgment as recited by the writ, "because that matter had been tried against them, and the defendants were concluded to falsify the judgment in the point tried." In the report of this case it is said: "And the court took this difference, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. Thus in debt for rent on an indenture of lease, if the defendant plead nil debet, he cannot give in evidence that the plaintiff had nothing in the tenements; because if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but if the defendant plead nil habuit, etc., and the plaintiff will not rely on the estoppel, but reply habuit, etc., he waives the estoppel and leaves it at large and the jury shall find the truth notwithstanding his indenture." The doctrine as modified by this case and stated in modern form is that the party, who relies on matter of estoppel, if he has no opportunity to plead it, may show

<sup>6</sup> Hob. 206.

<sup>7</sup> *Trevivan v. Lawrance et al.* (1705). 1 Salk. 276.

it in evidence, and it will have the same effect as an estoppel as though it were pleaded; but when the matter to which the estoppel applies is directly averred or denied by one party and the opposing party takes issue on the fact instead of pleading the estoppel, he is taken to have waived the estoppel and the jury may find the fact. In the year following the decision of this case the doctrine was still further modified, or explained by the case of *Kemp v. Goodal*,<sup>8</sup> which is authority for the proposition that where estoppel appears on the record, as where in an action of debt upon a lease the defendant pleads *nil habuit in tenementis*, the other party relying thereon may demur. It must be kept in mind that up to this time the cases discussing estoppel have been cases involving estoppel by record or deed only.

Certain cases,<sup>9</sup> decided during the latter half of the eighteenth or in the early part of the nineteenth century, are cited by the editors of SMITH'S LEADING CASES<sup>10</sup> as tending to show that the doctrine announced in *Goddard's Case* was not followed during the century following its decision. An examination of these cases tends to convince one that this conclusion is scarcely warranted by anything appearing in the cases with the possible exception of the statement by DEGREY, C. J., in the *Duchess of Kingston's Case* that "the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties." In the other cases cited it does not appear that the estoppel was not pleaded or that the question of failure to plead it was raised. In the case cited as a possible exception the question of pleading estoppel was not raised and the court made the statement quoted as a general statement of the law of judgments. That the editors of SMITH'S LEADING CASES have mistaken the attitude of the English courts toward the doctrine of *Goddard's Case* during the two centuries or more following its decision is indicated by Lord ELLENBOROUGH'S opinion in the case of *Outram v. Morewood*,<sup>11</sup> decided in 1803. In that case facts constituting an estoppel of record were pleaded in the replication. In his opinion the Lord Chief Justice said: "The plea would be conclusive that at the time of pleading the soil and freehold were in the defendant; and if properly pleaded by way of estoppel, it would estop the plaintiff, against whom it was

<sup>8</sup> (1706) 1 Salk. 277. See also to same effect, *Palmer v. Ekins* (1828), 2 Raym. 1550; *Heath v. Vennenden* (1695), 3 Lev. 146.

<sup>9</sup> *Aslin v. Parkin* (1758), 2 Burr. 665; *Hitchin v. Campbell* (1771-2), 2 W. Bl. 827, 830; *The Duchess of Kingston's Case* (1776), 20 How. St. Tr. 537; *Rex v. Inhabitants of the Parish of St. Pancras* (1794), 1 Peake 219; *Strutt v. Bovington* (1803), 5 Esp. 57.

<sup>10</sup> 11th Ed., Vol. 2, p. 769.

<sup>11</sup> 3 East. 345.

found, from again alleging the contrary. But if not brought forward by plea, as an estoppel, but only offered in evidence, it would be material evidence indeed that the right of freehold was at the time as found; but not conclusive between the parties, as an estoppel would be."

Whatever the authority of *Goddard's Case* may have been until the beginning of the nineteenth century, early in that century, in 1819 to be exact, there was decided the case of *Vooght v. Winch*,<sup>12</sup> in which the doctrine of the former case was approved. In the latter case the question of the necessity of pleading a judgment in order to use it as an estoppel was squarely raised and it was expressly decided that in order to operate as an estoppel a former judgment must be pleaded. The court applied the doctrine to the case in hand and the opinion contains no discussion of the modification, offered by some of the earlier cases, of limiting the doctrine to those cases in which in the regular course of pleading the party, seeking to enforce estoppel, has had an opportunity to plead it. Chief Justice ABBOTT in his opinion said: "I am of opinion that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff upon the plea of not guilty. It would indeed have been conclusive if pleaded in bar to the action by way of estoppel. \* \* \* But the defendant has pleaded not guilty, and has thereby elected to submit his case to a jury. Now if the former verdict was proper to be received in evidence by the learned Judge, its effect must be left to the jury. If it were conclusive, indeed, the learned Judge ought immediately to have nonsuited the plaintiff, or to have told the jury that they were bound in point of law, to find a verdict for the defendant. It appears to me, however, that the party, by not pleading the former judgment in bar, consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence then submitted to them."

It is perhaps unnecessary to trace further the English decisions on the method and rules as to pleading estoppel by matter of record or deed. Yet as certain cases remain which throw additional light on the question of the effect of failure to plead estoppel it may not be unadvisable to refer briefly to them here. I allude to the cases of *Doe v. Huddart*,<sup>13</sup> and *Matthew v. Osborne*.<sup>14</sup> These were both cases in trespass for mesne profits, and both followed the rule laid down in *Goddard's Case*, and are authority for the proposition that

<sup>12</sup> 2 Barn. & Ald. 662, 21 Rev. Rep. 446.

<sup>13</sup> (1835) 2 C. M. & R. 316.

<sup>14</sup> (1853) 22 L. J. R. (C. P.) 241.

a judgment in ejectment is not conclusive evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel, where the plaintiff has had an opportunity to do so; but the plaintiff having waived the right to plead the judgment as an estoppel may introduce it in evidence, to prove his title though it will not be conclusive for this purpose. As is suggested by the editors of SMITH'S LEADING CASES,<sup>15</sup> it is possible to reconcile all of the cases that have been cited if the language used in the opinions is not considered apart from the facts in connection with which it is used. Those cases in which the broad rule is stated that estoppel must be pleaded in order to constitute a bar will be found to involve a situation where the party seeking to enforce the estoppel had an opportunity to plead it and chose to file another plea. There is nothing in the earlier decisions that conflicts with the doctrine stated in some of the later ones that where the opportunity is present and the party relying on a record or deed as an estoppel fails to plead the same, the record or deed may be offered in evidence, not for the purpose of a bar, but to prove or disprove the fact in question. So it seems proper to say that the rule as fixed by the concurring English authorities is that estoppel by matter of record, or deed, in order to be given in evidence as a bar, must be pleaded by the party relying thereon, if he has the opportunity to do so, but if the opportunity is not furnished in the regular course of pleading, then the evidence of the record or deed may be taken as conclusive. It is true that the statements of the judges in the opinions in one or two of the cases cited if taken in the broadest meaning that might be attributed to them would be in conflict with the rule as above stated, but if only that meaning is given to the words which is necessary to uphold the decisions in those cases there is no conflict. There is nothing in any of the English cases referred to in the foregoing pages that indicates an opinion on the part of the judges that the order or general rules of pleading in cases involving estoppel should be any different than in other cases. In other words, the judges and expounders of the law have never meant to say that one should violate the logical order of pleading for the purpose of setting up an estoppel at all events.

Though Lord COKE mentioned estoppel by matter in pais as one of the divisions or kinds of estoppel, the question of the necessity of pleading it seems not to have arisen in England until comparatively modern times. It may be that this is to be attributed to the adoption of the rules of Hilary Term in 1834. Indeed, this explanation is suggested by a statement of Chief Justice TINDALL, in a case

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<sup>15</sup>Ed. 11, Vol. 2, pp. 771-2.

decided in 1842,<sup>16</sup> to the effect that the question of pleading a certain estoppel by matter in pais could not have arisen before the new rules, "as both the defense and the answer to it, might have been matter of evidence only." The most noticeable effect of these rules was the restriction of the defenses that could be offered in evidence under the general issue.<sup>17</sup> Estoppel is scarcely ever an element of the plaintiff's prima facie case, at least not to the plaintiff's knowledge; it occasionally arises as a part of defendant's defense, but by far the most common occurrence is its appearance as a means, on the part of the plaintiff, of meeting the defendant's defense. Where the defense is such that it can be given in evidence under the general issue, the estoppel is not to be pleaded because the plaintiff cannot be certain that the defense which he would urge to be barred by the matter in estoppel will be made, and of course he cannot plead an estoppel generally to deny the facts set up in his own pleading. This is illustrated by a reference to the action of trespass. The Rules of Hilary Term restricted the general issue in that action so that the plea of not guilty no longer operated as a denial of the plaintiff's possession or right of possession and so if these allegations of the declaration were intended to be challenged by the defendant he was obliged to resort to a common traverse.<sup>18</sup> Suppose the plaintiff in such an action took the position that the defendant by some act of his which had misled plaintiff was estopped to deny plaintiff's possession or right thereto. Before the Rules of Hilary Term the defense of no possession or right thereto in plaintiff could have been made under the general issue and so until the trial plaintiff could not know whether that defense was to be made and hence would not have pleaded the estoppel. But after the adoption of the said rules in order for defendant to make such a defense he must have filed a common traverse denying these facts and the plaintiff being thus notified of the defense to be made at the trial was in a position to file a replication in estoppel. In order to understand this thoroughly it must be kept in mind that though the general rule of common law pleading is that an issue well tendered must be accepted, and so when a common traverse is pleaded to the declaration the plaintiff as a general rule can do nothing except join issue, yet estoppels form an exception to this general rule<sup>19</sup> and may be pleaded in a case where issue would otherwise be joined. This conclusion seems not unreasonable when the nature of a plea of estoppel

<sup>16</sup> Sanderson et al. v. Collman et al. (1842), 11 L. J. R. (N. S.) C. P. 270.

<sup>17</sup> Martin's Civil Procedure, p. 337.

<sup>18</sup> Rules of Hilary Term, V. 2, under Pleadings in Particular Actions. See 1 Chitty on Pleadings, 16th Am. Ed., p. \*756.

<sup>19</sup> Perry, Common Law Pleading, p. 292.



is considered. An estoppel is a bar created by some act or statement of a party, which precludes him in law from making an "allegation or denial of a contrary tenor."<sup>20</sup> It certainly, then, seems logical to say that if in the case where one seeks to bar evidence in proof of an affirmative allegation on the part of his opponent, he must plead the matter constituting the estoppel, it is equally necessary to plead the matter constituting the estoppel where one seeks to bar his opponent from denying a certain fact. Indeed, this conclusion is supported by the comments of the reporter on the case of *Armstrong v. Norton*.<sup>21</sup> In this case the question whether a judgment in a former ejectment suit need be pleaded as an estoppel in order to be put in evidence as a bar was raised. During the argument the attorney for the defendant referred to the case of *Doe v. Huddart* and intimated that in that case the defendant having filed a plea concluding to the country, there was no opportunity given the plaintiff to reply an estoppel because of the conclusion of the plea. The case went off on another point but the reporter states: "On the following day, Baron Pennefather seeing Mr. Griffith (the attorney for the defendant) in Court made the following observations in reference to the preceding case:—Upon the decision which took place yesterday, as to how far the ejectment was to be considered conclusive in the action for mesne rates—it was contended on the part of the defendant, that it could not be held conclusive unless it were pleaded as an estoppel, and for that proposition the case of *Doe v. Huddart* was relied on. In that case there was a plea of the general issue, and a special plea that the premises in question were not the property of the plaintiff, and it was said by Mr. Griffith, that because the latter plea concluded to the country, the plaintiff was precluded from replying the estoppel, but I cannot concur in that proposition, as I am of the opinion that he might have replied the judgment as an estoppel notwithstanding such conclusion of the plea."

The earliest case, taking up the question of pleading estoppel in pais, which the writer has been able to discover, is that of *Sanderson et al. v. Collman et al.*,<sup>22</sup> decided April 23, 1842. This was an action of assumpsit by the indorsees of a bill of exchange against the acceptors. The declaration alleged the making and acceptance of the bill by the defendant. To this the defendant filed a plea denying the making of the bill, and the plaintiff filed a replication in estoppel, relying on the fact that the defendants had accepted the bill

<sup>20</sup> Andrews' *Stephen's Pleading*, p. 280.

<sup>21</sup> (1839) 2 *Irish Law Reports* 96.

<sup>22</sup> 11 *L. J. R. (N. S.) C. P.* 270.

See also *Phillips v. Im Thurn* (1865), 18 *C. B. N. S.* 400.

to estop them to deny that it was not made by them. To the replication the defendants demurred. Chief Justice TINDALL, in deciding the case, said: "As to the question of pleading the estoppel, there might, perhaps, be some doubt; but I think that the difficulty does not arise in this case, if we see, from the matter alleged in the declaration, that the party would be estopped from putting such a plea on the record, and that the plea is bad as it stands; not, indeed, that I feel any difficulty in saying that I do not see any sufficient ground for holding that such an estoppel might not be well pleaded. \* \* \* If the matter here were only quasi an estoppel, or mere evidence before a jury, the plaintiffs, perhaps, might not be allowed to plead it; but I do not see why the particular objection in this case might not well be raised by pleading." Justice ERSKINE, in the same case, said: "The question then is whether such a defense is pleadable. If the answer to the action on the bill be such as the defendants set up, the new rules oblige them to plead it, and he has done so. The plaintiffs then reply the estoppel, and add the material fact that the party took the bill on the faith of the acceptance; thereby, supplying what might have been said to be wanting on the face of the declaration. \* \* \* But even suppose that the question could have been gone into upon the mere traverse of the acceptance, I yet do not see why the estoppel may not also be relied on in pleading." The report of another case,<sup>23</sup> which was heard later in the same year shows that an estoppel by matter in pais was pleaded in the replication, but the opinion contains no discussion of it and the case is of no particular value except as an indication of what the practice was.

Some six years later another case<sup>24</sup> was decided, which is of considerable importance in the law of estoppel. It involved an action in trover by an assignee in bankruptcy for the conversion by the defendant of the property of the bankrupt before bankruptcy. The defendant pleaded the general issue, that the bankrupt was not possessed and leave and license from the bankrupt. At the trial evidence of certain acts and statements of the bankrupt was introduced for the purpose of estopping the bankrupt and his privies from saying that the goods belonged to the bankrupt. It was urged by the plaintiff that such evidence was improperly introduced as the estoppel had not been pleaded. Concerning this contention Baron PARKE said: "With respect to estoppel in pais, in certain cases there is no doubt they need not be pleaded in order to make them obligatory—for instance, where a man represents another as his agent

<sup>23</sup> *Darlington v. Pritchard* (1842), 12 L. J. R. (N. S.) C. P. 34.

<sup>24</sup> *Freeman et al. v. Cooke* (1848), 18 L. J. R. (N. S.) Exch. 114.

in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large and enable the jury to treat it as no contract; and the same rule appears to apply to all similar estoppels in pais." The final conclusion which the learned editors of SMITH'S LEADING CASES draw from the cases is that under the old system of pleading at common law it was "optional either to plead specifically the facts out of which the estoppel arises, or to allege or deny, as the case might be, that which those facts concluded the opposite party from denying or alleging, and rely at the trial upon the matter in pais which created the estoppel, as being conclusive evidence of such allegation or denial."<sup>25</sup> This is undoubtedly the conclusion that is warranted by the language used by the judges in the foregoing cases. It does, however, seem opposed to the spirit and all the rules of pleading to say that one, as he chooses, may or may not plead a certain plea and the result to his case will be the same whether he does or not. To those who have regarded common law pleading as a scientific and logical system a rule of this sort comes as a great surprise. If this is the rule, who will now longer venture to assert that "special pleading is the logic of the law"?

It will be well now to direct our attention to a consideration of the American cases on this subject. Since there are in this country two systems of pleading, the common law and code systems, and since the statutes establishing the code system in the various states contain a clause which, as authorities on pleading and courts generally agree, serves to change the common law rules as to pleading estoppel, the cases under these two systems should be considered separately. Following the chronological order the cases under the common law system should be studied first. It would be natural to expect to find these following more or less closely the doctrine of the English cases which we have just considered. As is suggested by Mr. Smith in his note to the *Duchess of Kingston's Case*,<sup>26</sup> the reason for the doctrine of *Goddard's Case*, if it ever did exist, at least, is not now present, since jurors are now sworn to find the facts according to the evidence, and as the effect of an estoppel, if enforced, whether pleaded or not would be to keep evidence away from the jury, the jurors could not keep their oath and still find against a good estoppel. So the reason for the decision having disappeared we may expect to find that it has had some effect in leading the courts, where the common law system of pleading is still in

<sup>25</sup> 2 Smith's Leading Cases, Ed. 11, 831.

<sup>26</sup> 2 Smith's Leading Cases, Ed. 11, 768.

vogue, to disregard the authority of this celebrated case and that of the great number of later English cases which refer to *Goddard's Case* as a precedent. It is said, in fact, by Mr. Bigelow in his work on Estoppel<sup>27</sup> that "the tendency of the decisions has been strongly the other way (i. e., opposed to the necessity of pleading estoppel), since Mr. Smith's work was published, especially in America." If the courts take this view and allow the admission of evidence of estoppels which are not pleaded, the jury under the modern form of oath cannot disregard the evidence, and, granting that it is sufficient, must find an estoppel to exist even though it is not pleaded.

In the cases involving technical estoppel the rule of *Goddard's Case* as altered by the later English cases, i. e., that estoppel by matter of record or deed, in order to be given in evidence as a bar, must be pleaded by the party relying thereon if he has the opportunity to do so, but if the opportunity does not present itself in the regular course of pleading, then the evidence of the record or deed may be received and taken as conclusive, is quite generally followed.<sup>28</sup> Of course, the cases are not uniform, and several courts have taken the view that technical estoppel need not be pleaded even though

<sup>27</sup> Bigelow, *Estoppel*, Ed. 5, 698.

<sup>28</sup> Illinois—*Smith v. Whitaker* (1849), 11 Ill. 417; *Leeper v. Hersman* (1871), 58 Ill. 218, (estoppel was pleaded in this case but the question of the necessity of so doing was not discussed); *Campbell v. Goodall* (1881), 8 Ill. App. 266, (this case is to the effect that it is not necessary to plead technical estoppel where opportunity to do so is not given in the regular course of pleading); *Mann v. Oberne* (1884), 15 Ill. App. 35, 39.

Massachusetts—*Howard v. Mitchell* (1817), 14 Mass. 241; *Eastman v. Cooper* (1834), 15 Pick. 276 (estoppel was specially pleaded in this case though the court does not discuss the necessity or advisability of so doing); *Gilbert v. Thompson* (1852), 9 Cush. 348 (this case, while holding that under the system of pleading, established by the statute of 1836, of trying all questions under the general issue estoppel need not be specially pleaded, indicates that any matter of estoppel relied on should be set out in the specification of defense); *Adams v. Barnes* (1821), 17 Mass. 364.

New Hampshire—*Towns v. Nims* (1830), 5 N. H. 259. (This case does not make exceptions of those instances where the opportunity to plead estoppel is wanting, but as no reason for this distinction appeared in the facts of the case, it is certainly no authority against the exception).

New York—*Davis v. Tyler* (1821), 18 Johns. 490, 492; *Wright v. Butler* (1830), 6 Wend. 284; *Daws v. McMichael* (1836), 6 Paige 139, 145; *Wood v. Jackson* (1837), 18 Wend. 107, 117; *Miller v. Manice* (1843), 6 Hill 114, 125; *Kingsland v. Spaulding* (1848), 3 Barb. Chanc. 341.

Kentucky—*Burdit's Exrs. v. Burdit & Tatum* (1819), 2 A. K. Marsh 143; *Keel v. Ogden* (1835), 3 Dana 103. (Code of Kentucky was not adopted until 1851).

Pennsylvania—*Lang v. Lang* (1836), 5 Watts 102; *Kilheffer v. Herr* (1828), 17 Serg. & Rawle 319. (This latter case acknowledges the general rule as stated above but holds that in the action of debt, assumpsit, etc., in Pennsylvania, where special pleadings are not required, estoppel of record is conclusive in evidence even though not pleaded).

United States—*Insurance Company v. Harris* (1877), 97 U. S. 331.

Vermont—*Lord v. Bigelow* (1836), 8 Vt. 445, 461; *Brinsmaid v. Mayo* (1837), 9 Vt. 31; *Isaacs v. Clark* (1839), 12 Vt. 692; *Gray v. Pingry* (1845), 17 Vt. 419, 424.

Virginia—*Carroll County v. Collier* (1872), 22 Gratt. 302.

opportunity to do so is present.<sup>29</sup> In some instances cases which at first glance seem opposed to the general rule above stated may be explained as depending on statutes providing for the general issue as the only plea in bar and that all matters of law or of fact in defense of any civil action may be given thereunder,<sup>30</sup> though it may be that the courts, mistaking the true nature of a plea of estoppel—it is not technically a plea in bar, though for the sake of convenience generally so classified—have unnecessarily regarded this statute as affecting it. There are still other cases in which because of the peculiar nature of the plea of general issue in certain actions, ejectionment for example,<sup>31</sup> the estoppel is not required to be pleaded but is treated as conclusive in evidence. This is generally traceable to some peculiar statute of the state or states in the reports of which such decisions are found.<sup>32</sup> The reason for insisting strictly on the necessity of pleading technical estoppel unless the party seeking to introduce it has no opportunity to plead it has frequently been stated to be that estoppels are odious and not to be favored by the law because they shut out the truth. This reason is commented on and disapproved, as regards estoppels of record, very justly, it seems, by Judge REDFIELD in his opinion in *Gray v. Pingry*,<sup>33</sup> in which he said, "I profess myself utterly opposed to the reason, which has been handed down to us for requiring this strictness of pleading in regard to estoppels of record, that is, that 'estoppels are odious,' 'not to be favored,' 'because they shut out the truth.' This last clause seems to contain the pith of the whole matter, the hinge upon which all odium turns,—'because they shut out the truth!' If it were said that they shut out litigation, or controversy about truth, I could comprehend the force of the maxim, but by what specie of logic is it

<sup>29</sup> Maryland—Beall v. Pearre (1858), 12 Md. 550, 564; Shafer v. Stonebraker (1832), 4 G. & J. 345; Brooke v. Gregg (1899), 89 Md. 234, 237.

Tennessee—Warwick v. Underwood (1859), 3 Head 237; Renkert v. Elliott (1883), 11 Lea 235, 250; Foulkes v. State (1884), 14 Lea 14. It may be that in these cases the judges meant to say no more than that where a party to a case has no opportunity to plead estoppel, it will be conclusive in evidence. The statement of principle that a former judgment is conclusive as a bar if pleaded or offered in evidence is absolute and unqualified, however, and one is led to the conclusion that the courts of Tennessee do not require estoppel to be pleaded in law cases even where the opportunity presents itself. This conclusion is strengthened by the case of Turley v. Turley (1886), 85 Tenn. 251, 260.

<sup>30</sup> Foye v. Patch (1882), 132 Mass. 105; Gilbert v. Thompson (1852), 9 Cush. 348.

<sup>31</sup> Wood v. Jackson (1831), 8 Wend. 9; Black v. Ticker (1866), 52 Pa. St. 436; Phillips v. Crist (1907), 33 Pa. Super. Ct. 445; but see Finley v. Haubest (1858), 30 Pa. St. 190, Young v. Black (1813), 7 Cranch 565, and Kilheffer v. Herr (1828), 17 Serg. & Rawle 319, where the same rule is held to apply to the general issue in debt and assumpsit.

<sup>32</sup> Black v. Ticker (1866), 52 Pa. St. 436; Phillips v. Crist (1907), 33 Pa. Super. Ct. 445.

<sup>33</sup> 17 Vt. 419.

made to appear that a second contestation of the same matter, after the lapse of considerable time, and the uncertainty which time always brings, more or less, upon all past transactions, is to be made more sure of resulting in the truth, is quite beyond my comprehension. I hold that the entire doctrine of the conclusiveness of former adjudications, not only as to the merits of the controversy, but as to all facts distinctly put in issue, and found by a tribunal of competent authority, instead of being an odious doctrine, is one of the most salutary and conservative doctrines of the law."

The rule that estoppel should be pleaded where it can be done in the regular order of pleading is not generally applied when the estoppel is by matter in pais. As hereinbefore stated the English rule in cases involving estoppel by matter in pais seems to be that such matter may, but need not, be pleaded in order to be produced in evidence as conclusive on the point for which it is offered. This rule, illogical as it is when the science of pleading is considered as a whole, has been followed exactly by the law courts of Illinois.<sup>34</sup> The courts of Michigan have adopted the rule that in law cases it is not necessary to plead estoppel by matter in pais.<sup>35</sup> The practical result of the rules of both of these states would seem to be that in actions at law equitable estoppel would never be pleaded. As in both of these states the use of the general issue with notice of special matter of defense is allowed, the question naturally arises, do statements that estoppel need not be specially pleaded imply that no special notice of it need be given in order to prove it under the general issue? This implication seems to be necessary, especially in Michigan, where special pleading has been abolished since 1846,<sup>36</sup> if the courts of this state take the usual untechnical view and regard the plea of estoppel as a plea in bar. At least one Michigan case bears

<sup>34</sup> *German Fire Insurance Co. v. Grunert*, (1884), 112 Ill. 68, 75; *Mann v. Oberne* (1884), 15 Ill. App. 35, 38; *Campbell v. Goodall* (1894), 54 Ill. App. 24, 27; *Evans v. Howell* (1904), 211 Ill. 85, 93; *Dickson v. New York Biscuit Co.* (1904), 211 Ill. 468; *Gray v. Merchants' Insurance Co.* (1906), 125 Ill. App. 370, 375; *Roraster v. Peoria Life Ass'n* (1909), 149 Ill. App. 536, 538. This doctrine in Illinois is probably influenced by the Practice Act of 1874, which allows the defendant to plead "as many matters of fact in general pleas as he may deem necessary for his defense or may plead the general issue and give notice, in writing, under the same of the special matter intended to be relied on for a defense at the trial." This statute, however, should not be taken to sanction pleading specially defenses which could be introduced under the general issue at common law, as the evident intent of the legislature was to allow the defendant to choose between the common law system of pleading and the simple and less technical system by general issue, giving notice of those matters which under the common law system would have had to have been set up by special plea.

<sup>35</sup> *Rogers, Adm'r v. Robinson* (1895), 104 Mich. 329, 336; *Dean v. Crall* (1894), 98 Mich. 591; *Mowers v. Evers* (1898), 117 Mich. 93; *Renackowsky v. Board of Water Com'rs* (1900), 122 Mich. 613, 615.

<sup>36</sup> § 10, 071 Mich. C. L. 1897; Chap. 99, § 72, Rev. Stat. Mich., 1846.

out this conclusion,<sup>37</sup> and though another and earlier case<sup>38</sup> takes a view directly opposed to this, it may be explained as belonging to that class of Michigan cases, decided before 1894, which held that estoppel by matter in pais must be pleaded.<sup>39</sup> In other states it has been held that in actions at law equitable estoppel should not be pleaded,<sup>40</sup> and in one state, at least, it has been held that in order to be conclusive in evidence, such an estoppel must be pleaded where the matter against which it is to operate appears on the record.<sup>41</sup>

Although, by the unquestioned weight of authority, in the so-called "common law" states in this country it is not necessary to plead equitable estoppel in actions at law, it is necessary to plead it, as well, as estoppel by matter of record or deed, when the proceedings are in a court of equity.<sup>42</sup> The reasons given by the cases for

<sup>37</sup> Thomas v. Watt (1895), 104 Mich. 201, 206.

<sup>38</sup> Johnson v. Stellwagen (1887), 67 Mich. 11.

<sup>39</sup> Wessels v. Beeman (1891), 87 Mich. 481; Gooding v. Underwood (1891), 89 Mich. 187; Pearson v. Harden (1893), 95 Mich. 360. These cases were expressly overruled on this point of pleading in the case of Dean v. Crall (1894), 98 Mich. 591.

<sup>40</sup> Connecticut—Hawley v. Middlebrook (1859), 28 Conn. 527, 536. (The code was not adopted in Connecticut until 1879, so this case, which was decided under the old system of pleading, is cited with the decisions of common law states).

Delaware—Bank v. Wollaston (1839), 3 Harr. 90, 95.

Maryland—Alexander v. Walter (1849), 8 Gill. 239, 251 (quoting from Canal Company v. Hathaway, 8 Wend. 483, on this point, and approving the quotation as a correct statement of the law); Babylon v. Duttera (1899), 89 Md. 444; Albert v. Freas (1906), 103 Md. 583, 591; Shutter Bar Co. v. Zimmerman (1909), 110 Md. 313, 320.

Mississippi—Turnipseed v. Hudson (1874), 50 Miss. 429, 435. Mississippi is what is known as a quasi-code state and the procedure act making it such was passed in 1850; however, the statute making the change is not worded similarly to the statutes of the true code states in the respect of requiring the pleading of the facts constituting the cause of action or defense. This is the portion of the codes that is regarded as changing the common law rule of pleading estoppel, and since it does not appear in that form in the Mississippi statute, this case is cited with the cases from states still retaining the common law system of pleading. It may be well to state here that cases from code states holding that it is not necessary to plead estoppel in pais are good authority for the proposition that such an estoppel should not be pleaded in a state where the common law system of pleading, or an approximation thereto, prevails.

New Hampshire—Chase v. Deming (1860), 42 N. H. 274, 280.

New York—Welland Canal Company v. Hathaway (1832), 8 Wend. 480; People v. Turnpike Co. (1840), 23 Wend. 222, 229.

<sup>41</sup> Davis, Adm'r v. Thomas et al. (1834), 5 Leigh (Va.) 1. See also Sawyer v. Hayt et al. (1803), 2 Tyler (Vt.) 288, 292, and Woodhouse et al. v. Williams et al. (1832), 14 N. C. 508. (The code was not adopted in North Carolina until 1868).

<sup>42</sup> Illinois—Potter v. Fitchburg Steam Engine Co. (1903), 110 Ill. App. 430, 456. But see Hoffman v. Burris (1904), 210 Ill. 587, 593, which is authority for the proposition that former adjudication of the question at bar may be considered by a court of equity although not expressly averred in the answer, where the fact of such adjudication fully appears from the bill itself, even though a demurrer to the bill has been withdrawn and answer filed.

Michigan—Moran v. Palmer (1865), 13 Mich. 367; Dale v. Turner (1876), 34 Mich. 405; Connerton v. Millar et al. (1879), 41 Mich. 608; Dean v. Crall (1894), 98 Mich. 591.

Tennessee—Turley v. Turley (1886), 85 Tenn. 251, 260; Rhead v. Citizens St. Ry. Co. (1903), 110 Tenn. 316, 330.

this difference are that in equity pleading the rule is that every fact essential to plaintiff's title to maintain the bill and obtain the relief asked must be stated therein and that all matters relied on as a defense must be stated in the answer in order to be availed of for that purpose and evidence relating to matters not stated in the pleadings cannot be made the foundation of a decree.<sup>43</sup> On first consideration, one is inclined to think that these same reasons should apply to pleading in actions at law as well as in actions in courts of chancery. This would be true if pleading were an exact science and the rules thereof had always been formulated with the real objects of pleading, i. e., to reach a narrow issue and to inform the opposing party of it, in view. It will be seen, however, that this has not been the case, and that many defenses have been allowed by the courts to be introduced under the general issue without any notice or special plea, so that often times the plaintiff is not informed of the exact defense he will be required to meet, and therefore it cannot be said that in law courts only those things may be proven which have been pleaded and that evidence relating to matters not stated in the pleadings cannot be made the foundation of a judgment. Looking at it in this light the distinction as to the necessity of pleading estoppel in pais drawn by the courts between actions at law and equity seems to be justified. The rule that in equity, where the practice of replying specially to matters in defense has ceased, estoppel should be set up in the bill by amendment if it is necessary to prove it as a bar to a defense offered illustrates the strict view some of the equity courts take of this matter. The usual method of anticipating such a defense is to introduce the defense in the form of a pretense in the bill and then follow it by matter in reply in the shape of a charge.<sup>44</sup>

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[To be concluded.]

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<sup>43</sup> *Rhead v. Citizens St. Ry. Co.* (1903), 110 Tenn. 316, 330; *Connerton v. Millar et al.* (1879), 41 Mich. 608, 612; *Moran v. Palmer* (1865), 13 Mich. 367; *Potter v. Fitchburg Steam Engine Co.* (1903), 110 Ill. App. 430, 456.

See also Story, *Equity Pleading*, § 257 and § 647; *Daniell's Chancery Pleading and Practice* (5th Ed.), § 603 and § 313 et seq.

<sup>44</sup> *Connerton v. Millar et al.* (1879), 41 Mich. 608, 612.



## PLEADING ESTOPPEL.

### H.

THE preceding installment of this article dealt with the English and the American authorities in the so-called common law states. It now remains to consider the question of the necessity of pleading estoppel in the states which have adopted the code system of pleading. Should we expect to find the rule different under the code system than under the common law system? The usual code provisions respecting the complaint and answer are as follows: "The complaint must contain: \* \* \* A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition,"<sup>1</sup> and "The answer of the defendant must contain: \* \* \* A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."<sup>2</sup> These or similar sections of the various codes of procedure are the provisions which are pointed out and relied on as rendering the rules as to pleading estoppel in the code states different from those adhered to in those states in which the common law system of pleading, or an approximation thereto, is still in vogue. These provisions of the code are interpreted to mean that the facts constituting the cause of action or ground of defense, whatever they may be, must be succinctly and clearly stated in the pleadings.<sup>3</sup>

Adopting this as the reason for pleading matter constituting an estoppel in the code states, it seems that no reason or justification exists for drawing a distinction, as to the necessity of pleading, between the different kinds of estoppel, but that estoppel by matter of record or deed should be pleaded as well as estoppel by matter in pais and vice versa. And, indeed, the courts of the states having the reformed procedure have adopted quite generally this attitude, and have held that matter of record,<sup>4</sup> of deed,<sup>5</sup> or in pais<sup>6</sup> to be availed

<sup>1</sup> New York Code Civ. Proc., § 481.

<sup>2</sup> New York Code Civ. Proc., § 500.

<sup>3</sup> Gill v. Rice (1861), 13 Wis. 549; Piercy v. Sabin (1858), 10 Cal. 22.

<sup>4</sup> California. Piercy v. Sabin (1858), 10 Cal. 22; Brown v. Campbe'l (1895), 110 Cal. 644; Estate of McNeil (1909), 155 Cal. 333.

Colorado. Hox et al. v. Leis (1870), 1 Colorado 187.

Kentucky. Morrison v. Price (1908), 130 Ky. 139, 112 S. W. 1090.

North Carolina. Thomason v. Seaboard Air Line Ry. Co. (1906), 142 N. C. 300, 55 S. E. 198.

Oregon. Pacific Live Stock Co. v. Isaacs (1908), 52 Or. 54, 96 Pac. 461; Davis v. Chamberlin (1908), 51 Oregon 304, 98 Pac. 154.

Utah. Bonanza Coal Min. Co. v. Golden Head Min. Co. (1905), 29 Utah 159, 80 Pac. 736.

See also 9 Ency. of Pleading and Practise 617 and cases there cited, and 23 Cyc. 1523, 1530 and 1531 and cases there cited.

<sup>5</sup> See Bigelow on Estoppel, 5th Ed., p. 707; Jones v. Peebles (1909), 130 Ala. 269, 30 So. 564.

\*Alabama. Blair v. Williams (1909), 159 Ala. 655, 49 So. 71; Bank v. Leland (1898), 122 Ala. 289; Jones v. Peebles (1901), 130 Ala. 269, 30 So. 564. (Alabama is not a true-code state as it maintains the distinction between legal and equitable actions, but as its procedure is statutory and resembles that of the code states more nearly than that of the common law states, these cases are cited here).

Colorado. Leachen & Sons Rope Co. v. Craig (1903), 18 Col. Ct. App. 353, 71 Pac. 885.

Connecticut. Wilmot v. McPadden (1905), 78 Conn. 176, 61 Atl. 1069.

Federal. In re Stoddard Bros. Lumber Co. (1909), 169 Fed. 190; Pennsylvania Co. v. Cole. (1904), 132 Fed. 668. (The latter decision was on pleadings under the equity rules of the Federal courts and strictly speaking is not authority for the rule in code states).

Georgia. Fidelity & Deposit Co. v. Nisbet (1904), 119 Ga. 316, 46 S. E. 444; Hill v. Terrell (1905), 123 Ga. 49, 51 S. E. 81; Madison Supply & Hardware Co. v. Richardson (1910), — Ga. Ct. App. —, 69 S. E. 45.

Indiana. Taylor v. Patton (1903), 160 Ind. 4, 66 N. E. 91; Adams v. Adams (1903), 160 Ind. 61, 66 N. E. 153; Webb v. Hancock Mutual Life Ins. Co. (1904), 162 Ind. 616, 69 N. E. 1006; Railway Co. v. Moore (1907), 170 Ind. 328, 82 N. E. 52.

Iowa. Haag v. Andrus (1904), — Iowa —, 100 N. W. 490; Continental Ins. Co. v. Clark et al. (1904), 126 Iowa 274, 100 N. W. 524; Watkins v. Iowa Cent. R. R. Co. (1904), 123 Iowa 390, 98 N. W. 910; McCorkell v. Herron (1905), 128 Iowa 324, 103 N. W. 988; Barnes v. Century Sav. Bank (1910), — Iowa —, 128 N. W. 541.

Kentucky. Peyton v. Old Woolen Mills Co. (1906), 122 Ky. 361; Hilton v. Calvin (1904), 25 Ky. Law 1808, 78 S. W. 890; Brown Wallace (1909), — Ky. —, 116 S. W. 763.

Louisiana. Thomas v. Blair (1903), 111 La. 678, 35 So. 811; In re Quaker Realty Co. (1910), — La. —, 53 So. 526.

Missouri. Realty Co. v. Musser (1902), 97 Mo. App. 114; Carthage v. Carthage Light Co. (1902), 97 Mo. App. 20; George B. Loving Co. v. Cattle Co. (1903), 176 Mo. 330, 75 S. W. 1095; Golden v. Tyer (1904), 180 Mo. 196, 79 S. W. 143; Keeney v. McVoy (1907), 206 Mo. 42, 103 S. W. 946; Turner v. Edmonston (1908), 210 Mo. 411, 109 S. W. 33; Railway Co. v. Railway Co. (1909), 222 Mo. 461, 121 S. W. 300.

Montana. Eisenhauer v. Quinn (1907), 36 Mont. 368, 93 Pac. 38; City of Butte v. Mikosowitz (1909), 39 Mont. 350, 102 Pac. 593.

Nebraska. Nebraska Mortgage Loan Co. v. Van Kloster (1894), 42 Neb. 746; Union State Bank v. Hutton (1901), 64 Neb. 571, 95 N. W. 1061; Carnahan v. Brewster (1902), 2 Neb. (unofficial) 366, 96 N. W. 590.

New Jersey. Scrymser v. Seabright Electric L. Co. (1908), 74 N. J. Eq. 587, 70 Atl. 977.

New York. Dresler v. Hard (1889), 6 N. Y. Supp. 500.

Ohio. Metropolitan Life Insurance Co. v. Howle (1903), 68 Ohio St. 614.

Oklahoma. Deming Inv. Co. v. Shawnee Fire Ins. Co. (1905), 16 Okl. 1, 83 Pac. 918; Town v. Gas Co. (1908), 22 Okl. 347, 97 Pac. 1007; Blakemore v. Johnson (1909), 24 Okl. 544, 103 Pac. 554; American Jobbing Ass'n v. James (1909), 24 Okl. 460, 103 Pac. 670; Cooper v. Flesner (1909), 24 Okl. 47, 103 Pac. 1016; Holt v. Holt (1909), 23 Okl. 639, 102 Pac. 187.

Oregon. Union St. Ry. Co. v. First Nat. Bank (1903), 42 Oregon 606, 72 Pac. 586.

South Dakota. McQueen v. Bank (1906), 20 S. Dak. 378, 107 N. W. 208; Hickox v. Eastman (1908), 21 S. Dak. 591, 114 N. W. 706.

Texas. Word v. Marrs (1904), 36 Tex. Civ. App. 637, 83 S. W. 17; Harle v. Texas Southern R. R. Co. (1905), 39 Tex. Civ. App. 43, 86 S. W. 1048; Rice & Irrigation Co. v. Eidman (1906), 41 Tex. Civ. App. 542, 93 S. W. 698; Couch v. Railroad Co. (1908), 49 Tex. Civ. App. 188, 107 S. W. 872; Oil Co. v. Storage Co. (1909), — Tex. Civ. App. —, 116 S. W. 397; El Paso & S. W. R. R. Co. v. Eichel & Weikel (1910), — Tex. Civ. App. —, 130 S. W. 922.

Washington. Olson v. Springer (1910), — Wash. —, 110 Pac. 807.

Wisconsin. Wisconsin Farm Land Co. v. Bullard (1903), 119 Wis. 320, 96 N. W. 833; Pratt v. Hawes (1903), 118 Wis. 603, 95 N. W. 965.

See also 16 Cyc. 806, and cases there cited and 8 Encyc. of Pleading and Practice 7, and cases there cited.

of as a defense by way of estoppel must be pleaded. Some jurisdictions have gone even further in their statement of the rule, and have announced the doctrine that matter of estoppel, whether as an element of a cause of action or as a defense, must be pleaded if it is to be availed of as a bar by the party offering it in evidence at the trial.<sup>7</sup> This rule has been qualified in most jurisdictions by cases holding that the rule as to the necessity of pleading estoppel applies only where opportunity to do so is given to the party offering it.<sup>8</sup> This means no more than that the regular order or method of pleading is not to be varied even though estoppel enters into the case as an element of the cause of action or defense. As a practical application of this rule the result is that in those states where the answer is the last pleading allowed, except in case of counterclaim or demurrer or unless special leave of court is obtained, as in New York,<sup>9</sup> if the answer consists of new matter to which the plaintiff would naturally reply matter constituting an estoppel, it is not necessary to plead such matter in order to make use of it as a bar to the defense. This rule, applied in those cases where the defendant files a specific

<sup>7</sup> California. *Fritz v. Mills* (1909), — Cal. —, 106 Pac. 725; *Hubbard v. Lee* (1907), 6 Cal. App. 602, 92 Pac. 744.

Georgia. *Brice v. Sheffield* (1904), 118 Ga. 128, 48 S. E. 925.

Indiana. *Taylor v. Patton* (1903), 160 Ind. 4, 66 N. E. 91.

Kentucky. *Peyton v. Old Woolen Mills Co.* (1906), 122 Ky. 361, 91 S. W. 719.

Montana. *Capital Lumber Company v. Barth et al.* (1905), 33 Mont. 94, 81 Pac.

994.

Nebraska. *Union State Bank v. Hutton* (1901), 64 Neb. 571, 95 N. W. 1061.

North Carolina. *McCollum v. Chisholm* (1907), 146 N. C. 18, 59 S. E. 160.

Oklahoma. *Deming Inv. Co. v. Shawnee Fire Ins. Co.* (1905), 16 Okl. 1, 83 Pac.

918; *Tonkawa Milling Co. v. Town of Tonkawa* (1905), 15 Okl. 672, 83 Pac. 914;

American Jobbing Ass'n v. James (1909), 24 Okl. 460, 103 Pac. 670.

Texas. *Oil Co. v. Storage Co.* (1909), — Tex. Civ. App. —, 116 S. W. 397; *Rice*

& *Irrigation Co. v. Eidman* (1906), 41 Tex. Civ. App. 542, 93 S. W. 698; *Rail v. City*

*Nat. Bank.* (1893), 3 Tex. Civ. App. 557, 22 S. W. 865.

Utah. *Homburger v. Alexander* (1895), 11 Utah 363, 40 Pac. 260.

Washington. *Jacobs v. First Nat. Bank* (1896), 15 Wash. 358.

See 16 Cyc. 808 and cases there cited.

<sup>8</sup> California. *Young v. Blakeman* (1908), 153 Cal. 477, 95 Pac. 888.

Georgia. *Rowe v. Weichselbaum Co.* (1907), 3 Ga. App. 504, 60 S. E. 275.

Indiana. *Railroad Co. v. Moore* (1907), 170 Ind. 328, 82 N. E. 52.

Louisiana. *Insurance Co. v. Von Schlemmer* (1908), 122 La. 280, 47 So. 606.

Missouri. *Powell v. Tinsley* (1909), 137 Mo. App. 551, 119 S. W. 47.

Montana. *Eisenhauer v. Quinn* (1907), 36 Mont. 368, 93 Pac. 38; *Capital Lumber Co. v. Barth* (1905), 33 Mont. 94, 81 Pac. 994.

Oregon. *Christian v. Eugene* (1907), 49 Or. 170, 89 Pac. 419; *Tieman v. Sachs* (1908), 52 Or. 560, 98 Pac. 163.

South Dakota. *McQueen v. Bank* (1906), 20 S. Dak. 378.

Wisconsin. *Gans v. St. Paul F. & M. Ins. Co.* (1877), 43 Wis. 108.

<sup>9</sup> New York Code of Civ. Proc. §§ 478, 487, 493 and 514. For examples see *Young v. Blakeman* (1908), 153 Cal. 477, 95 Pac. 888; *Keystone Life Ins. Co. v. Von Schlemmer* (1908), 122 La. 280, 47 So. 606; *Gans v. St. Paul F. & M. Ins. Co.* (1877), 43 Wis. 108.

denial and the plaintiff's position is that the defendant because of his conduct, or a judgment, or a recital in a deed signed by the defendant, is estopped to deny the fact which his pleading indicates he intends to deny, renders it unnecessary for the plaintiff to plead the matter, constituting the estoppel as a sort of a reply for in the reformed system of pleading there is no such practice as a further pleading after a denial. This, as is stated in the former installment of this article,<sup>10</sup> is not of necessity the practice in the states adhering to the common law system. The rule as above stated also applies in cases where only the general denial is filed as an answer or where the matter which the defendant contends the plaintiff is estopped to assert appears in the reply. In this latter case it is not necessary to set up the matter constituting the estoppel to meet the reply because the codes provide for no other pleading except a demurrer to follow a reply. Where the general denial is filed to the complaint or petition the rule is the same as the rule in the common law states when the general issue is filed, and the reason given for the rule in such states<sup>11</sup> operates here and is supplemented by the reason given for not requiring facts constituting an estoppel to be pleaded to a specific denial. It may be questioned, however, whether a case ever arises in a code state under proper pleadings in which the plaintiff finds it necessary to take the position that the defendant is estopped to deny certain facts alleged in the complaint or petition, for it may be contended, and, as it seems to the writer, with some degree of confidence, that usually where such a situation arises the plaintiff's case rests in estoppel and the facts constituting the estoppel should be set up in the complaint or petition rather than the facts which are denied.<sup>12</sup> The general rule that estoppel must be pleaded in order to be taken advantage of by the party offering it has been further qualified by cases in some jurisdictions holding that where the facts constituting estoppel are introduced in evidence by the adverse party himself even though for another purpose,<sup>13</sup> or where the adverse party does not object to the introduction in evidence of the facts relied on to show estoppel,<sup>14</sup> the court will allow the estoppel

<sup>10</sup> See former installment of this article, 9 Mich. Law Rev. 490-1.

<sup>11</sup> See 9 Mich. Law Rev. 491-2. For example of general denial taking away opportunity to plead estoppel see *Powell v. Tinsley* (1909), 137 Mo. App. 551, 119 S. W. 47.

<sup>12</sup> See page — of this article.

<sup>13</sup> Colorado. *Gillette v. Young* (1909), 45 Col. 562, 101 Pac. 766.

<sup>14</sup> Federal. *Standard Sanitary Mfg. Co. v. Arrott* (1905), 135 Fed. 750.

Kansas. *Edwards v. Sourbeer* (1906), 73 Kan. 224, 84 Pac. 1033.

Missouri. *McDonnell v. De Soto Sav. & Bldg. Ass'n* (1903), 175 Mo. 250, 75 S. W. 438.

Montana. *Capital Lumber Co. v. Barth* (1905), 33 Mont. 94, 81 Pac. 994.

Wisconsin. *Lawton v. Racine* (1909), 137 Wis. 593, 119 N. W. 331. (This case is

even though it is not pleaded. This rule is not universal, however, and there are some cases holding that a failure to object to the introduction of the facts in evidence is not a waiver of the failure to set up estoppel in the pleadings.<sup>15</sup>

The courts of some jurisdictions have adopted a peculiar doctrine with regard to the effect of failure to plead estoppel of record,<sup>16</sup> or "former adjudication" as it is now quite generally termed. These courts state the principle that while former adjudication in order to be used as a bar must be pleaded, still if it is not pleaded it may be introduced in evidence, and as such, will be conclusive as to the issues decided in the former suit. One of the most recent of the cases enunciating this doctrine is *Standard Supply & Equipment Company v. Merritt*.<sup>17</sup> The plaintiff in this case brought suit against the defendant on four promissory notes, suing on each in separate actions of which this case was one. One of the cases came to trial and a default judgment was rendered for plaintiff therein. As the notes were all given for the same consideration, at the same time, and under the same circumstances, the plaintiff on the trial of the present case and after the production of much other evidence (it does not appear whether or not against the objection of the defendant), introduced in evidence the record showing the judgment in the former case. The court immediately directed a verdict for the plaintiff. On appeal the judgment was sustained and Judge SCOTT of the Supreme Court of New York, Appellate Term, in his opinion said: "Nor is it of any moment that the judgment was not pleaded. The issues between the parties were issues of fact to be determined by evidence. The judgment was conclusive evidence between the parties as to the facts necessarily involved, and it was as such evidence that it was offered and received. It is only when it is desired to use a judgment as a bar that it is necessary to plead it. It may, without being pleaded, be used as evidence, and conclusive evidence, of the facts established thereby." It does not appear from the report of this case whether the issue was raised by an answer containing new matter or by an answer consisting of a denial and in either case the

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authority for the rule that estoppel need not be pleaded in express terms, but it is sufficient if the facts essential to constitute an estoppel are pleaded. See *Bank of Antego v. Ryan* (1899), 105 Wis. 37.

<sup>15</sup> Alabama. *Jones v. Peebles* (1900), 130 Ala. 269, 30 So. 564.

Iowa. *Schofield v. Cooper* (1905), 126 Iowa 334, 102 N. W. 110.

South Dakota. *McQueen v. Bank* (1906), 20 S. Dak. 378, 107 N. W. 208.

<sup>16</sup> *Garton v. Botts* (1880), 73 Mo. 274; *Standard Supply & Equipment Co. v. Merritt* (1905), 96 N. Y. Supp. 181, 48 Misc. 498; *Kreckler v. Ritter* (1875), 62 N. Y. 372; *Southern Pacific R. R. Co. v. United States* (1897), 168 U. S. 1. But see contra: *Meiss v. Gill* (1886), 44 Ohio St. 253; and cases cited under note 4 of this article.

<sup>17</sup> 96 N. Y. Supp. 181, 48 Misc. 498.

result reached by the court was the proper one. If raised by answer by way of new matter a reply could not be filed, since there is no reply in New York in such a case except with consent of court, and if raised by a denial, as heretofore explained,<sup>18</sup> a subsequent pleading on the part of the plaintiff would not have been proper, so in any event there was no opportunity to plead the estoppel by judgment. But the language of the court is very misleading and if the court intended to state the rule to be that evidence of a former adjudication can be introduced in a subsequent case, between the same parties, involving a like issue, and on that issue will be received by the court over the objection, by the opposing party, that it has not been pleaded, and treated as conclusive, it is certainly incorrect in principle and opposed to the weight of authority of the code states. To say that if not pleaded it cannot be introduced as a "bar" but may be used as "conclusive evidence" is certainly drawing a distinction without a difference. The use of matter constituting an estoppel as a bar simply means that on the point for which the estoppel is introduced the opposing party cannot dispute the allegations made by the party introducing the estoppel; if it happens that the former judgment decided all the issues raised in the present case, then the opposing party cannot dispute any of the allegations made by the party introducing the estoppel and so such allegations must be taken as true. How much does treating the judgment as conclusive evidence, in a subsequent suit, of the facts decided by it differ in result from the use explained above? If it is treated as conclusive evidence on a certain point, then no matter how much or how weighty evidence the opposing party may introduce, it will be given no consideration, and cannot be submitted to the jury, and the point will not be retried. Is this not in effect the same as refusing to allow one of the parties to dispute the decision of the court on a certain point in a former suit between the same parties? And is this not estoppel by matter of record? It is not meant to say that a former judgment may not be introduced as persuasive evidence without being pleaded, for this is and always has been the rule at common law<sup>19</sup> and nothing appears in the code to change it,<sup>20</sup> but the writer does not believe it should be admitted against the objection of the opposing party and treated as conclusive evidence unless pleaded as an estoppel. It is possible that all the courts meant in any of the cases cited was that where facts constituting an estoppel are allowed to be introduced in evidence without

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<sup>18</sup> See page — of this article.

<sup>19</sup> See former installment of this article 9 Mich. Law Rev. 489.

<sup>20</sup> Gray v. Linton (1906), 38 Colo. 175, 88 Pac. 749.

objection, they may operate as an estoppel even though not pleaded. If this is the meaning, then these cases are in accord with others hereinbefore cited on this proposition.<sup>21</sup> But as the Merritt case relies for its authority on *Kreckler v. Ritter*,<sup>22</sup> and in this case objection was made by the plaintiff to the admission of the evidence of the record, the above conclusion hardly seems justified.

One of the most interesting and at the same time most difficult phases of this question of the necessity of pleading estoppel arises when the matter of estoppel forms a part of the plaintiff's affirmative case. Perhaps the most usual situation where this occurs is in cases involving agency by holding out or agency by estoppel as it is sometimes termed. Suppose for instance the plaintiff has entered into what he understood to be a contract with the defendant made through one whom the plaintiff understood was an agent of the defendant; a breach has occurred, and the plaintiff wishes to sue the defendant on the contract. Suppose that at the time of entering into the contract the plaintiff did not inquire thoroughly into the authority of the person who acted as agent but that by defendant's statements and actions he was led so to believe and for that reason did not inquire as carefully into the authority as he otherwise would have done. Suppose still further that the party with whom plaintiff dealt was, as a matter of fact, not the authorized agent of the defendant but that the plaintiff does not learn of this fact until after he has begun suit or even until the trial of the case has begun. This being the situation the plaintiff naturally sues the defendant on the contract, pleading that the defendant by his agent undertook and agreed, etc., or as an act done by an agent is in legal effect done by the principal, plaintiff's pleading may simply state that the defendant undertook and agreed, etc. Suppose the defendant denies that by his agent or otherwise he ever promised. When the plaintiff learns the facts of the case, either before or at the trial, and finds that the party with whom he made the contract was not then the agent of the defendant, must he amend his complaint or petition to show the facts constituting the estoppel or will he be allowed to present these facts in evidence without having pleaded them? The law is that one who holds another out as his agent, and allows a third party to contract with him on such basis, is estopped to deny the agency and is liable on the contract made if the third party relied on the holding out and believed the party with whom he contracted to be the agent of the first party.<sup>23</sup>

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<sup>21</sup> See note 14 on page — of this article.

<sup>22</sup> 62 N. Y. 372.

<sup>23</sup> Mechem-Agency, § 83-4.

Let us turn to the cases to discover, if possible, what rule, or rules, have been adopted in practice and the reasons given for the adoption of the same. One of the best cases, dealing with the situation suggested, that have come to the writer's attention is the case of *Fritz v. Mills*.<sup>24</sup> The plaintiff in that case alleged that the defendant "through her duly authorized agent, executed her agreement in writing, wherein the said plaintiff agreed to sell, and the defendant agreed to buy" a certain tract of land. The defendant, in her answer, denied the execution of the contract. At the trial it appeared that the party who had pretended to execute the contract as the agent of the defendant was not, in fact, defendant's agent, though evidence appeared, which, if availed of, would have estopped the defendant to deny the agency. The court refused to allow a recovery on the theory of estoppel because the plaintiff had not pleaded it. In the opinion in this case it was said: "That a party, who has an opportunity to plead an estoppel, upon which his cause of action or defense depends, must do so, is the recognized rule in this state." Another case to the same effect is *Rail v. City National Bank*.<sup>25</sup> In this case the plaintiff brought suit against the defendant bank upon a contract alleged to have been made by the bank's authorized agent. The plaintiff appealed from a judgment for the defendant on the ground, among others, that the court should have charged the jury that, if the bank held out the person dealt with as having authority to make the contract on its (the bank's) behalf, it would be liable for his contract, though, in fact, he was not authorized to make it. The court, in commenting upon this objection, said: "No such state of case was set out in his pleadings. To bind the principal for an unauthorized act of the agent he must not only hold him out, but the apparent authority must be relied on in good faith, and in the exercise of reasonable prudence, by the party invoking the conclusive presumption of authority. We understand the rule in this state to be that an estoppel, which is the principle involved, to be available must be alleged." There are many other cases, involving agency by estoppel, or other state of facts where estoppel is the ground relied on by the plaintiff for his recovery, which enunciate the same general rule as the cases cited above.<sup>26</sup>

<sup>24</sup> (1909), — Cal. —, 106 Pac. 725.

<sup>25</sup> (1893), 3 Tex. Civ. App. 557, 22 S. W. 865.

<sup>26</sup> *Hombberger v. Alexander* (1895), 11 Utah 363, 40 Pac. 260; *Jacobs v. First National Bank* (1896), 15 Wash. 358; *Clark v. Johnson et al.* (1908), 155 Ala. 648, 47 So. 82 (bill in equity); *American Jobbing Ass'n v. James* (1909), 24 Okl. 460, 103 Pac. 670 (waiver of performance); *Kellog-Mackay-Cameron Co. v. Havre Hotel Co.* (1909), 173 F.d. 249 (the facts constituting the estoppel in this case were set out affirmatively in the complaint, but the question of the necessity of so doing was not raised); *McCollum v. Chisholm* (1907), 146 N. Car. 18, 59 S. E. 160; *Taylor v. Patton* (1903), 160



Some of the courts relying on the general rule that the facts constituting the estoppel need not be pleaded where there is no opportunity to do so have reached some very odd results in attempting to apply this rule in cases where the estoppel constitutes a part of the plaintiff's affirmative case. A good illustration of the result thus obtained is furnished by the case of *Capital Lumber Co. v. Barth*.<sup>27</sup> In this case the complaint counted on goods sold and delivered to the defendants, and the issue of fact was the agency of the person who bought the goods for the defendants. The evidence failed to show an actual agency, but did show facts constituting an estoppel against the defendants to deny the agency. It did not appear that the plaintiff knew, until the time of the trial, that he would be forced to rely upon the estoppel. The evidence was introduced without objection, but later the question of whether recovery should be allowed on the theory of estoppel, since it had not been pleaded, was raised. The court, in disposing of this question, said: "It is the general rule that matter of estoppel, to be effective, must be alleged. Where, however, there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged. \* \* \* Since it does not appear that the plaintiff knew that he would have to rely upon the estoppel, the matter was properly proved though not alleged. Again the evidence having been admitted without objection, the plaintiff was entitled to have it submitted to the jury as if warranted by the pleadings." In submitting to the jury the facts constituting an estoppel because no objection had been made the court is in accord with several cases hereinbefore cited.<sup>28</sup> But in offering as one of the reasons for this action the lack of opportunity to plead the facts constituting the estoppel, the court, even though supported by some slight authority,<sup>29</sup> was clearly wrong, since there was no real lack of opportunity as that word is used in connection with the rule as to the necessity of pleading estoppel. Certainly the lack of knowledge of facts on which his cause of action rests does not, in the ordinary case, excuse the plaintiff from pleading them, and if without knowledge of certain facts he has adopted a theory on which alone his pleading has been based, he cannot recover under such complaint on another

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Ind. 4, 66 N. E. 916 (in this case the complaint failed to state a cause of action unless the facts showing the estoppel were alleged); *Tonkawa Milling Co. v. Town of Tonkawa* (1905), 15 Okl. 672, 83 Pac. 914; *Rieschick v. Klingelhoefer* (1902), 91 Mo. App. 430; *Union State Bank v. Hutton* (1901), 61 Neb. 571, 95 N. W. 1061.

<sup>27</sup> (1905), 33 Mont. 94, 81 Pac. 994.

<sup>28</sup> See note 14, page —, of this magazine.

<sup>29</sup> *Vellum v. Demerle* (1892), 65 Hun. 543, 20 N. Y. Supp. 516; *Hubbard v. Lee* (1907), 6 Cal. App. 602, 92 Pac. 744.

theory, which has first been brought to his attention by evidence produced at the trial. The plaintiff's remedy, if newly discovered evidence changes his case, is to amend the pleadings so that they will embody the theory on which he finally seeks to recover. There is no reason why the rule should be any different where estoppel constitutes a part of the plaintiff's case. If the complaint is drawn on the theory of agency and at the trial the evidence fails to establish agency, but some of that offered shows estoppel, there is no reason why such evidence should be allowed to be introduced unless the complaint is amended to cover the evidence offered. When the courts have spoken of the necessity of pleading estoppel unless the party seeking to introduce it has had no opportunity to do so, they have used the word "opportunity" as applying and referring to the order of pleading, not to the information of the party pleading. The usual case where failure to plead estoppel does not bar evidence of it because of lack of opportunity to plead it arises where the code does not allow a reply and an answer by way of new matter sets up a defense, which, according to plaintiff's theory, the defendant is estopped to allege. In no instance where estoppel is a part of the plaintiff's affirmative case would the rule as to opportunity apply. Still other cases are to be found, which state as a general rule that estoppel as a part of the plaintiff's case need not be pleaded.<sup>30</sup>

In order to determine what the rule should be it is necessary first to consider what facts must be pleaded in setting up a cause of action in the ordinary code state. As hereinabove stated, the complaint, according to the codes, should contain "a plain and concise statement of the facts, constituting" the cause of action. The rule as to what facts are necessary to be pleaded under this code provision has been stated in various ways, but, in general, the cases seem to sanction the doctrine that only legal issuable facts can be pleaded.<sup>31</sup> This, then, is the test in any case, and if the legal issuable facts constituting a cause of action are pleaded, all facts, tending to prove the allegations and not barred by the rules of evidence, may be introduced. So if one determines in any case that the legal issuable facts are the facts constituting the estoppel, they should be pleaded; and, on the other hand, if the allegation, which, though not true, the defendant is by his acts and statements estopped to deny, is taken to be a legal issuable fact, then the necessity for setting up

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<sup>30</sup> *Plumb v. Curtis* (1895), 66 Conn. 154, 173; *Bernhard v. Rochester German Ins. Co.* (1906), 79 Conn. 388, 65 Atl. 134; *Larremore v. Squires* (1898), 62 N. Y. Supp. 885.

<sup>31</sup> *People v. Ryder* (1885), 12 N. Y. 433; *Sheridan v. Jackson* (1878), 72 N. Y. 170; Boone, Code Pleading, § 10.

the estoppel as a part of the plaintiff's case disappears. These considerations lead us naturally to the inquiry, what is a legal issuable fact? So far as the writer can learn, neither courts nor text-writers have ever attempted a definition of this phrase, and any attempt to do so must take one into the domain of philosophy. Any definition reached by means of philosophical speculation would undoubtedly be unsatisfactory, if an attempt were made to apply it in an actual case. For practical purposes it seems enough to determine whether the phrase used includes as "a legal issuable fact" any allegation which, though untrue, cannot be disputed by the opposing party, or whether the popular meaning is to be given to the word, "fact," i. e., an event or reality. The writer chooses the latter meaning because he believes that is the one the makers of the code had in mind, if they considered the question at all. Adopting this interpretation, it is necessary in every instance where the plaintiff's case rests in estoppel to plead the facts constituting it. However, if the other interpretation, i. e., an allegation which may not be disputed, is placed on the phrase, it will not, generally, be necessary for the plaintiff to set up in his complaint the facts constituting the estoppel. This seems to be the nearest approach to a solution that the problem is capable of, as any attempt at a philosophical definition will introduce more difficulties and more disputes. The starting point in the determination of whether or not to plead estoppel as a part of the plaintiff's case should be at a certain definition, or conception of the meaning of the phrase, "legal issuable fact." If one meaning is adopted, it will be logically necessary to conclude that the facts constituting an estoppel are not the legal issuable facts, and hence need not be pleaded; and if the other definition of the phrase is accepted, a contrary result will be reached. If, however, two courts enter upon the solution of such a problem with the same conception of the meaning of the phrase, the ultimate results should be identical.

In conclusion, it is the writer's belief that the careful code pleader will prefer the rule that the facts constituting an estoppel, whether it constitutes a part of his cause of action or a defense, must be pleaded unless there is no opportunity to do so—understanding "opportunity" to refer to the order of pleading rather than to the knowledge or information of the party seeking to avail himself of the benefit of the estoppel. Though, as above suggested, there are varying decisions on the subject, and some of them holding flatly that in the case of estoppel by matter in pais the facts constituting the estoppel need not be pleaded, still these cases are in the minority and are opposed to the great weight of authority. Even in Con-

necticut and New York, in which states the doctrine that estoppel may be shown in evidence though not pleaded is strongest, some of the expressions of the courts lead one to believe that they themselves are not too well satisfied with the doctrine or the reasons given to uphold it.

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