*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Robert Chadwick* v. *The Honourable Sir William Montagu Manning* (*and by Order of revivor*), v. *Robert Gray and The Honourable Charles James Manning and William Hubert Manning, from the Supreme Court of New South Wales; delivered 22nd February* 1896.

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Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

This is an appeal from a Decree of the Supreme Court of New South Wales pronounced by His Honour Mr. Justice Owen Chief Judge in Equity. The Decree restrains the Appellant from proceeding at law to enforce an agreement for indemnity contained in two letters addressed to him by the late Respondent Sir William Manning formerly Chief Justice of New South Wales and dated the 30th of July and the 7th of August 1885 and it orders that those letters be delivered up to be cancelled.

Sir William who was Plaintiff in the suit is now dead. The suit has been revived against his executors.

Though the evidence is voluminous the facts of the case may be stated shortly.

The Appellant Robert Chadwick a timber merchant in Sydney was a near neighbour of Sir William Manning. For many years Sir

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William and Mr. Chadwick were on very intimate terms of friendship. In 1880 an English gentleman a Mr. Lister Kaye and his wife were staying with Sir William. On that occasion Mr. Chadwick met Mr. Lister Kaye who was a relative or connection of Sir William more than once but their acquaintance was only slight and casual. After a short visit Mr. Lister Kaye left Sydney and went to Norfolk Island to help his friend Bishop Selwyn in some missionary work and Mr. Chadwick did not see him again for several years. In 1885 Mr. Lister Kaye returned to Sydney to find himself a ruined man. It seems that when he was in Sydney in 1880 he had placed the whole of his fortune which amounted to a sum of between 5,000*l.* and 6,000*l.* in the hands of a solicitor named Heron who was a son-in-law of Sir William Manning and whose firm acted as Sir William's solicitors. Heron fraudulently misappropriated the money lost it all and became insane. Sir William was in deep distress on account of the misfortune which had befallen his family. He was a loser himself by Heron's frauds. At the same time he was anxious to save what he could for Mr. Lister Kaye. He had no act or part in placing the money in Heron's hands. Apparently he knew nothing about the transaction until the crash came but he seems to have thought not unnaturally that Heron's connection with him might have had something to do with the blind confidence which Mr. Lister Kaye reposed in Heron's integrity. Accordingly Sir William invited Mr. Lister Kaye to stay with him and invoked the assistance of Mr. Chadwick. As Sir William's solicitors were not available Mr. Chadwick introduced Mr. Lister Kaye to his own solicitors Messrs. Holdsworth and Evans.

It was discovered that some portion of Mr. Lister Kaye's money had been laid out by Heron in conditional purchases of land at Wyong which he had taken in his own name and then mortgaged for his own purposes but there was reason to believe at the time that the equity of redemption was of considerable value. Mr. Chadwick thought well of the property as coal had been found in the neighbourhood. At Sir William's instance and out of regard for him and sympathy with Mr. Lister Kaye's unfortunate position Mr. Chadwick consented to join with Sir William in procuring an advance from the Australian Joint Stock Bank with the view of paying off the mortgage and securing the land for Mr. Lister Kaye's benefit. It appeared however on investigation that there were other encumbrances and then Mr. Chadwick consulted Messrs. Holdsworth and Evans. He was advised by them in a letter of the 29th of July 1885 not to go on with the business as the chance of benefiting Mr. Lister Kaye seemed very remote. Acting on this advice Mr. Chadwick told Mr. Lister Kaye that he must withdraw from the proposed arrangement.

On the 30th of July 1885 Sir William wrote to Mr. Chadwick to say that he could not be surprised at Mr. Chadwick's decision but that he had made up his mind to go on with the matter himself; so he asked Mr. Chadwick to consent to be his surety with the Bank instead of becoming a principal and he added "If you "let the credit stand as it is with only the "change of relations above mentioned I . . . "will give you a formal acknowledgment of "exclusive liability." Mr. Chadwick at once complied with Sir William's request and informed Messrs. Holdsworth and Evans of the new arrangement.

On the 7th of August 1885 Sir William sent to Mr. Chadwick for his execution a cash credit bond for 2,500*l.* and interest in favour of the Bank with the following letter :—

" R. Chadwick, Esq. Wallaroy,
" My dear Chadwick, 7th August 1885.

" I send with this Mr. Lister Kaye's cash " credit bond for your signature as a surety " with me.

" If you will sign it I undertake to hold you " harmless.

" Yours very truly,
" W. M. Manning."

Mr. Chadwick signed the bond on the faith of this letter and told Sir William that he accepted his indemnity.

Mr. Chadwick put the letters of the 30th of July and the 7th of August into a private drawer. They were never again referred to in conversation between Sir William Manning and Mr. Chadwick and apparently in the course of time their existence was completely forgotten by Mr. Chadwick if not by Sir William himself.

Mr. Lister Kaye left Sydney for England before the transaction was completed. He did not return to the Colony again.

Matters drifted on for several years. The interest to the Bank went on accumulating. No opportunity occurred of disposing of the land to advantage. Still there was no apprehension of ultimate loss. In the meantime owing to strikes and other causes a long period of depression set in. All property in the Colony especially mining property fell in value. The financial position both of Sir William Manning and Mr. Chadwick altered for the worse. Sir William who had retired from the Bench in 1886 was living on his pension. His private means seem to have been small. Mr. Chadwick

was hampered with a large building speculation and apparently had no money at his command.

By July 1892 the debt to the Bank had increased to 5,400*l.* or thereabouts. The Bank began to press for the liquidation of the account. The Manager told Mr. Chadwick that he should look to him for payment, as the more solvent man of the two. Mr. Chadwick became alarmed. He wished Sir William Manning to join with him in putting pressure upon Mr. Lister Kaye, who had lately come in for some money. This Sir William refused to do. Ultimately it was arranged without the intervention of Sir William, but with his knowledge and assent, that the Bank should accept 5,000*l.* in complete satisfaction of the debt, that Sir William and Mr. Chadwick should each pay 1,000*l.*, and that Mr. Lister Kaye should find the balance and take the land free of all claims. The arrangement was duly carried out, and Sir William and Mr. Chadwick were relieved from their liability to the Bank. It is perfectly clear that throughout the negotiations which led to this arrangement Mr. Chadwick regarded himself as being on precisely the same footing as Sir William. He wrote and acted just as if the agreement of indemnity were not in existence or as if it had completely vanished from his mind.

Shortly afterwards in looking through his papers Mr. Chadwick came upon the letters of the 30th of July and the 7th of August 1885. He mentioned the circumstance to Mr. Hubert Manning, a son of Sir William's, who had interested himself in the matter from the first, and said that he thought he was entitled to the benefit of the indemnity. Mr. Hubert Manning became extremely angry and told his father. Sir William who was a very old man then and in failing health was much annoyed. He declined even to see Mr. Chadwick

on the subject. And then a correspondence took place, in the course of which Sir William apparently persuaded himself that Mr. Chadwick's claim had no foundation either in law or honour. Mr. Chadwick was hurt by the tone of Sir William's letters, but he seems to have treated Sir William with the respect due to his position and character, though he still insisted on his rights. Sir William assured Mr. Chadwick that he fully believed his statement, that he had completely forgotten the agreement of indemnity, but he contended, in a very elaborate argument that the agreement had been tacitly waived or abandoned. Mr. Chadwick then proposed to refer the matter privately to arbitration, but Sir William refused the offer and challenged Mr. Chadwick to bring forward his claim in a Court of Law where he could, he said, meet it openly while he was still alive.

Thus challenged Mr. Chadwick brought an action at law claiming the sum of 1,037*l.* 10*s.* as due to him under the indemnity.

In August 1893 Sir William filed his statement of claim in this suit, praying for a declaration that the agreement for indemnity contained in the letters of the 30th of July and the 7th of August 1885 had been discharged, and asking for an order that the same should be delivered up to be cancelled an injunction against the continuance of the action at law and consequential relief.

The suit came on to be heard on the 21st of August 1894 and the three following days before the Chief Judge in Equity. On the 6th of September judgment was given in favour of the Plaintiff.

His Honour accepted somewhat grudgingly Mr. Chadwick's statement that he had forgotten the indemnity. "I am not bound" said His Honour "to accept the Plaintiff's belief in this

" respect and I can only do so on the assumption
" that the Defendant at the time of receiving
" the indemnity treated it as of no importance
" and not intended to be enforced. Otherwise I
" cannot understand how a man of business with
" his mental faculties unimpaired could have
" forgotten the indemnity on the faith of which
" as he now says he entered into this transaction."
That Mr. Chadwick did enter into the transaction on the faith of the indemnity is clear beyond all question. No doubt to any one who reviews the whole transaction with all the facts before him it must seem strange that in 1892 Mr. Chadwick should have forgotten the indemnity. Such a thing, however, is not incredible. Memory plays strange tricks sometimes. Mr. Chadwick deposed on oath to the fact that he had forgotten it and there was not the slightest attempt in cross-examination to shake his testimony on that point. His veracity was altogether unimpeached. Moreover there could not have been any motive for concealment on his part. He had nothing to gain by keeping back the indemnity. On the contrary in 1892 when he was urging Sir William Manning to put pressure on Mr. Lister Kaye and a certain coolness in consequence sprung up between them the indemnity if it had occurred to him then would have afforded a ready argument in favour of immediate settlement and one which Sir William was not in a position to gainsay. Mr. Chadwick naturally resented the suggestion that he was thinking of the indemnity while he was pressing for the settlement. But as a matter of law it is not easy to see what difference it would have made if it had been in his thoughts all the time. The result in law must be the same whatever may have been the state of Mr. Chadwick's mind.

The substance of His Honour's judgment is contained in the following passages:—

"It is clear to my mind . . . . that the "Plaintiff who knew nothing of the Defendant's "forgetfulness of the indemnity believed and "was justified in believing that the Defendant "had waived his indemnity and did not intend "to enforce it. Acting on that belief the "Plaintiff expressly gave up the land to Mr. "Lister Kaye free of any lien or claim by "him."

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"In my opinion the Plaintiff was induced by "the Defendant's conduct to believe and as a "reasonable man he was justified in believing, "that the Defendant did not intend to enforce "the indemnity given to him and that notwith-"standing such indemnity he was equally with "the Plaintiff liable for the debt and acting on "that belief the Plaintiff was induced to alter "his position to his own damage.

"This being so the Defendant is estopped "from enforcing the indemnity and the Plain-"tiff is entitled to the decree as prayed with "costs."

His Honour's judgment, it will be seen, is rested entirely on the doctrine of equitable estoppel by representation. It is difficult to see what room there is for the application of that doctrine in such a case as the present. Mr. Chadwick was forgetful and silent, or silent, it may be, without the excuse of forgetfulness. But silence is innocent and safe where there is no duty to speak. And it can hardly be suggested that Mr. Chadwick was in duty bound to remind Sir William of an obligation which he had at least as much reason to remember as Mr. Chadwick himself.

Assuming however that Mr. Chadwick is chargeable with a representation which may

have misled Sir William it appears to their Lordships that the conclusion at which His Honour arrived is in direct conflict with the law laid down by the House of Lords in *Jorden and wife* v. *Money* 5 H. L. C. 185. The head-note to that case the accuracy of which was not challenged by the learned Counsel for the Respondents is in the following words :—

"Where a person possesses a legal right, a "Court of Equity will not interfere to restrain "him from enforcing it, though, between the "time of its creation and that of his attempt to "enforce it, he has made representations of his "intention to abandon it. Nor will equity "interfere even though the parties to whom "these representations were made, have acted on "them, and have, in full belief in them entered "into irrevocable engagements. To raise an "equity in such a case, there must be a mis-"representation of existing facts, and not of mere "intention."

The learned Counsel for the Respondents did not of course question the law established by *Jorden and wife* v. *Money* nor did they deny its application to the view of the facts taken by His Honour which was certainly not unduly favourable to Mr. Chadwick. They endeavoured to argue that there was a contract on the part of Mr. Chadwick binding him not to enforce the indemnity. This argument was founded upon certain letters and telegrams which passed between the parties at the time when the settlement with the Bank was made. The letter on which most reliance was placed was a letter of the 27th of September 1892 written by Sir William Manning to Mr. Chadwick in the following terms :—

"Sydney,

"Dear Mr. Chadwick, 27th Sept. 1892.

"Referring to your negotiations for the "settlement of matters under our guarantee of

" the Lister Kaye cash bond at the Australian " Joint Stock I undertake to pay the sum of " one thousand pounds £1,000 to be relieved of " my liability.

" Yours faithfully,

" W. M. MANNING."

It was suggested that the liability there referred to included Sir William Manning's liability to indemnify Mr. Chadwick. But it is quite plain that the only liability present to the minds of the parties at the time of the settlement of 1892 was their liability to the Bank. It is satisfactory to find that this was Sir William's own view. The very point was one of a series of " conclusions " on which he insisted in a letter dated the 28th of April 1893 as being " manifest to his mind." Dealing with the settlement of 1892, " My indemnity of 1885 was " not," he says, " in the mind of either of us in " respect of that settlement."

Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed and the suit dismissed with costs.

The Respondents must pay the costs of the appeal.