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[1]Some Hiatuses In The Statutory Provisions On The Principle Of Estoppel In Nigeria

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Abstract
This paper examined the principle of estoppel as conceptualised at common law, and the fact that the principle is now enshrined in S 169-174 of the Evidence Act of Nigeria, 2011(as amended. The paper also analysed some provisions of some sections of the Evidence Act. The paper pinpointed the issue as to whether the principle of estoppel is a rule of evidence, a rule of substantive law, or a rule of law. The paper further highlighted some lacunae in the Evidence Act because of recent developments in case laws in areas of interests such as Carriage of goods at Sea most especially on matters involving the consignor, carrier, consignee, the third-party freight forwarder and the fact that the consignor must seek a reliable freight forwarder to avoid double liability on freight payment etc., concerning payment of freight charge. Issues of whether liability might be established against the government under the principle of estoppel when in contractual relation on matters of Maritime law were also espoused. Further, the significance of specific contents of the Bill of Lading as a contract of first instance in issues involving the consignor, the consignee, and the carrier was also a concern in this paper. The paper elaborated on other novel areas of the applications of the principle of estoppel in double jeopardy situations, as well as the importance of an estoppel certificate in a lease agreement. The paper relied on primary and secondary sources of information. Primary sources included the 1999 Constitution of the Federal Republic of Nigeria, the Evidence Act of Nigeria, 2011(as amended. Secondary sources of information relied on included books, journal articles, and the Internet. The data obtained from these sources were subjected to content analysis. Findings revealed that; by case developments and corresponding judicial decisions, the principle of estoppel is still evolving, that estoppel could no longer be pinned down to a specific definition, that there exist serious lacunae in the Evidence Act according to these new developments in law most especially in Australia, and the United States of America. The paper recommended that new Evidence Acts must take care of these case law developments by incorporating some of the judicial decisions to stress the importance of the fact that judgment informs legislation, and that new studies should incorporate novel development on the corpus of law concerning the principle of estoppel and Laws on Carriage of Goods by Sea. The law should recognise the concept of an estoppel certificate as a condition precedent for entering into a Lease Agreement.

Keywords: Hiatuses, Statutory, Provisions, Principle, Estoppel, Nigeria.

1.0 Introduction

There is a great debate about whether estoppel is a rule of evidence or substantive law. In this paper, we attempted to know whether estoppel is a rule of evidence, a rule of law, or a rule of
Substantive law, or rather a rule of law in Nigeria against the background of S. 169 – 174 of the Evidence Act, of Nigeria 2011 and appraising the 2011 Evidence Act of Nigeria, by examining the adequacies or otherwise of the Act. In this respect, we looked at the common law positions, we also statutory provisions as to whether it is comprehensive enough to capture the existing typologies of estoppel; and in determine this, we examined some cases from Australia and the United States of America Supreme Courts and we concluded that the provision is inadequate as it fails to capture the expanding frontiers of estoppel such as; on Carriage of goods by Sea, estoppel certificate, estoppel to compel governmental responsibilities when the government is involved in contract relating to Carriage of Goods by Sea, estoppel to preempt double prosecution by states. Given these statutory lacunae, we concluded that estoppel is a rule of law, a rule of evidence and a rule of substantive law in Nigeria.

1.1. Estoppel: a Rule of Evidence or a Rule of Substantive Law

According to Sir Edward Coke, the Chief Judge of the common law court, estoppel could be conceptualised as follows[2]: "*where a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth*". This conceptualisation by Sir Edward Coke implies that, at common law, a party would not be allowed to blow cold and hot simultaneously, contrary to what the Chief Judge of the common law insisted in the *Earl of Oxford's case*[3]. Consequently, according to this definition by Sir Edward Coke, the principle upon which the vital doctrine of estoppel stand is rooted in the promotion of justice and equity that, when a

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[2] Coke, E (1832), *Commentaries On Littleton,(*19th ed.) Volume II, Section 667, 3529, U.K.

[3] 1615)Cro. Jac. P. 443

party made a representation to another upon which the other placed reliance and in consequent acted on it to his detriment, the representor would be held bound to his representation and the Court would preempt him from denying such representation he has made. This common law principle was laid down in the case of *Picked v. Sears*[4] by the Court as:
When a person, by his words or conduct, willfully cause another to believe the existence of a specific state of things, and induces him to act on that belief to alter his previous position, the former is precluded from averting against the latter, a different state of things as existing at the same time. The doctrine of estoppel is based on equity and good conscience and aims to prevent fraud and secure justice in promoting honesty and good faith.

Meanwhile, the principle that consideration must move from the promisee is at the heart of English contract law. As a matter of law, the English court attaches high importance to the necessity that contracting parties must furnish consideration. Thus, mere promises are not enough and consequently, prominent in English law is that estoppel could only be used as a shield, i.e., as a defensive weapon against the suit brought at the instance of the promissor. Therefore, the defendant must prove the requirements or the elements below, which are cumulative.

i. The plaintiff made a representation.
ii. That the representation was intentionally directed to him
iii. That the defendant relied on the representation
iv. That he changed his position or suffered detriment by relying on that representation.

Thus, there is an evidentiary onus that the defendant must prove detrimental reliance to succeed in his defence. From the above, it is evident that, primarily, estoppel is a rule of evidence.

5.3 Can there be a Shift of Evidentiary Onus?

Fundamentally, where estoppel is being used as a sword at the instance of the plaintiff who placed reliance on the defendant's promise, the plaintiff must prove detrimental reliance, as it is trite law that he who alleges must prove. It is out of place to contemplate a shift in the evidentiary onus to the defendant promissor[5]. Consequently, the Australian Court in the case of *Sidhu v. Van Dyke*[6], rejected Lord Denning's position on the presumption of reliance in favour of the plaintiff in the case of *Dreasley v. Cooke*[7]. According to the Court, applying Lord Denning's reliance test in *Van Dyke* as presumed, then the evidentiary onus of proof would shift to *Sidhu* to prove that *Van Dyke* did not rely on the promise to her detriment. The facts of the case of *Sidhu v. Van Dyke*[8] are as follow:

Van Dyke while still a married woman, rented a cottage from Sidhu and his wife who lived 100 meters away in the main homestead on the property. Sidhu and his wife were joint owners of the property. Sidhu and Van Dyke commenced a love relationship involving sexual inter course, in consequent of which Van Dyke's marriage broke down. Sidhu gave Van Dyke assurance that she should not worry about getting a property settlement in the divorce as he promised to subdivide the property belonging to him and his wife, and gave the cottage to Van Dyke. Meanwhile, the relationship between Sidhu and Van Dyke ended eight years later and he repudiated the earlier promise he made to Van Dyke. At the same time, his wife refused to consent to a subdivision of the property. In this case, the Australia court rejected Lord Denning's idea on presumption of reliance test in the English case of *Greadley v. Cooke*[9] which would have shifted the evidentiary onus on Sidhu to prove that *Van Dyke* did not rely on his promise to her detriment.

Meanwhile, the Court unanimously held that; Van Dyke had successfully proved detrimental reliance and in consequent Sidhu was estopped from reneging on his promise to Van Dyke, that as the cottage had burned down and the subdivision unattainable, the Court held that equitable compensation equivalent to the value of what she had lost being the hub of the case be found in her favour. To buttress the fact that estoppel is a rule of evidence, Barnet[9] posted specific facts while commenting on this case, deduced the reasons underlying why the *pluralists* represented by French C.J, Kiefely Bell and Keane L.J overturned the trial judge's findings. In the present case, Barnettt elicited four evidential reasons of how the Court found detrimental reliance in favour of Van Dyke by reproducing the cross examination.

First, Van Dyke was found by the trial judge to be a reliable witness of truth since in her evidence in Chief, she stated that in reliance on Sidhu's promise, she did not engage in complete time work, and she failed to seek a divorce settlement as she chose to improve the property. This position, the pluralist argued that evidence of this nature reflected the probabilities of human behaviour in hope situations and they concluded that Sidhu's promise have a significant impact on Van Dyke's decision making process.

Second, Barnett further stated that the pluralist at p 11 of their judgement stated that:
Her Honour's finding that the appellant's promises played a part in her willingness to spend time and effort in the maintenance and improvement of the Oak cottage and assisted on the Burra Station property warranted the conclusion that the respondent had discharged the onus she bore.

According to the Court, the onus was on her to establish that she believed in Sidhu's representation and, consequent on that belief, she would suffer detriment if Sidhu were permitted to renege on the representation made to her. According to the Court:

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[4] (1837) 6. Add & El p. 469.

[5] *Sidhu v. Van Dyke* (2014) HCA p. 19 at p. 55 and 61.

[6] (1980) 3 All E.R. p. 710 at p. 713.

[7] (2014) HCA p. 19 at p. 55 and 61.

[8] Barnnet, Supra

[9] Barnnet, P. (2001) *Res Judicata, Estoppel, and Fereign Judgements*, Oxford University Press, U.K.

While she did not need to establish that the belief in the representation was the sole predominant cause of her decisions, she did need to establish that the belief was a contributing cause. To establish that the belief was a contributing cause, it was not sufficient to show that she had taken the belief into account. She needed to establish that the belief made a difference to her decision. In other words, she had to prove that she would not have acted (or refrained from acting) as she did without believing in the representation.

Third, the Court pointed out that the trial court acquiesced to the fact as deduced from evidence that van Dyke was worried as to whether Sidhu would honour his promise. The Court said in consequent that the fact that Van Dyke sought to put Sidhu promise down in writing was enough confirmation that Sidhu's promise was a material inducement for Van Dyke remaining on the property. On the last note, the Court found itself unimpressed by the argument that Van Dyke's equivocal evidence showed that she was not induced to stay at the property by Sidhu's promise.
Despite the preponderance of evidence in favour of Van Dyke, the hot question is; how would the Court find the relief, when the subject-matter of the promise had been destroyed by inferno and while at the same time Sidhu's wife who was in joint ownership with her husband refused her consent to let the subdivision of the property go. The Court, relying on past authority, has this to say on giving a remedy approximate in value to the subject-matter of the initial promise:
The award for estoppel could include either the enforcement of the promise or the performance of the expectation generated by the pledge. ……. courts take an approach of awarding the minimum equity to do justice, which sometimes results in less relief than the promise's enforcement. However, this was an instance where it was appropriate to give a remedy which reflected the value of holding Sidhu to his promise. Van Dyke could not get the promise enforced via specific relief. This was for several reasons. First, the cottage, which was initially the subject of the pledge, had burned down. Secondly, the promised sub division never took place because Sidhu's wife refused to consent to it.

Barnett stated in the Court's magic wand thus[10];

i. The Court of Appeal noted that it would be inappropriate to award specific relief because of its impact on Sidhu's wife as a joint owner of their property.
ii. He pointed out that the High Court was in tandem with the Court of Appeal that the appropriate remedy for relief lies in the award of equitable compensation measured by reference to the value of the respondent's disappointed expectations by referring to the values of the property earlier on promised as at the date of judgment.

Estoppel as a rule of evidence enables a party in litigation to invoke its principle against a defendant who had made a previous representation upon which the plaintiff has placed reliance to disable the defendant from rescinding his previous representation, and upon which the plaintiff had acted. First, as a rule of evidence, the principle could be invoked to apply to the present and past incidents. In the second instance, it is only applicable where the parties are involved in a pre-existing legal relationship, culminating in a variation of one of the parties' contractual rights. Thirdly, we must also distinguish between estoppel by representation and promissory estoppel. Estoppel by representation is a rule of evidence relating to an existing fact.

5.4 Estoppel as a Rule of Substantive Law

In contrast, where estoppel is used as a rule of substantive law, it provides a cause of action. Also, as a rule of substantive law, the principle could be invoked in connection with a representation of the promise or a representation made by the promisor in the future. It is also applicable regardless of any pre-existing legal relationship. Thus, it is intended to negate any act of unconscionability exemplified in fraudulent malpractices of one of the parties to promote honesty, good faith, and fair dealings among the parties. Promissory estoppel is not always dependent on a pre-existing legal relationship; it is even applicable to future promises as exemplified in *Hughes v. Metropolitan Railway Company*[11] *and Central London Properties Ltd v. High Trees House Ltd*[12].

5.5 Estoppel Binding Government to its Promises, a Rule of Evidence or that of Substantive Law

It is submitted that where estoppel is being invoked against the government, it is a rule of substantive law, primarily where a citizen as plaintiff used it as a course of action, as a sword rather than a shield. However, for the government to resile out of liability, the government need to provide evidence in rebuttal by in the first instance providing abiding proof that the government officials making such representation acted outside his authority or exceed his authority and second, by satisfying the Court with sufficient materials brought on record to explain to the Court that government policy and actions occasioning change in its position or representation was activated by a manifest compelling and supervening public interest, giving rise to superior equity over and above its previous representation[13].

5.6 Action in Demurrer and Proceedings in Lieu of Demurrer – Estoppel a Rule of Substantive Law?

The word *demurrer* originates from the Latin word *demorari,* meaning to wait or stay. In English, it is abstracted from the verb 'demur', which means to take exception, raise an objection or protest against. The question we need to ask here to argue whether estoppel is a rule of evidence or a rule of substantive law in Nigeria is the distinction between action in demurrer and proceedings in lieu of demurrer.

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[10] (1887) 2. App. Cas. P. 439.

[11] (1947) K. B. p. 130

[12] *Mortilat Padampats' case*, Supra.

[13] (2000) 6, N.W.L.R. (pt. 6590); (2000) 4 S.C. pt 1 p. 85.

A demurrer is a pleading in a lawsuit that objects to or challenges a pleading filed by an opposing party. A demurrer challenges the legal sufficiency of a cause of action in a pleading. In essence, if a cause of action discloses no cognisable claim, a party at the demurrer stage could raise in Nigeria an objection through an application akin to a preliminary objection as a matter of law and the entire action could be thrown out. In Nigeria, the Nigeria Supreme Court in the case of *Mobil Oil (Nig) Plc v. L.A.L Inc, per Ayoola, JSC*[14]*,* conceptualised demurrer as a longstanding procedure known to the common law for determining suits on points of law only.
In contrast, *Kekere Ekun J.C.A. in the case of Ojomo and Ors. v. Frozen Foods Nigeria Ltd*[15] *and Others,* construed proceeding in lieu of demurrer as follows;
Matters that could be raised on the pleadings, which could be taken in the proceeding in lieu of demurrer, are matters which go to the merits and include matters relating to cause of action, ground of defence, statutory provisions or defence of illegality and damages. They include matters of those pleas, such as pleas to the jurisdiction, stay or suspension of the action or in abatement, which are classified dilatory.

In essence, estoppel, when it involves objection, based on estoppel per *rem judicata,* could be raised as a preliminary objection to oppose the action brought by the opposing party. It is thus an action in demurrer to oppose the Court's jurisdiction. Therefore, estoppel in Nigeria in this kind of matter is seen as a rule of substantive law. In the case of Adigun and *Others v. Governor* of *Osun State and Others, Uwais JSC* stated that[16]:
The plea of estoppel per rem judicata, as found by the lower Court, has been established; the appellants are barred from bringing this action. I think it is apposite here to advert to the remarks of Ibekwe JSC in Yaye v. Olubode Res judicata. On the other hand, it operates not only against the party it affects, but against the jurisdiction of the Court itself.

With the above, estoppel is seen as a rule of substantive law. However, most of the common law position on the principle of estoppel is now incorporated in the Evidence Act 2011 of Nigeria. S. 59 of the Act incorporates the above judicial position. The above understanding serves as a prelude to the appraisal of the statutory provisions of the Nigerian Evidence Act 2011 on estoppel, in particular, Section 5a states that;
The existence of any judgment, order or decree which by law prevents any court from taking cognisance of a suit or holding a trial is a relevant fact, evidence of which is admissible when the question is whether such Court ought to take cognisance of such suit or to hold such trial.

5.7 Estoppel as a Rule of Evidence – an Appraisal
In *Nigeria,* the following statutory provisions established estoppel as a rule of evidence
Section 169 of the Evidence Act 2011 states that:
When one person has either by virtue of an existing court judgement, deed or agreement, or by his declaration, Act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing.

Section 169 of the Nigerian Evidence Act 2011 comprehensively dealt with the estoppel principle. Within the statutory provision of the section, one could decipher as many as possible typologies of estoppel. The phrase, "when one person has either under an existing court judgement, deed or agreement or by its declaration, action, omission. Intentionally caused another to believe a thing to be true encapsulates: Estoppel *per rem Judicata*, issue estoppel, estoppel by deed, the principle of proprietary estoppel, the principle of promissory estoppel and even one could construe within that provision, administrative estoppel in furtherance of democratic principle to make government officials and even political parties to be responsible in the fulfillment of their promises to electorate because, more often than not, they make promises they never fulfilled without any mechanism to enforce that promises. In this respect, we shall canvass a more aggressive radical approach by the Nigerian Court to use estoppel as an instrument for enforcing responsibilities on the part of our politicians. The advantages in this activist drive would be unprecedented, as this could arrest corruption and nepotism and promote political stability while reducing the menace of corruption in our society, which has become very endemic in our polity. With this approach, there could be sanity in our political milieu, and the twin principles of separation of powers could be seen operative at their heart with the rule of law fully entrenched.
This provision of the Nigerian Evidence Act is more comprehensive than S. 115 of the Indian Evidence Act. Section 115 of the Sentence Act of Indian provides as follows:
When one person has by his declaration, Act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or his representatives, to deny the truth of that thing.

What makes S. 169 of the Nigerian Evidence Act 2011 more comprehensive than that of Indian is the inclusion of the words *"either by virtue of existing court judgement, deed of or agreement*" between the phrases when one person has and by his declaration.
Yuvraji[17] commenting on S. 115 of the Indian Evidence Act cited this example to illuminate this provision. 'A intentionally and falsely leads B to believe that certain land belongs to A and thereby induces B to buy and pay for it. The land afterwards

[14] (2000) JELR 51012 (Supreme Court): SC. 106/1999.
[15] (2009) LPELR-LA/ PH/3/2008 at p. 21.
[16] (1995) 3. N.W.L.R (pt. 385) p. 513 at p. 515. +
[17] Yuvraj, R. Rathore, S.S. (2011) "The Doctrine of Estoppel as a Rule of Evidence: An Overview". *International Journal for Developments and Allied Issues* (Vol. 1, Issue 4).

becomes the property of A, and A seeks to set aside the sale on the ground that, at the moment of purchase, he had no title. He must not be allowed to prove his want of title.

It is a trite law that a person who lacks title to a particular thing at the moment of sale cannot put such a thing on sale. The canon of expression is *Nemo dat quod non habet*. However, a reminder that strikes the mind is that legal principles hunt in pairs. Therefore, this fraud should be prevented by the principle that a person should not be allowed to blow hot and cold simultaneously. Put differently, nobody should be allowed to approbate and reprobates. This principle is further reinforced in the maxim that *allegans contraria non est audiendus,* i.e no person who alleges contradictory facts should be heard by the Court.

Nevertheless, this is not to say that the person would not be heard based on his contradictory posture. It would offend against the rule of natural justice that audi alter partem, since estoppel should not be deemed conclusive evidence, and the Court must, therefore, hear the other side of the case. To take the complexity of such an injurious route by the Court is to destroy the character of the party making the representation rather than dealing with the facts in issue as presented by the parties in tango, thus committing the fallacy of *argumentum ad hominem*.

Meanwhile, another added advantage of section 169 of the 2011 Nigerian Evidence Act over that of the Indian Evidence Act is the inclusion of *"representatives in interest"*. Including this phrase implies that an agent of a person acting within the scope of his authority and not outside the scope could bind his principal by his representation. In this respect, the vital maxim that: *Qui facit per alium facit per se* applies, meaning he who does an act through another does it himself.

Nevertheless, including the phrase *'when one person'* does not lend this particular provision to straightforward interpretation. Are we talking about an individual as a person or a body corporate, like an incorporated company or corporation? If we restricted the interpretation to individuals, we could be talking about a representative acting on behalf of an individual personality. In this regard, the phrase neither he nor his representatives in interest could be interpreted easily to mean a principal and Agency relationship. The one person could be the principal, his representative in interest, or his agent. That is the only reasonable inference a legal mind could draw about the legislative intent.

It sounds reasonable that the word 'person' used in S. 169 should be imputed to include a corporate personality such as a company or other statutory corporation. This is because the principle of estoppel also binds the director of a company who happens to be the representative in interest of the company. This is in line with the *'organic theory'*, since a company has no brain to think, no hands to work, no legs to move; but the brain by which the company believes is that of its directors. The hands it uses to work belong to the director. Such a corporate personality could only be bound by the acts of its directors. Consequently, the prime movers of the company's directing will are the directors who happen to be the representatives in the interest of the corporate person, like a company or statutory incorporation. Hence, the principle of estoppel could bind a company through the acts of its directors using the provision of S. 169 of the Evidence Act of Nigeria, 2011.

The declaration should be interpreted to include a Will on even covenant. Once the will satisfied the requirement of a Will and, more importantly, the requirement of due execution, then the executor or executrix could be estopped from denying the validity of the disposition in the absence of a codicil negating the intent of the testator or testatrix. In this case, there is a presumption of regularity and the often-quoted maxim. *Omnia praesumautur rite esse ecta* applies. Section 172 of the Evidence Act 2011, which dealt with estoppel of a person signing an Act of lading, states that:

Every Act of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that some goods or some part of them may not have been so shipped, unless such holder of the Act of lading had actual notice at the time of receiving the same that the goods had not been laden on board.

S. 172 of the Evidence Act relates to Estoppel of Person Signing a Bill of Lading.

By this provision, a bill of lading shows the holder or consignee that he can claim the quantum of goods specified in it. The peculiar feature of a bill of lading is that the consignor's mere transfer of it conveys the consignor's representation that the quality of the goods specified in the Bill had been transferred to the importer of the goods or the consignee. In essence, the Bill of Lading in law represents the good itself. Thus, where, in the faith of such representation, the consignee had acted by making payment or furnishing consideration for the goods, the consignor of such goods is bound by the representation on the Bill of Lading.

In essence, S. 172 of the Evidence Acts of Nigeria estopped the consignor or a person signing such Bill of Lading from denying the representation he made on the Bill as to the fact of shipment of the goods and as to the exact quantum of the goods so shipped, subject, however, to two exemptions:

i. That the consignee or holder of such Bill or Act of lading had actual notice when receiving the goods that the goods had not been shipped or laid on board either in exact quantum or in whole.
ii. The master or the consignor could exonerate himself concerning such misrepresentation by showing that such misrepresentation was caused without any default on his part.
iii. That there was no misrepresentation on his part, but that the fraud of the shipper or other third party caused the seemingly misrepresentation.

S. 172 of the Evidence Act relating to the signing of a Bill of lading does not in any way capture the whole matter concerning estoppel situation that may arise on a bill of lading in terms of recent development in case law relating to this aspect of estoppel in Carriage of Goods by Sea and Admiralty matters.

Hearn et al.'s work remains the best eye-opener and revelations of the inadequacies of the provision of S. 172 of the Evidence Act, 2011 of Nigeria, which omitted estoppel situations arising from payment to carriers otherwise known as freight charges. Hearn et. al posited that[18]:
When seeking payment of freight charges, the carrier potentially has three sources from which to seek payment:
(i) The consignor who shipped the goods. (ii) the consignee who received the goods and/or (iii) a bill to a third party, such as a broker. The right to recover freight charges against these parties involves competing interests and potential defences, such as estoppel, due to the typical scenario in which the carrier does not always get paid.

Hearns et. al[19] addressed seven issues, but only four of these issues, which are germane to our discussion on the statutory inadequacies of our Evidence Act, would be addressed for our attention, viz:
i. The general rule is that the carrier gets paid
ii. If a carrier does not get paid, who is liable?
iii. What defences exist to the carrier's claim for payment?
iv. Who wins in a double payment scenario?

First, the rule that the carrier gets paid was established by Excel Transportation Services Inc. v. CSX Lines, LLC, where the Court declared that: *The bedrock of the rule of Carriage is that the carrier gets paid in the absence of malfeasance.* The gist of the above declaration by the Court is that the carrier must get paid, except that the carrier is involved in any wrongdoing, dishonesty, misconduct, or other illegal behaviour. In the absence of such, the carrier must get paid.
The factual situation of Excel's case[20] was that the shipper and consignor, *Marriott International*, hired Excel, a freight forwarder, to arrange multiple cargo shipments to Hawaii.
The shipper, *Marriott International,* was renovating a hotel in Hawaii and had multiple cargo shipments that needed delivery to the Hotel site. Thus, it is apparent that Marriott International was the shipper and the consignee of the numerous cargoes. Marriott International hired or contracted Excel Transportation Services as its freight forwarder. Then or thereafter, Excel contracted a second freight forwarder, Cab Logistic, who employed or contracted CSX lines to transport the multiple cargoes. CSX Lines began shipping the cargo and released it to Marriott Resorts in Hawaii. Although Excel paid Cab Logistics for the shipments, Cab Logistics was not forwarding the payments to CSX Lines. CSX Lines said it did not demand payment on delivery because it relied on Marriott's previously established creditworthiness and goodwill.
Consequently, CSX lines billed Marriott International directly for the initial shipments. Marriott complained to Excel Transport Services Inc. Consequently, Excel contacted CSX lines, telling them to bill Cab Logistics, who had received payment.
Facts revealed that CSX Lines sent two past notices to Marriott International when Cab Logistics stopped paying. It further communicated with Cab Logistic and Excel, hoping the payment problem would be resolved. Meanwhile, CSX Lines held cargo containers in Hawaii until Marriott directly paid part of the debt, leaving an outstanding 300,000 shipping charges unpaid. At one time, CSX lines sent all invoices to Cab Logistics and looked forward to Cab for payment, but when it was told to stop billing Marriott International, originally, CSX lines sent invoices to Marriott.

The argument was canvassed on behalf of Excel that CSX lines misled it into believing that Cab had paid the shipping bills because CSX lines did not notify it instantaneously, as per the Cab Logistics deficiency. Further, Excel argued the absence of privity of contract between it and CSX lines, stating that it cannot be liable to CSX. In addition, they claimed neither Excel nor Marriott was Cabs' principal, but Cabs' Logistics was an independent contractor and could not be caged in for Cabs' failure to pay. In summary, they argued that they were absolved from liability since Excel was neither Cab's principal nor in privity with Cab's lines. The Court held thus[21]:
i. Shippers are always liable for payments of freight charges, but the parties could reallocate this responsibility either explicitly by agreement or implicitly through their actions.
ii. CSX Lines' compliance with Excel's request to stop sending invoices to Marriott did not release Marriott or Excel from liability to pay.
iii. Since Marriott's liability was listed as the shipper and consignee on the invoices, it was not released from its responsibility to pay.
iv. Marriott's liability for payments did not end when it stopped receiving the bills, since it never requested an exemption from liability.
v. The CSX lines did not misrepresent the Cab's payment status.
vi. Marriott was negligent in not investigating the problem when it was first informed.
vii. Excel, Marriott International, Marriott Hotel services and Cub Logistics were jointly and severally liable to CSX for the charges incurred in shipping the cargo to Hawaii.
viii. Cab's status as an independent contractor does not release Excel from liability. The Bill of Lading and CSX's tariff made the shipper and consignee liable no matter what, regardless of their relationship with the carrier.

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[18] Suit No. SC 135/1985

[19] 19. *Mrs C.A. Sobamowo v. The Federal Public Trustee Suit No*: SC 77/1968. Supreme Court of Nigeria Judgement on Friday, the 29th day of May, 1970.

[20] Hearn, M.G. er.al: "Fact of Fiction: The General rules on Carriage of Goods", T.T.L. April 2012, Vol. 13, No. 5.

[21] *Ibid*

The tenor of this case is that, by the representation in the Bill of Lading, it estopped the consignee and the shipper from pleading anything to the contrary, except there was an agreement to that effect. The imprints on the Bill of Lading in law are tantamount to representations from which they could not resile. The Court, per Hughes D.J., explained the policy decision for this common law principle thus[22]:
The bedrock rule of carriage cases is that, absent malfeasance, the carrier gets paid. It is superficially unfair that Excel and Marriott must pay for the shipments twice. However, allowing them the benefit of Carriage without compensating the carrier would eventually cripple the shipping industry, and the economy generally, as carriers devoted their time to investigating potential customers. The entire point of the tariff regime, promoting commerce by removing a shipper's credit worthiness from the carrier's list of concern, would be eviscerated.

The second issue is: who is liable? As a general rule, the Bill of Lading determines who is liable[23]. However, it is also a truism that parties could modify the Bill of Lading by a prior written contract between the shipper and the carrier. The rule is that when parties enter into a contract before preparing a bill of lading, and there is an irreconcilable difference between the two documents or they conflict with each other, the prior written agreement prevails. Put differently, in case of any irreconcilable repugnancy between the prior written agreement on contract and the bills of lading, that conflict would be resolved in favour of the previous deal. It should be noted that this position is against or is repugnant to the maxim that *leges priores posteriors contrarias abrogants*, interpreted to mean that where the provisions of a later document are contrary to those of former document, the former must be considered as repealed. The former is the agreement, and the latter is the Bill of Lading that should rescind the agreement.
In other words, where the provision of a former document contradicts the latter, the former must be considered repealed. In this sense, it is necessary to reconsider or rethink the supra-legality of that canon of interpretation. By this rule, that a former contractual document takes priority over the provision of the billing of lading which is later, it should be considered an exemption to the *leges priores rule* as it estopped both the carrier and the shipper from pleading the contrary. The innuendo from that legal position is the rule of priority, that is to say, the agreement is first in time.

However, in the absence of a contract, where the Bill of Lading controls, the courts take a critical look at the 'abbreviated notations found on Uniform bills of lading to determine who is liable, such notations as exemplified by Hearn et. al are as follows[24];
i. "Prepaid" means the shipper/consignor is obliged to pay the carrier.
ii. "Collect" means the consignee is obliged to pay the carrier.
iii. "Nonrecourse" means a consignor must sign the nonrecourse box to be free from liability for freight charges.
iv. "Bill to third party" notation notifies a carrier that a third party will pay. But this notation does not absolve the consignor from liability unless and except the consignor has signed the nonrecourse box.

According to Hearn et.al, under the uniform Bill of Lading terms, the shipper or the consignor cannot escape liability unless the Bill of Lading is *automated "Nonrecourse"*. In contrast, the consignor, unless the Bill of lading is marked "prepaid", and even at that, the consignee must have paid its Bill to the consignor beforehand.
An interesting case to indicate the inadequacies of S. 172 of the Evidence Act 2011 is the American case of *Jones Motor Co. Inc. v. Teledyne and the United States of America*[25]. There are two cases on this matter. The first one under consideration involves the preliminary objection raised on behalf of the Government of the United States of America. The factual situation of this case goes thus. *Jones Motor's Co Inc*[26], otherwise referred to as Jones Motor initiated this action against Teledyne, Inc, hereinafter referred to as Teledyne and the United States Government to recover unpaid transportation charges of 62,100.00 dollars for 54 shipments of tank engine parts shipped by Jones Motor at Teledyne's request from Muskegon, Michigan, to the harbor at Baltimore, Maryland. Teledyne answered the complaint, denying liability and cross-claiming against the United States Government, seeking indemnification of the transportation charges according to an express guarantee on the bills of lading. The United States denied liability because the local contracting officer lacked the authority to issue the guarantee clause and because any equitable theories of relief were unavailable.
The United States raised, inter alia, two objections worth examining. The first objection was that neither Jones Motors nor Teledyne filed their claim regarding this dispute following the existing Act with the Administrative Contracting Officer. The basis of the United States' Government was that the Act divests the Court of its jurisdiction, since the Act's legislative history revealed that Congress intended to encourage resolution of matters of this nature through negotiations[27].
However, the Court discovered that the Act did not apply to every government contract. Thus, the Court rejected the proposal to make the Act applicable to agreements tangentially connected with government procurement of goods and services. Therefore, the initial issue in the preliminary objective argument was whether the guarantees made by the United States Government and imprinted on each Bill of lading are a contract which falls under the Act[28]. The Act provides that:

[22] 280 F. Supp. 2d 617 S.D, Tex. 2003
[23] *Supra*
[24] *Supra.*
[25] *Supra.*
[26] *Hearn, et.al. op.cil*
[27] Hearn, et.al. op. cit.
[28] 690 F. Supp. 310 CD Del. 1088.

Unless provided otherwise, it covers any express or implied contract entered into by an executive agency for (i) the procurement of property, other than real property in being, the procurement of services; (ii) the procurement of construction, alternation, repair or maintenance of real property; or (iii) the disposal of personal property.

The Court decided that, by definition, the Act does not cover a guarantee by the United States Government. The Court considered many definitions of guarantee, one of which is: an undertaking or promise that is collateral to primary or principal obligation that binds the guarantor to performance in the event of nonperformance by the principal obligor[29]. Consequently, the Court express its opinion thus[30]:
Consequently, the hallmark of a guarantee is that it is collateral to the first obligation and is different from the basic contract to which it is collateral. The government's collateral obligation was a promise to perform in the event of Teledyne's nonperformance of its obligation. The Army Tank Automotive command did not enter an express or implied contract with Jones Motors to deliver the tank engine assemblies. Instead, the government promised to pay Jones Motors if Teledyne failed to comply with its obligation imposed by the contract between it and Jones Motors. As such, this Court cannot consider the government's guaranty contract a contract for procuring services. Teledyne is not suing the government for breach of this contract. Teledyne's claim is based upon the guaranty language provided by the government at a later date. Thus, the prime contract's requirement that disputes arising thereunder be resolved per the Act is not applicable in this instance.

The second objection raised by the government in support of its motion for summary judgment is that this Court does not have jurisdiction under the Tucker Act and that a Federal District Court's jurisdiction under the Tucker Act for claims against the United States is limited to claims not exceeding $10,000. Hence, Jones Motors has 54 claims, based on 54 bills of lading, each costing 1,150 Dollars and totaling 62,100 Dollars, which far exceeded the limit for assuming jurisdiction by a Federal District Court. The Court does not find the government's argument persuasive enough to obviate the general principle that a bill of lading is a contract on its own.
The Court in its decision also acknowledged the fact that the case of *United States v. Louisville & Nashville Railroad Co.*[31] is squarely on all fours with this case, and the Court held it could not resile from the principle that a bill of lading is a separate contract between the shipper consignor and the carrier. The Court held further that the Bill of Lading is the basic transportation contract between the consignor and the carrier, and its terms and conditions bind the shipper and all connecting carriers. In addition, the Court pronounced that:
When a plaintiff has several Tucker Act claims and each one is under the jurisdictional ceiling, he may assert them in one action, and the claims will not be aggregated for purposes of defeating jurisdiction. It is generally well accepted that once a plaintiff correctly joins claims against a single defendant in a diversity action, he may aggregate the claims to satisfy the jurisdictional requirement that the amount in controversy does not exceed $10,000.

The second ambit of the case is the substantive matter, which concerns the legal effect of the annotation on the Bill of Ladings and the representation made by the government in guaranteeing payment. On the bills of lading, the Grand Rapids instructed Teledyne to (i) issue commercial bills of lading and to annotate freight bills prepaid, mail freight charges to the following address: Prudential Lines Inc, I world Trade Centre, New York, N.Y. 10048; (ii) annotate Freight Bills Transportation charges are guaranteed by Transport office, DCASMA Grand Rapids, Nil 19504, and (iii) Initiate intercourse clause on the freight Bill. Ms. Ann Fick, the Transportation Officer, DCASMA of Grand Rapids, Michigan, and the authorised agent of the Administrative Contracting Officer, Mr. J. James Young, provided these instructions. Each of the 54 Shipments transported by Jones Motor was made under a separate bill of lading, and Teledyne followed the above instructions in executing the 54 bills of lading. Although all the bills of lading were annotated with the word "Prepaid", none bore a designation' freight charge collects on third party billing'.
The Court discovered that the letter of Agreement between the United States and the Republic of Turkey does not authorise the contracting or transportation officer to guarantee shipping charges. Meanwhile, Jones Motors, yet to receive payment for any of its deliveries and owned 62,100.00 Dollars, calculated at the rate of ₦1,150 dollars, (aside any interest that accrued as a result of non-payment) consequent upon refusal of payment by Prudential Lines together with Teledyne and repudiation of liability by the United States government, Jones Motor commenced this action in consequent.

The decisions of the Supreme Court were based on three legal issues pertaining to:
i. breach of contract,
ii. promissory estoppel and
iii. the principle of Quantum Meruit

An issue relating to breach of contract claims against Teledyne, Jones Motor contended that Teledyne is liable for the unpaid transportation charges. On the other hand, Teledyne canvassed the argument that the Bill of Lading was annotated "prepaid, third-party billing" and in this respect, prudential, not Teledyne, ought to be liable for the shipping charges. Teledyne further argued that the "nonrecourse clause" insulates it from liability for any shipping charges, which is consistent with the purpose of government instructions and the guarantee language to protect Teledyne.

[29] *Supra.*
[30] *Supra.*
[31] *Supra.*

On the above argument, the Court held that in the present case, the nonrecourse clause only protects Teledyne from liability for payment of accessorial charges not ordered on the Bill of Lading. But Teledyne is still liable for the line haul charges under the term prepaid. The Court held that Teledyne is not shielded from liability to pay transport charges since Prudential did not pay it, and the operability of the nonrecourse clause could not be used as a shield, according to the Court.

……..*The only reasonable conclusion that could be drawn from this convoluted situation is that at least Teledyne remains liable for the shipping charges. Teledyne's assertion that it cannot be held liable under the 'nonrecourse clause' is misplaced because the express terms of the tariff prohibit a third-party billing situation if the nonrecourse clause is signed.*

On the applicability of the principle of promissory estoppel, the plaintiff and Teledyne both claimed that even if Ms. Fick was not authorised to issue the guarantee language, the United States government is still liable for the unpaid shipping charges under the principle of promissory estoppel. On the note, the Supreme Court of the United States of America raised an interesting caveat. According to the Court, apart from fulfilling the traditional requirement of the principle of promissory estoppel as applied to private citizen while invoking the principle against the government, the pleader had the additional burden of ensuring that he who purports to act on behalf of the government must stay within the bounds of his authority, the scope of such authority as explicitly defined by the Congress.

In the language of the Court. Although most circuit courts permit recovery against the government under the doctrine of estoppel, it has never been addressed by the Supreme Court. Noting that the historical rule disfavours the imposition of the estoppel defence against the government. Anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he purports to act for the government stays within the bounds of his authority. The scope of authority may be explicitly stated by Congress. Thus, men must turn square corners when they deal with the government.

The Supreme Court also held that it lies on the plaintiffs to prove affirmative misconduct on the part of the government official to ground a case of promissory estoppel against the government. The Court puts it in these words[32]:

However, the plaintiff has failed to introduce evidence that Ms. Fick acted with "affirmative misconduct" by intentionally or recklessly inspecting the guarantee language into the bills of lading. Instead, plaintiff and Teledyne argue (SIC) that if Ms. Fick's unauthorised action was a mistake of law, the government is still liable …… Even if the plaintiff's argument were correct, a mistake of law is analogous to mere negligence….. does not rise to the level of affirmative misconduct necessary to hold the government liable for the unpaid shipping charges in this case.

Based on the above opinion expressed by the Court, the Court concluded that the plaintiff is not entitled to recover the unpaid shipping charges from the government under a theory of promissory estoppel. To be precise, for the plaintiff to succeed in such a case, the innuendo from the decision of the Supreme Court is that the plaintiff must prove the following:

i. A misrepresentation by another party
ii. The reasonable reliance on the misrepresentation
iii. Reliance on such misrepresentation to their detriment.
iv. Ensuring that the representative acted within the bounds of his authority (in action against the government)
v. The representee or plaintiff seeking public funds must ensure that the representor act with scrupulous regard for the law requirement.
vi. The litigant must prove affirmative misconduct on the part of the public officer acting on behalf of the government.

While the Court concluded that the plaintiff satisfied the first three traditional requirements, they failed to comply with the last three requirements.

Lastly, on Quantum Meruit, it is a Latin phrase meaning "what one has earned". In contract law, it implies a reasonable sum of money payable on services rendered for work done for the beneficiary of such service. Concerning this case, both Jones Motor and Teledyne contended that the United States Government is liable for the unpaid shipping charges under the theory of quantum meruit. Applying this principle, the Court states that:

As the federal circuit has recognised in many circumstances, this Court agrees that it would violate good conscience to impose upon the contractor all economic loss from having entered into an illegal contract. Where the contractor has conferred a benefit on the government in the form of goods and services, which it accepted, a contractor may recover at least on a quantum valebant[33] or quantum meruit basis for the value of the conforming goods or services received by the government….. since the amount of recovery by the contractor under this theory is limited to the value of the benefits to the government, it follows that if the government receives no benefit from the contractor's performance, the contractor receiver no compensation.

Based on the above, the contractor must prove the following to succeed in a "Quantum Meruit" claim[34].

i. That he supplied goods or rendered services to the government.
ii. The plaintiff would bear the burden of the entire economic loss if not compensated.
iii. The government had obtained benefits from the supply of goods or services rendered.

In this case, the Court allowed the plaintiff's claim against the government on quantum meruit in the following concluding remarks. The government received the benefit of the services provided by Jones Motor in transporting the tank parts from Michigan to Baltimore, and Jones Motor is entitled to receive fair compensation for those services, guaranteed by the government in the bills of lading. The Court also noted that it would be unfair and inequitable for the government to induce

[32] *Supra.*

[33] *Supra*

[34] 236. U.S. (1914)

Jones Motor to enter into the contract to deliver these goods and turn it back when payment is due. For the same reasons, the Court also finds that the government must indemnify Teledyne for any $62,100.00 it may have paid for the transportation costs.

With due respect, this Court decision is far from stratospheric. The argument is tantamount to a convoluted twist if the Court held that, first, that a case of promissory estoppel could not be found in this case in, that "the plaintiff has succeeded in proving traditional elements of estoppel but that Mr. Fick did not have the authority to issue the guarantee of the transportation charges which Teledyne reasonably relied on and in another twist the Court pronounced that it could be unfair and inequitable for the government to induce Jones Motor to enter into the contract to deliver these goods and then turn its back when payment is due. In this regard, the two statements by the Court are opposed to each other. This is a situation where the antecedent denied the consequent and the consequent denied the antecedent". The Court ought to have found a case of promissory estoppel against the government in favour of the plaintiffs.

Nevertheless, it is submitted that this decision by the Court might stem from the policy statement by the Court that is inherent in its judgment, thus:[35]

"Moreover, it is now well settled that the government may not be estopped on the same terms as any other litigant because when the government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedient to the rule of law is undermined. The third circuit recognises the judicial reluctance based upon consideration of sovereign immunity, separation of powers and public policy, such as the fear of binding the government by the improper acts of its agents due to fraud, collision or the severe depleting of the public treasury".

5.8 Contract to Modify Bill of Lading

The shipper or consignee may raise the defence that they have modified the clauses in the Bill of Lading by a prior written agreement with the carriers. Thus, if the fact remains that parties are free to assign liabilities for payment of freight charges to another party via their agreement. Such a contract might state in the assignment of liability that (i) only the shipper is liable, (ii) the shipper pays only if the consignee does not pay, (iii) only the consignee is liable, or (iv) both the consignee and the shipper are liable. Any contract to modify the liability provisions of the Bill of Lading must involve the shipper and the carrier. Once modified, the parties are estopped from stating otherwise.

Raising the defence of estoppel where the carrier sued either the shipper or consignor, and the consignee is an interesting legal issue. This common occurrence happened when the carrier did not receive freight charges after it discharged the goods to the appropriate destination. Default in payment sometimes arises when the shipper or the consignee has paid a third party who has reneged on paying the carrier. In this situation, the shipper (consignor) and the consignee raise the estoppel defences to avoid double payment. Legally, however, pleading double payment is not enough to raise the defence based on the principle of estoppel. To establish estoppel in such circumstances, the following must be proved:

i. the carrier's misrepresentation
ii. exemplified in a false misstatement of prepaid on the Bill of Lading
iii. detrimental reliance on the misstatement.

Meanwhile, it is a tall order to prove detrimental reliance, most especially on the part of the consignor. On the other hand, it is very easy for the consignee to prove injurious reliance, as exemplified by case laws. Case law in the United States of America presents a problematic situation for a consignee that doubles as the consignor. In this respect, this paper examined two cases from the United States of America for the legislature's attention on the principle of estoppel concerning freight charges and liability thereof. The first is CF *Arrowhead Services, Inc. v. Amcec Corp*[36]. In this case, before the Court is the party's motion for summary judgment, where the legal issue centred on one undisputed common fact as to whether a carrier could recover its freight charges from the party that accepted the goods as consignee.

The factual situation of this case was that the plaintiff, *CF Arrowhead Services, Inc.,* a common carrier, carried various goods in October 1981 from Tennessee to Michigan. The consignor and seller of the goods was Mattrace Enterprises, and the consignee and apparent buyer of the goods was the defendant *AMCEC Corporation*. CF Arrowhead carried the goods pursuant to tariffs on file and issued bills of lading and freight for each shipment. Each Bill of Lading provided that if a particular box was not checked, the cargo was prepaid. None of the boxes were checked. Each Bill of Lading also provided that the shipment was received subject to the applicable tariffs.

The Court found it necessary to state section 7 of the said tariff, which states thus;

The owner or consignee shall pay the freight and average, if any, and any other lawful charges accruing, except in those instances where it may be lawfully authorised. No carrier shall deliver or relinquish possession at the destination of the property covered by this Bill of lading until all tariff rates and charges thereon have been paid PROVIDED, that, a consignee shall not be liable for transportation charges (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him subject to all the following conditions:

a. where the shippers or consignor instructed the carrier to deliver the goods to a consignee other than the shipper or consignor

[35] Jones v. Teledyne and the U.S. Supra

[36]36. *Supra.*

b. where the consignee is an agent only and has no beneficial title in the goods
c. where, before delivery, the consignee has notified the carrier in writing that he is only an agent without any beneficial title in the goods
d. where the shipment has been reconsigned or diverted to the destination rather than that stated on the Bill of Lading, and the consignee accordingly notified the carrier in writing of the name and address of the new consignee who has beneficial interest in the goods.

Based on the above facts, the Court's well-considered judgement viewed that the resolution of this case is found in the first sentence of S. 7 of the Tariff. Dissecting this section, the Court followed the logical sequence as contained therein in compliance with the provision:
i. The first part of the sentence makes the consignee liable for the freight charges.
ii. The payment of the charges thereafter becomes due at the time of delivery
iii. The rest of the sentence made it clear that liability is not absolute
iv. That, unless lawfully authorised to do so, the carrier must not relinquish possession of the goods being carried until the freight charges have been paid.

Thus, according to the Court, the Court considered that S. 7 made payment of freight charges a condition precedent to the carrier's deliverance of the goods to the consignee[37].
The carrier can use its possession of the goods to ensure payment, and the consignee can refuse delivery until it is satisfied that the proper party is paying the freight charges.
Here, by relinquishing the goods without demanding payment from AMCEC, CFArrowhead also relinquished its right to recover the freight charges due at that time from AMCEC.

The Court held in consequence.
i. The four conditions (a through to (d)), rather than applying to all freight charges, apply only to those charges that may be due after the property has been delivered.
ii. The charges that Cf Arrowhead seeks to collect were not found to be due after delivery; they were, in fact, due at the time of delivery.
iii. Those conditions listed in S. 7 give the consignee ways to protect itself from liability for charges which it knows nothing about at the time of delivery.

On estoppel, AMCEC argued that CF Arrowhead has stopped collecting freight charges because its payments to Mattrace expressly included the freight charges. In contradiction, Cf Arrowhead argued that an essential element of estoppel exception is that the consignee paid the freight charges to the consignor after delivering, relying on the carrier's misrepresentation as to that payment. They argued that AMCEC had paid most of the purchase price and freight charges to Mattrace before the delivery of the shipments.
However, the Court felt unimpressed by this submission and failed to give such factual difference as per the timing of payment as precluding AMCEC from invoking estoppel exception. Consequently, the Court found that it is undisputed that Cf Arrowhead has stopped claiming its freight charges from AMCEC. According to the Court, per William Hart, with Stevens. J., concurring,
this Court does not view those factual differences as precluding the use of the estoppel exception. Given the rule of the consignee's liability discussed above, accepting delivery is obviously a detriment to a consignee since the consignee is then liable for the freight charges. Since AMCEC obviously would not want to pay the freight charges twice, it would not have accepted delivery if it had known that, contrary to CF's representation, Mattrace had not prepaid the freight charges, its position was detrimental in reliance on CF Arrowhead's misrepresentation. Allowing CF, Arrowhead to recover under these circumstances would require an innocent consignee to defray freight charges exactly double the amount contemplated by the applicable tariffs.

Based on the above observation, the Court estopped CF Arrowhead from claiming the freight charges, which would have subjected AMCEC to the risk of double payment while denying the motion for summary judgment brought by CF Arrowhead. The Court, however, reached a diametrically different decision in the case of *Hilk Truck Lines, Inc. v. House of Wines, Inc*[38]. This case involves an action brought by the Hilk Truck Lines claiming transportation, charges for the seven loads of Coors beer from House of Wine, and being the wines' consignee. The House of Wine denied liability. For clarification, Hilk Truck lines is a motor carrier operating in the United States of America, whilst House of Wine is a beer and Wine distributor. Western State Beverages was the shipper involved in the litigation. The petition brought to the Court by Hilk Truck was predicated on two theories of recovery; the first was that the defendant House of Wine was the principal acting through its agent, Western State Beverage and consequently the consignor of the goods and therefore liable to pay the shipping or freight charges. The second theory was that the defendant, House of Wine, the receiver of the goods, was also the consignee and, as such, responsible for the payment of shipping or freight charges.

The defendants, House of Wine, in contradicting the plaintiffs, raised the defence that, first, the hill of ladings was marked 'prepaid' and consequently, placing reliance on that annotation, the theory of equitable estoppel applied in that the Freight or

[37] Suprs. s
[38] Jones Motor ‘ci. Inc. v. Teledyne Inc Sipra.

Shipping charges were made to the shipper directly. Secondly, the defendant denied being the principal of Western States Beverage; consequently, the shipper cannot be its agents. The Court held that :

i. The Bill of Lading states that Western State Beverage is the consignor of the four shipment loads.
ii. The House of Wine is the consignee of the four loads of shipments.
iii. Placing reliance on authorities, the rule was established that, regardless of contract, in equitable principles, a consignee who accepts delivery cannot avoid liability for freight charges.
iv. In many cases, the courts consistently affirmed that Congress intended to impose absolute liability upon the consignee[39].
v. That, far as the consignee of goods, as a matter of law, cannot evade liability for payment of freight charges by operation of law, the liability is absolute, and to avoid such liability, the defendant must prove the facts sufficient enough to create estoppel.
vi. The defendant, House of Wine, has failed to discharge the burden of proof of an estoppel defence, and since the payments have been made to Western State Breweries, before delivery of the good,s there was no way by which they would have placed reliance on the annotation contained in the Bill of Lading.
vii. Consequently, the defendants were liable to the plaintiff to make payment for the four shipments. The Court pronouncing on the principle of estoppel stated that[40]:

To establish an equitable estoppel, the defendant consignee must proof that the plaintiff made a false representation or concealment of material facts with actual or constructive knowledge of such false representation or concealment; that the defendant consignee did not have the knowledge or means of knowledge that such were misrepresented; and that the defendant consignee acted with reliance upon such facts to his prejudice.

These deadline or convoluted positions emanating from the United State of American Supreme Court is instructive to the parliament to fully understand the trends of case law concerning this aspect of the law to come out with reasonable and all embracive legislation in this aspect of law of Carriage by Sea, especially concerning freight charges that could stand the test of time. In this regard, the Evidence Act 2011 of Nigeria left much to be desired concerning estoppel legislation for Carriage of Goods by Sea.

It is worth noting that it is challenging to conclude that the Court in the *Hilk Truck line case delivered its judgment per incuriam*[41]. However, some salient legal facts are more relevant to estoppel matters concerning payment of freight charges.

i. First, is the paramountcy that carrier must get paid and that carrier looked up to the shipper/consignor or consignee for payment.
ii. Second, the bills of lading are primarily a contract between the consignor, the shipper and the carrier, and secondarily, it is a contract between the carrier and the consignee.
iii. However, the Court sometimes looks beyond the Bill of Lading to determine the party responsible for payment in conflicting annotations.
iv. The Court sometimes relied on the carriage tariff to resolve conflictual situations in Carriage by sea matters, most especially on payments of freight charges.
v. The consignor shipper and the carrier may vary the terms of their contract by a prior written agreement. Also, the parties, i.e., the shipper/consignor, the carrier, and the consignee, can also vary their contracts by assigning responsibility for freight payment to a third party. Such variation estopped the other party from denying the representations that form the basis of their contracts.
vi. Where a shipper or consignee pays a third party who failed to deliver the money to the carrier, without any misrepresentation from the carrier, the shipper or consignor will pay double. Though the party who made payment may wish to invoke the estoppel defence, they can only succeed where the carrier's misrepresentation exists to the detriment of the party that pays.
vii. Revelation from case law shows that shippers, rather than consignees, find it more challenging to prove the estoppel defence. This is based on the principle that shippers are in the best position to avoid liability for double payment by ensuring that they deal with a responsible and reputable freight forwarder or by paying the carrier directly.
viii. Except, there is culpability on the part of the carrier. The prepaid consignee might also find it a herculean task invoking the defence of estoppel where the third-party payee refused to pay the carrier.
ix. All things being equal, consignee might find itself in a predicament of making double payment in their choice of freight forwarder, except the carrier is involved in choosing the third-party freight forwarder. Without that, there can never be privity of contract between the freight forwarder and the carrier.

5.9 The Carriers' Liability-Bills of Lading as a Receipt

Generally, the terms set out on the reverse side of the bills of lading represent evidence of the contract of Carriage between the consignor, shipper and the carrier. Also, it is generally agreed that the Bill of Lading represents the receipt for the goods. The marginal description of the goods in the free space margin of the bills describes the goods in terms of their quantity and quality. The importance of the description lies in the fact that the consignee of the goods would generally have no opportunity to verify the representations made by the carrier at the time of preparation of the goods for shipment regarding the quantity

[39] 614 F. Supp. 1384 (ND. III. 1985)

[40] Jones Moto's ci. Inc. v. Teledyne Inc. Supra

[41] Hearn, et.al, op.cit

and quality of the goods. Consequently, the consignee, mainly the goods' importer, heavily relied on the representations the carrier made on the marginal notes[42]. The Bill of Lading as a receipt represents a document describing the number of packages and quantity of goods the ship carries, as indicated by the shipper in writing. On that representation, the consignee parts with the purchase price based on the carrier's representation[43].
The Bill of Lading is prima facie or even conclusive evidence of the quantum and quality of goods carried by the carrier. Thus, where the carrier breached an obligation regarding the quantity of the goods, the carrier might be held liable on the principle of estoppel founded on common law. In this case, the carrier has made an unequivocal representation of fact as per the quantity of the goods, with knowledge of its falsehood, or with careless misrepresentation as to that fact, the other person i.e. the consignee who acted or such misrepresentation has attuned his position by paying for the goods to his detriment, an estoppel arise as to the carriers representation[44].
Finally, it is worth noting that the carrier is not estopped as to the representation made on the quality of the goods, as the carrier cannot prove the state or the internal condition of the goods[45].

6.0. Invoking the Principle of Estoppel in Double Jeopardy Situation

Another serious gap or lacuna in the 2011 Evidence Act of Nigeria is the critical estoppel issue about double prosecution, or double trial. This lacuna was, however, provided for by S. 36(9) and (10) of the 1999 Constitution of the Federal Republic of Nigeria as amended.
S. 36(9) provides that:
No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence, save upon the order of a superior court.
S. 36 (10)
No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.

The sections of the Constitution elicited above are the equivalent of estoppel per rem judicata in civil cases. In this respect, it is a fellow up to the principle that matters and issues once litigated to conclusion before a court of competent jurisdiction, should never be relitigated. Doing so constitutes an abuse of the legal process, which is in tandem with the public statement that litigation must end. Thus, except for fresh evidence that was unavailable at the first trial, which upon proper perusal would have led the Court to reach a different position opposed to its previous ones, the matter and issue once litigated to finality by a court of competent jurisdiction are foreclosed.
In criminal matters, section 33(9) of the 1999 Constitution of the Federal Republic of Nigeria, as amended, estopped double prosecution of criminal matters. This operates as estoppel against double prosecution. This is the principle that the accused, once tried, convicted or acquitted could not be subjected to a second trial for that same offence, or any other offence having similar ingredients as the one for which he had earlier been convicted or acquitted.

With due respect, it is also submitted that this principle, as enshrined in the 1999 Constitution, is also operative even when the first trial is criminal prosecution and the second trial is civil prosecution, provided the two trials emanated from the same conduct. For illustrative purposes, where Junaid committed theft against Zainad. Then, when the state initiated prosecution against Junaid on the count of stealing, Zainad could also institute a civil action against Junaid, since the rule in *Smith v. Selwyn*[46] had been abolished in Nigeria. This ought not to be so. This submission is premised on two points of law. First, the wordings of S. 33 (9) itself encompass the following ingredients that the accused must prove successfully when the section is raised as the defence under that section:

i. He must show that he has been tried.
ii. The trial must be by a court of competent jurisdiction or a tribunal.
iii. The trial must be on merit and be conclusive.
iv. He must either have been convicted or acquitted.
v. He must show that the offence for which he is now being tried has the same ingredients as the previous offence for which he has been either convicted or acquitted.

The effect of this provision lies in the choice of words "for which he is now being tried". This phrase is not particular about the second trial being a criminal matter. Per adventure, if the word 'charged' had been used in the statute instead of 'tried', emphasis would have been that the second trial must necessarily be criminal. This submission aligns with the principle that a person should not be vexed or twice punished for the same offence. The canon of expression is '*nemo' debet bis puniri, unio delicto''*. The effect is that no one should be subjected to the risk of double jeopardy.
Another vital exemption introduced by S. 33(9) is the adjectival clause 'save upon the order of a Superior Court'. To appreciate the importance of this provision, which introduced the principle that a superior court could order a second trial, we need to look at some crucial developments in the United Kingdom, Australia and the United States of America vis–à–vis Nigeria. In the United Kingdom, a significant change in the double jeopardy rule was introduced on April 4th, 2005 following the Report

[42] *Ibid*
[43] *Ibid*
[44] *Ibid*
[45] *Ibid*
[46] Smith v. Selwyn (1814) K.B p p.98.

of Law Commission, Administration of part 10 of the Criminal Justice Act 2008, which now allows for quashing of acquittal and a retrial in the case of emergence of a new and compelling evidence and when particularly it is in the interest of justice to order a retrial. In Australia, Carroll's case, specifically Carroll v. the Queen, occasioneda rethink of the double jeopardy principle. This is a case where Raymond Carol, earlier on indicted for the abduction and murder of a 17-month-old girl in Queensland, but whose conviction was quashed by the Appellate court for want of evidence, was again re-arraigned. He was re-arraigned because advances in medical research and forensic science overwhelmingly strengthened the case against him. He was subsequently charged with perjury as an indictment for murder would fail under the double jeopardy rule, and he was found guilty by the jury. The Queensland Court quashed this conviction.

Meanwhile, the public backlash and outcry that greeted this decision led to the reform of the double jeopardy rule by the New South Wales Government under the government's move to enact a new evidence exception for the double jeopardy rule, on September 3rd 2013, which allows a retrial[47].

The above development in Australia, it is submitted, was replicated by the adjectival clause in S. 33(9) of the Constitution of the Federal Republic of Nigeria 1999, which is to the effect that there could be a retrial of an accused once convicted only by the order of a superior court. Thus, it is also submitted that the issue could be raised before the Supreme Court for a retrial of an accused earlier on discharged either in the face of the emergence of a new and compelling evidence which points unequivocally to the accused as one who has committed the offence for which he was earlier on discharged, or where forensic evidence pointed to the accused as the actual culprits for the offence for which he was acquitted[48].

Another issue of prime importance, which creates a serious lacuna in the Evidence Act 2011 of Nigeria, relates to what we call an issue about estoppel certificate in the legal world. What is an estoppel certificate? Estoppel certificate is the representations or statement by the lessee of a property, who filled in the estoppel certificate form at the lessor's request, demanding information from the lessee about a property, on the amount of his financial outlays on the property if any, the existence of any financial obligations to any bank and other necessary information's on the lessee's commitments in the property about to be leased by the lessor. The importance of an estoppel certificate is that before the expiry of the periodicity of the lease, the lessor might decide to sell the property, which forms the subject matter of the lease, or the lessor might otherwise decide to use the property as collateral security. In this circumstance, to protect the buyer's interest, or lender confirmation ought to be made as per the current status of the lease agreement. A lease certificate is, in essence, a document commonly used in real estate transactions which verifies the lease terms. Every transaction in real estate requires investigations such as purchase of property under a lease agreement, or using a property under a lease agreement as collaterial security to obtain a loan requires the lender to verify the details about the remaining periodicity of the lease, whether the leasee had used his term term to procure a facility, whether there is a proviso for extention of term etc. The graphic details of the verification are put on paper. Based on the strength of this paper, the buyer might decide to purchase the property, or the sender might give the loan out. Thus, when signed, the lessee cannot deny his representations, and the lessor cannot rescind from the contents of the estoppel certificate. The 2011 Evidence Act of Nigeria did not envisage this novel development in the applicability of the principle of estoppel.

Conclusion: There is a great debate as to whether estoppel is a rule of evidence or a rule of substantive law. This paper attempted to determine whether estoppel is a rule of evidence, substantive law, or a rule of law in Nigeria against the background of S. 169 – 174 of the Evidence Act of Nigeria 2011. In this respect, the paper looked at the common law positions. Also, it appraised the 2011 Evidence Act of Nigeria, by examining the adequacies or otherwise of the provisions on estoppel matters as to whether it is comprehensive enough to capture the new developments in applying the principle of estoppel. In determined this, the paper examined some cases from Australia and the United States of America Supreme Courts and we concluded that the provision is inadequate as it fails to capture the expanding frontiers of estoppel such as; on Carriage of goods by Sea, estoppel certificate, estoppel to compel governmental in contract of Carriage of goods by Sea, estoppel to preempt double prosecution by states. The paper concluded that estoppel is a rule of law, a rule of evidence and a rule of substantive law in Nigeria. The ex-rayed the circumstances when there can be a shift of the evidentiary onus, especially in proprietary estoppel cases, when the doctrine could be used as a sword, showing estoppel as a rule of substantive law. The paper touches on issues where estoppel is used as a rule of substantive law, providing a cause of action.

Findings revealed that there are uncovered areas on the principle of estoppel in the 2011 Evidence Act of Nigeria (as amended), and that S. 172 of the Evidence Act relating to signing of Bill of lading does not in any way capture the whole matter concerning estoppel situation that may arise on a bill of lading in term of recent development in case law relating to this aspect of estoppel in Carriage of goods by sea and admiralty matters. Essential court decisions in the United States of America were also navigated where the Court concluded that the plaintiff is not entitled to recover the unpaid shipping charges from the government under a theory of promissory estoppel and that for the plaintiff to succeed in such a case, the plaintiff must prove the following:

I. A misrepresentation by another party
ii. The reasonable reliance on the misrepresentation
iii. Reliance on such misrepresentation to their detriment.
iv. Ensuring that the representative acted within the bounds of his authority (in action against the government)
v. The representee or plaintiff seeking public funds must ensure that the representor act with scrupulous regard for the law requirement.

[47] *Carroll's v. The Queen* (1985) 19a. crim. R. p. 410

[48] Supra.

vi. The litigant must prove affirmative misconduct on the part of the public officer acting on behalf of the government. Based on the above, the contractor needs to establish the following to succeed in a "Quantum Meruit" claim:
i. That he supplied goods or rendered services to the government.
ii. The plaintiff would bear the entire economic loss if not compensated.
iii. The government obtained benefits from the supply of goods or services rendered.

Findings revealed inter alia that the shipper or consignee may raise the defence that they have modified the clauses in the Bill of lading by a prior written agreement with the carriers. Thus, if the fact remains that parties are free to assign liabilities for payment of freight charges to another party via their agreement, parties are estopped from pleading otherwise. Case law reveals that shippers, rather than consignees, find it more challenging to prove the estoppel defence. This is based on the principle that shippers are in the best position to avoid liability for double payment by ensuring that they deal with a responsible and reputable freight forwarder or by paying the carrier directly. As a result of new developments in the application of the principle of estoppel, the paper recommended that New Evidence Acts should incorporate the evolving novel issues on the principle of estoppel, for example, the *Corpus Juris* concerning the application of the principle of estoppel in Maritime Law, the concept of estoppel in double jeopardy situation, and the doctrine of estoppel certificate which is profound in laws relating to Real Estate Transaction and Secured Credit Transaction.