

December 28, 1928.

Dear Judge Stone:

I have read your revised draft of No. 51 and very much regret that I still find myself unable to accept it. I think it clearly appears in the Friedlander case that the decision was put upon two grounds, one being that the fraud was in respect of a matter outside the agent's employment, and that the principle that where one of two innocent parties must suffer, etc., did not apply. I think it did apply, and I think it applies here. That principle lies outside the doctrine of respondeat superior. It is a part of the law of estoppel, and, of course, applies in a great variety of cases. Look at National Safe Deposit Co. v. Hibbs, 229 U.S. 391, 396-397. The whole question is discussed in 21 Corpus Juris, beginning at p. 1170, and the general rule is there stated to be: "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." I think our opinion here should be put squarely and explicitly upon this principle and the Friedlander case expressly overruled on the ground that the principle was there misapplied.

Very sincerely,