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EQUITABLE ESTOPPEL AND THE ENFORCEMENT OF PROMISES

Ian William Duncanson

Submitted for the award of the degree of  
Bachelor of Civil Law in the University of Durham.

B.C.L.

EQUITABLE ESTOPPEL AND THE ENFORCEMENT OF PROMISES - Thesis submitted for the degree of Bachelor of Civil Law.

ABSTRACT

Taking as my starting-point the view that equity is essentially a mechanism for preempting the enforcement of common law remedies, I attempt to show that equitable estoppel is in the main stream of equitable developments; that its history is longer than that recognized in the more recent cases; and that it currently avails promisees who are unable to frame their suits in conformity with the requirements of common law contract.

I have preferred to look to the distinctly equitable view of contract, obscured for a time by the courts of the nineteenth century, rather than to the answer suggested by Atiyah, in order to meet the problems encountered at law by reason of the official obeisance to the doctrine of consideration. The equity, I suggest, facilitates a more unified picture, when placed in the context of equity's traditional aims, of recent changes, particularly in the field of licences: for by emphasising its equitable nature, one may more easily counter the objection that new interests in land are being created. Statute aside, the trust itself is a mere highly developed form of preemption of a legal claim; so, I urge, is the so-called "new equity". And again, the confusing kaleidoscope of recent cases may gain meaning if one sees them in this way.

By reference to its history, its analogy to so-called "proprietary estoppel", and its lack of real connexion with common law estoppel, I suggest that equitable estoppel in all of its manifestations can properly found a cause of action, and that only an unjustifiable judicial timidity prevents the realization of this. Moreover, I stress that greater equivalence between law and the mores, both of the commercial and the private transactor, may be obtained through greater use of the promise-enforcing remedy: that is to say, its criterion of enforcement, "equity", like that of the reasonable man at common law, is a parameter whose value may be varied according with the standards of the time.

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## Z

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E	
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G	
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H	
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I	
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J	
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## K

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## L

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N	
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O	
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P	
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Prole v Soady (1860) 2 Giff. 1	27, 32, 37
Q	
Quinn v Leatham (1901) AC 495	10
R	
Ramsden v Dyson (1866) LR I HL 129	36, 38, 50, 58, 70, 110, 111, 115, 136, 139
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Rookes v Barnard (1964) AC 1129	55
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S	
Salisbury v Gilmore (1942) 2 KB 39	68,69,71
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U	
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W	
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Wells v M.H.L.G. (1967) 2 ALLER	117
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Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co. (1972) 2 ALLER 127	131
Wroth v Tyler (1973) 1 ALLER 897	82,118,120

## INTRODUCTION

The object herein will be to examine the nature of what has been termed variously as promissory<sup>1</sup>, equitable<sup>2</sup> and quasi-estoppel<sup>3</sup>, and to do so within the wider context of promise-enforcement in law. An account of the development of this doctrine will be attempted, together with suggestions for its future growth. The dangers attendant upon legal stasis will be indicated, insofar as they concern this area. It will be assumed, building upon Stone<sup>4</sup> and Pound<sup>5</sup>, that emphasis is often misplaced, and that law is less a body of rules than a system for the reconciliation of claims asserted by individuals and groups. The granting or refusing of legal recognition is productive of rules of a pragmatic and mortal quality, quite lacking in the omnibus and eternal attributes sometimes noticed from the Bench.

Two of the more adventurous approaches to the law of contracts have been made by judges who sought deliberately to marry equitable with legal principles, Lords Mansfield<sup>6</sup> and Denning<sup>7</sup>. The notion of the 'common law' in this, fused, sense, and as distinct from the law of the draftsman or of the civilians, seems, like that jury, 'to invite accolades clothed in robust imagery.'<sup>8</sup> In insisting upon the proper function of the common law in this sense, it is hoped that such accolades may be avoided.

Footnotes:

- 1 Tool Metal Manufacturing Co v Tungsten Electric Co(1955)1WLR761.
- 2 Spencer-Bower and Turner: Estoppel by Representation 2nd ed p332.
- 3 Wilson: Recent Developments in Estoppel 67QR330; A Reappraisal of Quasi-estoppel 1965 CLJ93.
- 4 Stone: Social Dimensions of Law & Justice Chapter 4.
- 5 Pound: Introduction to the Philosophy of Law Chapter 2; 57HLR1.
- 6 Campbell: 'Lives' - defends Mansfield, but in my view not merely unconvincingly but also unnecessarily. See Keton & Sheridan: Equity 1964 p69; Holdsworth: Blackstone's Treatment of Equity 43 HLR1.
- 7 e g in Central London Property Co v High Trees House Ltd(1947)KBL30 at p135: 'At this time of day... when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect.'
- 8 Cornish: The Jury 1970 p138.

During the middle ages, a formally stratified society made easier the task of reconciling claims and recognising interests, for it could be accomplished within each lateral social division<sup>9</sup> and even within each vertical division representing localised jurisdictions.<sup>10</sup> Subject to the paramount claims of the superior jurisdiction, and increasingly as the middle ages waned, to that of the King, in each social group and community principles could be arrived at which would reflect the dominant social values in any age.<sup>11</sup> The Chancellor himself, for reasons of expedience, appointed local laymen to examine witnesses in areas remote from London and where possible, to arbitrate in disputes 'to hear and end (them) according to equity and good conscience,'<sup>12</sup> thus ensuring that the moves of laymen should be reflected in his system of justice. A cautious summary might be that as values changed, as new interests and claims arose, they quickly became the subject of public adjudication before a tribunal of communal, feudal, or royal jurisdiction. Administration, which is bound to have value judgements about society as its basis was seen, even until the nineteenth century, as justiciable, whilst in the twentieth century justice is often seen as an administrative concern.<sup>13</sup>

#### Footnotes:

- 9 The famous remark 'Do not gloss the statute for we made it and understand better than you what it means' (also Plucknett: Interpretation of Statutes p49) attests to the closeness of the judiciary and legislature within the lateral stratum at the top of society concerned with the law of the King's courts.
- 10 See Dawson: A History of Lay Judges 1960. He indicates that the local courts were encouraged by the Royal Courts to be, as it were, closed circuits.
- 11 Although, of course, legal development occurred by cross-fertilisation, particularly as 'lower' groups gained in social significance. See Milson: Historical Foundations of the Common Law 1969 p8 'for most ordinary men and most ordinary causes the county court was the highest regular forum... and therefore a principal source of things that will strike us as novelties when we first see them transacted on the lighted stage of the royal courts.'
- 12 See Dawson op.cit.
- 13 See e.g. Titmuss: Welfare Rights, Law and Discretion. Political Quarterly 1968 p113.

In its early development, then, English law is closely associated with society which is its matrix because its courts are generally in touch with that social group for whom they are adjudicating.<sup>14</sup> Only later do lawyers and laymen obtain their divorce in the formal areas of noncriminal law, lawyers on the Bench seeming quite deliberately to fail to notice the requirements of those likely to be affected by their pronouncements. It was the Donoughmore Committee<sup>15</sup> which pronounced the heresy of the inter-war years and not Professor Laski<sup>16</sup> in the sense that the former's boundary of the justiciable involved the assumption that discretion and public policy were unknown to, and unworkable by, the judges, whilst the latter recognises that 'law is always made in terms of what life has meant to those who make the law.'<sup>17</sup> Today, the marriage of the welfare-minded politician and the conservative lawyer could sire a most unfortunate monster. The local courts and, in the pre-Stuart era,<sup>18</sup> the conciliar courts, and the controversial local Courts of Requests which survived until 1846 when they were abolished by the County Courts Act,<sup>20</sup> all gave judgements notorious to those whom they served: modern arbitration procedures and so called 'administrative' tribunals, on the other hand, are private and, in practice, unsupervised<sup>21</sup> in the majority of cases.

#### Footnotes:

- 14 See White: Lawyers and the Enforcements of Rights, in Social Needs and Legal Action (1973) eds Campbell, Carton and Wiles, for a discussion of the difficulties of providing legal solutions where courts are meant to serve the whole of society rather than particular sections of it. He postulates 'A society which recognises a continuing multiple conflict of interests and values taking place within an accepted overarching structure of a more or less fluid or dynamic nature.' (p17).
- 15 Report of the Committee on Ministers' Powers 1932, Cmd 4060.
- 16 See, e g, his A Grammar of Politics 4th ed.
- 17 Op cit at p544. See also Abel-Smith and Stevens: Lawyers and the Courts p120.
- 18 See Sydney & Beatrice Webb: Local Government vol II p71-98. They discovered that fifty Courts Baron were operational in Northumberland and twenty in Durham as late as 1841.
- 19 See Winder: Courts of Request 52LQR369.
- 20 County Courts Act 1846. 9 & 10 Vict c.95 (36 Statutes at Large 313) Sections A & B.
- 21 See Law Commission: Working Paper No 40 - Revision in Administration Law p53 para 70.

The argument is this: that lawyers who attempt to concentrate on mere legal rules produce disaster. Had the property lawyers of the nineteenth century looked beyond their doctrines, contemporary food shortages might have been less severe.<sup>22</sup> Moreover, whilst the lawyer might not greet with enthusiasm the request that he be imaginative, and look to the other social sciences, Professor Fifoot's comment upon Eastwood v Kenyon<sup>23</sup> that Lord Denman's 'appeal to history must be allowed. Whatever its value in the modern law, the doctrine of consideration still rests upon the foundations laid by Elizabethan lawyers'<sup>24</sup> might, with respect, be tempered by the observation that had we relied upon the Lord Denmans of the judiciary we should not have a law of contract. The law is dynamic by tradition, at the hands of the judge, and also in strict logic, for even accepting it as a body of rules, the application of a rule which has been applied to a previous set of facts to a new set, must attract the definition of creativity. There is little room for argument concerning the quality of the judge's role, only as to the extent to which he creates.

#### Footnotes:

22 In passing the Settled Land Act 1882 to give the tenant for life much wider powers of dealing with land subject to a settlement 'the trading purpose of the legislature was to prevent the decay of agricultural and other interests occasioned by the deterioration of land and buildings in the possession of impecunious life tenants.' Bruce v Ailesbury (1892) AC 356 at p363 per Lord Watson, and Megarry and Wade: Real Property 2nd ed p287. Legislative intervention was necessitated by 'the fact that judges since 1833 have shewn only limited mastery over the fundamentals of property law; the subject does not possess the fascination it once did.' Simpson: Introduction to the History of Land Law 1961 p259. Surely this is because its social significance is diminished. We shall return to this point.

23 1840 11 Ad & el 438.

24 Fifoot: History & Sources of the Common Law 1949 p411. See Atiyah: Consideration - A Fundamental Restatement. Inaugural Address at the Australian National University.

Proponents of claims which do not achieve recognition in the courts have open to them two possible routes, both of which have disadvantages given the conservative climate of the judicial system.

The first is recourse to the legislature.<sup>25</sup> A group which cannot effectively mobilise the legal profession, or evoke sympathy from the Bench may use its political power to bypass the courts and acquire statutory recognition for its claims.<sup>26</sup> The drawback that it is still open to the courts to interpret the legislation in accordance with their own predispositions<sup>27</sup> may be overcome by repeated intervention from Parliament, as has occurred in the trade union field, or by the setting up of a separate system of courts not entirely controlled by professional lawyers.<sup>28</sup>

The second route is simply to opt out of the legal system, and this is the route likely to be taken by the businessman. Even though arbitration may cost more,<sup>29</sup> and even though the apparent fear that trade secrets might be revealed during litigation is unfounded,<sup>30</sup> the courts continue to compete unsuccessfully with arbitration procedures,<sup>29</sup> perhaps because substantive law has lagged behind the requirements of the commercial world.<sup>31</sup> Yet

#### Footnotes:

25 Those seeking a 'right' to privacy might well take this route.

26 Following the extension of the franchise in 1867 to 37% of the adult male population, trade unions of the skilled working class were in a position to seek legislative support.

27 See Abel Smith & Stevens: *Lawyers & the Courts* pp115 and 116 for a comment upon the unfortunate *Workmen's Compensation* Legislation.

28 Calvert: *Inaugural Lecture on the English Social Security System* at Newcastle University November 1971.

29 See Jackson: *Machinery of Justice* 6th ed p118.

30 See Russell on Arbitration 18th ed (Walton Q C ed) Preface. The unreported case of *Marchon Products v Thornes* is cited (at p161) to indicate the effective use of an injunction to restrain the improper use of trade secrets.

31 Little empirical research has been carried out in England into this problem, but see Macaulay: *Noncontractual Relations in Business - A Preliminary Study* 28 *Am Soc Rev* 55 for an investigation of the situation in the State of Wisconsin.

there are forceful reasons for wishing that businessmen would litigate more, and the call for a Court of Arbitration<sup>32</sup> may have merit, especially now that there is a general tendency away from the omnibus courts set up in 1875 towards more specialised bodies. As Walton indicates<sup>33</sup> 'no court can (or ought to) disguise the fact that a dispute between particular parties is in progress (as an arbitration can), but if a particular person is always involved in disputes - even though that be his misfortune - it may not be the best public policy to conceal the fact.'

More importantly for the law, 'the law must retain sufficient hold over (arbitration procedures) to prevent and redress any injustice on the part of the arbitrator, and to secure that that law that is administered by an arbitrator is in substance the law of the land and not some homemade law of that particular arbitrator, or that particular arbitration.'<sup>34</sup> In the words of Scrutton, L J 'there must be no Alsatia in England, where the king's writ does not run.'<sup>35</sup> The relative independence of the businessman results not merely from the enormous and growing power of organisations which are richer than many nation-states and which seek actively to overthrow regimes which they do not favour, but also from the nature of relationships between organisations of all sizes in which day-to-day affairs are controlled by managers. 'Managers... are not very keen on litigation. They do not mind very much whether they win or lose: what they want to do is to get the thing off their table.'<sup>36</sup> Disputes between commercial firms are

#### Footnotes:

32 See 1958 JBL 1.

33 Russell on Arbitration 18th ed Preface.

34 Czarnikow v Roth Schmidt(1922)2KB378 at p484 per Bankes L J.

35 Op cit at p488.

36 Sir Roger Ormrod 'The Reform of Legal Education' 5 J A L T 77 at p83.

He makes the point at p82 that 'the courts are seen as the sort of nucleus of the whole operation' with the 'law circulating around.' This he sees as mistaken. If the advisory role of the lawyer becomes much more important, for the reason given in the cited quotation, and upon which Ormrod 'would be prepared to take a gamble' the problem of maintaining contact between the law and practice will increase. The solution, apart from a greater judicial willingness to innovate, would seem to be in attaching a greater weight to juristic writings. They in turn will have to rely more upon empirical data concerning behaviour.

likely to occur within a continuing relationship productive of mutual advantage, and in a given focus of trades there are likely to be relatively few firms. This situation provides incentive to evolve rules and dispute-resolving mechanisms which are flexible and give least offence to either side: in other words rules and sanctions develop which are consonant with commercial morality. As Lord Devlin<sup>37</sup> says, the merchant does not have to take the law as he finds it and sees no profit in gaining a technical advantage over a person or organisation with whom he wishes to continue trading.

Professor Macaulay reports that all of the purchasing agents whom his researchers interviewed 'expected to be able to cancel orders freely subject only to an obligation to pay for the seller's major expenses'. Cancellation was frequently accepted by all of the sales personnel interviewed.<sup>39</sup> Gower suggests that in England 'what seems to be happening is that the businessman prefers to settle his disputes out of court, even though that court be an arbitral tribunal.'<sup>40</sup> Inevitably practices will develop of which the courts will have no knowledge, and of which they may well ultimately disapprove.<sup>41</sup> The danger in there being 'Alsatis' is obvious, and the likelihood is very great. Their existence is a measure of the law's inadequacy.

#### Footnotes:

- 37 Devlin: *The Relation between Commercial Law and Commercial Practice* 14 MLR 249.
- 38 Macaulay: *Non Contractual Relations in Business - A Preliminary Study* 28 Am Soc Rev 55.
- See Noelle & Schmidtchen : *The Significance of Mass Surveys in Public Life* 14 ISSJ 283. Where it is suggested that opinion surveys reveal a 'new idea of man.' Information gathered in this way may be useful to lawyers in the future for, since 1875 the decline of the civil jury has meant that the layman has little voice in the civil legal process.
- 39 The law relating to breach of contract is similar in Wisconsin, to English law. See Treital: *Contract* 3rd ed p727: Hochster v Dela Tour (1853) 2 E & B 678; Restatement s 318.
- 40 *Law & Public Opinion in England in the 20th Century* 1959 p170.
- 41 See, e g the former practice of solicitors, disapproved in Brown v C I R (1964) 3 All E R 119, of retaining the interest arising from deposit accounts containing clients' money, in certain circumstances.

There is no comparable measure available to indicate the dissatisfaction of the ordinary individual with the state of the law. A request for change in a particular area on his behalf must rest on such vague notions as the current conceptions of justice<sup>42</sup> and utility. Viewed at large these notions are ideals or maxims merely, but placed in context and applied to particular issues I shall argue that they can provide coherence in a dynamic system of law: for 'all action is subservient to some end, and rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient. When we engage in a pursuit, a clear and precise conception of what we are pursuing would seem to be the first thing we need instead of the last thing we look towards.'<sup>43</sup> It is in this spirit that I hope to examine the law's attitude towards promises.

I have argued that a judicial decision must create law. Inseparable from any critical discussion of the law is criticism or evaluation of the use to which judges put this facility. Only by becoming fully aware that they possess it can they hope to create a law which is relevant to those to whom it applies. 'If the law is to stand for the future as it has stood for the past, as a sustaining pillar of society, it must find some point of reference more universal than its own internal logic.'<sup>44</sup> It cannot be sufficient to say that 'I am unable to adduce any reason to show that the decision that I am about to pronounce is right...But I am bound by authority which it is my duty to follow.'<sup>45</sup> Donaldson, J, is much more practical: '...I should be surprised if the law compelled me to find in the plaintiff's favour, because, contrary to popular belief, the law, justice, and common sense are not unrelated concepts.'<sup>46</sup>

#### Footnotes:

42 I accept the analysis of justice provided in Rawls: A Theory of Justice.

43 J S Mill: Utilitarianism Everyman Edition p2.

44 Radcliffe: The Law and its Compass p14.

45 Olympic Oil and Cake Co v Produce Brokers (1915) 112 L T 744 at p748 per Buckley, L J. See Cohn: Existentialism and Legal Science for a critique of this type of approach.

46 Durham Fancy Goods v Michael Jackson (1968) 2QB839 at p847.

It is urged that Lord Devlin<sup>49</sup> is unduly pessimistic in assuming that the creative function of the common law is at an end, for the alternative, 'legislation... is a cumbersome process. Parliamentary time is in modern times notoriously limited and may well in future become ever more precious,<sup>47</sup> and in any event 'the *cassus improvisus* is always with us: and in ninety-nine cases out of a hundred it must be settled before Parliament can act. The appeal is made, not to laws, for there are none, but to Law, call it what you will - the common law, the principles of jurisprudence - anything from the *jus summum* to commonsense, from the *recto ratio* to a square deal; it is on and by that stuff that judges have to work, and they must do so not as bondsmen but as free.<sup>48</sup> Recognition of the vital role of the judge in shaping the law is given in the civil law countries. 'It is not generally realised that the number of decisions currently reported in France probably exceeds that of the United Kingdom... thus a more rapid evolution of the law is possible than in England.<sup>50</sup>

This is not to 'run the risk of finding the archetypal image of the judge confused in men's minds with the very different image of the legislator.<sup>51</sup> Judicial innovation is interstitial, it must conform with 'the vast body of substantive propositions... the great reservoir of principles available for the making of law... which... at the same time sets limits to the judge's power of choice.<sup>52</sup> Whilst the problem case must fall to the judge he is limited in his exposition of what the law should be to the facts before him, in contrast to the much wider scope of the legislator.

Footnotes;

- 47 Select Committee on Supreme Court Practice and Procedure 1953 Cond 8878 (Final Report).
- 48 Shaw: *Legislature and Judiciary* 1914 p14 cited Abel Smith and Stevens: *Lawyers and the Courts* p24. An 'accolade clad in robust imagery' perhaps.
- 49 Devlin: 1956 *Current Legal Problems*.
- 50 Amos and Walton: *Introduction to French Law* 2nd ed p 11 . See also Cohn and Zdzieblo: *I Manual of German Law* BllCL Comparative Law Series No 14 for a discussion of judicial lawmaking, e g in relation to BGB s 242.
- 51 Radcliffe: *The Law and its Compass* p14.
- 52 Jaffe: *English and American Judges as Lawmakers* p36

Jaffe's point<sup>52</sup> that lawmaking can be successful only where judge and legislator collaborate demands acceptance. Judicial performance in giving effect to the intention of Parliament has been poor<sup>53</sup> and capricious use has been made of the 'rules' of statutory interpretation. Similarly, performance in shaping the law in conformity with contemporary, socially-constructed reality,<sup>54</sup> has been spasmodic.<sup>55</sup> The judges cling to the doctrine of stare decisis and assert the need for certainty as though social change might be ignored. 'Nor will I easily be led by an undiscerning zeal for some abstract justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament, or the binding authority of precedent.'<sup>56</sup> The same learned lord managed to locate in a criminal court, however, 'a residual power to enforce the supreme and fundamental purpose of the law.'<sup>57</sup>

Footnotes:

53 See Fisher v Bell(1961)1QB394 (Restriction of Offensive Weapons Act 1959 s 1). Also Chandler v DPP(1964)AC763 and Thompson: The Committee of 100 and the Official Secrets Act 1911. 1963 Public Law p201.

54 Berger & Luckmann 1966 'The Social Construction of Reality' explain at length the implications of this phrase. In more legal terminology we might discuss 'the reasonable expectations of reasonable man,' perhaps.

55 e g Taff Vale Case(1901)AC426

Quinn v Leatham(1901)AC495

Searle v Wallbank(1947)AC391

Eaglewell v Needham (1972) 1 All E R 417 (action on a bill dismissed on a technicality).

But see Dutton v Bognor Regis (1972) 1 All E R 462 (liability of Local Authority for failure of its Inspector to inspect the foundations of a bungalow. Donoghue v Stevenson was applied. See particularly the judgement of Sachs, L J, p483L & Lord Denning, M R, p472b).

British Rail v Herrington (1972) 1 All E R 749 (Liability of negligent occupier for accident suffered by child trespasser).

56 Midland Silicones v Scruttons(1962)AC 446 at p467 per Viscount Simonds.

57 Shaw v DPP(1962)AC220.

Historically, no doubt the declaratory view of law was useful, in removing 'trouble' cases from the preview of the executive of Blackstone's time: and by adhering to it the invidious retrospectiveness of judicial legislation noticed by Bentham might be less apparent. It is tempting to speculate whether 'the movement of progressive society FROM STATUS TO CONTRACT'<sup>58</sup> noticed by Sir Henry Maine, which reached its apotheosis in the last century,<sup>59</sup> did not play a part in detracting the judge. In the United States, where freedom of contract was then tempered by a realisation that extreme competition leads ultimately to monopoly,<sup>60</sup> judges have played a more positive part in lawmaking<sup>61</sup> and in seeking the substance behind the form.<sup>62</sup> A modern return to a society more concerned with questions akin to those involving status has led to an enlargement of the field in which adjudication takes place, though the new courts are for the most part purpose-designed, and the adjudicator takes his premisses from the state.

That the apparently neutral, precedent-bound approach exists only in fantasy, there is no need to reiterate. It is impossible to create a functioning model out of the materials supplied by the doctrine of precedent.<sup>61</sup> Seidman indicates the reason why a part is

Footnotes:

58 Maine: 'Ancient Law' 1861 Oxford 1959 pl41.

59 Witness Sir George Jessel, M R in Printing & Numerical Registering Co v Sampson (1875) LR 19 EQ 462 at p465, that 'if there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely.... shall be held sacred and shall be enforced by courts of justice.' Cited Gheshire & Fifoot 'Contract 6th ed p21.

60 Hence the Sherman Act of 1890. cf Mogul SS Co v McGregor Gow (1892) AC25. Though see the discussion of the renegotiation decision US v Bethlehem Steel (1942) 315 U S 289 in Friedmann: Law in a Changing Society 2nd ed Chapter 4.

61 See Cross: Precedent 2nd ed. Also Goodhart: Precedent in English and Continental Law 50 LQR40 and particularly Stone: The Ratio of the Ratio Decidendi, 22 MLR 597; Legal System and Lawyers' Reasonings ch7.

62 Seidman: The Judicial Process Reconsidered 32 MLR 516 at p530.

missing from the received version of the model: 'To admit that judge-made law... represents the value choices of the decision-makers in society is to admit that the entire corpus of the law... represents the values... of those strata in society pro tempore in control.'<sup>62</sup> However, I suggest that this judicial unwillingness may at last achieve the opposite effect on some issues, and deny the manifest views of those strata and others.

It is not considered that judges should 'repossess themselves of the freewheeling powers of a Coke or a Mansfield'<sup>63</sup> but that they should respond in a positive fashion to the requirements of society. In this way reform of the law relating to promises is possible. Twenty years ago, Denning believed<sup>64</sup> that it was possible to implement the proposals in the Law Reform Committee's Sixth Interim Report,<sup>65</sup> but I shall argue that the judges can aim higher than this.

I shall look at the origins of contractual obligation to see how far this is connected with the idea of pacta sunt servanda, and at the growth of the consideration doctrine. At somewhat greater length I shall examine the use of Estoppel to enforce representations of intention. In *Simon v Anglo-American Telegraph*,<sup>66</sup> Bramwell, L J said 'I do not wish to speak against estoppels, for I do not know how the business of life could go on if the law did not recognise their existence.' I shall examine to what extent the doctrine has been used as a subsidiary of consideration, even to what extent it has on occasion suffered from ill-suited analogy with consideration, and whether it has an independent role in England, such as that conferred upon the American doctrine of promissory estoppel.<sup>67</sup> It will be necessary to ask whether disservice has not been done to the concept of consideration<sup>68</sup> by an unwillingness to enforce promises,<sup>69</sup> and whether it may not gain coherence from being confined.

#### Footnotes:

63 Jaffe: *English and American Judges as Lawmakers* p36.

64 Denning: *Recent Developments in the Consideration Doctrine* 15 MLR 1.

65 Cond: 5449.

66 (1879) 5 QBD188.

67 See *Restatement of the Law of Contract* S 90.

68 See Atiyah: *Consideration in Contracts*.

69 See e g *De la Bere v Pearson*(1908)1KB 280; *Gore v Van der Lann*(1967)2 Q B 31.

It is proposed to consider the licence cases and the 'holding-out' cases, and to make some proposals for the future. And throughout I hope to emphasise the proper role of law as, in Fleming's words 'dedicated to the rational solution of social conflict.' And because law is only a means, not an end, it falls to be adjudged, not by any internal standard, but by the degree to which it furthers relevant social ends'.<sup>70</sup> It approximates to Weber's 'rational substantive' category in its proper function - it is 'guided by general rules, by principles of an ideological system other than that of law itself',<sup>71</sup> not, as some lawyers would have it, to the 'rational, formal, logical' 'idealtyp.' I cannot agree with Lord Denning that the academic lawyer is 'not concerned as practitioners are, only with the law as it is',<sup>72</sup> because we cannot accept that the application of an abstraction or an analogy is logically justified other than by reference to an 'ought' proposition, the 'ought' being derived externally. The collection of laws available to academics and practitioners are, historical statements or abstractions, inert: only an 'ought' can breathe life into them. It cannot be sufficiently emphasised that there is nothing intrinsic to the present that without more enables us to refer it to the past. We refer to an object as an 'apple' not because it is inherently an apple, but because we think we should, for the purpose of communication, or so as to develop an understanding of the universe. If either purpose, or any other, ceased to be fulfilled, we should be wise to divide our observable universe differently. If we lose sight of this, we shall become, as Wittgenstern remarked 'betwitched' by words. A final point: throughout I shall be concerned with the provision of remedies. For this purpose it still seems worthwhile to draw distinctions between law and equity, and, in pointing the way to the establishment of a more comprehensive and flexible theory of obligations, respectfully to reject Professor Atiyah's suggestions relating to the expansion of the field of contract, in favour of a more equitable solution. However, as the growth of the trust from its origin as the specific performance of third party rights

#### Footnotes:

70 Fleming on Torts 4th ed preface.

71 Weber on law in economy and society. Introduction by Rheinstein p6.

72 Denning: The Way of an Iconoclast 3 Syd L Rev 209.

in contracts shows, the provision of a remedy may at times result in the creation of an institution, or 'interest.'<sup>73</sup> That this may be an awkward result should not deter us unduly if we remember that, so long as the interest remains dependent upon the remedy, and so long as the remedy is available only where equity and justice require it, flexibility will be retained and innovation kept within the bounds of the practicable.

Footnotes:

- 73 See, for example, the difficulties encountered in Binions v Evans (1972) 2 All E R 70. But see the discussion of, inter alia, Tomlinson v Gill (1756) Ambler 330 in Carbin: Contracts for the Benefit of a Third Party, in 46 LQR 12.

I:1

It seemed to Lord Cairns, L C axiomatic that his was 'the first principle of equity'.<sup>1</sup> His remark has puzzled commentators,<sup>2</sup> yet the solution may be in the nature of equity. Historically, the 'conception (of disparate systems) has had important effects on our jurisprudence. Reliance on equity to bring about a balance between legal rights and persons who would be seriously harmed by their strict enforcement has retarded the independent moral growth in the main body of the law.'<sup>3</sup> Equity, too, has suffered 'arrested development' as a result. It is surely no coincidence that the two judges to have made least of the disparity. Lords Mansfield and Denning, have travelled farthest toward legal enforcement of ethically binding promises.

I shall attempt to shew that equitable estoppel must be seen in context of the enforcement of promises of this nature. I shall survey, of necessity at second-hand, the emergence of a theory of contract in early equity and its treatment of promises; then I shall postulate that the re-emergence of this theory, strongly supported by arguments of morals and efficacy, and facilitated by the Act of 1873 goes far to explain a number of apparently only partially related phenomena - viz, the licence cases and the congress of promissory estoppel cases. The hypothesis will be scientific in Popper's sense; it will be subject to 'falsifiability.'

Jones<sup>4</sup> suggests that the chancellor's jurisdiction over contract is based upon procedure. In granting specific performance the attention of the chancellor is directed to the precise nature of the promise, and he is less concerned with the wrong done to the promisee. He is moved to affect the conscience of the promisor. Perhaps there is a more straightforward reason why the chancellor may incline to view promises as inherently valid. The Royal Courts allow a writ of covenant to enforce a promise as early as 1201, and it becomes the sole remedy of the termor for a time. To begin with, the form of the agreement is not settled, nor is the subject matter, so that a sealed

#### Footnotes:

1 Hughes v Metropolitan Ry (1877)2 Ap Cas 439 at p 450.

2 Wilson, at LQR 67: 330 & CLJ 1965: 93; Gordon CLJ 1963: 222, who seem to be rather at cross-purposes with the aims of Lord Denning.

3 Newman: Equity and Law, a Comparative Study 1961 ppl2 & 13.

4 Jones: The Elizabethan Court of Chancery.

document is merely evidence, and seisin need not be alleged. Over perhaps half a century the deed ceases to be merely evidence however, and becomes the contract itself... it develops 'an operative force of its own which intentions expressed, never so plainly, in other ways, have not'<sup>5</sup>. This evolution suggests that the source of the obligation is the promise contained in the deed; for implied in a concentration upon the finished product as written down that ultimately leads to an ignoring of what lies behind it, is a light regard for the motivation which produced it. In other words, although Pollock and Maitland refer to 'agreement,' there is no suggestion that the Common Law would not enforce a unilateral conventio, even before the requirement of writing.

Little is known about the enforceability of promises in the local courts for 'the County Court rolls of pleas were not kept in the preservative air of officialdom, but by the Sheriffs themselves,'<sup>6</sup> yet 'it may be that cases like that of Lampleigh v Braithwait'<sup>7</sup> again reflect a general rule about promises in local courts.'<sup>8</sup> This general rule, about which there can be no more than informed speculation, may have exhibited a divergence from subsequent common law similar to the rule of modern German law, under which, for example, a buyer's primary remedy against a defaulting seller in a Sale of Goods contract is specific performance of the promise, rather than damages.<sup>9</sup> In French law a promise is enforceable subject to its having a lawful 'cause,' but regardless of whether it is a contrat de bienfaisance or an onerous contract.<sup>10</sup>

Again, the laws of Switzerland, Austria, Mexico and Louisiana, of Norway, Sweden, Denmark, and of Pennsylvania<sup>11</sup> seek to give effect to promises in certain circumstances.

#### Footnotes:

5 Pollock & Maitland II: 220. Also Chapter 5 generally.

6 Milsom's Introduction to P & M's History of English Law, lxiii

7 (1616) 80 Eng Rep 255.

8 Milsom: Historical Foundations p315.

9 See Gebhardt: Pacta Sunt Servanda IOMLR 159 and generally Cohn: Manual of German Law vol 1.

10 Amos & Walton: Introduction to French Law 2 ed Chapter 8.

11 Equity & Law; A Comparative Study p251.

Notwithstanding the effects of diffusion and borrowing, it is possible to suggest that these jurisdictions place emphasis upon the promise because it is convenient to do so, and because not to do so may often be contra bonos mores. The early English Chancellors may borrow from Canon Law, but only to the extent that this suits the nature of their jurisdiction. Barbour<sup>12</sup> finds the Chancellor enforcing parole contracts in the fifteenth century and asks 'did (he) enforce the obligation because breach of the promise amounts to a tort, or because he holds that one who has for legitimate cause made a promise ought to carry it out?'

The latter reason is more direct, and I suggest that adoption of this approach by many jurisdictions attests its convenience. Examination of the plea rolls, Barbour says, suggests it to be the more likely. The pleas stress the promissor's faith, not his deceit; the cases shew beneficiaries not a party to the agreement moving the Chancellor to uphold promises in their favor: Where plaintiff, at A's request, becomes A's surety for a debt owed by A to B, the plaintiff does not seek a remedy in deceit, but alleges an implied promise by A to discharge him a promise which the Chancellor will enforce.

15th Century equity will enforce promises qua promissis so far as this accords with 'reason and conscience.' 'God acts as attorney to foolish people,' Bishop Stillington remarks.<sup>13</sup> This is not to suggest that equity would enforce a bare promise in all circumstances, or that the medieval doctrine of 'causa' was at all absent, indeed 'it looks very much as if causa has been contaminated by insular notions of quid pro quo.'<sup>14</sup> Without examining contemporary views of causa, it is sufficient to notice that there existed in equity a direct and logical approach to contract capable of flexibility and expansion. A similar facility probably existed in the courts of local jurisdiction -

Footnotes:

12 Barbour: History of Contract in Early English Equity. Oxford Studies in Social and Legal History (ed Vinogradoff) iv.

13 1467 YB 8edwIV. f4 11pl. cited by Vinogradoff: Reason & Conscience in Sixteenth Century Jurisprudence 24LQR 373 at p380.

14 J L Barton. The Early History of Consideration. 85LQR 372.

county courts, courts baron and pie powder courts.<sup>15</sup>

This contrasts with the common law situation, which led Holmes to say that 'the duty to keep a contract at common law means a prediction that you must pay damages if you break it.'<sup>16</sup> The contract is 'not a promise to pay damages, but an act imposing a liability to damages nisi. You commit a tort and are liable. You commit a contract and are liable unless the event agreed upon... comes to pass.'<sup>17</sup>

I:2

Holmes' analysis, odd though it may sound, is useful because historically accurate. The common law, authority has it, enabled the promisee to enforce a promise by a writ of Covenant. The restrictions placed by a failure, perhaps, to distinguish substantive and evidentiary rules, were not unduly onerous to those who wished to use the common law courts, and there was no pressure on the common law judges to develop rules about commercial agreements and parole contracts.

Pressure came, however, with the end of the middle ages, from a variety of causes, ultimately economic. Inflation followed the Black Death and was exacerbated by the influx of American silver: commercial adventures grew in scale and political significance. The forty-shilling limit drove actions from the local courts, and the Crown became concerned to satisfy the legal expectations of merchants, English and foreign. It accomplished this through conciliar courts - a process attended, in the parallel

Footnotes:

15 Mayut v Aklum (1324): parole contract upheld 'according to the usages of Scarborough' cited Vinogradoff op cit p384. Vinogradoff suggests that the binding effect of a promise for a promise originates from the local courts. See also Plucknett: Concise History p98. 'There are divers actions which a man may have in the City of London which he may not have at Common Law, such as an action on a covenant without a speciality.'

16 Holmes: The Path of the Law 10 HLR 457, and see the case cited in support of the historical truth of his statement: Bromage v Genning Roll Rep 368.

17 Holmes-Pollock Letters 1874-1932 de Wolfe Howe ed 2nd edn I: 177.

Scottish development, by the marriage of law and equity.<sup>18</sup>

The law of contract, already concerned with complex matters of credit, and insurance, and above all with speed, is the concern of equity, dispensed by the Chancellor, by the Privy Council, and by mixed commissions of laymen, lawyers, and civilians. 'The equity of the Tudor period was a kind of popular equity in the sense that it relied through arbitral commissions on the practical aid and the practical morality of selected groups of responsible laymen.'<sup>18</sup> And this is not a matter of satisfaction to common lawyers. They may well sit on the Privy Council, and confer with Admiralty on matters such as insurance; there are many grounds for supposing that they are aware of the necessity for developing a commercial law, and that the means lay outside the common law. Yet common lawyers have political reasons for opposing the growth of the conciliar courts and for restricting the operation of equity.<sup>19</sup>

The intellectual justification which Coke seeks for the law is in terms of reason, 'which is to be understood (as) an artificial perfection... gotten by long study, and not... every man's natural reason.'<sup>20</sup> For a law to be reasonable beyond doubt, it must have stood the test of time. The paradigm is custom, and declarations of custom are to be found in judicial decisions. The 'enlightened thinkers' of Coke's day might seek modernity as the Tudors had done, by sweeping away and replacing.<sup>21</sup> This is what the conciliar courts might be seen doing in the area of contract. To stay this the common lawyers opposed all advances made with the assistance of the prerogative by presenting an historiography in which the common law figured as a continuum.<sup>22</sup> All novelty was resisted except insofar as it could fit or be fitted into the gnarled forms of sixteenth and seventeenth century common law. By this means, that law was made 'the overruling

#### Footnotes:

18 See generally Dawson: The Privy Council & Private Law in the Tudor & Stuart Periods 48 Mich Law Rev 293 & 627.

19 See Ogilvie: The King's Government & the Common Law.

20 Cited Lewis: Coke & His Theory of Artificial Reasoning. 84LQR 330.

21 Holdsworth: Some Makers of English Law plll et seq.

22 See generally Pocock: The Ancient Constitution and the Feudal Law.

jurisdiction in this realm: the law, represented at times as almost eternal, a kind of Volksgeist, willed the King, according to the lawyers; the King had not given the law. A contradiction of this myth, even in detail, might undermine the position of the new men, whose strategy was to lead, paradoxically, to the doctrine of Parliamentary Supremacy.

If contract is to achieve recognition at Common Law, each brick in the pragmatic structure has to be positioned in accordance with contemporary theory. The 'daring reformers ranged under the banner of equity' make a lasting contribution to contractual remedies, but henceforward promises must take what advantage there is from the 'fertile mother of actions.' It is to the line whose contractual elements may first be discerned in the Humber Ferryman's Case<sup>23</sup> that the common lawyers look. And this line, to Slade and beyond, is trespassory. One can scarcely fail, in noting the collision of Common Pleas and King's Bench in Slade, to note also the contribution of the action of Debt to the common law of contract, yet with two reservations: in Debt 'the quid pro quo, as yet ungeneralised, was the principal; the promise, if recognised at all, was merely the accessory.'<sup>24</sup> Debt is available on a specialty<sup>25</sup> - the latter being itself the obligation and if it were lost, or not cancelled by the debtor upon repayment then the wronged party's only recourse was to the Chancellor who alone would find and enforce a promissory obligation - or on the receipt by the defendant of a quid pro quo, to which the defendant can merely answer nil debet, and wage his law.

The first reservation is as to the quality of the contribution. Popham's remark in support of the idea that every debt imports a promise, that 'long use and multitude of precedents... draw it into a law'<sup>26</sup> is dismissed by Baker as spurious, for Popham cites no precedent.

The second reservation concerns the quantity of the contribution, for 'the development of contract in the 17th century stemmed not from any solemn considered declaration of

#### Footnotes:

23 22 Ass 94 (No 47) cited Plucknett. Concise History 441.

24 Salmond: History of contract XIAR166 at p168. Also P & M Hist II 212.

25 P & M History II 203 et seq.

26 Barkley v Foster cited Baker: 'New Light on Slade's Case' 1971 CLJ (p51 & 214 at p222.

legal principle in Slade's Case, but from the doctrinal confusion caused by the failure of the judges to reach a national settlement.<sup>27</sup> In other words, if Debt had much to contribute to a transactional theory of contract is questionable; and if it did have, the extent to which it contributed is not measurable. The common lawyers were aware, simply, of where they wanted to go in each case, but failed to reconcile their desire for short-term progress with their dogmatic belief in the immutability of the law. It is not proposed to follow the growth of common law contract further. That equitable contract is promissory in the 17th century is suggested; thus Bacon can argue that duplicity of actions is not justified by analogy with the situation in which both Chancery and common law have jurisdiction to grant remedies in contract, for, he says, Chancery will compell the performance of a promise, it will not enforce a contract.<sup>28</sup> Common law, unconceptualised, grows from trespass. The dichotomy has modern significance.

Footnotes:

27 Op cit p236.

28 Op cit p59.

II:1

The next stage in establishing the hypothesis that equity retained a promissory approach towards contract, and in using this hypothesis to explain and justify a miscellany of modern cases by reference to a theoretical framework, must be to explore the cases. Justification in historical terms must be subordinate to explanation, for I cannot subscribe to the view epitomised by Kitto, J in Wilson v Darling Island Stevedoring Co that a new principle may not 'atone for its heterodoxy by the convenience of its results.'<sup>1</sup>

I disagree respectfully with Professor Wilson's confining of the equitable estoppel principle to matters of waiver and forbearance,<sup>2</sup> for these seem merely instances of a much wider doctrine; yet a very important reason for insisting that equity maintained its integrity is to be found in the case of Foakes v Beer.<sup>3</sup> The facts are well known. Mrs Beer obtained judgement against Dr Foakes in the sum of £2,090. 19. 0. She then made a promise in writing<sup>4</sup> not to sue for the balance, in return for an immediate payment of £500, followed by the balance in instalments. The House of Lords refused to uphold the promise, although the strength of the ratio may be diminished, since two members of the House considered that Mrs Beer had merely promised to wait, and not to forgo the interest. It is possible to see her promise as one of intention, as contrasted with a representation as to existing fact, but it was not necessary for the judges to speculate upon the nature of such promises generally in order to achieve what they

#### Footnotes:

1 95 CLR 43, at p85. The antithesis of Kitto, J's view is expressed in Cohn: Existentialism & Legal Science.

2 Recent Developments in Estoppel 67 LQR 330; & A Reappraisal of Quasi-estoppel 1965 CLJ 93. See also his article in Tulane Law Rev.

3 (1883) 11 QBD 221.

(1884) 9 App Cas 605.

4 It may be relevant to note that, as Trietel points out (Contract 3rd ed p99) Dr Foakes' solicitor drafted the document. It ought also to be borne in mind that the action was brought to obtain payment of interest, as to which the promise was silent. The House may have been divided had Mrs Beer expressly undertaken not to claim interest.

sought as between the parties.<sup>5</sup> The action of Debt, as we have seen, looked to the benefit to the promisor: Pinnet's Case<sup>6</sup> was brought in Debt (and even then the decision went the other way on a technicality) and the dictum cited in Foakes v Beer<sup>7</sup> is of limited relevance.

However, if we accept the case as indicative of the common law reaction to promises, must we accept Jorden v Money<sup>8</sup> as a summary of the equitable view?<sup>8A</sup> The case is fraught

Footnotes:

5 See Lord Denning's judgement in D & C Builders v Rees 1966 2QB617. Where, again, to uphold the promise would have been inequitable to the promisor.

6 1603 5 Co Rep 117a.

7 That 'payment of a lesser sum on the day in satisfaction of the greater cannot be any satisfaction of the whole because...by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater' whilst 'The payment and acceptance of a parcel before the day would be a good satisfaction...; for...it...would be more beneficial to (the plaintiff) than the whole at the day and the value of the satisfaction is not material'. As regards quid pro quo this is a most incontrovertial description, but to argue from here to a theory of consideration seems unnecessary. To the extent that it represents Debt's contribution to contract (ante) it would be a purely common law statement.

8 1854 5HL Cas 186; 10 Eng Rep 868.

8A Atiyah suggests another reason for the decision in Consideration in Contracts - A fundamental restatement, p54. 'The plaintiff...did shew a good contract and that is...why he failed... (T)he Statute of Frauds required that a promise in consideration of marriage must be proved in writing...but he had no written note or memorandum signed by the defendant. His counsel...deliberately refrained from arguing his case in contract, but relied in estoppel. Had this stratagem succeeded...it would have meant that any plaintiff who could show that he had altered his position in reliance on the defendant's promise could ignore the Statute and rely on estoppel'.

with difficulty and ambiguity, though the facts, again, are in part familiar. William Money, a Naval Ensign of little percipience was persuaded by two of his colleagues to purchase some Spanish bonds, the honouring of which by the Spanish Government his father was then negotiating. He borrowed £1,200 from one Charles Marnell in order to effect the purchase, but, following the failure of his father's negotiations, the bonds proved worthless and the money was lost. Because two others were implicated in the speculation, his father offered £400 to Charles Marnell in satisfaction of the debt, a sum which the latter intimated he would accept. On his death Charles's sister Louisa inherited the claim, and her solicitors, despite her insistence that she would never enforce the claim, wrote to Money's father about the offer of £400. His answer was that the circumstances were now changed, and he refused payment. There was evidence of a close friendship between William Money and Louisa Marnell. Being assured that she would not enforce the claim, he married. At 'an advanced age she married, taking as her marriage portion'<sup>9</sup> the debt. Jordan, her husband, joining his wife, sued. The case went on appeal from Chancery to the Court of Appeal in Chancery, thence to the House of Lords.

It is worth quoting the headnote, since the current view subscribed to by the courts seems to owe much to it. 'Where a person possesses a legal right a court of equity will not interfere to restrain him from enforcing it although between the time of its creation and that of his attempt to enforce it he has made representation of his intention to abandon it.' Jackson criticises<sup>10</sup> Lord Cranworth, L C's interpretation of the cases which he cites: in Montefiore v Montefiore<sup>11</sup> Lord Mansfield refused to allow a man to reclaim a sham note of hand which he had given to his brother for the purpose of inducing consent to the brother's marriage by the bride's father. (No man shall set his own iniquity up as a defence.' In Neville v Wilkinson<sup>12</sup> a creditor anxious to recover his money drew up a much reduced schedule of the defendant's debts: the father of the heiress whom the defendant sought to marry settled these, and consented to the marriage. The creditor sued the defendant for the balance after the marriage, when the

#### Footnotes:

<sup>9</sup> Lord St Leonards, at p249.

<sup>10</sup> Jackson: Estoppel as a Sword 81 LQR 84.

<sup>11</sup> 1 WBL 363.

<sup>12</sup> 1 Bro c c 543.

defendant was in possession of his wife's fortune. Not surprisingly the court held the creditor to his original representation of fact. Gregg v Wells<sup>13</sup> is a similar case, the decisions being that a party who has 'negligently' or 'culpably' stood by whilst another makes a contract on bases which the first knows to be false, may not subsequently assert the falseness of those bases.

Gale v Lindo,<sup>14</sup> cited by Lord Brougham, was another case of supplementing a sibling's fortune to enhance marriagability. Both parties being dead, the question between their executors was; could the brother who had lent his sister money in return for a bond whose existence was unknown to the future husband, and who had therefore made a representation of fact to the future husband, have enforced payment, in contradiction of the representation. Lord Jeffreys, L C held that that which was once a fraud must always be a fraud.

Contrasting with these cases of rather oblique relevance are those referred to by Lord St Leonards in his dissenting judgement. In Cookes v Mascall<sup>15</sup> a father promises to settle property on his daughter's future husband, and the latter's father is also to make a settlement on the suitor. Disagreement occurs. Subsequently the son is allowed to visit the girl with her father's approval, and the two were married, he 'being privy to it. He seemed well pleased.' The son's father offers to make the settlement on his son, and the father of the daughter was held in Chancery bound to perform. Another marriage case, Moore v Hart<sup>16</sup> concerned representations made by the defendant father to friends of the plaintiff that, were the latter to marry his daughter the defendant would give £4,000 along with her. Plaintiff became a suitor, with the defendant's approval, but the defendant's promise lost, whilst his daughter's affection for the plaintiff gained, strength. A letter was produced, written by the defendant to plaintiff's friend, and this was sufficient to enforce the promise to settle land on his daughter, once the marriage in reliance upon the representation of intention had taken place.

#### Footnotes:

13 10 Ad & El 90.

14 1 Vern 475, 23 Eng Rep 601.

15 23 Eng Rep 730; 2 Vern 200.

16 2 Vern 361. 23 Eng Rep 352.

Lords Cranworth and Brougham were entitled to reach, on their cases, the conclusion that a fraudulent representation of fact may not in equity be retracted when convenient, or indeed (Gale v Lindo<sup>14</sup>), ever, but scarcely the position that representations of intention were unenforceable in equity.<sup>17</sup> That the contrary was true may be seen from Lord St Leonard's cases, and also from a brief examination of a number of others. Thus Hobbs v Norton<sup>18</sup>: an intending purchaser of an annuity charged upon (and from) the younger, asked the elder, brother a number of questions about title. The elder brother answered that he believed that a settlement antedating the will would have the effect of avoiding the annuity, but that the purchaser need not worry, for he, the elder brother, had always paid the annuity to the younger on time. Encouraged, the purchaser bought the annuity. The Chancellor refused to allow the elder brother to take advantage of the settlement in question, to which he later succeeded, in order to avoid paying the annuity, holding him to his statement, from which there could be inferred a representation of intention to continue the annuity payments binding, at any rate in equity. Twelve years later<sup>19</sup> in Wankford v Fotherley<sup>19</sup> a father offered, to plaintiff's knowledge, to settle £3,000 on his daughter on the occasion of her marriage. The father seemed to approve of her subsequent marriage to plaintiff, and the Chancellor ordered him to pay the amount to the plaintiff as administrator, following the daughter's death.<sup>19A</sup> Doubtless Wankford v Fotherley might be viewed as a form of unilateral contract, a precursor of Carlill's case,<sup>20</sup> though an intention to be legally bound by a contract which it was necessary to discover in that case is perhaps absent. It is more usefully seen in the context of the preceding Chancery cases, the rationale being analogous to

Footnotes:

<sup>17</sup> See Jackson 81 LQR 84.

<sup>18</sup> 1 Vern 136; 21 Eng Rep (1099).

<sup>19</sup> (1694) 2 Vern 322; 23 Eng Rep 807.

<sup>19A</sup> See also Hodgson v Hutcheson (1711) 5 Vin Abr 522 pl 34 another marriage agreement enforceable outside the rules of common law contract.

<sup>20</sup> Carlill v Carbolic Smoke Ball Co (1893) 1 QB 256.

that which justifies the separation of the Hedley Byrne<sup>21</sup> cases from contract. It becomes important to maintain the distinction in view of the interpretation placed on Luders v Anstey<sup>22</sup> by Stephen, J in Alderson v Maddison.<sup>23</sup> The relevant facts of Luders v Anstey were that Robert Anstey made a proposal of marriage to Lucretia Light. She hesitated for fear of the financial consequences to her children by a former marriage. Anstey wrote to her proposing to settle two-thirds of her fortune on them, and one-third on any children of Lucretia and himself. His regiment was embarking for India, so he hastened after his letter, met her in Bath, where they were married. 'I do not see,' the Lord Chancellor said, 'how it is possible to avoid making the letter the basis of the settlement; Mr Anstey having instantly followed the letter and marriage having taken place immediately. Upon his part the letter contains a specific and complete arrangement of their money affairs and upon this the marriage took place. The only conclusion I can now draw is, that this satisfied her objections and she married.'<sup>24</sup> No suggestion is made that there might be a contract in the common law sense, yet Stephen, J, following the hearing of Alderson v Maddison at Durham Summer Assizes<sup>23</sup> is able to say that 'in Luders v Anstey it was held that a letter making a suggestion as to a settlement followed by a marriage...such as to imply...acceptance...may be a contract for a settlement.'<sup>25</sup> It is in this way that the history of the promise comes to be rewritten to fit the pattern of common law contract.

Footnotes:

- 21 Hedley Byrne v Heller & Partners(1964)AC 465.  
Anderson v Rhodes(1967)2 ALL E R 850 cf with De la Bere v Pearson(1908)1KKB280 a 'result-oriented decision' which imposed a strain on the rules of contract. A separate basis of liability is less tortuous, but see Treitel 3rd ed p49 n 67.
- 22 (1799) 4 Ves 501. Also on another point 5 Ves 213; & 1 Ves Supp 455.
- 23 (1880) 5 ex 293.
- 24 4 Ves 501 at p512.
- 25 1880 5 ex D 293 at p294. For other cases relied upon (I submit misguidedly) viz Hammersley v De Beler, & Prole v Soady, see later.

In Evans v Bicknell<sup>27</sup> the defendant had the fee simple in some property, in trust for his sister. He allowed Stansell possession of the deeds, enabling him to act as owner, and to enter into a mortgage with plaintiff's wife. On the facts the case is peripheral to our discussion, but there are one or two points of interest. The question put by the Chancellor to Romilly (for plaintiffs) concerning equity's jurisdiction was answered by referring to the limits of common law jurisdiction over representations: 'In this case there is no privity between Bicknell and the plaintiff: no assumpsit or contract.'<sup>28</sup> By contrast 'it is a very old head of equity, that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false.'<sup>29</sup> The contrast between this decision and the disaster of Derry v Peek<sup>30</sup> indicates and also explains the differing approaches of the two systems: 'if (the defendant) positively, plainly and precisely denies the assertion, and one witness only proves it positively, clearly and precisely, as it is denied, and there is no circumstance attaching credit to the assertion overbalancing credit due to the denial as a positive denial, a court of equity will not act upon the testimony of that witness.'<sup>32</sup> Not so at law. There the defendant is not heard. One witness proves the case; and however strongly the defendant is inclined to deny it upon oath there must be a recovery against him.'<sup>31</sup> Lord Eldon admonishes Lord Mansfield for his part in not attending to this difference between law and equity - no doubt justifiably in 1801. However, an earlier fusion of principle and procedure might have avoided later confusion.

Footnotes:

27 (1801) 6 Ves 174.

28 Op cit p176.

29 Op cit p182 per Lord Eldon, L C.

30 1889 14 App Case 337

31 (1801) 6 Ves 174 at p184.

32 See Arnot v Briscoe(1743) 1 Ves 96, Le Neve v Le Neve (1747) 1Ves 65. The action will not be sustained by reason of the evidence of one witness if the denial relates to the same fact, and if the denial is 'precise and positive.'

I have indicated that the facts of Jorden's Case<sup>33</sup> do not justify what is generally taken to be its ratio. The remarks concerning the enforceability of representations of intention in equity are mere obiter; not only so, but three final cases should suffice to shew that those obiter dicta are mistaken. Whilst the earlier cases (cited above) are open to attack grounded on their age, Hammersley v De Biel,<sup>34</sup> a House of Lords decision, precedes Jorden by only nine years. Baron De Biel being minded to marry Sophia Poullett Thompson, her father promised to give £20,000 to each of his two daughters. De Biel was required to settle £500 a year - 'a sum almost beyond my means' - on Sophia, following which he married her. A settlement of £10,000 was completed, and when de Biel noticed that no mention was made of the other £10,000, which Thompson had previously promised to leave in his will, he was told that inclusion of it in the indenture would be 'not proper in point of form.' Lord Lyndhurst, L C enforced the promise. Inducements, held are by a person 'plainly and deliberately' and having the desired effect of the promisee's celebrating a marriage because of them, are enforceable in equity at the suit of the promisee. '...A court of equity will take care that he is not disappointed.' There seems little doubt that Hammersley v De Biel could have been decided on contractual principles, with the same result, in a court of law.<sup>35</sup>

Footnotes:

33 Ante p23.

34 (1845) XII Cl & Fin 45 8 Eng Rep 1312.

See Stuart, V C in Loffus v Moore (1862) 3 Giff 592; 66 Eng Rep 544 Jorden v Money (ante) cannot be considered as a reversal of Hammersley v De Biel; and the proposition attributed to Lord Cranworth in the printed report, that a statement or representation of what a person intends or does not intend is not sufficient seems irreconcilable with the decision of the House of Lords in Hammersley..., and with the law as laid down by all the judges of highest authority. It is remarkable that the case...was not referred to by any of the counsel...in...Jorden v Money.'

35 See Wilson: Recent Developments in Estoppel 67 LQR 330 at p 331.

Lord St Leonards thought so in Maunsell v Hedges,<sup>36</sup> a case on appeal from the Court of Chancery in Ireland. 'I do not dispute the general principle that what is called a representation which is made for another person to act upon and is followed by his acting upon it, will, especially in such a case as marriage, be deemed to be a contract.'<sup>37</sup> However, Hammersley was not decided according to the narrow common law theory of contract, but according to a wider, equitable principle. And on its facts, Maunsell v Hedges no more runs counter to this equitable principle than D & C Builders v Rees<sup>38</sup> can be said to refute the modern statement of the principle in High Trees.<sup>39</sup>

The appellant, Maunsell, wished to marry a girl whose guardians refused their consent, she being not quite seventeen, and he being unable to make adequate financial provision for her. The respondents were the administrators of the estate of Maunsell's uncle, Robert Hedges. Hedges' representation that Maunsell would receive large estates in Tipperary under a will which at that time Hedges was 'convinced...I shall never alter... to your disadvantage' persuaded the guardians to observe that the girl's 'affections are strongly engaged, and to agree to the marriage. They were aware that Hedges had 'declined making any immediate settlement' upon the appellant.

The Uncle's financial adviser died in 1819, and in his stead the appellant on two occasions gave some rather dubious advice, involving Hedges in two lawsuits and loss of money. Rather unsurprisingly perhaps, Hedges was moved to question the wisdom of conferring upon his nephew the benefit of the Tipperary estates. He made a new will, excluding him, and afterward died.

Three observations need be made: first it was the guardians to whom any inducement was held out,<sup>39A</sup> and thus the guardians who must file the bill. Second, it is doubtful if

#### Footnotes:

36 (1854) 10 Eng Rep 769; 1854 HLC 1039.

37 Op cit at p1059.

38 (1966) 2 QB 617.

39 Central London Property Co v High Trees House Ltd (1947) KB 130.

39A i e Inducement to consent: it would not be realistic to hold that the nephew was induced to marry the girl, as he contended. This no doubt contributed to his failure. Through quare wether the guardians might be trustees of a right to sue on the principle of Tomlinson v Gill (ante).

the inducement could be held to be a representation, for, had Hedges wished he could have made an immediate settlement upon the appellant, and the significance of his not doing so ought to have struck the guardians;<sup>40</sup> they must be taken to have known that the will was revocable until death, for they knew that the appellant was not induced to seek the girl's hand by the uncle's promise. Third, having cost the uncle large sums in such a way the appellant may well not be in a position to request a court of equity to exercise its discretion in his favor. His appeal to Hedges' good faith is less strong.

These observations are relevant to a discussion of the second of the three cases more or less contemporaneous with Jorden, and which operate to cut down its supposed ratio:

Piggot v Stratton<sup>41</sup>. Here there were two plots of building land on the Isle of Wight held under a lease containing covenants restricting building density. Observation of these covenants was undertaken by both parties to the sublease of one plot, and this meant that from the bungalows built on that plot there was a view of the Solent. In consequence consideration for the sublease was high. The sublessor then surrendered the headlease and took a fresh one from the lessor containing no restriction on building density. Plaintiff - assignee of the sublease sought an injunction to restrain the sublessor from building on the property retained in such a way as to deprive his bungalows of their sea view and render them unmarketable.

Clearly plaintiff had no easement over the sublessor's plot.<sup>42</sup> Equally clearly, Lord Campbell, L C felt, it would not be 'consistent with equity and good conscience that Stratton, to make an increased profit on the land which he had not sublet, should be allowed to build houses on it...' in a manner contrary to the agreement between the parties to the sublease. There was no written covenant which plaintiff could rely upon, however but 'I apprehend the injunction to be supported on the well-established doctrine that if A deliberately makes an assertion to B intending it to be acted upon...and it

Footnotes:

40. Maunsell's earlier financial 'scrape' was mentioned in the letter in which the uncle said that the nephew was a beneficiary under his will.

41. 1859 1 De GF & J 33 (see p51 for an interpretation of Jorden v Money (ante))

42. For an attempt to confer greater respectability by finding an interest in land see later: inter alia Binions v Evans.

is... A is estopped from denying its truth.<sup>43</sup> But, it was argued, A was not here denying its truth. He had made a true representation of the covenants in the headlease, at the time of the sublease. The situation had since altered. Insofar as he had made a representation of intention to observe the terms of the headlease after leasing to be bound by them, this was unenforceable: Jorden v Money. 'But moralists and jurists tell us that words are to be understood in courts of justice in the sense in which the persons who used them wished them to be understood by the person to whom they were addressed.'<sup>44</sup> Although Stratton merely asserted that he had no power to build so as to block the sea view 'it would be childish to suppose that he meant to be understood to say although he had no power then to do the act, he might afterwards acquire the power by surrendering the lease.' In other words, Stratton's representation was worthless except insofar as it was a representation of intention. Whilst Louisa Jorden promised that she had no present wish to enforce the bond, her conduct in retaining the bond suggested possible future intentions of a different nature, which she could not be said to be concealing behind an unimpeachable statement of fact. Stratton, on the other hand, made a statement of fact which derived its whole substance from its implications about his future conduct. This discussion points to the casuistic nature of any distinction in principle between statements of fact and statements of intention. Such a distinction is bound to work capriciously and could favour scoundrels like Stratton. Common law pragmatism ought, and I argue is, tempered by an equitable concern with substantial issues: any other view must be retrograde to the achievement of justice. And it seems pointless to lose justice in the particular case merely because one cannot define justice at large.

The third case is Prole v Soady.<sup>45</sup> There was a representation which induced plaintiffs' father to marry their mother, made by their maternal grandfather, to the effect that certain property would become theirs (ultimately). It was made before the marriage and on several

#### Footnotes:

<sup>43</sup> 1859 1 De GF & J 33 at p49 See Nunn v Fabian 11 Jur N S 868 and, generally, Storey on Equity Jurisprudence (1866) p751 et seq.

<sup>44</sup> Op cit at p50.

<sup>45</sup> (1860) 2 Giff 1. 66 Eng Rep 1.

subsequent occasions. They sued his administrators as heirs of their dead mother, and were successful on the basis of Hammersley v De Biel. As with that case and Piggott v Stratton, a decision might have rested on the principles of contract.<sup>47</sup> It is necessary to emphasise however, that these were not cases in common law contract. Lord Cottenham expressed the matter quite clearly: 'A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realising such representation'.<sup>46</sup> This expression might, taken in its context, and in view of the predominant fact-situation of the authorities, be confined to promises inducing marriage.<sup>47A</sup> However, the authorities are wider than this.<sup>48</sup> Moreover, and perhaps significantly, the later cases following Jorden v Money and effectively submerging the equitable beneath the common law approach to promises have not sought so to confine the equitable doctrine, but have instead chosen to ignore it completely.

Before considering developments subsequent to the procedural fusion of 1873, it is necessary to assess another fetter placed upon the enforcement of promises by legal means. In Combe v Combe,<sup>49</sup> Denning L J reversing Byrne, J at first instance, 'insisted

#### Footnotes:

47 cf Caton v Caton (1861) LR I Ch 137: Lord Cranworth, L C reversing Stuart, V-C. The case is decided on contractual grounds, and plaintiff loses by operation of the Statute of Frauds s.4.

46 12 Cl & Finn 45 at p62 Note.

47A See also Ungley v Ungley 5 Ch D887

& Dean Pound's comment in 'Consideration in Equity' 13 Illinois L Rev 435 at p440 n 17 '...it is stretching the facts to say that the daughter made a... contract with her father to marry the man to whom she was already engaged.'

48 Representations inducing consent to marriage are generally representations of fact. For non-marriage situations see the cases cited earlier: Hobbs v Norton; Piggott v Stratton.

49 1951 2 KB 215.

with proper parental concern'<sup>50</sup> that the High Trees principle 'does not create new causes of action where none existed before,' warning that 'it is important that (the principle) should not be stretched too far lest it be endangered.'<sup>51</sup> This limitation is, he says, 'implicit in all the modern cases in which the principle has been developed.' To what extent is it supported by the earlier authorities?

II:2

I have perhaps said sufficient to establish a possible difference between equitable and common law approaches to promises. How far this enables us to differ from the reader of Spencer-Bower and Turner<sup>52</sup> who 'will be able to cock a snook at people who talk about equitable estoppel,'<sup>53</sup> and from the author who would apply to all forms of estoppel by representation 'the language of naval warfare (that) estoppel must always either be a mine-layer or a mine-sweeper: it can never be a capital unit,'<sup>54</sup> we must now examine. It is necessary to look briefly at the earlier authorities before examining the connexion between estoppel and the enforcement of promises after 1873.

Turner<sup>55</sup> cites Lord Esher, M R in Seton Laing v Lafone<sup>56</sup>: 'an estoppel does not in itself give a cause of action; it prevents another person from denying a state of facts.' Of Vaughan L J's dictum in Williams v Pinckney<sup>57</sup> he is dismissive.<sup>58</sup> Vaughan L J said 'the common law doctrine of estoppel is of a very personal nature and only exists between parties to a transaction. It is part of the law of evidence and not the same as the equitable doctrine. You cannot found an action on it as you can in equity.' Instead,

Footnotes:

50 See Stone: Social Dimensions of Law & Justice p261 note 259: see, for the suggestion that the case reflected 'the moral values of our society' Atiyah: Consideration p51.

51 1951 2KB 215 at p219.

52 Spencer-Bower & Turner: Estoppel by Representation 1966.

53 Harvey: Book Review of Estoppel by Representation 30 MLR348.

54 Spencer-Bower & Turner p7.

55 Op cit note 2.

56 (1887) 19 QBD 58.

57 (1897) 67 LJ Ch 30 at p37.

58 Spencer-Bower & Turner p12.

Turner says that estoppel occurs as a cause of action only in cases of acquiescence: in other cases the cause of action is in reality elsewhere, and estoppel is used as a 'mine-sweeper' to demolish a defence. Other cases are usefully categorised as wrongly decided.

There are a number of points to make here. As Turner admits throughout his book, many of the cases which can be categorised as cases of estoppel by representation contain no reference to the doctrine.<sup>59</sup> Denning, J, in High Trees states that 'these are not cases of estoppel in the strict sense. They are promises - promises intended to be binding, intended to be acted upon, and in fact acted upon...the proper inference was that the promisor did intend to be bound.'<sup>60</sup> Wrapped up in a technical doctrine such as that of common law estoppel, the limitation asserted to by Turner, and politically accepted by Denning, L J in Combe v Combe<sup>51</sup> might appear respectable. However, if the doctrine of equitable estoppel is aptly envisaged in High Trees, and as I should consider most useful, as merely an example of a method of enforcing promises where the facts justify this as being fair and equitable, then Turner's limitation appears suspiciously like an example of homeostasis. Arbitrary fetters excused by a pretense that rules of evidence are not in reality determinants of substantive rights<sup>61</sup> are bad enough, but

#### Footnotes:

- 59 Not merely the earlier cases referred to in this section, but those relied upon by Denning, J in Central London Prop Co v High Trees House Ltd(1947)KB 130, namely:  
Hughes v Metropolitan Railway Co(1877)2 App Cas 439  
Birmingham & District Land Co v LNWR(1888)40 Ch D 268  
Fenner v Blake (1900) 1QB 426  
In Re Wickham (1917) 34TLR 158  
Re William Parter(1937) 2 All E R 361  
Buttery v Pickard(1946)WN 25
- 60 High Trees at pl34.
- 61 cf the situation in criminal law where the rules governing the admissibility of confessions may be seen as guarantees of certain freedoms.

rules of equity dependent for their efficacy upon fortuities are worse, in an advanced legal system. Thus where A makes a promise to B and B plans his future around the promise, he cannot sue on it;<sup>62</sup> though if A sues in contradiction of the promise, B may set up the promise as a defence and estop A from denying it.<sup>63</sup> However, if A knows that B is infringing a right that A has but does nothing to inform him of his, and B is, reasonably, ignorant that he is doing so, then B may sue A and estop A from asserting the right in whose infringement he acquiesced.<sup>64, 65</sup> It may be wondered whether we cannot find a less capricious underlying principle.

Moreover, even if one were to reject the utilitarian approach, those who assert on the authorities that estoppel cannot found a cause of action are vulnerable for 'the logical situation is extremely simple. No number of observations of white swans can establish the theory that all swans are white: the first observation of a black swan can refute it.'<sup>66</sup> If we accept Lord Cairns' 'first principle' in its historical context, it has founded a cause of actions in a number of cases,<sup>67</sup> which cannot be classified as cases of acquiescence: nor does the cause of action lie elsewhere, leaving the action upon the promise a mere supportive, or 'mine-sweeper,' role. Hobbs v Norton,<sup>18</sup> Cookes

Footnotes:

62. Combe v Combe (1951) 2 KB 215.

63 Provided there is the ingredient of 'detrimental reliance'. High Trees cases see later. However this seems to be a wholly unnecessary import of the rules of common law contract to which, we argue, equity is not subject. See Jackson: Estoppel as a Sword 81 LQR84.

64 Ramsden v Dyson (1866) LRI HL 129.

65 See Nokes: Introduction to the Law of Evidence 1967 at p215 1216.

66 Popper: The Listener. 1971 p9

67 See Sheridan: Equitable Estoppel Today 15 MLR 325 for a more complete list of cases.

v Mascall, Wankford v Fotherley,<sup>19</sup> Burrowes v Lock,<sup>68</sup> Piggott v Stratton,<sup>41</sup> Prole v Soady<sup>45</sup> and Hammersley v De Biel<sup>34</sup> are all such cases.<sup>69</sup> It scarcely seems necessary to distinguish these cases from the parallel development in which it is admitted, a representation does give a cause of action,<sup>70</sup> viz the cases in which the plaintiff is to the defendant's knowledge led by the defendant to expend money on the defendant's land in anticipation that he has, or will receive, some interest therein. The notion of 'proprietary estoppel,' (I) suggest, is, along with equitable estoppel, a manifestation of equity's regard for fairness in the enforcement of promises. When the two concepts are seen as a part of the same whole, not only can a truer picture of the historical development be gained, but we shall see later that greater unity may be conferred upon a number of apparently disparate later cases.

Footnotes:

68 (1805) 10 Ves 470. Here one Cartwright offers to assign his share in the residue of a testator's estate in satisfaction of a trade debt. The creditor-plaintiff enquires of the defendant, who verifies that Cartwright's share is as the latter represents. The defendant had forgotten (fraud was not alleged) that Cartwright had assigned a part of his share already, 10 years previously. Damages were awarded to the plaintiff. 'What can a plaintiff do to make out a case of this kind but shew first that the fact represented is false and secondly, that the person making the representation had knowledge of a fact which was contrary to it. The plaintiff cannot dive into the secret reserves of his heart.' Clearly this would today be classed with the negligence mis-statement cases. But these are hedged about with restrictions: see Mutual Life Assurance v Evatt(1971) 1 All E R 150. Immediately before Hedley Byrne, the continued development of the High Trees doctrine seemed to promise an escape from Candler v Crane Christmas, see Sheridan: Estoppel Today 15 MLR 325.

69 Turner dismisses Hammersley as a case in contract. But his authority for doing so is probably the interpretation placed upon the case by Lord St Leonards in Maunsell v Hedges (Ante).

70 See Snell's Equity 26th Ed p627-633 (Distinction between proprietary and equitable estoppel on p629).

In Pilling v Armitage<sup>71</sup> Sir William Grant, M R, said 'if a landlord enters into an arrangement with a tenant relative to improvements, and so completely sanctions them as himself to agree to advance a part of the money...I doubt whether this does not fasten an equity upon the landlord precluding him from saying...that there is an end to the lease.' Similarly in Gregory v Mighell<sup>72</sup> a parol agreement for a twenty-one year lease was ordered to be specifically performed at the instance of the tenant after he had entered and expended money in anticipation. Failure to fix a rent was no bar to the equity, nor was it necessary to invoke the doctrine of part performance<sup>73</sup> where a father allowed his sons to occupy and to spend money on land of which he was the equitable owner, it was held that he could not assert title against the sons' trustee in bankruptcy: Unity Joint-Stock Banking Association v King.<sup>74</sup> Approbation by a father of expenditure by his son on a piece of land gave the son a right of action to perfect an otherwise imperfect gift and obtain the fee simple: Dilwyn v Llewellyn.<sup>75</sup> Lord Westbury, L C finds consideration in the expenditure combined with the father's knowledge and approval thereof, and yet 'does not make it entirely clear whether he considers the case to be one of gift or one of contract.'<sup>76</sup> In my view his difficulty is unsurprising. Finally Ramsden v Dyson<sup>77</sup> affirmed the principle that acquiescence by an owner who sees another spending money on the owner's property will confer title on that other where he, to the owner's knowledge was under the mistaken belief that he had title, or would as a result of his expenditure obtain it. The tenant was unsuccessful in the case since the landlord did not have the requisite knowledge, nor the tenant the requisite belief. However the principle of law now seems to have gained some acceptance. (See later). It is clear that a right of action exists to compel performance of a representation as

Footnotes:

71 (1806) 12 Ves 78.

72 (1811) 18 Ves 328.

73 cf Alderson v Madison and Wakeham v Mackenzie (ante)

74 (1858) 25 Beav 72.

75 (1861-73) All ER 384; 40 De GF & J 517.

76 Pettit: Equity & the Law of Trusts 1966 p66.

77 1866 LR 1 HL 129.

to title, or intention to create title, to land, if the representee had spent money on the strength of the representation. I would suggest that the proposition is capable of generalisation, and that expenditure of money on the faith of the representation is merely evidence upon which the Chancellor may act if he considers that but for his intervention an inequity would occur. And just as expenditure of money alone will not lead inevitably to the operation of equity,<sup>78</sup> so in a proper case presumably a court of equity or its successor will not hesitate to apply the principle where there has been no such expenditure. Wakeham v Mackenzie<sup>79</sup> was a case in which relief was given. The declared basis for relief was the existence of part-performance, but as Jackson suggests<sup>80</sup> the condition that equity would not relieve save where the promisee had acted to his detriment became confused with the similar principle that the Statute of Frauds could be circumvented only where there had been partial performance of the asserted obligation. The same article convincingly argues that this requirement was further confused with the contractual requirement of consideration, with the resultant petrification of a most useful tool.

Footnotes:

78 Ramsden v Dyson is just such a case, as I have indicated. See also the Victorian case of Brand v Chris Building Society (1957) VR625 in which a defendant paid a builder to construct a house in a site which he believed to be the site he had purchased, but which in fact belonged to the plaintiff. The plaintiff at the material time had no knowledge of the mistake, and in no way contributed to the defendant's belief. Thus the defendant was not able to call in aid equitable principles, not even the powerful embryo of unjust enrichment, presumably because, in medieval terminology, he had not done that which in good conscience he ought not to have done. Defendant was utterly responsible.

79 1968 1WLR 1175.

80 Estoppel as a Sword 81 LQR 84.

We must now look to the period after 1873, to discover, not whether equity may still bear children - though as the ethical component of the law there would seem to be no reason why it should not - but whether there is any nourishment to sustain one which, I have argued, maintained an uncertain existence prior to that date.

III:1

To state that the fusion of 1873 was merely procedural insofar as it affects the submissions made so far is not to deny the influence of procedure on substantive law. However, the principle was already almost three centuries old, that in the event of a disagreement equity should prevail over common law. Section 25 of the 1873 Act did not change the situation, but, in enabling all courts and judges to dispense equity the Act exacerbated certain confusions already apparent in the Court of Chancery.<sup>1</sup> The era surrounding the Tramways<sup>2</sup> decision, with its gloomy preoccupation with stare decisis, was not conducive to rectification of these confusions, since this necessitated a frank appraisal of the role of the judge in the lawmaking process.<sup>3</sup> Despite this, however, it may be possible to find leeways sufficient to provide a 'slim catena of authority' for a wider proposition than Lord Denning's.

The common law position in 1873 may be deduced from a number of cases: in Ogle v Earl Vane,<sup>4</sup> a forbearance case, the defendant was not able to reduce damages payable by him by reason of plaintiff's acceptance of a later delivery date at the defendant's request, and for the defendant's benefit. There seems nothing inconsistent here with the much later case of Rickards v Oppenheim,<sup>5</sup> for Vane was ultimately in default. Had he performed at the later date, it seems unlikely that plaintiff, having agreed to delayed performance, could have succeeded in an action for damages, although the judgement of Willes, J might suggest this.

#### Footnotes:

1 See the analysis of Coles v Pilkington L R 19 EQ 1711 by Malins, V C: 'If the conduct of one person induces another to alter his or her conduct, this will make a binding contract.' The consideration which he discovers in that case is perhaps not that which a contract lawyer would recognise, though he is in good company in mistaking Hammersley v De Biel for a case on contract.

2 London Street Tramways v LCC (1898) AC 375 . In particular the judgement of Lord Halsbury is depressing.

3 As to the English attitude generally see Jaffe (ante).

4 (1868) LR III QBD 272. See also Hickman v Haynes (1875) LR 8CP598.

5 (1950) 1 ALL ER 420.

Two cases involving companies, Re Bahia & San Francisco Railway Co,<sup>6</sup> and Hart v Frontino and Bolivia South American Gold Mining Co<sup>7</sup> merely estop a company, having accepted a person as a shareholder, from denying his status as such; in other words the defendant is prevented from denying a representation of fact upon which plaintiff has relied. Knights v Wiffen<sup>8</sup> is harder to fit into this category. A corn merchant sells a quantity of barley to one Maris, who resells a part to the plaintiff before himself taking delivery - before in fact the defendant corn merchant separates the consignment from his stock. The defendant promises to put the goods on the line to plaintiff on receipt from him of a forwarding note. After receiving payment from plaintiff, but before paying the defendant, Maris goes bankrupt, and the defendant refuses to deliver to the plaintiff. Plaintiff's action in trover is successful. Prima facie the defendant's promise to deliver is a representation of intention which the plaintiff relied on by taking no steps to secure immediate delivery, but the doctrinal difficulty is overcome by seeing the representation as one of fact; namely that the defendant has separated the consignment from the bulk and holds it to the plaintiff's order. On the facts this judgement is not particularly satisfactory, but it indicates quite clearly that Blackburn, J felt obliged either to hold the representation out of fact, or find for the defendant.

This common law position was adopted by Lord Selborne, LL in the Citizens' Bank of Louisiana and the New Orleans Canal & Banking Co v First National Bank of New Orleans.<sup>9</sup>

'The foundation of that doctrine (of equitable estoppel) which is...not likely to be departed from by this court is this, that if a man dealing with another for value makes statements to him as to existing facts...without...which the party...would not enter into the contract...he...shall be compelled to make them good. But those must be statements as to existing facts.' The facts were that the New Orleans bank, having remitted funds to a Liverpool bank, drew bills on the Liverpool bank and sold them to

Footnotes:

6 (1868) LR III QBD 584.

7 (1870) LR V Exch 111.

8 (1870) LR V QB660.

9 (1873) LR VI HL352.

the Louisiana bank. In order to encourage the apparently reluctant Louisiana bank, reference was made to the funds held in Liverpool, and a promise was made specifically to appropriate a part of these funds to the bills sold. This was not done. Subsequently the New Orleans bank went bankrupt, a receiver was appointed, and it was to him alone that the Liverpool bank would agree to pay the funds which it held. The Louisiana bank asserted unsuccessfully that there had been an equitable assignment of that portion of the funds equal to the value of the bills: or, if not the receiver, as successor to the New Orleans bank was estopped from denying the specific appropriation necessary to create an equitable assignment.

A different finding would have been quite incompatible with commercial understanding and convenience.<sup>10</sup> To have conferred priority upon the assignee in these circumstances would have altered the nature of negotiable instruments. Equally, to have enabled the assignor to achieve priority for the assignee through a promise 'followed by no action - to bind other creditors by such a promise - would in itself be inequitable. In these circumstances the decision in Hammersley v De Biel (ante) was not urged with any force by counsel for the appellant, nor was it even referred to by Lord Selborne, who participated, four years later, in Hughes v Metropolitan Ry,<sup>11</sup> a decision much more in line with Hammersley v De Biel and contrary in spirit to the Citizens' Bank of Louisiana. In Hughes, wherein Denning, J found authority for his 'new equity', the term equitable estoppel was not used, nor were there cited the cases to which I have referred. Instead, Lord Cairns relied on an inscrutable 'first principle of equity.' Far, however, from suggesting that this is a new equity, or that Jorden v Money and The Citizens' Bank of Louisiana have so restricted the old one as to render it inefficacious, the law as to representations may be seen to have been quite fluid. The foundation in 1865 of the council incorporated in 1870 as the Incorporated Council of Law Reporting for England and Wales, together with the amalgamation of the courts of co-ordinate jurisdiction in

Footnotes:

10 Not that the House is incapable of upsetting commercial understanding - or that of lawyers. cf Derry v Peek (1889) 14 Ap Cas 337 with Storey on Equity Jurisprudence (1866) 751 et seq.

11 1877 2 Ap Cas 439.

the Supreme Court of Judicature were followed by a congealing of judicial initiative, the climax of which was the Tramways (ante) dictum of 1898. It may have been a conscious or unconscious wish on the part of the House to preserve a fragment of the wider equity by asserting its qualitative peculiarity in Hughes. Their Lordships may have noticed the clash between the principle in Hammersley v De Biel and that of The Citizens' Bank of Louisiana and their respective predecessors. At any rate with hindsight we may observe that there was a clash, and that in an era in which the need for certainty was constantly expressed,<sup>12</sup> a flexible equitable doctrine was unlikely to survive intact when equity itself had for some years evinced a concern for certainty.<sup>13</sup> It is an indication of the paramount utility of the equity that it survived so far as it affected real property and waivers of existing contracts. In this emaciated form we may see it presently in operation and - though this does not exist sufficient to support a wider principle of equity - for this reason it is convenient to treat Hughes v Metropolitan Ry as a Watershed.

III:2

The plaintiff in Hughes v Metropolitan Ry<sup>11</sup> served on the defendant company a notice to repair. In reply the defendant referred to the shortness of the remaining term and queried the usefulness of carrying out the repairs, suggesting instead, terms for surrender. The landlord's solicitor indicated that although the terms were extravagant, more realistic ones might be acceptable; he reiterated the need for repair. No further communications were exchanged, and the company carried out the repairs, but outside the six months allowed from the date of the original notice.<sup>14</sup> The question that arose, therefore, was whether the landlord could forfeit the lease. He had clearly not

Footnotes:

<sup>12</sup> See Abel-Smith & Stevens: Lawyers & the Courts pp123 et seq.

<sup>13</sup> See Lord Eldon in Shedden v Goodrich, 8 Ves481 at p487. 'It is better that the law should be certain than that every judge should speculate upon improvements.'

<sup>14</sup> Moral reprehensibility is not necessary. James L J's finding that the lessor 'lulled the defendants to sleep, intentionally lulled them to sleep until it was too late for them to do the repairs' was disapproved. See Wilmott v Barber LR15 Ch 96 at P105 per Fry, J.

represented a fact - namely that the time allowed for repair was extended - for that would be straining the circumstances to fit a conception.<sup>15</sup> By his conduct, however, he may have represented an intention not to enforce the notice until a reasonable time after the breakdown of negotiations. This was Lord Cairns' 'first principle,' one 'upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture<sup>16</sup> - afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that strict legal rights under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who might otherwise have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between the parties.'<sup>17</sup>

The Chancellor having first entered the legal arena as one who comes between the subject and his strict rights in law where to allow him those rights would be against conscience, it is scarcely surprising to see Lord Cairns, L C doing just this; what is surprising, however, in the light of conventional wisdom, is that a statement of an intention should be within the purview of conscience in a 19th century court of equity. This writer's

Footnotes:

15 On the lawyer's tendency to do this, see Jhering on the Conceptualist's Heaven discussed; Stone: Legal System p226; translated (in part) in 11 Pol Sc Q 307. This does not seem to be an unduly nice point: the period is delimited by the right to enforce. If the appellant has represented that the period is in fact extended, he is indicating an intention not to enforce this right, at least, for a time - such time as may be reasonable in the circumstances.

16 See Carr v LNWR (1875) LR10CP317.

Espley v Wilkes LRVII Exch 298 (estoppel by deed).

Hart v Frontino and Bolivia South American Gold Mining Co LRV Exch 111.

17 (1877) 2 App Cas 439 at p448.

hypothesis seems to be supported, on this view of the case. No particular effort was made to disguise the support given to the statement of intention, nor was any apology offered for not following Jorden v Money, or the line of common law cases.<sup>15</sup> Instead the decision is consistent with there being in existence an equitable principle such as we have urged.

Having discussed the case it is perhaps opportune to suggest that the difficulties encountered later as to the temporary or permanent nature of the equity whose origin Denning, J ascribed to Hughes<sup>18</sup> are hard to understand. It may be that they are engendered by a misconception of the nature of the equity. Common lawyers, whose subject is rooted historically in the immutabilities of real property, are given to casting one eye upon eternity, and a principle whose longevity is governed according to common sense, equity and fairness may be indigestible.

The same year, at Durham Assizes, Stephen, J dealt shortly with an attempt to gain a life interest by means of an estoppel.<sup>19</sup> Here a housekeeper was induced to remain in service and to forbear to sue for past wages owed to her by the deceased in return for his promise to confer on her a life interest in his form after his death. His intention was implemented to the point of his making an improperly executed will, but 'to say that Alderson's heir-at-law is estopped by Alderson's conduct from denying the validity of the irregularly attested will would be to repeal the Statute of Wills... .' Instead Stephen, J was content to invoke the better-established doctrine of part-performance and to use his own terminology, 'repeal' the Statute of Frauds,<sup>20-21</sup> finding in the housekeeper's forbearance sufficient to serve as consideration for a contract. He disapproved Lord St Leonards' dissenting judgement in Jorden v Money, and, as we have suggested, mistakes Hammersley v De Biel for a case of contract.

Footnotes:

18 See the Tool Metal case and the authors cited in relation to it (post).

19 Alderson v Madison (1880) 5 Ex D 293.

20 'Decorous disregard' might be more appropriate. See Spencer v Hammerde (1922) 2AC 507 at p519, cited Megarry & Wade 2nd Ed p555.

21 cf II:1 n 2A. Again, resistance to estoppel to prevent 'repeal' of the writing requirements.

In the House of Lords<sup>22</sup> Lord Selborne predictably adopts the same stance in relation to estoppel as he did in First National Bank (ante) but disagrees with Stephen J as to the existence of part performance sufficient to prevent the Statute of Frauds from applying.<sup>23</sup> The decision is inconsistent with that in Hughes, which was followed in 1888 in the Court of Appeal.<sup>24</sup> We have noted the inconvenience accomplished by the decision in Foakes v Beer<sup>25</sup> as well as the weaknesses which undermine it. Insofar as it is based on Pinnel's Case<sup>26</sup> it is worth repeating that the inchoate condition of the law of contract in the early 17th century provides little in the way of foundation. Further, the reliability of Coke's Reports has recently been questioned,<sup>27</sup> and the 'horse, hawk or robe' fiction over-ruled.<sup>28</sup> It seems unsatisfactory to argue, as Trietel does,<sup>29</sup> that the Hughes equity is merely suspensory, for Lord Cairns nowhere suggests that his first principle is temporary of necessity,<sup>30</sup> and Lord Selborne makes no attempt to distinguish Hughes on this or any other ground. Foakes v Beer, in short, testifies to there being two lines of authority: the Hughes principle, despite Lord Chancellor Selborne's opposition to it, looks back to Hammersley v De Biel and its ancestors in equity, whilst Foakes v Beer looks to Pinnel's Case and Jorden v Money. As I have

Footnotes:

22 1883 8 App Cas 467

Over-ruling Sevart, V C in Loffus v Moore (1863) 3Cliff592 and disapproving Hammersley, upon which Stuart, V C relied.

23 The decision seems almost unnecessarily harsh, for in the circumstances the will would surely have suffered as a written memorandum: Re Holland(1902) 2Ch360 at p383. The forbearance could have amounted to consideration had the court wished. As to specific referability, see M & W 2nd Ed p559 & Note 74.

24 Birmingham & District Land Co v LNW (1888) 40 Ch D 268.

25 (1884) 9 App Cas 605.

26 (1602) 5 Co Rep 1170.

27 See Baker: New Light on Slade's Case! 1971 CLJ 51. Also comment in Lloyd's Jurisprudence 3rd Ed p704 n8.

28 D & C Builders v Rees(1966) 2QB 617.

29 Contract 3rd Ed p105.

30 See the remarks of Lord Denning M R in W J Alan v El Nasr (post)(1972) 2 All E R 127.

suggested that the latter is, in spirit, since it is by no means a clear decision, more consistent with common law principles than with equity, there is little significance in its having arisen on appeal from the Court of Appeal in Chancery.

Accepting that a smaller sum may not discharge an obligation to repay a larger sum lent, which seems a not unreasonable interpretation of Foakes v Beer, we find the equitable enforcement of promises of intention sheltering in hostile circumstances behind prior negotiations.<sup>31</sup> In Birmingham & District Land Co v London and North Eastern Railway Co<sup>32</sup> the appellant occupied land under three separate leases which contemplated that building would commence before the expiration of a certain term. It became known that the respondent company was seeking statutory powers to purchase land, possibly some part of that occupied by the appellant. To continue with the intention to build was inappropriate since even were the respondents to purchase other land, the proximity of a railway would alter the class of house in demand. At the suggestion of the landlord's agent, therefore, and in conformity with their own best interests, the appellants suspended their operations. The respondents duly purchased some of the landlord's property, subject to the appellants' building lease, and the question of compensation arose. It was the contention of the appellants that calculations should be on the basis of subsisting building agreement, whilst the respondents relied on the expiration of the term within which building should have taken place. The appellants claimed, on the authority of Hughes v Metropolitan Ry (ante), that the landlord had by his conduct in advising the suspension of building promised not to insist on his strict legal rights at the end of the term. As his successor, and with notice of the leases and the agreement to suspend building, LNWR were therefore bound by the promise: compensation was to be assessed as if the lease subsisted. Persons with 'contractual rights against others (who) induce by their conduct those others...to believe that such rights will not be enforced or will be kept in suspense or abeyance for some particular time...will not be allowed by a court of equity to enforce the rights until such time has elapsed

Footnotes:

31 1877 2 App Cas 439 at p447 per Lord Cairns, L C.

32 1888 40 Ch D 268.

without at all events placing the parties in the same position as they were in before.<sup>33</sup> Whilst denying that Hughes applies only to cases of forfeiture, Bowen, L J attempted to tie it to situations involving waiver of pre-existing contractual rights. He did not in the Birmingham case refer to estoppel, but was three years later, in Low v Bouverie<sup>34</sup> to declare that 'estoppel is only a rule of evidence. You cannot found an action upon an estoppel...it is only important as being a step in the progress towards relief on the hypothesis that the defendant is estopped from denying something he has said.' Clearly he is defining something different from the Hughes principle, since he makes no attempt to restrict estoppel to contractual situations, as he was at pains to do in the earlier case.<sup>35</sup> Might the Hughes-Birmingham phenomenon, therefore, not support a cause of action?

It is helpful to see Plimmer v Mayor etc of Wellington in the light of Hughes and Birmingham, bearing in mind particularly the role which equity assumed in those cases, of preventing the exercise of legal rights. This recalls the negative method by which the doctrine of the trust came to be recognised. John Plimmer had in 1848 moored a hulk on the foreshore at Wellington, and with the Crown's consent used it as a wharf and store. At the Provincial Government's suggestion in 1856 he built an extension and more buildings, to accommodate immigrants for whose use of the facility the Government paid Plimmer. During a reconstruction of the harbour he retained a temporary access from his wharf, to the shore by means of a gangplank, and it was not until 1878 that the Provincial Government indicated by a letter from the Secretary of Customs that the wharf was without the 'sanction or authority of the Government.' 'If this,' says the judicial committee's decision, 'was meant to apply to the whole wharf it is at variance with the whole preceding history of the case.'<sup>37</sup>

Footnotes:

33 1888 40 Ch D 268 at p 287 per Bowen, L J.

34 1891 3 Ch 82 at p105.

35 Though without the concurrence of Lindley L J in Birmingham.

36 1884 9 App Cas 699. An appeal to the Privy Council from a decision of the New Zealand Court of Appeal on a case stated.

37 At p707.

Subsequently the land was vested in the Corporation of Wellington by Statute, and in due course ejectment proceedings were brought by the Corporation against the occupiers. The Public Works Act of 1872 set up a Compensation Court, and provided for the payment of compensation to 'every person who immediately before the date of the... (Vesting Act) had any estate or interest in... the lands vested in the Corporation.' It is worth noting the proviso to section 4 of the Public Works Act that 'in ascertaining... the title of any claimant to compensation the Compensation Court shall not be bound to regard strict legal rights only but... any claim which the Compensation Court may consider reasonable and just having regard to all the circumstances,'<sup>38</sup> for it was sufficient to enable the Committee to take a wide view of the expression 'interest in land.'

The Committee noted the policy of the Provincial Government before 1867, which was not to build its own landing stages for immigrants but to use those already in existence in private hands - a policy responsible for the Government's encouragement to John Plimmer to extend his wharf in 1856. It was this encouragement which rendered inequitable the ejectment of the occupier without compensation: and presumably the repetition of this practice, leading to a number of ambiguous occupations of the foreshore, inspired the proviso to section 4 of the compensation statute. Reading the case in its context thus, rather than Ramsden v Dyson (ante) it was the Statute that let in regard for fairness and equity which facilitated Plimmer's claims. An unfortunate lack of clarity in the final paragraph of the judgement read by Sir Arthur Hobhouse has perhaps confused later discussion of the case: 'their Lordships have no difficulty in deciding that the equitable right acquired by John Plimmer is an interest in land carrying compensation under the Acts...'<sup>39</sup> Speculation on the status of his interest in land is pointless since the Statute is not concerned only with 'strict legal rights.' Leave aside the vesting Act of 1880 and the only interest in land it is useful to postulate is that possessed by the Provincial Government. It would be inequitable to permit the setting up of this legal title to deprive without compensation the occupier who had

Footnotes:

38 At p 708.

39 At p709: the emphasis is mine. In other words, equity requires that he be brought within section 4.

been encouraged by the owner to spend money on the property.<sup>40</sup> Ramsden v Dyson would require that the Government had knowingly exploited a mistaken belief by Plimmer that he possessed the freehold,<sup>41</sup> and there is no evidence that it did so. The Hughes and Birmingham cases are more apposite,<sup>42</sup> and I submit that attention to them confers

Footnotes:

40 of the support lent by early equity to the cestui que use as against the That the beneficiary must now have an interest in land (Settled Land Act 1925) is hardly the point. Suggestions that a beneficiary under an equitable estoppel must have an interest in land are misguided fidelity to analogy. We have here a similar but newer equity.

41 Or had represented to him that a specific interest would be conveyed to him - e g, in the case, a lease for years to a tenant at will.

42 Though see the two common law cases cited in Plimmer: Winter v Brockwell (1807) 8 East 308, and Liggins v Inge (1831) 7 Bing 684. In the former, having assented to his neighbour's construction of a skylight plaintiff could not, without affording compensation to the defendant, require him to remove it, even though it prevented the plaintiff from receiving fresh air through his own window. In the latter the defendants lowered a river bank by ten feet and built a weir, depriving plaintiff's father of some of the flow to his corn mill, but with his consent. ~~Serjeant Merewether~~ argues (at p687) 'If the grantee be led into expense by the licence, his remedy is in equity and not at law,' but Tindal, C J considered not. '...the operation effect of the licence after it has been completely executed by the defendants, is sufficient without holding it to convey any interest in the water to relieve them from the burden of restoring to its former state what has been done under the licence, although it has been countermanded (p691).'

greater coherence than more recent confusions.<sup>43</sup>

Having thus considered the 'watershed' cases and suggested that what we observe in action is equity acting traditionally in restraint of legal rights, and having indicated that motivating this restraint is the need to redress a balance destroyed by a representation by the promissor. We should also note the nice nature of the distinction between fact and opinion. The cases which we have already explored serve to illustrate the casuistry required to conceptualise fact and intention and place them in separate compartments: these cases do not attempt to distinguish on rational, but on historical grounds. It is not suggested, for example, in *Jorden v Money*, that efficacy on the one hand, or justice on the other, dictate the distinction: merely, it is said, authority does so.<sup>42A</sup>

Between fact and opinion, I submit, a greater gap exists, than between fact and intention.<sup>44</sup> That a man intends to bring about a state of affairs is a fact, though it would benefit a plaintiff little to prove merely the fact that an intention existed. Similarly, that a man has an opinion that a state of affairs exists, however unreasonable

#### Footnotes:

<sup>43</sup> See *Binions v Evans* (later). Mrs Evans should be able to either join the vendor-licensor by means of a third-party procedure, so as to make assertion of legal title to eject her a breach of contract: or raise an equity in her own favour, to prevent the Binions' legal rights ever being used unconscionably at her expense. Had they not bought with knowledge of her occupation, the position is similar to that of a purchaser of registered land subject to a short lease. However, the point is that Mrs Evans does not need an interest in land. And see *Corbin* (supra) <sup>46</sup>1012. See also *Crane: Estoppel Interests in Land* 31 Conv (NS)332 (later).

<sup>42A</sup> Logically and with equal lack of pragmatism one could argue that lawyers are prepared to countenance an estoppel where a statement about the past has been made, and additionally where a state of affairs has been denied. Strictly, neither can be a representation of an existing fact.

<sup>44</sup> See *Craine v Colonial Mutual Fire Insurance* (1920) 28 CLR 305, at p324 (post).

his opinion, is a fact. Departing from linguistic analysis, an examination of their effects suggests that reasonable reliance is more likely upon a statement of intention than upon a statement of opinion. A statement that a man will build a house, or will confer peaceful possession may well be acted upon, whilst a statement that a man thinks that a house exists ought to provoke an interested party to discover for himself whether it does.

The answer to a potential insurer's question 'Are you temperate?' may have been an opinion.<sup>43A</sup> 'There are facts innumerable,' said Lord Watson, 'which can be ascertained only by a test of opinion, but they are none the less facts in law, whatever they may be in a metaphysical sense.'<sup>45</sup> Thus the insured was taken to have misrepresented a material fact, and the policy was avoided. In Smith v Land & House Property Corporation<sup>46</sup> a property is described as 'satisfactory' by the vendor, whilst the experience of the purchaser who refuses to complete is that it is quite the reverse. 'It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve a statement of act...Where the facts are equally well known...what one (party) says to the other is frequently...an opinion. (This) is...a fact about the condition of a man's mind...but...it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by one who knows best involves...a statement of material fact, for he impliedly states that he knows of facts which justify his opinion.'<sup>47</sup> In other words, what is important is the effect which the statement has on the other party, insofar, presumably, as this is in the circumstances justified.

#### Footnotes:

<sup>43A</sup> Though Lord Blackburn thought not. Bearing in mind the evidence that the insured drank rather more liquor than his fellow town councilors he was no doubt justified in avoiding 'metaphysics.'

<sup>45</sup> Thomson v Weems 1884 9 Ap Cas 671: a Scottish Appeal.

<sup>46</sup> 1884 28 Ch D 7.

<sup>47</sup> See also per Bowen, L J in Edgington v Fitzmaurice 29 Ch D 459 at p483: 'There must be a mis-statement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion.'

Spencer-Bower & Turner,<sup>48</sup> in discussing the supposed fact-intention disparity, admits that 'there are very few assertions of intention which ingenious casuistry cannot plausibly treat as involving promises; and very few promises from which a representation of existing capacity and readiness to perform an engagement cannot with equal plausibility be inferred.' The energy spent in exposing such ingenuity may be criticised when the result 'has been in many cases to leave just expectations disappointed.'

III:3

It is clearly in the interests of any society that fair dealing should receive encouragement, and as the common run of transactions becomes more complex, so the conception of fair dealing must expand. If barter and immediate exchange for cash are the principal forms of trading then society's wellbeing requires that both goods and currency be what they appear to be, at the peril of the person presenting them. When exchanges of promises and the buying of future goods become usual, and when an increasingly specialised society necessitates reliance on data provided by experts, then it becomes increasingly vital to encourage reliability by compensating those who suffer from the lack of it. These are not the 'fine-spun speculations of visionary theorists,'<sup>49</sup> but the basis upon which decisions must be founded if the law is to maintain credibility. '...it may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of the community, but that is no reason for their refusing to entertain the question and declining to decide upon it.'<sup>50</sup> Examples proliferate, of judicial value-decisions, articulated and otherwise.<sup>51</sup>

We have already suggested that the law's laggard response to developing commercial morality has contributed to the decline in litigation in the courts upon the subject.<sup>52</sup>

#### Footnotes

<sup>48</sup> Estoppel by Representation 2nd Ed para 31.

<sup>49</sup> per Lord Halsbury in Janson v Driefontein Consolidated Mines(1902)AC 484 at p491.

<sup>50</sup> Per Pollock, C B in Egerton v Earl Brownlow(1853)1HL Cas 123 at p151.

<sup>51</sup> For a recent example see the comments of Blom-Cooper & Drewry on Morgan v Tate & Lyle(1955)AC21 in Final Appeal (1972) p325.

<sup>52</sup> See Civil Judicial Statistics 1971 Table A Cmnd 4982 cited Zander: Cases & Materials on the English Legal System p5.

There are those social demands upon the system which, when thwarted directly, reappear indirectly when legislation does not come to the rescue.<sup>53</sup> Over-subtlety leads to entanglement with doctrine and a respectable motive is discredited by use of the maxim about 'hard cases.'

We have noted that equitable regard for promises has to some extent taken refuge behind the waiver situation; but we have also submitted that the essence of the equity remains. An hypothesis viewing law as an adjustment of interests<sup>54</sup> might obviate for certain limited purposes the need for a distinction between public and private law: similarly an investigation into the recognition of promises might question for certain purposes the claim that the law of real property is qualitatively different from other branches of law in modern times. Why should the policy of the 1925 property legislation, for example, enjoy paramountcy over the necessity for protecting a deserted spouse?<sup>55</sup>

The history of the common law is a history of the law of property - primarily of real

Footnotes:

53 As it did following Derry v Peek (1889) 14 App Cas 337: 'this unfortunate decision (Palmer's Company Law 21st Ed p10) was modified by the Director's Liability Act 1890'. And Rookes v Barnard(1964)AC 1129.

54 See Stone: Social Dimensions of Law and Justice p164 et seq; Human Law & Human Justice p175. Some of the State's claims may seem less urgent if viewed as the claims of individuals to legal recognition of interests. This is not to enter the debate between sociologists and psychologists as to whether society is something qualitatively different from the aggregate of those who compose it, on which I confess total ignorance.

55 As in NPB v Ainsworth(1965)AC 1172. On the question of social necessity and the property legislation see Goodman: Adverse Possession 93 MLR 281, particularly p281-2. though clearly he is taking into account the need for certainty. How does the position of a purchaser differ, however, if he unknowingly buys land lost through adverse possession, from if he buys land subject to an equity?

The answer may be that multiplying the hazards is undesirable, but no I would argue social necessity.

property - with ancillary concerns<sup>56</sup> but this merely reflects the political power of property owners. Today we might reverse our priorities, or change them to suit our convenience. Not only is change necessary, but an extension of jurisdiction, to which judicial resistance is considerable.<sup>57</sup>

With these suggestions we can examine the cases after Plimmer as far as High Trees. A number of cases restrict the courts' jurisdiction over promises. To Derry v Peek I have adverted<sup>51</sup> the result here was so blatantly unfortunate at a time when accumulations of capital by means of public subscriptions to separate legal persons were becoming vital to the conduct of commerce that legislation was soon procured to avoid the decision's effect upon representations by companies. Lowe v Bouverie<sup>58</sup> belongs to the protracted history of liability for negligent mis-statement. A representation was made by the trustee of a fund to a potential creditor concerning incumbrances on the interest in the fund held by the potential debtor. Relying on the representation the plaintiff lent Admiral Bouverie a sum of money on the security of the interest, afterward discovering that there were incumbrances on the interest prior to his own, of which the defendant trustee had 'forgotten' at the time of the representation. The merits of the judgement are hard to find. Estoppel was not applicable, it was held, because the defendant had not promised that there were no incumbrances; he had instead forgotten those which defeated the plaintiff. Bowen, L J's definition encompasses common law estoppel upon which 'you cannot found an action...(it) is only a rule of evidence... important as being one step towards relief on the hypothesis that the defendant is

#### Footnotes:

56 See Milson: Historical Foundations p88 '...the economic basis of society was agrarian.' It may be an exaggeration, however, to say that 'today we think of the ownership of...a great agricultural estate as being something like the ownership of a motor car.'

57 On this see: Donoghue v Stevenson(1932)AC81(dissenting Judgements)  
Grant v Australian Knitting Mills(1936)AC85 at p107 per Lord Wright.

Also Jones v Padavatton(1969)1 WLR 328  
cf. Merritt v Merritt(1970) 2 All E R 760.

The danger perceived is that of overburdening the legal system.

58 1891 3 Ch 82.

estopped from denying the truth of something he has said.<sup>59</sup> Kay, L J, considering Piggott v Stratton (ante) which was cited for the plaintiff declared it to be 'a clear case of estoppel.' I fail to see how it can be within Bowen, L J's statement, and, bearing in mind Bowen's position in the Birmingham case,<sup>60</sup> it is clear that in this later statement his mind was addressed to the common law doctrine of estoppel on the one hand, and Derry v Peek on the other.

In neither Chadwick v Manning<sup>61</sup> nor Lala Beni Ram & Another v Kundan Lall et al<sup>62</sup> were the Hughes cases cited or discussed. A representation of intention was held to place the defendant under no liability in the first case. In the second, five tenants took a lease from a banker of a piece of land for the purpose of operating a saltpetre factory thereon. The appellants acquired the land from the bankers, thus becoming the landlords, and fairly soon after this the saltpetre manufacture was discontinued, several structures including a temple being built on the land instead. More than thirty years after acquiring the land the appellant lessors served a notice to quit and to remove the buildings from the land. The tenants appealed from an unfavourable decision by the Munsiff of Hathras, to the Subordinate Judge of Aligarh, who found in their favour. '...the evidence,' he said, 'shews in the most unmistakeable manner that not only did the original lessees (lessor, presumably) not object to the enclosing of these buildings when they were being erected, and stood by, but that by continuing to receive the rents from the lessees even after the erection of the buildings, and even though the saltpetre factory for which the land was let had ceased to exist he sanctioned the lessees' doing so. His successors are therefore equitably estopped from now suing for

Footnotes:

59 At p105.

60 See his remarks in Bentsen v Taylor (1893) 2 QB 283: 'Did the defendants by their acts or conduct lead the plaintiff reasonably to support that they did not intend to treat the contract for the future as at an end on account of his failure to perform the condition precedent' (the emphasis being mine).

61 1896 AC 231. See also perhaps, Cooke v Ingram (1893) 68LT 671.

62 LR XXVI IA 58 (1899).

the lessees' ejectment.<sup>63</sup> In support of his contention, the subordinate Judge, upheld in the High Court at Allahabad, cited Gopi v Basheshwar.<sup>64</sup> Interestingly the judges in India connect equitable estoppel, which resembles what we have seen of equitable promise-enforcement in the Hammersley v De Biel cases, with a Dilwyn v Llewellyn-Ramsden v Dyson situation. The Judicial Committee does not share this view. The judgement read by Lord Watson regrets the reliance in India upon 'the loose and inadequate statement of the rule of equity reported in Gopi v Basheshwar.' Insofar, however, as the Committee relies upon Ramsden v Dyson, it seems misled. An equitable remedy appears in the Committee's view restricted to situations in which the owner refrains from preventing another who is expending money on the owner's land 'under the mistaken belief that the land is his own property.' The House was prepared in Ramsden to enforce a representation of intention by the landlord to grant a lease to a tenant at will, if the tenant had expended money in reliance upon the representation. On the facts, however, it was decided that no such representation had been made. Neither here, nor in the later, Privy Council, case of Plimmer v Wellington, which was not considered by the Committee in the instant case, could the party seeking the relief have reasonably believed that he was the owner.

Further, 'if such representations had been made' (in Ramsden) '...I do not find that the noble and learned Lord indicated any opinion that...they would not have been sufficient to show the terms of a contract which might be enforced in a court of equity.' The said learned Lord may have had the good reason for not so indicating that contract was not in contemplation at the time by the court or the parties. As with Hammersley V De Biel, so with Ramsden v Dyson, the decision could have been reached upon contractual principles<sup>65</sup> but was not: yet the temptation remains, to attempt to squeeze an unfamiliar remedy into a familiar form,<sup>66</sup> notwithstanding that this exercise unfits it

#### Footnotes:

63 Cited at p60.

64 WN (1885) 100.

65 See the definition of consideration in Currie v Misa (1876) LR Exch 153 cf Gore v Van der Lann (1967) 2QB31.

66 See the phraseology adopted by Malins, V C in Coles v Pilkington (1874) LRL9 Exch 174. He enforces an intention to make a gift but adopts contractual terminology.

for its purpose.

In G Whitechurch Ltd v Cavanagh,<sup>67</sup> Cavanagh supplies goods to Innox, a firm substantially controlled by Raymond, who processes them and supplies them to the appellant company. Innox is indebted to both, but only the appellant has security. Cavanagh, fearing that Raymond's schemes to repay are in fact tricks to avoid or postpone repayment, obtains from the French courts (in whose jurisdiction both Innox and a branch of Whitechurch Ltd are) an 'opposition' which in effect 'lays an embargo' on the business of Innox until lifted.

Such an imposition on Whitechurch's supplier commends itself to neither Innox nor Whitechurch. Raymond's proposal is to provide Cavanagh with security by transferring to him shares which Raymond holds in Whitechurch Ltd. Whitechurch Ltd's secretary, one Wells, described as Raymond's 'instrument' certified two transfers which were executed by Raymond. There was later a meeting between Cavanagh and George Whitechurch, the managing director of the appellant company, at which the latter examined the certified transfers and said '...these transfers are in order. The secretary has, I see, certified them.'<sup>68</sup> Cavanagh lifted his 'opposition,' having, as he thought, obtained his security. Unfortunately, Raymond had acted fraudulently in executing, and Wells in certifying, the transfers. There were no shares. Nonetheless Cavanagh claimed the right to be placed on the company's Register of Shareholders on the basis either of the representation made by Wells on behalf of the company, or that of Whitechurch himself.

As to the first, the court held that a transfer certificate is merely a mechanism for share-dealing, and that the company gives the secretary authority only to acknowledge receipt, and not to promise to register the transferee. A secretary had been described as a 'humble' servant of a company whom 'no person can assume has any authority to represent anything at all,' and whose statements are not 'necessarily to be accepted as trustworthy without further inquiry.'<sup>69</sup> Given this climate, Cavanagh was unlikely to

Footnotes:

67 1902 AC 117.

68 At p129.

69 Barnett v South London Tramways (1887) 13 QBD 8 15 at p817 per Lord Esher cited Charlesworth's Company Law 9th Ed p225.

succeed on the secretary's representation.<sup>70</sup> Even the managing Director's representation did not bind the company, either because he had no authority, or because the representation 'if it is anything...(is)...a promise de futuro, which cannot be an estoppel.'

The position as to certification of transfers seemed curiously unsatisfactory, and is now contained in legislation<sup>71</sup> Lord Robertson's judgement asserted that whilst the managing director had no authority to bind the company by his representation, the secretary may have had: but that Cavanagh had not acted to his detriment. He had merely withdrawn his 'opposition' and this would not have done him any good anyway. After withdrawing it and finding himself without shares as security for the loan to Raymond, his position was exactly as it had been before.

It seems almost to be a matter of policy on the part of the courts to find no-one responsible for actions carried out on behalf of a company,<sup>72</sup> and this may perhaps be through a misunderstanding of the effect of corporate personality. To concentrate on the contractual rights of Cavanagh was to ignore the possible inequity which might have arisen - and to which Hughes would have provided a solution consistent with the equitable tradition I have sketched - had Whitechurch Ltd attempted to achieve priority over Cavanagh as Raymond's creditor before another solution, alternative to the transfer of shares, had been reached, so as to give Cavanagh security.

In contrast with these cases which deny all effect to representations which cannot be analysed contractually, is another line, beginning, for the purpose of our survey post-Hughes, with Tabor v Godfrey in 1895.<sup>73</sup> Here the plaintiff and his neighbours each occupied a house in a terrace owned by the landlord. It was intended by the landlord that there should be an unmetalled access road running the length of the terrace and joining the public highway at both ends. Plaintiff's lease included a small garden and

#### Footnotes:

70 See on this, the later case of Ruben v Great Fingall Consolidated(1906)AC 439.

71 See now Companies Act 1948 s 79.

72 For a slightly more justifiable refusal to estop a company from denying title see Guy v Waterlow (1909) 25TLR515

73 (1895) 64 LJQB 245.

a right of way with the other tenants, over the access road. In fact, his garden was so extended as to encroach upon the access road, bisecting it, since his house was in the middle of the row, and, although the lease excludes it, yet by the way in which the landlord has permitted him to occupy the encroachments (it) must be taken as included in the demise.<sup>74</sup> The landlord had by his acquiescence represented that he would not exercise his legal rights to eject the tenant and was prevented from suing either for an injunction or damages for trespass. Consideration was not provided by the tenant so as to bring the case within the pale of contract, and there does not appear to be a question of adverse possession, although the period exceeded twelve years, since the plaintiff did not occupy the land solely for his own benefit.<sup>75</sup>

Fenner v Blake<sup>76</sup> concerns a tenant from year to year of a Lady Day holding who wished, in December, to surrender with effect from midsummer. The surrender was accepted by the landlord, who then, in reliance upon it sold the property with possession from midsummer. The tenant was estopped from disputing that he did not hold under the new agreement. Being oral, this agreement contravened the Statute of Frauds. What did the tenant represent? He cannot have asserted the validity of the agreement in the face of

Footnotes:

74 Per Charles, J.

75 According with the solution proposed by Goodman: Adverse possession of land - Morality & Motive 33MLR 281 at p283, to the anomaly that a tenant who encroaches on his landlord's land does not acquire the fee simple, except that the consent here is implied and not express. There would be no point in awarding the tenant here so small a plot of land in fee simple; indeed if one assesses the utility of adverse possession in terms of maximising land use, the doctrine would have a malign influence and thus a counter-productive application to Tabor v Godfrey. cf on adverse possession by the tenant not raising a presumption that it forms a part of the tenancy, Hastings v Saddler(1898)79LT 355 (tenant of St Mary's Island, Northumberland occupying gardens on mainland belonging to the landlord).

76 1900 1QB 426.

the Statute, for a representation of law does not found an estoppel.<sup>77</sup> Nor can he have represented as fact that the new lease by operation of law replaced the original one, surely, if this operation of law is based upon the tenant's being estopped: for what then bases the estoppel? The better view, is that he represented his intention to leave in midsummer, and not to rely upon his strict legal rights under the original lease. In other words the court is giving effect to the equity.

In May v Belleville<sup>78</sup> an equity is enforced against a purchaser. Two properties, one tenanted, one owned by a vendor who sells one and retains the tenanted one. He sells subject to rights of way enjoyed over it by the tenants of the retained property, but the conveyance is not executed. The defendant, as successor in title of the purchaser under the conveyance containing the rights cannot insist on his strict legal rights and avoid the rights of way: the purchaser was put upon inquiry concerning the rights referred to in the conveyance, and thus so was the successor. She must therefore be held to have had constructive notice.<sup>79</sup>

Two years later the waiver principle is extended to a case in which the promisor has no authority to waive rights.<sup>80</sup> A husband on separating from his wife subscribed to a deed providing for payment by him to a trustee on behalf of the wife, and allowing the husband, after twelve months, to give notice to the trustee to pay a reduced sum. In fact he notified his wife's solicitors that he could no longer pay, and the wife waived the condition of notice to the trustee. The court held that the waiver operates to bind the wife so that she may not insist on receiving payments, nor can she sue for the arrears, for by failing to not give notice to the trustee the husband had acted to his detriment.

A case in which a licence to occupy was in effect converted is A-G for the Prince of Wales v Collon.<sup>81</sup> The defendant's grandfather owned land in Cornwall in which the Duchy

#### Footnotes:

77 Spencer-Bower & Turner p36, and the cases cited. See Creswell v Jeffreys (1912)

28TLR4.

78 1905 2 Ch 605.

79 Having been exercised by the tenants for 35 years, they were sufficiently defined.

80 Macnaghton v Paterson(1907)AC 483.

81 1916 2KB193.

of Cornwall owned the mineral rights. He occupied a house built in connexion with certain mining operations on his land, and the defendant occupied it after him, spending large sums so as to convert and enlarge it. The alterations were known to local agents of the Duchy of Cornwall who made no move to interfere, and as a result the Duchy was estopped from asserting title to the buildings.

Three cases follow which do not relate to land, but extend the Hughes principle and illustrate the use of equity to restrain legal rights. Lord Reading, L J in Panoutsos v Raymond Hadley Corpn of New York,<sup>82</sup> found an implied waiver on the part of a seller who accepted payment, for the shipment of flour, by unconfirmed banker's credit though the contract stipulated a confirmed banker's credit. It was not until the seller found it difficult to perform the contract - he had requested an extension of time for a later shipment - that he sought to escape from his obligations, as a strict legal interpretation<sup>83</sup> of the contract would have allowed, by pointing out the buyer's failure to open a confirmed credit. It was held that reasonable notice must be given before the strict terms of the contract could be complied with, in order to give the buyer time to comply. The waiver amounted, in short, to a representation that the seller did not intend to rely on this particular term of the contract, at least until after reasonable notice of a contrary intention.

Footnotes:

82 1917 2KB473. See also The Effy (1972) ~~211~~ 78.

83 I assume a distinction between law and equity which does not exist. Perhaps a better expression of the distinction would be 'formal' as against 'ethical,' but if it is borne in mind that this is what is meant a terminological departure from familiar shorthand usage may be avoided. The 1873 reforms meant that Law and Equity ceased to have separate identities. The jurisdiction of the Chancellor insofar as this related to the positive concepts necessitated by Equity's negative restraint upon the exercise of the common law rights passed for the most part to the Chancery Division, but insertion into formal law of an ethical component is now the task for all courts, and it is hoped that use of 'equity' does not result in 'bewitching' either myself or others.

In Ayrey v British Legal and United Provident Assurance Co<sup>84</sup> a wife sued as executrix. Her husband had taken out a life policy with the defendant, and had described himself on the proposal form as a fisherman. The degree of risk was greater in fact, because he was also a member of the Navy Reserve. He had told the local manager of this, and the manager had continued to accept premiums until 1916, when the husband was drowned. The suggestion that the contract was varied, the assured having submitted a new offer on new terms subsequently accepted when the manager received the next premium was rejected, since the manager had no authority to make contracts on behalf of the company, but it is not necessary in order to hold the company liable to the plaintiff to regard the district manager as having made a new contract,<sup>85</sup> instead 'the...question...is whether the company led the plaintiff to believe that they did not intend to treat the contract as at an end.'<sup>86</sup> The company was liable in the absence of a contract because with the knowledge imputed to it through its agent it continued to accept premiums, and could not therefore rely upon the strict terms of the contract.<sup>87</sup> It is sometimes assumed that the Hughes principle, being suspensory, must also be temporary.<sup>88</sup> Clearly, by the nature of Ayrey's case the remedy must be longer lasting.

In Craine v Colonial Mutual Fire Insurance Co<sup>89</sup> It was a term of the insured's contract of insurance that he should notify the company, within fifteen days of the occurrence of a fire, of the particulars of his loss. Failure could vitiate the policy. A further term provided that if the claim were not adjusted the company could take possession of the fire-damaged property, but without incurring any liability. The insured provided details of his loss outside the fifteen day period and was asked to reimburse them because the first documents were not in order. The company went into possession of the property and negotiations took place between the insured and the company. Ultimately the

Footnotes:

84 1918 1KBL36. (Divisional Court).

85 Per Lawrence, J p140.

86 Per Atkin, J at p142.

87 If the agent had gained the knowledge whilst helping the assured to fill in the proposal form it would not have been imputed to the company: Newsholme v Road Transport General Insurance (1929) 2KB 356.

88 See, for example, the articles by Professor Wilson, cited earlier.

89 (1920) 28CLR305. On appeal from the High Court of Australia, (1922)AC 541, sub nom Yorkshire Insurance Co v Craine.

company refused to accept liability under the policy. The High Court of Australia differentiated between a pure statement of intention which it considered would not be binding, and a statement of present intention together with a present act, which would suffice to estop the company from denying liability.

On appeal, the Judicial Committee felt that by taking possession the company had signalled not a present intention but a fact, namely that the claim was recognised as valid and that all that remained uncertain was the amount payable. It was felt safer to rely upon this representation than upon the one made at the time when the company returned the particulars of claim with an invitation to resubmit corrected particulars, even though the original submission was late: this was seen by the Committee as, if anything, a representation of an intention to consider the claim. Their Lordships decided that such a representation would not bind the company, and thus relied upon the company's occupation to estop it from denying having accepted liability.

The committee's analysis is scarcely more satisfactory than that of the High Court of Australia. In their effort to avoid binding the company by a representation of intention the latter invented a distinction which admits that statements of fact may derive their substance and form from the extent to which they indicate an intention about the future, and that any attempt to divide the legal effect of a statement of fact from that of a statement of intention and at the same time reconcile law and reality sinks one into a quagmire of semantics.<sup>90</sup> The former body seems to have been driven to abandon the

Footnotes:

<sup>90</sup> See Spiers v McCully (1925) NZLR 385. Builder contracts for the supply of materials. The supplier, aware of the builder's shaky finances, asked the owner of the potential house to guarantee payment: he did so, the house was built and on being passed by the owners the supplier sent a bill for £92. The owner then settled with the builder, who duly became bankrupt. The supplier sent a fresh bill to the owner. The High Court of New Zealand held that the supplier was estopped, having submitted one bill, from accepting that it was normal practice to submit a separate bill for joinery. Was this a representation of fact that the account was settled? If so, does this state of affairs not derive its substance from the intention which it implies not to submit fresh bills?

classical dogma that the court should give effect to the intention of the parties: a term of the contract provided for occupation of the insured's premises by the insurer without the latter incurring liability.

The plaintiff in Burns v Dilworth Trustee Board<sup>91</sup> sought a perpetual injunction to prevent the defendant from using land other than as a recreational area. The defendant had shewn on a plan an intention to use 23 acres of land within the city of Auckland as a 'recreational reserve,' and it was in reliance upon this that the holders of nearby lots had taken leases from him. The designation was a statement of fact, but this was meaningless without an intention that the area should continue to be reserved for this purpose yet 'The right of a lessee to restrain an owner from departing from his plan is based either upon an implied contract or upon estoppel by representation.'<sup>92</sup> Plaintiff succeeded.

These two cases may be contrasted with what seems conceptually a 'half-way case': Metcalf v Boyce.<sup>93</sup> A policeman became the quarterly tenant of a house, and received a grant to assist with payment of the rent. In 1912 the police authority, Somerset County Council, decided that the Chief Constable should become the tenant, and that constables should occupy houses as servants of his instead of as tenants on their own account. Thereafter no rate demands were sent to the defendant. Demands for rent he took to the Police Office from whom he received the sums payable and duly handed them to the estate office of his landlord. No written assignment was made, but the landlord knew of the

#### Footnotes:

91 1925 NZLR 488 - a case arising out of the Torrens system of registration. See also Bank of New Zealand v District Land Registrar 27 NZLR 126. Also Dabbs v Seaman (1925) 36 CLR 538. Plaintiff claimed that the plan, together with the words on a transfer of land to him by the defendant's predecessor in title amounted to a representation that she had a right of way. Held, inter alia, (Higgins J dissenting) that plaintiff had been misled, not by a statement of fact since the way was impassable, but by a statement of future intention to provide a way.

92 Per Reed, J at p505, Piggott v Stratton cited.

93 1927 1KB758.

change, and it was held that the constable was estopped from denying it. Thus 'the plaintiff can rely upon a surrender or assignment by act or operation of law sufficient to satisfy the Statute of Frauds.'<sup>94</sup>

The case is an illustration of the 'minesweeper' principle: the Chief Constable asserts that the attributes of tenancy belong to him and seeks to exercise them against the defendant. The latter is estopped from setting up as a defense that he is the tenant. It is not the cause of action which is provided by the estoppel but merely the means of achieving success. Metcalf v Boyle is a 'halfway' case because although the estoppel arises from a statement<sup>95</sup> of fact, this statement derives its substance from an operation of law.<sup>96</sup> The surrender is not effected by writing, and, as McKinnon indicates, satisfies the Statute of Frauds by reason of the performance of the parties. Conventional analysis, using a shorthand terminology masks the real nature of what has happened, which is that the tenant has stated that he will in the future no longer claim the attributes of tenancy. Both parties act in reliance upon that state of affairs, based on a statement of intention.

There is nothing to prevent the courts from allowing a statement of intention to base an estoppel in one circumstance - for example where a surrender or assignment is deemed by operation of law - but semantic confusion should not prevent recognition of reality,<sup>97</sup> although it seems to have done so. In Canadian Pacific Railway v R<sup>98</sup> the Judicial

Footnotes:

94 Per McKinnon, J at p764 . The judge felt that the pleadings in effect asserted an estoppel on the defendant's part, though they did not say so.

95 Using 'Statement' widely so as to include conduct amounting to acquiescence.

96 See Cheshire. Modern Real Property 9th Ed p438-9.

97 See also, perhaps, Rodenhurst Estates v W H Barnes Ltd(1936) 2 All E R 3: agreement for an assignment operating to prevent the assignee from denying liability to pay rent to the landlord, who had consented to the assignment. The agreement to assign is binding in the same way as a contract - it evidences a binding intention to create a situation which would be achieved by a deed.

98 1931 AC 414.

Committee stated that 'the foundation upon which reposes the right of equity to intervene is either contract, or the existence of some fact which the legal owner is estopped from denying.' Lord Tomlin's definition two years later<sup>99</sup> presents estoppel as a representation, or conduct amounting to a representation,<sup>100</sup> intended, to induce, and in fact inducing a course of action on the part of the representee: the two kinds of representation are not distinguished. Four years after that, in 1937 *Simmonds, J* gave effect to a promise concerning future conduct, though without mentioning the doctrine of estoppel.<sup>101</sup>

Re William Porter Ltd<sup>102</sup> involved a company the governing director (one Fontannaz) of which secured a resolution that no fees were to be paid to the directors from first October 1933 until the company was in better financial circumstances, when a contrary resolution might be passed. For this forbearance on the part of the directors there was no consideration but 'the resolution was intended to induce the company to take a certain course of action...(it) was not an act of benevolence...(but was)...intended to induce the company to enter transactions and to incur obligations which, but for that resolution it might not have done.' Following Fontannaz's bankruptcy the company resolved to go into liquidation. Fontannaz's trustee in bankruptcy sought to prove for the fees foregone by him after the date of the resolution, but he was unable to do so. The reasoning seems more in line with the dictum in Greenwood v Martin's Bank than with that of CPR v R.

Even more clearly, in Salisbury v Gilmore,<sup>103</sup> the court found for a tenant who had relied upon a representation by his landlord that at the termination of the tenancy the premises would be demolished. As a result the tenant had not complied with the covenant

#### Footnotes:

99 In Greenwood v Martin's Bank(1933)AC51 at p57.

100 The curious argument was raised that the silence of the husband might not found an estoppel against him. The efforts to restrict the doctrine seem to rely at times on flimsy and irrational pretexts.

101 The directors' action is classed as 'a waiver of claims'.

102 (1937) 2 All E R 361.

103 (1942) 2KB 39.

to repair contained in his lease Section 18 of the Landlord and Tenant Act 1927 allows damages for such a breach, equal to the diminution if any in the value of the reversion. Damages are not recoverable where the repairs would be made valueless by reason of structural alterations or, of course, demolition.<sup>104</sup> Here the landlord had changed his mind about demolition because of the outbreak of war, so that the repairs did in fact affect the reversion's value. Counsel for the tenant, Denning K C, urged the Hughes principle upon the court. Goddard, L J found the case 'of great simplicity' and felt it 'unnecessary to consider many of the interesting matters that were discussed before us' in finding in favour of the tenant. MacKinnon, L J alone<sup>105</sup> discussed the dictum of Bowen, L J in Birmingham, and distinguished the supposed Jorden v Money principle. He recognised that case as binding, but did not think that it 'avails to prevent the tenant from relying on the principle stated by Bowen, L J...merely because...the word 'intention' ' was used. Again the artificiality of the distinction was raised. 'If one says 'I am growing old and do not intend to live long' ,' MacKinnon reasoned, 'in form one states an intention, in substance one states a melancholy fact.'<sup>106</sup>

The analogy with the condition of mortality is not particularly apposite, though of course the dysfunctional nature of the semantic argument is illustrated. Clearly the court was requiring the landlord to stand by his representation of intention once the tenant had relied upon it. Neither the landlord nor the tenant can have understood by the landlord's representation that it was in substance a comment upon the inevitability of a demolition at the hands of the landlord, or that it was merely a statement of fact about the landlord's state of mind at a point in history with no implications for the future.

#### Footnotes:

104 See Gibson's Conveyancing 19th Ed p398-9.

105 The third judge, Lord Greene, M R found for the defendant on other grounds.

106 A statement: 'I am growing old and intend to commit suicide' would be more useful. Following the traditional interpretation of Jorden's Case, reliance upon this would not defeat an action by the maker of the statement against a promisee who had acted to his detriment. Following Salisbury v Gilmore, surely a different conclusion would be reached. But perhaps public policy would intervene.

In 1946,<sup>107</sup> Humphreys, J gave effect to a promise made by a landlord to accept a lower rent by preventing him from having the arrears. The tenant, who ran a dancing school in the premises, indicated to the landlord that, since wartime conditions prevented her from continuing to do so, either he must accept a lower rent, or she must go. He accepted her offer of one half of the amount provided for in the lease, and she over time paid, quite voluntarily, more, until the original rent level was attained. The court viewed the case as one of estoppel. Again the representation was in essence a statement of future intention.

Two Commonwealth cases, Svenson v Payne<sup>108</sup> and Canadian & Dominion Sugar Corporation v Canadian National S S Lines<sup>109</sup> emphasise the need for 'precise and unambiguous' language on which to found an estoppel. The latter case, appealed to the Judicial Committee, contains a statement stressing the application to estoppels of common law principles. Neither, on the facts, justifies the intervention of equity to restrain the exercise of legal rights, and since the promisee was in both cases unsuccessful they are merely negative authority.<sup>110</sup>

Footnotes:

107 Buttery v Pickard (1946) WN52.

108 (1945) 71CLR531.

109 (1947) AC 46.

110 In Svenson a tenant for life granted a lease. The remainderman did not realise that she had any present remedy. However, on the tenant-for-life's death she applied for equitable relief, overcoming an alleged estoppel based on her previous inactivity. It was held not to be unreasonable that she had not done anything earlier because, inter alia, the tenant for life was at the time of the grant healthy with a 'considerable' life expectancy. From the remainderman's point of view it was reasonable to suppose either that he was prepared to take the risk of the tenant's early death, or that he had insured against such risk. It was on the evidence of the tense that the court decided not to exercise its discretion under the Ramsden v Dyson principle. Similarly Canadian & Dominion Sugar formed on the evidence: the appellants failed to convince the Judicial Committee that the respondent had made an 'unqualified statement' as to the good order of the sugar on its receipt on board ship.

Before considering the High Trees case, it seems appropriate to make some concluding remarks about the earlier cases; the extent to which Denning J radically altered the existing law may then be apparent.

I shall in the next chapter suggest the necessity for redrawing the boundaries of legal categories, depending upon the purposes of the classification. Already it is clear that the clarity of the principle that equity will restrain the exercise of legal rights suffers or prevails, not always according to the merits of the case, but according to the category into which for other purposes, a case fits. Companies enjoy an astonishing immunity from responsibility, for example, at the hands of the judiciary.

Of the two lines of authority that we suggested emerged from the 1875 legislation, the line reflecting the common law view of estoppel and promise-enforcement enjoys exclusive attention at first. The Hughes and Birmingham cases are consigned to total obscurity until rescued by Denning as counsel for the defendant in Salisbury v Gilmore (ante). Only the climate of Uttar Pradesh seems to have stimulated judicial imagination sufficiently to see a useful connexion between Hammersley v De Biel (ante) and Dilwyn v Llewellyn.

In criticising the conclusion of the judges in Lala Beni Ram's Case, the Judicial Committee seem, as we have submitted, to have misunderstood Dilwyn v Llewellyn. Not until almost the turn of the century is the possibility of a non-contractual obligation recognised; and even after this efforts are made to adjust reality so as to support a conclusion that representations of intention do not create liability. Following Tabor v Godfrey recognition of claims against promissors are haltingly met, but with no consistent assertion of a principle.

The achievement of Denning, J in Central London Property Trust Ltd v High Trees House Ltd<sup>111</sup> was in his recognition that a connexion existed between the old cases of Hughes and Birmingham, and the then recent cases of Re William Porter and Salisbury v Gilmore. Indeed, the judgement must rely for its authority upon the general rule established - though scarcely always consciously - in these previous decisions, for the statement of

Footnotes:

<sup>111</sup> 1947 KB 130.

law relied upon subsequently, and attributed to the case by the leading text-writers, was obiter.<sup>112</sup> The facts of the case are too well known to warrant detailed rehearsal, but briefly, a block of flats was let by the lessor company to a subsidiary company, the defendant, in 1937. Before the block was fully tenanted, wartime made letting difficult and as a result the defendants were unable to pay the agreed rent from their profits. Following discussion with the plaintiff lessors the rent was reduced by half, which sum was paid until 1945. In that year plaintiff company's receiver, who had been appointed in 1941, discovered the arrangement, concluded, perhaps, that it was not legally binding, and claimed the full rent, together with the arrears. The proceedings in the High Court were in the nature of a test case, in which plaintiff claimed arrears only in respect of the last two quarters of 1945. Since the entire block was let at this time it was clear that the *raison d'être* of the arrangement was gone, and the plaintiff succeeded in his action.

Equally clear was Denning J's articulation of the principle according to which the promise could be enforced: 'a promise intended to be binding, intended to be acted upon and in fact acted upon, is binding so far as its terms properly apply.'<sup>113</sup> The cases which we have examined suggest that there was nothing new in the principle, but 'by... 1946 orthodox opinion had become so hardened in the view that gratuitous promises were never enforceable and that only bargains constitute contracts that orthodox lawyers could not believe that Denning J's dicta could be sound law.'<sup>114</sup>

#### Footnotes:

112 cf Hedley Byrne v Heller (1964) AC465. See, in relation to that case the statement by Heuston: Salmond on Tort 15th Ed p265-6. 'It would be pedantic and absurd to dismiss as obiter the fully considered judgement of five law lords delivered after hearing eight days of argument.'

It would seem equally absurd to dismiss Denning J's *ex tempore* judgement delivered after a much shorter hearing.

113 1947 KB 130 at p136.

114 Atiyah: Consideration in Contracts - a fundamental restatement 50.

## IV

I indicated in the foregoing chapters my adoption of the view that the law consists, in part anyway, in the conferment of recognition upon claims asserted by individuals or groups.<sup>1</sup> It was suggested that one such de facto claim was to have promises recognised and enforced in particular circumstances, and that equity anciently went further in recognising such claims than the common law. During the nineteenth century there was greater approximation between equity and common law, but nevertheless there emerged after the major reforms of the period two distinct attitudes to the promise, and two lines of authority. That which I characterise as equitable maintained its traditional role as such, by refusing the enforcement of strict legal rights contrary to a promise made and acted upon: I consider that the equity maintains its role yet.

The claims theory of law becomes central when one asserts that in order to satisfy the requirement of justice,<sup>2</sup> legal recognition may be given in inappropriate or inconvenient terms so as to avoid doctrinal conflicts which would force the decision in the other direction.<sup>3</sup> We have encountered cases in which it seems that promises have been enforced in a way which does not involve the court in unfamiliar or overly adventurous concepts, and in order to impose a meaningful unity upon cases I believe to be founded upon the 'broad principle of equity' it is necessary to see whether policy or expedience allow us to ignore the traditional boundaries between legal categories, and to question some assumptions made within those categories.<sup>4</sup> Legal classification takes place in order to

Footnotes:

1 See inter alia Stone: Social Dimensions of Law and Justice pl69 et seq. A utilisation of such a 'model' is White: Lawyers and the Enforcement of Rights, in Social Needs & Legal Action 1973. There is a discussion of the justice of recognising claims in Rawls' A Theory of Justice, 1972, Chapter 1 Justice as Fairness.

2 By this is meant the instinctive reaction in favour of one or other party.

3 De La Bere v Pearson(1908) LKB280 is a good example.

4 cf Schon's Reith Lectures November 1970 in which he argues in favour of functional categories. He considers that, in Government categories become most rigid after they have been useful. His examples include the Agricultural Extension Program, continued after the achievement of enormous agricultural surpluses. For problems in legal classification see Jolowicz (ed): The Division and Classification of Law.

solve particular problems and the classes should owe their continued existences to their continued capacity to solve those problems. To the extent that they do not have this function, lawyers should build new models, with new classes. Indeed this process is recognised, for example in the class Labour Law, which embraces contract and torts as well as new material. Trouble results when the old classes fail to be sufficiently fluid in their new contexts, for example where a traditional regard for freedom of contract<sup>5</sup> does not yield to the reality of consumer-manufacturer relations, or contracts of employment.<sup>6</sup> Failure to adopt new views may well be related to the reluctance to demystify the law, both being due to 'the failure on the part of ordinary men to realise that the forms of law and human society were at bottom merely human artefacts, not natural necessities but things made by men, and hence things that could be unmade

Footnotes:

5 See Friedmann: Law in a Changing Society 2nd ed p119. The Changing Role of Contract. Jolowicz op cit.

6 Americans seem more prepared to take a fresh and more empirical look at categories: See Childres & Spitz: Status in the Law of Contract 47 NYULR 1. Germans too, perhaps, at a more rarified level. See Rehbinder: Status, Contract & the Welfare State 23 Stanford LR941. 'It is easy to see why in an age of many transactions and therefore of increasing interaction, the importance of intention and will in the doctrine of legal transactions is steadily reduced in favour of protection of reliance.' (p952). Just as for Tawney Religion and Capitalism produced a unique ethos, so I venture the suggestion that the law of contract is a function of an entrepreneurial state. Its ethic is now obsolete. Friedmann (The State & the Rule of Law in a Mixed Economy) provides an analysis of Public, or State, participation in modern economics of the Anglo-American kind, and we have recently seen massive interference in the area of missiles, drugs and aero engines by the state, contrary to the spirit of the market, which inspired the law. If the law is to be effectively in control it must recognise new developments, and I suggest that the head of 'public policy' is inadequate for this purpose.

and remade.<sup>7</sup>

Hitherto, and perhaps to an extent even now, the old categories have absorbed the new to a remarkable degree. Thus equity is subsumed inter alia within the law relating to real property, and the law relating to contracts, though this is not to suggest that it has not transformed both. But whilst the unique character of interests in land as recognised in English law imposes the need for a separate law of real property, it should not be assumed that the claims which shaped the law - the claims of the conveyancer and the claim to the alienability - must forever take precedence over all other possible claims. Similarly, whilst common law contract embraces the theory of the bargain, this does not argue that all voluntarily-assumed relationships (as opposed to relationships such as Lord Atkin's 'neighbour' relationship which is one imposed by law) must be governed as if there were a bargain. Finally, for our present purposes, the welfare state and the mixed economy are both concepts which involve increased and increasing participation by administrative agencies in society. This participation is authorised by statutes and regulations, which allow wide discretion in the cause of flexibility. Refusal to allow such an agency to fetter itself, and strict control by means of the ultra vires doctrine, are both recognition of claims to restrain the activities of offshoots of the administration for the public benefit. But there is another claim which needs to be considered, and that is the claim to compensation or protection of the misled promisee who has altered his position in reliance upon a promise made by the agency.<sup>8</sup> Attributing to a contracting party knowledge of what is intra vires the company with which he contracts, on the basis of the possibility of inspecting documents lodged at Companies House, may be rational - although the Jenkins

Footnotes:

7. Hart: Bentham & the Demystification of the Law 36 MLR2. Also much confusion doubtless results from the lawyer's technique of adapting an old word to fit a new concept so that it carries much of its former meaning with it.

8. See Westminster Corpn v Lever Finance (later); Robertson v Min of Pensions (later).

Committee doubted it<sup>9</sup> pretending that an individual has notice of the precise powers of a central or local government body is unrealistic and unjust, by reason of the volume of principal and delegated legislation and the areas of discretion, what is accomplished is the reverse of what is sought; a charter is given to such bodies to act irresponsibly and to stand on the creating instrument as a defence.

In the following survey of the post-High Trees cases, then, I shall not divide the cases traditionally according to their subject matter, but instead attempt to see how they fit into the pattern of the 'broad principle of equity.' Clearly we have to consider whether the area of law in question requires special treatment, on the facts, where special reference is made, for example to the need for consideration, to the policy that land should be alienable without equitable fetters unforeseen in 1925, or to the necessity for restraining administrative agencies, I shall attempt to assess such reference on its merit.

The early cases often show Denning, J carefully nurturing the principle 'with proper parental concern,'<sup>10</sup> avoiding stretching it 'too far.'<sup>11</sup> A result of an English tendency noted, inter alia, by Abel-Smith and Stevens<sup>12</sup> to settle 'many things..by custom and convention...which in other countries would be settled by some enactment or judicial decision' has been that noticed by Blom-Cooper and Drewry in their study

Footnotes:

9 Report of the Company Law Committee Cmnd 1749 (1962). Paras 35-42 of the suggestion (Megarry & Wade 2nd Ed p1067) that 'it is unreasonable to allow a purchaser to purchase over an equitable owner... in possession who has failed to register an estate contract.' See also Maudsley: Bona Fide Purchasers of Registered Land 36 MLR 25. Also see Lau: The Ultra Vires Doctrine & the European Communities Act 1972. Guardian Gazette 28.3.73 at p9. On the difficulties of s9, in particular the requirement that the transaction sought to be enforced must have been decided upon by the directors, see Farrar & Fowler in 36MLR270 at pp274/5.

10 Stone: Social Dimensions p261.

11 Combe v Combe (1951) 2KB215/220 cited op cit.

12 Lawyers and the Courts pl.

of the House of Lords:<sup>13</sup> the law develops slowly, uncertainly and idiosyncratically. Foot Clinics(1943) Ltd v Cooper's Gowns<sup>14</sup> might have eased the fears of those who saw Denning J's earlier decision as a voyage of discovery. A lease given statutory validity under the Validation of Wartime Leases Act 1944 which allowed either party to give one month's notice in writing after the conclusion of the European war, was followed by a letter from the landlords that 'so far as we can see at present there is no reason why you should not continue till the expiration of your lease in December 1947 when our own lease expires.' The landlords then gave one month's notice to quit in August 1946. The notice was upheld, not on the ground that the earlier letter was in law incapable of binding the landlords, but on the basis that its terms did not show it to be a promise intended by both sides to be legally binding. In Ledingham v Bermejo Estancia Co<sup>15</sup> a loan was made to the company to enable it to continue in business, and interest was waived 'until such time as the company is in a position to pay.' The company did continue in business, but for twenty-two years the interest was unpaid<sup>16</sup> until finally the company went into liquidation.. Atkinson, J held that the creditor's rights to arrears of interest was extinguished, consideration had been provided, for the loan had purchased the continuance of the company. Prima facia the case fits into the orthodox doctrine of contract: so when the consideration failed, the arrears of interest became payable. However, if this is so it is difficult to see why the court relied upon Re William Porter (ante) and High Trees. In the former, Simonds J makes no

Footnotes:

13 Final Appeal p291. Referring to the law of 'obligations' the authors state 'The abiding impression of House of Lords decisions over the period of study is how infrequently major issues...come up for decision...the Law Lords have been starved of work that might have produced clarification of the law.'

14 (1947)KB507.

15 (1947) 1 All E R 749.

16 Although interest payments were credited to Mrs Ager in the company's books, and thus presumably debited elsewhere, creating no false impression to potential, third-party creditors. In any event, see Atkinson J's analysis of the meaning of the agreement at p751F.

mention, in his short judgement, of consideration,<sup>20</sup> and it was the latter case which launched Denning, J into his role of archetypal heterodox.

The answer may be that all three cases, and in addition the Scottish case of Cairncross v Lorrimer,<sup>17</sup> stress the purpose of the agreement. In Ledingham, Atkinson, J says<sup>18</sup> 'the whole object of the loan was to enable and induce the company to carry on.' He refers to High Trees, attributing to the lessors the sentiment: 'The whole idea was to enable you to carry on when you had empty flats.'<sup>19</sup> William Porter Ltd was 'entitled to assume that the directors would act in accordance with the provisions of the resolution they had passed, and would not claim remuneration until a further resolution was passed,'<sup>21</sup> because it could not follow the purpose of the resolution without making such an assumption. The resolution would be meaningless if it were not binding, and this is the reasoning permeating these cases. A party who takes advantage of such a promise must, in an age of transactions, be able to rely on it, but it is Procrustean, not to say circular, to move from this (the submitted premise upon which the cases rely) to the conclusion that if the promises were to be binding there must have been consideration. From being an ingredient which, with others, may render a promise binding, consideration becomes that which must have been present in all circumstances in which a promise has been held to bind a promisor. Without handing language and usage over to Fowler, it may be convenient to rescue words from Carroll's Humpty-Dumpty.

The decision in Couchman v Hill<sup>22</sup> has appended to it by the editor of the Incorporated Society's Reports a note. Scott, L J, reading the judgement of the Court of Appeal held that although the catalogue excluded all relevant liability for goods sold at an

Footnotes:

17 (1860) 3LT 170.

18 (1947) 1 All E R 749 at p 751F.

19 Ibid p752G.

20 Except in relation to West Yorkshire Darracq v Coleridge (1911) 2KB326 upon which Simonds J does not rely.

21 Re William Porter (1937)2 All E R 361 at p364A.

22 (1947) KB 554.

auction sale, the plaintiff was entitled to recover damages by reason of an oral guarantee given by the vendor whilst the goods were in the ring but prior to their sale. The editor suggests that such a promise by a purchaser could not if its legality were challenged, be upheld since bidders at an auction have a right to suppose that they bid on equal terms.<sup>23</sup> Such right is either very insubstantial on the facts of the case, or is unviolated: as counterpart to the bidders' right, presumably the vendor and the auctioneer have a duty to avoid making the terms unequal. If the duty were not met, damages for its breach would be difficult to measure,<sup>24</sup> for even if the argument that all parties still bid on equal terms, (the agreement affecting the rights of a particular bidder if he should be successful) is rejected, the loss to the other bidders is problematic. Plaintiff here might have been prepared to bid more, knowing of his special position vis a vis the vendor on being successful, but this does not assist with the assessment of what each of the others may have lost.

To avoid doctrinal difficulties which may or may not be realistic, such as whether it is consistent with the approach of the courts to auction sales that one bidder should be making a different offer to the auctioneer, unknown to the others, it might be possible to see the representation made by the vendor as a representation not to enforce certain terms of a contract even should a contract be made on those terms.<sup>24A</sup>

A similar case, that of Walker v Walker,<sup>25</sup> involved the lease of a flat under a standard

Footnotes:

23 At p560.

24 Presumably the breach would not be in contract see Harris v Nickerson (1873) 2R8QB 286. The general attitude of the courts to exclusion clauses is one of hostility, so that presumably in the absence of any fraudulent rigging of the auction it seems unlikely that an agreement which depends for its effect on the ordinary outcome of the auction sale, would be avoided.

24A - cf City of Westminster Property v Mudd (1958) 2 All E R 733 at p742 I per Harman J.

25 (1947)177 LT 204.

form of lease which made no reference to an agreement alleged by the tenant to have been made between himself and the plaintiff company that he should have the use of two additional rooms in which to start his property. Somervill, L J, decided, on being satisfied by the defendant's evidence, that the company should not have an injunction to prevent the tenant's use of the rooms. The oral agreement relating to the rooms might be enforced either by means of rectification of the lease or by implying a collateral warranty, the court held. In both this and the previous case, the result is that the oral agreement should be read with the written instrument so as to form one comprehensive contract,<sup>26</sup> and it may seem pedantic to analyse the reasoning in terms of the distinction between law and equity. I suggest that where continuity and convenience of outcome are compatible in the single case, and especially where regard for past forms points a practical way for the future, attention to history may be worthwhile. Thus, accepting Hohfeld's view<sup>27</sup> 'the so called legal rule in every such case (of conflict between equity and law) has...only an apparent validity and operation as a matter of law. Though it may represent an important stage of thought in the solution of the problem, and may also connote...important possibilities as to certain other closely-associated (and valid) jural relations, yet as regards the very relation in which it suffers direct competition with a rule of equity, such conflicting rule of law is pro tanto of no greater force than an unconstitutional statute.'<sup>28</sup> It would be

Footnotes:

26 Cheshire & Fifoot 8th Ed p109.

27 Hohfeld: The Relations between Equity and Law 11 Mich L Rev 537 that 'there is... a...marked...conflict between equitable and legal rules relating to various jural relations: and whenever such conflict occurs the equitable rule is in the last analysis paramount...' (p544).

28 p544. Note that there is nothing inconsistent involved in urging, on the one hand the unity of law and equity, and on the other, the utility of seeing first legal rights, and secondly equitable restraints which may be placed upon them: it is merely 'a stage of thought.'

possible to see the legal result of the agreements in Couchman v Hill and Walker v Walker resting upon the written contracts, but being subject to the equitable rule that a representation 'intended to be binding, intended to be acted upon and...in fact acted upon'<sup>29</sup> should bind the representor. As well as providing greater symmetry in Walker, setting up an equity as an alternative to the equity of rectification in achieving the desired result, such an analysis avoids the murky waters of intention to which Cheshire finds it necessary to refer.<sup>30</sup>

It is not suggested that this was the line of reasoning followed in either case: merely that both are result-oriented decisions, and that the same result might have been achieved with greater benefit for both past and future by the use of the equity. My initial postulate concerning the need for the equity of promise-enforcement is supported by these cases.

Two cases involving representations by the Crown were heard in 1948: Territorial Army v Nichols,<sup>31</sup> and Robertson v Ministry of Pensions.<sup>32</sup> In the first, the Court of Appeal accepted that the Rent Restriction Acts did not apply to the Crown, and that the Territorial Army, which had issued a rent book indicating tenancy rights under the Acts, attracted 'the contagion of the Crown's immunity.'<sup>33</sup> The question was raised whether the immunity was in any way undermined by the representation made to the tenant by the issue of the rent book, and the court relied upon a dictum of Bowen, L J in Low v Bouverie (ante) that 'the language upon which an estoppel is founded must be precise and unambiguous,'<sup>34</sup> finding that the rent book, when combined with a letter from the lessor stating the tenancy's terms (which were inconsistent with the Acts) clearly, was not a sufficiently precise representation. Bowen L J's dictum implies that the promisee,

Footnotes:

29 Rickards v Oppenheim (1950) 1 All E R 420 (see later).

30 Cheshire & Fifoot 8ed p109.

31 (1949) 1 KB 35 (Territorial & Auxiliary Forces Assoc of the Co of London v Nichols)

32 (1949) 1 KB 227.

33 (1949) 1 KB 35 at p44 per Scott, L J, who read the judgement of the court.

34 (1891) Ch 82 at p106 cited op cit p50.

the tenant, acted unreasonably, since it must surely be so, to act upon a representation which is not free of ambiguity. The unarticulated object of the court is to rescue from injustice one threatened by it, but a condition of the court's action is that he shall have done all that he reasonably should have done.<sup>35</sup> The test sounds like an equitable one, and is variable according with where the court considers that risks ought to be placed.

An argument advanced by counsel for the Army is worth examining for its apparent logic, that is, that if the statute does not bind the Crown directly, estoppel cannot make it do so. In principle of course, estoppel has exactly the effect of enabling that to be accomplished which, but for a representation by the promissor could not be accomplished.<sup>36,3</sup>

It is difficult to see why the necessity which allows the Crown to claim an immunity by statute should operate to prevent the Crown from apparently waiving its immunity, and even if it does, it is difficult to see why liability in damages is not incurred:

Footnotes:

<sup>35</sup> cf the equitable maxims concerned with laches, 'clean hands' etc.

<sup>36</sup> Associated with this contention is the suggestion, to which more weight was attached, that the representation was one of law and not of fact. The applicability of the Rent Acts to the Crown may well be a matter of law, but the question of whether the Act applied to a particular dwelling is surely out of fact. To argue that X does not have the attributes necessary to own property may be to argue a matter of law: if X stood by and allowed Y to sell goods as Y's he could not generally assert his own title against the purchaser, for he would be taken to have made a representation of fact despite the legal nature of the concept of ownership. One suspects that the fact/law dictionary is teliological. See Birch v Pease & Partners (1941) 1KB615 (Reliance placed on a representation of liability under the Workman's Compensation Acts: representation enforced). See also Solle v Butcher (post).

<sup>37</sup> See Wroth v Tyler (1973) 1All E R 897 at p910F, although this arises out of the character of the Land Registration Act 1925 s 139(1).

the policy of the statutes is to protect the Crown in its occupation of property, and not to leave the subject with no form of redress.<sup>38</sup>

The second case involved an Army officer who made a claim for a disability pension to the War Office, in respect of an injury sustained whilst on military service in December 1939. Under a Royal Warrant for Pay of 1940, authority to 'accept (injuries) as attributable to military service' was transferred from the War Office to the Ministry of Pensions except where the injury occurred before September 1939. Nevertheless the Director for Personal Services wrote purporting to accept the injury for disability pension purposes, and, relying upon this acceptance Colonel Robertson forebore to obtain independent medical assessment of his condition, and X-ray evidence disappeared. Subsequently the Ministry of Pensions disallowed the injury. 'Is the Ministry of Pensions bound by the War Office letter?...They assumed authority over the matter... if a government department in its dealings with a subject takes it upon itself to assume authority over a matter with which he is concerned, he is entitled to rely upon its having the authority which it assumes...He does not know, and cannot be expected to know the limits of its authority.'<sup>39</sup>

Denning, J differentiates the case from those in contract. Insofar as the promisee, Colonel Robertson had not foreborne to secure further medical assessment at the request of the War Office 'there is no consideration given at the time.' Rather 'the case falls within the principle that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it.'<sup>40</sup>

#### Footnotes:

38 See Fleming: Torts pp319-320. The Crown is normally liable for the damage caused by the negligent acts of its servants, except, it seems, where they are negligent in their representation of matters concerning Crown Immunity.

See Denning J's comments in Robertson v MoP (post) P231

39 Per Denning J at p232. Neither can the subject be expected to appreciate the extent of quality of Crown immunity, surely.

40 p231.

The latter principle can be seen at work in Tankexpresse A/S v Compagnie Financiere Belge des Petroles S A.<sup>41</sup> The appellants chartered a ship to the respondents on terms that payments should be made at a certain time of the month in cash, or the ship would be withdrawn. Over the period of hire payments had been made later in the month and by cheque, and this was accepted by the appellants as performance of the contract. The latter were, not, therefore, 'entitled to vary the accepted method of performance without first notifying the respondents in time to enable them to perform the contract in strict conformity with the terms of the charter party.'<sup>42</sup>

It is not satisfactory to see this, or the similar cases back to Hughes as examples of the suspensory effect of the equity, because quite clearly the effect so far as the action is concerned, is not suspensory, but total. Where the response of the promisee is once for all, as in Robertson, the effect of the representation cannot be undone, and the result of the equity is plain. In the context of a continuing relationship, the equity operates within the currency of the representation which has the effect of modifying expectations arising out of the relationship. The representation may cease to bind the promisor if the promisee is given notice, and if it is equitable<sup>43</sup> in all the circumstances for him to revert to the status quo ante - as it clearly would have been in The Petrofina, but not in Robertson - so that in a subsequent action, or perhaps as to a part of a present action, the promisor might be successful. It is misleading to suggest that his legal rights have been suspended;<sup>44</sup> they have been overridden by equity for as long as required by equity.

Footnotes:

<sup>41</sup> (1949)AC76. (The 'Petrofina').

<sup>42</sup> Op cit p93 per Lord Porter.

<sup>43</sup> ie fair. Thus 'adequate protection is given to suppliers by the requirement that the notice should be reasonable. Per Denning, L J Rickards (post) p424A.

<sup>44</sup> Except in the different sense, as applied by Hohfeld and adhered to here, that all overriding equities suspend legal rights except where jurisdiction is parallel. It is to the use of suspensory to note temporary to which we object because it obscures the true state of affairs. There is no qualitative difference between the overriding of legal rights for six months and doing so for eternity. In both cases the court is preventing the promisor from succeeding in his action.

In Richards v Oppenheim<sup>45</sup> the respondent ordered a chassis and required a body to be built on the chassis by a particular date. When it was not built by that date, he continued to press for delivery, and by the representation that he was still prepared to accept delivery he waived his right to repudiate the contract: 'by his conduct he made a promise not to insist upon his strict legal rights.' That promise was intended to be binding, was intended to be acted upon, and was in fact acted upon.<sup>46</sup> The Court of Appeal accepted that Oppenheim could not at that stage have insisted upon the terms of the contract, and went on to consider whether the notice which he gave the dealer of an intention to make time of the essence was reasonable. There having been a time-stipulation in the original contract, such notice as Oppenheim gave was valid, and, being four weeks, reasonable.

Two further cases in 1950 involved the Rent Restrictions legislation: Solle v Butcher<sup>47</sup> and Welch v Nagy.<sup>48</sup> In the first, it must be relevant that the parties had been partners in an estate agent business, and that it was the tenant who represented to the landlord that a particular flat was not in its reconstructed form, subject to the legislation. The Court set aside the lease on the ground of mistake,<sup>49</sup> and the applicability of the Statute to the flat seems this time to have been regarded as a matter of fact.<sup>50,51</sup> It was, on the facts therefore, unnecessary for the court to decide whether or not estoppel can oust the court from its jurisdiction to decide whether the rent claimed in respect of any dwelling house infringes...the...Act.<sup>53</sup> For a number of reasons Bucknell L J's

#### Footnotes:

45 (1950) 1 All E R 420. But a promise to do, on more favourable terms, what one has already contracted to do, is not in conventional doctrine, binding: Stilk v Myrick (1809) 12 comp 317.

46 Op cit p423E

47 (1950) 1KB671.

48 (1950) 1KB455.

49 For the terms suggested by Denning L J see (1950) 1KB671 at p697.

50 cf Territorial Army v Nichols (ante).

51 (1950) 1KB671 at p683 (per Buckmill, L J) & at p695 (per Denning L J).

52 p695.

53 At p688.

dictum would not embrace the equity relied on in the Hughes cases. Denning is at pains not to subsume the equity under the doctrine of estoppel,<sup>54</sup> for there would be little point in pursuing the implications of one doctrine if it were subject to precisely the limitations suffered by another.

Second, a misconception may have arisen to the extent that the earlier case of Welch v Nagy<sup>55</sup> was relied on. Here, the defendant became the tenant of furnished premises, and, after some months bought the furniture from the landlord. The latter then sold the house to the plaintiff, and purported to sell the furniture as well. When the tenant wrote to the new landlord exercising his option to extend the tenancy he mistakenly described the premises as 'furnished.' If the premises, which had clearly become 'de facto'<sup>56</sup> unfurnished, remained 'de jure'<sup>56</sup> furnished, the court would have had a much wider jurisdiction to grant possession, but this would be 'to confer on the court by act of one of the parties a jurisdiction (namely an untrammelled power to make orders for possession of premises in fact unfurnished) which Parliament has said that the Courts shall not have.'<sup>57</sup> The solution in the case is not questioned, but the reasoning appears, like much of the reasoning concerned with equitable estoppel, or the Hughes principle, to owe too much to the law of contract. A contract is 'a promise, or set of promises which the law will enforce,' and 'the parties...are free to make their own rules as to what shall and shall not bind them.'<sup>58</sup> All that is

#### Footnotes:

54. Robertson v MoP (1949) 1KB227 at p230: 'Those cases are not cases of estoppel in the strict sense...' Rickards v Oppenheim (1950) 1 All E R 480 at p4230: 'It is a kind of estoppel.' Central London Property Co v High Trees House (1947)KB130 at p136: 'If the case had been one of estoppel it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end...I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted upon is binding so far as its terms properly apply.'

55 (1950) 1KB455.

56 Per Asquith, L J at p461

57 Per Asquith L J at p464.

58 Chitty: Contracts, General Principles 1.

claimed for the equity is that it will rescue one party from the consequence of his reliance upon a promise, or an apparent promise. In contract the 'power of the individual to effect changes in his legal relations with others is comparable to the power of the legislative.'<sup>59</sup> It is in fact only a kind of political prejudice which causes us to use the word law in one case, and not in the other.'<sup>60</sup> As delegated legislature must not exceed an empowering statute, so the law-making power of individuals must not be allowed to contravene statutes dealing with the subject matter in question. When a person seeks the relief of the equity, he does not assert that the parties reached an agreement, and, whether or not this 'law' is one which they were competent to make, the courts must enforce it. He says instead that he has been led into a particular position, and he asks the court to help him out of it. It was not his desire that he should be in the present position.

Thus, in Welch v Nagy, had the parties agreed to treat what were in fact unfurnished premises as furnished, so as to confer a broader jurisdiction upon the court, they could not have enforced the agreement. Instead the landlord has been induced to undertake certain obligations on the basis that certain facts were true. If they were true, the court would have had an enhanced jurisdiction over the tenancy. Why could the court not preclude the tenant from denying the truth of the facts in an appropriate case, if failure to preclude him would result in an injustice?

As in the Robertson case, it seems that the courts are committed uncharacteristically to restraint upon freedom. If contracts in excess of statutes are enforced, then the purpose of the statute - indeed the whole concept of legislation - is gone: but if a statute obstructs a remedy and leads to inequity in doing so, no purpose is served.

Footnotes:

59 Particularly in the U S where Parliamentary sovereignty is unknown. Increasingly in the U K, where legislative power will have to be used in conformity with E E C policy or face annulment in the European court.

60 Fuller, Consideration & Form 41 Colum Law Rev 799 at p807.

This has been recognised in other cases.<sup>61</sup>

In Perrott v Cohen<sup>62</sup> the Court of Appeal construed the occupation by a tenant of certain lavatories not included within the lease as a representation by him that they were within the demise: 'The principle is that a man who gets in by reason of being tenant, must take land as under his original take.'<sup>63</sup> The landlords acquiesced in the tenant's conduct, and at the termination of the lease brought an action against the tenant on the repairs covenants. The tenant was bound by his original representation, for 'the representation was in effect a promise or assurance that the terms of the lease should apply to the adjoining piece (of land)...and it is binding on the principle which I endeavoured to state in Central London Property Co v High Trees House (ante).'<sup>64</sup> It should be noticed that the tenant-promissor is the defendant, and that his promise is being enforced at the behest of the landlord-promissee. Aside from the representation, plaintiff has no cause of action, except perhaps in quasi-contract. For this reason it

Footnotes:

61 See White & Tudor: Cases in Equity 8th edition p86 et seq (cases on the Statute of Frauds). Also Birch v Pease & Partners (1941) 1 All E R 334: Workmen's Compensation Act 1925 543: 16 provided that where a workman on entering employment falsely denied having suffered from a disease, compensation was not payable. With knowledge of the false statement, the company paid compensation. The court upheld the claim by the workman to continued payments. Also Kingswood v Anderson (1963) 2QB169 though here reliance is placed upon another statute. See also Harnam Singh v Jamal Pirbhai(1951) AC688. Different codes, restricting rents of respectively, dwelling houses and business premises. The Privy Council decided that where the premises were 'mixed;' the court must choose the more appropriate classification. The action of the party ousted the jurisdiction of the parties as to one of these codes. Moreover it was a letter from the tenant's solicitor which gave the court jurisdiction under the legislation applicable to statutory tenancies. (p699).

62 (1950) 2 All E R 939.

63 At p941 per Somervill, L J, citing Charles, J in Tabor v Godfrey (ante).

64 At p943 per Denning, L J.

is surprising to find Denning L J, in Combe v Combe,<sup>65</sup> asserting that the High Trees 'principle does not create new causes of action where none existed before'.<sup>66</sup>

Here, following the pronouncement of a decree nisi the promisor promised to pay his former wife £100 annually, after deduction of income tax. She pressed for payment, but without success, and, after more than six years brought an action on the promise.

At first instance Byrne, J found in her favour, but was reversed on appeal. Consideration was thought to be necessary to support the promise, unless it was being used as a defence, or as 'a part of a cause of action but not a cause of action in itself.'<sup>67</sup> In none of the cases relied on by the wife 'was the defendant sued on the promise, assurance, or assertion as a cause of action in itself,'<sup>67</sup> Denning L J said, apparently ignoring Perrott v Cohen.<sup>68</sup>

With Combe v Combe the creativity inspired by the High Trees decision seems to have reached its zenith. We have seen that although the equity has had a continued existence

#### Footnotes:

65 (1951) 2KB215. See Atiyah: Consideration p51.

66 Ibid at p219.

67 Ibid p220.

68 It would be possible to interpret Perrott v Cohen more narrowly, though none of the judges seems to have done so in Combe v Combe, and restricted to matters concerning landlord and tenant. See Cohen, L J's judgement (Perrott v Cohen (1951) 1KB705 at p709. 'My doubt was whether the equitable principle on which the judge arrived at his decision was really applicable to the facts as he found them. Fortunately I am not compelled to reach a conclusion on that point because (of) Tober v Godfrey' (ante).

See Denning L J's judgement, at p710: 'I know that this looks like creating an estoppel almost as if it were a cause of action in Rickards v Oppenheim, the case cited as authority by Denning, L J.

since 1875, for much of this time it has been submerged. High Trees represented a renewed articulation of a necessary principle, but because on the facts this declaration of principle was obiter it was some time before the 'kind of estoppel' could be asserted, openly and with confidence. Except for those who view the decision in its proper context, and have regard for the basic principle that a man must keep his word and compensate those who not reasonably led astray, the phenomenon is surprising and the reaction of the Court of Appeal in Combe v Combe merely moderate.

The Court could not easily uphold both the wife's claim and the doctrine of considerations.<sup>69</sup>

We have suggested<sup>70</sup> that both ethical and practical requirements point to the adoption of the equity, and are of the view that the traditional dogma within historical subject boundaries should justify themselves when they conflict with it. That the law ought to encourage men to keep their promises unless there is some positive contraindication<sup>81</sup> does not seem extravagantly idealistic.<sup>71</sup> Whether any such contraindication exalts the consideration doctrine when conflict occurs in Combe v Combe may be answered by

Footnotes:

69 Although courts have performed more difficult feats. See Gore v Van der Lann (1967) All E R 360. See also Treitel 3rd ed p57 et seq, especially ppl08-116.

70. See introduction.

71 In particular Rawls' rationally self-interested man would doubtless stipulate such a legal approach from behind his veil of ignorance. See Rawls: A Theory of Justice. See also, briefly, Runciman: Relative ~~Equity~~ & Social Justice, for an attempt to context justice in society.

81 See Atiyah: Consideration in contracts - A fundamental restatement 51. He suggests that Combe v Combe achieved a fair solution upon the facts and cites Denning, L J in support of his own conclusion, that the case 'decided nothing more than this, that an act or forbearance which naturally and foreseeably follows from and in reliance on a promise is not a consideration for the enforcement of the promise what the justice of the case does not require that it should be'<sup>1</sup> p52: the italics are his).

approaching the literature in the light of Fuller's analysis.<sup>72</sup> Commentators have stressed the importance of the role played by consideration in the enforcement of promises - notably, to adopt Fuller's terminology concerning the function of legal formalities, the evidentiary, cautionary, and channelling tasks performed. There is no reason to suppose that only consideration can perform these tasks in the context<sup>73</sup> generally, nor, in the case of Combe v Combe was the suggestion made that the husband's promise had been incautiously made, was vague, or that it had not been made at all. Its existence, and the wife's reliance upon it were accepted. All that consideration could have bestowed on a contract was in fact provided by other means, but because consideration itself was unsung the promise could not be upheld.<sup>75</sup> That the wife had, in reliance on the promise, foreborne to sue, was, no doubt quite rightly, held not to be consideration because she could not have so bound herself in advance.<sup>74</sup>

Footnotes:

72 Fuller: Consideration & Form 41 Col L Rev 799. See also Wright: Ought the Consideration Doctrine to be Abolished from the Common Law? 49 Harvard Law Rev 1225; Harrison: The Reform of Consideration CCKIV LQR237; Gardiner: An Inquiry into the Principles of the Law of Contracts 46 HLRL, at p9, but particularly pp22-43; Unger: (the conservative view) Intention to create legal Relations, Consideration, & Mutuality 19MLR96.

73 See the proposals of the Law Revision committee Sixth Interim Report (1937) Cmd 5449 ; & Hanson: The Reform of Consideration XLVI for a criticism of the more radical proposals.

74 See the comment of Henderson: Promissory Estoppel & Traditional Contract Doctrine 78 Yale L J 343 at p347: 'It is easy to forget that while reliance may in some instances be essential to bargain theory, bargain is not essential to reliance theory. Though it typically accompanies bargain transactions, conduct in reliance occurs in a variety of forms & degrees and may well be induced independent of the making of a bargain...But the fact that reliance coincides with bargain in some cases tends to pull it within the classification in all cases.'

75 '...Consideration is too firmly fixed to be overthrown by a side-wind' per Denning, L J in Combe v Combe (1951) 2KB215 at p220.

I am not concerned further with the application of the ordinary rules of contract to this case, except to regret that a benefit de facto conferred could not be seen as sufficient support for a return promise, even though by the nature of the situation it could not have been assured until the operation of the Limitation Act.<sup>76</sup>

I venture a suggestion, but one which could not realistically be urged upon the courts. Rather, I perceive dimly from study of the pragmatic accretion of decisions through which change occurs in English judge-made law, and more especially from observation of the legal system as a whole, an alteration in emphasis. Hence forward, I submit, this alteration may be seen being accomplished in the courts by means of our equity in its varied guises. Just as the process which comes to be known in Norman England as Covenant is said to be the product of a society (and particularly of a caste in society) which attaches a special significance to questions of honour and a duty to keep one's word,<sup>77</sup> so the binding nature of a bargain-contract is a product of a society placing unusual emphasis on individualistic self-expression. The bargain-contract enables a person, an entrepreneur, to improve his position vis a vis other members of society, and ultimately to exploit his superior economic efficiency.<sup>78</sup> Capitalism left unchecked leads to monopoly,

#### Footnotes:

76 See Corbin: Non-binding promises as consideration 26 Col L Rev 550 at p557 'The dictum that both parties to a bilateral agreement must be bound or neither is bound is inveterate'- though this is admittedly not supported by 'an exhaustive study of the cases.'

Note that in an executory contract, the first promise cannot be binding until the promisor has received the second. If the first promise is subject to a condition precedent it is not very different from the promise in Combe v Combe: it is not binding until the condition is fulfilled, any more than Mrs Combe's promise before the operation of the statute.

77 Hazeltine: The Formal Contract of Early English Law 10 Col Law Rev 608 on the Anglo-Saxon origin of the formal promise.

78 See Rehbinder: Status, Contract & the Welfare State 23 Stanford L Rev 941. Also Weber: Law in Economy & Society (ed Rheinstein) p301. 'The Formal Qualities of Modern law' where he discusses the commercial stamp placed upon transactions and the 'demands for a 'social law'...directed against the very dominance of a mere business morality.' (p309).

and contract as the paradigm of laissez-faire capitalism becomes unworkable except subject to restraint.<sup>79</sup> A new social departure is made visible by the welfare state: there is the recognition that legal duties of support are owed by individuals within the community to one another. Covenant and the bargain-contract are called into being by the demands of a particular era, and in the same way a new principle is in the process of being constructed by the present.

The new principle, which has to give effect to the concept of interdependence inevitably conflicts with the bargain-contract and may usefully be dated from 1932, when it was necessary to overthrow the 'privity of contract fallacy' in order to set up the 'neighbour test.'<sup>80</sup> Its transactional implications have to be found expressed in the old terminology.

Footnotes:

79 e g the Taft-Hartley Act and the Renegotiation Act in the U S. In this country Statutory Restraints include the Race Relations Acts, the Rent Acts and the Hire Purchase Acts. Also the remedies given to consumers as an adjunct to the criminal process (a method deplored by Pollock for its implications, in what's in a Name? (1956) Crim L R792; the Distinguishing Mark of a Crime 22MLR495, who fails, with respect, to note the return to a less laissez fair society which this use of the criminal courts symbolises). See Stone: Social Dimensions Chapter 15.

word misleads<sup>4</sup> unless reference is made to the context.<sup>4A</sup>

In the following year Errington v Errington<sup>5</sup> was decided. For his son and daughter in law to live in, a father bought a house in his own name. He obtained a mortgage in order to buy it and remained liable to meet the repayments, but he handed the repayment book to the daughter-in-law, saying that the house was a present to the couple, and that it would become their property provided that they met the repayments. He died, and in the same year his son left the daughter-in-law, and went to live with his mother. The mother, as executrix of the father, sought possession from the daughter-in-law, and the question was, therefore, what interest the daughter-in-law had in the property. Denning L J was satisfied 'that the couple were licensees having a permissive occupation short of a tenancy but with a contractual right, or at any rate an equitable right to remain so long as they paid the instalments.'<sup>5</sup>

Again, the difficulty was to safeguard the daughter's entitlement without conferring on her an absolute title free of the obligation to meet the mortgage repayments 'which would be quite contrary to the justice of the case.'<sup>6</sup> At common law a licence could be revoked at the licensor's will in despite of any contract. This position is no longer the case and 'since the fusion of law and equity no court in this country would refuse a plaintiff in Wood's<sup>7</sup> situation the remedy for which he asked.'<sup>8</sup> In other words the grounds of the relief which the licensee may claim are equitable, and

Footnotes:

4 See Pears: Wittgenstem 58. An assertion in ordinary factual discourse is a 'gross move.' Implicit in any complex proposition are many elementary propositions by which the complex proposition is understood or misunderstood.

4A The attempt to understand licenses by reference to a conceptual classification is in our view misguided. See: London Borough of Hounslow v Twickenham Garden Developments Ltd. (1970) 3 All E R 326. They must be seen in relation to their efficacy.

5 (1952)1 All E R 149.

6 Ibid p154.

7 In Wood v Leadbitter 13 M & W 838.

8 Winter Garden Theatre case (ante) p191 per Viscount Simon.

V:1

Since the chief advances in the use of the equity in the next period under consideration are to be found in relation to real property,<sup>2</sup> it may be useful to begin by referring to Foster v Robinson,<sup>1</sup> a case predating Combe v Combe (ante) by some months.

A farmworker occupied a farm cottage at a low rent. In 1946 he was no longer able to work whereupon the farmer, his landlord, indicated that he could continue to occupy the cottage rent free for as long as he lived. When he died, his daughter, who had been living with him in the cottage for nine years, took out letters of administration and sought to remain in the cottage. What became of her is of no importance here, save insofar as her fate, which was the issue before the court depended upon the right which her father had conferred upon him in 1946. Evershed, M R did not consider whether there was a tenancy at will, but preferred the view 'that the tenant was entitled as licensee to occupy the premises without charge for the rest of his days.' Moreover, 'If the landlord, having made the arrangement, sought to revoke it, he would be restrained by the court from doing so.'

The problem facing the court was to accept that the landlord's gratuitous promise was binding on him, but avoid doing so by creating an interest in land to which his daughter might succeed. By using the concept of the licence,<sup>3</sup> not only was this difficulty overcome, but the promise itself seems to have gained a force it could not otherwise have achieved in the absence of consideration. I emphasise the mere instrumentality of the licence in giving effect to the promise, since the use of the

#### Footnotes:

1 (1950) 2 All E R 342. See the remarks of Sir Raymond Evershed, M R at p346H.

2 See Cheshire: A New Equitable Interest in Land? 16MLR1; Crane: Estoppel Interests in Land 31 Conv (NS) 332; Maudsley: Licences to Remain on Land 20Conv (NS)281.

3 Winter Garden Theatre v Millenium Productions (1948)AC173 was referred to, but foremost in the court's mind in the present case was whether the surrender of the tenancy by operation of law would suffice to remove the property from the Rent Restriction Acts. In that case the licence had been created by an undoubted contract.

Denning L J's statement that 'this infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of contract'<sup>9</sup> is misleading, for it is not the contract which makes the licence irrevocable, but, wider than contract, the terms upon which the right basing the licence, are conferred. These terms might be contained in a gift; otherwise Foster v Robinson cannot be explained.

In Ferris v Weaven<sup>10</sup> the husband left his wife, in 1941, in occupation of the former matrimonial house, and lived apart from her. He promised that 'I will carry on paying on the house providing you do not annoy me.'<sup>11</sup> She complied by not seeking maintenance payments from him. Then in 1951, the husband wished to dispose of the house and sold it to his brother-in-law for a nominal consideration, which he did not in fact receive. The plaintiff, the brother-in-law, sought possession from the wife. The court held that he was not entitled to possession because the wife had a licence to remain in the house: the licence was conferred by the husband's promise; and the husband's promise was gratuitous, for the only return by the wife was a forbearance to 'annoy' him. This can only mean that she forebore to sue for maintenance, and since she could not in law so bind herself this could not amount to consideration for the husband's promise.<sup>12</sup> Clearly, to the extent that the case relies on Bendall v McWhirter,<sup>13</sup> and to the extent that Bendall v McWhirter<sup>13</sup> has been overruled by the unfortunate decision of the House

Footnotes:

<sup>9</sup> Errington v Errington (ante) at p155G.

<sup>10</sup> (1952) 2 All E R 233. See also Webb v Paternoster, Palm 71 cited Tudor: Leading Cases in Real Property etc 4th ed p805. 'Where the owner of a dominant tenement authorises the owner of a servient tenement, although only by parol, to do some act thereon, the effect of which will be to prevent the future enjoyment of the easement, it will be extinguished'. - i e irrevocable.

<sup>11</sup> Ibid p234B.

<sup>12</sup> See Combe v Combe, and the discussion ante. Atiyah does not seem to take this point.

<sup>13</sup> (1952) 1 All E R 1307.

of Lords in NPB v Ainsworth,<sup>14</sup> it cannot remain an authority. However, in the latter case the bank took by reason of a 'valid transfer,' whilst the brother-in-law in Ferris took by virtue of a 'sham sale'.<sup>15</sup> Moreover, there seems to have been no licence in NPB v Ainsworth, but a 'mere equity against anyone but a purchaser for value without notice,' and neither a registrable nor an overriding interest.<sup>16</sup>

The facts of Hopgood v Brown<sup>17</sup> were that two adjacent plots of land were conveyed to one Turner by two conveyances, neither of which precisely defined the boundary between. Eventually the defendant held the southern portion, and the northern portion was held by a company controlled by the defendant's father, of which the defendant was a director. By agreement with the company, the defendant built a garage, one wall of which would inevitably form a boundary between the plots. In fact 'it is not possible to imagine that along straight lines.'<sup>19</sup> and the garage encroached several feet on to the northern plot. Plaintiff, as the company's successor, was estopped from claiming a wedge-shaped piece of the defendant's garage by the company's agreement with the defendant. 'An assignee of a lease is estopped by the deed which estops his assignor.' 'It would be a very odd thing in the law of any country if A could take, by any form of conveyance a greater or better right than he who conveys it to him.'<sup>18</sup>

Footnotes:

- 14 (1965) AC1175. In NPB v Ainsworth the mortgagee had no actual notice of the occupancy.
- 15 Ibid p1223 per Lord Hodson. Curiously Lord Hodson admits that the wife is 'not a person who needs any licence from her husband to be where she has a right to be as a wife.' (p1223). Had she been a licensee, she might perhaps have been able to take advantage of the possibility that 'the list of exceptions is not closed' of licences binding on third parties.
- 16 For an equity overriding a Statute of Registrations. See White v Neaylor (1886) 11AC171. The Act failed to avoid oral contracts creating equities.
- 17 (1955) 1WLR213.
- 18 Per Mansfield C J in Taylor v Needham (1810) 2 Taunt 278 at p283 cited (1955) 1WLR213 at p231.
- 19 (1955) 1 MR 213 at p217 per Lord Evershed, M R.

The case is not especially controversial, except that the company's successor in title seems to have been bound by the company's representation to the defendant although from the title deeds he would, on purchasing the property, have had no indication from the plan of the encroachment. For the company 'did not make any express statements... (but) they did by their conduct impliedly represent that the defendant could safely proceed to build as he planned.'<sup>20</sup> That the purchaser is bound by a representation of this kind is not in all circumstances so easily acquiesced in.<sup>21</sup>

Plasticmoda Societa per Azioni v Davidsons (Manchester) Ltd<sup>22</sup> was a sale of goods case. The defendants agreed to sell a quantity of cable strippings and to ship them in two instalments. Payment was to be by confirmed letter of credit. Shipment was delayed and a time extension agreed, but the letter of credit was extended only for 30 tons 'because we have the feeling that you need more time than expected...and it would be of no sense to let our money laying for several months at the District Bank waiting that the material be ready for the shipment or wouldn't.'<sup>23</sup> It was clear that the buyer was prepared to increase the letter of credit. There was a long period of delay and evasion by the English seller, and finally the buyer sued. In defence the seller claimed that it was the buyer who was in breach of contract for failure to supply the agreed letter of credit. The Court of Appeal had no difficulty in finding that 'the seller by his conduct led the buyer to believe that he would not insist on the credit being established until the seller had told the buyer that the goods were ready.'<sup>24</sup> that is, the defendant had led the plaintiff to believe that he would not insist on his strict legal rights. It is an example of Spencer-Bower's 'minesweeper principle.'

Footnotes:

20 Ibid at p230 per Morris, L J.

21 An interpretation of the case to the effect that the wedge-shaped piece of land was simply not conveyed begs the question as to why it was not. The answer to this clearly lies in the representation made by the company prior to the conveyance, which brings us back to Mansfield's point.

22 (1952) 1LI Rep 527.

23 Ibid at p531.

24 Ibid at p538 per Denning, L J.

Similarly, in Tool Metal Manufacturing Co v Tungsten Electric Co<sup>25</sup> compensation payments were suspended. TMMC acquired certain patents from the Osram company. TECO was observed to be in breach of these patents, and negotiations followed, with the result that TECO was permitted to continue operation, but subject to a quota. Any production in excess of the quota was to be accompanied by compensation payments to TMMC. TMMC agreed not to enforce the agreement for compensation payments. TECO took the view that compensation payments were thereafter 'washed out,' claiming that it had entered the first agreement with TMMC under the delusion fostered by TMMC that TECO was being treated in the same way as other licensees of TMMC, and that these were the best terms commercially possible for TMMC to grant. TECO issued a writ against TMMC on this basis, and in their counterclaim TMMC pleaded 'the defendants do not wish to enforce payment of compensation in respect of deliveries made after 31st December 1939 but before the end of hostilities with Germany'<sup>26</sup> TECO's action was unsuccessful. Insofar as the counterclaim asked for compensation after that time, the trial court and the Court of Appeal applied Hughes and the Birmingham case, the only disagreement between them being as to the manner in which the suspensory period could be brought to an end. Since this latter point was not before the court, the 1954 Court of Appeal felt free to disregard the earlier court's discussion. Romer, L J, in whose judgement the others concurred, felt that unequivocal notice was required 'if the old terms were to be enforced again according to their literal provisions.'<sup>27</sup> He cited CPR v R<sup>28</sup> and MoH v Bellotti<sup>29</sup> for the proposition that 'Whether any and if so what restrictions

Footnotes:

25 (1954) 1WLR862 (CA), (1955)1WLR761 (HL). The first action and subsequent appeal by TECO reported at (1950) 69RPC108 was on the question of misrepresentation by Krupps, the former owner of TMMC. The second action and two appeals by TMMC were for claims by TMMC of compensation. It became relevant then, although it had not been so before, to decide when the suspensory period had been ended.

26 (1954) 1WLR862 at p870.

27 Ibid at p878 per Romer L J, citing Somervill L J in the previous appeal.

28 (1931) AC 414.

29 (1944) KB 298.

exist on the power of a licensor to determine a revocable licence...depend(s) on the circumstances of the case,' The notice must be 'reasonable.'

The House of Lords felt that the counterclaim was sufficient notice. Viscount Simonds' view was that equity did not require express notice that the period of 'indulgence' was over, especially since TMMC's attitude 'could not surprise the respondents, who had not hesitated to bring against them a serious charge of fraud.'<sup>30</sup> Further, 'I do not wish,' he said, 'to lend the authority of this House to the statement of the principle which is to be found in Combe v Combe (ante) and may well be far too widely stated...I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights,'<sup>31</sup> It is as doubtful whether he would sanction the creation of rights by such means in non-commercial transactions, however, as it is curious that he should so interpret Combe v Combe (ante).

Gordon maintains<sup>32</sup> that the suspensory effect of the waiver was not given the authority

#### Footnotes:

30 (1955) 1WLR760 at p764.

31 This quotation from Viscount Simonds seems to form the implicit centrepiece of D M Gordon's article at (1963) CLJ222, at p251. Neither the article nor the comment by Simonds is particularly satisfactory. Gordon's main contentions seem to be that courts have ignored the High Trees principle; that High Trees owes nothing to Hughes; and that to support the concept underlying High Trees is 'next door to being 'Fundamentalists, whose creed is that all statutes and law books should be scrapped and replaced by the Bible.' (p260). Presumably the same criticism can be levelled against equity as a whole in its origins, and against Donoghue v Stevenson for its discussion of neighbours.

Gordon fails to understand the nature of the legal process: there is no necessary connection between High Trees and Hughes, but this is not the same as saying that there cannot be a connection. (See Stone: Legal System & Lawyers' Reasonings).

32 Op cit p249: 'In the result all the courts made assumptions as to rights that may not have existed, and against rights that probably did exist, simply because those were never canvassed by successful parties.'

of the House because it was not disputed before the House: he overlooks the possibility that it was never questioned because its binding nature was a part of commercial mores.<sup>33</sup> The assumptions made by all three courts are sufficient to ensure the survival of the Hughes principle and its application to the debtor-creditor relationship, at least so far as it remains a 'minesweeper' and does not presume to be a 'capital unit.'<sup>34</sup> Having ended the previous section with the hunting effect of Combe v Combe (ante) we discussed in this section the extent to which the decision in Combe was consistent with that of Ferris v Weaven: it is therefore apt to end this section by considering Ward v Byham,<sup>35</sup> and its possibly liberating effect. If we approach Combe and Ward v Byham without a priori, legal conception we find a qualitative similarity. The facts of Ward v Byham are that an unmarried couple had a child, and when it was about 4 years old the father turned the mother out. The child was for a time looked after by a neighbour, but then the father consented to the mother's having the child: he was to pay £1 a week to the mother provided that she looked after the child satisfactorily. She promised to do so, but later both married and the father ceased the payments. The mother sued on the father's promise to make the payments and the father argued lack of consideration, the National Assistance Act 1948<sup>36</sup> placing upon a mother the duty of maintaining an illegitimate child.<sup>37</sup>

Footnotes:

33 See Wilson: A Reappraisal of Quasi-Estoppel (1965) CLJ93 at p113. Also, ante, Introduction.

34 See also Lyle-Mellers v Lewis (1956) 1 All E R 247 (CA) plaintiff granted a license to manufacture articles which he had patented, to the defendants. The defendants did so, remitting to plaintiff the sums due under the licence from time to time. They then repudiated liability, plaintiff sued for the sums unpaid, and the defendants were estopped from denying, as they sought to do, that the articles which they manufactured were covered by the licence.

35 (1956) 2 All E R 318.

36 s 42.

37 Presumably the term in the contract requiring the mother to allow the child to choose with whom she would live would be unenforceable: Humphreys v Polak (1901) 2KB385.

Denning, L J, with the agreement of Morris and Parker, L J J, based his decision in favour of the mother on the explicit assumption that a promise to perform an existing obligation is consideration. Whilst Combe involved a promise which should not bind the promisor, so Ward v Byham involved a promise to do something which the promisor was already bound to do. In other words, both promises are ineffectual to alter the status quo. They do not add to the promisor's burdens; she has given away nothing in return for the promise which she in turn has received. It is as difficult to share Atiyah's approval of the reasoning as it is easy to concur in welcoming the result.<sup>38</sup>

For the mother's promise to maintain the child satisfactorily is legally onerous only if one starts with that which one is required to prove, namely, that the promise is legally binding, enforceable by the father.<sup>38A</sup> If the promise is not actionable at the suit of the father, there is no burden on the mother. Implied in the decision is the initial presumption that the mother's promise is binding, that the father's promise is binding, and that either will provide the promisee with a cause of action.<sup>39</sup>

#### Footnotes:

38 Atiyah: Introduction to the law of Contract 2nd ed p69. 'The statutory duty of maintaining the child is only designed to deal with the duty of supporting the child as between the mother and the state, not as between the mother and the father. hence the mother's promise is, as between her and the father, a detriment to her, and a benefit to him.'

38A s 42 of the 1948 Act does not give a right of action other than by the Board to recover public money expended in support of the persons described in subsection 1.

39 Parker & Morris, L J J feel that the terms of the letter impose an extra duty upon the mother, namely that of keeping the child happy and well looked after. How convincing and realistic an extra burden is this? See 72LQR490. We cannot see how performance of a duty can constitute consideration by analogy with a bird in the hand. Surely the bird is already in the hand if a duty to perform exists - unless the performance is different in kind, when there must be a new contract.

The other of Corbin's arguments cited in the Note does not seem relevant to a discussion of Ward v Byham. In the non-commercial setting of the case there was no question of the promisee's using her resources elsewhere, and paying damages for breach of the duty out of the proceeds. Questions of public policy (see Glassbrook v Glams C C (1925)AC270) are subordinate, or irrelevant to the main issue of whether such promises are binding, and if so why.

There can be drawn no other conclusion than that the law will permit the enforcement of gratuitous promises, but that, having decided to do so must first assume consideration: the latter may sit easily or perilously on the facts of the case.

V:2

In Morrow v Carty<sup>40</sup> the plaintiff successfully bid for a bungalow that was being auctioned at Cookstown. He failed to produce the amount of the deposit, however, and asked for an hour in which to go home and fetch it. Significantly the property was not sold until more than one hour had elapsed, the defendant's solicitor considering himself 'in honour and legally bound'<sup>41</sup> not to sell. Relying on Viscount Simonds' interpretation of Birmingham in TMMC v TECO (ante) McVeigh, J decided that even if the plaintiff had returned within the hour the defendant would not have been bound to sell the bungalow to him, for 'nothing was done by the vendor's solicitor or by the vendor to cause the plaintiff to alter his position to his detriment.'<sup>42</sup> In case this ground should prove unsatisfactory, McVeigh, J added that plaintiff's disingenuousness forfeited his right to equity: he had not merely to go home to collect the deposit, but also to effect a sale of his stepfather's farm. '...Can he be heard to invoke the aid of equity? The principle is only allowed in where it would be 'unjust' to allow a party to insist on his strict legal rights.'<sup>43</sup>

It seems quite clear that the first objection might not have been final had the second been met. I have argued that the essence of equity remains ethics, and that it functions by restraining the enforcement of strict legal rights; this makes the second objection crucial, and quite independent of the first. On the basis of the reasoning which I rejected in relation to Ward v Byham, and bearing in mind the reference to advantage to the promisor in Hughes,<sup>44</sup> a case for the promisee could surely have been sustained. It was without doubt an advantage to both the vendor and his auctioneer not to have to resell the property: they might have received less favourable offers.

Footnotes:

40 (1957) NI 174.

41 Ibid p180:19.

42 Ibid p181:23.

43 Ibid, p182:27.

44 Lord Blackburn at (1877 2 App Cas 453, cited (1957) NI 182:39.

Plaintiff's was, in short, a bird in the hand.

The third objection, too, is far from fatal to the plaintiff's cause. The argument that equitable estoppel is a shield only, and not a sword may be met by asserting that the plaintiff seeks specific performance of the contract whilst the defendant is estopped from relying in his defence, on the original terms of the contract.

Thus the authority of Morrow v Carty may be narrower than it seems, prima facie, to be.

A liberal view was taken by Harman J in City of Westminster Properties v Mudd.<sup>45</sup> The defendant antique dealer had lived in the basement rooms below his shop during the war, as a safeguard against fire. He was granted a lease for three years, with a covenant not to use the premises for any but business purposes, nor to do anything which might cause the premises to be brought within the Rent Acts. On his application for a renewal there was some disagreement over the restrictive clauses, but the court accepted defence evidence that the landlords agreed to delete some part of them, and that in effect there was a promise to the tenant that if he executed the lease, no attempt would be made to enforce the 'shop-only' covenant against him. '...but for the promise made he would not have executed the lease but would have moved to other premises available to him at the time...There was a clear contract acted on by the tenant to his detriment, and from much the landlords cannot resile'.<sup>46</sup>

Harman, J cites Re William Porter (ante) in support of his conclusion: here however - and in relation to Cairncross v Lorimer, a case relied upon in Porter it is even more so - what is being emphasised is not consideration proper, but reliance upon a representation, the result of which is that the promisee has put himself into a disadvantageous position. This is 'the doctrine...which is to be found...in the laws of all civilized nations',<sup>47</sup> and this, we consider to be the underlying reason for the decision. The creation of the collateral contract is unnecessary for it neither fits traditional nineteenth century contract dogma, nor accomplishes its objectives

Footnotes:

<sup>45</sup> (1958) 2 All E R 733.

<sup>46</sup> Ibid p7 43A.

<sup>47</sup> Ibid C. from Cairncross (1860) 3LT130 per Lord Campbell, L C.

simply in the present century.<sup>48</sup>

A gratuitous act was performed in Schneider v Eisovitch.<sup>49</sup> Plaintiff was injured, whilst in France, by the defendant's negligent driving, and her husband was killed. Her Brother-in-law and his wife flew out to render her assistance. 'If she had said at the time: 'if you help me and save me the expense of hiring services I will repay you your fares' there would have been a legal liability to pay'<sup>50</sup> and damages would unarguably have had to include an appropriate sum for this: a fortiori if she had actually hired help. Paull, J held that 'strict liability is not the be-all and end-all of a tortfeasor's liability'.<sup>51</sup> Damages ought to include payment for services gratuitously rendered where the acts were reasonable and necessary as a result of the tortfeasor's action, and where the plaintiff undertook to pay the volunteer. The tenor of Megarry's Note<sup>52</sup> is critical, for 'English law has always drawn a strict line between acts done in return for a promise and acts done voluntarily.'<sup>53</sup> Yet the thaw of this rigid, glacial approach is to be welcomed insofar as it accords with reality: the expense was incurred, and as a result of the tortfeasor's act, it was not unreasonable, and therefore to shield the tortfeasor or his insurers behind a technicality seems quite unjustified. The implications for the equity which forms our subject may seem slight, but we may discern in Schneider the direction in which the warmer currents are travelling.

Footnotes:

48 Whilst it may 'enable substantial justice to be done' (Cheshire & Fifoot: Contract 8th ed p56) it does so with some sacrifice of convenience and rationality. Suppose that Mr Mudd had after examining the lease revealed to the landlord that he was living on the premises, and the landlord had promised not to enforce the covenants. Mr Mudd might as a result have put himself to considerable expense and difficulty, but the promise would have been gratuitous and thus unenforceable. Quaere whether the oral variation is enforceable insofar as its objectives seem to be to defeat rent restriction legislation.

49 (1960) 2WLR169.

50 Ibid at p174 per Paull, J.

51 Ibid p176.

52 76LQR187.

53 Ibid at p188. Quaere substitution of 'is' for 'ought'?

The expression in which Devlin J puts his solution of Parker v Clark<sup>54</sup> owes much to Hammersley v De Biel (ante), to the necessity for compensating plaintiff for his reliance upon the defendant's representation. It is a non-commercial situation, and one in which bargain was not foremost in the parties' minds. An old couple who lived in a large house in Torquay suggested that a younger couple come to live with them. As an inducement sharing of the expenses was to be on a basis favourable to the younger couple.<sup>55</sup> Amid later acrimony, when the sum was offered, it was refused.<sup>56</sup> The plaintiffs, the younger couple, had indicated that the contemplated move to Torquay would necessitate the sale of their Sussex cottage, and in response the defendants promised to make up for this by leaving a share in the Torquay house to the younger wife. Devlin, J found that the sharing arrangement was expected to last until the defendants' deaths, but in fact the relationship became strained and plaintiffs were forced to move out. In reliance on the defendants' representations plaintiffs had lent a substantial part of the proceeds of the sale of their cottage to their daughter, to enable her to buy a flat, so that their position became difficult. There is no doubt that between the couples there was a contract. What is striking is the reliance upon Synge v Synge<sup>57</sup> and Hammersley, and the phraseology adopted, which suggests that an animal is being considered whose territory merely overlaps that of contract. In Synge a 'proposal of terms was made as an inducement to the lady to marry:'<sup>58</sup> in Hammersley v De Biel, Baron De Biel was promised a sum of money by his future bride's father, and, following the promise, the marriage took place. The word 'inducement' is rarely used in relation to contracts.<sup>59</sup> Generally an offeror wishes to exchange a commodity which he possesses for one possessed by the offeree: in no

Footnotes:

54 (1960) 1 All E R 93 see p100.

55 Ibid p97D.

56 Ibid p99A.

57 (1894) 2QB462.

58 Ibid at p469 per Kay, L J.

59 Except in relation to misrepresentation, perhaps.

sense can, say, a vendor be said to receive the purchase money as a compensation for his loss, and the substitutional remedy of damages represents for the plaintiff a sum equivalent to that which he would have had had there been no breach, not a compensation for loss of what he once had.<sup>60</sup> Damages reflect accurately the nature of the situation. In Parker v Clark what the plaintiff expects is not an advantage, but that which will reveal that it is not a case of contract proper: it is framed that way merely in order to place it within the known forms of action.<sup>60A</sup> Again we are faced with a bewitchment by words.

The case of Chalmers v Pardoe<sup>61</sup> supplies an example of the flexibility of the equity.

A Fijian Native Land Trust Ordinance prohibited the dealing in assignment or sub-letting of property in a native land area except with the consent of the Native Land Trust Board - the lessor. The respondent was the assignee of a lease held of the Board, who enabled the appellant to construct a house on a part of the respondent's land, on the

Footnotes:

<sup>60</sup> In an action in tort, plaintiff seeks compensation for injury to an interest of which he was possessed. The value of what the victim has lost may of course be assessed by reference to what he would have done with his asset. e.g. injury to a pianist's hands by negligence of tortfeasor, or loss of an opportunity to get a job at an interview at which the victim would have displayed his expertise. In contract he seeks compensation from the other contracting party for loss of that which the other contracting party promised to render him. One would thus expect that damages in contract should be confined within a narrower framework; and they are. cf Hadley v Baxendale (1854) 9 Ex 341; Heron II (1969) 1 AC 350 with Wagon Mound (No 1) (1961) AC 388; Re Polemis (1921) 3 KB 560. See Lawson: Remedies in English Law pp102 et seq. Perhaps one could say without too much oversimplification, that damages in contract look forward, whilst damages in tort look backwards.

<sup>60A</sup> cf De la Bere v Pearson (1908) 1 KB 280 with Hedley Byrne (1964) AC 465; and see the comments of Lord Denning MR in Letang v Cooper (1965) 1 QB 232 at p239.

<sup>61</sup> (1963) 1 WLR 677.

understanding that the respondent would apply for permission to sublet to the appellant; or else he would surrender his lease and enable the Board to let the land to the appellant.

The result of a quarrel between the parties was that the respondent refused to do either, and the appellant claimed on the basis of 'the general equitable principle that, on the facts of the case, it would be against conscience that Pardoe should retain the benefit of buildings erected by Chalmers on Pardoe's land so as to become a part of that land without repaying to Chalmers the sums expended by him in their erection.'<sup>62</sup> Sir Terence Donaldson, reading the judgement of the Judicial Committee agreed, consistently with cases cited, notably Unity Finance v King, and Plimmer v Wellington, that 'unless there is some special circumstance which precludes it, equity would intervene to prevent Pardoe from going back on his word and taking the buildings for nothing.'<sup>63</sup> However, there was a dealing in the land which had not had the prior consent of the Board, and for that reason the equity would not operate. Since the appellant did not have 'clean hands' in the matter, it was not unconscionable to allow the respondent to benefit. He could not enlist the aid of equity in an attempt to do what was unlawful.<sup>64</sup>

Another case before the Judicial Committee of the Privy Council is less than free from ambiguity: Emmanuel Ayodeji Ajayi v R T Biscoe (Nigeria).<sup>65</sup> 'The difficulty...stems ...from the fact that the equitable defence was never expressly pleaded.'<sup>66</sup> The

Footnotes:

62 Ibid at p681.

63 Ibid at p684.

64 Indeed, although it was not suggested by the Privy Council, as a solicitor Chalmers must be taken to have been aware of the Ordinance. The manoeuvre seems to have been designed to avoid its effect and purpose - notably to prevent land from being purchased by those who did so in order to build without the consideration of the Native Land Trust Board.

65 (1964) 1WLR 1326.

66 Ibid at p1330.

appellant bought a number of trucks from the respondent under a hire purchase agreement. They were not entirely satisfactory and the respondent agreed not to insist on payment of the instalments whilst they were 'withdrawn from active service.' Although the report is not clear, it appears that the instalments were not paid even after the trucks had been repaired, so that the letter suspending the obligation could not be relied upon to provide an equitable defence to the action for payment.

Since the facts relied upon indicate either the appellant's lack of clean hands, or at least his failure to support his allegations, the comments of Lord Hodson, reading the judgement of the Board, must be taken to be obiter insofar as they relate to the equity. His interpretation of the Hughes principle in the light of TMMC v TECO is innocuous enough: plaintiff, he said, must have altered his position in reliance upon the representation, and only if it is not possible for him to regain his original position will the concession made in the representation achieve permanent effect.<sup>67</sup>

A more useful case, and in view of the pleadings submitted to the Judicial Committee in Ajayi v Briscoe, a more authoritative, is Inwards v Baker.<sup>68</sup> At his father's suggestion, the defendant built a bungalow on a piece of his father's land in 1931. When his father died in 1951, under a will of 1922 (ie before the land had been acquired by the father) most of the property was left to the father's mistress and the two children of that union. No dispute with the defendant arose, and he continued to occupy the bungalow until 1963 when proceedings were commenced to remove him. Plaintiffs relied upon analysis of the nature of the defendant's interest in the land, which they said was a license. In order to be irrevocable it would, they alleged, need to be supported by a contract, and since there was no contract here, the licence could be, and had been, revoked. As in earlier cases in which acceptance by the court of a narrow a priori conceptualization of the license would have justified an unmeritorious pleading, the Court of Appeal here permitted the equity of the result

Footnotes:

67 At p1330. The alteration of position need not, on this view, be requested by the promisor. See Atiyah: Consideration in Contracts: A Fundamental Restatement at pp46-47 et seq.

68 (1965) 1 ALL E R 446.

to subordinate the technicality. Ample authority was available for the assertion 'that if an owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be allowed to remain there, that raises an equity in the licensee such as to entitle him to stay.<sup>69</sup> Further, Lord Denning suggested, not only were successors-in-title such as the father's natural sons, bound by the equity, but so too would be a purchaser with notice. The obvious link with equitable estoppel was recognised by Danckwerts, L J.<sup>70</sup>

In Ward v Kirkland,<sup>71</sup> whilst Ungeod-Thomas, J did not take Inwards v Baker 'to establish that an incitement or request...was an essential ingredient before the equity can be created...as contrasted with standing aside with knowledge of expenditure by a claimant',<sup>72</sup> he acknowledged that such a request would raise the equity. The issue before the judge concerned, inter alia, the laying of some drains by the plaintiff in some adjoining land. At the time the drains were laid the defendant was tenant, and a rector the fee simple owner, of the adjoining land. The rector's consent to the temporary location of the drains was not a disposition which would have required the consent of the Ecclesiastical Commissioners, but the plaintiff's expenditure constituted 'the subsequent action which converts what is done into an equity of which this court

#### Footnotes:

69 Ibid at p448G. Per Lord Denning, M R from Ramsden v Dyson (though the remarks were of course obiter) it seems clear that for the landowner merely to allow a plaintiff to expend money on the land would be sufficient encouragement, unless the landowner were ignorant, in which case he could hardly be said to 'allow' the expenditure. See (1866) IR 1HL129 at p141 per Lord Cranworth.

70 Ibid at p449I. Whether estoppel or equitable estoppel is the more apt it is unnecessary to decide in view of Ramsden, but if it were necessary, the substance of the representation by conduct would be of an intention (ie not to disturb). cf Piggott v Stratton (ante).

71 (1966)1 ALL E R 609.

72 Ibid at p625H.

would take cognizance.<sup>73</sup> Although the rector could not have granted his irrevocable consent without obtaining that of the Commissioners, the same effect as if he had been able to give such consent was realised in equity once the plaintiff had expended money in constructing the drains, for equity fastens 'on the conscience of the fee simple owner.'<sup>74</sup> As successors in title, the defendant was bound by the consent: 'the expense was incurred by the plaintiff on the footing and in the belief and conviction that he had permission properly granted by the rector for putting drain there for an indefinite time...so that the right to the equity to have the drains there is permanent.'<sup>75</sup> To overcome the difficulty that the consent related only to the discharge of bathwater through the drains, and not to the discharge of effluent from the two water closets installed by the plaintiff, the judge refused an injunction to restrain the trespass involved in the latter activity on the ground that 'if a trespass is trivial an injunction may not be granted.'<sup>76</sup>

The Ramsden v Dyson principle, creating an equity binding a landowner who acquiesces in expenditure by another on his land was extended by Ives v High,<sup>77</sup> beyond Inwards v Baker. Here, the expenditure by the other was on his own land, but induced by the promise of the adjoining owner's predecessor in title that a right of way would exist over the adjoining land. The defendant, High, built a house on a bomb-site. On the

Footnotes:

73 Ibid at p626B.

74 cf the Lever Finance case (post).

75 (1966) 1 All E R 609 at p626I. Note, then (i) that the promise is enforced at the suit of the promisee; and  
(ii) that the equity affords more than mere temporary relief.

This is the message of this line of cases.

For the suggestion that the development of the enforcement of promises in this way utilising the concept of equity, is more convenient than the argument advanced by Atiyah (see Consideration in Contracts), see later.

76 Ibid at p627B. The judge cited Armstrong v Sheppard (1959) 2 All E R 651 in support.

77 (1967) 1 All E R 504.

neighbouring site one Westgate began building a block of flats whose foundations encroached on High's land. Instead of requiring Westgate to remove the foundations, as he would have been entitled to do, High agreed to their remaining, subject to his being allowed access to his house by car over Westgate's land. Westgate sold to Wright, who watched High construct a garage on his own land, the only access to which was over Wright's land. Wright sold by auction to the plaintiffs who had knowledge of the informal agreement between High and Westgate. The Court of Appeal found in the defendant's favour on two bases; first that of mutual benefit and burden;<sup>78</sup> and second that of acquiescence by the plaintiff.

From an analytical viewpoint, a difficulty arises out of the second basis. Any interest in land which the defendant obtained by the informal agreement should, if it were to bind the plaintiff, have been registered, under the provisions of the Land Registration Act 1925. The argument of Lord Denning, M R<sup>79</sup> depends for its efficacy upon there being 'an equity arising out of acquiescence.' In the words of Danckwerts, L J<sup>80</sup> 'Mr Westgate acquiesced in the use of the yard for access and the Wrights stood by and, indeed, encouraged the defendant to build his garage in these conditions and for these purposes. Could anything be more monstrous and inequitable (than) afterwards to deprive the defendant of the benefit of what he has done?' The 'right' possessed by High is not an interest in land unforeseen by the legislature in 1925, but an equity which achieves the same end, much as the disposition by the rector in Ward v Kirkland, though not a disposition requiring consents, achieved the same object once any other finding would produce inequity: once the promisee has reasonably relied upon the promisor's representation the promisor may not withdraw.

Such an interpretation, intelligible in the light of, inter alia, Hohfeld's analysis of the equity-law relationship subsequent to the dispute between Ellesmere and Coke, whose solution was reiterated in 1875,<sup>81</sup> renders otiose any search for the precise

#### Footnotes:

78 On the authority of Halsall v Brizell (1957) 1 All E R 371.

79 (1967) 1 All E R 504 at p508B.

80 Ibid at p510I.

81 Ibid at p514 G.

nature of the promisee's interest.<sup>82</sup> It is puzzling to find Winn L J remarking that '...the promisee...is not asserting any positive rights, but is invoking law or equity to afford him procedural protection to avert injustice,'<sup>83</sup> when it seems clear that the promisee is indeed asserting a positive right, namely that entitling him to equitable intervention on his behalf.<sup>84</sup> A possible explanation of Winn L J's statement is that the equity that may be invoked in any particular case depends entirely upon the circumstances of the particular case: the equity may fail the promisee if he fails equity.<sup>85</sup> That equity works by restraint upon common law rights does not make it less of a positive remedy.<sup>86</sup>

The capacity of the equity to create an obligation outside the context of land transactions and in the absence of a pre-existing contractual relationship is illustrated by Durham Fancy Goods v Jackson:<sup>87</sup> as we have suggested, the equity is wider than contract, and as both Combe v Combe and D & C Builders v Rees<sup>88</sup> indicate, it is more flexible than the traditional doctrine of contract, although, as Atiyah<sup>89</sup> argues, the courts find ways which are as effective as that of the equity, of refusing

Footnotes:

82 And in Ward v Kirkland the promisee is the plaintiff.

83 See e g D & C Builders v Rees (post).

84 Supreme Court of Judicative Act 1875 s 25(11).

85 Thus specific performance may be analysed as a restraint upon the common law right to tender damages in lieu of performance, but nevertheless it is regarded quite rightly as the most positive and direct method of enforcing a contract.

86 cf the use made of another equitable concept, the trust, in the later cases.

87 (1968) 2 All E R 987.

88 (1966) 2 QB 617.

89 Atiyah: Consideration pp5-9.

to enforce contracts prima facie valid.<sup>90</sup> In D & C Builders v Rees, the respondent offered and the appellant accepted, a smaller sum in satisfaction of a contract debt. Knowing that the appellant builders were in financial difficulty, the debtor had threatened to make no payment at all if the sum offered were not accepted, and for this reason, Lord Denning, said, the builders were not precluded from enforcing their strict legal rights and suing for the balance.<sup>91</sup>

In Durham Fancy Goods the plaintiffs drew a bill on the defendants whose 'nomenclature at any particular point of time was fortuitous and devoid of significance to anyone concerned.'<sup>92</sup> The company secretary of Jacksons Ltd accepted the bill, signing, on behalf of the company under the name of 'M Jackson (Fancy Goods) Ltd, Manchester.' Before the bill had matured the company was in difficulties, and the bill was

Footnotes:

90 Atiyah refers to the necessity of an 'intention to create legal relations' - the policy adopted by the courts so as to leave certain areas, in Fuller's words 'law-free' e.g social arrangements, arrangements between husband and wife made during an amicable phase of the marriage. cf Balfour v Balfour (1919) 2KB571, with Merritt v Merritt (1970) 2 All E R 760 cf also Edwards v Skyways (1964) 1WLR 349 with Jones v Padavatton (1969) 1WLR 328. In the latter case, serious injustice seems to have occurred, however, precisely because of the inadequacy of the common law, expressing itself through the 'traditional' law of contract, in failing to adapt to the particular circumstances of the case. Common law attempts to achieve particular justice always suffer from their concealment behind a vest of generality, so that the policy and substance of the decision is misunderstood later.

91 In allowing the appellant to rely on the so called 'rule in Pinnel's Case' ie applying the common law and ignoring the equity, the majority of the Court of Appeal were in effect achieving the same objective, and taking the same attitude towards an unmeritorious defence. The drawback of this approach is the same as we have already noticed in relation to Jones v Padavatton.

92 (1968) 2 All E R 987 at p988 per Donaldson J.

dishonoured. '...Neither the plaintiffs (nor) Jacksons, nor Mr Michael Jackson had ever given a thought to section 108 of the Companies Act 1948 if...any of them had even heard of it.' But, 'exercising their new found knowledge of the law,' the plaintiffs sought to make Michael Jackson personally liable on the bill on the grounds that he had accepted it containing an unregistered variant of his company's name.<sup>93</sup> The plaintiffs had not objected to the variant, so that although Donaldson J had 'no doubt that he is liable to the plaintiffs...because this is what the Statute says,'<sup>94</sup> he sought to prevent the plaintiffs from enforcing the liability. He accomplished this by resort to Lord Cairns' 'first principle.'

Once the essential unity of the Cairns principle and that to be found in Ramsden v Dyson has been recognised, the necessity for a pre-existing contractual relationship disappears, and we suggest that Durham Fancy Goods is best seen in this way. It was sufficient, to prevent the enforcement of section 108, that there should be a 'pre-existing legal relationship.' That the decision should be based upon the equity, and that it should be explained as functioning in this particular way is a useful heuristic device, but this heuristic convenience should not obstruct realistic analysis of the equity's substance. It has substantive effect, and to view it other than as a substantive doctrine could lead to arbitrary and uncertain results.

Section 108 of the Companies Act is quite clear and does not appear to allow the remedy provided for the defendant by Donaldson, J.<sup>95</sup> The equity seems to have operated

Footnotes:

93 Ibid p990F.

94 That variant had of course been placed on bill by the drawer, so that although technically M Jackson had accepted it, he had been invited to do so by the plaintiff. Had this not been the case, quare whether the decision might not have gone the other way.

95 The material part, set out at (1968) 2 All E R 987 at p9894 is as follows: (Subs 4) 'If an officer of the company...b) signs...on behalf of the company any bill of exchange...wherein its name is not mentioned in the manner aforesaid...he...shall... be personally liable to the holder...'

outside and against the statute.<sup>96</sup>

In Lever (Finance) Ltd v Westminster Corporation<sup>97</sup> the appellants submitted a plan with their application for planning permission in order to build fourteen dwelling houses in St John's Wood. Permission was granted by the respondent authority on the basis of the plan, but slight variations were subsequently made from this plan, the result of which was that one of the new houses was much closer to some existing houses. The amended plan was sent to the authority but was lost by them, so that when a telephone call was made to ascertain if the alterations were material the local authority servant who answered replied that they were not. Later, the planning committee, finding that the alterations were material, refused consent. The Court of Appeal decided that the authority was bound by its officer's assurance to the appellants: although it had no power to delegate,<sup>98</sup> it was bound by the unauthorised statement of its servant once this had been acted upon by the appellant.

We have already suggested that the width and detail of administrative controls renders unreal the requirement that an individual should investigate the regulations authorising such control: where an official gives an assurance which there is reasonable ground for acting upon, the assured, or promisee, should not suffer for his reasonable reliance. This contention receives support from developments in the sphere of company law,<sup>99</sup>

Footnotes:

<sup>96</sup> As, of course, the equity of part performance did in relation to the Statute of Frauds.

<sup>97</sup> (1970) 3 All E R 496. cf Norfolk C C v Secretary of State (1973) 3 All E R 673. Planning authority not bound here because error rectified in time.

<sup>98</sup> Until this power was conferred by the Town & Country Planning Act 1968 s64 the authority did not delegate in writing pursuant to this Statute in any case.

<sup>99</sup> See the material cited ante. Additionally Farrar & Fowler: The Effect of Section 9 of the European Companies Act 1972 on English Company Law 36 MLR 270.

and from Robertson's case (ante), as well as from Lever (Finance) v Westminster. The latter case may decide more than that 'if an officer acting within the scope of his ostensible authority<sup>100</sup> makes a representation on which another acts, then the public authority may be bound by it...' Lord Denning at least (with the concurrence of Megaw, L. J), felt that 'considerable reserve' ought henceforth to be placed on the cases deciding that an authority 'cannot be estopped from doing its public duty.'<sup>101</sup> It would be a pity if the case merely 'extended the category of technicalities'<sup>102</sup> upon which an authority was estopped from relying, beyond the Wells case, and I suggest that herein lies the value of Lord Cairns' principle.

Planning legislation is concerned with adjusting conflicting interests and courts are reluctant overtly to enter this arena<sup>103</sup> when controversy appears likely. It is scarcely

Footnotes:

100 Evidence was given that it is normal practice for minor alterations in plans to be accepted by planning officers, though the officer 'should always say "In my opinion it is not material"' (1970) 3 All E R 496 at p500B per Lord Denning, M R. (Hence the change accomplished by the 1968 Act).

101 Ibid at p500H. He saw Lever (Finance) as extending Wells v M H L G (1967) 2 All E R 1041. Here the applicants sought to erect a plant for manufacture of concrete blocks, and were informed by Leatherhead UDC that since this was within the existing use Class, only byelaw consent was required. After the plant was finished an enforcement notice was served by the UDC, because the plant was higher than the applicants had stated. Held, that the decision that planning permission was not required was irrevocable: the authority could be 'estopped from relying on technicalities' (at p1044F): cf Norfolk C C v Sec of State op cit n97 per Lord Widgery, C J: 'What one hopes to achieve in a situation like this...is that everybody shall end up in the position in which they would have been had the mistake not been made,' p677F.

102 Evans: Note on Lever (Finance) Ltd 34MLR335 at p339.

103 Naturally, since it is inherent in the function of courts, they do so, and the curious fate of the Race Relations & Immigrant legislation at the hands of the House of Lords indicates that that House is not averse to imposing its views despite statutory wording.

sufficient to state baldly that developers should not suffer from the mistakes of local authority servants,<sup>104</sup> for as a generalisation it is as urgent that local residents and others for whose benefit planning legislation exists,<sup>105</sup> should not suffer. If the courts are going to interfere at all - and I consider, with Jaffe<sup>106</sup> that both courts and legislature have equal and coextensive responsibility for effective lawmaking, and so they should interfere - then they must not be blown by capricious eddies and gusts of technicality. An equity is required which will restrain the granting of an enforcement notice except where it would be just and equitable. Generally, since the developer has relied upon the representations of the local authority through its servant, the simplest and cheapest remedy is to restrain the rights which the local authority would otherwise have, but it is not difficult to envisage a situation in which a structure is seriously deleterious to amenity. The solution is not to pretend that the merits have changed,<sup>107</sup> or to penalise local inhabitants, but to remove the offending building and compensate the developer for his loss of profit.<sup>107A</sup> It is doubtful if this degree of flexibility could be achieved on any but equitable principles without the attendant danger of excessive convolutions certain later to be misunderstood. Equally of the present as of the eighteenth century we have suggested, it is true that 'equity left intact...common law rights...and merely made it...impossible to pursue them...and was subjecting positive law to the test of morals quite as much as was natural law. The main difference...was that the former refrained from formulating

Footnotes:

104 (1970) 3 All E R 496 at p501G per Lord Denning.

105 One looks in vain, both in the judgements and in Evans' learned note for a recognition that this is what planning legislation is about.

106 Jaffe: English & American Judges as Lawmakers.

107 Assuming that the developer acted on the representation of the local authority, and assuming also, perhaps, that he could not himself have foreseen damage to amenity.

107A As to the measure of damages by way of compensation see Wroth v Tyler (1973) 1 All E R 897 at p921 per Megarry J; Grant v Dawkins (1973) 3 All E R 897 at p900, per Goff, J for the equitable rule.

in advance the assumptions on which (it) proceeded,<sup>108</sup> though system may at times be discerned. Both an equitable type of contract and the licence have been used as devices for achieving equity between promisor and promisee. More recently the trust has been resurrected as an instrument of innovatory justice. However, as I have ventured earlier, although for the observer an understanding of the way in which the law is changing may be gained by the use of static concepts, it should not be assumed that the static concepts describe the law exclusively. By a process of analogy old concepts are put to new uses, and at the adventurous extremes, that is to say where change occurs as a single step rather than as many small ones, the process may be termed legal fiction. The concepts are tools and as such are subordinate to the end we wish to achieve. They do not define or limit the ends sought, but this is not easy to see because the stabilising factor is that both the ends and the concepts are products of what those who operate the legal system<sup>109</sup> consider that it ought to be achieving. The legal mind may be too prepared to find a causal link where there is none, particularly where this conceals a possible value orientation.

Thus, whilst it is useful to attempt exhaustive definition<sup>110</sup> it must be remembered that such definition is an historical statement and should not hinder growth in a dynamic system. Its proper function is, by indicating past development, to point out future possibilities.

In Binions v Evans<sup>111</sup> Mrs Evans' husband had worked for Tredegar Estates all his life. After his retirement, an arrangement was entered into by which he, and his wife if she survived him, might remain in their cottage free of rent, subject to four weeks' notice on their part if they wished to terminate the arrangement. The agreement would no doubt bind the parties to it, following Foster v Robinson, but unfortunately third

#### Footnotes:

108 Stone: Human Law & Human Justice p78.

109 In the widest sense - ie society at large to the extent that social expectations mould the law, practitioners and officials, as well as judges and legislators.

110 See, e g the discussion of licences by Megarry, J in Hounslow v Twickenham Garden Developments Ltd (1970) 3 All E R 324.

111 (1972) 2 All E R 70.

parties became involved when Tredegar Estates sold the property concerned to Mr and Mrs Binions. It was admitted that they had notice of the agreement between the vendor and Mrs Evans, and for this reason 'there is no doubt that...they paid a reduced price for the cottage.'<sup>112</sup> In NPB v Ainsworth,<sup>113</sup> a mortgagee who had no notice of the wife's occupancy of the matrimonial home was able to take free of it following the failure of the mortgagor company, which was controlled by the husband, and to which the husband had conveyed the property. Megawry and Stephenson L J J, in Binions, preferred to grant a remedy to Mrs Evans, though their mode of doing so differed from that of Lord Denning, M R, the third member of the Court of Appeal. His view was that a contractual licence, which 'the courts of equity will not allow the landlord to...breach...nor the purchaser if he bought with knowledge of her right' was the better solution:<sup>114</sup> theirs was that Bannister v Bannister<sup>115</sup> enabled them to confer

#### Footnotes:

112 Op cit p73 per Lord Denning, M R.

113 (1965)AC1175. Had the decision gone the other way the bank would scarcely have been ruined, and the wife would have had somewhere to live. In an era of housing shortages the decision shews the usual social myopia of the House of Lords. Mortgagees could have guarded against the situation by inspecting the premises, and the wife would moreover have received notice of the husband's intentions with respect to the matrimonial home.

The House's concept of its own role seems somewhat limited, and its plea for legislative intervention on the one hand optimistic (See Blom-Cooper & Drewry: Final Appeal p209. Of 14 cases in which such a plea was expressly made 'in only seven ...was there a direct response to the call for reform'), and on the other naively confident in the effectiveness of Parliamentary draftsmen, already overworked by virtue of Government legislative programmes. See Adams: Wroth v Tyler and the Measure of Damages LSG 13th June 1973 p1918. See also the comments of Megarry, J in that case (1973) 1 All E R 897 at p925D. 'The Act certainly changed the law; but not every change is reform.'

114 (1972) 2 All E R 70 at p75D.

115 (1948) 2 All E R 133. A case in which the purchaser was held to be a trustee of property during the life of the vendor, and for her benefit, so as to prevent him from using s40 as an engine of fraud. Equity, in other words, is acting typically, establishing a positive interest by restraining the use of common law remedies.

upon her a life interest.

The difficulty in the latter solution is that 'a tenant for life under (the law of Property Act 1925) has power to sell the property...and to treat himself...as the owner...No one would expect Mrs Evans...to be able to sell the property or to lease it.'<sup>116</sup>

Both conceptually and practically, the difficulty of preserving a distinction between a tenancy for life and an equitable life interest seems too difficult to recommend Bannister as a solution for Mrs Evans' problem, which calls for a much less drastic course.

Lord Denning's answer is equally problematic and for the same, terminological, reason. Given that, to be specifically enforceable, a licence must arise out of a contract capable of attracting such a remedy, preservation of a distinction between contracts 'which a court of equity will enforce,' and others, enforceable at common law and requiring consideration, becomes precarious: we have seen the assimilation by common law of equitable contract in the past. The main objection to Atiyah's reformulation of a law of obligations is that it repeats the old terminology to the extent that it utilises 'contract', and 'consideration'. A fresh look, at the remedies required, rather than at the substantive categories to which the results of the remedies may be analogous,<sup>116A</sup> would be preferable.

Sir Raymond Evershed, M R however, accepted that, as between a landlord and a tenant, an agreement to permit the tenant to remain on the premises rent free would be enforced by the courts as a contract: Foster v Robinson. Similarly, in Winter Garden Theatre

Footnotes:

<sup>116</sup> (1972) 2 All E R 70 at p74F per Lord Denning, M R.

<sup>116A</sup> Illustrative of the danger of proceeding by analogy in the area of natural science is the controversy over the nature of light - particles or waves? It turns out, for practical purposes, to have the characteristics of both, because it is neither: the words are descriptions by analogy.

v Millenium Productions Ltd<sup>117</sup> the court granted that a contractual licence might be specifically enforced against the licensor. It is tempting to suggest that this remedy might avail a plaintiff against a third party. Militating against indiscriminate use is its equitable (thus discretionary) nature. The point was deliberately left open by Megarry, J in Hounslow v Twickenham,<sup>118</sup> and it may be that orthodoxy will prevail. A second interesting possibility suggested by Lord Denning M R, is that 'the court will impose on the purchaser a constructive trust for her (Mrs Evans') benefit for the simple reason that it would be utterly inequitable for the purchaser to turn the widow out contrary to the stipulation subject to which he bought the premises.'<sup>119</sup> The objection raised<sup>120</sup> that a constructive trust should be imposed only 'where all the policy considerations justify such an action, not just because it happens to be convenient in the individual case'<sup>121</sup> is surely inappropriate, for policy can make itself felt only through individual cases, and it can never have been policy to restrain the extension of discretionary remedies, not subject to the 'hard cases' aphorism,<sup>122</sup> where injustice would otherwise result. Mr Oakes' own suggestion of an injunction to restrain a breach of contract is anyway open to precisely the same objection, since the end product is the same.

Footnotes:

117 (1946) 1 All E R 678 (CA) cited in Hounslow v Twickenham (1970) 3 All E R 326 at p335d. The decision itself was reversed in the House of Lords, (1947) 2 All E R 331, but 'nothing that I can see in the speeches in the House of Lords suggests that the Court of Appeal was wrong in the law which that court applied to an irrevocable licence.' op cit per Megarry, J.

118 (1970) 3 All E R 326.

119 (1972) 2 All E R 70 at p76b. Lord Denning cites Cardozo, J in Beatty v Guggenheim (1919) 225 N Y 380 at p385: 'A constructive trust is the formula through which the conscience of equity finds expression.'

120 Oakley: 35MLR551.

121 Op cit at p556.

122 Much overworked anyway. See Stone: Legal System.

Third, and completely overlooked by the court, is the conferring upon Mrs Evans of a right to enforce the contract between the other two, with or without the use of a constructive trust. Underlying Beswick v Beswick<sup>123</sup> was the need to confer such a right in a widow as regards a contract made between her deceased husband and his nephew, by the terms of which the latter agreed, in return for the business, to pay sums of money to the husband, and, after his death, to his widow. The court rejected her claim directly to enforce the contract,<sup>124</sup> but gave her an indirect remedy qua executrix. This scarcely stands scrutiny as anything other than a jus quaesitum tertio, for there is a distinct logical difficulty in allowing her to stand in the shoes of the deceased so as to enforce a contractual term which the deceased could not have enforced: by its nature it was not enforceable until he had died. This seems to have been the view of the court in Snelling v Snelling<sup>125</sup> where Ormrod J said: 'the principle seems to be that if the right parties are before the court the action will be maintainable.'<sup>126</sup> Transposed into the Binions situation the principle seems to yield this: that where Mrs Evans pursued the defendants her contractual relationship with Tredegar Estates would have enabled her to join them as co-plaintiffs, willy-nilly. Once the parties were served with process, they would be before the court, and Ormrod J's dictum would have applied.

Alternatively, the much-neglected approach of Tomlinson v Gill<sup>127</sup> might have been used. Here a widow was promised by the defendant that in consideration of his appointment as administrator of her late husband's estate, he would pay any debts due to a

Footnotes:

123 (1967) 2 All E R 1197.

124 This accords with conventional wisdom. See Dunlop v Selfridge (1915)AC847; Dowrick: Jus Quaesitum Tertio in Contract 15 MLR374.

125 (1972)1All E R 79.

126 Op cit at p87c.

127 (1756) Ambler 330. For a more complete citation of authorities see Corbin: Contracts for the Benefit of a Third Party 461QR12.

deficiency of assets.<sup>127A</sup> As her husband's creditor 'the plaintiff is proper for relief here...he could not maintain an action at law, for the promise was made to the widow; but he is proper here for the promise was made for the benefit of the creditors and the widow is a trustee for them.'<sup>128</sup> 'The equitable rule was that the party to whose use, or for whose benefit a contract had been entered into has a remedy in equity against the person with whom it was made.'<sup>129</sup> The rule in Lamb v Vice<sup>129</sup> that the promisee in a contract made for the benefit of a third party could have full, and not merely nominal, damages for the breach of the contract is consequent upon this reasoning.<sup>130</sup>

It is important to notice that in creating a trust, the court in Tomlinson did not make the defendant a trustee of the estate for the benefit of the creditors, but instead made the widow a trustee of the promise for their benefit. It was not of a fund, but of the right to sue that she was trustee. In terms, once more, of Binions v Evans, whether or not Mrs Evans had a contract with Tredegar Estates - the efficacy of this being the lynch-pin of the other solutions - she may sue the Binions through her trustees, Tredegar Estates, who, though they no longer hold an interest in the property, retain a right to sue on the contract with the Binions, and if necessary, obtain an injunction to restrain them from evicting Mrs Evans.

Footnotes:

127A His motive was presumably as to obtain the status of preferred creditor in the deceased's estate, a valuable perquisite of an administrator's office prior to 1971.

128 Op cit at p334.

129 Corbin op cit at p181-2. The common law position was summed up in Lamb v Vice (1840) 6 M & W 467, a case in Exchequer Chamber, and therefore superior to the subsequent case of Tweddle v Atkinson (1861) 1 B & S 393, which could be held to be per incuriam.

130 That he could have only nominal damages 'is a startling and an alarming doctrine, and a novelty.' per Lush, J in Lloyd's v Harper (1880) 16 Ch D 290.

This last seems the tidiest solution, and the one most consistent with the nature of equity. In essence, the trust is a restraint, granted at the suit of a third party beneficiary, upon the promisor. As Corbin indicates,<sup>131</sup> the search for a trust fund is misguided, for there is nothing inherent in a trust which requires this: it is the produce of a lasting juristic preoccupation with 'things.'<sup>132</sup>

However one views the decision in Binions v Evans, the widow obtained a right to remain on the land: it seems better that this should have as its origin the contract between the vendor and the purchaser, so that both the issue of the registrability of the right, and its efficacy in relation to the third party, are avoided. That a remedy has been given creating in its wake a right not contemplated a half-century ago in Lord Birkenhead's legislation is scarcely a cause for alarm, however, and even if Tomlinson v Gill can be utilised in Binions v Evans it is clear that there will be many cases in which it cannot be applied; for example it would be inapplicable if Mrs Evans were not mentioned at the time of the contract for sale. Thus the need for the kind of remedy envisaged by Lord Denning, M R, persists.

A defense of the latter involves an examination of one of the premises of the present theses. Concepts, I have submitted, are subordinate to, indeed given substance by, the uses to which they are put. Chaos and Old Night are avoided in the reality of a living system of law<sup>132A</sup> by the unity of approach governing both ends and means. That

#### Footnotes:

131 In the above-cited article.

132 Hohfeld's talk of 'bundles of rights' to describe rights in rem is unhelpful in this regard. See also some discussions of legal personality.

132A Cheshire: A New Equitable Interest in Land 16MLR1 at p10, cites Lord Brougham in Keppell v Bailey (1834) My & K 517. 'Great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote.' As Cheshire points out, fourteen years later came Tulk v Moxhay (1848) (1843-60) All E R Rep 9, with 'A new equity of remarkable virility.' Moreover, the predicted detriment did not occur and it is worth remembering that land was of greater social and economic significance then.

Mrs Evans' interest in land depended for its existence upon the justice of her cause does not assimilate the members of the Court of Appeal to the *cadi* under his palm tree, conjuring up the spirits of uncertainty whom Lord Halsbury sought to exorcise. In all cases the statement 'Y has X interest in land' is merely another way of stating that 'the merits of Y's case outweigh those of Y's opponents.' The same core principle underlies the statement that 'it is inequitable that Y should be turned out by Z.'<sup>133</sup> If we can explore why it is inequitable, without merely restating that it is so in words which are different, yet seem to compel us to awkward conclusions, we may avoid the charge of caprice. Chaos and uncertainty are resisted because if we can read the meaning of the preceding law, add this to the facts, and then include the indisposible catalyst of social desirability, we can predicate the principle containing the solution in advance. The 'Bad Man' of Massachusetts may have his answer, 'what the courts will do, and nothing more pretentious,' though he may not like it.

The equation I have outlined is not an attempt to resurrect Savigny's *Volksgeist*, nor is it a different way of expressing the discredited view that law is declared and not made. Its components vary with social priorities, and as a result, so will the answer. Neither through logic<sup>134</sup> nor through *stare decisis*<sup>135</sup> can law become certain. Insofar as law is concerned with justice - not the justice of the Austinian, for there are too many variables in the calculation, nor that of the utilitarian whose arithmetic calculations are too crude - we may approach a certainty of

Footnotes:

133 Atiyah: *Accidents, Compensation and the Law* approaches the reasoning behind the duty of care in the same way, referring to 'the extraordinary hold which legal concepts acquire on the minds of lawyers'(p46). 'The concept of the duty of care is simply coextensive with the boundaries of liability'(p47).

134 See Lloyd: *Reason and Logic in the Common Law* 64LQR468.

135 See, *inter alia*, Stone: *Legal System*, referring to Llewellyn's 'leeways'.

symbolism, although the values which we attribute to the symbols will inevitably alter. Through Rawls' social contract<sup>136</sup> we can perhaps find an acceptable hypothesis concerning justice.

Simply put then, using the symbols given by generations of judges, for example, justice, reasonableness, fairness and equity among others, and by proceeding in the spirit of the earlier cases to which I have referred, one might examine, say, Mrs Evans' case. This is, that she has relied upon her agreement - contractual or not - with Tredegar Estates. She has not been induced to do that which she was not already inclined to do, or indeed, doing, but a promise was made to her in certain circumstances justify the intervention of the law to enable her to continue to benefit from the promise or, in other situations, to receive compensation for her disappointment, depends upon factors extrinsic to the law and which sound nebulous: nevertheless it is upon these factors that the superficially more substantial test of 'reasonableness' relies. As a basic legal generalisation from the cases we might suppose that where a promise, or an act, or omission has occurred such that it generates a reasonable belief in the ordinary course of events in the mind of a recipient, that the person who promised, acted, or omitted to act, will do or has done something in relation to the recipient, the recipient will be entitled to relief or compensation for his subsequent disappointment, if any.

The boundaries of what is a 'reasonable belief' will vary according to the views of society, insofar as this is transmitted through the courts, as to who should bear losses. Thus it may be that in an entrepreneurial or capitalist society, or one which the courts believe is such, a gratuitous promise given in a commercial context will not be one which will generate a reasonable belief in its inviolability. A further test may be added, namely that, outside the sphere of insurance, or exceptional circumstances,<sup>137</sup> there should be 'reasonable foreseeability' before the party causing

Footnotes:

136 Rawls: A Theory of Justice; In particular the essay 'Justice as Fairness'.

137 The width of exceptional circumstances will vary with social expectations. In the game of 'Diplomacy' Hedley Byrne would not be compensated for relying on Heller & Partners' statements as to Easipower's financial status.

the disappointment should suffer compared with the recipient. In the Binions v Evans situation, this produces the result that had the Binions had no knowledge - and the imputation of 'constructive notice' is, again, a tinkering with 'reasonable foreseeability' to adjust liability to social circumstances - which is expressed as 'notice' in the context of real property law, then Mrs Evans would have been unprotected.<sup>138</sup>

The not dissimilar case of Hussey v Palmer<sup>139</sup> was solved by the majority of the Court of Appeal using, once more, 'generalisations...more familiar to American than English lawyers.'<sup>140</sup> Plaintiff, a woman 'well over 70' sold her condemned house, and was invited to stay with her daughter and son-in-law. Since their house was insufficiently large, the plaintiff paid for an additional room to be built from the proceeds of sale of her own house. She and the daughter quarrelled and after fifteen months she left. A year later, being hard up - the balance of the proceeds of sale presumably having been spent - she asked the son in law, first for some financial assistance and then, since this request were unacknowledged, for a repayment of the cost of the extra room.<sup>141</sup> She was nearly defeated by the ghosts of the forms of action, rattling their chains in her path, for the registrar before whom she first appears, claiming repayment of the loan, decided that this was a family arrangement and was therefore unenforceable. To overcome this difficulty she claimed the money under a resulting trust. Lord Denning, M R agreed, though feeling 'that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words...The two run together. By whatever name it is described it is a trust

Footnotes:

138 Quaere whether a trust would not have affected the purchase-money, however.

139 (1972) 3 All E R 744.

140 Goodhart: 89LQR2.

141 The circumstances assume importance of course, once one accepts that the law is more than a system of rules produced by generalising from the facts of each case, but a method of solving disputes in a socially acceptable way. Disputes rarely sort themselves out for the benefit of positivist lawyers with their procrustean concepts.

imposed by law whenever justice and good conscience require it. It is a liberal process, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone.<sup>142</sup> The judge at first instance, and Cairns, L J on appeal, both preferred to see the transaction as a loan. Had this been the majority view on appeal, Mrs Hussey would have been unsuccessful, the pleadings not having claimed the return of money lent, as a result of the Registrar's decision.

Dr Goodhart objects to the use of the principle stated in Chalmers v Pardoe (ante) on the ground that there was here no promise to Mrs Hussey of a conveyance of the property: however, the expectation was created, and within the principle I have already stated, such an expectation was in the circumstances reasonable. No express promise was made in Inwards v Baker (ante).<sup>143</sup> Goodhart's second objection is that a constructive trust should not have been imposed without a consideration of Carl Zeiss Stiftung v H Smith.<sup>144</sup> An examination of the circumstances of this case leaves little room to doubt that it could have been distinguished. The alleged constructive trustees were solicitors, and the receipt of assets by them took place during litigation, between an East German and a West German foundation, which had lasted since 1955. In the words of Lord Selborne, in Barnes v Addy<sup>145</sup> 'If those principles were disregarded. I know not how anyone could, in transactions admitting of doubt as to the view which a Court of Equity would take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees.' The principles were that the constructive trustee must have had cognizance of the trust, and that the transfer of funds to him was a misapplication of the funds.<sup>146</sup> However, '...as I understand it, no stranger can become a constructive trustee merely because he is made aware of a disputed claim the validity of which he cannot properly assess.'<sup>147</sup>

Footnotes:

142 (1972) 3 All E R 744 at p747c per Lord Denning M R.

143 (1972) 3 All E R 744 at p748A per Lord Denning M R.

144 (1969) 2 All E R 367.

145 (1874) 9 Ch App 244 at p252 cited by Danckwerts L J (1969) 2 All E R 367 at p374G.

146 Reference was made at p372F to Halsbury 3rd Ed vol 38 paras 1446-1450.

147 (1969) 2 All E R 367 at p378B per Sachs L J.

Edmund Davies L J in that case approved Snell's expression: 'A possible definition is that a constructive trust is a trust imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties.'<sup>148</sup> 'Concepts', the learned judge adds, 'may defy definition and yet the presence in, or absence from a situation of that which they denote, may be beyond doubt. The concept of 'want of probity' appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts.'<sup>148</sup>

In Hussey v Palmer the Court of Appeal accepted that Mrs Hussey did not intend a gift of the money. At the time of the payment its purpose was to provide her with somewhere to live for the rest of her life, and 'want of probity' is surely evident in the son's refusal to accept liability of any kind following the failure of that intention. Both the availability of the constructive trust doctrine,<sup>149</sup> and the principles of inter alia Unity v King, Chalmers v Pardoe and Inwards v Baker attest the correctness of the decision.

Two further cases illustrate the essential flexibility of the equitable approach. In W J Alan Ltd v El Nasr Co<sup>150</sup> Kenyan sellers of coffee entered two contracts with the respondents each for the sale of 250 tons of coffee, payment to be by confirmed irrevocable letters of credit, and in Kenyan shillings. The buyers paid for the entire shipment of 500 tons by means of a single letter of credit which, in several other ways did not conform with the terms of the contract: moreover payment was expressed to be made in pounds sterling. Nevertheless, the sellers accepted this mode of payment by drawing on the letter for the amount of the initial 250 tons, and shipped the balance of the coffee (the quantity shipped in September of 1967 in two instalments actually being 279 tons). Devaluation of sterling occurred very shortly after the second shipment, and the sellers required additional payment, asserting that the

Footnotes:

<sup>148</sup> Ibid at p381, citing Snell: Equity 26th Ed p201.

<sup>149</sup> See also the matrimonial cases cited by Lord Denning M R at (1972) 3 All E R 744 at p747E.

<sup>150</sup> (1972) 2 All E R 127.

Kenyan currency was the money of account, not merely the money of payment<sup>151</sup> under the contract. The buyers replied that by accepting the nonconforming letter of credit the sellers had made a representation varying the contract which they were now precluded from reneging: in other words they could not rely on their strict legal rights.

There was no detriment to the promisee, indeed, as Lord Denning indicates, there was a benefit.<sup>152</sup> But 'he has conducted his affairs on the basis that he has that benefit and it would be inequitable now to deprive him of it.'<sup>153</sup> A clear development is taking place, away from the confusion between detriment, reliance and the consideration doctrine, yet sufficient vitality remains, and promise-enforcement has not become a doctrine, so that in the similar case of Woodhouse AC Israel Cocoa Ltd S A v Nigerian Produce Marketing Co Ltd<sup>154</sup> both the Court of Appeal and the House of Lords agreed that the decision should go the other way. In W J Alan the circumstances were such as to render enforcement by the seller of his legal rights inequitable, whilst in Woodhouse they were not.

Here cocoa had been purchased in sterling until a request by the sellers had had the effect of substituting Nigerian pounds. Because it was not possible to buy this currency forward, the buyers obtained two concessions from the sellers: one was that existing contracts could be treated as if the 'money of account were British currency'; and the second was that for the future sterling should be the currency of account. Both of these concessions were subsequently withdrawn despite the requests of the buyers. Crucial to the decision was whether, in the light of this withdrawal, a later letter agreeing that payments might be made in sterling was a representation that sterling had once more become the currency of account. With devaluation impending, the concessions had clearly been withdrawn to prevent this, and the alleged representation

#### Footnotes:

<sup>151</sup> The distinction is made by Lord Denning M R in the C A in Woodhouse AC Israel Cocoa Ltd S A v Nigerian Produce Marketing Co (1971) 1 All E R 665 at p662.

<sup>152</sup> As in High Trees, where it was to the promisee's advantage to pay a rent of £1,250 p a rather than of £2,500.

<sup>153</sup> (1972) 2 All E R 127 at p140F per Lord Denning M R. See also the judgement of Megaw L J at p144E.

<sup>154</sup> (1972) 2 All E R 271.

was in response to the buyers' request 'if you can arrange to accept payment against documents in sterling in Lagos as a temporary alternative?'<sup>155</sup> The umpire's finding that the reply was a representation estopping the sellers was unfortunate, not least because it could be overturned only if it were a finding of law. To permit the finding to stand appeared manifestly unjust to both appeal courts, and so the question of what a representation was in all the circumstances becomes, like the 'reasonable man' a legal concept: one fears that its terrestrial feet may atrophy, and after 'the whole sequence of cases based on promissory estoppel...(is) reduced to a coherent body of doctrine'<sup>156</sup> it may become yet another mere vehicle for lawyerish preconceptions.

Footnotes:

<sup>155</sup> Ibid at p279B in Lord Hailsham's judgement.

<sup>156</sup> Ibid at p282G per Lord Hailsham.

## CONCLUSION

At the outset it was suggested that law should be seen as a dynamic apparatus for the resolution of disputes, and that rules of law are historical statements of how this has been accomplished - namely by the grant or refusal to grant recognition to claims asserted by individuals or groups - and why. The normative content of these statements derives from one of the components in the postulated justice equation; that of the felt need for consistency, or evenhandedness in the administration of law. Consistency is generally seen as satisfactorily reached by means of analogy: like cases should be treated alike unless some other component in the equation is given priority.

In the 'trouble' case, analogy is extended and weak. The other component, that of social efficacy, becomes in relation more powerful in such cases<sup>1</sup>; but even where a whole line of decisions is interlocked by analogy, the question of social efficacy lies to hand, for legal principles are not formed in vacuo. Isolation of social matrices assists in the identification of unsuspected analogies, and, as suggested above, reveals the fundamental unity of remedy and resultant right.

I have tried to locate in equity a coherent body of principles relating to liability for promises, established by a line of decisions from those discovered by Barbour<sup>2</sup> to Hughes<sup>3</sup>, and from Hughes to the present, and justified by reference to social expectations. It is no accident that continuity of development by analogy, from case to case, is in this sphere at its most confusing in the latter half of the nineteenth century: nor is it surprising that, if I am correct in suggesting that equity and common law developed a differing view of contracts, this should have occurred at the beginning of what was in the West a period of dramatic commercial expansion. Equity was by tradition the law of the poor man, through the Court of Requests; nor did Star Chamber's remedies benefit only the Crown in their application to the rich and powerful. If a poor man encountered a national law at all, other than upon suspicion

## Footnotes:

- 1 For a less agreeable example, see the reasoning behind Priestley v Fowler (1837)  
3 M & W 1.
- 2 Barbour: History of Contract in Early English Equity.
- 3 Hughes v Metropolitan Ry (ante).

of having broken the King's Peace, the chances of its being equity were high. Equally, equity was the law of the King and his executive. Their concern, as much as the poor man's was to achieve stability.<sup>4</sup> Bureaucracy, which term almost by definition embraces any formal means of government, strives to maintain a status quo. Commerce, at its entrepreneurial outset, has entirely the opposite objective.<sup>5</sup>

The men of commerce looked to the common law, and, as I have suggested, it was the common law which assisted the rapid development of a market economy, whilst paradoxically, purporting to provide a pillar for cherished traditions and beliefs. Those who ventured themselves or their wealth were in pursuit of the infinite, and the common law reflected their ethos in the sixteenth century, just as the Chancellor's court came to echo at times the universal materialist optimism of the Victorians.

A result of the modern recognition that the world may after all not be inexhaustible, and that societies may not increase their wealth infinitely has been a greater realisation that misfortunes must be shared; they cannot be repaired by the victim's seeking recompense in a New World wilderness. In other words, like the preColumbean village, modern society can work justly only given legal recognition of the interdependence of the community's members.

It is in this context that the hypothesis concerning the legal effect of promises is set. it seems self-evident that wherever men deal with one another, where living space and essential commodities, money and credit are in visibly finite supply, a society which is organised on a formally egalitarian basis,<sup>6</sup> and equally, in a formally

#### Footnotes:

4 See Plucknett: Concise History p638 '...the council and the Chancellor were at first concerned principally with the de facto failings of the common law (to maintain the peace) rather than with its doctrinal shortcomings.'

5 See Schon's 1970 Reith Lectures for an account of the homeostatic nature of both Government and commercial bureaucracies.

6 That is to say the kind of society which Dicey had in mind. Society is still formally egalitarian where access to remedies compares, in the famous phrase, with access to the Ritz Hotel.

stratified society, insofar as the relations within the strata are so organised, duties will be found imposed on the members of the society, or strata, in much more stringent terms than would be the case in the expansive societies found in the West between the sixteenth and early twentieth centuries. Between de facto equals there will be, law aside, a felt need to avoid methods of living and transacting which are damaging to dequals.<sup>7</sup> To the extent that law is under the control of de facto equals, this felt need will find legal means of expression.

We should therefore expect in such societies legal - using the term here to include the 'laws' of private and local jurisdictions, and those of the Chancellor - sanctions attending what we may term bad faith: the supply of shoddy goods; the conduct of dangerous activities, the breach of promises. All things are a matter of degree, of course, so that a purchaser of cheap goods may be taken to assume the risk that they will not compare in quality with equivalent but more expensive goods; and the recipient of an ambiguous promise, or one which in all circumstances cannot be legally acknowledged to have been seriously meant,<sup>8</sup> should not expect legal help to enforce it. Some of these expectations are to be found realised in the middle ages; in particular, as Barbour's researches show, the Chancellor upholds promises. Vinogradoff<sup>9</sup> indicates the same readiness on the part of local jurisdictions, and indeed much earlier the

Footnotes:

7 Clearly, the notion of freedom of contract, the 'hands-off' approach epitomized by a Chancery judge of the nineteenth century, Sir George Jessel, (see the Sampson case cited ante), does not satisfy this need.

8 In the sense a) that the promissor did not mean it; or b) that the promisee did not believe that the promissor meant it; or c) that it would place a socially unacceptable burden upon promissors to have them bound to unwary promisees in all the circumstances where the promissor did not intend to be bound.

9 Vinogradoff: Reason and Conscience in Sixteenth Century Jurisprudence 24LQR373.

common law is to be found granting relief without a specially in actions on a covenant.<sup>10</sup> Despite the eclipse of the conciliar courts in the seventeenth century we can trace the continued existence of promise-enforcement until the nineteenth century, and the phrase ~~marriage~~ consideration supports Atiyah's contention that the term consideration meant essentially a reason for having entered into a transaction; or, more properly, a reason why the courts should step in and impose liability. In equity, then, the term contract did not mean what it came to mean at common law, that is to say, a bargain, or a transaction framed to fit the bargain-form.

If the hypothesis is correct, not only shall we find a distinct line of promise-enforcing decisions of the kind postulated, in equity, but we shall also discover a growing tendency towards the same practice at common law: not merely by virtue of the rule that equity prevails, but because society has changed. Atiyah argues<sup>11</sup> that it is only by ignoring a substantial body of case law<sup>12</sup> that we can assert the nineteenth century dogma concerning common law contract.

Prior to 1875 we can find numerous examples of judicial acknowledgement that reasonable expectations created by promises, or conduct reasonably capable of being taken to be promises, should not be disappointed: Luders v Anstey;<sup>13</sup> Hammersley v de Biel;<sup>14</sup> Piggott v Stratton;<sup>15</sup> Dilwyn v Llewellyn;<sup>16</sup> Ramsden v Dyson.<sup>17</sup> After 1875, at a time when we might expect a hardening of the legal arteries, the same phenomenon reappears in Plimmer v

#### Footnotes:

10 Pollock & Maitland: History Vol II chapter 5.

11 Atiyah: Consideration.

12 The perpetuation of the old views may owe much to Messrs Cheshire & Fifoot. See the select bibliography in Atiyah: Introduction to the Law of Contract 2nd ed p281.

13 (1799) 4 Ves 501.

14 (1845) 12Cl & Fin 45.

15 (1859) 1De G F & J 33.

16 (1866) LR I HL 129.

17 (1862) 4 De G F & J 517.

Wellington<sup>18</sup>; Hughes<sup>19</sup>; & Birmingham<sup>20</sup>. In spite of Jorden v Money<sup>21</sup>, and for the reasons I have stated this seems to be a much narrower decision than is commonly supposed, it may be possible to refer to an 'equity' of promises, for we can trace the line of equitable authorities more clearly. From a technical point of view - as distinct from the functionalist and somewhat sociological view adopted immediately above - it is a rational next step to use Hohfeld's heuristic technique<sup>22</sup> to explain post-1875 developments. We can state that the strict common law of contracts will be applied unless the equity is invoked, when a promise will be enforced despite its non-bargain nature: which is really to say that the law will uphold promises, dependent upon the circumstances. Now that equity automatically prevails in all courts, what we have to look to are the particular facts of the case. Just as the presence of what technically amounted to consideration did not avail the plaintiff in Jones v Padavatton<sup>23</sup> because the courts could find no reason to enforce the mother's promise, so the absence of consideration did not avail the plaintiff in Tabor v Godfrey<sup>24</sup> or High Trees<sup>25</sup>, or the defendant in Chalmers v Pardoe<sup>26</sup> or Ward v Kirkland<sup>27</sup>.

Far from being weakened, the persuasiveness of the equity's existence is strengthened by the variety of subject matters in relation to which it appears, for we have postulated a Chomskyan 'deep-structure' need to have promises enforced in certain social contexts, and we should anticipate the manifestation of this across a wide range of law categories.

Footnotes:

18 (1884) 9 App Cas 439.

19 (1877) 2 App Cas 439.

20 (1888) 40 Ch D 268.

21 (1854) 5 HL Cas 186.

22 Hohfeld: The Relation between Equity and Law 11 Mich L R 537.

23 (1969) 1 WLR 328.

24 (1895) 64 LJ QB 245.

25 (1947) 1 KB.

26 (1903) 1 WLR 677.

27 (1966) 1 All E R 609.

The constraints which should operate for the future development of a wider law, of obligations rather than of contract; have already been adverted to. It is difficult to conduct analysis of the legal past, with its undoubtedly normative influence on the present and the future, without imparting a natural science vocabulary and forgetting momentarily that the parameters in the justice equation, referred to earlier, are man-made. I have postulated a 'felt need' to impose liability to indemnify in certain circumstances, given certain changes in the nature of society; and the existence of the line of equitable authorities makes it possible to impose such liability. What is required is merely a proper common law eclecticism, applied across the range of equitable and legal remedies.

I have pointed out the limitations of Jorden v Money<sup>28</sup> and the narrowness of Foakes v Beer.<sup>29</sup> Exploitation of the Hughes and Birmingham cases rather than the more conservative authorities typified by The Citizens' Bank<sup>30</sup> case, would have been possible. Indeed the latter may instructively be seen in the terms used by Childres and Spitz<sup>31</sup> in relation to contracts. Here was a 'formal' transaction entered into by sophisticated equals conversant with the legal rules as to preferment of creditors. Had the Louisiana bank been successful, this could only have been at the expense of the other creditors, with commercially inefficacious results.

Hughes was, however, consigned to obscurity, although the need for such a principle was recognised in, inter alia, Tabor v Godfrey,<sup>32</sup> and Re William Porter,<sup>33</sup> even if not expressly admitted. A second opportunity arose following the explicit redefinition of the 'equity' in High Trees, apparently to be lost again as a result of Combe v Combe.<sup>34</sup> But, as we have seen, Combe v Combe need not be seen in this, restrictive,

Footnotes:

28 (1854) 5 H L Cas 186.

29 (1884) 9 App Cas 605.

30 (1873) L R VI HL 352. See Spencer-Bower: Estoppel, for a fuller list.

31 Childres & Spitz: Status in Contract Law 47 NYULRL.

32 (1951) 2KB215.

32 (1895) 64 LJ QB245.

33 (1937) 2 ALL ER 361.

34 (1951) 2 KB 215.

light: the merits lay clearly with the defendant. Both this case and D & C Builders v Rees<sup>35</sup> illustrate the necessity for a more flexible response to the facts than might be accorded to them by the application of an extension of the common law contract doctrine advocated by Atiyah. And viewing Combe v Combe, courts might 'discover in the (past) court's unmentioned knowledge of the consequences (of the rule in the decision)...a motivation for decision which cuts deeper than any shown by the opinion.' In other words they may find that 'the available leeway is nothing less than huge.'<sup>36</sup>

Analogical development, the stuff of the law, points to assimilation by the general equity of proprietary estoppel, and there is every indication that whilst Lord Denning remains in the Court of Appeal, and whilst the Lords' antipathy toward its inferior's reforming zeal remains dormant in this area, it will occur. The arguments for maintaining the distinction appear a priori in nature and not functional, for the principle underlying Ramsden v Dyson,<sup>37</sup> Foster v Robinson,<sup>38</sup> Binions v Evans,<sup>39</sup> Hussey v Palmer,<sup>40</sup> Tool Metal<sup>41</sup> and Alan<sup>42</sup> is, I have argued, the same, and is not affected by the difference in subject-matter. If this is indeed the case, then there seems to be no reason why the High Trees equity should not be used to found a cause of action: the courts can clearly cope with such a situation, as they do in the so called proprietary estoppel cases, and as they have done in the earlier cases, in Chancery. One of the early reasons, I suggested, for the difference between law and equity, in this regard, was that at common law a defendant was not heard in his own defence, so that a

Footnotes:

35 (1966) 2QB617.

36 Llewellyn: Some Realism About Realism 44 HLR 1233. Throughout I am driven to advocate the practice of Llewellyn's 'Grand Style' of judicial decisionmaking. See Twining: Karl Llewellyn p203 et seq.

37 (1866) LR I HL 129.

38 (1951) 1KB 149.

39 (1972) 2 All E R 70.

40 (1972) 3 All E R 744.

41 (1955) 1WLR 761 (HL).

42 (1972) 2 All E R 127.

witness against him could not be answered. In equity, on the other hand an allegation of a representation, supported by the testimony of a witness could be countered by evidence sworn by the defendant himself. The foundation for the distinction has since gone, too, so that there appears to be no reason why the new equity should not afford as much protection as the old.

I have discussed, in the context of Binions' and Hussey's cases the objection that a remedy which appears to contemplate the creation of a new interest in land is unfortunate in complicating the pristine simplicity of the 1925 legislation. It is a function of a dynamic society that new legal remedies are sought from time to time, and whilst no provision for registration of the equity exists, hurried legislation to provide for it before the courts have fully worked out the implications does not seem to be the answer.<sup>43</sup> Consolidating legislation may be used to simplify existing law, but it cannot anticipate and should not stunt future growth. It presupposes development by the courts, and in the Binions v Evans situation this has not happened yet. Moreover, future moves may not be analysable in terms of interests in land, for such a concept may prove too rigid. The desired solution must precede the legal principle, which can be used as a sheet-anchor to restrain excesses and indicate the possibilities.

One primary objection to the use of the equity in promise situations is the absence from some of these of consideration. My answer has been that consideration as it was ordered in the latter half of the nineteenth century was an impractical aberration: that it was an indicium of a certain social view which could not survive as a blanket requirement after the exposure of that social view - which in the legal world might

#### Footnotes:

<sup>43</sup> See the preceding discussion of the case for legislation which followed the somewhat negative decision in NPB v Ainsworth.

have been delayed until 1932.<sup>44</sup> Since it was the touchstone of the enforceability of contracts it has been stretched far beyond its original unitary meaning and it is quickly becoming a shibboleth whose adherents grow weary. For forty years it has been under regular academic attack<sup>45</sup> and it may be that only the 'Formal Style' of the English judiciary has maintained the illusion of its integrity. Now might be the time to relieve it of excess burden by attributing to it merely its earlier meaning.

Many alternative tests of obligation can be formulated, - though preferably none should be exclusive - but for our purposes it remains to reiterate that a promisee who has been given what the law in its search for justice considers a reasonable basis for believing in the seriousness of a promise should be able to enforce the promise or obtain recompense to the extent that it appears just that he should.<sup>46</sup> For the above reasons it appears to me that the law is moving in this direction, though hesitantly and with diffidence.

Footnotes:

44. See Donoghue v. Stevenson (1932) AC 595.

45. eg Wright: Ought Consideration to be Abolished? XLIX HLR 1225 (1936).

Gardner: An Inquiry into the Principles of the Law of Contracts XLVI HLR1 (1932).

Fuller: Consideration and Form 41 Col L R 799.

Denning: Recent Developments in the Consideration Doctrine 15 MLR 1.

Chloros: The Doctrine of Consideration and the Reform of the Law of Contract 17 BllCh 127.

Von Mehren: Civil Law Analogues to Consideration: A Comparative Analysis 72HLR1009.

Atiyah: Consideration in Contracts - A Fundamental Restatement. ANU Inaugural Address.

See also the Sixth Interim Report of the Law Revision Committee 1937 Cind 5449.

For a defence of the doctrine see inter alia Hamson: The Reform of Consideration CCXIVLQR233; Unger: intention to create legal relations, consideration and mutuality 19MLR96.

46. See Poulton: Tort or contract 82LQR346. He cites Lord Ellenborough in Gorett v Radnidge (1802) 3 East 62 at p70: 'What inconvenience is there in suffering the party to allege his gravaman if he please as consisting in a breach of duty...and to consider that as fortious negligence instead of considering the same circumstances as forming or (implied) breach of promise.'