A COMPARATIVE ANALYSIS OF THE DOCTRINE OF PROMISSORY ESTOPPEL IN AUSTRALIA, GREAT BRITAIN AND THE UNITED STATES

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[*The author undertakes a comparison of the doctrine of promissory estoppel as applied by courts in the common law jurisdictions of Australia, Great Britain and the United States. A substantial divergence is shown between the United States on the one hand, and Great Britain and Australia on the other. In the former jurisdiction, promissory estoppel is likened to an action in tort, whereas in Great Britain and Australia it remains an essentially contractual doctrine. The author espouses promissory estoppel as developed by the American courts for its applicability to modern conditions.*]

The aim of this article is to compare the doctrine of promissory estoppel in contract as it has been understood and applied by courts in Australia, Great Britain and the United States. It will be suggested that comparison of three jurisdictions with the same common law heritage and honouring the same equitable principles leads to the conclusion that, despite some superficial similarities, the doctrine of promissory estoppel in the United States is fundamentally different from the doctrine as recognized and applied in Great Britain and Australia. Furthermore, it will be demonstrated that significant differences between Great Britain and Australia are beginning to appear. In short, comparative analysis supports the conclusion that promissory estoppel is recognized in Great Britain and Australia as a contractual doctrine to be relied upon in circumstances where common law contractual principles would operate to cause an injustice whilst in the United States promissory estoppel has developed into a principle more akin to a cause of action in tort and is applied in a variety of situations which may, but certainly need not, involve a contractual relationship between the parties.

It must be recognized at the outset that there is significant agreement between the three jurisdictions as to the meaning of the term promissory estoppel. The differences lie in the circumstances in which the different jurisdictions recognize that the doctrine may be relied upon. Furthermore there is agreement as to the difference between promissory estoppel and estoppel generally.

The degree of similarity between what may be described as classic decisions from each of the three jurisdictions is remarkable. Indeed, all three are landlord/tenant cases. In the United States the Supreme Court of Pennsylvania in *Fried v. Fisher*[1] enforced a landlord's promise to forego his rights under an existing lease.

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[1] 115 A. L. R. 147 [1938], 32 Pa. 497, 196 A. 39 [1938].

A member of a lessee partnership wished to withdraw and go into business elsewhere but did not wish to enter the new venture unless he could be assured of release from his existing partnership obligation. The lessor told him that if the co-partner would assume the balance of the lease he would release the withdrawing partner from his obligations. When the withdrawing partner in reliance upon this promise engaged in business elsewhere the lessor was held, on the basis of promissory estoppel, to be estopped from suing the withdrawing partner upon the lease. In other words a promise to forego rights under an existing lease was enforced when it had been relied upon by the lessee, and when the lessor attempted to exercise those rights.[2] An estoppel was predicated upon on an assurance as to the future and the Court recognized that promissory estoppel was an exception to the general rule that an estoppel may be founded only upon a statement as to an existing fact.

In England the modern era of the doctrine of promissory estoppel was heralded by the decision in *Central London Property Trust Ltd v. High Trees House Ltd*[3] (The 'High Trees' Case). Denning J., as he then was, in a remarkably similar fact situation involving a landlord's promise to reduce rent during the war held that he could not resile from his promise when the tenant had relied upon it. In short a representation as to the future was held to be enforceable in equity. Because Lord Denning said that this was not an estoppel in the strict sense the doctrine has often been described in Great Britain as quasi-estoppel.

Finally, in Australia, after a smattering of cases in which courts flirted with the doctrine and then decided on other grounds or held that the facts did not support a promissory estoppel the Supreme Court of South Australia decided *Je Maintiendrai Pty Ltd v. Quaglia & Quaglia*.[4] This case also involved a landlord's promise to accept as rent an amount less than that stipulated in the lease. In three carefully reasoned judgments the Court recognized that the doctrine of promissory estoppel was part of the law of Australia; that it applied to a promise to, in the future, forego existing contractual rights; and that it could, in an action to enforce those rights, be raised as a defence by a tenant who had relied upon it.

This admittedly superficial treatment of three important decisions evidences agreement at least to the extent that promissory estoppel arises out of a promise as to the future which has been relied upon. One other thing must at this stage be noted about these decisions. In each case promissory estoppel was successfully relied upon as a defence to an action upon an existing contract and furthermore an action in which at common law the plaintiff had to succeed. Is promissory estoppel then but an instance of the application of the general principle that equity intervenes in cases where enforcement of common law rights causes manifest injustice? This is the primary question to be addressed. The answer will, it is submitted, support the conclusion already suggested that a significant parting of the ways between Great Britain and Australia on the one hand and the United States on the

[2] It was also held that S. 90 of the Restatement (Contracts) was merely a statement of the doctrine of promissory estoppel. *Infra*.

[3] [1947] K.B. 130.

[4] (1981) 26 S.A.S.R. 101. For an exhaustive list of these decisions see Lindgren K. E. and Nicholson K. G., 'Promissory Estoppel in Australia' (1984) 58 *Australian Law Journal* 249.

other has led to the development of doctrines which though sharing the same name are crucially different in the circumstances of their application. The doctrine of promissory estoppel as it is applied in each jurisdiction will now be examined.

Great Britain

In the case of Great Britain a distinction will be drawn between 'mainstream authorities' and those which challenge those authorities. The aim is not to dwell on the traditional authorities which have been so well analyzed elsewhere,[5] but rather to highlight those areas of controversy which persist in Great Britain and to highlight important differences between Great Britain and the United States.

It is generally agreed that promissory estoppel in Britain had its genesis in a statement of Lord Cairns in *Hughes v. Metropolitan Railway*.[6]

> It is the first principle 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 — afterwards by their own act or with their own consent enter upon a course of negotiation which has the affect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise may have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.[7]

It is suggested that the doctrine enunciated in *Hughes'* case is but an example of the general basis of equitable intervention. The doctrine was restated in its modern form by Denning J. in the *High Trees* case. He decided that a promisor could not exercise his rights under the contract where a promise was made which was intended to affect legal relations and which to the knowledge of the person making the promise was going to be acted upon by the person to whom it was made and was so acted upon. It should again be noted that promissory estoppel was relied upon as a defence to a claim indisputably good at common law. Although Lord Denning's statement is technically *dicta* the decision is regarded as one of the leading English decisions of its generation and has frequently been cited as the basis of the modern doctrine.[8] Even so, it could fairly be said that the decision in *High Trees* was not an earth shattering one. As Jackson points out:

> In reality all that was needed for the decision of the *High Trees* case was merely an application of a principle advocated by the House of Lords in *Hughes v. Metropolitan Rly*.[9]

In other words it was, like *Hughes'* case, but a specific application of a broad general equitable principle.

In *Ajayi v. R. T. Briscoe (Nigeria) Ltd*,[10] the Privy Council attempted definitively to state the law in England. It made the following categorical statement:—

[5] Bower, G. S., *The Law Relating to Estoppel by Representation* (3rd Ed., 1977).
[6] [1877] 2 App. Cas. 439.
[7] *Ibid.* 448.
[8] Bower, G. S., *op. cit.* 369.
[9] Jackson, D., 'Estoppel as a Sword' (Pt. II) 81 *Law Quarterly Review* 223, 241.
[10] [1964] 1 W.L.R. 1326. The Privy Council found that the defendant could not rely upon the defence of promissory estoppel because it had not shown that it had acted in reliance upon the plaintiff's promise to extend the contractual date in payment.

> The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position.[11]

This statement has been extensively quoted as settling the law in England.[12] It is argued that, despite the clear intention of the Privy Council that this should be the effect, it has not been achieved.

It is recognized that one thing is certain in Great Britain and would seem unlikely to change. It is not a mere coincidence that in each of the cases the following facts were established (a) the parties were in a pre-existing contractual relationship, (b) the promisor promised not to exercise rights under that contract, rights he had a perfect *legal* right to exercise (c) it was recognized that where the promisee had relied upon that promise promissory estoppel would be available as an equitable defence to an action on the original contract by the promisor.

Must there be a pre-existing legal relationship and if so must it be contractual?

There is some support for the argument that a legal relationship other than a contractual one will suffice. In *Combe v. Combe*,[13] it was suggested that the legal relationship of marriage might suffice. A relationship imposed by bankruptcy legislation has also been recognized as a sufficient 'pre-existing legal relationship'.[14] In another case a relationship imposed by the Companies Act sufficed and a promise not to rely upon rights arising out of that relationship was enforced.[15] In *Durham Fancy Goods Ltd v. Michael Jackson (Fancy Goods) Ltd*[16] Donaldson J. said: 'Lord Cairns in his enunciation of the principle assumed a pre-existing contractual relationship between the parties, but this does not seem to me to be essential, providing there is a pre-existing legal relationship which could in certain circumstances give rise to penalties and liabilities'.

In Wallis's Cayton Bay Holiday Camp v. Shell-Mex and B.P. Ltd[17] Lord Denning said that he saw no reason why the principles expressed by himself in *High Trees* should not be applied so as to preclude a squatter from enforcing his rights under the Limitation Act.

In *Crab v. Arun District Council*[18] he observed that the doctrine of promissory estoppel prevented a person from insisting upon his strict legal rights 'whether arising under a contract, or on his title deeds or by statute'. On this point Lord Denning appears to have had the last word.

[11] *Ibid.* 1330.
[12] *Je Maintiendrai v. Quaglia* (1981) 26 S.A.S.R. 101, 105; *Legione v. Hateley* (1983) 57 A.L.J.R. 292, 297.
[13] [1951] 2 K.B. 215.
[14] *In re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097.
[15] [1968] 2 Q.B. 839.
[16] *Ibid.* 847.
[17] [1975] Q.B. 94; [1974] 3 All E.R. 575.
[18] [1976] 1 Ch.D. 179; [1975] 3 All E.R. 865.

Despite these suggestions, however, it seems clear the courts will insist that some sort of pre-existing legal relationship exist between the parties to the promise in question and that the promise be made with respect to the promisors' rights arising under that relationship. The American authorities are examined in more detail below but a significant distinction must now be mentioned. The American authorities include a number of decisions in which the doctrine of promissory estoppel has been applied not only to promises or representations made in the precontractual or negotiatory stage,[19] but also to a whole range of cases where promises made in the absence of a pre-existing relationship of any kind have been enforced and where no future contractual relationship is contemplated.[20] Although it seems probable that in Great Britain there will be a continued insistence upon a pre-existing legal relationship it is suggested that there is no reason in principle why this should be so. Jackson, for example, takes a view which will be seen to be consistent with the American approach. He asks:

> Is there any real distinction between promising a course of action where prior to the promise none has been agreed and where one has been agreed? No justification of the distinction seems to have been made despite the oft repeated emphasis on the distinction. The representation, if recognised, means a change in a legal relationship. It creates a new relationship. It seems entirely illogical to insist that before it can be recognised the parties must have already solemnly agreed to pursue one course of action which is changed by the promise. It would be more logical to say that once they *have* agreed, the law will not recognise an alteration by promise, but it will recognise that a relationship can be created, and remedies flow, from a simple promise.[21]

This argument is, it is submitted, quite consistent with the general equitable principle of equitable intervention when the common law rules result in injustice. In this case the common law does not recognize that a promise given without consideration can be enforced. Equity intervenes to remedy the manifest injustice which would occur if such a promise could be resiled from when acted upon.

The 'Sword or Shield' Question

In all the cases thus far referred to the doctrine of promissory estoppel has been relied upon as a defence. In the United States on the other hand it is generally accepted, and this is the most significant point of departure, that a promise acted upon may found a course of action. In other words, in the case of promissory estoppel, estoppel may in the United States be used as both a sword and a shield.

The decision most often relied upon by those who support the traditional British view that promissory estoppel may be relied upon only in defence is that of Lord Denning in *Combe v. Combe*.[22] Here a wife attempted to enforce her husband's promise to make maintenance payments. She argued that she had relied upon the promise in not seeking a court order for maintenance. She did not establish that he had promised to make the payments in consideration of an undertaking by her not to seek a maintenance order. Therefore there could be no contractual basis for direct enforcement of the promise. The trial judge nevertheless found for the wife

[19] *Infra* 148-150. The most notable of these are the franchise and construction bid cases.
[20] *Infra* 151-152.
[21] Jackson, *op. cit.* 242.
[22] [1951] 2 K.B. 215.

on the basis that the husband had made an unequivocal promise to the wife to pay maintenance, intending that his wife should act upon it, and that she had in fact acted upon it. The Court of Appeal reversed the decision. Lord Denning, with whom the other members of the Court agreed, admitted that he had left this point obscure in *High Trees* but now asserted that promissory estoppel could not be the basis of an independent cause of action.

> Much as I am inclined to favour the principle stated in the *High Trees* case, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before.[23]

He went on:

> Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge. I fear that it was my failure to make this clear which misled Byrne J., in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce it if there was consideration for it. That is, therefore, the real question in the case: was there sufficient consideration to support the promise?[24]

This view was expressly supported by Buckley L.J in *Beesley v. Hallwood Estates Ltd* (another landlord and tenant case) in which he said

> where one party is under an existing legal obligation to another, who has so acted as to lead the former party to believe that the latter will not enforce that obligation, or not enforce it to its full extent, or for the time being, intending the former party to act on that footing and the former party has so acted the latter party may be restrained in equity from enforcing the obligation on any footing inconsistent with the belief so induced, and may be so restrained notwithstanding that he has received no consideration for the modification of his rights. The doctrine may afford a defence against the enforcement of otherwise enforceable rights; it cannot create a cause of action. It cannot in my judgment be invoked to render enforceable a right which would otherwise be unenforceable, nor to negative the operation of a statute.[25]

The above discussion depicts the traditional view. There is another. If one returns to Lord Denning's judgment in *Combe v. Combe* one finds that he did not say merely that 'the principle does not create new causes of action where none existed before'. He went on, in the same paragraph, to say 'It may be part of a cause of action, but not a cause of action itself'. What, then, does Lord Denning mean by 'part of a cause of action'? There is an answer to this question which is consistent with the principle which the supporters of the traditional view extract from *Combe v. Combe*. While it may be true to say that the effect of the successful invocation of the doctrine of promissory estoppel is to give rise to a defensive equity, that does not mean that the equity will arise only in favour of *defendants*. Indeed in *Hughes'* case itself the doctrine was successfully relied on by a plaintiff. By way of illustration the facts of the Australian High Court case of *Legione and Another v. Hateley*[26] may be simplified. The parties have entered into a contract of sale. The contract allows the vendor to rescind the contract for tardy payments. The vendor promises that he will not rescind and accepts a late payment. The

[23] *Ibid.* 219.
[24] *Ibid.* 220.
[25] [1960] 1 W.L.R. 549, 560.
[26] (1983) 57 A.L.J.R. 292, 297.

vendor resiles from his promise and rescinds the contract. The purchaser sues for specific performance. He relies upon the vendor's promise as part of his cause of action in order to demonstrate that the vendor has not effectively rescinded the contract and that the purchaser is entitled to specific performance. This example shows that the metaphor that estoppel may be used 'only as a shield' and not as a sword should, even if correct, 'not be sloppily misinterpreted into a notion that only defendants can rely upon the principle.'[27] Even the traditional view allows that there is no reason why a plaintiff cannot rely upon it provided that, as in the example given, he has an independent cause of action. On the traditional view the promise itself will not suffice. It has been said in this context that estoppel may be used as a 'minesweeper' only.[28]

Jackson puts forward another view. He considers that to say that promissory estoppel may only be relied upon defensively is to confuse the principle with its application in a particular case.[29] He feels strongly that a representation acted upon should be enforceable directly. He sees this as the principle and notes that we are not enforcing executory promises but promises acted upon. To support his argument that there is no reason in principle why such representations should not be enforced, Jackson relies upon a decision which is, paradoxically, one of Lord Denning himself. In *Charles Rickards Ltd v. Oppenhaim*[30] the defendant contracted with the plaintiff that the plaintiff should build a motor car body. The plaintiff failed to deliver the car on the due date. The defendant pressed for delivery and specified a new date by which he must have the car. It was not delivered by this date. When it eventually was delivered the defendant refused to accept delivery. The plaintiffs sued for the price of the car, or alternatively for work and labour done. Lord Denning said that if the car had been delivered during the time covered by his representation the defendant could not have refused delivery:

> If the defendant, as he did, let the plaintiff to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights: That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.[31]

It is interesting to note that Jackson in insisting that a promise acted upon should be directly enforceable does not draw upon the American decisions which would have provided so much support for his views. Atiyah, on the other hand, does. In arguing that specific performance should be available on the basis of promissory estoppel alone he says:

> It is worth noting that a parallel phenomenon is occurring in the United States, where the huge growth of the doctrine of promissory estoppel threatens to engulf the entire law of contract. But the process there seems to be a much more conscious one and it is one from which we can learn.[32]

[27] Cheshire, G. C. & Fifoot, C. H. S., *The Law of Contract* (10th Ed., 1981) 87.
[28] Bower, G. S., *op. cit.* 13, 387.
[29] Jackson, *op. cit.* 242.
[30] [1950] 1 K.B. 616.
[31] *Ibid.* 623.
[32] Atiyah, P. S., 'When is an Enforceable Agreement not a Contract? Answer: When it is an Equity' (1976) 92 *Law Quarterly Review* 174, 179.

In support of his argument Atiyah cites *Re Wyvern Development*.[33] This was an action brought upon a promise by the official receiver in bankruptcy to join in the execution of a contract of sale. Templeman J. held that the official receiver was bound by the doctrine of promissory estoppel. When *Combe v. Combe* was cited to show that promissory estoppel was available only as a defence, he brushed it aside as inapplicable with the statement that:

> [E]stoppel applies where the promisor knows and intends that the promisee will irretrievably alter his position in reliance on the promise.[34]

On this decision Atiyah comments:

> We are left to infer that in *Combe v. Combe* the promisee did not irretrievably alter his position which is presumably true. Still it is a very casual way to brush aside all the learning that has grown up around that case about estoppel being used as a shield and not a sword. The casualness might be objectionable if it mattered, but if estoppel is only being used to achieve the same result as conventional contract doctrine anyway it hardly seems to matter at all. This was really a very simple case of a promisee acting on a promise in such a way that it would be outrageous if the promisor were allowed to resile from his promise.[35]

Jackson points out that although the principle *as applied* in *Hughes'* case was wholly defensive that does not mean that an action can never be brought upon a misrepresentation. He goes on to say:

> The principle *as applied* in the *Hughes* case was wholly defensive. This does not imply that an action *cannot* be brought on a representation, and it is submitted that any attempt to restrict the effect of such a representation to defence (as by reference to a shield and not a sword) ignores the principle on which that defence is based, i.e., that a promise may be enforced.
>
> Just as there is nothing in the principle to support such a limitation, it is submitted there is nothing that supports the somewhat more vague limitation that although it may be a direct defence or a part of a cause of action, it may not be a cause of action in itself. To maintain this is again to recognize not the principle but its application to a particular case.[36]

In other words because the result of the principle as applied in a particular case is to afford a defence against a promisor, this does not mean that the same principle, which is based upon equitable enforcement of the promise, cannot be applied so as to found a cause of action. It is argued that if the basis of the doctrine of promissory estoppel is the classic principle of equitable intervention, then it is perfectly consistent with this principle to allow a promise acted upon directly to be enforced. If as Denning M.R. said in *Crab v. Arun* it is 'a situation in which equity comes in true to form to mitigate the rights of strict law'[37] why should equity not come in on the side of a plaintiff seeking directly to enforce a promise? After all, the equitable doctrine of part performance is but another application of the same principle. It is worth noting, as did Atiyah in a later paper,[38] that in deciding *Combe v. Combe* Lord Denning himself was clearly influenced by a feeling that the merits of the case were with the husband. The doctrine of consideration, he said, is

[33] [1974] 1 W.L.R. 1097.
[34] *Ibid.* 1104.
[35] Atiyah, P. S., 'Consideration and Estoppel: The Thawing of the Ice' (1975) 38 *Modern Law Review* 65, 68.
[36] Jackson, *op. cit.* 242.
[37] [1976] 1 Ch. 197; [1975] 3 All E.R. 865.
[38] Atiyah, P. S., *Consideration in contracts: a fundamental restatement* (1971) 51.

> sometimes said to work injustice, but I see none in this case . . . I do not think it would be right for this wife, who is better off than her husband, to take no action for six or seven years and then come down on him for the whole £600.[39]

Perhaps this is the real explanation of *Combe v. Combe*. To paraphrase Lord Denning's own words, it was a case where equity should 'true to form refuse to come in'.

Two other areas of uncertainty persist in Britain.

1. If it must be demonstrated that the promisee has acted in reliance on the promise, must it also be demonstrated that this reliance resulted in some detriment to the promisee?
2. Is the effect of promissory estoppel to extinguish rights or is the effect merely the suspension of those rights?

That these uncertainties persist clearly denotes the width of the gulf that separates the American and Anglo/Australian authorities on promissory estoppel. Because of the direction which authorities on promissory estoppel have taken in the United States the difficulties which still persist in the other jurisdictions could not arise. The existence of these uncertainties in one jurisdiction and their absence in another has significance in a comparative analysis. In the present context it suffices to observe that because the essence of the American doctrine is detrimental reliance, the requirement of detriment is obvious. Furthermore, if promissory estoppel is not confined to a promise to forego an existing right then the question of whether its effect is suspensory or extinctive is not relevant.

1. *The Requirement of Detriment*

Lord Denning has argued both in his judgments and in other writings that the promisee should have altered his position in reliance on the promise but that it is not necessary that he should thereby have suffered any damage. The opposing view is that it is the suffering of a detriment which makes it inequitable for the promisor to resile. These difficulties are yet to be resolved in England. It is clear that the promisee must have relied upon the promise and must have altered his position in such reliance. In *Ajayi v. Briscoe*[40] this principle was firmly espoused. Denning's view has been that the alteration of position is sufficient and that a further requirement of detriment should not be imposed.[41] A clear expression of this view may be found in *W. J. Allan's Co. Ltd v. El Nasr & Import Co.*[42]

> A seller may accept a less sum for his goods than the contracted price, thus inducing him to believe that he will not enforce payment of the balance . . . In none of those cases does the party who acts on the belief suffer any detriment. It is not a detriment but a benefit to him, to have an extension of time or to pay less, or as the case may be. Nevertheless, he has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it.[43]

[39] [1951] 2 K.B. 215, 222.
[40] [1964] 1 W.L.R. 1326, 1330.
[41] Denning, A. T., 'Recent Developments in the Doctrine of Consideration' (1952) 15 *Modern Law Review* 1, 5.
[42] (1972) 2 All E.R. 127.
[43] *Ibid.* 140.

He went on to say that 'all that is required' is that the one should have '*acted* on the belief induced by the other party'.[44]

The opposite view insists upon a detriment suffered by the promisee in reliance on the promise. As Turner puts it,

> [I]n promissory estoppel, as in orthodox estoppel, detriment, in Dixon J.'s sense, will be found essential; for to go further must go perilously close to the enforcement of a simple gratuitous promise.[45]

It is suggested that Lord Denning's view is more consistent with the true basis of the promissory estoppel. If equity is to intervene 'true to form' it must be to remedy an injustice. If the promisor has not suffered as a result of reliance there is no injustice. The real question is, as always, should equity intervene? Clearly it should when the promisee has acted to his detriment *in relying on the promise*. (For example in the case of a tenant who refuses a chance of cheaper accommodation).

There may also be cases where equity should intervene where as Lord Denning suggests the inequity lies in the result of a deprivation of benefit when the promisee has conducted his affairs in the expectation of retaining it. This will usually be the case. What Lord Denning perhaps could have said was that equity will intervene if the promisee suffers a detriment as the result of reliance on the promise itself or as a result of deprivation of benefit. The notion of detriment is synonymous with the notion of injustice. Seddon observes that 'it seems better to apply a test of inequitableness rather than a test of detriment'.[46]

It is argued, with respect, that Turner's views are inconsistent with general principle. To say that if one did not require detriment one would be 'perilously close to enforcement of gratuitous promises', is to demonstrate, with respect, a lack of appreciation of the basis of the doctrine and to tie it to the contractual requirement of consideration.[47] In any event, as Jackson pointed out,

> Yet let it not be forgotten, firstly, that in order to enforce estoppel the representation must have been intended to be binding, intended to be acted upon, *and in fact acted upon*. There is no executory estoppel.[48]

2. *Suspension or Extinction*

The mainstream authorities assume that promissory estoppel will effect only a suspension of rights. In other words, that the promise not to enforce rights can always be revoked upon the giving of notice. Certainly the Privy Council made this point strongly in *Ajayi v. Briscoe*.[49] Lord Denning, however, thought that the doctrine was extinctive and not merely suspensory. In *High Trees*, for example, he said,

> The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding.[50]

[44] *Ibid.*

[45] Bower, G. S., *op. cit.* 394. The reference is to Dixon J.'s comments regarding estoppel by representation in *Grunder v. Great Boulder Gold Mines Ltd* (1938) 39 C.L.R. 641, 674-5.

[46] Seddon, N., 'Is Equitable Estoppel Dead or Alive in Australia?' (1975) 24 *International and Comparative Law Quarterly* 438, 457.

[47] This point will be developed further in the context of the American authorities.

[48] Jackson, *op. cit.*247.

[49] [1964] 3 All E.R. 556, 559.

[50] [1947] K. B. 130, 135.

and in *D. & C. Builders v. Rees* he said,

> It is worth noticing that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.[51]

Treitel appears to have changed his view. In 1962 he considered that the doctrine operated extinctively if it operated at all.[52] In the most recent edition, however, he appears to have changed his views, saying that for the present the 'better view is that the principle is only suspensory'[53] but, as both he and Davies point out, to say that the doctrine is suspensory is ambiguous. As Davies puts it:

> It can either mean that after suspension has ended the debtor must make future payments in full but need not make up past lower payments to the full amount, or it can mean that he must do both.[54]

He thought that the latter view was

> more correct because otherwise the periodic payer would be in a better position than the lump sum payer.[55]

Treitel, expressing the view that the principle is only suspensory says

> But the meaning of this is not entirely clear where the promisee is under a continuing obligation to make periodical payments, e.g. of rent under a lease . . . In such cases the statement may mean one of two things: first, that the promisor can only claim the full amount of payments which fall due after the expiry of reasonable notice of retraction of the promise; or secondly, that he is entitled, not only to future payments in full, but also to the unpaid balance of past ones.[56]

Treitel does suggest that in 'exceptional' cases a creditor's right may be wholly extinguished. He refers to *Brikom Investment v. Carr*.[57] It is suggested that, as Treitel himself recognizes, *Brikom* was not a promissory estoppel case at all but concerned rather a variation supported by consideration.[58] Spencer refers to 'anomalous exceptions to the [general] rule'.[59]

It is submitted that these difficulties are manufactured and that the solution is to be found in the basis of the doctrine. It has already been argued that the doctrine of promissory estoppel as recognized in England and Australia is but one example of the general principle of equitable intervention in situations where common law rules (in this case the requirement of consideration) operate to cause manifest injustice.[60] If this is borne in mind there is no need to formulate a rigid rule. As Jackson puts it, echoing his observations regarding the 'Sword or Shield', controversy:

> Firstly it is clear that the principle as expressed is not confined to suspension. It specifically contemplates either the non-enforcement or the suspension of rights. Secondly it is submitted that to imply therefrom a distinction of suspension from creation or cancellation of rights is to recognize the application of the principle as the principle itself.[61]

[51] [1966] 2 Q.B. 617, 624.
[52] Treitel, G. H., *The Law of Contract* (1962) 67-71.
[53] Treitel, G. H., *The Law of Contract* (6th Ed., 1983) 102.
[54] Davies, F. R., *Contract*, (4th Ed., 1981) 33.
[55] *Ibid.* 34.
[56] Treitel, *op. cit.* 102.
[57] [1979] Q.B. 467.
[58] *Ibid.* 484-5.
[59] Bower, G. S., *op. cit.* 399.
[60] *Supra.*
[61] Jackson, *op. cit.* 241-2.

In other words, it is argued, the correct view is that there is nothing in the *Hughes* principle which requires that the parties can be restored to their original position. One must look at the representation itself. If the representation be that the original position will be abandoned forever (*e.g.* a promise to reduce rental for the remainder of the term of a lease), how 'can the court enforce such a representation and at the same time' ignore it?[62] The basic question is should equity intervene? How it intervenes whether by extinction or suspension of rights will depend entirely upon the facts of the individual case.

Australia

The facts of *Je Maintiendrai v. Quaglia*[63] have already been outlined. It was a classic landlord/tenant case in which the landlord promised to accept a reduced rental, and the tenant, it is presumed, relied upon the promise at least to the extent of not seeking alternative accommodation. This was not made clear.

In three individual and carefully reasoned judgments it was categorically stated that promissory estoppel is part of the law of Australia; that *Ajayi v. Briscoe* correctly stated the law and that in order for the defence to succeed it must be shown that the defendant had incurred some kind of detriment in relying on the promise. The Court did not precisely state that the doctrine could be relied upon only defensively. This did not arise. However, the unqualified support for *Ajayi v. Briscoe* indicates that, if asked, the Court would have adopted the traditional view.

Why did Australian courts take so long? There had been some cases in which the existence of the doctrine had been recognized but it had never before been applied. There had been doubts expressed about whether the doctrine applied in Victoria.

These doubts were encouraged by the Australian authors of Cheshire & Fifoot who, as recently as the third edition, continued to misconstrue an earlier High Court decision in which the doctrine was not applied for the very simple reason that the promise in question was clearly supported by consideration. This was pointed out in *Je Maintiendrai v. Quaglia*.[64]

Furthermore, it is argued that Australian courts have been comparatively relaxed with respect to consideration. In other words, the courts have been more ready to find it in cases which in other jurisdictions might be decided on the basis of promissory estoppel. This will be expanded below.

In *Reed v. Sheehan*[65] promissory estoppel was argued in the Federal Court. In view of the controversy in Britain it is interesting to note that in this case a plaintiff sought to rely upon the doctrine.

The facts involved an option to purchase a taxi which the plaintiff operated upon a licence from the defendant. The action was for specific performance. The

[62] *Ibid.*

[63] (1981) 26 S.A.S.R. 101.

[64] This is considered in detail in Morgan, S. M., '*Je Maintiendrai v. Quaglia* — Promissory Estoppel in Australia' (1982) 13 M.U.L.R. 475. For support for their view of the decision in *Albert House Ltd v. Brisbane City Council* (1968) 118 C.L.R. 144, the authors in the 4th edition rely upon *Brikom v. Carr* [1979] 2 All E.R. 753, 143.

[65] (1982) 56 F.L.R. 206.

defendant, relying upon a clause in the agreement, argued that in making late payments the plaintiff had disentitled himself from exercising the option. The plaintiff, however, argued that the defendant had promised that he would accept late payments and that he therefore could not rely upon the relevant clause as a defence. Two of the judges expressed a tentative inclination to accept the doctrine as expressed *Ajayi v. Briscoe*[66] and stressed that its applicability was restricted to situations of pre-existing contracts. The majority was tentative because of a finding on the facts that there had been no unequivocal representation. The dissenting judge categorically accepted the doctrine and applied it.

Finally, *Legione v. Hateley*[67] came before the High Court. Again the plaintiff relied upon promissory estoppel in an action for specific performance and again the defence was based on a clause in the agreement allowing the defendant the right to rescind for late payments. The defendant argued that as the plaintiff had been late in making some payments he had a right to rescind and therefore the plaintiff was not entitled to specific performance. On this occasion the five members of the High Court seized the mettle and in three separate judgments went out of their way to state unequivocally that promissory estoppel was part of the law of Australia.

In this case all judges agreed that if it could be shown that the defendant had made an unequivocal statement as to future intention and that the plaintiff had relied upon it to her detriment, then the doctrine would apply. Furthermore, all stressed the requirement of detriment, and found that in allowing the settlement date to pass the plaintiff had acted to her detriment. The High Court, however, found by a majority of 3-2 that no promissory estoppel was established in this case because no sufficiently unequivocal statement of intention had been made. The Australian High Court has therefore at least recognized the doctrine for Australia. It is yet to apply it. The current position, therefore, is that it has only once been applied in Australia.

Despite the fanfare which greeted it,[68] it is suggested that in so far as promissory estoppel is concerned the High Court's decision in *Legione v. Hateley* is not momentous. The case was basically concerned with relief against forfeiture. Promissory estoppel was barely referred to by counsel for either party.[69] The decision really adds nothing to the principles expressed in *Hughes v. Metropolitan Railway*.[70] It is argued that the principle recognized by the High Court in *Legione v. Hateley* is little more than an application of the general equitable principle of equitable intervention in circumstances where the common law operates to cause a manifest injustice.

As the parties were in a pre-existing contractual relationship the question of whether this was essential did not directly arise in *Legione v. Hateley*. Mason and Deane JJ. said

[66] [1964] 1 W.L.R. 1326.
[67] (1983) 57 A.L.J.R. 292.
[68] Lindgren and Nicholson, *op. cit.*
[69] Mr. R. A. Finkelstein, counsel for the respondent in *Legione v. Hately* kindly allowed me to peruse counsel's written submissions.
[70] [1877] 2 App. Cas. 439.

> There is strong authority in equity for a *limited* doctrine of promissory estoppel — representations (or promises) as to future conduct restricted to precluding departure from a representation by a person in a pre-existing contractual relationship that he will not enforce his contractual rights[71] (emphasis added).

They went on to say

> established equitable principle and the legitimate search for justice and consistency under the law combine to pursuade us to conclude that promissory estoppel should be accepted in Australia as applicable between parties in such a relationship.[72]

If the High Court had found in *Legione* that the circumstances were such that the doctrine of promissory estoppel should be applied the opportunity would have arisen to consider a question which in the writer's opinion remains critical and unanswered. Reference has been made to the controversy in England as to whether the doctrine may be relied upon to extinguish or merely to suspend rights. As the representation in *Legione* was that an extension of time would be granted successful invocation of the doctrine would have led, of course, to a suspension of rights. In *Je Maintiendrai* on the other hand the effect of the decision was to extinguish rights with respect to arrears of rents.

The United States

Lengthy examination of the doctrine of promissory estoppel in the United States is beyond the scope of this article. Discrete areas in which the doctrine has been applied have been chosen in order to demonstrate the gulf which has developed between the doctrine as recognized in Anglo/Australian jurisdictions and the doctrine as recognized in the United States. The general observation can be made that the doctrine enjoys enormous popularity in the United States. Although the dominance of consideration still results in its relegation to a secondary role, the remedial flexibility and the appropriateness of awarding reliance damages in some circumstances is largely responsible for its popularity.[73]

The divergence may perhaps partly be explained by at least in Australia, a comparatively relaxed attitude to consideration in Australia. A comparison of three classic decisions will demonstrate the point and also provide simple illustrations of fundamental differences. Just as *Todd v. Nicholl*[74] is frequently encountered by Australian students of contracts as one of the first cases for class discussion so are *Kirksey v. Kirksey*[75] and *Ricketts v. Scothorne*[76] familiar to their American counterparts. In *Todd v. Nicholl* the plaintiffs' actions in giving up a job, packing and despatching household goods, booking a passage *etc.*, were held to constitute consideration for the defendant's promise to allow them to live rent free in her home. In *Kirksey v. Kirksey* despite the dissenting judge's view that the loss

[71] (1983) 57 A.L.J.R. 292, 302.
[72] *Ibid.* 303.
[73] Feinman, J. M., 'Promissory Estoppel and Judicial Method' [1984] 97 *Harvard Law Review* 678, 687-8.
[74] [1957] S.A.S.R. 72
[75] 8 Ala. 131 (Supreme Court of Alabama 1845).
[76] 77 N.W. 365 (Supreme Court of Nebraska 1889).

and inconvenience sustained in breaking up a home and moving was sufficient consideration for a promise to provide a home,[77] the majority saw the promise as a 'mere gratuity' and refused to allow damages for its breach. Fifty years later in *Ricketts v. Scothorne* the Supreme Court of Nebraska was concerned with a case in which following and induced by a promise by her grandfather to pay her a sum of money the plaintiff gave up her job. It was held that the action was not consideration; the defendant had not requested her to give up her job nor exacted any *quid pro quo*. *Todd v. Nicholl* demonstrates that an Australian court might well have found a consideration. However, the Nebraskan Court went on to decide that the evidence 'conclusively established' the elements of equitable estoppel. It was said that the defendant

> having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker . . . to resist payment on the ground that the promise was given without consideration.[78]

These simple cases demonstrate the major points of departure which will shortly be developed in the context of more complicated examples. Note that in *Ricketts v. Scothorne* no comment was made as to the availability of promissory estoppel to found a cause of action. Indeed in subsequent cases specific performance has been awarded in promissory estoppel cases.[79] It should also be noted that the parties were not in a pre-existing relationship. The basis of enforcement was simply that of a promise relied upon. It is fair to say that the doctrine of promissory estoppel has developed in the United States into a substitute for consideration and as an alternative basis in the enforcement of promises. Although in earlier cases such as *Ricketts v. Scothorne* judgments are couched in terms suggesting that the remedy remains equitable this is no longer the case. In Anglo/Australian jurisdictions promissory estoppel could be described as but an illustration of the operation of the general equitable principle of equitable intervention in circumstances where common law rules would operate to cause a manifest injustice. There can be no doubt that courts in the United States consider themselves to be making available a legal remedy in a wide variety of circumstances where promisors who knew their promises would induce reliance seek to resile from them.[80]

Corbin suggests that the very phrase promissory estoppel is 'objectionable'. He considers the Restatement correct in stating the rule in terms of action or for-

[77] 8 Ala. 131 (Supreme Court of Alabama 1845).

[78] 77 N.W. 365, 367.

[79] The clearest examples are to be found in those cases in which promissory estoppel has been used to avoid the effect of the Statute of Frauds Agreements, unenforceable for non-compliance with the Statute, but relief upon which have been enforced. See, *e.g.*, *Janke Construction Co. v. Vulcan Materials Co.* 386 F. Supp. 687.

[80] *E.g.* promises made to would-be employees, *Grouse v. Group Health Plan Inc.* 306 N.W. 2d. 114; *Hunter v. Hayes* 533 P. 2d. 952: promises not to plead the Statute of Limitations *Troy's Stereo Center Inc. v. Hodson* 39 N.C.A. 591, 251 S.E. 2d. 673. In *Choppin v. Labranche* 48 La. Ann. 1217, 20 So. 681, it was held that the owner of a tomb was estopped from insisting upon the removal of remains of deceased persons which had been transferred to it by relatives who had relied upon the owners' promise that they could remain forever. In *Bush v. Bush* 117 So. 2d. 568 a promise by a step-mother to leave property to her step-children by will was held enforceable where it had been relied upon.

bearance in reliance on a promise.[81] The remedy has been made available in a range of circumstances where to refuse it would amount to the countenancing of a manifest injustice. The point is succinctly put by Feinman,

> [T]he typical doctrinal formulation of promissory estoppel holds out as its paradigmatic case a clear promise manifesting a commitment to future action, to which the promisee responds, as the promisor should have foreseen, by undertaking a specific act of substantial reliance sufficient to ensure that non-enforcement of the promise would be a manifest injustice.[82]

It is now proposed to demonstrate these points of departure by considering two discrete situations.

The flexibility afforded by the remedy and also the peculiar suitability of the remedy in cases where damage has been suffered by reliance on a broken promise will also be shown.

The 'Franchise' Cases

These cases illustrate the stress placed by American courts upon good faith in negotiations and upon protecting the interests of persons who have relied upon promises but who have not the benefit of a contract. The classic 'franchise case' is *Hoffman v. Red Owl Stores Inc.*[83] The facts serve to explain the distinction in the United States between 'reliance' damages and 'expectation' damages which in turn underlies the vast impact promissory estoppel has had on non-contractual promises made in a commercial context. The basic aim of contractual remedies is to put the plaintiff in the economic position in which he would have been if the contract had been performed; in other words to compensate for loss of his 'expectation interest'. Suppose a grandfather promises his grand-daughter that he will pay her $10,000. In circumstances in which it can be established that she has relied upon the promise and that the reliance was foreseeable the grand-daughter spends $2,000 on a fur coat. If contractual or 'expectation' damages were to be awarded for breach of the promise, the grand-daughter would recover $10,000 or nothing at all. If, however, reliance damages could be awarded she would recover the $2,000 which she was 'out of pocket'. Situations such as this in which expectancy greatly exceeds actual loss are situations which cry out for something other than contractual damages. Knapp provides an excellent summary of the facts of *Hoffman's* case.

> A who owns and operates a bakery, desires to go into the grocery business. He approaches B, a franchisor of supermarkets. B states to A that for $18,000 B will establish A in a store. B also advises A to move to another town and buy a small grocery to gain experience. A does so. Later B advises A to sell the grocery which A does, taking a capital loss and foregoing expected profits from the summer tourism trade. B also advises A to sell his bakery to raise money for the supermarket franchise saying, 'Everything is ready to go. Get your money together and we are set'. A sells the bakery taking capital loss on this sale as well.[84]

[81] *Corbin on Contracts* (1952) 232. *Restatement (Second) of Contracts* (1981) (hereinafter referred to as the Restatement, S. 90.) Promise Reasonably Inducing Action or Forbearance.
(1.) A promise which the promisor should resonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. The remedy granted for breach may be limited as justice requires.

[82] Feinman, *op. cit.* 689.

[83] 26 Wis. 2d. 683, 133 N.W. 2d. 267 (1965).

[84] Knapp F. L., 'Reliance in the Revised *Restatement*: The Proliferation of Promissory Estoppel' (1981) 81 *Columbia Law Review* 52, 57.

The negotiations collapse.

Apart from the possibility of manipulating the rules of offer and acceptance as was done in *Abbot v. Lance*[85] an Australian court would, on the present state of the law, be forced to deny a remedy as the franchise agreement was yet to come into existence. A could therefore not recover his expectation interest *i.e.* he could not recover damages to recompense him for what he would have got out of a franchise agreement. Despite the fact that his reliance upon B's promise was both predictable and reasonable in term of his actions and that furthermore he was substantially out of pocket as a result, an Australian or English court could not compensate him for this. The court would be forced to choose between a full contractual remedy or none at all.

In *Hoffman's* case the court was forced to consider whether promissory estoppel would serve as an independent basis for recovery. It was prepared to compensate the promisee for his 'reliance' damages, *i.e.* for what he had actually lost in reliance on the promise — namely loss of sales of the bakery and grocery, removal and temporary living expenses. In doing so the court demonstrated a clear acceptance of promissory estoppel as founding an action quite distinct from an action for breach of contract.[86]

Curry C.J. quoted with approval the judgment of McFaddin J. in *People's National Bank of Little Rock v. Linebarger Construction Coy*[87] in which he said that promissory estoppel was an attempt by the courts 'to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings'.[88]

The decision in *Hoffman's* case, as one commentator has put it, established the foundation for 'an important new legal duty of good faith in the conduct of contract negotiations'.[89]

The 'Construction Bid' Cases

Another example of the flexible approach of the American courts is to be found in the construction bid cases.[90] These cases also demonstrate a tension between the rules relating to unilateral offers and promissory estoppel. The fact situations are substantially similar and can briefly be summarized. Typically a building contractor (the 'prime-contractor') will call for bids from sub-contractors *e.g.* in the classic case of *Drennan v. Star Paving*[91] bids for paving were called for. The prime-contractor will then, before accepting a bid use one of them, usually the

[85] (1860) Legge, 1283.
[86] 26 Wis. 2d. 683, 698; 133 N.W. 2d. 267, 275 (1965).
[87] 240 S.W. 2d. 12, 16.
[88] See also *Trilogy Variety Stores v. City Products Corp.* 523 F. Supp. 691 (N.Y. 1981).
[89] Summers, R. S., '"Good Faith" in General Contract Law' (1968) 54 *Virginia Law Review* 195, 223.
[90] For a concise account of bidding practices in the United States see Schultz, F. M., 'The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry' (1952) 19 *University of Chicago Law Review* 237.
[91] 333 P. 2d. 757.

lowest, as the basis for his own general bid on the complete job. As in the *Drennan* case a dispute arises if when the prime-contractor's bid is accepted the sub-contractor upon whose bid the prime-contractor has relied either revokes the bid or refuses to perform in accordance with it. If the prime-contractor were to sue in contract for damages or ask for specific performance the answer would be simply that the bid was a unilateral offer which had not been accepted and was therefore not binding. An Anglo/Australian court would, unless it was in this instance also prepared to manipulate the rules regarding acceptance of unilateral offers as in *Abbot v. Lance*, be forced to the same conclusion.[92]

In some cases a clear injustice will occur. A sub-contractor could deliberately submit a low bid, knowing that it will be relied upon, then withdraw with impunity and attempt to renegotiate the price.

Initially American courts were reluctant to extend promissory estoppel to commerical cases. In *James Baird v. Gimbel Bros, Inc.*[93] Learned Hand J. held that promissory estoppel was not applicable to 'bargain promises' *i.e.* unilateral offers intended to ripen into contracts. He said that:

> There is no room in such a situation for the doctrine of 'promissory estoppel'.[94]

It was, he considered, applicable only to 'donative promises' *i.e.* promises intended to be relied upon but with respect to which a *quid pro quo* was not expected.

Twenty-five years later, however, in *Drennan v. Star Paving Inc.*[95] the doctrine was extended to commercial transactions. When a sub-contractor revoked his bid the day after the prime-contractor's bid, based on that of the sub-contractor, had been accepted, the prime-contractor sued to recover the increased cost of having the work done by another sub-contractor. He succeeded. It was held that the prime-contractor's reliance on the bid had the effect of making it irrevocable. In so deciding, Traynor J. said that:

> Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not . . . It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid . . . Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.[96]

Drennan's case was enthusiastically received and promissory estoppel became widely used as a basis for enforcing unaccepted offers by subcontractors. S. 87(2) of the Restatement (second) of Contracts (1981) is said to adopt the *Drennan* ratio.[97]

[92] *Supra.*
[93] 64 F. 2d. 344.
[94] *Ibid.* 346.
[95] 333 P. 2d. 757.
[96] *Ibid.* 760.
[97] Metzer, M. B., & Phillips, M. J., 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 *Rutgers Law Review* 472, 487, 514. S. 87(2). 'An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.'

By 1974 and the decision in *Debron Corp. v. National Homes Construction Corp.*[98] the trend towards treating promissory estoppel as an independent basis for recovery had become established.[99] The significance of the *Debron* case is that it was accepted that where the plaintiff made no claim in contract at all, promissory estoppel provided an independent cause of action which, whatever else it might be, was not a contractual remedy.[1]

Even clearer acceptance of promissory estoppel as an independent remedy is to be found in *Janke Construction Co. v. Vulcan Materials Co.*[2] The court in *Janke* relied heavily on *Hoffman's* case and said that the significance of that case was

> that the court clearly distinguished between an action on a promise based on promissory estoppel and one based on breach of contract.[3]

In answer to an argument that the promise was unenforceable for non-compliance with the Statute of Frauds, the Court in *Janke* said 'The Statute of Frauds relates to the enforceability of *contracts*; promissory estoppel relates to *promises* which have no contractual basis and are enforced only when necessary to avoid injustice'.[4] This view was supported in *Illinois Valley Asphalt Inc. v. J. F. Edwards* when the Supreme Court of Illinois said,

> Promissory estoppel is a doctrine under which a plaintiff may recover without the presence of a contract and Illinois courts have permitted suit on this theory in the absence of a contract . . . Therefore, the absence of a contract does not preclude a recovery by plaintiff under a theory of promissory estoppel.[5]

The construction bid cases demonstrate very clearly the vast gulf between the doctrine of promissory estoppel as understood in the United States on one hand and in England and Australia on the other.

The recognition of promissory estoppel as an independent basis of recovery is not confined to these situations. Indeed, it is now generally accepted in the United States that promissory estoppel is the basis of a cause of action which is now so distinguishable from a contractual claim as to qualify as an independent cause of action.

Indeed the doctrine has successfully been invoked in commercial cases where not only is there no contractual relationship between the parties but where none was contemplated. In *Insilco Corp. v. First National Bank of Dalton*[6] where a 'senior lender' was in breach of a promise to give a 'junior lender' notice of any default by the debtor it was held that the fact that no alternative claim in contract could be made did not prevent a claim based upon promissory estoppel. Similarly in *Higgins Construction Co. v. Southern Bell Telephone*[7] a promise by a utility company to remove power lines on a bridge which the plaintiff had contracted with

[98] 493 F. 2d. 352 (Mo.).
[99] Griffin, S., 'Promissory Estoppel — the Basis of a Cause of Action which is Neither Contract, Tort or Quasi-contract', 40 *Missouri Law Review* 163.
[1] For a comprehensive overview of the American position see Metzer & Phillips, *op. cit.*
[2] 386 F. Supp. 687, affd. 527 F. 2d. 772 (Misc.) (1976).
[3] *Ibid.* 693.
[4] *Ibid.* 697.
[5] 413 N.E. 2d. 209, 211 (1981).
[6] 283 S.E. 2d. 262 (1981).
[7] 281 S.E. 2d. 469.

a third party to repair was enforced on the basis of promissory estoppel alone. Damages were recovered for the increased cost attributable to the delay.

In Anglo/Australian law promises by employers to pay bonuses to employees in recognition of past services have been regarded as unenforceable for lack of consideration. The rule that past consideration is no consideration is automatically applied. The American decisions which recognize that such promises if relied upon may be enforced on the basis of promissory estoppel emphasize perhaps most clearly the recognition of promissory estoppel as a cause of action quite independent of contractual principles.[8]

The language of s. 90 of the Restatement itself suggests an independent cause of action of which the elements are (1) a promise, (2) which the promisor should reasonably expect to induce action or forbearance and which (3) induces such action and where (4) non-enforcement would produce injustice. Nothing in this language suggests that it is a substitute for consideration. Observation by the courts re-inforce the status of promissory estoppel as an independent basis for recovery. It has been described as 'a successful basis for recovery', a 'legitimate source of recovery', an 'alternative theory of recovery', 'the basis of an action for damages' and a 'cause of action'.[9]

Conclusions

The doctrine of promissory estoppel is recognized in the United States as an independent cause of action the basis of which is reliance. Furthermore, it is seen as being completely independent of any contractual principles. It is directed towards, in particular, a kind of wrong — namely the making and breaking of a promise on which it was (or should have been) foreseeable that the promisee would detrimentally rely. It is argued that this is the language of tort rather than of contract.[10] It has recently been described as

> a principle of abstract justice capable of application in an infinite variety of factual situations.[11]

It has emerged as a remedy which is particularly apt when

> commercial men have acted without legal advice which is in the great majority of cases because it finds the answer to their problem.[12]

In other words it allows them to recover what they have lost as a result of reliance on the promise. It is clear that promissory estoppel remedies are largely discretionary. The reference in s. 90 of the Restatement to 'injustice' makes it clear that the remedy may be tailored to the requirements of justice. Recognition of promissory estoppel as an independent cause of action avoids the concerns which it is argued have inhibited courts in both Australia and Great Britain. Dixon J., for example,

[8] *E.g. Division of Labor Law Enforcement v. Transpacific Transportation Co.* 69 Cal. App. 3d. 268, 137 Cal. Rptr. 855 (1977).

[9] *Allen v. A. G. Edwards & Sons* 606 F. 2d. 84, 86; *Division of Labor Law Enforcement v. Transpacific Transp. Co.* 69 Cal. App. 3d. 268, 275; 137 Cal. Rptr. 855, 859 (1977); *Hoffman v. Red Owl Stores op. cit.* These references are from Metzer, *op. cit.* 511.

[10] Knapp, *op. cit.* 78-9.

[11] *Ibid.* 78.

[12] Seddon, *op. cit.*448.

commented that he found the doctrine unappealing. His concern was that it 'cuts across hallowed principles of contract'. 'Offer and acceptance and consideration', he said, 'are out of the way'.[13]

Turner, it will be recalled, expressed concern that extension of the remedy would go 'perilously close to the enforcement of gratuitous promises'. It is suggested that this concern is unfounded. The views of Jackson and Atiyah are echoed by the American authorities and it is submitted that they are correct. The doctrine of consideration has its place in the law of the contract. It provides a body of predictable rules upon which contracts can be based. The doctrine of promissory estoppel, however, has its place. It is not connected with contracts and consideration. It occupies its own place[14] and should be available, as in the United States and according to the views of Jackson and Atiyah, in circumstances where the law of contract can have no application. Unless the concern for consideration is replaced in Australia and Great Britain by recognition of promissory estoppel as an independent cause of action it is suggested that the gulf between those jurisdictions and the United States will continue to widen. An American commentator has recently succinctly stated the position:

> The tide is still coming in, and we can confidently expect additional applications in the future.[15]

Seddon[16] makes the point that a venerable doctrine (in this case consideration) is no more respectable than a modern doctrine. The proper question he suggests is 'Does it suit today's conditions?' It is suggested in the case of promissory estoppel as developed by American courts that the answer, is indubitably 'Yes!'

[13] Dixon, O., 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 475.
[14] Seddon, *op. cit.* 448.
[15] Knapp, *op. cit.* 77.
[16] Seddon, *op. cit.* 112.