MAKING REPRESENTATIONS GOOD

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This Article is about an old Equity line of cases in which representations were ordered to be made good. The Article is written in the form of a conversation which takes place between a tutor and his pupil after formal teaching has ceased and the term has come to an end. This format has been chosen because this Article is, in a sense, a luxury. Its purpose is not to argue that the line of cases about to be discussed now represent the law or even should represent the law. Rather it is designed to show that certain pressure points always exist in the law. At one time they are regulated in a certain way. The law changes, fashion dictates that a certain line of cases becomes exploded doctrine, but the pressure points remain. New lines of authority spring up to deal with them and these are difficult to reconcile with the established law. The conversation which follows is necessarily wide ranging impinging as it does on many of the fundamental principles of our Law of Civil Obligation. It should be seen not so much as an attack on the correctness of the leading cases, but as an attempt to put such cases into perspective and to suggest the reasons why certain lines of modern authority cause more difficulty than others. The reading list assigned for the tutorial is attached as an addendum to this Article.

Professor

May we begin by you outlining what you make of this supposed equitable doctrine of making representations good?

Student

I think the best way that I can outline the doctrine is to say that it appears to have been concerned in the main with two lines of cases. The first line was concerned with informal marriage settlements which faced problems as a result of the Statute of Frauds. In these cases a representation of intention (I intend to settle Blackacre on you and my daughter if you wed) which was seriously made and which to the knowledge of the person making it was going to be acted upon by the person to whom it was made was binding in equity so soon as it was acted upon, even though the formalities had not been complied with. Although these cases are akin to contract the cause of action is not in contract, and that is why the Statute of Frauds is not applicable. The leading case in this line is *Hammersley* v *De Biel*,[1] a decision of the House of Lords. The other line of cases was mainly concerned with what we would characterise today as Negligent Misrepresentation cases. In these cases someone, who because of his special position had access to information would give advice as to a certain fact (as for example whether a trust fund was encumbered). If the representee purchased property in reliance on that statement and suffered loss as a

[1] (1845) 12 Cl. & F. 45; 8 E.R. 1313.

result, equity held him entitled to have the representation made good. The leading case in this line of case in *Burrowes* v *Locke*.[2]

Professor

What is the cause of action in these two lines of cases?

Student

I think that the right answer is Fraud in the equitable sense. This is the way that Lord Eldon explains it in an early case[3] and you find similar statements in both the lower Court proceedings in *Jorden* v *Money*[4]. At common law the action for deceit was governed by *Pasley* v *Freeman*[5] which held that a man was responsible for the truth of the assertion which he makes. If a man made a statement to another knowing that statement to be false and with the view of thereby inducing the person to whom he made the statement to do an act whereby that person received an injury, an action was held to lie at his suit against the person who made the statement, although he derived no profit or advantage from it. Equity followed the law but went further in that it did not inquire whether in such cases the person making such statements knew that the statements were false. Equity took the view that if a deliberate statement was made by one person to another with the intention that it be relied upon, the person who made the statement was held to it and was compelled so far as lay in his power to make good the statement he asserted to be true.

Professor

Before we start going into the cases, could you tell me what you see as the modern significance of this doctrine?

Student

Well first of all the point must be made that the doctrine is no longer law today — though it sheds light on some of the recent decisions[6]. The real significance is what it reveals about our attitude to Equity. We tend to learn our Law of Contract and Tort very much as Common Lawyers have always done. If the doctrine were the Law today, we would see our Law of Civil Obligations in an entirely different way, as I suspect Nineteenth Century lawyers must have done. Dishonesty would not be a prerequisite to fraud, so *Derry* v *Peek*[7] would have to be decided differently; *M.L.C.* v *Evatt*[8] would appear a curious aberration as it is to all extents

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[3] (1805) 10 Ves. 475; 32 E.R. 927.

[2] *Ex P. Carr* (1814) 3 V. & B. 108 at p. 110-111; 35 E.R. 420 at p. 421.

[4] (1851) 21 L.J. Ch. 531, 897.

[5] (1789) 3 T.R. 51; 100 E.R. 450.

[6] See *Pascoe* v *Turner* [1979] 1 W.L.R. 431 and *Greasley* v *Cooke* [1980] 1 W.L.R. 1306 and cf. *Loffus* v *Maw* (1862) 3 Giff. 603; 66 E.R. 554 and *Pilkington* v *Coles* (1874) L.R. 19 Eq. 174.

[7] (1889) 14 App. Cas. 337.

[8] [1971] A.C. 793.

and purposes indistinguishable from the former leading case of *Burrowes* v *Locke. Maddison* v *Alderson*[9] would go the other way as would *Rutherford* v *Acton Adams* [10] (no damages for innocent representation). Our doctrine of consideration would have to alter to take into account the equitable considerations: the restrictions in *Combe* v *Combe*[11] for example would no longer be good law. An estoppel could found a cause of action so *Low* v *Bouverie*[12] would no longer stand, and a representation of intention as well as facts would be sufficient for an estoppel so *Jorden* v *Money*[13] would appear to be the aberration, rather than the promissory estoppel line of cases[14].

Last but not least monetary awards would be available in equity, and for a tort you would in equity receive the expectation interest — an order that the representation be made good. To put it very bluntly many well established principles on which so much of our Law of Contract and Tort rest would have to be seen as misconceived That is what I think is significant — it shows that different attitudes at Law and Equity existed, and it leads us to ask why ultimately it was the Law that triumphed.

Professor

Perhaps we can turn to specific examples of the doctrine. What did you make of *Loffus* v *Maw*?[15]

Student

That was the case of a young widow with a child who went to live with her uncle. The uncle was elderly and unwell and induced the young woman to go and live with him by promising to make some provision for her support and to leave her something considerable in his will. After a while she discovered that her uncle had only left her a legacy of £10. The work was hard and gruelling and she found the constant attention he required was wearing her down. So she threatened to leave him unless he provided for her as he had promised. After procrastinating for a while the uncle caused a codicil to his will to be prepared leaving her the rents of two houses which belonged to him for her life. But just before he died the uncle executed another codicil revoking the provision made for the plaintiff and leaving the houses to his son. The widow's problem was that if she sued in contract she would be met by the Statute of Frauds. So rather than put her case in contract she relied on the doctrine of making representations good and in particular on the House of Lords decision in *Hammersley* v *De Biel.*

There Lord Cottenham's statement that "A representation made by one

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[9] (1883) 8 App. Cas. 467.

[10] [1915] A.C. 866.

[11] [1951] 2 K.B. 215.

[12] [1891] 3 Ch. 82.

[13] (1854) 5 H.L.C. 185; 10 E.R. 868.

[14] *Hughes* v *Metropolitan Railway Co.* (1887) 2 App. Cas. 439; *Central London Property Trust Ltd.* v *High Trees House Ltd.* [1947] K.B. 130.

[15] (1862) 3 Giff. 592; 66 E.R. 544.

party for the purpose of influencing the conduct of the other party and acted upon by him will in general be sufficient to entitle him to the assistance of this Court for the purpose of realising those representaions" was approved.[16] She succeeded and the Vice-Chancellor ordered that the trusts in favour of the plaintiff declared in the codicil be performed. In his judgment he pointed out that the Statute of Frauds had no application to cases of this kind.

Professor

Why did the Statue of Frauds not apply?

Student

Because the cause of action is in fraud, in which Equity had a concurrent jurisdiction.[17]

This is best explained in *Ex p. Carr*,[18] a decision of Lord Eldon's on guarantees:

> The Statute of Frauds (Stat. 29 Ch. 2, c.3), requiring a written Engagement for the Debt of another, has been considerably cut down ever since the Case of *Pasley* v *Freeman* (3 Term Rep. 51. See the Lord Chancellor's Observations, 6 Ves. 386, in *Evans* v *Bicknell*), at Law; where this was determined: that, if you throw into the Declaration an Allegation that the Engagement was fraudulent, and in the Form of a Representation, that the Party is of sufficient Substance to pay the Debt, the Recovery is not of the Debt, as Debt, upon the Contract, as Contract; but a Recovery of Damages to compensate what they call a Fraud. It was long, before I was reconciled to that: but with those Doubts I know it has been settled as Law by subsequent Decisions. I do not therefore mean to deny this Proposition, as settled Law; that, if a Man asks, whether he may trust A. and the Answer is, that he may, the Person giving that Answer, knowing at the Time that he cannot be trusted, must pay in Damages for the Consequences of that Misrepresentation: but, if the Answer is, that he has so good an Opinion of A.'s Circumstances, that he will pay the Debt, if O. does not, there can be no Recovery.
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> This has some Authority in a Class of old Cases referred to in *Neville* v *Wilkinson* (1 Bro. C.C. 543), and a Case at Law, *Montefiori* v *Montefiori* (1 Black 363). If a Person was induced to advance his Money by the Representation of another, that he had no Demand upon a particular Individual, that Consideration being clearly made out, and the Person, so advancing, misled by that, being a Misrepresentation, a Court of Equity had long held, that the Mouth of the Person, who made that Misrepresentation, was shut; that he should never utter a Contradiction to what he had so asserted, thereby misleading others. (16 Ves. 125. *Scott* v *Scott*, 1 Cor, 366.) Accordingly in *Neville* v *Wilkinson* Mr Wilkinson was held bound by his Representation: the Marriage being had upon that Representation, clearly proved to have been made, it was held, that he never could in respect of his Demand, a very large one, disturb by bringing any Action that State of Things, upon which the Father of the Lady had dealt.

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[16] (1845) 12 Cl. & Fin. 45 at p. 79, 88; 8 E.R. 1312, at p. 1327, 1331.

[17] *Hill* v *Lane* (1870) L.R. 11 Eq. 215, at p. 220-221.

[18] (1814) 3 V. & B. 108 at p. 110-111; 35 E.R. 420.

Professor

That was the case that led to Lord Tenterden's Act.[19] Now would *Loffus* v *Maw* be decided in the same way today?

Student

It is difficult to be certain, but on balance I think, yes. The case was thought to be wrongly decided by the House of Lords in *Maddison* v *Alderson*.[20] But since then the whole law of part performance has been reconsidered. In *Steadman* v *Steadman*[21] the House of Lords held that the alleged acts of part performance had to be considered in their surrounding circumstances, and, if they pointed on a balance of probabilities to some contract between the parties, and either showed the nature of, or were consistent with the alleged oral agreement then there was sufficient part performance. In my opinion the going to live with the deceased, and the performance of housekeeping and nursing services for the deceased were such as to postulate the existence of some contract and are consistent with the contract alleged. So I think that she would succeed on somewhat different grounds: but the important thing is that today as in 1862 the Statute of Frauds is bypassed where a person has relied upon an oral undertaking and that the two doctrines coincide at many points. The party pleading part peformance must show that in reliance on the contract he incurred expense, prejudice or detriment. Part performance gives rise to an equity and this, not the contract, is performed. Incidentally I have not mentioned the Law Reform (Testamentary Promises) Act 1949, the ideas in which bears a striking resemblance to the equity given effect to by *Loffus* v *Maw*. That would seem to be the obvious way to proceed in New Zealand.

Professor

I tend to agree with your suggestion that the doctrine of making representation good and the doctrine of equitable part performance play a similar role. On the other hand I think we should observe that the recent English cases show little enthusiasm for the ideas contained in *Steadman* v *Steadman*. If the part performance doctrine is going to be given effect to in the manner suggested by those cases, i.e. "You must not first look at the oral contract and then see whether the alleged acts of part performance are consistent with it. You must first look at the alleged acts of part performance to see whether they prove that there must have been a contract and it is only if they so prove that you can bring in the oral contract",[22] it seems to me that we have not advanced far beyond the idea that the part performance exception is a principle of evidence. But let us return to *Loffus* v *Maw*. The widow faced a further difficulty apart from the Statute of Frauds in advancing her case. How did she circumvent *Jorden* v *Money*?

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[19] Statute of Frauds Amendment Act (9 Geo. 4, c.14) 1828.

[20] (1883) 8 App. Cas. 467.

[21] [1975] A.C. 536.

[22] See *Re Gonin* [1979] Ch. 16; *Daulia Ltd* v *Four Millbank Nominees Ltd.* [1978] Ch. 231. And see Wade (1974) 90 L.Q.R. 433, 434-435. But cf. *Ogilvie* v *Ryan* [1976] 2 N.S.W.L.R. 504.

Student

That is one of the more curious aspects of the case. Counsel had submitted that the equity in *Loffus* v *Maw* arose from expressions of mere intention, whereas according to the House of Lords' decision in *Jorden* v *Money* a representation of fact was required. Stuart VC simply gives *Jorden* v *Money* the go-by.

This is what is reported[23]

> "As to the reliance which the Defendant's counsel placed on the decision of the House of Lords in the case of *Jorden* v *Money*, although the decision is no doubt binding, it cannot be considered as a reversal of the decision of the House of Lords in *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* v *De Biel*, and with the law as laid down by all Judges of the highest authority. It is remarkable that the case of *Hammersley* v *De Biel* was not referred to by any of the counsel or Law Lords in the case of *Jorden* v *Money*."

Professor

Do you agree with the Vice-Chancellor?

Student

Yes, I do. I have no doubt that in *Hammersley* v *De Biel*, the representation made by the father of the wife was merely of an intention to make a further provision for his daughter and her children of £10,000 on his death. There was no more than the expression of an intention to leave this sum by a revocable instrument. There is a particularly clear illustration in Lord Campbell's judgment as to the nature of the representation that gives rise to the equity. After setting out Lord Cottenham's statement of the general principle, his Lordship says[24]:

> "Of course Lord Cottenham is here speaking of negotiations in reference to marriage; and if that were not to be considered as the doctrine of a Court of Equity, the most monstrous frauds would be committed. Some fraudulent father might hold out to the suitor of his daughter that he meant to make a settlement upon his daughter and her issue. The marriage would take place in the belief that that settlement would be made; and then, after the marriage he might say, "this was only an intimation of my intention at the time — I have changed my mind and I will not give her a shilling". That would be most unjust; and to prevent such fraud, this doctrine has been laid down. . ."

In practice, of course, the doctrine was made workable because the Equity judges carefully defined what sort of conduct in reliance was to be protected. The marriage settlement cases show concern for the reasonableness of the representee's reliance, and with the definite and substantial character of the representation. The House of Lords decision in *Maunsell*

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[23] (1862) 3 Giff. 592, at p. 604; 66 E.R. 544 at p. 549.

[24] (1845) 12 Cl. & Fin. 45 at p. 88-89; 8 E.R. 1312 at p. 1331.

v *Hedges*[25] is a particularly good illustration of a representation being couched in such terms that the representee could not be said to have reasonably placed reliance upon it.

Professor

Did you find any other cases round about this time in which *Jorden* v *Money* is given the 'go by'?

Student

Yes. *Prole* v *Soady*[26]; *Bold* v *Hutchinson*[27] and *Williams* v *Williams*[28] are all good illustration of representations of intention being given effect to under the doctrine of making representations good even after *Jorden* v *Money* was decided. In *Prole* v *Soady* the representation was that an estate and a sum of rupees would become the property of the representor's daughter and children on his death. In *Bold* v *Hutchinson* the material representation was as follows: "I pledge you my word as an officer and a gentleman that at my death and Lady Hutchinson's my daughter will have £10,000 at the very least. I have made no eldest son, and my children will share equally." In *Williams* v *Williams* the representation was "I will give £200." Yet in each of these cases the representation was held binding when the representee acted to his detriment in reliance on the representation.

Professor

Jorden v *Money* is clearly central to this whole issue. I want us to discuss why it was that Lord Cranworth reasoned as he did in *Jorden* v *Money* and why *Jorden* v *Money* was ultimately thought to be right. Can we go through the facts of *Jorden* v *Money* now?

Student

In *Jorden* v *Money*, Mrs Jorden was entitled to a bond into which Money had entered to secure the payment of a sum of money: he had as a foolish

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[25] (1854) 4 H.L.C. 1039; 10 E.R. 769: "My sentiments respecting you continue unalterable, however I shall never settle part of my property out of my power while I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made". Marriage and Marriage Settlement in reliance. Held not an actionable representation within the Marriage Settlement cases. Compare *Hammersley* v *De Biel* — "Mr J.P.T. (the father) also intends to leave a further sum of £10,000 in his will to Miss T to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject of course, to revision; but they will be sufficient for Baron B. to act upon". Held: actionable, notwithstanding the reservation.

[26] (1859) 2 Giff. 1; 66 E.R. 1.

[27] (1855) 20 Beav. 250; 52 E.R. 599 (affirmed on different grounds 5 De G.M. & G. 588; 43 E.R. 986).

[28] (1868) 37 L.J. Ch. 854.

youth played the futures market and got his fingers rather burned. The money for the speculation had been borrowed from Mrs Jorden's brother and the bond was given to him to secure the repayment. The brother died soon after leaving all his property to Mrs Jorden (his sister). Now it so happened that Mrs Jorden was young Money's aunt, he her favourite nephew. When Money was about to be married, his aunt let it be known that she would not distress Money about the bond and that she would never enforce it. But when asked to give it up she said "No I will be trusted, but he may rely upon my word." So young Money married and in consequence of the marriage certain property settlements were made on the couple, which would not necessarily have been made had Louisa Jorden not given the assurances that she had. The reason incidentally that she gave for wanting to hold on to the bond was that she might enforce it against the co-obligor who was one of the speculators. The trial Judge found that the conversation took place with references to the marriage and with a view to the arrangement to be made on the marriage — that is, to enable the plaintiff Money to know what his situation was and to enable him and his wife to deal with the property that would be settled on them by their respective parents on the marriage. Well as everyone knows the lady changed her mind, put the bond into suit, and got execution against young Money's person. He managed to get released from jail and sought an injunction restraining the defendant from enforcing execution of the judgment entered on the bond.

Professor

What exactly were the grounds which the plaintiff said entitled him to relief in equity?

Student

There were two distinct grounds. First the doctrine of making representations good: the plaintiff alleged that Mrs Jorden was bound to make her representation good and was estopped from enforcing any money due upon the bond by reason of her declarations and assurances that she would never attempt to do so. Secondly, on the ground of a contract whereby Mrs Jorden agreed to give up her rights to the bond in return for Mr Money senior giving up a claim that he had on certain property in India. This second ground is really totally irrelevant to the main point — but it does cause confusion unless you read the case very carefully.

Professor

The plaintiff obtained his injunction at first instance. What does the head note say was the basis of the decision?[29]

Student

The headnote says:

> **"The Court will restrain a party from enforcing a legal claim where promises have been made to the person legally liable not to enforce it, upon the faith whereof obligations have been entered into."**

[29] (1852) 21 L.J. Ch. 531.

Professor

Now what is the ground for Lord Cranworth's dissent in the Court of Appeal in Chancery[30] and/or for his opinion in the House of Lords.[31]

Student

In both courts his Lordship gives two reasons. The first is that there was no evidence such as would found an estoppel within the making representations good doctrine. A misrepresentation of intention is not sufficient. There was clear evidence of assurances that she would not enforce the bond, and these were made under circumstances which might very likely influence the marriage property settlements. But not being representations of *fact* they gave rise to no equity. The second reason went to the contract part of the case i.e. the Indian property limb of the case: it was, essentially, that given Equity's procedures, the evidence was not sufficient for a Court of Equity to act on and this was notwithstanding a finding that Mrs Jorden "certainly bound herself for valuable consideration never to enforce the bond against the plaintiff." It is no doubt this procedural point that bedevils an understanding of the case, but a reading of Lord Eldon's Judgment in *Evans* v *Bicknell*[32] puts this part of *Jorden* v *Money* into perspective.

Professor

You take the orthodox view then that *Jorden* v *Money* really did turn on the simple proposition that the doctrine of making representations good only applies if there is a representation of fact, and does not apply if there is a representation of intention.

Student

Yes. I simply cannot understand how that can ever have been questioned. Lord Cranworth and Lord Brougham are quite categorical in their view that a representation of fact is required[33] and Lord St Leonards who dissents is equally categorical that a representation of intention is sufficient.[34]

Professor

Taking the matter on principle, which view do you prefer, and why?

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[30] 21 L.J. Ch. 893 at p. 896-898.

[31] 5 H.L.C. 154 at p. 208-224; 10 E.R. 879-885.

[32] (1801) 6 Ves. 174; 31 E.R. 998. "A Defendant in this Court has the protection arising from his own conscience in a degree, in which the law does not affect to give him protection. If he positively, plainly, and precisely, denies the assertion and one witness only proves it as positively, clearly, and precisely, as it is denied, and there is no circumstance, attaching credit to the assertion overbalancing the credit due to the denial, as a positive denial, a Court of Equity will not act upon the testimony of that witness."

[33] 5 H.L.C. 154 at p. 214-215, 225-227; 10 E.R. 868, at p. 882, 886-887.

[34] *ibid*, at p. 251 et seq.; *ibid*, at p. 896-897.

Student

I prefer Lord St Leonards. The facts of *Jorden* v *Money* fall squarely within what we would now call the principle in *Hughes* v *Metropolitan Railway*.[35] The parties entered into distinct terms involving certain legal results — certain penalties. Afterwards one led the other to suppose that the strict rights arising under the contract would not be enforced or would be held in abeyance. Mrs Jorden who otherwise might have enforced those rights ought not to have been allowed to enforce those contract rights given the property settlement made in reliance on the assurances she had given.

Professor

I am inclined to agree with that analysis looking at the facts through the spectacles of 1982. But this was pre-Judicature Act days. Was Mr Money plaintiff or defendant in this cause?

Student

He was Defendant at Law and Plaintiff in Equity. Your point no doubt is that as Plaintiff in Equity he required a ground to support his bill. His cause of action here is fraud — in the Equitable sense.

Professor

Is it fraud to say "I intend to settle Blackacre on you", if, at the time I make the statement, "I do in fact intend to settle Blackacre"? Does not fraud require a misrepresentation of fact to be actionable as deceit? If I make a promise with every intention of fulfilling it, I cannot be held liable for fraud should I subsequently change my mind. It would be entirely different of course if at the time I make my promise I never intend to perform.[36] What Lord Cranworth was saying in *Jorden* v *Money* was simply this. Your cause of action is Fraud. That requires at law a false statement of fact made knowingly. Equity shuts the mouth of the representor: he who asserts a fact is estopped from denying knowledge. But the cause of action remains fraud, and its prerequisites must be complied with. Here you have no false assertion of fact, but a promise. Therefore there can be no fraud. If A says to B "I intend to settle Blackacre on you", and at the time he makes the statement he does intend to settle Blackacre, you may have a cause of action in contract — because it is in respect of the broken *promise* that you are suing — but you cannot sue in fraud.

Student

As I understand you, your point is that the basis of the doctrine of making representations good is fraud. With that I agree. And that because fraud at law requires a misstatement of fact, ergo it must in Equity. But

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[35] *Central London Property Trust Ltd.* v *High Trees House Ltd.* [1947] K.B. 130; Chitty, *Contracts, General Principles*, (24th Ed. 1977) *paras.* 197-204.

[36] *Re. Shackleton, ex p. Whittaker* (1875) L.R. 10 Ch. App. 446, 449-50.

is not the fraud to be found not in the transaction itself, but in the subsequent attempt to go back upon your word and upon the basic assumption around which the parties settled their affairs? That is how Lord Campbell saw it in *Hammersley* v *De Biel*.[37] Fraud is as James LJ said in *Torrance* v *Bolton* "nomen generalissimum."[38] It is used to denote what a Court of Equity considers a breach of duty where the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. It seems to me that fraud in this sense denotes dishonesty, that is discreditable conduct which is at variance with straightforward dealing, conduct forbidden by honour. In any event, if you take your view of 'fraud', are you not driven to say that *Hammersley* v *De Biel* and the marriage settlement cases are really cases of *contract*?

Professor

Yes you are because liability for representation must be fraud or contract and it is not fraud. *Jorden* v *Money* shows that the doctrine of making representations good can only apply where the representation is of a fact, because the action is fraud. A case like *Hammersley* v *De Biel* which as you rightly say contained a representation of intention has to be explained away as turning on contract (I promise to leave a further sum of £10,000 in my will to Miss T if you, Baron de Biel, marry her). Because the action is in contract the prerequisites to a successful action in contract must be complied with — such as for example the Statute of Frauds.

Student

But that approach completely ignores the fact that one of the key issues in *Hammersley* v *De Biel* was lack of compliance with the Statute of Frauds. It is precisely because the plaintiffs in *Hammersley* v *De Biel* faced problems with the Statute of Frauds that as one of their alternative arguments they ran their case in Equity on the ground of making representations good — that is, fraud in the extended sense. When Lord Cottenham heard *Hammersley* v *De Biel* in the Court of Chancery he pointed out that in *Luders* v *Anstey*,[39] one of the early marriage settlement cases, a mere suggestion for consideration was held to be binding. And speaking of the general doctrine he said:[40]

> "If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum or in the other evidence in the cause, proof of any such contract; and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to it will be found that no such formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted upon by him, will in general be sufficient to entitle him to the assistance of this

[37] (1845) 12 Cl. & Fin. 45 at p. 88-89; 8 E.R. 1313 at p. 1331.

[38] (1872) L.R. 8 Ch. App. 118 at p. 124.

[39] (1799) 4 Ves. 501; 32 E.R. 257.

[40] 12 Cl. & Fin. 45 at p. 61; 8 E.R. 1313 at 1320.

> Court for the purpose of realizing such representation. Of this *Hodgson* v *Hutchenson* (5 Vin. Abridg. 522), *Cookes* v *Mascall* (2 Vern. 200) and *Wankford* v *Fotherley* (2 Vern. 322) which last case was affirmed by the House of Lords afford strong instances."

That is not the language of contract.

Professor

You surely cannot be suggesting that by simply shifting your sphere of operations into Equity and pleading in representation you should be entitled to by-pass the Statute of Frauds?

Student

The Statue of Frauds should not be used as an instrument of fraud. By and large nineteenth century Equity Judges respected this. Even after *Caton* v *Caton*[41] was decided by the House of Lords, the Vice-Chancellors went on giving effect to the doctrine of making representations good in marriage settlement cases. It is only after *Maddison* v *Alderson*[42] was decided that it became fashionable to read *Hammersley* v *De Biel* down as a contract case. The fashion became so well accepted that by the turn of the century counsel is able to argue that the doctrine of making representations good is exploded.[43]

Professor

The interpretation given to *Hammersley* v *De Biel* by the House of Lords in *Maddison* v *Alderson* is surely necessary if you are trying to work out a coherent Law of Obligations. If you take 'fraud' to mean going back on your word when no honourable man or just man would, you would have a very different notion of contract. It would mean that an unrequested and unbargained for act of reliance might give rise to what is essentially specific performance of the representation.

Student

So much the better if justice so required. That is, as I see it, how some Equity Judges saw the doctrine as operating. Take *Coles* v *Pilkington*[44] for example where the plaintiff went to work as a domestic in a house in Upper Baker Street. The house belonged to the plaintiff's cousin who let her half-sister live there rent free on condition of paying the ground rent and rates and taxes. When the half-sister died the plaintiff, being no longer needed, was all set to go into a bonnet and millinery business and was negotiating for premises in which to carry on the business. Just before concluding her arrangements her cousin called in to see her and told her that she could have the house in Baker Street rent free and support herself by letting out

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[41] (1867) L.R. 2 H.L. 127.

[42] (1883) 8 App. Cas. 467.

[43] *Re Fickus* [1900] 1 Ch. 331, at p. 334-335.

[44] (1874) L.R. 19 Eq. 174.

lodgings in it. On the faith of this promise the plaintiff broke off negotiations for the millinery business and continued to live in the house in Baker Street supporting herself by letting lodgings. Some years later after her cousin had died the executor of the cousin's estate sought to eject her. She relied on the general equitable principle of making representations good. Malins VC rightly in my opinion found the transaction to involve a gift of the house for life on condition of paying only the ground rent but held the estate bound by the principle stated by Lord Cottenham in *Hammersley* v *De Biel* — "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 realizing such represenation". Accordingly he granted a declaration that the plaintiff was entitled to live in the house in Baker Street for her life and an injunction against all further proceedings in the action of ejectment.

Professor

What is left of the doctrine of consideration if that case is right?

Student

In theory, the Law of Contract and the doctrine of consideration remain unaffected. But over and above that there are some cases where Equity decrees that a promise or a representation of intention ought to be enforced even though it is not bargained for. In practice, of course, to the extent that the Law follows Equity, the doctrine is affected. *Shadwell* v *Shadwell*[45] for example no longer appears such a strange decision if one keeps one eye on what was going on in Equity.

Professor

What sort of legal system is it that states as one of the fundamental principles of its Law of Obligations that there exists a doctrine of consideration, and also that certain formalities have to be complied with as a precondition to the disposition of interests in land, but which dispenses with these principles at the incantation of the magic word 'Equity'?

Do you seriously believe that fusion could have been achieved without the active support of the common lawyers? And in order to obtain that support was it not essential that Equity become systematised? The great nineteenth century judges like Fry, Selborne, Cairns, Knight-Bruce, Turner and Cotton were only carrying on developments that had been set in motion by their predecessors. There could have been no fusion without

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[45] (1860) 9 C.B. (N.S.) 159; 142 E.R. 62. Letter in the following terms held binding when marriage celebrated in reliance of statement therein: "My dear Lancey — I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay you £150 yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas; of which your own admission will be the only evidence that I shall receive or require. Your ever affectionate uncle, C.S."

Eldon: the common lawyers would simply not have stood for it. And after fusion it really was impossible for the Judges to go on wearing two hats. You cannot expect a viable system to continue to proceed by asking what the position 'at Law' is, and then what is the position in 'Equity'. One set of facts demands one set of principles to give one right answer. If the Law of Contract postulates that a promise is binding only if bargained for, and the Law of Equity postulates that a promise or a representation may be binding if it was intended to be relied upon, and was in fact relied upon, it seems obvious that sooner or later one or the other has to give way. I think it beyond argument that there was a doctrine which once upon a time gave the full force of a contract to a mere representation of an intention in marriage settlement cases, and possibly also in property cases generally. But striking as it does at one of the fundamentals of the Law of Contract, either it or the doctrine of consideration had to give way. That was the great significance of *Jorden* v *Money* and *Maddison* v *Alderson*. Exactly the same happened in *Derry* v *Peek*[46] in connection with the other limb of the doctrine. You could not have at one and the same time a doctrine which laid down that a representation was only actionable if fraudulent, and a doctrine that misrepresentation had to be made good.

Student

But why did the Judges, faced with the choices that they had, choose to have Law triumph over Equity? Surely the recent developments in both the estoppel and the negligent misrepresentation lines of cases shows that the nineteenth century judges took the wrong turn. A Law of Obligations which makes promises binding only if there is consideration in the sense of a quid pro quo, or which holds representations actionable, apart from warranty, only where made with knowledge of their falsehood is too rigid. However inconvenient from a logical point of view, there are cases where there is no fraud but where the representor should be held responsible for his misstatement and cases where there is no consideration but justice demands that the promise be held binding. The principle in *Hedley Byrne & Co. Ltd.* v *Heller & Partners Ltd.*[47] is now firmly part of our Law. I see the recent estoppel cases as recognizing that there is room for a doctrine of making representations good, and as recognizing the need to enforce promises or representations of intention in exceptional cases even though there is no contract in the orthodox sense. It seems to me from reading these cases that our Law of Obligations is beginning to recognize the existence of a general principle that a promise or a representation of intention which the promisor or representor should reasonably expect to induce action or forbearance on the part of the person to whom that promise or assurance or representation is given and which does induce such action is binding if it is unconscionable for the representor to go back on his assurance.

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[46] (1889) 14 App. Cas. 337.

[47] [1964] A.C. 465.

Professor

How can that be achieved within the confines of the doctrine of precedent?

Student

The starting point is the doctrine of proprietary estoppel. Unlike other estoppels, this gives a cause of action. This is well established, and has been assented to at the highest level on more than one occasion.[48] The next step is to extend the ambit of this doctrine by blurring the traditional distinctions that have always been maintained between proprietary estoppel and promissory estoppel. Often this may be done accidentally, but it is particularly helpful to have Judges making statements such as "I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance."[49] Then comes the stage of an avalanche of cases ,all being decided in much the same way but for a variety of different reasons. Again it is helpful if one or more of these cases are not land cases but are dealt with as if they were. Finally comes the reconciliation, at first rather tentative but then boldly espousing that proprietary estoppel is really a species of equitable estoppel, that estoppel can therefore give rise to a cause of action provided only that it is unconscionable to go back on your representation. That is where I believe we are at the moment.

Professor

That was not quite the question that I asked. You have told me what has happened, not whether what has happened is right in principle.

There have clearly been a great many cases in the past six or seven years, and we cannot subject all of them to critical analysis. What I think we should do is for you to proceed chronologically through the cases. Where absolutely necessary, I shall intervene to prod you on one point or another. But you must not take my encouragement as in any way assenting to your overview of the recent developments. In my experience, whenever estoppel whether it be promissory or proprietary estoppel reaches the highest courts, there is no discernible willingness to expand the ambit of its operation. In this field more than perhaps any other you must take care not to be deceived by broad dicta: this doctrine has a long history of enthusiastic espousal by puisne judges, and even I dare say in the Court of Appeal, but it is rarely given a full head of steam in the Privy Council or in the House of Lords. I would like you to begin by outlining the nature of the *Ramsden* v *Dyson*[50] equity (that is, proprietary estoppel) as this is central to an understanding of the recent cases.

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[48] *Ramsden* v *Dyson* (1866) L.R. 1 H.L. 129; *Plimmer* v *Wellington City Corporation* (1884) 9 App. Cas. 699; *Dillwyn* v *Llewellyn* (1862) De G.F. & J. 517. But see Spencer Bower and Turner, *Estoppel by Representation*, (3rd Ed., 1977) *para.* 307 for an attempt to explain the cases away in alternative ways.

[49] *Crabb* v *Arun District Council*, [1976] Ch. 179, 193 B *per* Scarman L.J.

Student

As I have already indicated its most important characteristic is that it is a sword, as well as a shield. Its prerequisites are variously stated. The best known statements are made by Lord Kingsdown in *Ramsden* v *Dyson*[50] and by Lord Cranworth in the same case[51] Lord Kingsdown says:[52]

> "If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

The Equity stretches back a very long way.[53] Until recently, the leading modern case was *Willmot* v *Barber*[54] where Sir Edward Fry J, in a manner so characteristic of his era laid down the five prerequisites that made up the equity.

These were: 1. the person said to have been encouraged must have made a mistake as to his legal rights; 2. he must have expended some money or must have done some act (though not necessarily on the representor's land) on the faith of his mistaken belief; 3. the representor, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the other, 4. and he must be aware of the other party's mistake as to his legal rights. 5. finally the representor must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal rights.

Professor

A couple of points by way of asides. Lord Eldon's judgment in *Dann* v *Spurrier*[55] is important as to the burden of proof, and the sort of evidence that is required to make out such a case. In that case his Lordship said:

> "it must be upon the party to prove that case by strong and cogent evidence, leaving no reasonable doubt that he acted upon that sort of encouragement."

Secondly Lord Diplock in *Kammins Ballrooms Co. Ltd.* v *Zenith Investments (Torquay) Ltd.*[56] clearly considered it essential that all five points are proved to make out a case of quasi-estoppel by acquiescence. Now I think the best way to proceed is chronologically starting in 1975, but confine yourself to the important cases."

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[50] (1866) L.R. 1 H.L. 129.

[51] *Ibid*, at p. 140-141, 170-171.

[52] *Ibid*, at p. 170-171.

[53] See *Earl of Oxford's case* (1615) 1 Ch 1; 21 E.R. 485 (Lord Ellesmere L.C.); *Stiles* v *Cowper* (1784) 3 Atk 692; 26 E.R. 1198 (Lord Hardwicke L.C.); *Dann* v *Spurier* (1802) 7 Ves. 231; 32 E.R. 94 (Lord Eldon).

[54] (1880) L.R. 15 Ch. 96, at p. 105-106.

[55] (1802) 7 Ves. 231, at p. 235-236; 32 E.R. 94 at p. 95.

[56] [1971] A.C. 850 at p. 884.

Student

The only really important decision in that year was *Crabb* v *Arun District Council*[57] though a number of other cases are worth a passing mention. *Evenden* v *Guildford City Association Football Club Ltd.*[58] which has now been overruled[59] contains some interesting observations as to the scope of promissory estoppel — it is suggested that the doctrine is not limited to pre-existing contractual relationships.[60] *Moorgate Mercantile Co. Ltd.* v *Twitchings*,[61] also now overruled,[62] contains a very significant dictum that proprietary estoppel may apply to other forms of property than land — to goods for example.[63] This seems to have been accepted as correct recently by the Court of Appeal[64] and by Oliver J in *Taylors Fashions Ltd.* v *Liverpool Victoria Trustees Co. Ltd.*[65] *Tanner* v *Tanner*[66] and *Eves* v *Eves*[67] are both worth a look at because both cases are essentially cases where the legal owner of the house represented or assured to his mistress that she was entitled to a share in the house in one case and to stay in the house until the children left school in the other. In both cases the mistress relied upon the representation to an extent which made it inequitable for the maker of the statement to go back upon his word. In the first case the plaintiff succeeds on the ground of a constructive trust, in the second by way of a contractual licence. In both cases the reasoning is artificial, especially on consideration in the latter case.[68]

Crabb v *Arun District Council*[69] is however by far and away the most important of the cases in that year. The case cannot properly be under-

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[57] [1976] Ch. 179.

[58] [1975] Q.B. 917.

[59] *Secretary of State for Employment* v *Globe Elastic Thread Co. Ltd.* [1980] A.C. 506.

[60] [1975] Q.B. 917 at p. 924 C; "[Counsel] referred us, however, to Spencer Bower and Turner, Estoppel by Representation, 2nd Ed. (1966), which suggests, at pp. 340-342, the promissory estoppel is limited to cases where parties are already bound contractually one to the other. I do not think it is so limited: see *Durham Fancy Goods Ltd.* v *Michael Jackson (Fancy Goods) Ltd.* [1968] 2 Q.B. 839, 847. It applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act upon it and he does act upon it."

[61] [1976] Q.B. 225.

[62] [1977] A.C. 890.

[63] [1976] Q.B. 225 at p. 242.

[64] *Western Fish Products Ltd.* v *Penwith D.C.* [1981] 2 All E.R. 204 at p. 218.

[65] [1982] Q.B. 133 n. at p. 154-155.

[66] [1975] 1 W.L.R. 1356.

[67] [1975] 1 W.L.R. 1338.

[68] [1975] 1 W.L.R. 1338 at p. 1352 B: "the proper inference to be drawn from the facts is that the defendant was granted a licence on the terms that she would give up her rent controlled flat in Steeles Road and look after the twins at 4 Theobalds Avenue".

[69] Noted 92 L.Q.R. 174, 342; 40 Conv. 156.

stood without a map so I have drawn one up.[70] To the south of Hook Lane there is a large field of $5\frac{1}{2}$ acres divided into two parts by a line running from north to south, with two acres on the eastern side and three and one half on the western side. The field was owned by a Mr Alford. He sold the western part to the council and the eastern part to the plaintiff. At the time of the sale of the eastern part to the plaintiff it was contemplated by the parties that the council would build a new road along the boundary, and in the conveyance the plaintiff was granted a right of access at point A and a right of way along it to Hook Lane. Subsequently the plaintiff decided to divide the eastern part into two one acre blocks and sell off the top half. If the bottom half of his land were not to be landlocked he would clearly need another point of access. So the plaintiff and his architect contacted the council and had a meeting with some representatives of the Council. The result of the meeting was that it was agreed in principle that the plaintiff should have an additional access at point B and an easement over the new road. Although further dealings and formalities were contemplated, no formal grant was ever made though the council did fence off the plaintiff's land from the new road and made a gap at point 'B'. The plaintiff then sold the top half of his land but did not reserve any right of way over that portion because he believed he had access at point B. The Council then backtracked on their agreement and blocked up the access. The plaintiff sought a declaration as to his entitlement to access point 'B' and an injunction restraining the defendants from interfering with the reasonable enjoyment of the right of way. Although he initially framed his case in contract, the pleadings were subsequently amended to raise the *Ramsden* v *Dyson* equity.

Professor

Why did the plaintiff not pursue the contract line of argument?

Student

This is very well explained in the note in the L.Q.R.[71] There were four difficulties. First no contract was ever concluded. Secondly, even if it were it was unsupported by consideration. Thirdly there was no evidence in writing to satisfy the formal prerequisites to the disposition of an interest in land. And finally, and most important, there were real agency problems.

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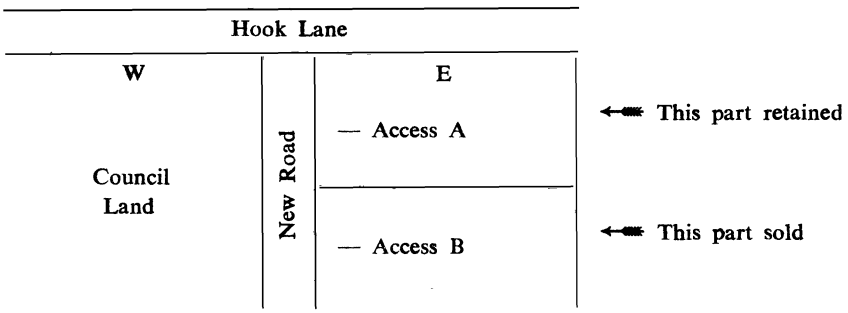

[71] (1976) 92 L.Q.R. 342.

Professor

What was the result of the appeal in this case?

Student

The plaintiff succeeded in his appeal and the Court of Appeal held him entitled to an injunction and a grant of access at point B and a right of way along the road because the defendants knowing of the plaintiff's intention to sell his land, by putting gates in led the plaintiff to believe that he would be granted a right of access at point 'B'. By failing to disabuse him of his belief, the defendants encouraged him to act to his detriment in selling part of his land without reservation over it of any right of way. They were accordingly estopped from denying the plaintiff his right of access and were ordered to grant the plaintiff the right of way.

Professor

What do you see the significance of this case as being?

Student

I see the case in terms broadly similar to the old doctrine of making representations good. The fraud arises after the event when the defendant seeks by relying on his legal rights to defeat the expectation which he encouraged the defendant to have.[72] The plaintiff has a cause of action and the defendant is as a result of the equity ordered to make good his informal assurance. Here the Council were bound to grant the plaintiff a right of way from access point B to Hook Lane once the plaintiff had acted irrevocably to his detriment by selling the front portion of his field leaving the back portion land locked. Technically the case was argued within the *Ramsden* v *Dyson* principle but it seems clear that it goes beyond the orthodox view of the doctrine in that it does not comply with the *Willmot* v *Barber probanda.* There was no mistake as to the parties respective legal rights for each party knew that the road was vested in the defendant Council, and each knew that no formal grant had been made. All that occurred was that the plaintiff was encouraged to alter his position irrevocably to his detriment on the faith of a belief which was known to and encouraged by the defendants that he was going to be given a particular right of access. What is particularly significant is the virtual equation of promissory and proprietary estoppel and the resulting extension of each doctrine beyond its former sphere of operation. The other aspect that I find significant is the emphasis placed by Scarman LJ on on-going relationships and reasonable expectations.[73] An obligation in equity is imposed on the defendant simply because given the relationship between the parties and the various assurances both oral and by conduct, it would be unconscionable for the defendants to go back on their promise after the plaintiff had acted to his detriment. This is a theme that runs through all the recent

[72] [1976] Ch. 179 at p. 195 D.

[73] *Ibid,* at p. 198 E-G.

cases and it leads me to wonder whether a new head of the Law of Obligations is being developed whose concern is to protect the reasonable expectations that have arisen by virtue of an ongoing relationship which whilst often akin to contract is not necessarily contractual.

Professor

The case certainly goes well beyond *Willmot* v *Barber*, though one should observe that *Inwards* v *Baker*[74] probably did too, so it probably did not break new ground on that score alone. What is important is the purported assimilation of promissory and proprietary estoppel to create a flexible doctrine of equitable estoppel which can create rights. Extend that principle beyond land transactions to other forms of property, and the whole Law of Obligations is at once transformed.

Student

The only important development in 1976 and 1977 occurred in *Shaw* v *Applegate*[75] which contains dicta suggesting that the defence of estoppel by acquiescence is really founded on a broad principles of an unconscionable exercise of strict legal rights, and that whilst it will generally be sufficient to comply with the five *probanda* in *Willmot* v *Barber* there may be cases where the defence is made out even in the absence of one or other of these prerequisites. Apart from this case little of significance takes place. *Ismail* v *Polish Ocean Lines*[76] and *Jones* v *Jones*[77] are both unexceptional: the former provides a good illustration of a conventional estoppel by representation of fact ("the potatoes are packed in a new kind of bag which makes dunnage unnecessary") whilst the latter is a classic example of estoppel by acquiescence or encouragement (old Mr Jones was estopped from denying his son's right to stay in the house for his life because he had stood by whilst his son spent money on the house believing it was to be his family home for the rest of his life.) *Moorgate Mercantile Ltd.* v *Twitchings*[78] affirms the principle that to constitute an estoppel by representation of fact, a representation must be clear and must state unequivocally the fact which the maker is ultimately to be prevented from denying.

Professor

The importance of that case is not so much in what it decides but for the manner in which the House of Lords chose to couch their reasons. In contrast to some of the opinions delivered in the Court of Appeal, the different types of estoppel are carefully separated and distinguished. This must be borne in mind in considering some of the more sweeping statements made in the recent cases. Much the same point can be made about the House of Lords decision in *Secretary of State for Employment* v *Globe*

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[74] [1965] 2 Q.B. 29.

[75] [1977] 1 W.L.R. 97 at p. 978 per Buckley L.J. and at 980 per Goff L.J.

[76] [1976] Q.B. 893; [1976] 1 W.L.R. 419 (H.L.) (petn. dismissed)

[77] [1977] 1 W.L.R. 438.

[78] [1977] A.C. 890.

Elastic Thread Co. Ltd.[79] which overruled the *Evenden* decision. It is difficult to believe reading the opinions delivered by their Lordships in that case that we are developing a Law of Obligations which is relationship based and which turns on broad notions of protecting reasonable expectations.

Student

Yes, very much the same can be said of the Court of Appeal's decision in *Western Fish Products Ltd.* v *Penwith District Council* decided in 1978 but only reported recently.[80] There the Court specifically rejected any broad doctrine of making representation good based on Lord Cottenham's statements in *Hammersley* v *De Biel* and held that the principle of proprietary estoppel can only be applied where the plaintiff encouraged by the defendant acts to his detriment in the expectation of acquiring a right over the defendant's land. The ratio of the case is that even though the plaintiffs had incurred considerable expenditure on their own land they had not done so in the expectation of acquiring any rights in relation to the council's or any other person's land and accordingly could not rely on the principle of proprietary estoppel. Obviously if promissory and proprietary estoppel were assimilated the case could not have been decided on this ground. On the other hand the case can be explained as also turning on other grounds, it stands in stark contrast to the trilogy of licence cases decided in the same year and it is of some significance that counsel did think it worth his while addressing the Court on the *Hammersley* v *De Biel* line.

Professor

I am interested to hear you on the contractual/equitable licences cases. Could you confine yourself to, say, *Hardwick* v *Johnson*[81] and mention the others in passing. Is there any principle that can be deduced from the cases?

Student

I suspect that if the doctrine is permitted to take root that these will be considered ultimately as being of considerable significance in the overall development of the law. Their tenor stands in marked contrast to the *Western Fish* case and the ideas contained in these cases are accurately, I believe, summarised in the following extract from Browne-Wilkinson J's opinion in *Re Sharpe*:[82]

> "This [argument] is based upon the line of recent Court of Appeal decisions which has spelt out irrevocable licences from informal family arrangements and in some cases characterised such licences as conferring some equity or equitable interest under a constructive trust. I do not think that the principles lying behind

[79] [1980] A.C. 506.

[80] [1981] 2 All E.R. 204.

[81] [1978] 1 W.L.R. 683.

[82] *Re Sharpe, ex p. Trustee of the Bankrupt's property* [1980] 1 W.L.R. at p. 223.

> these decisions have yet been fully explored and on occasion it seems that such rights are found to exist simply on the ground that to hold otherwise would be a hardship to the plaintiff. It appears that the principle is one akin to or an extension of a proprietary estoppel stemming from Lord Kingsdown's well-known statement of the law in *Ramsden* v *Dyson*. . . In a strict case of proprietary estoppel the plaintiff has expended his own money on the defendant's property in an expectation encouraged by or known to the defendant that the plaintiff either owns the property or is to have some interest conferred on him. Recent authorities have extended this doctrine and, in my judgment, it is now established that, if the parties have proceeded on a common assumption that the plaintiff is to enjoy a right to reside in a particular property and in reliance on that assumption the plaintiff has expended money or otherwise acted to his detriment, the defendant will not be allowed to go back on that common assumption and the Court will imply an irrevocable licence or trust which will give effect to that common assumption."

In *Hardwick* v *Johnson* a mother bought a house for her son and his new wife to live in. Under the terms of the arrangement, which were extraordinarily vague it appears to have been the expectation of the parties that the couple could live in the house at a rent of £7 per week and that the house would devolve upon them by inheritance. When the marriage broke up the mother sought to dispossess the young wife. The Court of Appeal held that the mother could not do so. The remarkable aspect of the case is that a majority of the Court were prepared to find that a contract had been entered into on the facts, and that it was the duty of the Court to impute to the parties a common intention that they admittedly never formed to spell out the terms of the contract.

Professor

How vague were the arrangements?

Student

This is what the young wife says in chief:[83]

> ". . .I did not really know where we stood except that she was buying the house for Robert and I. Mrs Hardwick did not want to take payment for the first few months to help us get on our feet. . .Think Mrs Hardwick always envisaged that house would become ours by inheritance. Nothing ever was said about when you've finished buying I will convey. Previously she had agreed to loan us the money. That is why I paid £100 reservation. . .. Think (we) agreed . . . just before marriage that we would pay £7 a week. I don't know what it was for really. Subject was always dropped like a hot potato. 'Rent' and 'purchase price' never really regarded as separate matters. Never anything crystal clear about this arrangement so that I could turn round and say we are renting it or buying it."

Lord Denning rightly in my opinion rejects the possibility of a contract being found in these circumstances because of the vagueness of the arrangements and because of the family context in which the arrangements are made.[84]

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[83] [1978] 1 W.L.R. 683 at p. 687 F-H.

[84] *Balfour* v *Balfour* [1919] K.B. 571; *Jones* v *Padavatton* [1969] 1 W.L.R. 328.

Professor

It cannot be contract because the Court admits that it is imposing the terms on the parties. Classical Contract concerns the Court giving recognition to the agreement made by the parties themselves.[85] If this case is right, the law on Implied Terms, Frustration and Damages, to think of three areas alone, would have to be completely rewritten. But if it is not contract, what is it?

Student

It seems to me that what the Court is really doing in these cases is giving effect to the reasonable expectations of the young wife who relied to her detriment or altered her position on the mother's representation or assurance that she would have a roof over her head. The mother is prevented from going back on her word because it is unconscionable for her to do so. The significant aspect of each of these cases is the imposition of obligations which appear to be in accordance with what the parties might reasonably expect to have occurred had good faith been kept on all sides. For example had the young wife not had a child and had she instead begun to live with another man the licence would have determined.[86] The obligations are not all one way.

Professor

I realise that is what the cases say but I find that confused thinking. How can something be classified as a proprietary interest and yet be revocable for bad behaviour as the *Staite* case suggests? Surely, it is a right which crystallises once and for all at the time of the estoppel.[87]

Student

The cases are as conceptually difficult for orthodox Land lawyers as they are for contract lawyers. It is probably no more correct to attempt to analyse them in orthodox Land Law terms than to try to fit them into preconceived notions of the Law of Contract. I believe that the simple truth is that our Law of Obligations has expanded — the central theme of these cases is the flexibility of equity's remedies to work out what is reasonable given the assurances given, the reliance placed on these assurances, and the context in which they were given.

Professor

Time is running short if we are to discuss the Tort cases at all. I want to get on to the rationalisation that took place in *Taylors Fashions Ltd.* v

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[85] Salmond and Williams on *Contract* (2nd Ed., 1945) Ch. 1 contains perhaps the best exposition of the classical will theory of the Law of Contract. See also Chitty, *Contract General Principles* (24th Ed., 1977) paras. 1 and 6.

[86] [1978] 1 W.L.R. 683 at p. 698 G; *Williams* v *Staite* [1979] Ch. 291.

[87] *Williams* v *Staite* [1979] Ch. 291 at p. 300 B *per* Goff L.J. (dissenting).

Liverpool Victoria Trustees Co. Ltd. But before we do so perhaps you could just briefly indicate how you view the following cases: *Brikom Investments Ltd.* v *Carr;*[88] *Pascoe* v *Turner*[89] and *Greasley* v *Cooke.*[90]

Student

Brikom Investments Ltd. v *Carr* was the case where landlords orally assured their prospective tenants that they would not claim the proportionate cost of repairs to the roof of the building under a covenant in the lease which entitled them to do so. They went back on their word and claimed on the covenant against a number of persons: first a tenant to whom the assurance had originally been given; secondly an assignee, of such a tenant who had informed the assignee of the representation; and thirdly an assignee from an assignee, who was not told of the representation and only became a tenant after the repairs had been done and after the previous tenant had failed to pay for the repairs. The Court of Appeal held that the landlords could not enforce the covenant to contribute to the cost of repairs against any of these persons because of the oral assurance they had been given. Two of their Lordships explained their decision by saying that the covenant had been waived[91] whilst Lord Denning relied upon promissory estoppel.[92] In addition the whole court relied on a collateral contract analysis.

Professor

The collateral contract rationale faces very great difficulties with the parol evidence rule as there are at least three Court of Appeal decisions holding that a collateral contract must be consistent with the later written contract.[93] Promissory estoppel might be available as against the original tenants but it is in general confined to existing legal relationships.[94] Most confusing of all is the position of Ms. Hickey the assignee from the assignee. We are not given the covenant here but as a general proposition it is clear that an assignee is not liable for breaches of covenant committed during the previous tenancy — there should therefore be no need to pray in aid the estoppel.[95] As to the majority reasoning on waiver,

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[88] [1979] Q.B. 467.

[89] [1979] 1 W.L.R. 431.

[90] [1980] 1 W.L.R. 1306.

[91] [1979] Q.B. 467 at p. 488 *per* Roskill L.J. and at p. 490-491 per Cumming-Bruce L.J.

[92] *Ibid* at p. 482-485.

[93] *Carter* v *Salmon* (1880) 43 L.T. 490; *Henderson* v *Arthur* [1907] 1 K.B. 10; *Horncastle* v *The Equitable Life Assurance Soc. of U.S.A.* (1906) 22 T.L.R. 735; And see *Hoyt's Proprietary Ltd.* v *Spencer* (1919) 27 C.L.R. 133; *Donovan and Another* v *Northlea Farms Ltd.* [1976] 1 N.Z.L.R. 180; *Lysnar* v *National Bank of New Zealand Ltd.* [1935] N.Z.L.R. 129 (J.C.P.C.)

[94] *Canadian Superior Oil Ltd.* v *Paddon-Hughes Development Co. Ltd.* (1970) 12 D.L.R. (3d) 247 (S.C.C.)

[95] Hinde, Land Law, (vol. 1, 1978), para. 5. 134; *St Saviours Southwark (Churchwardens)* v *Smith* (1762) 1 Wm. Bl. 351; 97 E.R. 827; *Re. Green* [1923] G.L.R. 726.

the reasoning appears to be that an intentional relinquishment of a known right is effective. This is of course patently unsound.[96] A release under seal or an accord and satisfaction are the traditional ways of relinquishing contract rights or choses in action.[97] Given these difficulties, how would you analyse the case?

Student

I think the case can be supported notwithstanding the difficulties that you have just set out. I see it as a modern example of the old doctrine of making representations good. The maker of the representation of an intention is prevented from going back on his word because the representation when made was intended to be binding, intended to be relied upon, and was in fact relied upon by the tenants going ahead with the transaction.[98] It would be a fraud in the equitable sense to allow the landlord to go back on his word.

Professor

How does that enure to the benefit of the assignee?

Student

A representation need not be made directly to the person seeking to set it up. It can be made to one to be passed on to another. It is sufficient if it was within the contemplation of the representor that it would or might be communicated to the person who relied upon it.[99] Here it was plain that when the landlords made this promise they intended it to be for the benefit of all those from time to time holding the leases, realising that each in turn would tell his successor that the landlords were going to repairs the roofs at their own expense.[100]

Professor

In effect, then, you agree with the Master of Rolls.

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[96] *Foakes* v *Beer* (1884) 9 App. Cas. 605; see generally Williston, *A Treatise on the Law of Contracts*, Rev. Ed. (1936), vol. 3 paras. 678 and 679.

[97] See generally *Mcdermott* v *Black & Another* (1940) 63 C.L.R. 161; and cf. Smith's Leading Cases, Vol. 1 (8th Ed., 1879), p. 357 (the note to *Cumber* v *Wane* — written prior to *Foakes* v *Beer*).

[98] [1979] 1 Q.B. 467, at p. 488-489.

[99] *Swift* v *Winterbotham* (1873) L.R. 8 Q.B. 244; and see *Gross* v *Hillman* [1970] Ch. 445.

[100] [1979] 1 Q.B. 467 at p. 488-489.

Student

Almost, but there is an important distinction which clearly lies at the heart of the majority's unease as to the promissory estoppel reasoning. Strictly speaking the *Hughes* v *Metropolitan Rly. Co.* line of cases has been confined to on-going contractual or at least legal relationships.[101] This equity goes beyond the existing contracting parties and enures to the benefit of the assignees — the intended representees. I should add incidentally that I find the position of the transferee of the reversionary interest in the lease much more difficult: in principle he should take free of the obligation, if he is a bona fide purchaser for value without notice.

Professor

What do you make of *Pascoe* v *Turner* and of *Greasley* v *Cooke*?

Student

Pascoe v *Turner* can be analysed in traditional terms of proprietary estoppel — even on the narrow test laid down by Lord Cranworth in *Ramsden* v *Dyson*. He there states that proprietary estoppel requires actual knowledge by the representor of his own rights and of the fact that the other party is expending money on the representor's land under a mistaken assumption that those rights will not be enforced against him.[102] In *Pascoe* v *Turner* it was the standing by by the common law husband whilst the common law wife spent money on the property believing that it was hers that gave rise to the equity. The significant thing about the case however is the remedy that the Court of Appeal were prepared to grant. One might have thought that if unjust enrichment was at the core of this equity that the common law wife would have received back the expenditure that she had incurred in mistakenly improving the house plus a generous sum for interest for being out of her money — but not the fee simple in the house. The significant aspect of the case is that the Court orders that the man's statement that the "house is yours and everything in it" be made good thereby giving effect to, as Lord Kingsdown puts it, "the promise or expectation."[103]

Professor

Yes that is the surprising aspect of this equity. A strong case can be made out in restitution in such circumstances. But to award the expectation interest because of reliance on the promise seems wrong conceptually. Do you take the same view of *Greasley* v *Cooke*?

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[101] *Canadian Superior Oil* v *Paddon-Hughes Development* (1970) 12 D.L.R. (3d.) 247; *Durham Fancy Goods Ltd.* v *Michael Jackson (Fancy Goods) Ltd.* [1968] 2 Q.B. 839 at p. 847; *Evenden* v *Guildford City A.F.C.* [1975] Q.B. 917, at p. 924.

[102] *Ramsden* v *Dyson* (1866) L.R. 1 H.L. 129 at p. 140-141.

[103] *Ramsden* v *Dyson* (1866) L.R. 1 H.L. 129 at p. 170-171.

Student

Greasley v *Cooke*[104] is either a very important case in the overall development of the law or plainly wrong. It goes well beyond the established law on proprietary estoppel on two counts. First on the onus of proof it is quite at odds with the traditional view laid down in *Dann* v *Spurier* by Lord Eldon,[104a] and given effect to in *Ramsden* v *Dyson.* But perhaps more important still is the fact that in *Greasley* v *Cooke* there was no expenditure of money and it is difficult to see how old Doris Cooke can be said to have acted to her detriment or otherwise prejudiced herself when all that she did was to go on living with Kenneth as his "wife" and tending to Clarice just as she had always done. Lord Denning expressly says that he considers it unnecessary to show an expenditure or prejudice: all that is required is that the party to whom the assurance is given acts on the faith of it — in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it.[105] He then cites two cases, one a promissory estoppel case[106] and the other a proprietary estoppel case.[107] That surely is to equate promissory and proprietary estoppel.

Professor

Do the other judges equate promissory and proprietary estoppel here?

Student

No, not in express terms. That is why I said the case is either wrong or rightly decided and very important. On orthodox reasoning the result should probably have gone the other way.[108] But the case is almost on all fours with *Coles* v *Pilkington* which we discussed earlier and the case begins to make sense if looked at from the perspective of the old doctrine of making representations good. The Court orders that the assurances given by Kenneth and Hedley to Doris Cooke leading her to believe that she

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[104] In 1938 Doris Cooke aged 16 entered the Greasley household to work as a live-in maid to Arthur Greasley and his four children. In 1946 she formed an attachment with Kenneth one of the children and they began to live as man and wife. In 1948 Arthur died, and Doris Cooke remained in the house without remuneration but looking after a daughter who was mentally ill. Both Kenneth and the daughter died in 1975. The surviving son and grandchildren succeeded to the property, and brought an action for possession in order to evict Doris. She counterclaimed that she reasonably believed and was encouraged by members of the family that she could regard the property as her home for the rest of her life and accordingly did not ask for any payment. She said that "Kenneth said he would do the right thing by me. Hedley said no need to worry I'd be looked after." Held on these facts that she was entitled to occupy the house for the rest of her life.

[104a] Supra at note 55.

[105] [1980] 1 W.L.R. 1306 at p. 1311.

[106] *Moorgate Mercantile Ltd.* v *Twitchings* [1976] Q.B. 225 (which had been overruled).

[107] *Crabb* v *Arun District Council* [1976] Ch. 179.

[108] See notes 44 M.L.R. 461 and 45 Conv. 154.

[109] Supra at note 44.

would be allowed to stay in the house are to be made good because it appears that she acted on the faith of that representation by looking after Clarice as an unpaid help and that it would be unconscionable to turn her out. The case also bears a striking resemblance to *Loffus* v *Maw*.[110]

Professor

Yes, *Greasley* v *Cooke* certainly comes uncomfortably close to the old doctrine of making representations good. It is only likely to be followed if it is considered legitimate to assimilate promissory and proprietary estoppel. That leads us naturally to the attempt to rationalise these cases that took place first in *Taylor's Fashions Ltd.* v *Liverpool Victoria Trustees Co. Ltd.*[111] and then in *Amalgamated Investment Property Co. Ltd.* v *Texas Commerce International Bank Ltd.*[112] Begin with *Taylor's* case — how do you see that case?

Student

The *Taylor* case is an important case because it is the first overt statement which gives recognition and some legitimacy to the ideas underlying such cases as *Crabb* v *Arun District Council* and other recent proprietary estoppel cases. In *Taylor's* case the argument presented was that landlords had encouraged their tenants to spend money on improvements on the supposition that an option to renew the lease contained in the lease was valid. When the tenants sought to exercise the option the landlords took the point that the option was void for want of registration. The landlords argued that a distinction ought to be drawn between estoppel by acquiescence or encouragement on the one hand (the *Ramsden* v *Dyson* type of estoppel) and estoppel by representation and promissory estoppel on the other. It was said that there could be no estoppel by representation or promissory estoppel because the representation (if any) was one of law. Nor, it was argued, could the tenants rely on an estoppel by acquiescence or encouragement because the landlords had not stood by knowingly when the improvements were made — for they, like their tenants, shared the belief that the option was valid. Accordingly, the third of the five *probanda* not having been complied with, *cadit quæstio*.[113] Oliver J after a careful review of the recent cases rejected the view that there was a distinction to be drawn between estoppel by acquiescence or encouragement on the one hand and estoppel by representation on the other. The recent cases established a much wider jurisdiction to interfere in cases where the assertion of strict legal rights was found by the Court to be unconscionable. Accordingly he held in respect even though the landlords had no knowledge of the other party's mistake. What was essential was a representation (the encouragement) and an unconscionable going back on one's word. The *Willmot* v *Barber probanda* were *indicia* of the factors going to make up

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[110] Supra at note 15.

[111] [1982] Q.B. 133 n.

[112] [1982] Q.B. 84.

[113] The reference is to the five probanda in *Willmot* v *Barber* set out supra at note 54.

unconscionability but were not prerequisites — at least not unless the case was one of mere acquiescence. The learned judge commented favourably on the passage in *Crabb* v *Arun District Council* which equated promissory and proprietary estoppel and observed that the 'fraud' in these cases is not to be found in the transaction itself but in the subsequent attempt to go back on the basic assumptions which underlay it.[114]

Professor

If that were right, should *Midland Bank Trust Co. Ltd.* v *Green*[115] not have been decided the other way? The House of Lords there held that it was not fraud to rely on legal rights conferred by an Act of Parliament. In effect *Taylor's* case expands the statutory proviso in the Land Charges Act 1925, s.13(2).

Student

The facts in the *Midland Bank* case do appear at first glance to be somewhat analagous to those in *Taylor's* case and I am puzzled at the absence of any argument on proprietary estoppel as Geoffrey was in possession of the farm and presumably must have believed that the option was valid and must have farmed it in that belief. However that may be, and there may be good reasons why the point was not taken, the general approach on estoppel by acquiescence to be found in *Taylor's case* has already been endorsed by the Court of Appeal in a case not involving land. In *Habib Bank Ltd.* v *Habib Bank A.G. Zurich*[116] the Court of Appeal held that on the assumption that the defendant had infringed the plaintiff's legal rights by passing itself off as the plaintiff by assuming a similar trade name a defence of acquiescence or laches was made out. The defendants had obtained the right to use the name "Habib" because of the plaintiff's encouragement or acquiescence in the defendant opening and running its London branch and because it would now be unconscionable for the plaintiffs to go back on their word.

Professor

That case is also very important on the burden of proof because it affirms *Greasley* v *Cooke*: there had been no express proof that the defendants had acted on the encouragement but the Court thought it was not necessary formally to call a witness to say "we did this in reliance upon the supposition that we were allowed to use our Corporate name."[117]

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[114] [1982] Q.B. 113 n at p. 147 H .

[115] [1981] A.C. 513. In 1961 a father granted to his son a 10 year option to purchase the farm which the son farmed as tenant. The option was not registered under the Land Charges Act 1925. In 1967 the father conveyed the farm to his wife (the son's mother) at a gross undervalue. In proceedings commenced against the mother's estate for a declaration that the option was binding, held the option was void.

[116] [1981] 1 W.L.R. 1265, at p. 1282 et seq.

[117] *Ibid* at p. 1287.

Student

The *Habib* case is not the only case that has extended the proprietary estoppel principle beyond land to other forms of property. In *Amalgamated Investment and Property Co. Ltd.* v *Texas Commerce & International Bank Ltd.*,[118] the second of the two important cases you mentioned a moment ago, the trial judge was prepared to allow the principle to be used to estop the defendant from denying that it was party to a contract of guarantee. Very simply that was a case in which a bank (A) agreed to lend money to a company (B) in consideration of a guarantee by B's holding Company (C) that C would repay the bank if B defaulted. Because of exchange control difficulties the bank set up a wholly owned subsidiary (D) to advance monies to B. But the bank failed to obtain a new guarantee from C guaranteeing loans from D to B as well as, or instead of, from A to B. When the holding company C went into liquidation the question arose whether it had guaranteed the loan by D to B, or only a loan from A to B. The guarantee was in the usual form of an 'if contract', and the liquidator of the Company not unnaturally took the point that the guarantee was at most an open offer which had long since lapsed because no monies had ever been advanced by the bank to B. If the bank failed to obtain the appropriate security documents that was its own tough luck.

Professor

How did the bank respond?

Student

It puts its case in two ways. First that as a matter of interpretation the terms of the guarantee were wide enough to embrace a loan by D to B as well as a loan by A to B. This argument was essentially built around the fact that D was a mere puppet, 'a front' for A — a mere nominee company. The argument was quite properly rejected by Robert Goff J at first instance who said this:[119]

> "The words of the guarantee are clear, and under them the guarantee was applicable only to moneys due or owing or payable to the bank. It is plain, on the evidence before me, that the Nassau loan was advanced not by the bank, but by Portsoken; no part of the loan was ever due or owing or payable to the bank — the creditor was always Portsoken. I can see no reason for departing from the natural and ordinary meaning of the words of the guarantee; certainly, the facts relied upon . . . do not justify any such departure. The fact that the bank chose, for its own purposes, to substitute Portsoken as the lender in a transaction under which it had originally been intended that the bank should be the lender does not enable the bank thereafter to say that a guarantee given previously guaranteeing payment of sums due or owing or payable to the bank, was applicable to the changed transaction, however close the relationship between the bank and the new lender may have been."

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[118] [1982] Q.B. 84.

[119] *Ibid* at p. 94.

I set that passage out at length because somewhat surprisingly the argument on interpretation found more favour in the Court of Appeal. There all three members of the Court of Appeal held that the words of the guarantee were to be interpreted against the surrounding circumstances, and at the time the advance was made the words "money. . .for or owing or payable to you" were apt to cover monies due and owing to the subsidiary, which the subsidiary was then immediately required to pass on, without deduction to the bank.

Professor

I have to admit that I share your surprise. The contract was a contract of guarantee all the terms of which have to be contained in the writing and signed by the party to be charged. If the Court of Appeal is right on this part of the judgment the meaning of the written offer (executed on September 28) changes by virtue of the events that took place in December. That is very odd, so the estoppel argument does, in my mind, assume considerable importance.

Student

The bank's alternative argument was that the bank had made it obvious to the holding company that it assumed that the guarantee covered and was applicable to the liability of the company in respect of the loan; that the company encouraged or acquiesced in that assumption and that in reliance on this encouragement the bank acted to its detriment. The bank contended that the company was consequently estopped from saying that the guarantee did not cover the advance made by the subsidiary.

Professor

In other words, the doctrine of proprietary estoppel applied here to give the bank a right against the Company which *ex hypothesi* it did not have under the writing?

Student

Yes. It is as if there was now an agreement between the bank and the Company whereby the Company guaranteed the bank to repay loans made by the bank itself *or by its subsidiary*. In effect this means that the original writing is varied, without consideration, and that the obligations undertaken by the guarantor are enlarged, and the enlarged obligations given effect to notwithstanding the Statute of Frauds.

Professor

So estoppel is a cause of action, a variation may be made without consideration and the Statutes of Frauds need not be complied with. How can this possibly be? There was no proprietary estoppel because there was no property involved. There can be no room for promissory estoppel because there was no pre-existing relationship. There was merely an offer which had never been accepted.

Student

These arguments were canvassed. At first instance they were rejected on the ground that it cannot be right to restrict equitable estoppel — of all doctrines surely one of the most flexible — to certain defined categories. In particular proprietary estoppel was an amalgam of doubtful utility.[120] The new cases it was held showed that the inquiry should be simply whether in all the circumstances it was unconscionable for the defendants to take advantage of the mistake which all parties shared.[121] In the Court of Appeal Lord Denning saw the doctrine in equally all embracing terms but two members of the Court of Appeal preferred to see the facts in terms of an estoppel by convention.[122]

Professor

Convention means agreement. Both parties were mistaken and neither party addressed itself to this question. The creation of a contract by a mutual mistake is a novel concept.

Student

Yes, but the liquidator sought leave to appeal in the House of Lords, and the leave committee dismissed the petition.[123]

Professor

Where in your opinion does that leave the law? Answer on the assumption that there is one fused system dealing with the enforcement of promises or representations.

Student

There are clearly five or six decisions of the Court of Appeal in recent years which have expanded the ambit of estoppel. Some of these decisions cannot be explained away on orthodox grounds however hard one tries. If these cases are not overruled, we will soon have a new conception of the Law of Contract. 'Contract' will not be founded on a theory of autonomy as existing contract law is, but on the imposition by the Courts of just solutions which can be ascribed to reasonable men in the position of the parties. In practical terms this will involve the rewriting of much of our existing law. If we confine ourselves to the recent cases alone we can see how the law would have to alter. The Law on formation of "contract" would no longer be exclusively based on offer acceptance and consideration — obligations might arise because of assurances given and because detrimental reliance had occurred on the faith of the assurances: *Amalgamated Investment and Property Ltd.* v *Texac Commerce International Bank Ltd.* Third parties will take the benefit of assurances:

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[120] *Ibid* at p. 103.

[121] *Ibid* at p. 104.

[122] See generally Spencer Bower and Turner, *Estoppel by Representation*, (3rd Ed., 1977), Ch. 8.

[123] [1982] 1 W.L.R. 1.

Brikom Investments Ltd. v *Carr.* Terms will be implied because it is just and reasonable to do so: *Hardwick* v *Johnson.* For all practical purposes there will be no distinction between representation and warranty — the undertaking will be otiose. Remedies including damages will be enormously flexible allowing the Court to do what is just and equitable in all the circumstances: *Crabb* v *Arun District Council*; *Pascoe* v *Turner.* Notions of good faith during the on-going relationship will be developed: *Williams* v *Staite.* These developments in turn may lead to a complete rethinking of the basis of "contract". It would not surprise me to see my generation talking in terms of contractual justice and a broad theory of the equivalence of the exchange. That would lead to a different treatment of frustration, mistake, and I dare say a reintroduction of the doctrine of fundamental breach if the legislature has not by then brought in a notion of the fair exception clause.

Professor

I think you are reading too much into the cases. But obviously what we need now is another *Jorden* v *Money* to canvass the whole question of the interrelationship of estoppel and contract. May we discuss the tort cases now: I think these are valuable if only to show that the sort of problems that the new estoppel cases have raised are not new to the law. Begin with a general introduction, and give one illustration — either *Burrowes* v *Locke*[124] or *Slim* v *Croucher*[125] will do.

Student

Equity's notion of what constituted fraud is described as follows by Story in his treatise on Equity Jurisprudence.[126]

> "Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party."

Thus the Court of Equity formerly held a representor to be liable in "fraud" for making a false statement as a matter of fact even though the statements were made in the belief that they were true.[127]

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[124] (1805) 10 Ves. 470; 32 E.R. 927.

[125] (1860) 1 De G. F. & J. 518; 45 E.R. 462.

[126] Story, *Equity Jurisprudence,* (13th Ed., 1886) Vol. 1 para. 193.

[127] See, *inter-alia, Hobbs* v *Norton,* (1682) 1 Vern. 136; 23 E.R. 370; *Hunsden* v *Cheney* (1690) 2 Vern. 150; 23 E.R. 703; *Pearson* v *Morgan* (1788) 2 Bro. C.C. 384; 29 E.R. 214; *Burrowes* v *Locke* (1805) 10 Ves. 470; 32 E.R. 927; *Pulsford* v *Richards* (1853) 17 Beav. 87, 94; 51 E.R. 965, 968, 969; *Rawlins* v *Wickham* (1858) 3 De G. & J. 304; 44 E.R. 1285; *Slim* v *Croucher* (1860) 1 De G.F. & J. 518; 45 E.R. 462; *Re Overend Gurney* (1867) L.R. 3 Eq. 576, 623-624; *Reese River Silver Mining Co.* v *Smith* (1869) L.R. 4 H.L. 64, 79; *Ramshire* v *Boulton* (1869) L.R. 8 Eq. 294, 300-301; *Eaglesfield* v *Marquis of Londonderry* (1875) L.R. 4 Ch 693, 699, 704-706; *Mathias* v *Yetts* (1882) 46 L.T. 497, 502.

Professor

What sort of remedy was granted?

Student

The remedy was moulded to fit the circumstances. Usually this meant that a Court would order that the representation be made good.[128] But on occasions a Court might order rescission,[129] or an injunction,[130] or even that a representor's security be postponed to the representees.[131]

Slim v *Croucher*[132] is in every way representative of Equity's approach. In that case a builder named Hudson having finished building four houses on a piece of land asked the plaintiff's solicitors if any of their clients would lend him money on a mortgage of the houses. At the same time Hudson informed the solicitors that Croucher (the defendant) had agreed to grant him a lease of the land on which the houses were built. The solicitors read an agreement for a lease and asked for an assurance from Croucher that he would grant a lease according to the agreement. Croucher wrote back to the solicitors in the following terms:

> "Post Office, Shadwell, December 7, 1856. — Sir, — I am quite agreeable to grant a peppercorn lease of ground on which four houses are erected, and situate at Bromley to Mr Hudson — I am Sir, your etc. — J. T. Croucher."

Subsequently Croucher granted Hudson a lease which was handed to the plaintiff as security. The plaintiff then advanced money to Hudson. It turned out that Croucher had previously demised the same premises for the same term to Hudson who had since assigned it for value. A bill was filed against Croucher and Hudson claiming that the plaintiff had been induced to advance monies by fraud, misrepresentation and concealment on the part of both the defendants; that Croucher had assisted Hudson in misleading and deceiving the plaintiff and praying that Croucher might be ordered to repay the sums advanced. Croucher denied the truth of the allegation of fraud, misrepresentation and concealment and stated by way of defence that at the time of granting the lease comprised in the plaintiff's security, he had forgotten the grant by him to Hudson of the prior lease of the same premises and had inadvertently granted the second lease. The plaintiff claimed to be entitled to be indemnified for the loss occasioned by taking the security of an invalid lease having relied upon Croucher's representation that he had the power to grant the lease. The Court of Appeal in Chancery (Lord Campbell LC, Knight-Bruce, Turner LJJ) held that even though the defendant had not been shown to have been guilty of

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[128] *Burrowes* v *Locke* (1805) 10 Ves. 470; 32 E.R. 927; *Slim* v *Croucher* (1860) 1 De G. F. & J. 518; 45 E.R. 462.

[129] *Pulsford* v *Richards* (1853) 17 Beav. 87; 51 E.R. 965.

[130] *Piggott* v *Stratton* (1859) 1 De G. F. & J. 33; 45 E.R. 271.

[131] *Ibbotson* v *Rhodes* (1706) 2 Vern. 554; 23 E.R. 958; *Draper* v *Borlace* (1699) 2 Vern. 370; 23 E.R. 833; *Thompson* v *Simpson* (1870) L.R. 9 Eq. 497.

[132] Supra at note 125.

[133] (1853) 17 Beav. 87, at p. 94-96; 51 E.R. 965 at p. 968-969.

wilful deception, or of having done more than forgotten the previous lease when he granted the second, he was liable for 'fraud' and that this was a proper case for an order directing payment by the defendant of the sum which the plaintiff had advanced.

Professor

Were there any general principles to govern which remedy was most appropriate?

Student

There is a very useful exposition of the general principles by Sir John Romilly MR in *Pulsford* v *Richards*. You will see from this passage that the remedy appropriate to the case was very much at large, and in the discretion of the Court. His Lordship says:

> The ground on which this relief is asked is that principle of equity which declares that the wilful misrepresentation of one contracting party, which draws another into a contract, shall, at the option of the person deceived, enable him to avoid, or enforce that contract. I think it convenient, in the present case, to state my view of this principle of equity, before applying it to the facts of this case as they appear to me to be established by the evidence in the cause.
>
> The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth in all dealings of mankind. The principle itself is universal in its application to these cases of contract. It affects not merely the parties to the agreement, but it affects also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty, they ought to have known, or if they had formerly known and ought to have remembered the fact which negatives the representation made. A strong illustration of this is to be found in the case of *Burrowes* v *Lock* (10 Ves. 470); and in my opinion (as I held in the case of *Money* v *Jorden* (15 Beav. 372), this principle applies to all representations made on the faith of which other persons enter into engagements, so that whether the representation were true or false, at the time when it was made, he who made it shall not only be restrained [95] from falsifying it thereafter, but shall, if necessary, be compelled to make good the truth of that which he asserted.
>
> The results, however, which flow from the application of this principle, differ materially in different cases. In the case where the false representation is made by one who is no party to the agreement, entered into on the faith of it, the contract cannot be avoided, and all that equity can then do is to compel the person who made the representation to make good his assertion, as far as this may be possible. In cases, however, where the false misrepresentation is made by a person who is a party to the agreement, the power of equity is more extensive; there the contract itself may be set aside if the nature of the case and condition of the parties will admit of it, or the person who made the assertion may be compelled to make it good. The distinction between the cases where the person deceived is at liberty to avoid the contract, or where the Court will affirm it, giving him compensation only, are not very clearly defined. This question usually arises on the specific performance of contracts for the sale of property; and the principle which I apprehend governs the cases, although it is in some instances, of very difficult application, and leads to refined distinctions, is the following, viz., that if the representation made be one which can be made good, the party to the contract shall be compelled or may be at liberty to do so; but if the representation made be one which cannot be made good, the person deceived shall be at liberty, if he please, to avoid the contract.

Professor

That passage also contains the interesting observation that misdescription in the sale of land cases was regulated by this doctrine. Those cases have always been difficult to analyse in orthodox mere representation/warranty/condition terms. Why in your view have we lost sight of the way in which representation was regulated formerly?

Student

The short answer is the Judicature Act[134] and *Derry* v *Peek*.[135] The position on fraud at common law was always very different: to support an action of deceit it was necessary to prove actual dishonesty. No honest mistake was fraud. One only has to read Parke's B opinion in *Taylor* v *Ashton*[136] and compare that with what was happening contemporaneously in the prospectus cases in Equity to see the collision that was inevitable once fusion occurred.

Professor

What was the consequence of *Derry* v *Peek* on the doctrine of making representations good?

Student

It meant that where the misrepresentation was not fraudulent in the sense of dishonest you could no longer obtain compensation. *Low* v *Bouverie*[137] decided that cases like *Slim* v *Croucher* being inconsistent with *Derry* v *Peek* should be overruled.

Professor

What then happened to cases involving non-fraudulent misrepresentations where rescission rather than damages were sought?

Student

Somewhat paradoxically the right to obtain rescission for non-fraudulent representation survived. This was one of those accidents that make the law so beguiling. It survived simply because before *Derry* v *Peek* was decided there was already authority which stated that rescission of a contract could be obtained for 'equitable fraud'. The clearest illustration is provided by *Redgrave* v *Hurd*[138] in Lord Jessel's judgment where his Lordship says:

> Before going into the details of the case I wish to say something about my view of the law applicable to it, because in the text-books, and even in some

[134] Judicature Act 1873.

[135] (1889) 14 App. Cas. 337.

[136] (1843) 11 M. & W. 401.

[137] [1891] 3 Ch. 82.

[138] (1881) 20 Ch. D. 1; *Adam* v *Newbigging* (1888) 13 App. Cas. 308.

observations of noble Lords in the House of Lords, there are remarks which I think, according to the course of modern decisions, are not well founded, and do not accurately state the law. As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law — a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, "A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it." The other way of putting it was this: "Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements." The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of Common Law there is no doubt it was not quite so wide. There were, indeed, cases in which, even at Common Law, a contract could be rescinded for misrepresentation, although it could not be shewn that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care, whether it was true or false, and not with the belief that it was true. But, as I have said, the doctrine in equity was settled beyond controversy, and it is enough to refer to the judgment of Lord Cairns in the *Reese River Silver Mining Company* v *Smith* (1), in which he lays it down in the way which I have stated.

Now that passage shows quite clearly that the basis of the right to rescind was equitable fraud. That is the only part of the doctrine that survived the nineteenth century — the general right to rescind for innocent misrepresentation.

Professor

You may be interested to know that Pollock doubted whether there was a general right to rescind for innocent misrepresentation.[139] It used to be thought that the right to rescind for misrepresentation was governed by he general common law rule (illustrated in such cases as *Kennedy* v *Panama Royal Mail Co.*[140] and *Riddiford* v *Warren.*[141]) And that the equitable rule only applied in certain classes of contracts, which had traditionally been the province of equity — such as Partnership, Suretyship, Land Sales, Family Settlements, and sale and purchase of shares. In respect of these contracts the duties imposed varied according to the specific risks of the type of contract in question. It was only later that opinion swung round to the view now held that there was a general right to rescind for innocent misrepresentation.[142] I think that sheds light on the Court of Appeal's

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[139] Pollock, Principles of Contract, 9th Ed., 1921, at p. 599.

[140] (1867) L.R. 2 Q.B. 580.

[141] (1901) 20 N.Z.L.R. 572.

[142] See Pollock, Principles of Contract, (10th Ed.) p. 525, 555 — abandoning contrary opinion expressed in earlier editions.

decision in *Riddiford* v *Warren*.[143] Would you now briefly summarise the demise of the doctrine?

Student

In the middle of the nineteenth century the doctrine of making representation good applied to the marriage settlement cases and in cases which would now be categorised as negligent misrepresentation cases and also to some other cases, such as *Loffus* v *Maw*. As a result of the combined effect of *Jorden* v *Money*, *Caton* v *Caton* and *Maddison* v *Alderson* it became accepted that to the extent that the marriage settlement cases were concerned with promises or representations of intention, they were to be regulated by the Law of Contract. That involved compliance with the doctrine of consideration and the Statute of Frauds. So far as the tort line of cases was concerned compensation was ordered even though the misrepresentation had not been made dishonestly. As this was quite inconsistent with the way common lawyers viewed the basis of liability for misrepresentation it was inevitable that after fusion one or the other line of cases would have to give way. *Derry* v *Peek* decided that to succeed in an action for deceit proof of actual dishonesty was required. This inevitably led to the overruling of many of the equity cases, though the right to rescind for innocent misrepresentation somewhat anomously survived.

Professor

Does what happened last century, especially in connection with the marriage settlement cases shed any light as to what might happen to the new estoppel cases?

Student

We have moved a long way away from the view that representations are actionable only if fraud or warranty is made out. Our statutory law now recognizes that no practical distinction exists between representations of *fact* and warranty.[144] *Hedley Byrne & Co. Ltd.* v *Heller & Partners Ltd.*[145] recognizes that representations of fact made negligently may give rise to liability. It is clear then that liability for representation has expanded.

Professor

But the difficulty with the recent estoppel cases is that they are concerned with statements as to future conduct and this has traditionally been seen to be the realm of contract. Either the Law of Contract as we know it has to be substantially rewritten or these cases have to go.

Student

Perhaps Lord Wilberforce was right when he said that the movement of the law of contract is away from a rigid theory of autonomy towards the

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[143] *Riddiford* v *Warren* (1901) 20 N.Z.L.R. 572, at p. 577 and 579-581.

[144] Contractual Remedies Act 1979, s.6.

[145] [1964] A.C. 465.

discovery — or I do not hesitate to say imposition — by the courts of just solutions, which can be ascribed to reasonable men in the position of the parties.[146]

Professor

We shall have to see.

READING LIST

General Texts:

Meagher, Gummow and Lehane, "Equity, Doctrines and Remedies", pp. 532-371.
Pollock, *Principles of Contract*, (9th Ed., 1921), note i (appendix), p. 757.
Spencer Bower and Turner, Estoppel by Representation, (3rd Ed., 1977) Ch. 12.

Articles:

Jackson, 81 L.Q.R. 84, 223.
Sheridan, 15 M.L.R. 325.

Cases:

cases marked with an * denote the more important cases.

(a) *General Width and Scope of the Doctrine.*

*Loffus v Maw (1862) 3 Giff 603; 66 E.R. 554.
*Coles v Pilkington (1874) L.R. 19 Eq. 174.
*Burrowes v Locke (1805) 10 Ves. 475; 32 E.R. 927.
*Slim v Croucher (1860) 1 De G. F. & J. 518; 45 E.R. 462.
*Money v Jorden (1851) 21 L.J. Ch. 531.
*Jorden v Money (1854) 5 H.L.C. 185; 10 E.R. 868.
*Low v Bouverie [1891] 3 Ch. 82.

(b) *Marriage Settlement Cases.*

*Hammersley v De Biel (1845) 12 Cl. & Fin. 45; 3 E.R. 1313.
Luders v Anstey (1799) 4 Ves. 501; 32 E.R. 257.
Prole v Soady (1859) 2 Giff 1; 66 E.R. 1.
Williams v Williams (1868) 37 L.J. Ch. 854.
*Maunsell v Hedges (1854) 4 H.L.C. 1039; 10 E.R. 769.
*Caton v Caton (1865) L.R. 1 Ch. App. 137; (1867) L.R. 2 H.L. 127.
Shadwell v Shadwell (1860) 9 C.B. (NS) 159; 142 E.R. 62

(c) *Negligent Misrepresentation Cases.*

Hobbs v Norton (1682) 1 Vern. 136; 23 E.R. 370.
Pearson v Morgan (1788) 2 Bro. C.C. 384. 29 E.R. 214.
*Burrowes v Locke (1805) 10 Ves. 470; 32 E.R. 927.
*Slim v Croucher (1860) 1 De G.F. & J. 518; 45 E.R. 462.
*Pulsford v Richards (1853) 17 Beav. 87; 51 E.R. 965 (relief)
Redgrave v Hurd (1881) 20 Ch. D. 1 (relief)
Adam v Newbigging (1888) 13 App. Cas. 308 (relief)
Piggott v Stratton (1859) 1 De G.F. & J. 33; 45 E.R. 271 (relief)
*Derry v Peek (1889) 14 App. Cas. 337.
*Low v Bouverie [1891] 3 Ch. 82 (heroic attempt at reconciliation?)
Fry v Smellie [1912] 3 K.B. 282 (exploded doctrine)
*Nocton v Lord Ashburton [1914] A.C. 932 (criticism of Derry v Peek)
M.L.C. v Evatt [1971] A.C. 793. (cf. Burrowes v Locke)

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[146] *National Carriers Ltd.* v *Panalpina (Northern) Ltd.* [1981] A.C. 675 at p. 696 H.

(d) *Recent Developments in Estoppel*

*Crabb v Arun District Council [1976] Ch. 179; 92 L.Q.R. 174, 342.
*Evenden v Guildford City A.F.C. [1975] Q.B. 917.
Moorgate Mercantile Ltd v Twitchings [1976] Q.B. 225; [1977] A.C. 890.
Eves v Eves [1975] 1 W.L.R. 1338.
Tanner v Tanner [1975] 1 W.L.R. 1346.
Shaw v Applegate]1977[1 W.L.R. 970.
Ismail v Polish Ocean Lines [1976] Q.B. 893.
Jones v Jones [1977] 1 W.L.R. 438.
*Hardwick v Johnson [1978] 1 W.L.R. 683; 95 L.Q.R. 11.
*Williams v Staite [1979] Ch. 291.
Chandler v Kerley [1978] 1 W.L.R. 693.
*Re Sharpe [1980] 1 W.L.R. 219.
Western Fish Products Ltd v Penwith D.C. [1981] 2 All E.R. 204.
*Pascoe v Turner [1979] 1 W.L.R. 431.
*Greasley v Cooke [1980] 1 W.L.R. 1306.
*Brikom Investments Ltd v Carr [1979] Q.B. 467.
Secretary of State for Employment v Globe Elastic Thread Co Ltd [1980] A.C. 506.
*Amalgamated Investment & Pty Co v Texas Commerce Int. Bank [1982] Q.B. 84.
*Taylors Fashions Ltd v Liverpool Victoria Trustees [1982] Q.B. 133n.
Habib Bank Ltd v Habib Bank Zurich [1981] 1 W.L.R. 1265, 1282 et seq.
The Proodos C [1981] 3 All E.R. 189.

(e) *Reflections on Part Performance*

Loffus v Maw (1862) 3 Giff. 603; 66 E.R. 654.
Maddison v Alderson (1883) 8 App. Cas. 467.
Oglivie v Ryan [1976] 1 N.S.W.L.R. 504.
Re. Gonin [1979] Ch. 16.
Daulia Ltd v Four Millbank Nominees [1978] Ch. 231.
Greasley v Cooke [1980] 1 W.L.R. 1306.