# PROMISSORY ESTOPPEL

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Williston, under the rubric of "estoppel as a substitute for consideration", pointed out that in the United States there has been a development away from the idea of purchasing a promise for a price and towards the idea of founding contractual liability upon action in "justifiable reliance" on a promise.[1] This development Williston called the doctrine of "promissory estoppel". American authorities sometimes trace the basic idea underlying this doctrine—namely, the performance of some act detrimental to the performer upon the faith of a gratuitous promise made to him—to the early common-law notion of giving a remedy in deceit, later in assumpsit where detriment had been suffered by someone owing to his reliance upon a promise.[2] The way in which a connection is alleged to exist between this early doctrine of "reliance on a promise", which produced a remedy in tort—deceit or assumpsit—and the modern notion of "promissory estoppel" is shown by Seavey's statement[3] that "estoppel is basically a tort doctrine" and by his further comment, speaking of section 90 of the Restatement of the Law of Contracts, of which more will be said later, that its rationale is

> that justice requires the defendant to pay for the harm caused by foreseeable reliance upon the performance of his promise.

Such language and the context of the article in which it was used suggest that Seavey had in mind a closer connection between obligations arising from promissory estoppel and obligations

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[1] Williston on Contracts (1936), Vol. 1, para. 139, pp. 494-503.

[2] Thus in *Fried* v. *Fisher*, which will be discussed later, reference was made to Ames's writings; see Express Assumpsit (1888), 2 Harv. L. Rev. 1 (Selected Readings on the Law of Contract (1931) p. 33).

[3] Seavey, Reliance on Gratuitous Promises (1951), 64 Harv. L. Rev. 913, at p. 926. A similar approach, which seems to draw estoppel and tort cases together, can be seen in Stoljar, A Rationale of Gifts and Favours (1956), 19 Mod. L. Rev. 237.

arising from some tortious conduct, such as deceit or negligence, than between promissory estoppel and contract.

The flavour of tort which use of the word "estoppel" introduces into this part of the law, according to American ideas about the origins of estoppel, may therefore substantiate Corbin's criticism[4] of the use of the expression "promissory estoppel". For there is no connection between promissory estoppel and liability in tort. So far as history is concerned, the recent investigations of Mr. Fifoot[5] into the growth of the law of contract in England seem to show that the connection between the modern law of contract and the mediaeval law of tort is less than writers such as Ames had previously thought. No part of the doctrine of consideration, as formulated in the sixteenth and seventeenth centuries, can be derived with any certainty from the tortious idea of detriment which formed the basis of the action of assumpsit before the sixteenth century. Therefore, expression of the development of promissory estoppel in terms which indicate that it is a survival or resuscitation of the earliest kinds of contractual liability, and hence that its basic notions are tortious rather than contractual in nature, is undesirable. For the language of the courts, as will be seen from what is said later, is contractual in form and content rather than tortious. "Promissory estoppel" (a phrase which will be used in this essay for the sake of convenience and because it is used by the American courts, although there is much to be said for Corbin's expression "justifiable reliance on a promise") is part of the law of contract, not part of the law of tort. Whether or not its origins can be traced back to assumpsit—which is certainly not true of the English development to be discussed later—its modern formulation is undeniably contractual.

Hence the discussion, in the United States at least, about promissory estoppel as a substitute for consideration. Williston thought that it undoubtedly was available as an alternative to consideration for the purpose of founding or creating contractual obligations. Judge Learned Hand, in *Porter* v. *Commissioner of Internal Revenue*,[6] called it "a recognized species of consideration". But in the leading case of *Allegheny College* v. *National Chautauqua County Bank of Jamestown*[7] Cardozo C.J. said *obiter* (for on the facts of the case the majority of the court found that

[4] Corbin on Contracts (1950), Vol. I, Chap. 8.
[5] Fifoot, History and Sources of the Common Law (1949) pp. 330-340, 395-399.
[6] (1932), 60 F. (2d) 673, at p. 675; affirmed (1933), 288 U.S. 436.
[7] (1927), 246 N.Y. 369; 57 A.L.R. 980.

there was consideration for the promise to donate to the college) that the doctrine of promissory estoppel applied only to cases of charitable subscriptions, that is, to promises to donate to charities, in respect of which the doctrine was "a substitute for consideration or an exception to its ordinary requirements". Cases involving promises to donate to charities have long been considered in the United States as *fons et origo* of the modern doctrine of promissory estoppel.[8] In such instances the mere promise to donate money, if it has been acted upon, in the sense that buildings have been erected or other onerous obligations undertaken in reliance upon the donor's promise, has given rise to liability to pay the sums promised. It is possible to see here not a modern illustration of the notion of detriment in assumpsit, but a modern illustration of a "serious" promise, one made for "cause", such as the Chancellor would have enforced before the common-law courts gave a remedy in contract, and before the growth of the doctrine of consideration.[9]

The doctrine of promissory estoppel, in fact, is not tortious in origin but equitable—a point made clearer by the English cases, as will be seen later, in the second part of this essay. Equitable ideas about consideration were finally rejected by English courts in 1840 in *Eastwood* v. *Kenyon*,[10] where, despite the earlier opinion of Lord Mansfield, it was decided that a moral obligation would not amount to consideration at common law. Hence it is not surprising that when in 1885 an English court had to consider a "charitable subscription" case for the first time the claim failed because there was no consideration. In *Re Hudson*,[11] although *P* (the Congregational Union) alleged that they had been led by *X*'s promise to pay them £20,000, in the form of a number of annual subscriptions, to contribute larger sums to churches than they otherwise would have done, *P*'s claim to £8,000 which had

[8] See Billig, The Problem of Consideration in Charitable Subscriptions (1927), 12 Cornell L.Q. 467 (Selected Readings, p. 542); Carver, Consideration in Charitable Subscriptions (1928), 13 Cornell L.Q. 270 (Selected Readings, p. 559), which discusses the *Allegheny College* case.

[9] St. Germain, Doctor and Student (1530), Dialogue II, Chap. XXIV, quoted in Fifoot, *op. cit.*, pp. 326-329. See also Fifoot, *op. cit.*, pp. 301-307.

[10] (1840), 11 Ad. & El. 438. For earlier cases in which equitable ideas can be seen to operate, see: *Marsh* v. *Rainsford* (1588), 2 Leon. 111; *Brett's Case* (1600), Cro. Eliz. 735; *Dutton* v. *Pool* (1677), Raym. T. 302; *Hayes* v. *Warren* (1732), 2 Str. 933; *Hawkes* v. *Saunders* (1782), 1 Cowp. 289; *Trueman* v. *Fenton* (1777), 2 Cowp. 544; *Atkins* v. *Hill* (1775), 1 Cowp. 284; *Cooper* v. *Martin* (1803), 4 East 76; *Lee* v. *Muggeridge* (1813), 5 Taunt. 36.

[11] (1885), 54 L.J.Ch. 811. A second ground for the decision was the operation of the Statute of Frauds.

not been paid (£12,000 had been) failed. Pearson J. held that there was no consideration for the promise to pay since in fact nothing had been undertaken by the committee of the Congregational Union. The promise was merely voluntary. By contrast a Canadian case, *Sargent* v. *Nicholson*,[12] decided that where *several* people promised to subscribe to a charity the consideration for each individual promise to subscribe was the promise of the *others* to subscribe: hence there was a valid binding contract. No doctrine of promissory estoppel was invoked.

However, the American courts, according to Cardozo C.J., have not always been worried by questions of consideration in such cases. Promissory estoppel has taken its place. But the problem still remains: Has this doctrine any wider application? In answering this question a division can conveniently be drawn between the period before the American Law Institute's Restatement of the Law of Contract appeared in 1933 and the period after. Section 90 of that restatement reads as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

How far did that represent the law up till that time, and how far does it represent the law today?

In the Pennsylvanian case of *Fried* v. *Fisher*[13] Stern J. makes it quite clear that the doctrine of promissory estoppel preceded its formulation in the Restatement. The leading decision is *Ricketts* v. *Scothorn* in 1898.[14] There:

> P left her employment in reliance upon a promise by X to pay her a sum of money. It was held that X contemplated that P would give up her occupation as a reasonable and probable consequence of his gift. Hence X was liable to make good his promise.

Here was a case which did not involve a charitable subscription, and which could not be interpreted so as to produce consideration for *X*'s promise. Yet there was liability. The basis for the application of the doctrine, as Stern J. said in *Fried* v. *Fisher*, was not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain

[12] (1915), 25 D.L.R. 638; cp. also a New Zealand case, *Williams* v. *Hales* (1890), 8 N.Z.L.R. 100.
[13] (1938), 328 Pa. 497; 115 A.L.R. 147.
[14] (1898), 57 Neb. 51. See also *Faxton* v. *Faxton* (1873), 28 Mich. 159; *Stevens* v. *Turlington* (1923), 186 N.C. 191; 32 A.L.R. 870.

situations. That principle, as many American cases show,[15] is based upon the theory that where one has, by one's conduct, led another to change his position to his damage, one is estopped from benefiting from such conduct. The essential elements of reliance, detriment and injury point to the tortious quality of estoppel[16]—which seems to be stressed by Stern J. But some of the pre-Restatement cases cited by Corbin are more contractual in nature.

Thus in *Underwood Typewriter Co.* v. *Century Realty Co.*[17] *L* agreed to let *T* assign his term to anyone who was an acceptable tenant to *L*. *T* found a new tenant *X* who was acceptable to *L*, but *L* refused to consent to the assignment. *L* was held liable to pay *T* what he had lost through not being able to assign. In *Spitzli* v. *Guth*[18] *D*, the lessor, gave an option to *P*, his lessee, to purchase the demised premises. The purpose of this was to protect *P* if he made valuable improvements to the property. This *P* did: whereupon *D* gave *P* notice of revocation of the option. In reply *P* accepted the option, and succeeded in getting a decree of specific performance of it.

Another leading case, cited by Stern J., which seems to make the same point, is *Faxton* v. *Faxton*.[19] There a promise was made not to enforce a mortgage. In reliance thereon *X* stayed on the land instead of going away, believing that the mortgage was not going to be enforced. It was held that the promise made the mortgage unenforceable. The Michigan court said:

> . . . The rule does not rest upon the assumption that he has obtained any personal gain or advantage but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.

Here, it is suggested, the underlying idea is that a promise seriously made and meant to be taken seriously is one which the promisee is entitled to make the promisor fulfil. If the word

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[15] *Taylor* v. *Quinn* (1941), 68 Ohio App. 164, 39 N.E. 2d 627, at p. 629; *Meyn* v. *Aetna Life Ins. Co.* (1942), 46 F. Supp. 143, at p. 147 (Mo. Dist. Ct.); *Richards* v. *Frick-Reid Supply Corp.*, 160 S.W. 2d 282, at p. 287 (Tex. Civ. App.); *Smith* v. *Coutant*, 6 N.W. 2d 421, at p. 425 (Iowa); *Fallow* v. *Oswald*, 9 S.E. 2d 793, at p. 796 (S.C.); *Ziegler* v. *Ryan*, 285 N.W. 875, at p. 879 (S.D.); etc.

[16] *Nathan Miller, Inc.*, v. *Northern Ins. Co. of New York* (1944), 39 A. 2d 23, at p. 25 (Del. Sup. Ct.); *Babcock* v. *McKee*, 18 N.W. 2d 750, at p. 754 (S.D.); *Blaisdell Automobile Co.* v. *Nelson*, 154 A. 184, at p. 186 (Me.); *Trimble* v. *New York Life Ins. Co.* (1932), 255 N.Y.S. 292, at p. 297; *McLearn* v. *Hill* (1931), 177 N.E. 617, at p. 619, 77 A.L.R. 1039 (Mass.).

[17] (1909), 220 Mo. 522.

[18] (1920), 183 N.Y.S. 743.

[19] (1873), 28 Mich. 159.

"prejudiced" seems to suggest tort, the words "encouraged them to expect" seem to indicate contract as the basis of the rule. In an Iowan case, *Simpson Centenary College* v. *Tuttle*,[20] the court, in language which avoided any reference to tort, referred to

> the equitable principle that after allowing the donee to incur obligations on the faith that the note would be paid, the donor would be estopped from pleading want of consideration.

There was thus plenty of authority to substantiate section 90 of the Restatement and, it is suggested, to show that its basis is contract, not tort. After the Restatement the number of cases increases, and it would seem that section 90 is accepted.[21] But the big question then arose whether the operation of the doctrine was in any way limited. In *Fried* v. *Fisher*[22] Stern J. said that from the earliest times the following principle had been recognized, namely that

> an estoppel might . . . arise from the making of a promise, even though without consideration, if it were intended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice.

But he went on to add that the most frequent application of the principle had been to cases

> in which a person announces his intention of abandoning an existing right, and thereby leads another, relying thereon, to some action or forbearance.

In respect of such cases, estoppel was not restricted to representations on existing facts (as it was elsewhere) but, in the words of the annotator in the American Law Reports,[23] could be "predicated on promises or assurances as to future conduct".

This looks much more like a contractual than a tortious obligation. This impression is perhaps strengthened by Stern J.'s restriction of the operation of the doctrine that a representation as to the future gives rise to an estoppel to one where "it relates to an intended abandonment of an existing right". For in such cases the doctrine of promissory estoppel is intimately connected with contractual rights, or property rights arising from contract. That the doctrine was limited in this way was suggested before the Restatement. The leading case before section 90, one which

[20] (1887), 71 Iowa 596.

[21] Thus, writing in 1951, Seavey says that by and large the courts have accepted section 90: Seavey, *ante*, footnote 3, p. 925.

[22] (1938), 115 A.L.R. 147, at p. 150.

[23] *Ibid.*, at p. 153.

purports to restrict the doctrine to "abandonment of existing rights" cases, is the decision of the Supreme Court of the United States in *Union Mutual Life Insurance Co.* v. *Mowry*.[24] There it was held that the insurance company was *not* estopped by a promise made to *A*, the insured, in the course of negotiating a contract of insurance, that the insured would be notified in time to make payment of the premiums. According to the court, promissory estoppel only operated

> where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.

Yet how does this accord with the "charitable subscription" cases? If this statement is correct and applies after section 90 of the Restatement, so as to curtail its effect, the "charitable subscription" cases are hard to understand, and the suggestions of Williston, Judge Learned Hand and others, that promissory estoppel is a substitute for consideration, is an ill-founded one. Stern J. in *Fried* v. *Fisher* cited a number of cases to support this restriction of the doctrine of promissory estoppel. Most of them were decided before the Restatement. Some cases, however, postdate the Restatement and show that the doctrine operates to enforce the abandonment of existing rights but do not make it clear that the doctrine does not operate otherwise. Thus in *Longbotham* v. *Ley*,[25] after a note had been made the holder agreed not to demand interest promptly when the note matured: this was binding on him. But in *Barnes* v. *Boyd*[26] *V*, who agreed to execute a release of a lien, was not estopped against *X* who lent money to *P* in reliance upon *V*'s promise. No new obligation arose from the promise of *V* unsupported by consideration from *X*. As against this case, however, is the decision in *Burgess* v. *California Mutual Building & Loan Association*,[27] which will be discussed later and seems to suggest the opposite from *Barnes* v. *Boyd*. Another case on "abandonment of existing rights" is *Fried* v. *Fisher* itself. There *X* (the lessor of certain premises) was told by *Y* (a lessee-partner) that *Y* wanted to withdraw from the partnership and go into business elsewhere, provided he could be released from his present partnership obligations. *X* was perfectly satisfied to allow

[24] (1877), 96 U.S. 544. See also *Dickerson* v. *Colgrove* (1879), 100 U.S. 578; *Banning* v. *Kreitor* (1908), 153 Cal. 33; *Johnson* v. *Blair* (1901), 132 Ala. 128; *Kingston* v. *Walters* (1911), 16 N.M. 59; *Witherall* v. *Kelly* (1921), 187 N.Y.S. 43; *Stayton* v. *Graham* (1891), 139 Pa. 1.

[25] (1932), 47 S.W. 2d 1109 (Tex. Civ. App.).

[26] (1934), 18 Tenn. App. 55.

[27] (1930), 210 Cal. 180.

this if the other partners would answer for the balance of the lease. It was held that a promissory estoppel arose precluding *X* from holding *Y* liable on the lease when he left the partnership business and set up elsewhere.

All these cases, therefore, seem to be restricting the doctrine. But the view put forward by the annotator of *Fried* v. *Fisher* in the American Law Reports is that the doctrine is not limited in the way suggested by Stern J. On the contrary it is said that[28]

> the courts have frequently applied the doctrine of promissory estoppel in cases not involving any abandonment of an 'existing right'. . . .

Statements to the contrary were merely *obiter dicta*, and the better considered statements of the doctrine did not warrant this limitation. In support of this were cited the following classes of cases in which promissory estoppel has given rise to binding obligations as distinct from affecting existing rights: (1) the charitable subscription cases (which seem hardly justifiable unless the doctrine has a wide application); (2) cases involving the statutes of limitations (that is, promises not to plead the statute); (3) claims by creditors (though these may well be cases of abandoning or waiving existing rights since they spring from the fact that the creditor has lulled his debtor into a state of believing that payments would not be enforced); (4) promises about encumbrances upon the purchase of real estate subject to such encumbrances.

Furthermore, there are some Pennsylvanian cases[29] where a licence was held to be irrevocable because it was intended to induce and did induce the expectation that a lease would be granted. In another Pennsylvanian case, *Cameron* v. *Townsend*,[30] *Y* promised to buy property at a judicial sale for *X*'s benefit, and consequently *X* refrained from buying it himself: *Y* was estopped from denying that he held the property on trust for *X*. This does not look like a case of "abandonment of existing rights"; nor is it flavoured by tort. It is more like a case of resulting or constructive trust, possibly even unjust enrichment. At any rate, it is certainly more like a case of contract than anything else and seems to show how promissory estoppel can be used to create contractual, or equitable relations. An even stronger case, not affected by questions of trusteeship, is *Trexler's Estate*.[31] There a promise by an employer to pay pensions to elderly employees whom he was retiring was enforceable, since the employees did not as as-

[28] (1938), 115 A.L.R. 147, at p. 156.
[29] *Harris* v. *Brown* (1902), 202 Pa. 16; *Park Steel Co.* v. *Allegheny Valley Rly. Co.* (1905-6), 213 Pa. 322.
[30] 286 Pa. 393.
[31] (1936), 27 Pa. D. & C. 4.

siduously seek other employment as they would or might have done if there had been no such promise. The principle arising from these, and other cases, is that, provided there was a promise and that such promise induced the detrimental acts, and provided also that "the promisor could reasonably have expected the detriment to be incurred on the strength of the promise", the promise is enforceable.

The relationship between the promise and the act induced is very similar to the relationship between the promise and the consideration for it which Holmes J. pointed out[32] must exist for there to be an enforceable promise at common law. In this respect the parallel between consideration in common law and detriment in the doctrine of promissory estoppel (which as already suggested is equitable in origin), pointed out in the post-Restatement Nebraskan case of *Fluckey* v. *Anderson*,[33] is noteworthy—especially since the same parallel has been more recently pointed out (as will be shown in the second part of this essay) in a New Zealand case which discussed the recent English decisions.

Such cases as those cited seem to show that the doctrine of promissory estoppel is firmly ensconced in the United States, that it is contractual in form and content, and that it is not restricted to cases of "abandonment of existing rights", but can give rise to new, binding obligations, despite the absence of consideration.

Corbin[34] is strongly in favour of the existence and utility of such a doctrine of promissory estoppel—though, as already seen, he prefers to call it by another, and perhaps more descriptive and accurate name, "justifiable reliance on a promise". Indeed he goes so far as to say[35] that such a doctrine is not inconsistent with the law on consideration, which is flexible enough, according to him, to include the doctrine. The history of consideration, he says at one point,[36] shows how actions were given for "injury caused by the promisee's action in reasonable reliance" upon a promise. As already suggested, that may very well have been true when contract was dealt with by the tortious actions of deceit and assumpsit; but the doctrine of consideration made radical changes, in England at any rate, in the theory of contractual obligation; and any modern doctrine of promissory estoppel should be closer to contract than to tort in its essentials. The decisions in English and

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[32] *Martin* v. *Meles* (1901), 179 Mass. 114; *Wisconsin & M. Rly. Co.* v. *Powers* (1903), 191 U.S. 379.
[33] (1937), 132 Neb. 664.
[34] Contracts (1950), Vol. 1, Chap. 8.
[35] *Ibid.*, pp. 637-638.
[36] *Ibid.*, p. 638.

American negligent mis-statement cases[37] seem to show that liability in tort cannot spring from reliance upon statements, in the absence of a contract, however detrimental such reliance may turn out to be, and however foreseeable the reliance may have been on the part of the maker of the statement. If liability is to exist, it must arise from a *contractual* obligation created by a statement or representation which amounts to a promise and induces action in reliance on it. The fact that liability in tort has been held not to exist by American courts may be the reason why the doctrine of promissory estoppel has developed in the manner indicated.[38]

Cases cited by Corbin show that section 90 of the Restatement is firmly entrenched in the law applied by at least some American courts,[39] such that in *Volkwein* v. *Volkwein*[40] a Pennsylvanian court approved section 90 while finding it inapplicable to the facts before it. There a widow promised to pay her husband's funeral expenses out of the insurance money to be received by her on her husband's death. She was not liable at the suit of the deceased's personal representatives, because there had been no reliance, inducement of action or forbearance as a result of her promise. On the other hand, a case in which the doctrine was applied but there was no reference to section 90 was *Goodman* v. *Dicker*.[41] Here *D* promised to give *P* a dealer's franchise to sell radios. *P* incurred expense in preparation for the future sale of the radios, and then *D* repudiated his promise. It was held that *D* was liable for the amount of *P*'s expenses, though not for the loss of expected profits on the sale of the radios, which would have been recoverable had there been a contract between *P* and *D*.

This last case shows one limitation upon the doctrine, though Corbin argues for the extension of the remedies available for a failure to implement a promise which grounds a promissory estoppel. On the other hand, a case which shows how wide is the operation of the doctrine, and indicates a possible way round the negligent mis-statement cases, is the Californian decision in *Burgess* v. *California Mutual Building & Loan Association*,[42] to which ref-

[37] *Candler* v. *Crane, Christmas & Co.*, [1951] 2 K.B. 164; *Glanzer* v. *Shepard* (1922), 233 N.Y. 236; *Ultramares Corp.* v. *Touche* (1931), 255 N.Y. 170, are perhaps the most famous.

[38] The connection between estoppel and the negligent mis-statement cases is pointed out and discussed in Seavey, *ante*, footnote 3, at pp. 921-928, especially pp. 923 *et seq.*, and Stoljar, *ante*, footnote 3, at pp. 240-242. Cp. also Sheridan, Equitable Estoppel Today (1952), 15 Mod. L. Rev. 325, at pp. 328-331.

[39] Corbin, *ante*, footnote 4, at p. 682, note 77; for cases where the doctrine was not applied see p. 689, notes 88-90.

[40] (1944), 146 Pa. 265.

[41] (1948), 169 F. 2d 684.

[42] (1930), 210 Cal. 180.

erence has already been made. Here a mortgagor got a written promise from his mortgagee that the latter would reconvey the mortgaged property on payment of a sum of money which was only *part* of the sum lent on mortgage (this is significant in the light of the English discussion of the effects of promissory estoppel on the rule in *Pinnel's* case,[43] making a promise to accept a smaller sum for a larger which is owed an unenforceable promise because of the lack of consideration). The mortgagee knew that this document was to be used to further a transaction with a third party involving title to the property, though he did not know who that third party was. In an action against the mortgagee by that third party, who had lent money to the mortgagor on second mortgage, it was held that the first mortgagee was estopped from denying that there was no consideration for his promise to reconvey as between himself and the third party. It may be that this case could be explained on the grounds of fiduciary relationship in respect of mortgages; but since there is no suggestion of fraud or negligence about the case (whether on the part of the mortgagor or the first mortgagee), it is suggested that the better view is that it is a straightforward case of promissory estoppel binding the promisor as against anyone who can reasonably be expected to rely and act upon the promise.

This is the crucial test: namely, that the promise or representation was intended or could be foreseen as being likely to induce conduct on the part of somebody else such that it would be unjust to refuse to enforce the promise.[44] Corbin makes this quite clear in the following passage, which merits citation in full:[45]

> In determining whether action in reliance on a promise, in any particular case, is sufficient to make that promise enforceable, it may be helpful to suggest a number of questions to be answered. First, was the action in reliance actually bargained for by the promisor and given by the promisee in exchange for the promise? If the answer to this is yes, we have a case of true consideration. . . . But if the answer is no, the following additional questions are suggested.
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> 1. Was the action of the promisee actually *induced*, in part or whole, by the promise?

[43] (1602), 5 Co. Rep. 117a. See also *Foakes* v. *Beer* (1884), 9 App. Cas. 605. For a discussion of this point see Cheshire and Fifoot, Central London Property Trust Ltd. v. High Trees House Ltd. (1947), 63 L.Q. Rev. 283, at pp. 283-289.

[44] Cp. Stern J. in *Fried* v. *Fisher* (1938), 115 A.L.R. 147, at p. 151: "the safeguarding features thrown around the doctrine of promissory estoppel to prevent its too loose application—that the promise be one likely to induce action, that such action be of a definite and substantial character, that the circumstances be such that injustice can be avoided only by the enforcement of the promise".

[45] Corbin, *ante*, footnote 4, at pp. 674-675.

2. Was that action or forbearance substantial, constituting a material change of position by the promisee?

3. Did the promisor desire or request it, even though not offering his promise in exchange for it?

4. Did the promisor have reason to foresee such action or forbearance as a probable result of his promise?

5. Was the promised performance costly or difficult?

6. What ratio does the cost or value of the action in reliance bear to that of the promised performance?

7. In the light of the answers to the foregoing questions, what remedy, if any, will be just and equitable?

It is suggested that the authorities already cited and discussed in this essay, as well as the further cases cited by Corbin, support the questions which Corbin puts forward as the relevant ones, and support his general approach to the subject of promissory estoppel.

The result of this part of the present investigation is to show that in the United States there is a flourishing doctrine of promissory estoppel, which in proper cases can operate so as to give rise to the creation of enforceable promises, and binding contractual obligations, even where there is no consideration such as at common law would have supported the promises and obligations.

By contrast the modern English and Commonwealth development has not gone nearly so far. The leading protagonist in England of a doctrine of promissory estoppel has been Lord Justice Denning. Starting with the case of *Central London Property Trust Ltd.* v. *High Trees House Ltd.* in 1947,[46] he seems to have been endeavouring to introduce into English law something approaching the American doctrine of promissory estoppel which has been outlined and discussed in the foregoing pages. In a recent case, *Lyle-Meller* v. *A. Lewis & Co. (Westminster), Ltd.*[47] he said that common-law estoppel was "confined to representations of existing fact; but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations." As will be seen from what is said later, this is not the only pronouncement of the learned lord justice on this topic. His previous expressions of opinion have given rise to much debate in the courts and among academic writers on law.[48] The opinion of some

[46] [1947] K.B. 130. [47] [1956] 1 All E.R. 247, at p. 250.

[48] Articles include Cheshire and Fifoot, Central London Property Trust Ltd. v. High Trees House Ltd. (1947), 63 L. Q. Rev. 283; Wilson, Recent Developments in Estoppel (1951), 67 L. Q. Rev. 330; Mitchell, Recent Trends in the English Law of Contract (1953), 2 Univ. of Western Australia Ann. L. Rev. 255; Sheridan, Equitable Estoppel Today (1952), 15 Mod L. Rev. 325; Guest, The New Estoppel; An English Development (1956), 30 Aust. L. J. 187.

writers[49] seems to be that suggestions of novelty in respect of the doctrine are unfounded: but the caution of some judges in their reaction to statements about the effect of estoppel upon contractual relations makes it necessary to see to what extent Denning L.J.'s "new" view of estoppel is justified, as well as to consider how extensive is the operation of the doctrine in England. It has recently been said by one writer[50] that Denning L.J.'s doctrine has no "very firm body of authority to support [it] ... from a common law standpoint". But this is to leave out of account the effects of equitable developments upon this branch of the law of contract. So far as this is concerned, the decided cases would suggest, and the academic writers would agree in general, that there is considerable support from equity for some kind of doctrine of promissory estoppel in English law. What kind of a doctrine it is, and how far it goes, must now be examined.

## II

*Hughes* v. *Metropolitan Railway Co.*[51] is the decision from which, according to modern cases, the English doctrine of promissory estoppel stems. But the history of the application of estoppel to contractual relationships is older than that case. Moreover that history shows that in English law at any rate the basis of the doctrine is not tort but something else.

Starting with the decision in *Hunt* v. *Carew* in 1649,[52] the Court of Chancery had formulated the idea that conduct or misrepresentation upon which another person acted could operate either as a defence to an action by the representor or as a cause of action on the part of the representee. Such misrepresentations had to be *culpable*, that is, either fraudulently made with knowledge of their falseness—as in *Hunt* v. *Carew* itself and *Hunsden* v. *Cheyney*[53]—or negligently, as in *Hobbs* v. *Norton*[54] and *Ibbottson* v. *Rhodes*.[55] An innocent misrepresentation, one made in ignorance of the truth, was of no effect in equity: *Dyer* v. *Dyer*.[56] But equity drew no distinction between a representor who was a party to a contract and one who was a stranger. Both were equally

[49] Cheshire and Fifoot, *ante*, footnote 48, at p. 288: "a slim but sufficient catena of authority"; Wilson, *ante*, footnote 48, at p. 348; Mitchell, *ante*, footnote 48, at pp. 246, 248.

[50] Guest, *ante*, footnote 48, at p. 190.

[51] (1877), 2 App. Cas. 439.

[52] (1649), Nels. 46.

[53] (1690), 2 Vern. 150.

[54] (1682), 1 Vern. 136. See also *Mocatta* v. *Murgatroyd* (1717), 1 P. Wms. 393—a doubtful case since it concerned mortgages and may therefore be in a special category.

[55] (1706), 2 Vern. 554.

[56] (1682), 2 Ch. Cas. 108.

bound. So long as the representor knew that the representee was going to act upon the misrepresentation the latter would have a remedy in equity. Thus in *Rawlins* v. *Wickham*[57] the representor was a partner in a banking concern which the plaintiff was going to enter as a partner. In *Burrowes* v. *Lock*[58] and *Evans* v. *Bicknell*[59] the representor was the trustee of property, in respect of which the plaintiff was going to enter into a contract. But in *Slim* v. *Croucher*,[60] as in *Arnot* v. *Biscoe*,[61] the representor could be regarded as "a perfect stranger" to the contract which the representee was induced to make as a result of the misrepresentation. The important thing was that there was a misrepresentation made fraudulently or by gross negligence, or with intent to conceal something, and that the representation to the knowledge of the representor was going to be relied upon by the representee.

The common-law courts, in the eighteenth century, adopted this principle and themselves gave a remedy for fraudulent misrepresentation. Lord Mansfield said in *Montefiori* v. *Montefiori*:[62]

> The law is that where upon proposals of marriage third persons represent anything material in a light different from the truth . . . they shall be bound to make good the thing in the manner in which they represented it . . . for no man shall set up his own iniquity as a defence any more than as a cause of action.

This principle was given wider application, first in *Pasley* v. *Freeman*,[63] and then in a series of cases in the early part of the nineteenth century, of which the most famous are *Pickard* v. *Sears*[64] and *Freeman* v. *Cooke*.[65] In the former case Lord Denman C.J. said:[66]

> . . . the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. . . .

In a later case, *Gregg* v. *Wells*,[67] Lord Denman thought the principle could be stated more broadly:

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[57] (1858), 3 De G. & J. 304.

[58] (1805), 10 Ves. 470. At pp. 475-476 Sir William Grant M.R. says there must at least be gross negligence.

[59] (1801), 6 Ves. 174. At p. 190 Lord Eldon says there must be fraud, concealment or gross negligence.

[60] (1860), 1 De G. F. & J. 518.

[61] (1743), 1 Ves. Sen. 95, in which the expression "perfect stranger" is first used.

[62] (1762), 1 Wm. Bl. 363. See also *Neville* v. *Wilkinson* (1782), 1 Bro. C.C. 543.

[63] (1789), 3 T.R. 51.

[64] (1837), 6 Ad. & E. 469.

[65] (1848), 2 Ex. 654.

[66] (1837), 6 Ad. & E. 469, at p. 474.

[67] (1839), 10 Ad. & E. 90, at p. 98.

> A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

Baron Parke, in *Freeman* v. *Cooke*, put it thus:[68]

> By the term 'wilfully' [in *Pickard* v. *Sears*] . . . we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth. . . .

By the year 1854, when *Jorden* v. *Money* was decided,[69] it was quite clear that common law and equity covered the same ground and approached cases of estoppel in the same way and in accordance with the same principles. Hence the suggestion[70] that *Pasley* v. *Freeman*—the foundation of the modern tort of deceit—was also a case of equitable estoppel. The important question, however, was whether the equitable or common-law remedy rested upon a misrepresentation of fact. Would a statement of future intention bind someone in the same way as a mis-statement of fact? In answering this question an opportunity was given to limit the scope of the doctrine of consideration. But no real advantage was taken of that opportunity.

The cases from *Hunt* v. *Carew* onwards seem to concern only statements of fact: they are largely concerned with (a) the position of a party under a settlement (for example, *Hobbs* v. *Norton*), (b) the existence of previous mortgages or other encumbrances (for example, *Arnot* v. *Biscoe*), (c) the existence of other interests in land (for example, *Slim* v. *Croucher*), or (d) interests in property under trusts or wills (for example, *Burrowes* v. *Lock* and *Stephens* v. *Venables* (*No. 2*)[71]). In other words, so far as equity was concerned, the law of estoppel seems more intimately connected with the law of real property than with the general law of contract. The importance of this is that, in respect of real property, equity was never concerned with intentions as to the future, but always with the existing state of some property. Equity was never concerned to ask whether the representor had misrepresented what he was going to do in the future so as to bind the representee to

[68] (1848), 2 Ex. 654, at p. 663. [69] (1854), 5 H.L.C. 185.
[70] Lord Eldon in *Evans* v. *Bicknell* (1801), 6 Ves. 174, at pp. 182-183.
[71] (1862), 31 Beav. 124.

him in some sort of contractual obligation. Equity was only interested in deceptions which produced conflicting claims over property. A post-*Jorden* v. *Money* case, *Slim* v. *Croucher*, looks as though it concerns a future intention, but may very well involve—as Professor Sheridan says[72]—a statement about the representor's present interest in and powers over certain property. There *P* wanted to lend money to *X* on the security of a lease to be granted by *D* (the owner of the land). In fact *D* had already granted a lease to *X* which *X* had previously encumbered. It was held that *D* was liable to repay *P* what the latter had given as a result of *D*'s misrepresentation.

The common-law courts were more concerned with the creation of binding obligations out of promises as to future conduct. The statements already quoted seem to leave uncertain whether the representation had to be about "the existence of a certain state of things" or could concern what "a man's real intention may be". Hence possibly the difference of opinion in *Jorden* v. *Money*, a case which did involve the attempt to set up a *contractual* obligation from a representation that when *X* married *Y X* would get a certain amount of money. Here it seems to have been finally decided, by two members of the House of Lords to one, that a representation in order to give rise to an estoppel—and thus a cause of action—had to be one of fact. This was denied by Lord St. Leonards in a dissenting speech, who said: [73]

> . . . it is utterly immaterial whether it is a misrepresentation of fact, as it actually existed, or a misrepresentation of an intention to do, or abstain from doing, an act which would lead to the damage of the party whom you thereby induced to deal in marriage or in purchase, or in anything of that sort, upon the faith of that representation.

After this case it was said more than once in equity cases (again concerning property rather than contract) that liability depended upon an "assertion" upon which somebody acted;[74] and it is noteworthy that in *Stephens* v. *Venables* (*No. 2*), in 1862, Sir John Romilly M.R.[75] said that *Jorden* v. *Money*, though it had thrown doubt upon the principle that equity compelled "any person to make good his assertion, when the person to whom it had been

[72] Equitable Estoppel Today (1952), 15 Mod. L. Rev. 325, at pp. 329-330.

[73] (1854), 5 H.L.C. 185, at p. 248.

[74] *E.g.*, *Re Ward* (1862), 31 Beav. 1, where Romilly M.R. said: "if a man who makes to another person, upon a solemn occasion, an assertion upon which that person acts, he lies under an obligation to make good his assertion". Cp. also *Crosbie* v. *M'Doual* (1806), 13 Ves. 148; *Skidmore* v. *Bradford* (1869), L.R. 8 Eq. 134.

[75] (1862), 31 Beav. 124, at pp. 127-128.

made has acted on the faith of it", could not necessarily be taken to have upset that principle. So that between 1854 and 1877, when *Hughes* v. *Metropolitan Railway Co.* was decided, the idea that statements about future intention could give rise to estoppel in proper cases was still very much alive, notwithstanding the criticism made in *Jorden* v. *Money* of the broad expression of the doctrine of estoppel by such common-law judges as Lord Denman and Baron Parke. In this respect it is important to point out that two factors were stressed: first, the inducement by a statement of a course of conduct; secondly, detriment to the representee who acted in reliance on the statement. Both of these factors of course were important in the tort of deceit, which though resting upon mis-statement of fact seems later to have been taken to include statements of intention of a certain kind. The difference between deceit and estoppel was that in the former the representation had to be fraudulent; in the latter no wrongful intent was necessary.

One further development must be noted before dealing with the *Hughes* case. A number of cases laid down a principle akin to the doctrine of equitable (and common-law) estoppel described. It was expressed by Romilly M. R. in *Rochdale Canal Co.* v. *King* as follows:[76]

> . . . if one man stand by and encourage another, though but passively, to lay out money, under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the Court will not permit any subsequent interference with it, by him who formally promoted and encouraged those acts of which he now either complains or seeks to obtain the advantage.

Once again the important factors are: non-fraudulent inducement, or encouragement (an expression also to be found in the "estoppel" cases), and detriment to the "representee" (as he may be called). Once again it is noteworthy that questions of interests in or over real property were involved in these cases rather than the existence of purely contractual rights, even though, from a formal point of view, they seem to be concerned only with the revocability or otherwise of a licence, that is, with questions of contract.

The point that is suggested as being most relevant about all these cases, those concerning "estoppel" and those concerning

[76] (1853), 16 Beav. 630, at pp. 633-634. Cp. *Duke of Beaufort* v. *Patrick* (1853), 17 Beav. 60; *Ramsden* v. *Dyson* (1866), L.R. 1 H. L. 129, at pp. 170-171. See on this Cheshire, A New Equitable Interest in Land (1953), 16 Mod. L. Rev. 1, at pp. 4-7. At p. 7 Cheshire in fact says that this principle and the *Hughes* principle (expounded in the *High Trees* case) are akin.

"licences", is that the operation of any principle of equitable or promissory estoppel is largely connected with the settlement of conflicting claims to or in respect of property. Hence possibly the creation of new "equities"—which is one way of regarding the entire idea of estoppel as it was developed after *Hunt* v. *Carew*.

This was the position when *Hughes* v. *Metropolitan Railway Co.* was decided in 1877. In that case *P* in October gave notice to *D* to repair within six months houses held on lease by *D*. *D* asked if *P* wanted to purchase the houses, that is, buy out *D*'s interest. Negotiations continued until December but did not result in a sale. Some months later, in April, when the notice to do repairs had almost run out, *D* said that they would do the repairs; but the repairs could not be done within the notice period. *P* brought an action for ejectment when the time under the notice had expired. It was held by the House of Lords that *D* was entitled in equity to relief from forfeiture. The October-December negotiations suspended the operation of the original notice until December when the negotiations ended; time ran from then and not before. Lord Cairns L.C.,[77] after making it quite clear that the relief available to *D* did not depend upon fraud, that is, upon any intention on the part of *P* to wrong *D*—which there was not—expressed the basis of the court's intervention thus (though without citing any authority for his statement):

> . . . it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results . . . afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

It should be noted that the *Hughes* principle, as first stated, was intimately connected with interests in land. In that respect, although Lord Cairns cited no authority for his remarks (or any other member of the House of Lords), there was plenty of authority for supporting such ideas. As already seen, there were many previous decisions in equity supporting the proposition that "assertions" which were acted upon gave rise to *equitable*—if not common law—relief. What does seem to be novel about Lord Cairns' remarks, in view of *Jorden* v. *Money*, is that they

[77] (1877), 2 App. Cas. 439, at p. 448.

make representations about *future intentions* as binding in equity as promises supported by consideration are at common law. As Lord Cairns said, the course of negotiations must have "the effect of leading one of the parties to suppose that the strict rights arising under the contract *will not* be enforced, or *will* be kept in suspense . . .". Here, therefore, is a definite change in the law, or perhaps it would be better to say a limitation upon the doctrine of *Jorden* v. *Money*, to the extent that statements of future intention are meant to bind or otherwise affect interests in land.

Between the *Hughes* case and the *High Trees* decision seventy years later most of the cases in which this principle was invoked and applied were cases involving contractual obligations in respect of interests in land. Thus in *Birmingham & District Land Co.* v. *L.N.W. Rly.*[78] the estoppel was created by negotiations about the sale of land held by *D* under a building lease. Because of the negotiations the legal obligation to build on the land was suspended until a reasonable time after the termination of the negotiations. In *Fenner* v. *Blake*[79] the estoppel resulted from an unenforceable agreement to determine a lease at an earlier date than that for which the tenant could give a valid notice to quit. On the faith of that agreement the plaintiff (who was the defendant's landlord) had to the defendant's knowledge sold the premises to *X* with right to possession at the date agreed upon by the plaintiff and the defendant. When the plaintiff brought ejectment the tenant was estopped from denying that his tenancy ended at the agreed date. In *Salisbury* v. *Gilmore*[80] the estoppel resulted from a statement by a landlord that when *D*'s tenancy ended he, the landlord, intended to demolish the premises which *D* had covenanted to leave in good repair at the end of his term. When the landlord sued for damages for breach of covenant (since the tenant had not repaired), his statement of future intention was a good defence against him. In *Buttery* v. *Pickard*[81] the estoppel resulted from an agreement by the landlord to take 15s. a week rent instead of 30s. as provided for in the lease. This agreement was reached when the tenant pointed out that because of bad business conditions due to the war it would be impossible to continue the tenancy unless the rent were reduced until business improved. When the landlord sued for the difference in rent between 15s. and 30s. a week, the agreement estopped him. Even the *High Trees* case[82] itself concerned a lease. Once again the estoppel alleged

[78] (1888), 40 Ch. 268.
[79] [1900] 1 Q.B. 426.
[80] [1942] 2 K.B. 38.
[81] (1946), 62 T.L.R. 241.
[82] [1947] K.B. 130.

(which failed as a result of a finding of fact that the circumstances it was meant to cover had ceased to exist) arose from a promise to accept half the covenanted rent while war-time conditions continued to make things difficult for the tenants.

Subsequent upon the *High Trees* case there were others in which once again the principle was used in connection with rights over property (even though for various reasons the principle was held inapplicable in particular cases). Thus in *Foot Clinics (1943), Ld.* v. *Cooper's, Gowns Ld.*,[83] after the end of the war, *P*, the landlords, wrote a letter suggesting to *D* (the tenants) that *D* should carry on in possession until the expiry of the lease between the parties, despite the operation of the Validation of War Time Leases Act, 1944, by which the lease in question was determinable by one month's notice in writing. It was held that this letter was not a representation as to future intention within the *High Trees* principle and *P* was not estopped from recovering possession on giving one month's notice. In *Wallis* v. *Semark*[84] a statement by the landlord that two years notice was required to terminate a lease subject to the Rent Acts, and not the one month notice originally agreed upon, was held by Denning L.J. to estop him from recovering possession after giving a notice of increase of rent which under the acts was a notice to quit. Somervell L.J.[85] seems to have thought that the agreement about longer notice was made for *consideration* and was therefore good, but Denning L.J. was content to rely upon the *High Trees* principle. In *Mitas* v. *Hyams*[86] the estoppel resulted from an oral agreement changing the date on which rent was to be paid by *D* to the landlord *P*. The original dates were contained in a lease under seal. Notwithstanding this, the oral variation was valid as a defence to an action for rent due on the date stated in the lease. Once again Denning L.J. (but not the other members of the court) cited and relied upon the *High Trees* case. In *Perrott* v. *Cohen*[87] the estoppel resulted from the use of lavatories by the defendants, tenants of land on which were the lavatories in question, inclusion of which in the lease had been disputed between the parties. In this case, however, the estoppel gave rise to a cause of action, for it was the landlord who could use the estoppel to make the tenant liable to repair the lavatories. Although Somervell and Cohen L.JJ. relied upon cases other than the *High Trees* decision, Denning L.J. put the case

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[83] [1947] K.B. 506.
[84] (1951), 67 (2) T.L.R. 222.
[85] *Ibid.*, at p. 225.
[86] (1951), 67 (2) T.L.R. 1215.
[87] [1951] 1 K.B. 705.

upon the footing that it was "akin" to if not "strictly" an estoppel. Hence, applying the *High Trees* principle, there was liability. As for the fact that the estoppel was grounding an action, and not providing a defence (a point to which reference will be made later), the learned judge said:[88]

> I know that this looks like treating an estoppel, almost as if it were a cause of action, but it is habitually done in cases of waiver . . . and I see no reason why we should not do the same here.

This, as will be seen later, is a somewhat misleading statement. But for the moment it is sufficient to notice how in these cases estoppel of the kind that has been discussed in this essay has been applied in the courts after the *High Trees* case.

From what has been said there seems to be a very strong connection between the use of estoppel to create binding legal obligations and rights over, or in respect of land. As against this, however, there are cases before the *High Trees* decision in which estoppel was used in a purely contractual context. These have been described by Cheshire and Fifoot[89] as cases illustrating a "somewhat elusive doctrine variously called 'waiver', 'forbearance' or 'substituted performance' ". But the important feature of these cases,[90] so far as the present essay is concerned, is that they are not concerned with the creation of entirely *new* contractual obligations but deal with new modes of performing previously created contractual obligations. Moreover, it may be possible to regard these cases, or some of them at least, as involving representations about *existing facts* and not representations about *future intentions*, though in *Charles Rickards Ltd.* v. *Oppenhaim*[91] (a post-*High Trees* decision) Denning L.J. spoke of the defendant leading the plaintiffs to believe that

> . . . he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it. . . .

This suggests that the representations in such cases, involving "time of performance", are representations as to future intention. But may they not be regarded as though they represent—or were saying—"I am telling you that I do not *now* hold us to be

[88] *Ibid.*, at p. 710. Cp. Vaughan Williams L.J. in the course of the argument in *Williams* v. *Pinckney* (1897), 67 L.J.Ch. 34, at p. 37.

[89] (1947), 63 L. Q. Rev. 283, at p. 289.

[90] *E.g.*, *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598; *Leather Cloth Co.* v. *Hieronimus* (1875), L.R. 10 Q.B. 140; *Panoutsos* v. *Raymond Hadley Corp. of New York*, [1917] 2 K.B. 473; *Hartley* v. *Hymans*, [1920] 3 K.B. 475; *Besseler Waechter Glover and Co.* v. *South Derwent Coal Co., Ltd.*, [1938] 1 K.B. 408. They are discussed in 63 L. Q. Rev. 283, at pp. 289-301.

[91] [1950] 1 K.B. 616, at p. 623.

bound by the terms of our contract", and not as though he were saying, "If you do so-and-so, then I shall not insist upon the original terms of our contract"?

After the *High Trees* case there were some decisions in which the doctrine seems to have been put forward so as to give rise, or in the attempt to give rise, to binding contractual obligations unconnected with interests in land. In *Ledingham* v. *Bermejo Estancia Co. Ltd.*[92] Atkinson J. (harking back to a decision of Simonds J. in 1937, *Re William Porter & Co., Ltd.*[93]) held that the personal representatives of a company director (and his wife) who had agreed to waive the interest due on money lent to the company were estopped from claiming the interest at a later date. The promise had been made to induce the company to carry on when it was in financial difficulties—which it had done. In *Robertson* v. *Minister of Pensions*[94] the estoppel alleged resulted from a statement made to *P* by the War Office that his claim for a pension due to injuries received on active service had been accepted. On the faith of this he did not get independent medical advice nor did he secure the X-ray plates which could help him prove his claim. When *P* later claimed from the Ministry of Pensions a pension because of his injuries Denning J. held that the ministry was estopped from denying his claim. In *Combe* v. *Combe*[95] a husband had promised to pay his wife £100 a year permanent maintenance when she obtained a decree nisi. The wife thereupon refrained from applying for maintenance from the court and later sued the husband when he failed to pay her the money as agreed. It was held that no estoppel operated and the wife's claim failed. In *Lyle-Meller* v. *A. Lewis & Co. (Westminster), Ltd.*[96] Denning L.J. referred to the doctrine again, but it was unnecessary for the decision there since the representation involved in that case was clearly a representation about an existing fact, namely, that the defendants were using the plaintiff's invention in the manufacture of their lighters. In *Tool Metal Manufacturing Co. Ld.* v. *Tungsten Electric Co. Ld.*[97] the House of Lords was able to determine the effects of a representation without reference to the *High Trees* case simply by re-affirming the authority of *Hughes* v. *Metropolitan Railway Co.* There an agreement to suspend the operation of a contract about patent rights was held to be terminated by reasonable notice.

The following points may be made about the foregoing cases. *Robertson*'s case has been said not to involve the doctrine at all.

[92] [1947] 1 All E.R. 749.
[93] [1937] 2 All E.R. 361.
[94] [1949] 1 K.B. 227.
[95] [1951] 2 K.B. 215.
[96] [1956] 1 All E.R. 247.
[97] [1955] 1 W.L.R. 761.

Professor Sheridan[98] called it "a good old-fashioned case of estoppel", that is, one involving a representation about an existing state of facts, namely that *P*'s injury was the result of his war-service. Professor Mitchell says of it:[99] "Properly speaking *Robertson's Case* was not a case of contract at all, but one involving the question of the revocability of administrative acts". *Combe* v. *Combe* is a case where the doctrine failed to provide a remedy because it was there said that the *High Trees* principle was a shield, a defence, not a cause of action (a point on which more will be said later). *Ledingham* was the only one in which the principle was successfully invoked and even there it was used as a *defence*—not a cause of action—and it might be added that the promise was binding because there was consideration for it, namely, that the company would continue to operate. In this respect the recent Canadian decision of *Sloan* v. *Union Oil Company of Canada Ltd.* is worthy of notice.[100] Here a promise to pay "fringe" benefits was held to be good consideration for continued work by the plaintiff, or alternatively was binding because, as Denning L.J. had said in the *High Trees* case, it was made with intent to create a legal relationship, was intended to be acted upon and was acted upon. The suggestion is made that this ground of the decision was not really necessary because the learned judge, Wilson J., decided that there was con-

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[98] Equitable Estoppel Today (1952), 15 Mod. L. Rev. 325, at pp. 339-340. Cp. Goodhart in (1956), 72 L.Q. Rev. 162.

[99] The Contracts of Public Authorities (1954) p. 30, note 1.

[100] [1955] 4 D.L.R. 664. In this respect, also, should be noted cases where the consideration alleged for a promise was the offer to perform a duty which the promisee was already bound to perform as regards someone else, not the promisor. The most famous case of this is *Shadwell* v. *Shadwell* (1860), 9 C.B.N.S. 159, which has been much discussed, most recently by Stoljar, Rationale of Gifts and Favours (1956), 19 Mod. L. Rev. 237. Are such cases really illustrations of promissory estoppel and not of consideration? Corbin would seem to think so, for he cites *Shadwell* v. *Shadwell* and the similar New York case of *De Ciccio* v. *Schweizer* (1917), 221 N.Y. 431, in support of his explanation of the doctrine. Similar cases are *Dunton* v. *Dunton* (1892), 18 Vict. L.R. 114, where a promise to maintain a wife was held enforceable by the Supreme Court of Victoria because it was said that there was consideration in the form of a promise to behave properly, and *Davies* v. *Rhondda D.C.* (1917), 87 L.J.K.B. 166, where a promise to pay money to employees who volunteered for military service was also said to have been made for consideration (cp. *Larner* v. *L.C.C.*, [1949] 2 K.B. 683). See also the recent case of *Ward* v. *Byham*, [1956] 1 W.L.R. 496, where a father promised to pay money to a woman for the upkeep of their illegitimate child. This was held to be enforceable, although the mother was already under the obligation to look after the child by the provisions of the National Assistance Act, 1948. The Court of Appeal went to some pains to find consideration for the father's promise; but had it been treated, and if it could have been treated, as a case of promissory estoppel in the American sense the difficulties of the case could have been avoided.

sideration for the promise to pay the benefits, namely, the plaintiff's continuance at his work. As the learned judge said:[101]

> By staying until he was discharged he did something that was not required by his contract of employment and he says that his knowledge of the provision for a termination allowance was one of the factors which induced him to continue his employment.

All this would suggest the following: first, that "promissory estoppel", in so far as it exists in English law at all, is primarily concerned with statements of future intention as affecting existing rights over land and, in particular, with statements that purport to "waive" or "affect" existing rights over the land in question; secondly, that it has been extended in a few, but only a few, cases to deal with contractual relationships unconnected with interests in land. But in such cases all the doctrine amounts to is a doctrine of waiver of established contractual rights: it does not give rise to new contracts; it does not affect the doctrine of consideration; it merely affords an equitable defence to an action based upon a contract. Thirdly, attempts to turn the English form of "promissory estoppel" into a substitute for consideration such that contractual rights can arise out of the estoppel capable of giving rise to a cause of action (as distinct from a defence) have failed. Denning L.J., by eschewing the original idea of detriment to the representee (which has been seen to run through the cases before and after *Hughes* v. *Metropolitan Railway Co.*) as the basis of equity's intervention in these cases, and substituting the notion of "intention to create legal relations" has attempted to turn the English doctrine into something approaching the American idea of promissory estoppel. That he had this in mind is perhaps shown by his reference in *Dean* v. *Bruce*[102] to "what is sometimes called a promissory or equitable estoppel". But his attempt has met with no success. Indeed he seems to have accepted defeat himself. If not in the *High Trees* case itself, where he seems to have restricted the utility of estoppel to its use as a defence, then elsewhere[103] he has sought to indicate that promissory estoppel could be used as a substitute for consideration. But in *Combe* v. *Combe* and *Lyle-Meller* v. *A Lewis & Co. (Westminster), Ltd.*, he seems to have realized that this was impossible, and that all estoppel could do was "affect" existing legal relations, or rights, and not create new

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[101] [1955] 4 D.L.R. 664, at p. 673.
[102] [1952] 1 K.B. 11, at p. 14.
[103] In addition to the cases cited in the text see Lord Justice Denning's article, Recent Developments in the Doctrine of Consideration (1952), 15 Mod. L. Rev. 1.

ones where none existed before. Thus in the *High Trees* case,[104] using language which he quoted on later occasions, he talked of

> a promise . . . intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on

and said that such a promise "must be honoured". But in *Combe* v. *Combe* he said:[105]

> . . . where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.

And in the *Lyle-Meller* case he said:[106]

> We have reached a new estoppel which affects legal relations. . . . The assurance was not a contract binding in law, but it was an assurance as to the future; it was intended to be acted on, it was acted on, and it was held binding on the party who gave it. . . . The statement was not . . . a contract, and not regarded as such, but it was an assurance as to the legal position—as to the legal consequences of the facts known to both—which was intended to be acted on, was acted on, and was held to be binding. It did not give rise to a cause of action in itself, but it did prevent the party making it from setting up a defence which would otherwise be open to him. In that sense it gave rise to an estoppel, but it was not the old kind of estoppel, which was only a rule of evidence. It was the new kind of estoppel which affects legal relations.

Such language is very different from Denning L.J.'s suggestion in *Perrott* v. *Cohen* that estoppel can be a cause of action. And it is difficult to see how such an assertion could be justified on the authorities. Were it correct it would mean that the law on consideration might well have become outmoded, and its place taken by some kind of doctrine of "serious" promises, to which legal force must be given by virtue of the "seriousness" of their making. But it does not now seem possible for the doctrine of consideration to be avoided by the operation of estoppel. Indeed, in *Combe* v. *Combe*[107] Denning L.J. himself said that "the doctrine of considera-

[104] [1947] K.B. 130, at p. 134. [105] [1951] 2 K.B. 215, at p. 220.
[106] [1956] 1 All E.R. 247, at pp. 250-251.
[107] [1951] 2 K.B. 215, at p. 220.

tion is too firmly fixed to be overthrown by a side-wind". If the effect of estoppel was the creation of a cause of action, then the doctrine of consideration would indeed be overthrown. But this is far from being so; and the more recent statements of Denning L.J. show that he himself has preceived how the *High Trees* principle must be limited. In *Combe* v. *Combe* he pointed out that the utility of the doctrine was such that it should not be endangered by being stretched beyond its legitimate limits. In view of this remark, he may have gone too far when he suggested in the recent case of *Sidney Bolsom Investment Trust Ltd.* v. *E. Karmios & Co. Ltd.*[108] that the doctrine applies to representations about the legal effect of a document and that such representations would give rise to an estoppel. If all he was trying to do here was to point out that the doctrine operated so as to "affect" the legal relations between the parties there is nothing inconsistent between his remarks in that case and the earlier remarks already quoted. But if he was attempting to say that the doctrine applied to representations of law, it is suggested that he went too far. For recently in *Kai Nam* v. *Ma Kam Chan*[109] the Privy Council reiterated the principle that a representation of law would not give rise to an estoppel. In this case a claim was being brought for possession of premises. *D*, the tenant, relied upon an ordinance for protection. *P*, the landlord, claimed that the premises were outside the ordinance because they were an entirely new building within the meaning of the ordinance. *D* argued that *P* was estopped from saying this because *P* had served a notice of increase of rent within the ordinance and *D* had acted on the notice. Here it might well be thought that there was clear evidence of a representation with intent to affect legal relations action upon the representation, and possible detriment to the representee. Yet the Privy Council held that *P* was not estopped. As Lord Cohen said:[110]

> It is sufficient to observe that if the documents relied on can be regarded as containing representations, such representations are representations of law, not of fact, and cannot found an estoppel.

Hence, to say, as Denning L.J. has recently said, that a representation about the legal effect of a document grounds an estoppel is very questionable.

Other judges have also pointed out the limits of the *High*

[108] [1956] 2 W.L.R. 625, at p. 632.

[109] [1956] A.C. 358, relying on *Territorial and Auxiliary Forces Assn. of the County of London* v. *Nichols*, [1949] 1 K.B. 35; see also *Langford Property Co., Ltd.* v. *Goldrich*, [1949] 1 All E.R. 402.

[110] [1956] A.C. 358, at p. 367.

*Trees* principle. Thus in *Re Venning*[111] Somervell L.J. refused to accept it as applying to a case where a mortgagee had agreed to the reduction of the stipulated rate of interest on the mortgaged property. The agreement did not preclude the mortgagee from subsequently claiming the full sum due under the (unvaried) mortgage deed. In contrast with this are not only the American cases cited in the first part of this essay but also the judgment of Denning L.J. in *Mitas* v. *Hyams*, where the facts were somewhat similar in that they were concerned with the due date of payment of rent, and therefore the amount payable, and Denning L.J. based his judgment on the *High Trees* principle. Moreover, in *Vaughan* v. *Vaughan*[112] Evershed M.R., commenting on his earlier judgment in *Foster* v. *Robinson*[113] (on which Denning L.J. had relied for support in an essay written after the *High Trees* case) said:[114]

> I did not intend to lay it down . . . that, where a promise has been made which is not contractual in form or effect and that promise has in fact been acted upon, then and without more a right is given to the promisee to go on enjoying the subject-matter of the promise indefinitely.

Since that was a case in which property rights were involved—namely, whether a licence to occupy premises continued after the expiry of a tenancy—the statement of Evershed M.R. is of particular relevance in view of the suggestions made in this essay about the connection between the *Hughes-High Trees* principle and interests in property. In *Combe* v. *Combe*[115] Asquith and Birkett L.JJ. pointed out that the *High Trees* principle was useful only as a "shield" not a "sword"—a defence, not a cause of action. And in the more recent case of *Tool Metal Manufacturing Co. Ld.* v. *Tungsten Electric Co. Ld.*[116] Lord Simonds, referring to Denning L.J.'s remarks in *Combe* v. *Combe*, already cited, said that even in the terms used there the principle had been "far too widely stated" and that it must not be supposed that "mere acts of indulgence are apt to create rights".

Other criticism has come from the Commonwealth. In two New Zealand cases statements were made throwing doubt upon the breadth of the *High Trees* principle as originally formulated by Denning L.J. In *John Odlin & Co. Ltd.* v. *Pillar*[117] Fair J.[118]

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[111] (1947), 63 T.L.R. 394. [112] [1953] 1 Q.B. 762, at p. 767.
[113] [1951] 1 K.B. 149.
[114] Recent Developments in the Doctrine of Consideration (1952), 15 Mod. L. Rev. 1.
[115] [1951] 2 K.B. 215, at pp. 224-225.
[116] [1955] 1 W.L.R. 761, at p. 764.
[117] [1952] Gaz. L.R. 501. [118] *Ibid.*, at p. 506.

thought the principle should be applied only "with the greatest caution". Gresson J.,[119] though agreeing that "the principle is clearly in accord with justice", applied it only as a *defence* where the plaintiff's representation had caused *detriment* to the defendant (an element, as already seen, which had been abandoned by Denning L.J. in the *High Trees* and subsequent cases and in his article on the subject). In Gresson J.'s judgment can be clearly seen the re-affirmation of the connection between equitable rights resulting from this "new" estoppel and the idea of detriment, a connection which as already seen has been stressed by many American cases. Thus Gresson J. said:[120]

> Contract and estoppel are akin to one another and have at least this in common—that contract requires consideration and estoppel requires detriment, in some cases the latter may constitute true consideration.

The truth and purport of this last remark can be seen in cases such as *Ledingham* v. *Bermejo Estancia Co. Ltd.* and *Sloan* v. *Union Oil Company of Canada Ltd.*, which have been discussed earlier in this essay. It calls to mind also the closeness of the connection between consideration and promissory estoppel, which is evident from the passage from Corbin cited earlier and the general approach of American cases on this topic.

Another New Zealand case in which the *High Trees* doctrine was confined to its availability as a defence was *Buckland* v. *Commissioner of Stamp Duties*,[121] where North J. said that the principle was supported by authority but restricted its application. In that case a promise to suspend rights under a deed of family arrangement, which was intended to be acted upon and was acted upon, was sufficient to make a release in respect of past administration of an estate valid for purposes of relief from estate duty. The effect of the promise was to deprive the person entitled under the deed of her rights of property under it; hence the later release did not amount to a "disposition" of property, since she had none to dispose of; hence it was not liable to duty.

In these cases, therefore, if not in some of the more recent English ones, can be seen the revival of two important features of the pre-*High Trees* statement of the principle put forward in *Hughes* v. *Metropolitan Railway Co.* They are: the need for detriment to the representee, and the availability of the estoppel by way of defence only and not as a cause of action, so that the

[119] *Ibid.*, at p. 512.
[120] *Ibid.*, at p. 510.
[121] [1954] N.Z.L.R. 1194.

doctrine applies only to what the American cases have referred to as the "abandonment of existing rights".

From all this it is suggested that the idea that promissory estoppel can take the place of consideration in the creation of contractual obligations and enforceable promises, which has been shown to have been accepted in some, at least, of the states of the United States, is not an idea which has met with favour in English or Commonwealth courts. Wilson J., in the *Sloan* case, flirted with the idea, and seems to have approved the statements by Denning L.J. in favour of the doctrine that promises intended to create legal relations, if acted upon, do give rise to binding obligations. But the approach of Wilson J. seems to indicate that he was thinking in terms of orthodox consideration; and since in that case the learned judge did find that there was consideration for the promise to pay "fringe" benefits, his approbation of the *High Trees* principle was obiter and ought not to be interpreted as contradicting the other authorities cited in this essay. The "new" estoppel expounded by Denning L.J. seems therefore to be very limited in scope. It does not appear to provide an alternative for consideration in cases where consideration is required at common law. Those who view with disfavour the strictness of that requirement may regret that the equitable principle encouraged to develop by the *Hughes* case and exploited by the American courts, following their own line of authorities, has not been developed still further. But the courts in England have shown that the *Hughes* principle cannot be carried too far. It may be valid in settling conflicts over property rights; it may be useful in determining disputes about the proper performance of contracts; but it cannot be taken to eliminate the need for consideration for the creation of enforceable promises and binding contractual obligations.

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## The Web of the Law

Others believe no voice t'an organ
So sweet as lawyer's in his bar-gown,
Until, with subtle cobweb-cheats,
They're catched in knotted law, like nets;
In which, when they are once imbrangled,
The more they stir, the more they're tangled;
And while their purses can dispute,
There's no end of th' immortal suit.

(Samuel Butler: Hudibras, Part II, Canto III. 1664)