THE EQUITABLE DOCTRINES OF PART PERFORMANCE AND PROPRIETARY ESTOPPEL†

BY P. A. RIDGE*

[*The equitable doctrines of part performance and proprietary estoppel can both apply to oral representations concerning land. Their operation is inconsistent as proprietary estoppel's requirements are easier to satisfy and are not subject to the Statute of Frauds. The author examines the rationales and development of the two doctrines and their remedies; and finds no satisfactory resolution of the conflict in the Australian cases. The RESTATEMENTS OF CONTRACTS are used to suggest a solution that recognises the doctrines' common rationale*]

I. *INTRODUCTION*

Oral contracts concerning land are commonplace in the twentieth century despite the Statute of Frauds' requirement that such contracts be in writing and signed by the parties.[1] Many people do not frame their personal arrangements in written contractual terms. Nonetheless they may expect that such formal arrangements will give rise to legal rights.[2] The following is common:

> A and B orally agree that in return for B caring for A and maintaining A's house and land B can live with A rent-free and will be entitled to an interest in the land on the occurrence of a specified event (generally A's death). B relies on the agreement by performing its terms, incurring related expenses and by foregoing other opportunities. B may go further and improve the property in the expectation that its enhanced value will accrue to B's benefit. The specified event occurs but when B seeks to enforce the agreement he or she is thwarted by the Statute.

Similarly, de facto spouses may not formalise their property arrangements yet one or both may act in reliance on an agreement that they will obtain an interest in the other's land. It is common in Australia for family members to contribute their assets to the building of a 'granny flat' on their children's property. The arrangement is seldom formalised in writing; indeed the drafting of legal documents may be regarded as socially unacceptable behaviour in a family.

The problem is not confined to personal relationships: A and B may be adjoining landowners or a local council and a property developer, and the interest in question an option or a right of way. The common feature of all these instances is B's reliance on an unenforceable contract concerning an interest in A's land.[3]

The equitable doctrine of part performance evolved as a response to these situations and allows specific performance of a contract of which there have been

† This paper is based on the author's LLB Honours thesis submitted in March 1986. Although it precedes *Waltons Stores (Interstate) Ltd v. Maher* (1987) 76 A.L.R. 513 it is not inconsistent with that case.

* B.A., LL.B. (Hons) (A.N.U.); B.C.L. (Oxon); Lecturer in Law Australian National University.

1 29 Car. 2, c3 (subsequently referred to as 'the Statute'). This requirement survives in all Australian jurisdictions. *E.g.* Conveyancing Act 1919 (N.S.W.) s. 54A: no action or suit may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

2 Davies, J. D., 'Informal Arrangements Affecting Land' (1979) 8 *Sydney Law Review* 578, 580–1; 'Constructive Trusts, Contract and Estoppels: Proprietary and Non-Proprietary Remedies for Informal Arrangements Affecting Land' (1980) 7 *Adelaide Law Review* 200, 217.

3 Or land which A will acquire: *Riches v. Hogben* [1986] 1 Qd. R. 315.

sufficient acts of performance, notwithstanding non-compliance with the Statute. 'Performance' is a misnomer, as B's action need not be performance of a contractual term; it may be sufficient for his conduct to be a consequence of the contract.

Nowadays another equitable doctrine — proprietary estoppel — may provide an equivalent remedy. A representation by A to B with respect to A's land is enforced when (1) there has been reliance by B on the representation with A's acquiescence or encouragement and (2) B would suffer unconscionable detriment if A were allowed to resile from his representation. Where there is an oral contract the representation can either be A's initial contractual promise or a subsequent representation (made orally or by conduct) that, notwithstanding the Statute, A will perform his contractual promise.

The areas in which the doctrines of part performance and proprietary estoppel operate overlap because B's reliance on an unenforceable oral contract concerning land can be characterised as either part performance of the contract or conduct in circumstances that would make it unconscionable for A to resile from the contract. But the result of applying either doctrine will not necessarily be the same, since the requirements of part performance are stricter than those of proprietary estoppel.

There is further inconsistency in the application of the two doctrines. While part performance attempts to reconcile enforcement of the oral contract with the policy of the Statute, by requiring cogent evidence of the contract, proprietary estoppel ignores the Statute because it enforces a representation implicit in A's contractual promise or subsequent conduct and only indirectly the contract itself.[4] Recent Australian cases confirm that both doctrines can apply to the same facts and also that proprietary estoppel is the preferred cause of action.[5] Until the inconsistent operation of the doctrines is resolved parties who could have sought specific performance of a contract using part performance, will instead plead proprietary estoppel.[6]

This article will consider the relationship between the two equitable doctrines through a discussion of their development and rationales and the remedies available in the area in which they overlap. Australian judicial responses to the problem will be examined as well as the experience of the United States.

[4] Nicholson, K. G., '*Riches v. Hogben*: Part Performance and the Doctrines of Equitable and Proprietary Estoppel' (1986) 60 *Australian Law Journal* 345, 348.

[5] *E.g.* N.S.W. Supreme Court: *Beaton v. McDivett* (16 September 1985, unreported decision of Young J.); *Lucas v. Mok* (27 July 1983, unreported decision of McLelland J.); *Sabaza Pty Ltd v. A.M.P. Society* (21 July 1981, unreported decision of McLelland J.); N.S.W. Court of Appeal: *Millett v. Regent* [1975] 1 N.S.W.L.R. 62; Queensland Supreme Court: *Riches v. Hogben* [1985] 2 Qd. R. 292 and on appeal [1986] 1 Qd. R. 315. *Cf. Thwaites v. Ryan* [1984] V.R. 65 (Victorian Court of Appeal). This article addresses only the relationship of part performance and proprietary estoppel. Similar issues need consideration with respect to the relationship of these doctrines with other equitable doctrines *e.g.* constructive and resulting trusts and see the range of remedies suggested in *Berg v. Giles* (1979) A.N.Z. Conv. R. 119.

[6] *E.g. Crabb v. Arun District Council* [1976] 1 Ch. 179. See also Atiyah, P. S., 'When is an Enforceable Agreement not a Contract? Answer: When it is an Equity' (1976) 92 *Law Quarterly Review* 174; and in reply Millett P. J., '*Crabb v. Arun District Council* — A Riposte' (1976) 92 *Law Quarterly Review* 342.

2. *THE ENFORCEMENT OF PROMISES — TWO THEORIES*

It is necessary to consider briefly two theories that describe what sort of promises are enforced by the common law as these influenced proprietary estoppel and part performance in the nineteenth century. The bargain theory requires an exchange of promises with consideration.[7] It provided the paradigm of nineteenth century contract law which was characterised by a rigid adherence to rules.[8] The reliance theory makes a promise enforceable when there has been reliance on it by the promisee to his detriment. The influence of this theory can be seen in several contexts, for example unilateral contracts, but it was also the basis of promise enforcement in situations where there was no bargain at all. The reasons why these particular promises were enforced will not be discussed here: the function of these theories or descriptions is only to explain the history and present status of part performance and proprietary estoppel.

The two theories differ in approach because the former looks primarily to the time of bargain: a promise is actionable immediately; whereas the latter determines rights and liabilities on the basis of conduct after the promise: a promise is actionable only after detrimental reliance.[9]

Reliance Theory and Bargain Theory in the Nineteenth Century

The reliance theory underlies many cases where promises were enforced in the eighteenth century and it continued to be influential in the mid-nineteenth century. For example, in *Hammersley v. de Biel*[10] it was held that if a representation was made with the intention of inducing certain conduct and was acted upon by the representee to his detriment, the Court would order that the representation be made good.

But legal, social, economic and political conditions in the nineteenth century ensured the dominance of the bargain theory[11] and it was adopted as the exclusive mode of enforcing promises. In *Jorden v. Money*[12] it was held that for a promise to be binding, a bargain with consideration was necessary. Where there was no bargain, a representation of fact would only prevent the representor from

[7] Metzger, M. B. and Phillips, M. J., 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 *Rutgers University Law Review* 472, 477.

[8] For a description of nineteenth century legal formalism see Atiyah, P. S., *The Rise and Fall of Freedom of Contract* (1979) 388, 660.

[9] Dawson, F., 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329, 342.

[10] (1845) 12 Clark & Finelly 45; 8 E. R. 1312, 1320 *per* Cottenham L. C., 1327 *per* Lyndhurst L. C. See also *Luders v. Anstey* (1799) 4 Ves. 501; 31 E. R. 263; *Crosbie v. M'Doual* (1806) 13 Ves. 148; 33 E. R. 251; *Bold v. Hutchinson* (1855) 5 De G. M. & G. 558; 43 E. R. 986 (cited in Atiyah, P. S., *The Rise and Fall of Freedom of Contract* (1979) 458 n. 5).

[11] The reasons for this are well documented; see for example Atiyah, P. S., *The Rise and Fall of Freedom of Contract* (1979) Chapter 14 and Fifoot, C. H. S., *History and Sources of the Common Law Tort and Contract* (1949) 398-9.

[12] (1854) 5 H. L. C. 185; 10 E. R. 868.

asserting the facts to be other than as represented[13] but it could not found a cause of action.[14]

Despite this, the reliance theory was again used to enforce a promise in *Loffus v. Maw*[15] where A was an invalid who promised to leave B, his young widowed niece, his house when he died. But in *Maddison v. Alderson*[16] the bargain theory was reasserted. The facts in that case were very similar to those in *Loffus v. Maw*: the plaintiff was a housekeeper who had served her master without wages for many years in reliance on his promise to leave her an interest in property to which he was entitled. His will to that effect was found to be invalid. The plaintiff relied on the 'doctrine of representation' citing *Hammersley v. de Biel* and *Loffus v. Maw*. Lord Selborne in the leading judgement rejected this argument because the facts did not show a bargain theory contract.[17]

Survival of the Reliance Theory: Proprietary Estoppel

Proprietary estoppel was a specific area of reliance theory promise enforcement which existed as early as 1740[18] and which survived *Maddison v. Alderson*. Lord Kingsdown's statement of principle in *Ramsden v. Dyson*[19] is authoritative:

> 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.[20]

Thus a contractual promise or a representation (made orally or by conduct) with respect to A's land is relied upon by B to his detriment. Because A has encouraged B's reliance or has not taken steps to prevent it, it would be fraudulent for A not to give effect to the promise or representation.[21]

The principle in *Ramsden v. Dyson* (now known as proprietary estoppel) was applied by the Privy Council in the case of *Plimmer v. Wellington Corporation*[22]

13 As in common law estoppel by representation: *e.g. Grundt v. Great Boulder Gold Mines Pty Ltd* (1937) 59 C. L. R. 641, 674.

14 Professor Atiyah considers that *Jorden v. Money* has been wrongly interpreted as depending only on estoppel whereas there was also a contract made unenforceable by the Statute. The issue was whether the plaintiff 'could evade the Statute of Frauds by calling his cause of action estoppel instead of contract': Atiyah, P. S., *Consideration in Contracts: A Fundamental Restatement* (1971) 54-5. If this is correct, the House of Lords' rejection of the reliance theory in favour of the bargain theory contract is clearer still. However, the more accepted view is that there was insufficient evidence to prove a contract: see Dawson, F., 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329, 337.

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

16 (1883) 8 App. Cas. 467.

17 *Ibid.* 472, 473. Plaintiff's counsel in *Jorden v. Money* (Mr Roundell Palmer) later became the Earl of Selborne L.C. Lord Selborne explained the arrangement in *Hammersley v. de Biel* as a bargain theory contract which complied with the Statute and therefore *Jorden v. Money* and *Hammersley v. de Biel* were consistent and *Loffus v. Maw* was wrongly decided. But compare the clear endorsement of the reliance theory given in *Hammersley v. de Biel* (1845) 12 Clark & Finelly 45; 8 E.R. 1312, 1320 *per* Cottenham L.C.; 1327 *per* Lyndhurst L.C.; 1331 *per* Lord Campbell.

18 *East India Co. v. Vincent* (1740) 2 Atk. 83; 26 E.R. 451.

19 (1866) L.R. 1 H.L. 129.

20 *Ibid.* 170. (Subsequently referred to as 'the principle in *Ramsden v. Dyson*').

21 *Jackson v. Cator* (1800) 5 Ves. Jun. 688; 31 E.R. 806; *Dann v. Spurrier* (1802) 7 Ves. Jun. 232, 235; 32 E.R. 94, 95.

22 (1884) 9 App. Cas. 699.

only a year after *Maddison v. Alderson* was reported. But its scope was limited by the influence of bargain theory formalism. Mr Justice Fry in *Willmott v. Barber*[23] laid down five requirements for the doctrine to operate. Because on the facts A stood by while B acted to his detriment on a mistaken belief as to his legal rights, Fry J. formulated his requirements in terms of mistake. Thus A must know of B's mistake and of his own legal rights. Subsequent judges applied these requirements to all proprietary estoppel cases with the result that if, for example, B was not mistaken as to his rights but reasonably believed that A's inconsistent rights would not be exercised against him, the doctrine could not operate. There were also attempts to explain proprietary estoppel cases in bargain theory language by holding that the acts of reliance supplied valuable consideration or that *Ramsden v. Dyson* only concerned the application of part performance.[24] This contributed to the gradual decline in the doctrine's application.

Rationale for the Modern Jurisdiction: Reliance Theory's Influence in the Twentieth Century

In 1956 in the New Zealand case of *Thomas v. Thomas*,[25] the *Ramsden v. Dyson* principle was applied to enforce an imperfect gift of land when detriment was incurred by the donee in reliance on the gift with the donor's acquiescence. *Ramsden v. Dyson*, *Dillwyn v. Llewellyn*[26] and *Plimmer v. Wellington Corp* were cited as authorities. This development was followed in England[27] and then in Australia.[28] The rationale for the revived jurisdiction was seen as the prevention of unconscionable behaviour by the representor.[29] By 1976 this rationale was explained in reliance theory language in *Crabb v. Arun District Council*:[30]

> The fraud, if it be such, arises after the event, when the defendant seeks by relying on his right to defeat the expectation which he by his conduct encouraged the plaintiff to have.[31]

In that case a property developer negotiated with a local council for a right of way over their land. With the council's knowledge he subdivided his property so that a part of it would be landlocked if the right of way were not given. As the council had encouraged his actions it would have been unconscionable for them to then refuse to grant the right of way.

[23] (1880) 15 Ch. D. 96, 105.

[24] In *Dillwyn v. Llewellyn* (1862) 4 De G.F. & J. 517, 522; 45 E.R. 1285, 1287 conduct in reliance on an imperfect gift of land was held to supply valuable consideration. In *Ariff v. Jadunath Majumdar* (1931) 58 L.R.I.A. 91 the Privy Council explain Lord Kingsdown's judgement in *Ramsden v. Dyson* as dealing only with the doctrine of part performance, and similarly in *Canadian Pacific Railway Co. v. The King* [1931] A.C. 414, 428 they explain *Plimmer v. Wellington Corp* as based on an inferred contract.

[25] [1956] N.Z.L.R. 785.

[26] *Supra* n. 24.

[27] *E.g. Armstrong v. Sheppard & Short Ltd* [1959] 2 Q.B. 384, *Chalmers v. Pardoe* [1963] 1 W.L.R. 677, *Inwards v. Baker* [1965] 2 Q.B. 29, *E.R. Ives Investment Ltd v. High* [1967] 2 Q.B. 379.

[28] *E.g. Jackson v. Crosby (No. 2)* (1979) 21 S.A.S.R. 280, *Morris v. Morris* [1982] 1 N.S.W.L.R. 61.

[29] *Ward v. Kirkland* [1967] Ch. 194, 235 *per* Ungoed-Thomas J.

[30] [1976] 1 Ch. 179.

[31] *Ibid.* 195 *per* Scarman L.J.

The rejection of formalism as embodied in the *Willmott v. Barber* requirements soon followed. Although they were perfunctorily considered in *Crabb v. Arun District Council*,[32] in a subsequent case the 'real test' was perceived to be whether,

> it would be dishonest or unconscionable for . . . the person having the right sought to be enforced, to continue to seek to enforce it.[33]

This allows a more subjective, discretionary enquiry in which A's knowledge and encouragement or acquiescence, B's detrimental reliance and any special circumstances are considered but are not conclusive.[34] So, for example, on the hypothetical facts given in the introduction, the fact that B spent money on A's property in the expectation that it would accrue to his benefit, will vary in significance depending on whether A actively encouraged B's actions, simply refrained from intervention or was unaware of the expenditure. The state Supreme Courts in Australia have generally followed these trends[35] despite the occasional citation of *Willmott v. Barber*.[36]

3. *PART PERFORMANCE*

Proviso

The doctrine of part performance is nearly as old as the Statute of Frauds itself.[37] It is not possible to reconcile all the cases over such a long period and the doctrine is better understood by a different means. There are two rationales for part performance that can be discerned in the case law and these reflect the bargain and reliance theories of promise enforcement. They are not articulated and are often blurred together in the courts' reasoning. Nevertheless the tension between them explains the different emphases placed on the doctrine's requirements. Both rationales give the prevention of fraud as the basis of the doctrine, but 'fraud' is defined differently according to which theory of promise enforce-

[32] *Ibid.* And also in *Coombes v. Smith* [1986] 1 W.L.R. 808 but *cf. In re Basham, dec'd* [1986] 1 W.L.R. 1498.

[33] *Shaw v. Applegate* [1977] 1 W.L.R. 970, 978 *per* Buckley L.J. And see also *Taylor Fashions v. Liverpool Victoria Trustees Co.* [1982] Q.B. 133, 152, 154 *per* Oliver J., endorsed in *Habib Bank Ltd v. Habib Bank AG Zurich* [1981] 1 W.L.R. 1265.

[34] *E.g.* in *Greasley v. Cooke* it was held unnecessary to prove *any* detriment if in the circumstances it would be unconscionable for the representor to go back on his promise. Similarly, the burden of proof was relaxed: [1980] 1 W.L.R. 1306, 1311 *per* Lord Denning M.R. But see *Western Fish Products Ltd v. Penwith D.C.* [1981] 2 All E.R. 204, 217 where the Court of Appeal did require detriment. It may be argued therefore that modern proprietary estoppel does not illustrate the reliance theory but instead is based on a notion of unconscionability. However detrimental reliance is still the central factor justifying relief. A quite different analysis of at least part of proprietary estoppel based on the principle of unjust enrichment or restitution is put forward by Professor Birks. He argues that some cases can be explained on the ground of restitution known as 'free acceptance'. If A with an opportunity to reject, accepts or acquiesces in B's non-gratuitous conduct with respect to A's land and this results in a benefit to A he must restore the benefit or its equivalent to B. There is a residue of cases which do not fit this analysis and Professor Birks suggests they illustrate promissory estoppel (and therefore the reliance theory): Birks, P., *An Introduction to the Law of Restitution* (1985) 290-2.

[35] *E.g.* N.S.W. Supreme Court *Morris v. Morris* [1982] 1 N.S.W.L.R. 61; *Vinden v. Vinden* [1982] 1 N.S.W.L.R. 618. See also *Cameron v. Murdoch* [1983] W.A.R. 321, 351 (approving *Taylor Fashions v. Liverpool Victoria Trustees Co.).*

[36] *E.g. Crompton v. Wheat* (1983) 71 F.L.R. 346; *Dewhirst v. Edwards* [1983] 1 N.S.W.L.R. 34.

[37] The Statute was passed in 1677; an early part performance authority is *Butcher v. Stapeley* (1685) 1 Vern. 363; 23 E.R. 524.

ment is preferred, and this in turn determines the requisite nature of the acts of part performance.

Reliance theory rationale

Before *Maddison v. Alderson* the fraud was often described in terms identical to the *Ramsden v. Dyson* principle:

> when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed, the person contracting with him to act, and expend his money.[38]

The 'fraud' is thus found in one party's conduct in allowing or encouraging the other to act to his detriment on the assumption that the contract will be performed. This is similar to the modern doctrine of proprietary estoppel and illustrates the reliance theory.[39] There is implicit in A's conduct a representation that he will perform his side of the bargain. B need not be mistaken as to the Statute's requirements but he relies on A's lack of objection to his acts of part performance as being a representation that the contract will be performed nonetheless. B's reliance on the representation by part performance makes the representation actionable.[40]

The reliance theory rationale therefore emphasizes acts of part performance which would make it fraudulent for the other party to escape from the contract.

Bargain theory rationale

Even in cases influenced by the reliance theory rationale, cogent evidence of the contract was always required. With the dominance of the bargain theory in the mid-nineteenth century, the requirement that the contract be evidenced became itself a rationale. Given the rejection of the reliance theory in *Jorden v. Money* and *Maddison v. Alderson* the representation implicit in the subsequent conduct could not be enforced. The only potentially enforceable promise was the contract itself, for which consideration had been given but which did not comply with the Statute. It was reasoned that if acts done in performance of the contract pointed irresistibly to its existence, oral testimony of its terms would be unnecessary and the Statute's policy of preventing perjury would not be thwarted by enforcing the contract. On this view the 'fraud' was in pleading the Statute to avoid a contract which had been sufficiently proved by the acts of part performance.

[38] *Caton v. Caton* (1866) L.R. 1 Ch. 137, 148. Lord Kingsdown in *Ramsden v. Dyson supra* uses almost precisely the same language despite there being no bargain theory contract.

[39] See *Monarco v. Lo Greco* 35 Cal. 2d 621 (1950); 220 P. 2d 737 (Cal. 1950) where the Californian Supreme Court held that in both estoppel and part performance cases an implicit promise that the contract will be performed, on which the other party relies in changing his position, is enforceable.

[40] The fact that B may not be mistaken as to the legal enforceability of the contract under the Statute was seen by L.A. Sheridan in 1957 as indicating that the doctrine's basis was the *Hammersley v. de Biel* reliance theory rationale. It went further than proprietary estoppel because *Willmott v. Barber* required the relying party to be mistaken as to his legal rights: Sheridan, L.A., *Fraud in Equity* (1957) 154-5. However modern proprietary estoppel is not limited by *Willmott v. Barber* and the two doctrines' rationales are identical.

Thus the bargain theory rationale emphasizes acts of part performance which are highly probative of the contract.[41]

Lord Selborne's judgement in *Maddison v. Alderson* is the classic statement of this bargain theory rationale.[42] He begins with an apparent endorsement of the reliance theory: the doctrine operates on the subsequent reliance, not on the unenforceable contract.[43] However the requisite nature of the reliance suggests that Lord Selborne really supports the bargain theory rationale because the acts in performance of the contract must be 'unequivocally and in their own nature, referable to some such agreement as that alleged'.[44] That is, only acts of reliance which evidence the contract will be relevant. They must *prove* the contract because the court enforces the contract itself, not the subsequent equities.[45] This conclusion is supported by Lord Selborne's rejection of the reliance theory as used in *Hammersley v. de Biel* and *Loffus v. Maw* and by his decision on the facts that even if there had been a contract the plaintiff's reliance was not sufficient evidence of it because her conduct could be explained on other grounds.[46]

Maddison v. Alderson did not simplify the doctrine of part performance because elements of the two rationales were mingled in Lord Selborne's judgement. Nonetheless the case made it clear that reliance on the contract was only relevant for its evidential value. Subsequent cases then vacillated as to how probative the reliance must be: should it be explicable by reference only to the alleged contract and no other[47] or is it sufficient that it suggests there is *a* contract, the details of which can be clarified by parol evidence?[48]

The bargain theory rationale in Australia

Maddison v. Alderson was followed by the High Court in *McBride v. Sandland*[49] and *Cooney v. Burns*.[50] In *McBride v. Sandland*, Isaacs and Rich JJ. refer to 'fraud' as the basis of the jurisdiction[51] but this is bargain theory fraud because the seven requirements that they list for the doctrine to operate all concern the probative value of the conduct in reliance on the contract.[52] So, for example, the

41 *E.g.* taking possession of the land. One possible explanation is that the framers of the Statute never intended it to apply where there had been part performance equivalent to the old livery of seisin of an oral contract (the common law method of conveying land). See Costigan, G.P., 'The Date and Authorship of the Statute of Frauds' (1913) 26 *Harvard Law Review* 329, 343-4. Another explanation was that unless a person in possession were allowed to prove the contract he would be liable to an action for trespass by the legal owner: *Britain v. Rossiter* (1879) 11 Q.B.D. 123, 131 *per* Cotton L.J.

42 (1883) 8 App. Cas. 467. See also *Dale v. Hamilton* (1846) 5 Hare 369; 67 E.R. 955 and *Ungley v. Ungley* (1877) 5 Ch. D. 887.

43 '[T]he defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself': (1883) 8 App. Cas. 467, 475.

44 *Ibid.* 479. 'So long as the connection of those res gestae with the alleged contract does not depend upon mere parol testimony but is reasonably to be inferred from the res gestae themselves, justice seems to require some such limitation of the scope of the statute . . .' *Ibid.* 476.

45 See Corbin, A.L., *Contracts* (1950) sections 420-3.

46 (1883) 8 App. Cas. 467, 480.

47 *Chaproniere v. Lambert* [1917] 2 Ch. 356.

48 See Sheridan *op. cit.* 156.

49 (1918) 25 C.L.R. 69.

50 (1922) 30 C.L.R. 216.

51 (1918) 25 C.L.R. 69, 87.

52 *Ibid.* 78-9.

acts of the relying party must be such as could be done with no other view than to perform the contract.[53] The plaintiff in that case lost partly because her actions by themselves were not explicable only by reference to the (alleged) contract. In *Cooney v. Burns*, Isaacs J. again rejected the reliance theory rationale and stressed the evidential requirements of part performance: detrimental reliance was only relevant if it evidenced the contract.[54] Despite *McBride v. Sandland* and *Cooney v. Burns* a few Australian judges still implied approval of the reliance theory rationale by giving a wider, less literal interpretation of Lord Selborne's 'unequivocally referable' test in *Maddison v. Alderson*.[55]

The modern doctrine

The bargain theory rationale of part performance has recently been challenged and rejected in favour of the reliance theory rationale. This development reflects the reassertion of the reliance theory of promise enforcement in proprietary estoppel. In *Steadman v. Steadman*[56] the House of Lords re-examined the basis and requirements of part performance. Their enquiry was prompted by a relaxation in *Kingswood Estate v. Anderson* of the 'unequivocally referable' test.[57] The issues in *Steadman v. Steadman* were (1) whether payment of money could be sufficient part performance and (2) the necessary probative nature of the part performance. Their Lordships were not unanimous on any point; the case changed English law only to the extent that payment of money can be sufficient part performance in some circumstances and the standard by which the conduct in reliance must prove the contract is relaxed to the balance of probabilities.[58] The judgments of Lord Reid and Lord Simon are interesting for their recognition and analysis of the competing rationales of part performance.[59] Lord Reid rejected the bargain theory rationale as illogical[60] and preferred the reliance theory rationale which he stated in *Ramsden v. Dyson* terms.[61] Thus his enquiry was directed to whether there was detrimental reliance rather than to whether the acts unequivocally proved the contract. Consequently, the standard of proof of the contract need only be the balance of probabilities and all the circumstances can be considered to see whether it is more probable than not that the acts were done in reliance on a contract.[62]

53 *Ibid.* 79.
54 (1922) 30 C.L.R. 216, 230.
55 *E.g. Francis v. Francis* [1952] V.L.R. 321, 334 *per* Sholl J. See also Knox C.J.'s dissenting judgement in *Cooney v. Burns* (1922) 30 C.L.R. 216, 226.
56 [1976] A.C. 536.
57 [1962] 3 All E.R. 593, 604 *per* Upjohn L.J. (followed by *Wakeham v. Mackenzie* [1968] 2 All E.R. 783). Lord Upjohn rejected the strict test in *Chaproniere v. Lambert* that the acts must refer only to the alleged contract and to no other title. Instead the acts must be 'such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.'
58 Thompson, M.P., 'The Role of Evidence in Part Performance' (1979) 43 *Conv.* 402.
59 Lord Dilhorne's and Lord Salmon's judgments are based on the bargain theory rationale and the tests given in *Maddison v. Alderson*. Lord Morris (dissenting) followed *Maddison v. Alderson* and held that the acts of part performance must point to a contract concerning land.
60 [1976] A.C. 536, 542.
61 *Ibid.* 540.
62 *Ibid.* 541-2.

Lord Simon also discussed the competing rationales of part performance and he thought that they could be reconciled by giving more weight to the reliance theory rationale. This would be done by relaxing the doctrine's evidential requirements.[63]

The issues raised by *Steadman v. Steadman* should be addressed by the High Court.[64] Although some state courts have cautiously approved the decision,[65] others have indicated its inconsistency with established authority.[66]

4. *REMEDY IN PART PERFORMANCE AND PROPRIETARY ESTOPPEL*

Before considering the remedies given by part performance and proprietary estoppel in detail, it is helpful to describe what types of remedy could be given when an oral contract has been relied upon.

On the hypothetical facts given in the introduction, B has three interests which the remedy could seek to satisfy.[67] B expects to receive A's land when A dies; an expectation remedy would match A's and B's expectations as at the contract date by ordering, for example, specific performance of the contract. Alternatively a reliance remedy could be given which would compensate B for the total cost of his reliance on the agreement. This would include costs incurred in moving into A's house and in improving the property. A charge over A's land could be ordered to secure the amount of B's reliance. Finally a restitution remedy is possible. This would only compensate B for reliance by which A benefited; so for example, the cost of B's improvements would only be recoverable to the extent that they enhanced the value of A's land, but B could claim on a quantum meruit basis for the cost of his care of A. The reliance interest will also cover such a claim.

Remedy in part performance

Part performance protects the expectation interest by awarding specific performance of the contract and is only available if restitution is inadequate and there are no other bars to specific performance. The actual losses suffered in reliance will generally be subsumed in the expectation interest.[68] If the doctrine's requirements are not met a quantum meruit claim for services given or a claim for repayment of money spent under the contract are clearly permissible and such restitutionary remedies although not often adverted to in the case law should not

[63] *Ibid.* 562.

[64] The High Court found it unnecessary to consider *Steadman v. Steadman* in *Regent v. Millett* (1976) 50 A.L.J.R. 799.

[65] *E.g. Pattison v. Mann* (1975) 13 S.A.S.R. 34, 40 *per* Bray C.J.; 46 *per* Zelling J.

[66] The Victorian, New South Wales, Queensland and Western Australian Supreme Courts and the New South Wales Court of Appeal have all discussed *Steadman v. Steadman* without indicating outright rejection but will not apply the case until the High Court has accepted it. *Thwaites v. Ryan* [1984] V.R. 65, 78; *Ogilvie v. Ryan* [1976] 2 N.S.W.L.R. 504, 521; *Riches v. Hogben* [1985] 2 Qd. R. 292 and on appeal [1986] 1 Qd. R. 315; *Trifid Pty Ltd v. Ratto* [1985] W.A.R. 19, 37; *Millett v. Regent* [1975] 1 N.S.W.L.R. 62, 72.

[67] Fuller, L.L., and Perdue, W.R., 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 352, 387.

[68] See 'Once More Into the Breach: Promissory Estoppel and Traditional Damage Doctrine' (1970) 37 *University of Chicago Law Review* 559, 566.

be overlooked.[69] Thus in *Deglman v. Guaranty Trust Co. of Canada*[70] the Supreme Court of Canada held that even though the evidential requirements of part performance were not met on the facts, the plaintiff was entitled to recover the value of the services he performed for his elderly aunt because she had received the benefit of his performance of the contract.[71]

Remedy in proprietary estoppel

The proprietary estoppel remedy is more flexible. The court has a discretion to satisfy the expectation, reliance or restitution interest. Even in the nineteenth century the doctrine provided a remedy appropriate to the individual case. Thus it was said that:

> the Court must look at the circumstances in each case to decide in what way the equity can be satisfied.[72]

The modern doctrine grants the appropriate remedy to remove any fraud caused by the detrimental reliance.[73] This may mean satisfying the expectation interest but a lesser remedy is also available. In granting a remedy the parties' expectations are relevant but not conclusive; other considerations will be the knowledge of both parties, the extent of reliance, the encouragement given and whether subsequent events were forseeable.

In *Morris v. Morris*,[74] a 'granny flat' case, the plaintiff's expectation that he could live with his son and daughter-in-law was defeated when their marriage broke down, but his reliance interest was secured by an equitable charge over their property for the value of his contribution to the building of extensions. On the other hand, satisfaction of the expectation interest may not be adequate: in *Crabb v. Arun District Council*,[75] a case involving negotiations to buy a right of way over a local council's land, the council was ordered to grant the right of way without payment because of the long sterilisation of the plaintiff's land while the right of way had been witheld. Satisfying the expectation interest only would not have compensated him for his reliance costs.

What remedy will proprietary estoppel give in an oral contract case to which the doctrine of part performance may also be applied? The general test often cited

[69] Finn, P.D., (ed.) *Essays on Contract* (1987) 'Equity and Contract' text accompanying footnote 232 where the authorities cited include *Deglman v. Guaranty Trust Co. of Canada* [1954] 3 D.L.R. 785 and Goff, R., and Jones, G., *The Law of Restitution* (2nd ed. 1978). See also *Berg v. Giles* (1979) A.N.Z. Conv. R. 119, 120-2.

[70] *Deglman v. Guaranty Trust Co. of Canada* [1954] 3 D.L.R. 785

[71] *Ibid.* 795.

[72] *Plimmer v. Wellington Corp.* (1883) 9 App. Cas. 699, 714. The Privy Council cited *Duke of Beaufort v. Patrick* (1853) 17 Beav. 60; 51 E.R. 954, *Dillwyn v. Llewellyn* (1862) 4 De G.F. & J. 517; 45 E.R. 1285 and *Unity Joint Stock Banking Assoc. v. King* (1858) 25 Beav. 72; 53 E.R. 563 in support. In *Dillwyn v. Llewellyn* (imperfect gift of land by father which son relies upon by taking possession and building a house with father's encouragement) the equity could only be satisfied by granting a fee simple. In *Unity Joint Stock Banking Assoc. v. King* a restitution remedy was more appropriate as the father had not intended to make over an interest in his land to his sons. Thus a lien and charge over the land for the amount expended by the sons was ordered. In other cases the remedy amounts to an estoppel preventing the legal owner from asserting his rights contrary to the mistaken belief that he did not correct. *e.g. Duke of Beaufort v. Patrick* (1853) 17 Beav. 60; 51 E.R. 954 (plaintiff entitled to the land on which canal constructed if defendant given its value); *Willmott v. Barber* (1880) 15 Ch. D. 96.

[73] *Morris v. Morris* [1982] 1 N.S.W.L.R. 61, 64.

[74] *Ibid.*

[75] [1976] 1 Ch. 179.

is that given by Scarman L.J. in *Crabb v. Arun District Council* that the court must find 'the minimum equity to do justice.'[76]

But this does not mean granting a restitution remedy.[77] Depending on the extent of reliance the English courts tend to award an expectation remedy if it is possible in the circumstances.[78] Similarly, some Australian judges prefer to satisfy the expectation interest holding that the remedy should reflect the parties' common intention if possible.[79] So if the interest in dispute conforms with a recognised interest in land it may be granted; otherwise more appropriate relief will be given, but still 'with the object of matching the benefits which have been represented or promised.'[80]

Because the agreement concerns land and the reliance by B nearly always relates to the land, a restitution remedy will generally be inadequate to remove A's unconscionability. However, monetary awards expressed as a lien over the property have been made[81] and the availability of an alternative quasi-contractual claim noted.[82]

Nonetheless, where the parties conclude a contract the court is likely to award a remedy which matches their contractual expectations[83] subject only to variations such as in *Crabb v. Arun District Council* where the plaintiff incurred extra expense in reliance on the agreement. The effect of awarding an expectation remedy is, of course, to enforce the contract and thus proprietary estoppel's remedy matches that of part performance. The advantage of proprietary estoppel is that a more appropriate remedy is possible, as in *Morris v. Morris*, if the parties' contractual expectations cannot now be met.

5. *JUDICIAL RESPONSES TO THE PROBLEM IN AUSTRALIA*

Recent Australian cases illustrate divergent approaches to the problem of the inconsistent operation of part performance and proprietary estoppel but offer no acceptable solution. Some judges would exclude proprietary estoppel altogether from the domain of oral contracts. Mr Justice Fullagar in *Thwaites v. Ryan*[84] refused to go on to consider proprietary estoppel after finding insufficient part performance of a contract.[85] And Hutley J.A. in *Millett v. Regent*[86] said that the

[76] *Ibid.* 198.

[77] *Pascoe v. Turner* [1979] 2 All E.R. 945, 950 *per* Cumming-Bruce L.J. For a discussion of remedy within the context of the law of restitution and a general criticism of remedial flexibility and judicial discretion see Birks, P., *An Introduction to the Law of Restitution* (1985) 290-3.

[78] *E.g. Pascoe v. Turner* [1979] 2 All E.R. 945; *Greasley v. Cooke* [1980] 1 W.L.R. 1306; *In re Sharpe* [1980] 1 W.L.R. 219; *Salvation Army Ltd v. West Yorkshire M.C.C.* (1981) 41 P. & C.R. 179.

[79] *E.g. Jackson v. Crosby* (1979) 21 S.A.S.R. 280, 289.

[80] *Wood v. Browne* [1984] 2 Qd. R. 593, 607 *per* Macrossan J.

[81] *E.g. Unity Joint Stock Banking Assoc. v. King* (1858) 25 Beav. 72; 53 E.R. 563 *supra* n. 72. A monetary award not secured by the land was given in *Raffaele v. Raffaele* [1962] W.A.R. 238. Heydon, J.D., Gummow, W.M.C. and Austin, R.P., *Cases and Materials on Equity and Trusts* (2nd ed. 1982) 1820.

[82] *Berg v. Giles* (1979) A.N.Z. Conv. R. 119.

[83] For an express judicial statement to this effect, see *Costello v. McGufficke* (N.S.W. Supreme Court, 21 July 1987, unreported decision of Cohen J.) 5.

[84] [1984] V.R. 65.

[85] *Ibid.* 95.

[86] [1975] 1 N.S.W.L.R. 62.

two doctrines should not be pleaded together as to do so would abrogate part performance.[87]

Such an exclusion of proprietary estoppel leads to an anomaly which does not accord with justice. If the court finds that dealings between A and B did amount to a contract, albeit oral, the doctrine of part performance must be considered. B's detrimental reliance may then fail to satisfy that doctrine's evidential requirements. But if the conduct of A and B does not show that a contract was made, the same detrimental reliance by B has much more weight in determining whether proprietary estoppel can enforce the representation. Thus, B's chances of success are greater if the court does not find a contract. This can only lead to further distortion of the law as the argument must then focus upon whether or not there was a contract, rather than on the substantive question of whether, given the parties' conduct, A should be allowed to resile from his contractual promise or representation. The problem is exacerbated if Fullagar J.'s strict formulation of part performance is accepted.[88]

By contrast Young J. in *Beaton v. McDivett*[89] partly incorporates proprietary estoppel into contract law by holding that a contract can be created by either (1) an exchange of promises with consideration or (2) a representation which is relied upon. Where an oral contract of either sort has been relied upon then both part performance and proprietary estoppel are potentially applicable.[90] Whether modern Australian contract law recognises a contract without an exchange of promises or consideration is debatable.[91]

But in allowing both doctrines, despite their inconsistencies, to apply to the same facts, Young J.'s judgment reflects the most common judicial approach which is to view the two doctrines as equally acceptable alternatives in oral contract cases.[92] Consequently, the need to resolve the contradictory rationales of part performance is minimised because proprietary estoppel is perceived to ameliorate any harsh consequences of the bargain theory rationale of part performance. There is a suggestion in some judgements that part performance must be considered first because it allows enforcement of the *contract*.[93] Why this is so is not obvious. Proprietary estoppel's remedy compares favourably with specific performance.

[87] *Ibid.* 66.

[88] The acts must be considered first without reference to surrounding circumstances to see whether they imply on the balance of probabilities *any* contract before the alleged contract can be proved by other evidence. Finally the acts must not be inconsistent with that contract: [1984] V.R. 65, 77 *cf.* 73 *per* Glass J.A. and *Steadman v. Steadman* [1976] A.C. 536, 556. And see *Riley v. Osborne* [1986] V.R. 193, 198 *per* Kaye J. and *Butler v. Craine* [1986] V.R. 274, 282 *per* Marks J.

[89] N.S.W. Supreme Court, 16 September 1985, unreported decision. For other examples of this approach see *supra* n. 24; *Raffaele v. Raffaele* [1962] W.A.R. 29; *Riches v. Hogben* [1986] 1 Qd. R. 315, 326 *per* Macrossan J.

[90] See Sutton, V.C.T., 'Promises and consideration' Finn, P.D. (ed) *Essays on Contract* (1987) Ch. 2.

[91] Sutton *op. cit*; Atiyah, P.S., *Consideration in Contracts: A Fundamental Restatement* (1971) 58.

[92] *E.g. Riches v. Hogben* [1985] 2 Qd. R. 292 and [1986] 1 Qd. R. 315 esp. 341 *per* Williams J.; *Jackson v. Crosby* (1979) 21 S.A.S.R. 280; *Sabaza Pty Ltd v. A.M.P. Society* (N.S.W. Supreme Court, 21 July 1981, unreported decision of McLelland J.); *Lucas v. Mok* (N.S.W. Supreme Court, 27 July 1983, unreported decision of McLelland J.); *Riley v. Osborne* [1986] V.R. 193.

[93] *E.g. Riches v. Hogben* [1985] 2 Qd. R. 292, 301; *Beaton v. McDivett* (N.S.W. Supreme Court, 16 September 1985, unreported decision of Young J.) 14-5, 38-9.

Given that the judicial approaches to the problem can be criticised, it is appropriate to consider the directions taken elsewhere. The United States offers the most instructive example because, although American courts began by endorsing *Maddison v. Alderson*, they have advanced much further in addressing the issues raised by the re-emergence of the reliance theory in proprietary estoppel and in *Steadman v. Steadman*. Because the law varies over the fifty-one jurisdictions of the United States the following discussion is based on the First and Second RESTATEMENTS OF CONTRACTS.[94]

6. *THE AMERICAN DOCTRINE OF PART PERFORMANCE*

The early history of part performance in the United States parallels that of England and Australia. The leading American authority, *Burns v. McCormick*,[95] decided in the same year as *Cooney v. Burns*, also favoured the bargain theory rationale and followed *Maddison v. Alderson*. The acts of part performance must be highly probative of the contract. Thus, the type of act that can constitute part performance is restricted. Section 197 of the first RESTATEMENT OF CONTRACTS illustrates this by requiring either valuable improvements to the land or the taking of possession coupled with payment of part or all of the purchase price. No other act would constitute sufficient part performance.[96]

However, even while the RESTATEMENT was being published a number of cases described the doctrine's true rationale as estoppel, that is, reliance theory fraud;[97] the primary role of the part performance being not to prove the contract but to show reliance with the other party's acquiescence or encouragement. The probative value of the acts 'may have been a justification of the doctrine, but . . . was not the basis thereof'.[98]

This development was endorsed by the RESTATEMENT (SECOND) OF CONTRACTS published in 1979 in which the doctrine was completely reformulated in reliance theory terms in section 129.[99] Now it is not necessary for the court to find acts 'unequivocally referable' to the contract or to ignore parol

[94] *RESTATEMENT (FIRST) OF CONTRACTS (1932); RESTATEMENT (SECOND) OF CONTRACTS* (1979), published by the American Law Institute. These statements of the 'principles and rules of the common law' although not binding, are considered extremely persuasive nationwide because of the distinguished lawyers involved in their formulation. They 'may be regarded both as the product of expert opinion and as the expression of the law by the legal profession': RESTATEMENT (FIRST) OF CONTRACTS xi, xii.

[95] (1922) 135 N.E. 273, 274 *per* Cardozo J.

[96] Section 197 Contracts Specifically Enforceable Because Of Part Performance: Where, acting under an oral contract for the transfer of an interest in land, the purchaser with the assent of the vendor (a) makes valuable improvements on the land, or (b) takes possession thereof or retains a possession thereof existing at the time of the bargain, and also pays a portion or all of the purchase price, the purchaser or the vendor may specifically enforce the contract: *RESTATEMENT (FIRST) OF CONTRACTS* (1932).

[97] *E.g. Vogel v. Shaw* (1930) 42 Wyo. 333, 294 P. 687, 75 A.L.R. 639; *Walter v. Hoffman* (1935) 267 N.Y. 365, 196 N.E. 291, 101 A.L.R. 919; *Wolfe v. Wallingford Bank* (1938) 124 Conn. 507, 1 A. (2d) 146, 117 A.L.R. 932.

[98] 'Comment Note to *Vogel v. Shaw*' (1930) 75 A.L.R. 650.

[99] Section 129. Action in Reliance; Specific Performance: A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement.

evidence of the contract. Instead all the circumstances can be considered to determine whether the acts were done in reliance on a contract with the continuing assent of the other party.[1] Possession, improvements and payment of money are not essential although they will show reliance, making it unjust not to award specific performance. Furthermore, if the other party admits the contract the only enquiry will be whether there was reasonable reliance.[2] The contract is specifically performed because of the subsequent reliance, not because the acts unequivocally prove the existence of a contract.[3] Section 129 embodies the tentative developments in the English doctrine as expressed by Lord Reid in *Steadman v. Steadman* and provides a useful example for the High Court to consider.

Promissory estoppel and the Statute of Frauds

There is no doctrine of proprietary estoppel as such in the United States: it is encompassed in the wider doctrine of promissory estoppel which is described in section 90 of the first and second RESTATEMENTS.[4] Promissory estoppel embodies the reliance theory of promise enforcement as applied in eighteenth and nineteenth century English cases before that theory was confined to promises relating to land. A promise is enforced when it induces reasonable reliance to the promisee's detriment.

It was not made clear in the first RESTATEMENT OF CONTRACTS whether the doctrine of promissory estoppel could apply to oral contracts concerning land which the Statute made unenforceable, but which had been relied upon by one party. At first, courts willing to apply promissory estoppel to such facts required an express promise by A either to reduce the contract to writing or that the Statute would not be pleaded.[5] The court would then apply promissory estoppel as defined by section 90 to this ancillary promise and, in so doing, indirectly enforce the contract without having to confront the Statute.

> 'Former section 197 has been entirely rewritten to accord with the overwhelming weight of American authority that the 'part performance doctrine' rests on 'estoppel' and 'virtual fraud' rather than on ideas of livery of seisin or on evidentiary considerations.'
>
> *RESTATEMENT (SECOND) OF CONTRACTS* (1979) Reporter's Note to section 129, p. 326.

1 'The evidentiary element can be satisfied by painstaking examination of the evidence and realistic appraisal of the probabilities on the part of the trier of fact . . .': *RESTATEMENT (SECOND) OF CONTRACTS* (1979).

2 *E.g. Rosen v. Rittenhouse Towers* 482 A. 2d 1113 (Pa. Super. 1984); *Hayes v. Hartelius* 697 P. 2d 1349 (Mont. 1985). See also Comment (d) to section 129 *RESTATEMENT (SECOND) OF CONTRACTS* (1979), Vol. 1, 327.

3 Not all American States have accepted section 129: a different view seems to prevail in Washington: *Miller v. McCamish* 479, P. 2d 919 (Wash. 1971), 923 *per* Finley J. Followed by *Ben Holt Industries v. Milne* (1984) 675 P. 2d 1256 (Wash. App. 1984).

4 Section 90: 'Promise Reasonably Inducing Action or Forbearance. (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires' :*RESTATEMENT (SECOND) OF CONTRACTS* (1979), Vol. 1, 242.

5 *E.g. Seymour v. Oelrichs* 156 Cal. 782 (1909), 106 P. 88 (Cal. 1909). Although the decision was based on equitable estoppel, promissory estoppel' better explains the result. See Metzger, M.B., 'The Parol Evidence Rule: Promissory Estoppel's Next Conquest?' (1983) 36 *Vanderbilt Law Review* 1383, 1426-9.

Then in *Monarco v. Lo Greco*[6] the California Supreme Court held that B, in acting on the oral contract, relied upon A's encouragement of, or acquiescence in, his actions as being an implied representation that A would perform his contractual obligations. It would be unjust if this representation were not also enforced. Thus it was accepted that promissory estoppel could be applied to an oral contract concerning land and this accords with the present status of proprietary estoppel in Australia.

Section 139 of the RESTATEMENT (SECOND) OF CONTRACTS illustrates how the United States has resolved the inconsistency which exists in Australia where part performance but not proprietary estoppel takes account of the legislative policy behind the Statute's writing requirements.[7] Section 139 prescribes the application of promissory estoppel in a Statute of Frauds context. It stipulates a list of factors to be considered in determining the remedy, if any, to be given. The factors reflect the requirements of part performance in requiring, for example, clear convincing evidence of the promise and reasonable reliance on it, of such substance as to warrant a remedy. The section's wording is very similar to that of section 129, as Comment (a) to the former recognises in describing section 129 as a particular application of the same principle to *contracts* concerning land.[8]

Thus the American answer to the conflict between part performance and proprietary estoppel (as encompassed in their wider notion of promissory estoppel) is to hold that both doctrines must recognise the Statute of Frauds, by requiring for the operation of either doctrine (1) detrimental reliance such as to warrant a remedy and (2) satisfactory evidence of the contract or representation. The two doctrines are made even more coherent by the recognition that they have a common basis in the reliance theory of promise enforcement.[9]

6 35 Cal. 2d 621 (1950); 220 P. 2d 737 (Cal. 1950), 741 *per* Traynor J. (followed by *Lucas v. Whittaker Corp* 470 F. 2d 326 (1972) and *In re Eastview Estates II* 713 F. 2d 443 (1983)).

7 Section 139: 'Enforcement by Virtue of Action in Reliance (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires. (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action of forbearance was foreseeable by the promisor': *RESTATEMENT (SECOND) OF CONTRACTS* (1979), Vol. 1, 354. For a general discussion of the draft section see Steinberg, J.G., 'Promissory Estoppel as a Means of Defeating the Statute of Frauds' (1975) 44 *Fordham Law Review* 114.

8 Both section 129 and section 139 were approved of in their draft form by Prager J. in *Walker v. Ireton* Kan., 559 P. 2d 340 (1977), 346: 'They are based upon the equitable doctrine of reliance which is the fundamental theory upon which all of our prior cases are founded.'

9 Although after *Monarco v. Lo Greco* 35 Cal. 2d 621 (1950) 220 P. 2d 737 (Cal. 1950) it was thought that promissory estoppel would make part performance obsolete, this has not occurred because the latter has been reformulated in reliance theory terms: 'Part Performance, Estoppel, and the California Statute of Frauds' (1950) 3 *Stanford Law Review* 281, 297. Part performance is a thriving doctrine in the United States: *e.g.* New York: *Royal Air Maroc v. Servair Inc.* 603 F. Supp. 836 (1985); *Margate Industries Inc. v. Samincorp Inc.* 582 F. Supp. 611 (1984); *Dobbes v. Vornado Inc.* 576 F. Supp. 1072 (1983), Washington: *Ben Holt Industries, Inc. v. Milne* 675 P. 2d 1256 (Wash. App. 1984), Alabama: *Smith v. Smith* 466 So. 2d 922 (Ala. 1985). In addition promissory

Remedy in the United States

Section 129 satisfies B's expectation interest by allowing specific performance of the contract while section 139 may satisfy either B's expectation or reliance interests. Under either section a relevant consideration is whether there is clear evidence of the agreement,[10] and then their remedies are only available if a restitutionary remedy would be inadequate to remove A's unconscionable advantage.[11] Thus, while the American scheme does not allow A to unconscionably benefit from B's reliance, it recognises that this does not mean that B's expectation interest (to have the contract enforced) must always be satisfied. The appropriate question to ask first is whether A's unconscionability can be removed by simply awarding B a restitution remedy.

7. *CONCLUSION*

Three steps should be taken to resolve the inconsistent operation of part performance and proprietary estoppel. First, the reliance theory rationale of part performance should be accepted and the doctrine's requirements revised accordingly. It would then be sufficient to show (1) reliance of such substance and in such circumstances that it would be unconscionable for A to resile from his contractual obligations and (2) clear convincing evidence of the terms of the contract. The second requirement could be established by evidence of all the surrounding circumstances or by both parties admitting the contract.

Secondly, proprietary estoppel must give serious consideration to the Statute of Frauds' policy before awarding an expectation remedy whether or not there is a finding that the parties' dealings amounted to a contract. Otherwise the outcome of a case will depend on whether or not there was a contract, whereas the substantive question really concerns whether, given the conduct of both A and B, B's expectations should be legally enforced despite the Statute's writing requirements.

Thirdly, more consideration should be given to the possibility of a restitution remedy whichever doctrine is applied, to further safeguard the policy of the Statute. However, it is recognised that where an oral contract concerning *land* has been relied upon restitution will often be inadequate.

The American scheme illustrates how these steps could be implemented and, indeed, shows that such a resolution is feasible. There are no serious impediments to the adoption of a similar scheme in Australia. The most obvious difference between the jurisdictions is that the Statute is regarded as directly applicable to promises enforceable by promissory estoppel whereas proprietary estoppel in Australia does not directly enforce the contract and is therefore not affected by the Statute.[12] But if we accept that part performance is founded upon

estoppel has not yet been fully accepted nor has its place in, and effect on, contract doctrine been resolved: Feinman, J.M., 'Promissory Estoppel and Judicial Method' (1984) 97 *Harvard Law Review* 678, 696. It may also be perceived as giving a less acceptable remedy.

[10] See for example comment (d) to Section 129 and Section 139 (2) (c) *RESTATEMENT (SECOND) OF CONTRACTS* (1979) Vol. 1, 327, 354.

[11] Section 375 expressly permits restitution when a contract is within the Statute of Frauds: *RESTATEMENT (SECOND) OF CONTRACTS* (1979) Vol. III, 219.

[12] *Dewhirst v. Edwards* [1983] 1 N.S.W.L.R. 34, 50.

the same rationale as proprietary estoppel and, in fact, is a species of that doctrine operating in the limited context of contracts subject to the Statute, whichever doctrine is used, the legislative bar to enforcement of the contract must be a serious consideration in determining the appropriate remedy.

On this analysis the first consideration in applying either doctrine will be whether a restitution remedy would remove any unconscionable advantage derived by A from B's reliance. If it will not, then the same question must be asked of a reliance remedy. Only if the terms of the contract are clearly established and A's unconscionability would not otherwise be removed, can an expectation remedy be given and the contract enforced.

This proposed compromise between the two doctrines involves only a recognition of part performance's true rationale, a restriction (because of the Statute) on the tendency of proprietary estoppel to award the expectation interest and a greater appreciation of the restitution remedy.[13]

[13] The conclusions reached by P.D. Finn on the doctrine of part performance in 'Equity and Contract' Finn, P.D., (ed.) *Essays on Contract* (1987) have greatly influence this discussion.