INFORMAL ARRANGEMENTS AFFECTING LAND*

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The border between property rights and contract is a source of difficulty in a number of areas of law and equity. I would like to refer briefly to some of them and then consider one area in more detail, the problems that arise when parties make informal arrangements concerning the use and occupation of land.

When an agreement is made under which one party receives the right of exclusive occupation of the land of the other for a specific period, the law generally says that this is a lease, and property consequences follow. The fact that the parties had envisaged it as an arrangement between themselves without those consequences may not suffice to prevent the consequences of property being stamped on the bundle of rights they have created.[1] And if they have not used the formalities that are required for the creation or enforcement of a property interest, the contract will be unenforcable unless the circumstances are such that equity will specifically enforce it. The parties do not have an option of letting their agreement have an alternative effect in contract only. Yet in other property contexts the law can be more flexible. If a contract grants an option to purchase property at too distant a date so that the option offends the rule against perpetuities, the contract will not be specifically enforced, but the common law allowed the grantor to be sued for breach of contract if he did not enable the purchase to take place.[2]

Suppose, alternatively, that the parties make their agreement for occupancy of the land for the life of one of them. The question now tends to be asked—what property interest has that right for life become, and *Binions* v. *Evans*[3] suggests that it attracts the property consequences of the Settled Land Acts, with very curious results. Old ladies, glad of receiving some security with which to end their days peaceably, find

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[1] Similarly with a bundle of rights that is capable of taking effect as an easement: *Armstrong* v. *Sheppard & Short Ltd.* [1959] 2 Q.B. 384.

[2] *Worthing Corporation* v. *Heather* [1906] 2 Ch. 532. *Cf. Re Lander and Bagley's Contract* [1892] 3 Ch. 41 at 50.

[3] [1972] Ch. 359.

themselves armed with the large powers of tenants for life. The option of treating the matter in contract only is not available apparently, as the policy which must prevail is that of ensuring that it is life occupiers who have the right to sell or not to sell the land free of overreachable equitable interests. But I doubt if the concept of licences for life taking effect in contract would prove so vicious in practice that relaxation here would be dangerous.[4]

All too familiar an area in which there was confusion in the nineteenth century between property rights and contract was irrevocability of licences. Alderson, B. appeared to be saying in *Wood* v. *Leadbitter* that irrevocability must depend on the grant of a property right, and we had to wait a hundred years before this was finally exposed as error.[5] Whether a limit will be set on the revocability of a contractual licence should be determined, of course, as it now is, by the terms, express and implied, of the contract itself. There cannot be so much emphasis on contractual intentions, however, where X contracts with Y giving Y the right to use X's land for some limited purpose or giving Y the right to prevent X's land being used in a particular way, and the issue arises whether Y can enforce the right against successors in title of X. This question is usually answered in terms of property law, and the right will only bind the successor if it is of a kind recognised by property law as having that consequence.[6] But if it is of that kind, it will then bind automatically, provided requirements of registration are observed. The expectations of the parties are not crucial here; the status of the right is. Hence arguments about the nature of the right of pre-emption,[7] and about licences of exclusive occupation for periods other than life. Nor does the knowledge of the successor of Y's rights affect the matter unless conspiracy or inducing breach of contract enter into the picture.[8] Of course, there is an important and justifiable point of policy here. It greatly helps in reducing complexity in the land law to limit the number of adverse rights that can bind land in the hands of successors. But it seems to be assumed that the only way of making rights bind is to do so automatically, subject to notice which is almost invariably a question of registration. Why need it follow, however, because some rights have a high capacity for binding land, that others can have none?

Another awkward border between property and contract occurs when X and Y contract that Z shall have a benefit in certain circumstances. If X and Y do not intend to commit themselves to Z irrevocably,

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[4] *Cf.* J. A. Hornby, "Tenancy for Life or Licence" 93 *L.Q.R.* 561. The question also arises whether there can be, as an object of a trust, a beneficiary entitled to a licence as distinct from a conventional property interest in equity: *Re Potter* [1970] V.R. 352.

[5] *Wood* v. *Leadbitter* [1845] 13 M. & W. 838, 153 E.R. 348; *Winter Garden Theatre (London), Limited* v. *Millenium Productions Ltd.* [1948] A.C. 173.

[6] *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175.

[7] *Pritchard* v. *Briggs* [1978] 2 W.L.R. 317.

[8] *Hollington Brothers, Ltd.* v. *Rhodes* [1951] 2 All E.R. 578; *Esso Petroleum Co., Ltd.* v. *Kingswood Motors (Addlestone), Ltd.* [1974] Q.B. 142.

the arrangement cannot constitute a trust and Z can never enforce it. Once a contract, always a contract, and it cannot turn into a property right half way. Even in a case where Z is to benefit from X on Y's death and Y has provided full consideration before death, the answer is the same.[9] Z can do nothing; though Y's executors can, but do not have to, ask that X be ordered to carry out his promise in favour of Z. But why should this have to be so? Trusts can have revocable elements built into them, why not irrevocable elements built into contracts? By contrast it appears remarkably easy[10] to entrench the position of favoured creditors by using the language of trusts, albeit from the commencement of a transaction, in situations that are basically contractual.

And so one could go on. The rules that govern gifts to unincorporated associations are a terrible jumble of property and contract notions; happily the rules that provide for the distribution of surplus assets of such associations on dissolution now endeavour to separate property and contract elements out.[11] Contract and property matters are also confused in promises as subject matters of a trust; when consideration is needed for transfers of future property and when future property vests in a beneficiary under the rule in *Holroyd* v. *Marshall*,[12] which types of assignment have to take effect in contract and which by transfer? In mutual wills, contracts to make a will in a specific manner and also in secret trusts, the contract element in the controversial case of *Ottaway* v. *Norman*[13] is worth looking at. The decision illustrates too, how recent manifestations or extensions of equity incline to go straight to a doctrine, for instance fraud, to give apparent respectability to an intervention, rather than risk analysing a complex fact situation into its true if inconvenient component elements. Yet it is such elements that I think we should risk investigating in the particular area that I now want to discuss.

In recent years it has become more and more common for parties to come to rather informal arrangements concerning the use and occupation of land. I believe that most of these arrangements are intended to have legal consequence, but it is difficult to fit some of them into the traditional property and contractual picture. There are several reasons for this. Home ownership has become more widespread and reflects the aspirations of wider sections of society; there are problems created by the common law marriage; and problems of special arrangements made for retired people and relatives. Many "arrangements" which seemed to the parties to be adequate at the time will have been made in a mood of optimism which failed to contemplate the various troubles into which personal arrangements are liable to fall. The law can take a superior

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[9] *Re Schebsman* [1944] Ch. 83; *Beswick* v. *Beswick* [1968] A.C. 58.

[10] *Re Kayford, Ltd.* [1975] 1 All E.R. 604; *Aluminium Industries Vaassen BV.* v. *Romalpa Aluminium, Ltd.* [1976] 2 All E.R. 552.

[11] *Re West Sussex Constabulary's Trusts* [1971] Ch. 1.

[12] (1862) 10 H.L.C. 191; 11 E.R. 999. *Cf.* Phillimore, L.J.'s remarks in *Re Lind* [1915] 2 Ch. 345 at 367.

[13] [1972] Ch. 698.

attitude and refuse to help in this range of situations, by asserting that the law of property and the law of contract are available for all and that those who fail to take the advice that is needed for their proper use must pay the penalty of the muddle they get into. The law itself must not be confused by slipshod ways of trying to invent solutions for hard cases. Yet the law is for the poor as well as for the rich, and there is an increasing social problem, the housing shortage, behind the muddle into which the less wealthy fall. It is certainly arguable that the law ought not to wash its hands of it, but should devote some energy to see whether solutions can be found which do not in fact unduly disrupt the basic property rules. Some useful steps in this direction could be taken, I believe, if we did not commit ourselves too much to property law for solutions, kept property and contract in this area apart as much as possible and, above all, analysed the cases honestly.

I want to look first at some solutions which have been attempted. It is familiar law that if land is acquired in the name of X, but both X and Y have contributed to its purchase, X holds on resulting trust for himself and Y in the appropriate proportion. Y's contribution need not necessarily be in money but can be in work provided the contribution is substantial.[14] Although based on a contract or understanding, there is no doubt that the finding of a resulting trust here leads to concurrent ownership. The interests of X and Y under the trust are proprietary.[15] They affect third parties, and can be traced; and as the property rises in value, so proportionately does the value of each share. Such a trust is not to be imposed simply because it is just, but must reflect a common[16] intention that the property should be owned concurrently. There should be evidence of some arrangement to that effect, but it is at this point that considerable controversy has arisen. The courts may imply such an arrangement, but how readily should they do it? There is no doubt to my mind that the stricter view that there must be genuine evidence[17] of the arrangement has been treated in cavalier fashion in some cases, in an endeavour to find just solutions for hard cases.

One of these, I believe, is the English Court of Appeal decision in *Eves* v. *Eves*.[18] Janet, already married, met Stuart Eves, also already married, when she was 19, lived with him and had children by him. With the help of a mortgage, he bought a house for them all to live in (Janet did not contribute), but told Janet (quite untruly) that it could not be put in her name as well as in his, since she was under 21. The house was very dilapidated, and Janet stripped wallpaper, painted parts of the interior and exterior, broke up concrete in the front garden and prepared the area for turfing, and helped Stuart to demolish a shed and

[14] *Pettitt* v. *Pettitt* [1970] A.C. 777.
[15] *Heseltine* v. *Heseltine* [1971] 1 W.L.R. 342; *Caunce* v. *Caunce* [1969] 1 W.L.R. 286.
[16] *Burgess* v. *Rawnsley* [1975] Ch. 429.
[17] *Gissing* v. *Gissing* [1971] A.C. 886.
[18] [1975] 3 All E.R. 768.

put up a new one. They both obtained divorces but did not marry as Stuart met Gloria and went to live with her. As a result of threats from Gloria, Janet was afraid to remain in the house and moved out with the children, Stuart and Gloria moving in with an Alsation dog. The Court of Appeal found that Janet had a concurrent interest in the ownership of the house; in Brightman, J.'s words,[19] "I find it difficult to suppose that she would have been wielding the 14-pound sledge-hammer, breaking up the large area of concrete, filling the skip and doing the other things which were carried out when they moved in, except in pursuance of some expressed or implied arrangement and on the understanding that she was helping to improve a house in which she was to all practical intents and purposes promised that she had an interest." I do not find that very convincing as logic. In moods of optimism all sorts of things are done for the love of it and someone else, and although the court no doubt felt it just to infer the existence of a property interest, the decision comes closer to giving Janet a reward for industry than requiring real proof of her intentions. The difficulty becomes clearer when the court had to quantify that interest, conluding "without confidence" that it was a quarter share. A finding of a specific property interest has been conjured out of an amalgam of facts, Janet's work contribution, her expectations, and Stuart's pretence at the beginning.[20] I fear that it is a case of 2 + 2 + 2 = 7. The result may be just, but as a property lawyer it makes me shudder. The recent decision of the New South Wales Court of Appeal in *Allen* v. *Snyder*[21] suggests that the courts here will not follow the same path, and indeed I think there is gain in restricting the finding of a resulting trust to cases where it really is likely that a proprietary consequence was intended. It does more harm than good to overstretch property law. But this strict approach is tolerable only if there are alternatives. Do they exist?

In some cases it will be possible to find a contract. If so, the contract should certainly be brought into the light of day and not suppressed though, as we shall see later, to do so may not solve every problem and may create more. Where there is a contract, the occupation under it of the licensee against the licensor will be protected as needed by injunctions,[22] a method which avoids necessarily importing property law consequences. But the problem inevitably arises of whether injunctions are available against third parties who acquire the property with notice of licence. If an injunction is issued in a particular case on the merits as between original licensor and licensee, it would seem very odd if the licensor could evade the result by transferring the property to a third party. In *National Bank* v. *Ainsworth*,[23] Lord Upjohn kept open

[19] *Id.* 774.

[20] *Cf.* Brightman, J.'s comments of two days later in *Tanner* v. *Tanner* [1975] 3 All E.R. 776 at 781.

[21] [1977] 2 N.S.W.L.R. 685.

[22] *Hounslow L.B.C.* v. *Twickenham Garden Developments* [1971] Ch. 233.

[23] [1965] A.C. 1175 at 1239-1240. *Cf. Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170.

the possibility that licences, at least of exclusive occupation, could bind third parties with notice, and I would want this suggestion to be followed up. But not, as Lord Upjohn I think intended it should be done, by making licences of a distinct sort into "equitable interests"; turning them as if by magic into property rights. I would prefer an injunction to be issued against a third party as a matter of discretion on the basis of the merits as between him and the licensee, and not merely as a repeat of how it would be as between original licensor and licensee. On this basis the extent of the injunction might well be different in the two situations. It is not a question of making an adverse right bind the third parties with notice automatically, but a question of keeping open the possibility that an injunction can be issued against a third party where it is appropriate. It might be possible in this way to ensure that licences are effectively enforced without raising fears of damage to the fabric of the property law.

Finding the terms of the contract may not be easy however. The parties may not have had quite the same ideas, they may have had only a very general picture of what they wanted, or may never have got so far as an actual contract but acted on certain assumptions. Yet they might both believe that "their rights" are legally protected. The English case of *Tanner* v. *Tanner*[24] comes, it seems to me, close to this position. "Mr. Tanner was a milkman during the day and a croupier at night" as well as married, Lord Denning, M.R. tells us, but he still had time to pay regular visits to "an attractive Irish girl", Josephine, at her rent-controlled flat in Hampstead. When she gave birth to twin daughters it was decided to buy, with the help of a mortgage, a house for Josephine and the children to live in. There was no question of marriage, the house was in his name, and Josephine contributed only some furnishings. The Court of Appeal held that, when Josephine left her flat, it was on the understanding that Mr. Tanner was providing her with a home in which to bring up the children until they left school, so that the licence to occupy could not be revoked before that time. There was consideration in leaving the flat, so that the licence was contractual; but "subject to any relevant change of circumstances, such as her marriage".[25] But what sort of contract is this to change so conveniently with events? And what a lot depends on having a flat to leave. I feel that the court here is as much imposing a contract on the parties as the court was imposing a trust in *Eves* v. *Eves*. But, however one feels about this particular case, clearly contract cannot always provide the solution in every situation. Is there another alternative?

I think it can be found in the law on estoppel, on which doctrine I hope the judgment of Scarman, L. J. (now Lord Scarman) in *Crabb* v. *Arun D.C.*[26] will become authoritative. I prefer to say "a" doctrine

[24] [1975] 3 All E.R. 776.
[25] *Id.* 781 *per* Browne, L. J.
[26] [1975] 3 All E.R. 865.

of estoppel, however, as there are other forms of estoppel in law and equity, and it is on the whole better not to confuse or conflate them. This particular form of estoppel, which is not a recent invention and was certainly known a hundred years ago, is based upon X having induced Y to act in a certain manner that he would not otherwise have done, and Y having so acted on an expectation that has not been fulfilled. The inducement must not have been as a result of a mistake by X as to his legal rights, which shows that the remedy is given for what equity regards as a form of wrong. If X has encouraged Y to spend money on building a house on X's land in the reasonable expectation that Y will be allowed to acquire an interest in the land, equity may order that Y should acquire an interest. The form of the remedy is discretionary, and will reflect all the circumstances and the degree of wrong. Y may acquire a proprietary interest in the land, for life or more, or be given only a personal licence to occupy, or may only receive money compensation in lieu. Of course there are difficulties in such a discretionary remedy. If Y is given a licence for life to occupy a bungalow he has built on X's land as a result of X's inducement,[27] what happens if the bungalow burns down, or X burns it down, or the land is compulsorily acquired? But the courts seem prepared to face the difficulties. Scarman, L. J.[28] formulates three questions that the court, "having analysed the conduct and relationship of the parties, has to answer. First, is there an equity established? Secondly, what is the extent of the equity if one is established? And thirdly, what is the relief appropriate to satisfy the equity?" Further, although the whole history of the facts must be assessed, the remedy arises only when the inducer, relying on his strict rights at law, refuses to implement the expectation. "Whether one uses the word 'fraud' or not, the plaintiff [Y] has to establish as a fact that the defendant [X], by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable, or unjust . . . . The fraud, if it be such, arises after the event, when the defendant [X] seeks, by relying on his right, to defeat the expectation which he by his conduct encouraged the plaintiff [Y] to have".[29] So that the fact that the parties have not worked out their intentions precisely, or turned them into a contract, is not fatal. There may still be a remedy though it will only be the "minimum equity to do justice",[30] determined by the court at the date of hearing.

A remedy available on these bases could be most useful in areas in which the parties, though intending legal consequences, have been unfortunately if forgivably vague about them. There is the further advantage that the extent of the remedy is not predetermined. Also, the remedy could avail against a third party who purchased the property in question

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[27] As in *Inwards* v. *Baker* [1965] 2 Q.B. 29.
[28] *Supra* n. 26 at 875.
[29] *Id.* 877 *per* Scarman, L. J.
[30] *Id.* 880 *per* Scarman, L. J.

with some knowledge of the situation, along the discretionary lines I suggested when discussing (*supra*) the enforcement of contractual licences: as in those cases it is not a question of making an ascertained adverse right bind a third party automatically but of measuring the degree of unconscionability afresh. I appreciate that this raises the spectre of constructive notice, too large a topic for this lecture, but I would be optimistic that its solution in this area could be achieved without real damage to conveyancing practice.

A recent example of a discretionary remedy following an estoppel is provided in England by *Jones* v. *Jones*.[31] Old Mr. Jones was a scrap metal merchant in Kingston, where he lived. His son, Frederick, lived nearby with his wife and children in a house which his father had given him. Relations between father and son were obviously good, so much so that when he retired and went to live in Suffolk, old Mr. Jones persuaded Frederick to leave his job and home in Kingston and move to Suffolk also. A house called "Philmona" was bought for Frederick and his family, Frederick providing a quarter of the cost and becoming thereby entitled to a quarter share in it, his father providing the rest. But the title was put in old Mr. Jones' name alone, and that caused a problem when, after his death, Frederick's step-mother tried to get "Philmona" sold. The facts have some of the contractual flavour of *Tanner* v. *Tanner*, but the court, instead of inferring a contract in Frederick's favour, emphasised his expectations. He had been persuaded by his father to leave Kingston in the very reasonable expectation that the house to be bought in Suffolk was to be a home for himself and his family. There had been a variety of representations by his father to this effect, and it was held by the court that it was equitable on the "now well-settled law on estoppel"[32] to give Frederick a licence to occupy the house for his life —but not for the lives of his family.

There are further interesting facets of this decision: it was possible to superimpose Frederick's licence on his quarter-share and the licence did not necessarily make Frederick a tenant for life under the Settled Land Acts.[33] Yet would these consequences have followed a finding of a contract whereby Frederick could live in the house for the rest of his life, a finding that would not seem difficult if, as in *Tanner* v. *Tanner*, the move of house and job were treated as consideration? To add an estoppel remedy to a situation already governed by a contract seems somewhat strange, though it is arguable that it has been done.[34] Yet is it much more strange than adding it to an intended property interest? The line between the finding of a trust and of a contract can be so thin in particular cases that to have estoppel available in the former but not in the latter situation would certainly be unsatisfactory.

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[31] [1977] 2 All E.R. 231.
[32] *Id.* 236 *per* Roskill, L. J.
[33] *Id.* 237 *per* Roskill, L. J.
[34] *Errington* v. *Errington* [1952] 1 K.B. 290; *Ives Investments, Ltd.* v. *High* [1967] 2 Q.B. 379. Neither a convincing example.

I believe that it is preferable in this area to find a contract only where it is clear that one was intended.[35] I would give a larger role to estoppel. The factors that could lead to a finding of a contract or an inducement in particular cases are similar, commonly mingled, and not often conclusive of the parties' true obligations. Estoppel looks at all the facts but does not require, as contract does, that expectations should have been reduced to promises. Estoppel provides a remedy that is appropriate at the time it is granted, while a contract remedy must reflect what precisely the parties undertook. In this area, where there is frequently such doubt on a contract's terms, or on whether a contract was intended at all, it may be wiser to concentrate attention on the finding of a remedy appropriate to any wrong that has been done.

The case of *Hussey* v. *Palmer*[36] reveals many of the difficulties of the area. Old Mrs. Hussey left her own "dilapidated little house" to go and live with her daughter and son-in-law, Mr. Palmer, an extra room being built on to their house (which Mr. Palmer owned) to accommodate her and for which she paid a builder £607. But sharing had its difficulties, and 15 months later Mrs. Hussey decided to leave. Subsequently she demanded £607 from Mr. Palmer on the basis, judging by the claim, "of a beneficial interest in Mr. Palmer's house of the value of £607". The Court of Appeal, Cairns, L. J. dissenting, declared that she was entitled to the £607 on the basis of a constructive or resulting trust. The evidence was very confused, but the majority of the court rightly came to the conclusion that there was no loan, noting that there was no provision for repayment during Mrs. Hussey's life and that it was unlikely that Mrs. Hussey's executors would have a right to it on her death. But neither did they think it was a gift, which suggests that it was intended to have at least some legal significance. There could have been a contract, but this was not shown. It does not at first sight seem more difficult to imply a contract here than in *Tanner* v. *Tanner*. Mrs. Hussey most probably thought she was gaining a home for life out of her £607, which suggests the core of an agreement. But the terms of any such contract had not been thought out, and in their absence, how does one deal with the situation produced by Mrs. Hussey herself leaving? A contract might enable her to stay, but how, without largely inventing terms or using the doctrine of frustration, could it enable her to leave and get the £607 back? The majority preferred to rely on the cases in which money is given to purchase or improve a house vested in another, and the ownership then becomes concurrent. According to Phillimore, L.J. there was a resulting trust, according to Lord Denning, M.R. a constructive trust; in either case, Mrs. Hussey was entitled to an interest in the house propor-

[35] The inter-relation of contract and estoppel and their remedies is extremely difficult as well as contentious. It might be possible to enforce *Crabb* v. *Arun D.C.* contractually — see (1976) 92 *L.Q.R.* 174 — but I do not think we should be over-ready to find contracts in the area under discussion. I do not put it more highly than that.

[36] [1972] 3 All E.R. 744.

tionate to what she paid, i.e. she would gain a proportion of any increase in value. But she only got £607 as that is all the claim was for. The resulting trust solution is, however, unreal. Did Mrs. Hussey really intend to acquire an interest in the whole house as distinct from a right to use parts of the house, principally the new room? Did Mr. Palmer intend to turn himself into a concurrent owner with his mother-in-law, thus reducing his ownership to an interest in proceeds of sale? I doubt if Mr. Palmer even contemplated losing exclusive possession of any part of the house, let alone bringing about such a drastic change in the character of his ownership. But neither is a constructive trust solution any the more appealing. This is the borrowing of a technique, not the analysis of a fact situation. Ungoed-Thomas, J. may have called the constructive trust a "formula for equitable relief",[37] but the imposition of one here is nothing more than the use of the category as a means of producing a just solution. Mr. Palmer happened to hold a legal estate onto which the terms of a remedy just to Mrs. Hussey could be engrafted. This is not an application of principles of property law but pure discretion, as indeed Lord Denning would not seem to deny.[38]

I would prefer to see the steps in the case proceed as follows: Is there intent to create Mrs. Hussey as a beneficial owner in any form? I think the truthful answer is NO. Did she conclude a contract with Mr. Palmer? NO. Did she and Mr. Palmer intend legal relations to subsist between them? There is, I believe, a probability that the arrangement would not have been put into action unless they thought the answer was YES. Mr. Palmer believed he was acquiring the extra room at no cost to himself, Mrs. Hussey that she was acquiring protection for her old age. But what protection? A set of circumstances has arisen lacking contractual shape and falling short of property. Her expectations can be provided for, in my view, through estoppel or not at all. There was probably enough inducement to enable Mrs. Hussey to come within the principle of *Crabb* v. *Arun D.C.* If Mr. Palmer had attempted to drive her out, I believe equity could have protected her occupation by injunction or, if it proved impossible to devise a formula for co-existence,[39] could have given her compensation in lieu under Lord Cairns' Act. The remedy available in equity should be able to provide also for the contingency of Mrs. Hussey feeling compelled to leave. If her reason for leaving was to re-marry, I would have thought the courts would impose little burden on Mr. Palmer—perhaps asking him to pay up to £607 by instalments, perhaps not even asking that. If, on the other hand, Mrs. Hussey was forced to leave, the appropriate remedy might well be the payment of the £607 immediately. But if the £607 is to increase to a proportionate share, this should follow only as a matter of the court's

[37] *Selangor United Rubber Co.* v. *Cradock* [1968] 2 All E.R. 1073 at 1097.
[38] *Supra* n. 36 at 747.
[39] *Cf. Thompson* v. *Park* [1944] K.B. 408.

discretion, and not as a necessary consequence of a supposed property right.

Is all this too chaotic and unpredictable a discretion? Some will think so, but I would urge aaginst them. 1. Facts have been analysed honestly. 2. There is a wrong: the inducement as the basis of the estoppel, which is thus unlike the totally discretionary imposition of a constructive trust. 3. The remedy is not at large, but is the minimum needed for redress of that wrong. 4. It is the only way, without forcing facts into categories to which they do not belong, to do justice in this area to the have-nots, and those who have not much.

Would such an approach find favour in New South Wales? I do not know, but a case which can be discussed by way of comparison is *Ogilvie* v. *Ryan*.[40] In 1955 Mr. Ogilvie came to live with Miss Ryan who, with her mother (who died in 1962), occupied rented accommodation owned by a company for which she worked and of which he was the managing director. He paid her $10 a week board until the property was sold to developers in 1969; at which stage he dissuaded Miss Ryan (then aged 62) from acquiring another home of her own and bought a house himself, the arrangement being that she would be entitled to live in it for the rest of her days if she would look after him in it during the rest of his life. He died three years later, aged 84, Miss Ryan having kept her side of the bargain. But his executor tried to recover possession of the house from her. On these facts Holland, J held[41] that the executor was bound to hold the legal title in the house upon trust to permit Miss Ryan to occupy it for the rest of her life rent-free if she so wished. In his view Miss Ryan held a beneficial proprietary interest in the property, and it was unnecessary for him to decide whether there had been a contract concluded in her favour. He reached this conclusion by relying on the doctrine of constructive trusts. After an extensive contribution, i.e. her services, and Mr. Ogilvie's assurance, i.e. that she would get the house rent-free for life, were in no material way different from other situations in which money or work contributions led to the recognition of a trust. I have sympathy for Holland, J.'s dilemma, but I doubt if it is wise to put so much emphasis on a solution through the law of trusts. I also wish that he had investigated the contract side more fully. To find the ordinary form of resulting trust from Miss Ryan's promise to look after Mr. Ogilvie would, of course, be difficult; apart from the nature of the contribution, would such a trust arise prospectively when she moved house or only when she died? Would it vanish if she became incapacitated during his lifetime, or if after his death she ceased to wish to live in the house? As a property interest, it would require some skill in drafting and for a court to infer it would seem beyond its legitimate powers. But it is wrong to suppose that all problems disappear by calling it a constructive trust. Is the trust so arrived at a reflection of the parties'

[40] [1976] 2 N.S.W.L.R. 504.
[41] *Id.* 513, 519.

intentions or a product of the court's discretion? Holland, J. was in favour[42] of a "declaration of an appropriate constructive trust . . . in Equity to defeat a species of fraud, namely, that in which a defendant seeks to make an unconscionable use of his legal title" to defeat common intentions or a beneficial interest that has been promised. But we still cannot be sure of the form of the interest, and even if we were, it would not seem to follow that a remedy given at the time of a hearing, on this basis of "fraud" should have to be in the form anticipated by the parties. Further, I do not see why it has to be proprietary — could not Miss Ryan have been equally well protected by a licence? Holland, J., on the facts as they turned out, was able to give Miss Ryan the protection she had hoped for, but the facts could have turned out differently, needing another solution, for instance, if Miss Ryan had been forced to leave during Mr. Ogilvie's life. I do not believe that either the science or the terminology of constructive trusts really assists here. Where there is no clear intent to confer a proprietary interest of a distinct and finite sort, and no concluded contract shown, it is in my view preferable for any remedy that the court gives to be seen for what it is, namely the provision of a remedy appropriate at the time it is given to the merits of the case viewed as a whole. Expectations count, and may be reflected in a remedy, but do not determine it.

A discretionary remedy may be what, under the guise of a constructive trust, is being imposed. But I would prefer to see it done under the head of estoppel as explained in *Crabb* v. *Arun D.C.* by Scarman, L.J. The proprietary flavour of constructive trusts hinders more than it helps, and the estoppel remedy emphasises the relation between the remedy and the wrong: it is not palm-tree justice. I have a further reason, too, for wishing that estoppel may be pleaded in subsequent cases similar to *Ogilvie* v. *Ryan*, where there is a strong element of inducement, but possibly no intended property rights or a complete contract. The reliance that Holland, J. places on some of the precedents on constructive trusts may not be wholly consistent with the views of his Court of Appeal in *Allen* v. *Snyder*. Though the decision may survive, its width of ground may not. Constructive trusts may not prove the panacea that some would wish, and if their use in the area I have been talking about comes to be discouraged, I would hope that estoppel will be seen as the alternative and, indeed, preferable solution.

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[42] *Id.* 518.