little the testator may have intended it) that the gift was to the individual members in the name of the society or of the committee of the society'.[38] The cases of *Cocks v. Manners*,[39] *In re Smith*,[40] and *In re Clarke*[41] are cited for this proposition. However, in the instant case, their Lordships held that the circumstances of the case, and the wording of Clause Three, were sufficient to show that the testator attempted to create a trust for the purposes of the Order, rather than make a gift to the individual members thereof.[42] The form of the gift, being expressed to an Order *qua* Order; the fact that the members of the Order might be very numerous and scattered over the world; the fact that the property was realty; and the assumed nature of the rules and purposes of the possible recipient Orders, all combined to indicate that the members were not to take beneficially.[43] The conclusion is that all the surrounding facts must be considered in determining who is the intended beneficiary.

The net result of the case, it is submitted, is a substantial agreement, on every important issue, with the judgment of Dixon C.J. and McTiernan J. in the High Court.[44] Clear and authoritative statements now cover many much-disputed areas of the law relating to charitable trusts.

N. H. M. FORSYTH

B. R. MEADOWS AND SONS v. ROCKMAN'S GENERAL STORE PTY LTD[1]

Contract—Consideration—Equitable Estoppel

The plaintiff B.R.M. commenced an action against the defendant R. to recover the sum of £403 15s. 4d. representing the cost of goods sold and delivered. By way of defence, the defendant raised an agreement with the plaintiff concerning the payment of the sum for which the plaintiff was now suing. Hudson J. held that this agreement was not a defence to the action, and the plaintiff was entitled to judgment.

As to the nature and terms of the agreement relied upon by the defendant, the learned judge was not prepared to accept some of the allegations in the defendant's pleadings. For convenience, only the learned judge's findings are summarized here, and substantial differences between finding and pleading will be indicated. (1) There was an agreement between the plaintiff and the defendant that the defendant should be at liberty to withhold payment, in respect of goods which the plaintiff had sold and delivered to the defendant, of a sum equivalent to a debt owing to the defendant by H. & N. Meadows Pty Ltd, until such time as that debt was paid by the debtor. (2) H. & N. Meadows Pty Ltd went into liquidation and its assets realized only sufficient to pay two shillings in the pound. (3) There was no request or promise, either express or implied, that the defendant should not take legal action against H. & N. Meadows

[38] *Ibid.*, 732.
[39] (1871) L.R. 12 Eq. 574.
[40] [1914] 1 Ch. 937; 30 T.L.R. 411.
[41] [1901] 2 Ch. 110; 17 T.L.R. 479.
[42] [1959] 2 W.L.R. 722, 737-738.
[43] *Ibid.*, 738.
[44] [1958] Argus L.R. 257.
[1] [1959] V.R. 68; [1959] Argus L.R. 298. Supreme Court of Victoria; Hudson J.

Pty Ltd. (4) The allegation that the plaintiff agreed that it 'would waive such payment permanently' had not been established. (5) The agreement between the plaintiff and the defendant was unsupported by consideration. The learned judge summarized his findings thus:

> In my view the only agreement made by the plaintiff was a bare promise unsupported by consideration that the defendant should be at liberty to withhold payment from the plaintiff of an amount equivalent to the debt of H. & N. Meadows Pty Ltd until such time as this company should discharge its indebtedness.[2]

The defendant had alleged that the plaintiff agreed:

> If the defendant would continue to supply goods ordered by a company known as H. & N. Meadows Pty Ltd and would forbear to sue the said H. & N. Meadows Pty Ltd, the plaintiff would consent to the defendant withholding payment to the plaintiff of moneys then owed to it by the defendant to the 'value' of £403 15s. 4d., and would waive such payment permanently.[3]

The defendant further alleged that 'in reliance on the said agreement it forbore to press for and obtain payment of the said sum from H. & N. Meadows Pty Ltd, and continued to deliver goods to the said H. & N. Meadows Pty Ltd'.[4] Although His Honour specifically rejected the allegation that the defendant agreed to forbear to sue H. & N. Meadows Pty Ltd, he did not specifically accept or reject the allegation that, in reliance on the agreement, the defendant continued to deliver goods to H. & N. Meadows Pty Ltd. Although an omission from the official report does not warrant the drawing of a strong inference, if this was in fact the case, then His Honour may have been mistaken in holding that the agreement was 'unsupported by consideration'.[5]

Consideration has been held to exist in cases where companies have continued business operations, in reliance on agreements to waive claims to interest or salaries.[6]

The existence or non-existence of consideration could be important. If there had been good consideration, the learned judge would have allowed a cross action for damages—the difficulty, of course, as His Honour pointed out, would then be that the present defendant, the plaintiff in the cross action, would have to prove his damages, which may not be equivalent to the sum for which he is being sued in breach of the agreement.

Because of action taken by defendant, equity may be prepared to assist it, as was the case in *Thomas v. Thomas*.[7] This case is noteworthy, not only because of the discussion of the circumstances in which equity will assist, but also because of the extent to which equity did assist. A donee of an estate in land under a verbal gift was given the right to call on the donor to complete the gift.

[2] *Ibid.*, 69. [3] *Ibid.*, 68, 69. [4] *Ibid.*, 69. [5] *Ibid.*, 69.
[6] *Re William Porter and Co. Ltd* [1937] 2 All E.R. 361; *Ledingham and Others v. Bermejo Estancia Co., Ltd. Agar and Others v. Same* [1947] 1 All E.R. 749.
[7] [1956] N.Z.L.R. 785.

It was the opinion of Hudson J. that an agreement such as he found to have been made between the parties afforded the defendant no defence to this action, nor would it have afforded a defence even if it were supported by consideration. His Honour said that because the plaintiff's agreement was not unlimited as to time and unconditional, it could not be construed as a release but as a mere covenant not to sue for a limited time or until the fulfilment of some condition. He continued, 'The covenantee in the latter case, if sued in breach of the covenant, cannot defend himself by reliance upon the covenant but is left to his remedy by cross-action against the covenantor for such damages as he may prove he has suffered by reason of the breach', a contention which he supported by ample authority.[8] It is not proposed to challenge the correctness of this statement of the position at common law; the only comment is that the cases in support of the proposition are 1848, 1849, and 1865, all of which are prior to the operation of the Judicature Acts 1875.[9] Whereas the common law would allow a covenant not to sue to be pleaded as a defence only if it was 'unlimited as to time and unconditional', it is submitted that this is not the position in equity. Because he believed the agreements could not be pleaded as a defence, the learned judge stated he was relieved of the necessity of considering the application of the doctrine of equitable estoppel.

The case therefore presents two major issues. The first is whether or not the equitable estoppel doctrine is applicable, and the second is whether or not this doctrine is good law and should be applied. The learned judge said the doctrine was inapplicable, and in any case 'on the face of it, appears to be directly opposed to what was decided by the House of Lords in *Jorden v. Money*'.[10] [11] Rather than considering these questions separately at this point, the better course would appear to be an examination of the relevant cases with a view to both discovering and evaluating the principle. The doctrine of equitable estoppel was brought to the fore by Denning J. (as he then was) who, in *Central London Property Trust Ltd v. High Trees House Ltd*,[12] 'sought to tap a slender stream of authority which had flowed in equity since the judgment of Lord Cairns in *Hughes v. Metropolitan Railway Company*'.[13] [14] This slender stream of authority may be traced through a line of cases prior to the *High Trees* decision,[15] and perhaps a broader stream during the period since this decision.[16]

J. F. Wilson gives a succinct statement of the principle in these words:

'Quasi-estoppel' is available when an unambiguous representation of

[8] [1959] V.R. 68, 70.

[9] 1875 need not necessarily be the relevant date, as the Common Law Procedure Act 1854, s. 83, allowed equitable defences to be raised at common law.

[10] (1854) 5 H.L.Cas. 185.

[11] [1959] V.R. 68, 70.

[12] [1947] K.B. 130.

[13] (1877) 2 App. Cas. 439.

[14] Cheshire and Fifoot, *The Law of Contract* (4th ed. 1956) 78.

[15] *Birmingham and District Land Company v. L. & N. W. Railway* (1888) 40 Ch.D. 268; *Panoutsos v. Raymond Hadley Corporation of New York* [1917] 2 K.B. 473.

[16] *Robertson v. Minister of Pensions* [1949] 1 K.B. 227; *Combe v. Combe* [1951] 2 K.B. 215; *Tool Metal Manufacturing Co. Ltd v. Tungsten Electric Co. Ltd* [1955] 2 All E.R. 657; *Lyle-Meller v. A. Lewis & Co. (Westminster) Ltd* [1956] 1 W.L.R. 29.

> intention is made, which is intended to be acted upon and is, in fact, acted on by the party to whom it is made, with the result that on the faith of it he prejudices his position in relation to the representor.[17] 'Quasi-estoppel' acts only to suspend the representor's rights, and once the other party has had an opportunity in which to correct his position, these rights regain their full force.[18]

A statement of the principle in these terms does not necessarily put an end to the matter. Unfortunately, it is not clear whether it is essential that the representee suffer some detriment by acting on the faith of the representation. Lord Denning has frequently avoided any reference to detriment, not only in judgments,[19] but also in an extra-judicial article;[20] other judges have also omitted reference to detriment.[21] The orthodox view is that the person seeking to establish the estoppel must have prejudiced his position on the strength of the representation.[22] It is submitted that the existence of a doubt whether detriment is an essential requirement in no way detracts from the proposition that equitable estoppel is applicable when detriment *is* present; this point is further discussed in reference to the House of Lords' attitude. The other aspect on which there is some doubt, is the actual operation and effect of the estoppel. The doubt is not concerned with the availability as a defence of limited or conditional waivers, but solely with the effect of waivers expressly stated to be permanent; the uncertainty is whether or not the doctrine applies to make such a waiver irrevocable. There are many cases which support the view taken by Mr J. F. Wilson, though the opposite view is not completely untenable.[23] This doubt, however, in no way detracts from the operation of the doctrine in suspending rights, at least until the other party has had an opportunity to correct his position. As regards the instant case, the doctrine certainly does not require that the agreement not to sue be 'unlimited as to time and unconditional' before it becomes available as a defence—every case supports this contention.

In the *High Trees Case* itself, Denning J. expressly found that the arrangement was only temporary.

Even if the existence of this doctrine is admitted, what is its value, especially in view of the statement of Hudson J. that it was, on the face of it, directly opposed to what was decided by the House of Lords in *Jorden v. Money*?[24] Denning J. recognized the existence of the decision of *Jorden v. Money,* which held that estoppel may be founded only on a representation of existing fact; he said, 'the law has not been standing

[17] 'Recent Developments in Estoppel' (1951) 67 *Law Quarterly Review* 330, 333.
[18] *Ibid.*, 349.
[19] *High Trees Case* [1947] K.B. 130, 134; *Combe v. Combe* [1951] 2 K.B. 215; *Lyle-Meller v. A. Lewis & Co. (Westminster) Ltd* [1956] 1 W.L.R. 29.
[20] 'Recent Developments in the Doctrine of Consideration' (1952) 15 *Modern Law Review* 1.
[21] *E.g.*, Asquith L.J. in *Combe v. Combe* [1951] 2 K.B. 215, 225-226.
[22] A. G. Guest, 'The New Estoppel: An English Development' (1956) 30 *Australian Law Journal* 187, 189; (1951) 67 *Law Quarterly Review* 330, 334; Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 475-476.
[23] (1956) 30 *Australian Law Journal* 187, 189.
[24] *Supra*, n. 10.

still since *Jorden v. Money*',[25] which is submitted to be a legitimate statement. It is not that this decision is ignored; what is claimed is that the doctrine of equitable estoppel, which was applied as early as 1877 by the House of Lords in *Hughes v. Metropolitan Railway Company*,[26] exists alongside the decision in *Jorden v. Money*.[27] It must be that Lord Selborne considered this to be the position for, some years after his participation in *Hughes v. Metropolitan Railway Company* (1877),[28] he upheld *Jorden v. Money*[29] in *Maddison v. Alderson* (1883).[30] The doctrine of equitable estoppel was approved by the Court of Appeal, and the position clarified, especially by the statements that the doctrine operated as a shield and not a sword, in *Combe v. Combe*.[31] Since this decision a question of estoppel by representation arose in the Court of Appeal in *Lyle-Meller v. A. Lewis & Co. (Westminster) Ltd.*[32]

The House of Lords discussed the doctrine of equitable estoppel in 1955 in *Tool Metal Manufacturing Co. Ltd v. Tungsten Electric Co. Ltd.*[33] Whilst it may not be said that the House of Lords gave unqualified approval to the doctrine as expressed in *Combe v. Combe*, it seems quite legitimate to say that the House of Lords recognized the existence of equitable estoppel. Lord Simonds expressed the opinion that the doctrine 'may well be far too widely stated'.[34] It is submitted that by reference to the context of this remark, and the need for the House of Lords to be cautious when a statement was not essential to the decision, it is a permissible inference that His Lordship wanted to insist that detriment may be essential to the doctrine. If such was his intention, then the note of caution does not cast serious doubt on the moderate doctrine of equitable estoppel, as set out in the preceding paragraphs.

Hudson J. said it seemed obvious that the defendant could not by means of a plea of estoppel claim to be in any better position than it would occupy if the promise were contained in a deed or contract for valuable consideration. It may be that the defendant would not be claiming to be in a better position, because he may be entitled to assistance from equity. *Dicta* of Bowen L.J. in *Birmingham and District Land Co. v. L. & N.W. Railway*[35] and statements by Evershed L.J. (as he then was)[36] support this contention. Even if the defendant was claiming to be in a better position, it seems quite as obvious that the law should 'prevent a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties'.[37]

It is submitted, therefore, with the greatest respect to the learned judge, that at least a moderate doctrine of equitable estoppel exists and that this would have been a suitable case for its application.

T. J. HANRAHAN

[25] [1947] K.B. 130, 134.
[26] *Supra*, n. 13. [27] *Supra*, n. 10. [28] *Supra*, n. 13. [29] *Supra*, n. 10.
[30] (1883) 8 App. Cas. 467, 473. [31] [1951] 2 K.B. 215; [1951] 1 All E.R. 767.
[32] *Supra*, n. 16. [33] [1955] 2 All E.R. 657. [34] *Ibid.*, 660. [35] *Supra*, n. 15.
[36] (1948) 1 *Journal of Society of Public Teachers of Law* 171, 176.
[37] *Combe v. Combe*, *per* Denning L.J. [1951] 1 All E.R. 767, 769.