PROTECTION OF THE PURCHASER'S RELIANCE IN 16TH–18TH CENTURY ENGLAND AND EUROPE

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Abstract

This essay is focused on the protection of purchaser's reliance during the 16th–18th centuries, with the aim of tracing how this problem was approached on both sides of the Channel. The issue involves the doctrine of equitable estoppel, with particular regards to proprietary estoppel, which is commonly considered a genuine common law doctrine, without a civil law counterpart. The author claims that common law and civil law shared a common rule of protection of the purchaser's reliance up to the 19th century. She concludes that the equitable doctrine of estoppel has its early source in the *Jus commune* developed in Europe.

I INTRODUCTION

The existence of a link between English law and continental law up to the 19th century has been widely demonstrated by comparative legal studies.[1] Canon law and the canonical process were the main vehicles through which

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1 See generally R Zimmermann, 'Der Europäiche Charakter des englischen Rechts' (1993) 4 *Zeitschrift für Europäiches Privatrecht* 9.

roman-canon law and the medieval jurisprudence were spread across the Channel from the early 13th century.[2]

Common lawyers knew both *Justinian's Digest* and canon law sources. Both the *Justinian* materials and the *Decretum Gratiani* were housed in Bracton's library. The *Summa* of Azo was Bracton's principal model in writing *De Legibus and Consuetudinibus Regni Angliae*. Maitland showed that Bracton incorporated part of Azo's commentary in his own work and how many passages from Bracton refer the readers to Azo's writings.[3]

Additionally, the Court of Chancery played an important role as a bridge between common law and roman-canon law in the following centuries. The Chancellor was traditionally a member of the clergy until the appointment of Thomas More in 1529, and a civil lawyer was usually appointed Master of the Rolls. The procedure of the Court was inspired by canonical procedure.[4] After the Reformation, when the ecclesiastical jurisdiction was in decline, continental ideas nevertheless filtered through the interpretation of the Court into principles of equity and justice.[5]

On the Continent, investigations of both the jurisprudence and decisions by the Roman *Rota* and other tribunals of developing nation-states suggested

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2 See generally R H Helmholz, *The Canon Law and the Ecclesiastical Jurisdiction from 597 to the 1640s, in The Oxford History of the Laws of England* (Oxford University Press, 2004) vol 1, 311.

3 See the introduction in F W Maitland (ed), *Select Passages from the Works of Bracton and Azo* (Bernard Quaritch, 1895) XVIII.

4 G Gilbert, *The History and Practice of the High Court of Chancery* (H Lintot, 1857) 20-28; W J Jones, *The Elizabethan Court of Chancery* (Cleredon Press, 1967) 177-336;

5 W S Holdsworth, *A History of English Law,* (Methuen, first published 1925, 1936 ed) vol 4, 276-77; W T Barbour, 'The History of Contract in the Early English Equity', in P Vinogradoff (ed), *Oxford Studies in Social and Legal History* (Claredon Press, 1914) 9, 150-168.

the presence of a dialogue between common lawyers and civil lawyers from the 16th through the 18th century.[6] Although partially ignored in the first half of the 20th century, these researches later led to a revisiting of the comparison between common law and civil law. Thus, the idea of an autonomous and independent development of English law from continental law has been partially abandoned by civil lawyers.[7]

Following the path of the mentioned studies, the present work focus on the protection of purchaser's reliance during the 16th–18th centuries, with the aim of tracing how the problem was approached on both sides of the Channel. The issue involves the doctrine of equitable estoppel, with particular regards to proprietary estoppel, which is commonly considered a genuine common law doctrine, without a civil law counterpart. A right generated by proprietary estoppel is capable of binding successors in title,[8] whereas in civil law expectation or reliance does not give rise to proprietary rights. So, while proprietary estoppel can be used in common law systems to remedy the defects of a void transfer of land, as a general rule a void transfer of land cannot be validated in civil law systems.

The origins of proprietary estoppel are still partially unknown. The modern formulation of the doctrine traces back to the half of 19th century, but estoppels have more ancient foundations: 'there are but few older principles or rules of law that had been handed down from generation to

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6 On the issue see the studies drawn by Gino Gorla on the so-called 'Great Tribunals', now collected in the volume G Gorla, *Diritto Comparato e Diritto Comune Europeo* (Giuffré, 1981).

7 G Gorla and L Moccia, 'A "Revisiting" of the Comparison between "Continental Law" and "English Law" (16th to 19th Century)' (1981) 2 *Journal of Legal History* 143.

8 M Dixon, 'Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: a Theory of Unconscionability' in E Cooke (ed), *Modern Studies in Property Law* (Hurt Publishing, 2003) vol 2, 165.

generation, from the earliest days of the Roman law to the present time, than that of estoppel'.[9]

Sir Coke explained that the word estoppel derived from the French *estoupe*: 'Estoppe commeth of the French word estoupe, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closed up his mouth to allegae or plead the truth …'.[10]

In the *Justinian's Digest* the same definition was expressed in the maxim *allegans contraria non est audiendus*.[11] The maxim prevented anyone from alleging something before the trial, which contradicted his previous allegation. It constituted an application of a wide principle, which prevented anyone from contradicting his own act. During the *Jus commune*, this principle was expressed in the maxim *venire contra factum proprium nemo potest*. Thus, despite the common belief, the common law doctrine seems to be linked to Continental law and to the *venire contra factum* maxim, from which we need to start our investigation into the protection of the purchaser's reliance.

II THE MAXIM *VENIRE CONTRA FACTUM PROPRIUM* AND CUJAS' THEORY

The maxim *venire contra factum proprium nemo potest* was formulated by the glossators, who interpreted the passages of *Corpus Iuris Civilis* on the

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9 H R Herman, *The Law of Estoppel* (Law Booksellers, 1871) 1.

10 Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton* (Clarke, Pheney and Brooke, 18th revised ed 1823) vol 2, 667 [352a].

11 See Zimmermann, above n 1.

exceptio doli generalis.[12] The exception was used in the Roman formulary process to stop the action of a plaintiff when it was fraudulent. This happened, for example, when a purchase was void because the vendor was not the true owner of the land. If a vendor sold land which did not belong to him, and he delivered it to the purchaser by *traditio*, then if the vendor later acquired the land he could not exercise the *vindicatio* to recover the land from the purchaser to whom he had earlier sold the land. His legal action was unfair and the defendant could stop it. In the same way, if a creditor concluded with the debtor a *pactum de non petendum*, he could not recover his debt from the debtor he had earlier promised not to sue. By the age of Justinian, the *exceptio doli* subsumed the previous exceptions *in factum* and it was used as a general remedy to protect anyone from a fraudulent action: 'dolo facit, quicumque id, quod quaqua exceptione elidi potest petit'.[13]

Azo was one of the first Glossators who used the maxim.[14] Following the method of distinctions, he evidenced the meaning of the maxim by giving examples of when one could contradict himself and when he could not.

In his Brocardica,[15] Azo distinguished between lawful actions and unlawful actions. Among the unlawful actions he made further distinctions, depending upon whether the commission of an action was expressly

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12 W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge University Press, 3rd revised ed, 1966) 654.

13 Ulpian, D 44 4 2 5; see, eg, A. Burdese, 'L'eccezione di dolo generale in rapporto alle altre eccezioni' in L. Garofalo (ed), *L'eccezione di dolo generale. Diritto romano e tradizione romanistica* (Cedam, 2006) 461.

14 See L Diez-Picazo Ponce de Léon, *La doctrina de los proprios actos* (Bosch, 1963) 46.

15 Azonis Bononiensis, *Brocardica* (Eusebium Episcopium et Nicolai Episcopij haeredes, 1567) 121.

prohibited by enacted law or not. If the action was prohibited by enacted law, it was not binding and its author could always act contrary to it. Otherwise, if the action was unlawful because some of the legal requirements of such an action had not been satisfied, the author could not contradict his action. This happened, for example, when someone concluded an agreement without the formalities required by law or, when the consent of either party was lacking at the time the agreement was concluded. Azo mentioned the passage of the *Digest* D 1 7 25 for the first case and the passage D 8 3 11 for the second.

In D 1 7 25, Ulpian wrote that a father could invalidate the will of his emancipated daughter, alleging the invalidity of the emancipation because it lacked the formality required by law; but when that father had acted for a long time in a manner conforming to the emancipation, he could not unexpectedly change, thereby frustrating the reliance of the heirs.[16]

The second passage, from Celsius, concerns an alienation of an easement. In Roman law, a valid alienation needed the consent of both co-owners of the servient land. If only one of the co-owners gave his consent, the alienation was void, but the vendor could not contradict his action and he was prevented from prohibiting use of the easement by the dominant tenant.[17]

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16 Ibid 123; D. 1 7 25: 'Post mortem filiae suae, ut mater familias quasi iure emancipata vixerat et testamento scriptis suis heredibus decessit, adversus factum suum, quasi non iure eam nec praesentibus testibus emancipasset, pater movere controversiam proibetur'.

17 Azonis Bononiensis, above n 15; D 8 3 11: 'Per fundum, qui plurium est, ius mihi esse eundi agendi potest separatim cedi. Ergo subtili ratione non aliter meum fiet ius, quam si omnes cedant: et novissima demum cessione superiores omnes confirmabuntur. Benigni tamen dicetur, et antequam novissimus cesserit, eos, qui antea cessere, vetari uti cesso iure non posse'.

Azo turned to the issue in his *Summa*,[18] where he considered the vendor and purchaser of land. In the title *De Agricolis, et Censitis et Colonis*, he explained when the vendor could contradict himself and recover the possession of the land from the purchaser. Azo insisted on the distinction between actions prohibited by enacted law and actions not prohibited. The vendor could contradict himself and exercise the *vindicatio* only when the purchase was prohibited by enacted law. On the contrary, he could not if the purchase lacked the formality or the expression of consent necessary to be binding. So, the *Lex Iulia* prevented a husband from alienating his wife's dowry, without the consent of the wife. The alienation of the dowry by the husband was void, when lacking the consent of the wife. However, the husband could not revoke his consent and his action to recover the dowry could be opposed by the *exceptio doli generalis* by the purchaser.

Accursius used the same examples as Azo,[19] describing the application of the Latin maxim. The first commentators, such as Bartolus of Saxoferrato,[20] followed the theory developed by the glossators, too.

The ratio of the maxim was a matter of considerable debate among the jurists during the late Middle Ages. Although they agreed on the meaning of the maxim and on its areas of application, they developed a wide range of arguments about its legal basis. Accursius and Bartolus mentioned the

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18 Azonis Bononiensis, *Summa* (G Bindonum, 1583) 9–10, *annotatio De Agricolis et Censis et Colonis*.

19 See especially *Digestum Vetus seu Pandectarum Iuris Civilis*, (Aquilae renouantis, 1606) vol 1, 74, the comment to the fragment *post mortem* and the comment to the fragment *per fundum* '… Alioquin si unus concedit mihi, alii possunt me prohibere, sed ille, qui concessit mihi, non potest me prohibere, et non valet concessio ab uno facta nisi alii cedant: unde ista cessione priores cessiones confirmantur': at 1139.

20 Bartoli a Saxoferrato, *In Primam Digestis Veteris Partem* (D Zenarum, 1603) vol 1, 29, 185.

debate among the jurists in their works and evidenced the lacking of a *communis opinio* among them. According to one argument the maxim was based on a presumption which prevented the vendor from alleging the truth; a second argument was that a tacit renunciation by the vendor of his right to sue could be deduced from the behaviour of the vendor, who for a long time had acted in a manner conforming to his act; another argument found the ratio of the maxim in a fiction based on *aequitas,* according to which the realisation of the elements necessary for a binding contract, after the conclusion of the contract, confirmed the contract from the time of the agreement.[21]

The debate on the ratio of the maxim continued up into the 15th century and beyond. However, medieval jurists never recognised a proprietary right in the purchaser, deriving from the application of *venire contra factum* maxim. This development of the doctrine originated with Cujas, in the 16th century.[22] Cujas discussed the case of a purchaser who used the *exceptio doli generalis* to opposed the *vindicatio* brought by a vendor of land who was not the owner at the time of sale, but acquired ownership later. Cujas was the first to affirm that the purchaser indirectly acquired a good title. The title of the purchaser was founded on *aequitas* and took effect from the *traditio*. In his comment on *Papiniani Opera*, Cujas wrote that the doctrine, which prohibits the confirmation of void contracts, was corrected *ex aequo and bono* and explained[23] the rule through the examples previously used by glossators, such as the sale of the dowry by the

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21 Ibid.

22 See F Ranieri, *Alienatio convalescit: contributo alla storia e alla dottrina della convalida nel diritto dell'Europa continentale* (Giuffré, 1974) 26–7.

23 J Cuiacii**,** *Praestantissimi Tomus Quartus vel Primus Operum Postumorum*, *Commentaria Accuratissima in Libros Quaestionum Summi inter Veteres Iuriconsulti Aemilii Papiniani, Opus postumum* (M A Mutio, 1722) part 1, 96.

husband, without the consent of the wife; the purchase from the non-owner; the creation of a pledge by the non-owner. In these cases the contract was void, but it could not be invalidated by the vendor who eventually acquired a good title after the purchase.

By opposing the *exceptio doli*, the purchaser stopped the action of the vendor for the recovering of the possession of the good and he indirectly acquired a good title from the conclusion of the agreement. The doctrine followed the maxim *venire contra factum proprium nemo potest* and it prevented the vendor taking advantage of his fraud. Cujas explained:

> ... According to the Catonian rule, the void alienation could not be confirmed. This rule is applied both to succession law and to agreements. However, one needs to add to the rule that those agreements, which could not be directly confirmed by enacted law could nevertheless be confirmed indirectly *ex aequo et bono*, through the remedy of retention and *exceptio doli mali* ... [For example], a pledge created by the non –owner is void, but it is confirmed if the debtor, after the creation of the pledge, acquires a good title on the good put in pledge. This happens when the debtor inherits the good from the true owner. In this case the pledge, although it is void, is confirmed ... by retention ... and *exceptio doli mali*. The remedies are given because the debtor, who wanted to recover the good put in pledge, had a fraudulent intent. Then the action and the exceptio *doli mali* prevent fraud.[24]

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[24] Ibid: '… Obiicitur primum regola Catoniana: *quae ab initio non valent, ex post facto non convalescunt*: quae plerumque valet, non sulum in legatis, et substitutionibus, sed etiam in contractibus. Sed ita respond. *non convalescunt ipso iure*, fateor, directo, sed remedio retentionis, remedio exceptionis doli mali ex aequitate, quod ita demonstro. Rei alienae pignus non valet, convalescit tamen acquisitione dominii, si is, qui domino pignus posuit, domino heres extiterit, et convalescit, non directo, non ipso iure … sed per retentionem ut … per exceptionem doli mali, quod scilicet debitor velit auferre rem creditori, quam ei pignoravit, quod sit mendax. Nam actioni et exceptioni doli mali insunt mendacia'[author's trans].

Cujas' theory was accepted by civil lawyers in the 17th century, when the rule of the confirmation of void agreements *ex aequo et bono* was well established. In the late 17th century the German lawyer Samuel Stryk dedicated a monograph to the matter, entitled *De Impugnatione Facti Proprii*.[25] He collected the developments of the debate among the civil lawyers in the previous centuries, showing that the ideas of Cujas were kept during the *Jus commune*. Stryk claimed that the rule was inspired by natural law and it had its ratio in the protection of the purchaser's reliance. In fact, the plaintiff was not allowed to sue contrary to his previous act when his action realised a breach of faith of the defendant.[26] One of the main examples of the application of the maxim *venire contra factum proprium* concerned agreements: the promisor could not revoke his promise to the detriment of the promisee who had acted in reliance of it.

The same argument had been sustained by the later Spanish scholastic lawyers, such as Molina and Gomez, who shared the opinion according to which no one can contradict himself with the fraudulent aim to take an unjust profit to the detriment of another. These lawyers traced the rule from a principle of natural law and used the same examples as glossators and commentators to describe it.[27]

The rule survived even in the 18th century, although the lawyers interpreted it as an application of the warranty against eviction, which was implied in all contracts of sale. The French lawyer Domat, in his *Les Lois Civiles Dans Leur Ordre Naturel*, wrote that the plaintiff was barred from

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25 S Stryk, *Disputatio Iuridica*, *De Impugnatione Facti Proprii* (Coepselius, 1688).

26 Ibid [15].

27 L Molina, *De Primogeniorum Hispanorum Origine, ac Natura* (Arnaud and Borde, 1672) Book I, ch 1, [17]; D A Gomez, *Ad Leges Tauri Commentarium Absolutissimum* (Regiae Societatis, 1794) 640.

recovering the possession of the land whenever he was obliged to provide the possessor with a warranty against eviction.[28] He quoted the *Digest* and the remedy of the *exceptio doli generalis*. Domat underlined that the French doctrine constituted an application of the Latin maxim *venire contra factum proprium nemo potest*. The same doctrine was accepted by Voet[29] and later by Pothier.[30]

Up to the 19th century, the civil law tradition accepted a doctrine which prevented the vendor from invalidating a void purchase to the detriment of the purchaser's reliance. The doctrine was developed by civil law jurisprudence from a principle of *aequitas*, according to which the void agreement could be confirmed *ex aequo et bono* to stop a fraudulent claim. This doctrine, both in its procedural origin and in its equitable aim, presents a high degree of similarity with the doctrine of equitable estoppel, developed by English law. Following the path of the protection of purchaser's reliance, our attention is now to be focused on English law, in order to outline some comparative remarks on the law developed on both sides of the Channel during the same centuries.

III THE MEDIEVAL COMMON LAW ESTOPPEL VS EQUITABLE ESTOPPEL

By the 14th century, common law courts had been using the word estoppel to indicate the defendant stopping the plaintiff from alleging something before the jury, which contradicted the plaintiff's own previous act. These

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28 J Domat, *Les Loix Civiles dans leur Ordre Naturel* (Cavelier, 1771) vol 1, supplement, part VIII, 8, *De l'Eviction et des Autres Meubles*.

29 J Voet, *Commentarius ad Pandectas* (Frates Cramer, 1757) vol 1, part XI, title III, 758 [2].

30 R J Pothier, *Treaté du Contrat de Vente* (Letellier, 1806) 100.

kinds of estoppels were called estoppels by matter *in pais* and they developed the principle that it was the estopped person's own act which prevented him from alleging a different state of fact.[31]

Estoppels *in pais* applied in connection to land law and barred the plaintiff from recovering possession of land when the recovery contrasted with a previous positive act of the same plaintiff. One of the main examples of this kind of estoppels concerned the *cui in vita.* It was a writ of entry through which the wife, after the husband's death, could recover the possession of freehold land alienated by the husband during his life.[32]

In a case of 1343 at the Cambridge Assizes,[33] a wife sued a *cui in vita* to recover her dower. Dower was land which belonged to a husband, but which a wife was entitled to enjoy after his death. In this case the husband had leased that land, preventing his widow from enjoying the land after his death. After the death of the husband, the lessee had assigned a third part of the land to the wife by parol agreement and he had retained the other two parts. The wife wanted to recover these two parts of the land. Normally a widow could use the writ *cui in vita* to recover such land, except in the case she had accepted the lease by deed or by fine. The court stated that she may enter into the two parts of the land, as the acceptance of dower here was not by fine or deed and so shall not conclude her. The wife's acceptance by parol was not an estoppel to her. Even if the wife were estopped, because of her acceptance, this bar would not affect anyone claiming the land other than the wife (such as her heir) because they had

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31 See W S Holdsworth, above n 5, vol 9, 159.

32 See ibid, 22.

33 17 Edw 3 49a; see also the paraphrase of the report compiled by D J Seipp, *An Index and Paraphrase of Printed Years Books Reports, 1268–1535* (10 May 2012) < http://www.bu.edu/phpbin/lawyearbooks/search.php>.

not acted in such a way to be estopped. The Court added: '… if the disseised [the wife] took homage of the disseisor [the purchaser] for her life she would be barred of the Assize but her heir not barred to a writ of entry sur disseisin of the same disseisin made to his ancestor'.[34] Only those who were privy to the agreement were bound by it and were prevented from recovering the land.

A century later, in a very similar case in the Common Pleas,[35] a widow sued a *cui in vita* to recover her dower from a certain Mr Thomas. The defendant alleged that the widow and her husband had given the land to him for life and he had paid the widow the rent, which she had accepted. But the plaintiff replied that the acceptance of the rent was in the country and it did not have the same value as an agreement in a court of record, therefore the acceptance did not bar the action. Then, the court dealt with the question if the widow was privy to the agreement between the husband and Thomas. The answer depended on the value of her acceptance of the rent after her husband's death. Newton CJ affirmed that while previously a wife could maintain a writ of entry on a lease made by her and her husband, now the law had changed. So the widow was privy to the agreement: her acceptance of rent worked as an estoppel.

A line of cases on the same matter is reported by Fitzherbert and Brooke under the titles *cui in vita* and *estoppel*.[36] In these cases the force of the bar was the quid pro quo that the plaintiff had accepted, such as a fine for alienation, a rent, homage, or an exchange. As a result, the presence of an

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34 D J Seipp, above n 33, commentary and paraphrase.

35 21 Hen 6 24b–26a.

36 Sir A Fizherbert, *Graunde Abridgement* (In aedibus Richardi Tottelli, 1516) vol 2, 103, title *estoppel*; Sir R Brooke, *Le Graunde Abridgement* (In aedibus Richardi Tottelli, 1586) 198–9, title *cui in vita*.

agreement barred the action by those who were privy to it. The heirs of the plaintiff, for example, were not privy to the void alienation of the father and they could recover possession of the land after the father's death, except in cases of their confirmation of the father's alienation. The confirmation of the void alienation made them privy to the agreement and estopped them from suing the purchaser.

This doctrine had been recognized by Bracton as part of English law in the 13th century.[37] In *De Legibus et Consuetudinibus Regni Angliae* the author wrote that if the wife, after her husband's death, agreed and ratified the gift of her inheritance, that her husband had made during his life, she was prevented from recovering the gift.[38] Similarly, the true owner was prevented from recovering land from the possessor, when he had previously confirmed the title of the possessor. The confirmation of the title could be express or through conduct.[39] The confirmation of the heir, when the right had descended to him, made an originally invalid grant valid. Thus the heir, who confirmed the void grant, was prevented from suing for the recovery of land. Bracton wrote: 'quod ab initio invalidum fuit quia imperfetum, per confirmationem validum fecit et perfectum quia confirmatio supplevit defectum'.[40]

The common law estoppel and the doctrine of confirmation of void alienations seems to resemble the medieval jurisprudence on *exceptio doli generalis*, developed on the Continent. It is possible that the basic idea of

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37 The exact date of Henry de Bracton's work is an issue of debate among jurists. On this theme see P Brand, 'The Date and Authorship of Bracton: a Response' (2010) 31(3) *Journal of Legal History* 217.

38 Henry de Bracton, *Bracton on the Laws and Customs of England* (Harvard University Press, 1968) vol 4, 31 [trans of S. E Thorne].

39 Ibid vol 2, 173.

40 Ibid vol 3, 292.

common law estoppel was borrowed by Bracton from the civil law jurisprudence, and it was developed by English courts in different details. However, it is very difficult to prove any clear link between common law and civil law doctrines and the issue is beyond the scope of the present work.[41]

The previous discussions show that common law estoppel was based on a positive act of the plaintiff, by which he was bound. It may be an agreement by deed or before the jury, or something received by the plaintiff from the defendant before the jury, such as homage, rent or the fealty from a tenant or a lessee. As far as the effects of common law estoppel, they were confined to procedure, such as the *exceptio doli* was, without recognising a real title of the defendant. These features, together with the language used by the common law courts, make a difference between common law estoppel and the doctrine of estoppel, which developed in the Court of Chancery, even if a reciprocal influence appears feasible.

The equitable doctrine was formulated to prevent fraud and was based on good conscience and *aequitas*: equity protected the defendant against the fraudulent action of the plaintiff, who wanted to take an unjust profit from the defendant's reliance. The aim of the doctrine was to relieve against the bad faith of the plaintiff, who had induced the defendant to expend his money on the faith of some promise or representation, which he afterward violated.[42]

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41 R T Macnair, *The Law of Proof in Early Modern Equity, Comparative Studies in Continental and Anglo-American Legal History* (Duncker & Humblot, 1999) 131; J H Wigmore, *Treatise on Evidence in Trials at Common Law* (Little, Brown, 3rd revised ed, 1940) [1117] and [2426].

42 *Thornton v Ramsden* (1864) 4 Giff 566.

The Court gave an equitable title to the defendant to protect his reasonable confidence that his possession would not be disturbed.[43] The aim of the doctrine was to prevent the landlord from acting fraudly and profiting from the expectation of the possessor.

One of the foundational authorities of the doctrine, as applied to property law, is found in the dissenting opinion given by Lord Kingsdown in *Ramsden v. Dyson*,[44] decided by the House of Lords in 1866:

> The rule of law applicable to the case appears to me to be this: 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.[45]

The doctrine developed by Equity law is usually presented as a quite modern one, traced back to the 19th century. However, a series of cases, decided by the Court of Chancery between the 16th and the 18th century demonstrate that the protection of a purchaser's reasonable confidence and the basic idea of equitable estoppel were known by the Court of Chancery even in those centuries, although the Court did not used the word estoppel to identify the doctrine. The main matter of these cases was the protection of a purchaser against a fraudulent act of a seller, on which we shall now focus our attention.

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43 Ibid 571.

44 See Edward Coke, *The Modern Law of Estoppel* (Oxford University Press, 2000) 45.

45 *Ramsden v Dyson and Thornton* (1866) LR 1 HL 173.

IV THE PROTECTION OF THE PURCHASER AGAINST THE FRAUDULENT ACTION OF THE SELLER

In a line of cases, between the 16th and the 18th century, the Court of Chancery was asked to protect a good faith purchaser against a seller. The central issue of these cases was to establish if the seller may be barred from exercising a common law right when his purpose was fraudulent. The main example concerned void grants and conveyances: the purchase of the land was void but the seller let the purchaser enter in possession of the land and induced the purchaser to think he had a good title. Some years later, for various reasons, the seller rethought and sued an action of ejectment to recover the land. According to the common law, the seller had the right to sue, as purchase was void and the purchaser's possession of land was based only on a bare promise or representation. Common law estoppel needed the agreement to be accepted by the vendor by deed or before the jury.

In the same centuries, civil lawyers were confronted with very similar cases: the seller was not the true owner, but he acquired the ownership after the purchase and he sued to recover the possession from the purchaser; the non-owner created a pledge and after he had acquired the ownership of the good he sued to void the pledge; the father sold the land of his son but, after his death, the heir sued to recover the possession of the land alleging the contract was void; the husband sold the dower of his wife, but after the purchase he rethought and he wanted to invalidate the purchase.[46]

These cases brought out the difficult relationship between law and *aequitas*: the seller had the right to void the purchase but the exercise of his

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46 D Tuschi, *Praticarum Conclusionum Iuris* (Borde, Arnaud, Rigaud, 1661) vol 3, 168 [368]; M A Sabelli, *Summa Diversorum Tractatuum, in Quibus Quamplurimae Universi Iuris* (Balleoniana, 1748) vol 2, 390.

right led to a fraud against the purchaser. This happened when the seller contradicted his previous own act, which the purchaser had relied on.

The civil law jurisprudence investigated if it was right and just to follow law even when the result was contrary to *aequitas* and it concluded that the legal action of the plaintiff could be barred by the defendant when it was fraudulent and contrary to *aequitas*. As mentioned above, by the end of the sixteenth century, the rule that the void purchase was to be confirmed when the vendor had induced the purchaser to rely on it was well established on the Continent. The confirmation of the title was a remedy, founded on *aequitas*, to prevent the plaintiff from exercising a right to the detriment of the purchaser's reasonable confidence. The result was that the non-owner could not contradict his previous act, but was forced to confirm the act and its legal effects.

During the same period, the Court of Chancery was ruling on similar cases, which were very close to the continental doctrine. In a case of 1492, the Court of Chancery protected the plaintiff against the defendant, who wanted to profit from his own fraudulent act to the expense of the first one. The plaintiff was creditor of a sum of money and he had obtained a judgment against the debtor, to be executed over the debtor's land. Before the debt was paid, the debtor granted his land to a certain Mr Capel. At the time of purchase the purchaser did not know the land was under execution. When the purchaser discovered that the land was subject to the judgment for execution, he offered the creditor a sum of money smaller than the value of debt, but the creditor refused to accept this. Then, the purchaser brought a writ of right against the plaintiff and entered the land. According to the *Statute of Gloucester* of 1278, the creditor could falsify the recovery of land by the purchaser, but as he had not falsified the recovery he had lost his right. The Court of Chancery had to address the question if the creditor

could sue a writ of subpoena against the purchaser even when he had no common law right.

The majority of judges stated that even if there was no remedy in common law, the plaintiff should be restored of his possession:

> ... it seems expressly good conscience to restore him to the possession if there is no remedy by common law for him, because this recovery was by fraud and recovery by fraud is abhorred in our law, and nothing is more abhorred than fraud; because if one recover on a true title by fraud in our law, it will be defeated because this recovery was by fraud.[47]

The case was compared with the case of a window who sued for the recovery of her dower. Huse CJKB and Bryan CJCP affirmed:

> … as in case it seems as if a widow cause one enter on dead husband or disseised her husband's heir against whom she recovered her dower, this will be defeated, and so here in our law fraud is always expelled; so it appears here express fraud, because Sir W. Capel has no right to the land except by fraud, because he knew at the time of recovery of the recognisee's title, and so this was no recovery by title, but by fraud and no title, for which cause it is good reason and conscience that the plaintiff will be restored …[48]

The same example was the issue of another case at the end of 15th century.[49] A husband made a lease on the wife's land, the lessee being in good faith and he built upon the land. After the death of the husband, the wife sued the possessor to recover the land, but the Court of Chancery compelled her to provide recompense for the improvements from which she benefited. The *ratio* was that the owner was prevented from unjust

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47 7 Hen 7 10b-13b, paraphrased by D J Seipp, above n 31.

48 Ibid.

49 *Peterson v Hickman* (1458) 34 H 6.

profiting to the detriment of the possessor. The remedy was personal, forcing the owner to give the possessor a recompense for the improvements. But in the following century the Court started to bar the owner from recovering the land and, eventually, to confirm the void title of the possessor.

The *Earl of Oxford's Case* followed the path of these previous decisions. The matter of controversy was a void lease, based on a conveyance prohibited by a statute of 1571. The lessee had occupied the land for many years and had spent a great deal of money in improvements, relying on the fact that his possession was based on a good title. Magdalene College, the lessor, decided to void the lease and recover the land. The action of ejectment brought by the plaintiff was founded on a good title, but it would have had the result of giving the plaintiff an unjust profit to the detriment of the lessee. One of the main issues of the case was if a void lease could produce any effects in order to avoid a result contrary to conscience.[50] The Court stated that the presence of a void lease did not prevent the plaintiff obtaining relief in Chancery: '… Equity and good conscience speak for the plaintiff ... Nor does the law of the land speak against him. But that and Equity ought to join hand in hand, in moderating and refraining all extremities and hardship.'[51]

The report refers to some decisions of the 16th century, where the plaintiff had a remedy in equity against the defendant, notwithstanding the

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50 See D J Ibbetson, 'The Earls of Oxford's Case (1615)', C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart, 2012) 1–32, where the author affirms: '… the decision if favour of the Earl reflected two important points. First was that Common Law did not have a monopoly over the determination of rights of real property, second that — in modern terms — the Court of Chancery had the power to manipulate property rights based on the working of what we would see as a broad principle of estoppel': at 28.

51 *The Earls of Oxford's Case* (1615) 1 Chan Rep 1.

defendant had a good title at common law. Most of the examples are taken from the law of obligations. Along this line the Court quoted a case of 1599 and stated: 'So if one neglect to enroll his deed of bargain and sale, being his only assurance, and the bargainor brings an ejection against him and has judgment, the bargainee may resort to Chancery, and there be relieved, if not for the land, yet for the money paid'.[52]

In the 16th century the Court of Chancery protected the good faith purchaser of the land through a personal remedy, a century later the Court began to give a real remedy to him.[53] In the case of *Hunt v Carew*, decided by the Court of Chancery in 1649, a purchaser's reliance on the validity of the title was the basis for recognising his right to possession of the land.[54] A father had a piece of land for life, reminder in tail to his son. The plaintiff, thinking the father had the inheritance, asked the son for his assistance in procuring a lease from his father. The son helped the plaintiff and he also received a sum of money from him. After the purchase, the plaintiff discovered that the father was only a tenant for life and the lease was void. Then he sued the Court of Chancery to have the lease confirmed by the father and the son.

The Court ordered

> … since the plaintiff was not acquainted that the father had exceeded his power, and he relying on the affirmation of the son (who had most of the

52 Ibid 6.

53 The sixteenth century cases mainly concerned questions about leases, which were initially not seen as proprietary rights. Leases gradually developed into proprietary rights, protected by proprietary remedies; on this issue see generally W Plucknett, *A Concise History of the Common Law* (OUP, 5th ed, 1956) 570–4; H Baker, *An Introduction to English Legal History* (Butterworths, 4th ed, 2002) 298–308; R Megarry and H W R Wade, *The Law of Real Property*, (Sweet & Maxweel, 7th ed, 2008) 729.

54 *Hunt v Carew* (1649) 21 ER 786.

> money), that the lease would be good without his joining, by which he was deceived; that therefore both should join at their own costs to make an assurance, and confirm the lease to the plaintiff during the estate thereby granted.[55]

The affirmation of the son, reassuring the purchaser about the validity of the lease, worked as an estoppel against him and let the purchaser go to the Court of Chancery and obtain the confirmation of his title.

In the same way, in a case of 1689, a purchaser, who relied on the validity of the vendor's title, had a cause of action against the true owner, who encouraged him to proceed to the purchase.[56] Sir George Norton's young brother had an annuity, charged on land by his father's will. Mr Hobbs, who wanted to purchase the annuity, went to Sir George and asked for assurance about his brother's title. Sir George answered that his father had the inheritance of the land when he made the will and his brother had a good title. He added that he heard there had been a settlement made by his father before the will, but he did not know the content, so he encouraged Mr Hobbs to purchase the land. Actually the father had sold the land to a certain Mr Baldwin. Therefore, the purchase of the annuity by Mr Hobbs was void, because the father was not the true owner of the land and Sir George's brother did not have a good title. Afterwards, Sir George acquired the land and wanted to void the annuity. Mr Hobbs went to the Court to have his annuity decreed. The Lord Chancellor

> … decreed the payment of the annuity, purely on the encouragement Sir George gave Hobbs to proceed in his purchase, and that it was a negligent thing to him not to inform himself of his own title, that thereby he might

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55 Ibid.

56 *Hobbs v Norton* (1689) 1 Vern 137.

> have informed the purchaser of it, when it came to enquire of him: and therefore decreed Sir George to confirm the annuity to Hobbs.[57]

Similarly, in a case decided by the Court of Chancery in 1711,[58] the son, remainder in tail, was barred from avoiding the lease granted by the father, during his life. The son had never acquainted the plaintiff with the power of the father, but he had let him make improvements with the design to reap the whole benefit. The Court decreed the son to confirm the lease.

Bacon[59] and Viners[60] collected these decisions under the title *Fraud*, underlining that the Court faced the question of fraud by construction: the contract between the parties was not made by fraud, but the action for the recovery of possession had a fraudulent aim. The Court found fraudulent the behaviour of the vendor, who contradicted himself, and protected the reliance of the purchaser by confirming his title from the beginning. The void title of the purchaser was made good *ex aequo et bono*. The purchaser could oppose his title both to the seller and his heirs and third parties who had notice of the purchase.

The use of the title fraud is revealing of the ratio of these decisions and it also suggests the likelihood of a link between them and the continental jurisprudence developed on *exceptio doli*. Fraud in England, as *dolus* in Europe, is the central issue of the cases mentioned above. The Court of Chancery states that the vendor who contradicts his previous promise or representation commits fraud and it opposes his fraudulent act obliging him

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57 Ibid; see also *The East India Company v Vincent* (1740) 2 Atkin 82; *Stiles v Cooper* (1748) 3 Atkin 692; *Dann v Spurrier* (1802) 7 Ves 230.

58 *Huning v Ferrers* (1711) 25 Eng Rep 59.

59 M Bacon, *A New Abridgement of the Law*, London (H Lintott, 1736) vol 1, 597.

60 C Viner, *General Abridgement of Law and Equity* (G G J and J Robinson, 2nd ed, 1791) vol 13, 535.

to give effects to his promise or representation. This interpretation may also help to explain why the Court of Chancery did not use the word estoppel (even if it was known by the Court) to describe these situations. While the word estoppel was used by the Court to indicate the common law remedy, in these cases the words fraud and confirmation were mainly used echoing the words *dolus* and *confirmatio* of Continental origins. This makes the word estoppel misleading to follow the path of the development of equitable estoppel from the 16th to the 18th century. On the contrary, the cases mentioned above seem to be the direct precedents of the doctrine as they are referred to *Thornton v Ramsden*, later reversed by the House of Lords in *Ramsden v Dyson*, one of the foundational authorities for the formulation of the idea of proprietary estoppel.[61]

V CONCLUSION

In the 16th–18th century England and Europe seem to share a common solution to the problem of protection of the purchaser's reliance. The protection of the purchaser, who relied on a promise or representation by the vendor, later frustrated, finds an early source in the *exceptio doli generalis* of Roman Law and in the maxim *venire contra factum proprium nemo potest*, later formulated by glossators. During the *Jus commune*, the interpretation of the *exceptio doli generalis* developed in a doctrine according to which a void purchase could be confirmed *ex aequo et bono* to stop a claim from the vendor in contrast with his previous act. The doctrine was inspired by natural law and obliged the seller to confirm the void purchase when his action to void the contract would be realised a *laesio*

61 *Thorton v Ramsden* (1864) 4 Giff 566, 564: 'One of the earliest cases laying down the principle on which this Court acts was The Earl of Oxford's Case […] which in the material facts very much resembles the present one'; see especially E Coke, above n 44, 42.

fidei of the defendant. The civil law doctrine seems to have an English counterpart in a series of cases decided by the Court of Chancery from the 16th to the 18th century. These cases concerned void purchases or conveyances. The Court of Chancery protected the purchaser of the land against the vendor, who wanted to take an unjust profit from the void contract to the expense of the purchaser. As on the Continent, in these cases the vendor was decreed to confirm the void purchase and let the purchaser peacefully enjoy his possession. The remedy was inspired by good conscience and the *ratio* was to prevent fraud. Although it is difficult to demonstrate a borrowing of the Continental doctrine by the Court of Chancery, the language used by the Court and the identification of the cases as examples of fraud strengthen the theory that the Continental doctrine was a probable source of inspiration for the Court of Chancery. In this case, the equitable doctrine of estoppel would be more ancient than the 19th century, having its early source in the *Jus commune* developed in Europe.