[HIGH COURT OF AUSTRALIA.]

HUME AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

MONRO AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Supreme Court (N.S.W.)—Equitable jurisdiction—Declaration of right—Negative declaration—Argument of preliminary point of law—Want of equity—Consideration of whole record—Statement of claim disclosing no equity—Assertion of equitable claim by defendant—Equity Act 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *sec.* 10—*Administration of Justice Act* 1924 (*N.S.W.*) (*No.* 42 *of* 1924), *sec.* 18—*Consolidated Equity Rules* 1902 (*N.S.W.*), *r.* 155.

H. C. OF A. 1941. SYDNEY, *Nov.* 17, 18; *Dec.* 8. Rich, Starke, McTiernan and Williams JJ.

The jurisdiction to make a declaratory decree without consequential relief under sec. 10 of the *Equity Act* 1901 (N.S.W.), as amended by sec. 18 of the *Administration of Justice Act* 1924 (N.S.W.), extends to the declaration of the non-existence of equitable rights or interests in the defendant and is not limited to the declaration of their existence in the plaintiff.

Where a submission of want of equity is argued as a point of law under rule 155 of the *Consolidated Equity Rules* 1901 (N.S.W.), the court, in order to determine whether an equity exists, may take the whole record into consideration and is not confined to the statement of claim. Where the claim is for a declaratory decree negativing the existence of rights claimed by the defendant and no consequential relief is sought, it is sufficient to give to the court jurisdiction under sec. 10 of the *Equity Act* 1901 (N.S.W.), as amended by sec. 18 of the *Administration of Justice Act* 1924 (N.S.W.), that it appears upon the whole record that the claim which the defendant is making is equitable; it is not necessary in such a case that the statement of claim should disclose that some question of equitable rights or remedies is involved.

Decision of the Supreme Court of New South Wales (*Roper* J.), by majority (*Rich, McTiernan* and *Williams* JJ., *Starke* J. dissenting), reversed.

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APPEAL from the Supreme Court of New South Wales.

A suit, in which the plaintiffs claimed declarations of right but did not claim consequential relief, was brought in the equitable jurisdiction of the Supreme Court of New South Wales by Stanley William Huon Hume, Norman Francis Rawdon Hume and Francis Albert Wakely against Cecil Owen James Monro, Jane Alice Nesbitt Wheat, as executrix of the will of Gerard Stephenson Wheat deceased, John Harrison Wheat, Arnold Victor Richardson, as official receiver of the estate of Ralph Mervyn Mitchell Houston deceased under the *Bankruptcy Act* 1924-1933, and Holt Sutherland Co. (1933) Ltd.

The statement of claim alleged in substance :—(*a*) a written request by one Marien to a predecessor in title of the defendant company for a ninety-nine years' lease at a rent therein mentioned of certain land under the *Real Property Act* dealing with which said land was controlled by the *Holt-Sutherland Estate Act* 1900, the said request containing a promise to pay rates and taxes ; (*b*) devolution of Marien's interest to the plaintiff Stanley William Huon Hume through a series of " purported transfers " by instruments in writing each containing a direction to the defendant company's predecessor " to transfer the land in its books and to have the lease made out in the name of " the transferee thereunder ; (*c*) acceptance of the said transfers by the transferees thereunder, their handing to the defendant company's predecessor and their remaining in its custody or that of the defendant company ; (*d*) the execution of no other instrument by Marien, any of the mesne transferees, or the plaintiff Stanley William Huon Hume, and the execution of no instrument by way of lease or otherwise by the defendant company or its predecessor in favour of Marien, any of the mesne transferees, or the said plaintiff ; (*e*) the absence of any consent, as required by the *Holt-Sutherland Estate Act* 1900, to any appointment by way of lease to Marien, any of the mesne transferees, or the said plaintiff ; (*f*) the absence of any entry upon, or occupation or possession of, the said land by the said plaintiff ; (*g*) one month's notice in writing given by the said plaintiff to the defendant company determining any tenancy of the said lands which might be held to exist ; and (*h*) the holding by the said plaintiff and the mesne transferees of their interests in the said land as agents for a partnership, the devolution of the interests of members of the partnership, and the absence of any possession of the said land by the partnership.

Par. 13 of the statement of claim alleged in substance that the defendant company claimed that the plaintiff Stanley William Huon Hume was then and would continue in the future to be liable to make payments by way of rent and otherwise to the defendant

company in respect of the said land under and by virtue of the transfer to the plaintiff and threatened and intended to hold the said plaintiff so liable.

The plaintiffs claimed that it might be declared:—"(*a*) That (i) there is not now and (ii) never at any time has been any privity of interest between the plaintiff Stanley William Huon Hume and Holt Sutherland Co. Ltd. and/or the defendant company in respect of the subject lands or any part thereof. (*b*) That (i) the plaintiff Stanley William Huon Hume is not now and (ii) never has been at any time under liability present and future to pay moneys to the defendant company or otherwise in relation to the defendant company in respect of the subject lands or of any part thereof." Similar declarations were claimed in relation to the syndicate and its members. The Holt Sutherland Co. Ltd. mentioned in the said claim is identical with the defendant company's predecessor above referred to.

The defendants Monro and Holt Sutherland Co. (1933) Ltd. entered disputing appearances. The defendants Wheat entered an appearance in which they disclaimed all right, title and interest in the subject matter of the statement of claim, and, together with the defendant Richardson, submitted to such decree or order as the court thought fit to make.

By its statement of defence the defendant company put the plaintiff to proof of most of the matters alleged in the statement of claim, but did not plead to par. 13 thereof.

The defendant company said that it accepted the said request in writing of Marien and that thereupon Marien entered into possession of the land in pursuance of the request and not otherwise and paid to the defendant company the rent as stipulated by the request in writing and paid to the appropriate authorities the taxes and rates referred to in the request and that Marien so remained in possession and so continued to pay the rent and taxes and rates until 1st September 1919 or thereabouts.

The defendant company further said that upon the lodgment with the company of the respective instruments of transfer therein the company accepted the same and did transfer the land in its books and records out of the name of the transferor into that of the transferee. Each of the mesne transferees, and the plaintiff Stanley William Huon Hume, successively entered into possession of the land in pursuance of the respective instruments of transfer and the acceptance thereof by the company and not otherwise and thereafter paid the rent, taxes and rates mentioned in the request in writing.

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The defendant company further said that a consent as required by sec. 6 of the *Holt-Sutherland Estate Act* 1900 was duly obtained by the company to the leasing by it to the plaintiff Stanley William Huon Hume of the land. The defendant company further said that upon receipt of the one month's notice hereinbefore referred to the company informed the said plaintiff that it did not accept the notice.

By par. 23 of its statement of defence the defendant company submitted that the plaintiffs had no equity entitling them or any of them to proceed against the defendants or any of them in the equitable jurisdiction of the court and that the proper remedy (if any) was at law.

By their replication the plaintiffs, *inter alia,* joined issue upon the company's statement of defence.

The pleadings are more fully set out in the judgment of *Williams* J. hereunder.

Upon motion by the defendant company *Roper* J. ordered that the demurrer point raised by par. 23 of the statement of defence be set down for argument under rule 155 of the *Consolidated Equity Rules* 1902 (N.S.W.).

The grounds of demurrer served pursuant to his Honour's order were in substance :—(*a*) That the facts alleged in the statement of claim did not disclose any equity or cause of action entitling the plaintiffs to the relief claimed against the defendant Holt Sutherland Co. (1933) Ltd. ; (*b*) that the plaintiffs claimed only a declaration of right and did not claim any relief ; (*c*) that upon the facts alleged in the statement of claim the plaintiffs were not entitled to any relief in a court of equity ; and (*d*) that in the circumstances and upon the facts alleged in the statement of claim the court had no power to make a declaratory decree.

Roper J. held that the declarations sought did not relate to equitable rights or titles or to the existence of equitable relief, and, therefore, that the court had no jurisdiction to make them or any of them. His Honour upheld the demurrer, granted leave to the plaintiffs to amend the statement of claim generally, and ordered that unless it was amended within twenty-one days the suit be dismissed with costs.

From that decision the plaintiffs appealed to the High Court.

Upon the hearing of the appeal the defendants other than the defendant company, not being interested in the point at issue, did not appear.

Maughan K.C. (with him *McKillop*), for the appellants. The court below had jurisdiction to grant the declarations sought. The

judge took a wrong view of the facts. An important fact is that at all material times title to the subject land was under the *Real Property Act* 1900. Rent under an unregistered lease in respect of land under that Act can be recovered only in a court of equity; the landlord has not any remedy therefor at common law. A document that requires registration under the *Real Property Act* does not confer any rights at common law, either personal or proprietary, in favour of the person executing it (*Davis* v. *McConochie* (1)). The consent required under the *Holt-Sutherland Estate Act* 1900 to the leasing of more than fifteen acres has not been obtained. The facts in the statement of claim disclose that the only remedy open to the respondent company when it sets up that there is a claim against the appellants to pay moneys and also a claim otherwise is to take proceedings against the appellants in equity. These proceedings attract the jurisdiction of the court under sec. 10 of the *Equity Act* 1901. The equity court, under sec. 10, can investigate the claim and, if it thinks fit, it can make a declaration that there is not a claim. Equitable principles and rights are involved in this suit; therefore the appellants are entitled to go into the equity court and to ask for a declaration. Having got into the court the whole of the facts will be investigated and the court will determine whether or not the appellants ought to get any sort of a declaration. In a proper case a court of equity will grant a negative declaration (*Société Maritime et Commerciale* v. *Venus Steam Shipping Co. Ltd.* (2)). The unlimited power of the court is shown in *Burghes* v. *Attorney-General* (3), *Guaranty Trust Co. of New York* v. *Hannay & Co.* (4), *Hanson* v. *Radcliffe Urban District Council* (5), and *Cooper* v. *Wilson* (6)—and see also *In re Clay*; *Clay* v. *Booth* (7). If there are facts in existence relating to a person's title to land he is entitled to invoke the aid of the equity court (*Cooper* v. *Commissioners of Taxation* (8)). Although the decision in *Tooth & Co. Ltd.* v. *Coombes* (9) constitutes an exception to the generality of the rule as interpreted in England, it does show that suits for equitable relief or relating to equitable rights and titles do come within the scope of sec. 10. That view was approved in *David Jones Ltd.* v. *Leventhal* (10) and *Langman* v. *Handover* (11). If in a dispute in respect of a transaction between parties one has a right to go into equity on any item of the dispute the court of equity is seised of all the items

(1) (1915) 15 S.R. (N.S.W.) 510, at p. 515; 32 W.N. 172, at p. 173.
(2) (1904) 9 Com. Cas. 289.
(3) (1911) 2 Ch. 139, at p. 155.
(4) (1915) 2 K.B. 536, at p. 561.
(5) (1922) 2 Ch. 490, at p. 507.
(6) (1937) 2 K.B. 309, at pp. 321, 359.
(7) (1919) 1 Ch. 66.
(8) (1897) 19 L.R. (N.S.W.) Eq. 1.
(9) (1925) 42 W.N. (N.S.W.) 93.
(10) (1927) 40 C.L.R. 357.
(11) (1929) 43 C.L.R. 334.

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of the dispute before it (*Wright* v. *Carter* (1)). That case is not cut down by anything contained in *David Jones Ltd.* v. *Leventhal* (2). The claim alleged in par. 13 of the statement of claim should not be read that the plaintiff there mentioned is and will continue to be liable to make payments (*a*) by way of rent, (*b*) and otherwise, but that he is and will continue to be liable (*a*) to make payments of rent and (*b*) otherwise. " Otherwise " is in contradistinction to " pay money ". It must relate to equity, because at common law one cannot sue for anything other than the payment of money. Where with the consent of the lessor there is an equitable but not a legal assignment of a lease of land under the *Real Property Act* 1900, the assignee is not liable to the lessee for rent, nor for use and occupation (*Thornton* v. *Thompson* (3)). Where, as in this case, it is shown that upon an examination of all the facts the only court in which the claim could be pursued is a court of equity, then that court has jurisdiction under sec. 10 to enter into consideration of the claim to determine whether it will or will not make a declaration. On a demurrer *ore tenus* the court is entitled to look at the affidavits (*Metropolitan Theatres Ltd.* v. *Harris* (4)), and upon argument upon a preliminary point of law set down under rule 155 of the *Consolidated Equity Rules* the court may have regard to the whole of the record (*Richards* v. *Butcher* (5) ; *Preston Corporation* v. *Fullwood Local Board* [*No.* 2] (6) ; *Annual Practice* (1941), p. 432 ; *Parker's Practice in Equity* (*N.S.W.*), (1930), p. 206). The questions in issue are all cognizable in a court of equity. There is not any relationship between the respondent company and the first-named appellant which would give rise to any action at law. The appellants do not seek a general declaration ; they seek a declaration that there is no claim under the document.

Kitto, for the respondent company. The statement of claim does not allege a threat by the respondent company to take any equity proceedings against the first-named appellant. Par. 13 of the statement of claim cannot, on any fair construction, be read as alleging a claim by the respondent company that it is entitled to sue the first-named appellant in equity. The plain meaning of that paragraph is that the company claims that that appellant is under some pecuniary liability to it. That is a claim which can be litigated at common law. The facts alleged in the statement of defence, whether or not they can be taken in conjunction with the

(1) (1923) 23 S.R. (N.S.W.) 555 ; 40 W.N. 99.
(2) (1927) 40 C.L.R. 357.
(3) (1930) S.A.S.R. 310.
(4) (1935) 35 S.R. (N.S.W.) 228 ; 52 W.N. 68.
(5) (1890) 62 L.T. 867.
(6) (1885) 34 W.R. 200.

facts alleged in the statement of claim, do not assert an equitable claim. The company did not counterclaim for specific performance. It is a departure from principle that on a demurrer the court can look outside the statement of claim. Par. 13 of the statement of claim should be construed on its own terms and without reference to any other pleadings (*Metropolitan Theatres Ltd.* v. *Harris* (1)). The cases cited in support of the converse proposition show that the court may determine a point of law. The record may be looked at only for the purpose of determining, when the court has dealt with the point of law, whether leave to amend should be given. The point of law which arose was not whether the appellants had any equity, but whether the statement of claim was demurrable. None of the allegations in par. 13 amounts to a claim which would be cognizable in equity. The observation made in *Davis* v. *McConochie* (2) to the effect that a court of equity, regarding, as it does, a lessee as invested with an equitable term, would order payment of rent, was *obiter* and goes too far. On the statement of claim there is no case made upon which money could be claimed in equity. Even if par. 13 be construed as alleging that the company had threatened the plaintiffs with equity proceedings, that circumstance would not give an equity to entitle the plaintiffs to bring this suit. This is not a claim to equitable relief and it is not a suit relating to equitable rights and titles (*Tooth & Co. Ltd.* v. *Coombes* (3)). It does not disclose any recognized head of equity, as in *Cooper* v. *Commissioners of Taxation* (4). See also *Story* on *Equity*, 3rd ed. (1920), p. 294, par. 694. The proposition that a suit to negative an alleged equitable personal liability can be maintained is directly in conflict with the decisions in *David Jones Ltd.* v. *Leventhal* (5) and in *Langman* v. *Handover* (6). In those two cases the court accepted as correct that jurisdiction exists only in proceedings for equitable relief or remedy or as to equitable rights or titles, and they both establish that the matter is one of jurisdiction and not of discretion. A court of equity cannot determine purely legal questions, except in the course of an equity suit. An equity suit is a suit in which the plaintiff seeks not only determination of legal questions, but the granting of equitable relief in respect of the legal position created, and unless that equitable relief is claimed there is no jurisdiction to determine legal questions (*Furphy* v. *Nixon*

(1) (1935) 35 S.R. (N.S.W.), at p. 233; 52 W.N., at p. 70.
(2) (1915) 15 S.R. (N.S.W.), at p. 515; 32 W.N., at p. 173.
(3) (1925) 42 W.N. (N.S.W.) 93.
(4) (1897) 19 L.R. (N.S.W.) Eq. 1.
(5) (1927) 40 C.L.R. 357.
(6) (1929) 43 C.L.R. 334, particularly at p. 343.

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(1) ; *Schnelle* v. *Dent* (2) ; *Bethell* v. *Automatic Totalisators Ltd.* (3)). At common law an injunction to restrain can be obtained only if actual *mala fides* be shown (*Halsey* v. *Brotherhood* (4)).

Maughan K.C., in reply. The proper construction of par. 13 of the statement of claim shows that the company's claim is under the document. If the asset with regard to which the issue arises is an equitable title then the issue can be brought under sec. 10 of the *Equity Act* (*Tooth & Co. Ltd.* v. *Coombes* (5)). The whole of the judgment in that case was referred to with approval in *David Jones Ltd.* v. *Leventhal* (6). If the title in dispute is equitable, then the court has jurisdiction under sec. 10 to make the declaration sought. The effect of the decision in *David Jones Ltd.* v. *Leventhal* (7) is that a person who is threatened by another person with equity proceedings is entitled under sec. 10 to institute a suit in the court of equity for a declaration that that other person has no equity against him. There is sufficient in the statement of claim to indicate unequivocally a claim by the company to have an equitable right against the appellants ; therefore it is not necessary to apply the decisions in *Dixson Trust Ltd.* v. *Beard Watson Ltd.* (8) and *Queensland Insurance Co. Ltd.* v. *Australian Mutual Fire Insurance Society Ltd.* (9).

Cur. adv. vult.

Dec. 8.

The following written judgments were delivered :—

RICH J. The question raised by the present appeal is relatively a simple one. The appellant plaintiff launched a suit in equity against the defendant company in reliance upon sec. 10 of the *Equity Act* 1901 (N.S.W.), which provides that no suit shall be open to objection on the ground that a merely declaratory decree is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed. In New South Wales, in order that a litigant may be entitled to approach the Supreme Court in its equitable jurisdiction it is necessary that some question of equity—of equitable right or liability—should be involved. He cannot approach the court in that jurisdiction if nothing but legal rights or liabilities are involved. Sec. 10 is very wide in its scope, but it is limited as to jurisdiction within the

(1) (1925) 37 C.L.R. 161, at pp. 172-173.
(2) (1925) 35 C.L.R. 494
(3) Noted (1928) 1 A.L.J. 386.
(4) (1881) 19 Ch. D. 386, at pp. 389, 393.
(5) (1925) 42 W.N. (N.S.W.), at pp. 94, 95.
(6) (1927) 40 C.L.R., at pp. 368, 381.
(7) (1927) 40 C.L.R. 357.
(8) (1915) 19 C.L.R. 499.
(9) (1941) 58 W.N. (N.S.W.) 182.

boundaries of the general jurisdiction of the Supreme Court in Equity. It is available only if some question of equity is raised in the proceeding in which it is invoked.

It is contended in the present case that the statement of claim did not show that any question of equity was involved in any aspect of the matter in respect of which a declaratory decree was sought. It may be that the statement of claim itself is defective in this respect, and that if a formal demurrer had been filed a judgment upholding the demurrer for the reasons stated by *Roper* J. ought not to be disturbed, on the footing that any doubts raised by a pleading should be resolved against the pleader. But the defendant company did not file a formal demurrer. It put on a statement of defence; and then procured a preliminary point of law as to the existence of any equity, to be set down for argument under *Consolidated Equity Rules* 1902, rule 155. Now the practice under the corresponding provisions of the English rule (Order XXV., rule 2), as is stated in the *Annual Practice* (White Book) (1941), p. 432, is for the court to take the whole record into consideration, so that a plaintiff who objects to a defence may find himself called upon to defend his statement of claim, and *vice versa*. In the present case, whatever the deficiencies of the statement of claim, I am of opinion that it sufficiently appears from the statement of defence that the defendant company is seeking to fix the plaintiff with liability under an agreement for a lease which it claims to be specifically enforceable against him in equity. In these circumstances I am of opinion that the learned judge whose order is the subject of this appeal was in error in holding, as he did, that the court had no jurisdiction to make the declarations asked for or any of them. Whether any ground exists for making a declaratory decree in the plaintiff's favour, or for giving him any relief, does not, of course, at this stage arise for consideration.

For these reasons I am of opinion that the order should be: Appeal allowed. Discharge the order of the court below and in lieu thereof order that the determination of the point of law raised by par. 23 of the statement of defence stand over until after the evidence has been taken at the hearing, either party to be at liberty to amend as they may be advised. Costs of this appeal to be costs in the suit. Costs of the order below to be reserved and disposed of at the hearing.

STARKE J. Declarations without any consequential relief were claimed in this suit pursuant to the provisions of the *Equity Act* 1901 (N.S.W.), but the principal defendant submitted by its defence that the plaintiffs had no equity entitling them or any of them to

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proceed against the defendants or any of them in the equitable jurisdiction of the Supreme Court, and that the proper remedy (if any) was at law.

An order was made under the *Consolidated Equity Rules*, rule 155, that this point of law be set down and disposed of before the hearing of the suit, but no order was made under the rule for taking evidence on any issue of fact necessary for the purpose of deciding the point of law so raised. It is clear upon the pleadings that the litigant parties were not agreed upon the facts. For instance, the plaintiffs allege as material facts founding their right to relief in the equitable jurisdiction of the Supreme Court that the plaintiff Hume never entered upon the lands in the pleadings mentioned and that no consent to any appointment by way of lease was given as required by sec. 6 of the *Holt-Sutherland Estate Act* 1900, but these facts are not admitted.

The function of the court is, as was said in *Stephenson, Blake & Co.* v. *Grant, Legros & Co.* (1), to decide questions of law arising between the parties as the result of a certain state of facts (*Western Steamship Co. Ltd.* v. *Amaral Sutherland & Co. Ltd.* (2)).

In the circumstances of the case, the order made pursuant to rule 155 should not, I think, have been made. It might, as in the *Western Steamship Case* (2), be set aside, and the judgment on the preliminary point be set aside with it. But as the preliminary point was argued at some length, perhaps I may be permitted to state my opinion upon it.

The judgment held in effect that the plaintiffs in their statement of claim had disclosed no case for the exercise of the equitable jurisdiction of the court, but that, if they had such a case, then they could amend and plead it properly. The pleading rules require that the plaintiffs set forth the material facts upon which they rely for the relief claimed. All they claimed were declarations without any consequential relief. But such a claim is permissible under the *Equity Act* 1901 (N.S.W.), sec. 10, if some real and not some theoretical or fictitious matter is in dispute between the parties, attracting the equitable jurisdiction of the Supreme Court (*Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* (3) ; *David Jones Ltd.* v. *Leventhal* (4)). But, as *Greer* L.J. observed in *Ruislip-Northwood Urban District Council* v. *Lee* (5), the plaintiffs cannot merely assert that someone may make a claim, and then claim that if he ever does make that claim then he will

(1) (1916) 86 L.J. Ch. 439.
(2) (1914) 3 K.B. 55.
(3) (1921) 2 A.C. 438.
(4) (1927) 40 C.L.R. 357.
(5) (1931) 145 L.T. 208, at p. 214.

be wrong. Here the plaintiffs allege that the defendant company claims that the plaintiff S. W. H. Hume is now and will continue in the future to be liable to make payments by way of rent or otherwise to the defendant company in respect of certain lands held under lease for a long term of years pursuant to the *Holt-Sutherland Estate Act* 1900 under and by virtue of an instrument dated 8th June 1921, under which one Houston assigned and transferred all his right in certain lands to Hume and requested the company to transfer the land in its books and to have a lease made out in his name, and that the defendant company threatens and intends to hold the plaintiff S. W. H. Hume so liable. The company has not denied this allegation in its defence. So I take it that there is some matter in dispute between the parties. But the plaintiffs allege that S. W. H. Hume never entered upon the lands and was never in occupation or possession thereof and, without admitting any tenancy, that one month's notice in writing was given pursuant to the *Conveyancing Act* 1919, sec. 127, determining any such tenancy as might be held to exist.

How the claim of the defendant company arises, where, when, and how it is to be enforced, are all left, so far as the statement of claim is concerned, to guesswork or imagination. But it was pressed upon us that the looseness of the plaintiffs' pleading was cured by a pleading equally obscure on the part of the defendant company.

In answer to the allegation in the statement of claim, which set forth the instrument of June 1921 already mentioned, the company alleged that, upon lodgment of that instrument, it transferred the land in its books and records out of the name of Houston into that of Hume and that Hume entered into possession of the land in pursuance of the instrument of transfer and acceptance thereof by the company and not otherwise, and thereafter he paid rent, taxes and rates in respect thereof and continued in possession and so continued to pay rent up to 30th June 1939 and some part of the said taxes and rates.

A tenancy from year to year cannot after the commencement of the *Conveyancing Act* 1919-1939 be implied in New South Wales from the payment of rent, but the allegations suggest a good deal more than payment of rent, and another paragraph, which alleges that the defendant company did not accept the notice given pursuant to the Act purporting to determine any tenancy subsisting between Hume and the company, aids this view. The statement, it should be noted, is merely pleaded in answer to the allegations made by the plaintiffs. It asserts no claim, and no counterclaim is made. So what the claim is or how it arises and where it is to be enforced are still quite uncertain.

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The plaintiffs' case seems to be that the defendant company has no right at law or in equity and the defendant company's that it has some right, but what that right is, how it is to be enforced, and where it is to be enforced, are equally uncertain. The superior courts of law and equity take judicial notice of their own jurisdiction, but I apprehend that it is still necessary that the material facts attracting the jurisdiction of the Supreme Court in its equitable jurisdiction should be stated with certainty and precision and that the court should not be left, as in this case, to reach conclusions in law on facts that are not stated or are not stated with certainty and precision and are in truth unknown. In the end, I expect that the parties to the suit will amend their pleadings, which means that this appeal achieves but little else than an unnecessary expenditure upon costs.

I would dismiss the appeal and affirm the order of *Roper* J. that the plaintiffs have liberty to amend their statement of claim.

McTIERNAN J. The question to be decided is whether it is within the jurisdiction of the Supreme Court of New South Wales in Equity to make the declaratory decree which is sought by the present appellants as plaintiffs. The question was set down for argument pursuant to rule 155 of the *Consolidated Equity Rules*, which were made under the authority of the *Equity Act* 1901 (N.S.W.) as amended. *Roper* J., who sat as a judge exercising the jurisdiction of the Supreme Court in equity, decided that jurisdiction was not disclosed on the pleadings to make the declaratory decree sought by the appellants.

Where a point is set down for argument the whole record is to be taken into consideration. The language of the rule appears to require the observance of this practice in disposing of the point set down for argument. The appellants invoked sec. 10 of the *Equity Act* 1901 as amended. It says that no suit shall be open to objection on the ground that a merely declaratory decree is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. The word court, as defined by sec. 3 of the Act, means the Supreme Court in Equity. The limits of sec. 10 were defined by *Harvey* C.J. in Eq. in *Tooth & Co. Ltd.* v. *Coombes* (1). This decision was approved in *David Jones Ltd.* v. *Leventhal* (2). *Harvey* C.J. in Eq. said: "The subject matter of this section" (sec. 10) "is a 'suit in equity' a well-known form of procedure, viz.: a suit for equitable relief or relating to

(1) (1925) 42 W.N. (N.S.W.) 93.

(2) (1927) 40 C.L.R. 357.

equitable rights and titles," (1) and: "sec. 10 of the *Equity Act* has to be interpreted alongside the whole of the rest of the Act and in the light of the well-established construction of the Act as conferring upon the judge sitting in equity the power to administer only a portion of the jurisdiction of the Supreme Court" (2).

In *David Jones Ltd.* v. *Leventhal* (3) *Isaacs* J. said:—"Sec. 10 provides for a declaration of right but in a 'suit' and by 'decree' though without the necessity of 'granting consequential relief' . . . The Act of 1924" (by which sec. 10 was amended into its present form) "does nothing more than extend the equitable power of making declarations to equitable causes in which for any reason no relief can be decreed." It is therefore necessary to ascertain what, if any, ground of equitable right or remedy is disclosed by the record.

The statement of claim alleges that the company claims that the first-named plaintiff, who is stated to be the agent for the others, is and will continue "to be liable to make payments by way of rent and otherwise" to it in respect of certain lands under and by virtue of "an instrument of transfer" relating to the lands, and that the company "threatens and intends to hold that plaintiff so liable." The plaintiffs seek a declaratory decree negativing any privity with the company and that the liability which it claims to exist does exist.

The allegations in the statement of claim are that the company has a leasehold interest in certain lands with a power of disposition given by a statute; the lands are under the *Real Property Act* 1900 (N.S.W.); a lease of the lands for ninety-nine years was applied for and the applicant transferred such interest as he obtained; his transferee and successive transferees assumed to transfer such interest, the last of such transfers being that under and by virtue of which the company claims that the first-named plaintiff is liable to it as alleged. There are other allegations negativing compliance with the company's statutory authority, that any lease was ever executed, and that the first-named plaintiff entered into possession. It is further alleged that the company has the instrument naming the first plaintiff as the transferee in its custody and that he gave notice to the company disclaiming any privity of contract or estate or tenancy or liability to pay money to it and terminating any tenancy if one existed. The statement of defence says that this notice was not accepted, that the above-mentioned plaintiff was

(1) (1925) 42 W.N. (N.S.W.), at p. 94.
(2) (1925) 42 W.N. (N.S.W.), at p. 95.
(3) (1927) 40 C.L.R., at p. 380.

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entered in its books as the transferee of the lands upon the receipt of the instrument of transfer which he signed as transferee, it having been sent to the company by its transferor, and that it does not admit that he did not go into possession. It says that it duly exercised its statutory authority to deal with the land.

The allegation in the statement of claim that the company claims that the plaintiff is liable to it in the manner alleged by the plaintiffs is admitted upon the record. It is consistent with the terms of this allegation that the company claims that the liability is at law. But the supposition upon which it is contended that the question whether the court has jurisdiction to make the declaratory decrees sought by the plaintiffs is to be decided, is that the statement of defence discloses grounds upon which the company could seek specific performance, and, accordingly, that the claim which it admits that it has is an equitable claim for money payable by the first-named plaintiff as tenant of the land. The record does not disclose that the plaintiffs have any grounds for claiming equitable relief. There is no allegation of any circumstances of fraud or oppression that would attract the jurisdiction of a court of equity. A claim for a declaratory decree is not a claim for equitable relief (*David Jones Ltd.* v. *Leventhal* (1); *Langman* v. *Handover* (2)). And the record discloses that the plaintiffs do not rely upon any equitable right or title in the lands. It discloses only, according to the supposition which has been made, that there are grounds upon which the company may obtain specific performance against the first-named plaintiff or against the syndicators, the other plaintiffs for whom he acted. I find it difficult to say that the substance of the suit in equity exists where the plaintiff does not allege that he has any equitable right or title or any facts entitling him to equitable relief. In *Langman* v. *Handover* (3) *Rich* J. and *Dixon* J. said: "In *David Jones Ltd.* v. *Leventhal* (1) the decision of *Harvey* C.J. in Eq. in *Tooth & Co. Ltd.* v. *Coombes* (4) was approved, and it was held that this statutory provision did not enable the court to make a declaration of right, except in proceedings for equitable relief or relating to equitable titles." Their Honours continued: "It is, however, suggested that, if the subject of the suit is within the cognizance of the court in its equitable jurisdiction, sec. 10, as amended" (i.e., sec. 10 of the *Equity Act* 1901, as amended) "has the same effect as Order XXV., r. 5, of the English *Rules of the Supreme Court* has throughout the High Court of Justice and creates a new statutory remedy, which is to be administered without regard to equitable principles.

(1) (1927) 40 C.L.R. 357.
(2) (1929) 43 C.L.R. 334.
(3) (1929) 43 C.L.R., at p. 357.
(4) (1925) 42 W.N. (N.S.W.) 93.

. . . The argument is not easy to apprehend, because it assumes that a claim may be within the equitable cognizance, although the plaintiff has no equity" (1). In the present case I have a doubt whether the plaintiffs' claim for a declaratory decree is within the cognizance of the court. I have this doubt because the record does not disclose that they have any ground of equitable right or remedy. If it were disclosed that the plaintiffs had an equity, there could be no doubt about the jurisdiction of the court to make the declaratory order sought. The question would be whether the circumstances would make it proper to exercise the jurisdiction. But *Rich* J., who was a party to the decision in *Langman* v. *Handover* (2), is of the opinion that the claim for a declaratory decree under sec. 10 is within the cognizance of the court in equity because it appears from the record that the claim which the statement of claim alleges the company is making against the first-named plaintiff is equitable. This view involves, I think, an extension of the statutory remedy beyond the limits which I should have thought that the construction placed on sec. 10 in *David Jones Ltd.* v. *Leventhal* (3) and *Langman* v. *Handover* (2) allows. It is true that this view of *Rich* J. does not imply that the section is applicable to any but equitable rights and interests; but it allows that even if the facts of the case do not disclose that the plaintiff himself has an equity, the court has jurisdiction under sec. 10 to make a declaratory decree in his favour negativing a claim he alleges the defendant is asserting against him provided that equitable rights and interests are involved in the defendant's claim. Though I doubt whether this view is supported by these cases, I do not dissent from it, and I concur in the order allowing the appeal.

WILLIAMS J. The appellants brought a suit against the respondent company and certain other defendants asking, *inter alia*, for the following declarations:—That it may be declared: (*a*) that (i) there is not now and (ii) never at any time has been any privity of interest between the plaintiff Stanley William Huon Hume and the Holt Sutherland Co. Ltd. and/or the defendant company in respect of the lands referred to in the statement of claim or any part thereof; (*b*) that (i) the plaintiff Stanley William Huon Hume is not now and (ii) never has been at any time under liability present or future to pay moneys to the defendant company or otherwise in relation to the defendant company in respect of the subject lands or of any part thereof.

(1) (1929) 43 C.L.R., at p. 357. (2) (1929) 43 C.L.R. 334.
(3) (1927) 40 C.L.R. 357.

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The statement of claim alleged that the defendant company, which was incorporated in 1933, was the successor in title of a previous company, Holt Sutherland Co. Ltd., which was authorized to grant leases in accordance with a private Act of the New-South-Wales Parliament, the *Holt-Sutherland Estate Act* 1900. This Act authorized the previous company and its assigns to appoint by deed by way of lease any part of the Sutherland Estate for any term of years not exceeding the residue then unexpired of 99 years computed from 18th July 1899 inclusive, and to lease privately subject to such provisions as might be required by the persons mentioned in sec. 6 of the Act for the protection of the interests of the beneficiaries under the will of Thomas Holt deceased.

The statement of claim alleged, par. 2, that the previous company was entitled to a leasehold interest in certain lands under the *Real Property Act* 1900 (N.S.W.) (as amended), being portions 86 and 87 of the Holt Sutherland Estate and containing 103 acres 2 roods 24 perches or thereabouts, under and pursuant to the Act and certain memoranda of lease referred to in and varied by the Act, and that at all material times this company was entitled to deal with these lands as provided by the Act and the memoranda of lease as varied as aforesaid and not further or otherwise; par. 4, that on or about 20th August 1918 one Sebastian Marien made a request in writing to the previous company for a lease by that company to him of the lands for a period of ninety-nine years computed from 1st July 1899 pursuant to and in terms of the aforesaid Act and memoranda of lease, the application being in the following words and figures and no others that is to say :—" To the Holt-Sutherland Estate Co. Ltd., 5 Bligh Street, Sydney, I, Sebastian Marien of Miranda, orchardist, hereby request the company to lease to me for the period of ninety-nine years from 1st July 1899 portions 86 and 87 containing about 103 acres 2 roods 24 perches at a rental of £116 12s. 4d. per annum on the usual terms comprised in the company's leases and I also request the company to prepare for signature by me a lease in such terms including an agreement by me to pay all taxes rates assessments and outgoings whether parliamentary municipal or otherwise payable in respect of the said land from this date and I hand you herewith the sum of £10 as deposit on account of ground rent from 1st January 1919. (Sd.) S. Marien. Dated at Sydney 20th August 1918. Witness: (Sd.) G. Morris."

Pars. 5, 6, 7 and 8 referred to transfers in writing of Marien's rights under this instrument of request to successive assignees, concluding with a transfer dated 8th June 1921 from R. L. Houston to the plaintiff Hume, all the assignments being made by instruments

in writing which included a direction and request that the previous company should transfer the lands in its books and have the lease made out in the name of the assignee. Par. 8 alleged that the several instruments were immediately upon their execution and acceptance by the successive assignees handed to the previous company and the same had since remained in the custody of that company or the defendant company. Par. 9 that no other instruments had been executed by or on behalf of Marien or his successors in title, and that neither of the companies had executed any instrument in respect of the lands or any part thereof pursuant to the original request or the various assignments by way of lease or otherwise to or in favour of or by direction of Marien or any of the assignees or of any person or persons or corporation or corporations on their behalf or claiming through under or in trust for any of them. Par. 10 charged it to be the fact that no consent to any appointment by way of lease by either of the companies to Marien or any of the assignees or any person or persons or corporation or corporations by their direction or on their behalf or claiming through under or in trust for them had been given as required by sec. 6 of the Act. Par. 11 alleged that the plaintiff Hume had not at any time entered upon the lands or any part thereof or ever been in occupation or possession of the lands or any part thereof pursuant to the transfer to him of 8th June 1921 or at all. Par. 12 that on or about 22nd July 1940 he delivered to the defendant company a notice in writing which, *inter alia*, gave it one month's notice pursuant to sec. 127 of the *Conveyancing Act* 1919 (as amended) determining any tenancy at law which might be held to exist between him and the defendant company in respect of the lands. Par. 13 that the defendant company claimed that Hume was then and would continue in the future to be liable to make payments by way of rent and otherwise to it in respect of the lands under and by virtue of the aforesaid instrument dated 8th June 1921 from Houston to the plaintiff and threatened and intended to hold him so liable.

The statement of claim also alleged the existence of a partnership for which Hume was acting in his dealings with the defendant company, traced the devolution of the interests in the partnership assets showing that several of the partners had died and their estates were being administered by their personal representatives, and claimed on behalf of the partnership the same relief against the defendant company as was claimed against it on behalf of the plaintiff Hume.

The statement of defence of the defendant, in addition to putting the plaintiff to proof of most of the matters contained in the statement

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of claim but admitting par. 13, alleged, par. 2, that the company accepted the request in writing of Marien and that he thereupon entered into possession of the subject lands in pursuance of the request and not otherwise and paid to the defendant the rent therefor as stipulated by the request and paid to the appropriate authorities the taxes and rates therein referred to and that Marien so remained in possession and continued to pay the rent and the taxes and rates until 1st September 1919 or thereabouts; that the company accepted the transfers to the successive assignees, that they entered into possession of the lands pursuant to these transfers and acceptances and not otherwise and thereafter paid the rents, taxes and rates; and, with respect to the assignment from Houston to Hume of 8th June 1921, that the company transferred the lands in its books into his name and that he thereupon entered into possession thereof in pursuance of this instrument of transfer and the acceptance thereof by the company and not otherwise and continued in possession and paid the rent up to 30th June 1939 and also paid some part of the rates and taxes; that consent as required by sec. 6 of the Act was duly obtained by the company to the lease to Hume; and that the company upon the receipt of the notice of 22nd July 1940 informed him that it did not accept the same or any part thereof.

Par. 23 of the statement of defence is in the following terms: "The company submits that the plaintiffs have no equity entitling them or any of them to proceed against the defendants or any of them in the equitable jurisdiction of this court and that the proper remedy (if any) is at law."

The plaintiffs by their replication, par. 1, joined issue with the defendant company, and by par. 2 raised a demurrer point which is irrelevant to this judgment.

On 27th June 1941, *Roper* J., on the motion of the defendant company, ordered that, pursuant to rule 155 of the *Consolidated Equity Rules* 1902 (N.S.W.), the point of law raised by the company in par. 23 of its statement of defence should be set down for hearing. This rule is in the following terms:—"Any party may within fourteen days after a suit is at issue apply by motion to the court that any point of law raised by the pleadings may be set down for argument and disposed of before the hearing of other questions in the suit, and for the purpose of deciding any point of law so raised, the court may, if it appears convenient, order that evidence be taken on any issue of fact either orally or by affidavit independently of the other issues of fact raised in the suit."

By an order made on 26th September 1941 his Honour held that the point of law was good and sufficient; and that, unless the

statement of claim was amended within twenty-one days, the suit should be dismissed with costs. It is against this last-mentioned order that the plaintiffs have appealed.

The statement of claim asks for a purely declaratory decree. Sec. 10 of the *Equity Act* 1901 (N.S.W.) (as amended) provides that no suit shall be open to objection on the ground that a merely declaratory decree is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. With immaterial variations this section is the same as Order XXV., rule 5, of the *Rules of the Supreme Court* 1883 (England). In *Hanson* v. *Radcliffe Urban District Council* (1) Lord *Sterndale*, in a passage which appears in many subsequent cases, said: "In my opinion, under Order XXV., rule 5, the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion." In *Ruislip-Northwood Urban District Council* v. *Lee* (2) *Scrutton* L.J., after referring to several of the cases decided under the rule, said: "In my view all the court should look at is whether there is a real dispute between the parties on the point raised."

In my opinion the principles laid down in the English decisions relating to the construction of Order XXV., rule 5, apply to sec. 10, subject to any limitation that flows from the fact that the court of equity only has jurisdiction where equitable relief is sought or the right or title relied on is equitable (*David Jones Ltd.* v. *Leventhal* (3); *Langman* v. *Handover* (4); *Prescott Ltd.* v. *Perpetual Trustee Co.* (*Ltd.*) (5)). And I agree with *Roper* J. that, subject to this limitation, it would be "no objection on the ground of want of jurisdiction to the making of a declaratory decree that it was essentially negative in the sense that it declared the non-existence of rights or interests in the defendant and not their existence in the plaintiff: See, e.g., *Société Maritime et Commerciale* v. *Venus Steam Shipping Co. Ltd.* (6); *Dyson* v. *Attorney-General* (7); *Burghes* v. *Attorney-General* (8)."

The argument before *Roper* J. appears to have proceeded on the basis that the court was only entitled to look at the allegations in the statement of claim in order to ascertain whether the declaration sought related to the existence or non-existence of equitable rights or remedies, but, in my opinion, upon an application to determine

(1) (1922) 2 Ch., at p. 507.
(2) (1931) 145 L.T., at p. 213.
(3) (1927) 40 C.L.R. 357.
(4) (1929) 43 C.L.R. 334.
(5) (1928) 28 S.R. (N.S.W.) 324; 45 W.N. 80.
(6) (1904) 9 Com. Cas. 289.
(7) (1911) 1 K.B. 410; (1912) 1 Ch. 158.
(8) (1912) 1 Ch. 173.

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a point of law under rule 155, the court is entitled to look at the whole record (*Richards & Co.* v. *Butcher* (1); *Preston Corporation* v. *Fullwood Local Board* [*No.* 2] (2)). Moreover, par. 23 of the statement of defence does not refer in terms to the statement of claim, but is in a form often used by a defendant who does not himself desire to have the point argued before the hearing, but does wish to be able to contend, if the facts are found against him and he succeeds on the law, that he is entitled to the costs of the suit and not of a demurrer only. And where a defendant himself pleads facts which show he is making an equitable claim against the plaintiff it can hardly lie in his mouth to say that the suit is not one relating to the existence or non-existence of equitable rights or titles.

The learned judge based his decision upon the ground that the court had no jurisdiction to try the suit because the statement of claim did not disclose any ground of equitable right or remedy; but he pointed out that the question whether the court would, in the exercise of its discretion, make a purely declaratory decree would have to be determined after the facts had been ascertained, if the suit was properly cognizable in equity. He said: "The additional facts pleaded do show the existence of a state of facts which emphasize the desirability to the plaintiff S. W. H. Hume of his knowing his true position in regard to the lands in question; because no doubt, if he is liable to pay the rent and other outgoings, he wishes to assert his rights against those persons who are alleged to be or represent his partners. These facts are relevant to the exercise of the discretion to make a decree if jurisdiction to make it is established, but the exercise of that discretion is not involved in the argument before me." These views as to the probable desirability of exercising the discretion are soundly based. The ascertainment of Hume's position is urgent because some of the partners are dead and their estates are being distributed. If he is bound, the liability will continue until 1998. It is plain there is a real dispute between the parties.

Turning to the question of jurisdiction, the root of the matter is that the request to the company by Marien and the subsequent instruments of transfer by which the contract was to be novated between the company and each assignee in turn all related to a lease of land under the *Real Property Act* for a term of eighty years. This Act, sec. 53, provides that when any land under its provisions is intended to be leased for any term of years exceeding three years the proprietor shall execute a memorandum of lease in the form of the eighth schedule thereto. The initial request and the subsequent

(1) (1890) 62 L.T. 867.

(2) (1885) 34 W.R. 200.

instrument of transfer, even if they have been duly accepted by the company, were never registered and were not in registrable form. They were therefore ineffective to pass any estate or interest in the land at law (*Davis* v. *McConochie* (1)) and by themselves could only create an agreement specifically enforceable in equity (*York House Pty. Ltd.* v. *Federal Commissioner of Taxation* (2); *Carberry* v. *Gardiner* (3)). If Hume entered into possession and paid rent, a tenancy at law would have been created between him and the company determinable under the *Conveyancing Act*, sec. 127, by one month's notice in writing. Such a tenancy would have been determined on 26th August 1940 by the notice which he gave to the company on 22nd July 1940, and therefore prior to the institution of the suit. If the statement of claim alone is looked at, it states that Hume never entered into possession and never paid rent or rates and taxes, so that when the pleader alleged in par. 13 that the defendant company claimed Hume was then and would continue in the future to be liable to make payments by way of rent and otherwise to the defendant company in respect of the subject lands under and by virtue of the instrument of 8th June 1921, the allegation could only refer to the assertion of an equitable right; and the parts of the statement of defence to which I have referred, coupled with the determination of any tenancy that could have existed at law by the notice of 22nd July, to the form of which no objection could be taken, and which could only have been rejected by the defendant because it was asserting that Hume was bound by some higher obligation, make this clear. This claim must be based on the equitable doctrine that an agreement for a lease which is specifically enforceable is equivalent in equity to a lease at common law, since equity can decree the preparation, execution and registration of a proper memorandum of lease, and, if Hume had entered into possession, order the payment to the company of any moneys which would have become payable as rent and for rates and taxes if such a memorandum of lease had been executed and registered at the commencement of the tenancy. So it is not entirely inappropriate to describe the company's claim against Hume as one for payment of money by way of rent and otherwise.

In my opinion, therefore, it does sufficiently appear from the statement of claim itself and certainly from the whole record that the defendant is asserting an equitable claim against the plaintiff, so that the court of equity has jurisdiction to hear the suit and, if the

(1) (1915) 15 S.R. (N.S.W.) 510; 32 W.N. 172.
(2) (1930) 43 C.L.R. 427.
(3) (1936) 36 S.R. (N.S.W.) 559, at p. 569.

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facts or law so warrant, in the exercise of its discretion, to make a declaratory decree that the defendant has no rights in equity against the plaintiffs to the payment of moneys or otherwise in respect of the subject lands arising out of the instrument of 8th June 1921. Since the dispute depends upon the determination of facts placed in issue by the pleadings, the proper course will be to order the argument on the point of law to stand over until these facts have been ascertained and determined at the hearing (*Western Steamship Co. Ltd.* v. *Amaral Sutherland & Co. Ltd.* (1); *Scott* v. *Mercantile Accident & Guarantee Insurance Co. Ltd.* (2); *M. Isaacs & Sons Ltd.* v. *Cook* (3); *Dixson Trust Ltd.* v. *Beard Watson Ltd.* (4); *Queensland Insurance Co. Ltd.* v. *Australian Mutual Fire Insurance Society Ltd.* (5)).

The appeal should be allowed.

Appeal allowed. Discharge the order of the court below and in lieu thereof order that the determination of the point of law raised by par. 23 of the statement of defence stand over until after the evidence has been taken at the hearing, either party to be at liberty to amend as they may be advised. Costs of this appeal to be costs in the suit. Costs of the order below to be reserved and disposed of at the hearing.

Solicitors for the appellants, *Campbell, Campbell & Campbell.*
Solicitors for the respondent company, *Minter, Simpson & Co.*

J. B.

(1) (1914) 3 K.B. 55.
(2) (1892) 8 T.L.R. 431.
(3) (1925) 2 K.B. 391, at p. 401.
(4) (1915) 19 C.L.R. 499.
(5) (1941) 58 W.N. (N.S.W.) 182.