[HIGH COURT OF AUSTRALIA.]

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

AND

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

[No. 2.]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1943.

SYDNEY, *April* 14-16; *May* 6.

Latham C.J., Rich, Starke and Williams JJ.

Practice—Supreme Court (N.S.W.)—Equitable jurisdiction—Declaration of right—Negative declaration—Want of equity—Involvement of legal rights—Formulation of claim in precise and definite terms—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.

A suit was brought in the Supreme Court of New South Wales in its equitable jurisdiction in which the relief sought was, in effect, declarations negativing privity between the plaintiff and the defendant in respect of certain land and liability of the plaintiff to pay money to the defendant in respect thereof. The claim for this relief was based on allegations of certain facts and an obligation that the defendant claimed that by virtue of those facts the plaintiff was and would continue to be liable to pay rent to the defendant in respect of the said land.* The suit was dismissed. On appeal to the High Court,

Held that the suit was properly dismissed: by *Latham* C.J. and *Starke* J. on the ground that the evidence did not disclose such a precise definable equitable claim by the defendant as would form proper subject matter for a suit for a negative declaration in the Supreme Court of New South Wales in its equitable jurisdiction; by *Rich* and *Williams* JJ. on the ground that the plaintiff had failed to prove that the defendant was not entitled to have specifically performed a contract for a lease made between the plaintiff and the defendant's predecessor in title.

Decision of the Supreme Court of New South Wales (*Roper* J.): *Hume* v. *Munro*, (1942) 42 S.R. (N.S.W.) 218; 59 W.N. 132, affirmed.

* See *Hume* v. *Monro*, (1941) 65 C.L.R. 351.

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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* 1900 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 land 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 land 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 land or of any part thereof." Similar declarations were claimed in relation to the syndicate and its members. 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.

Upon a motion by the defendant company *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 a demurrer raised by par. 23 of the statement of defence, 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.

Upon an appeal from that decision the High Court held that 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.), the Supreme Court of New South Wales in its equitable jurisdiction has power to make a declaration of the non-existence of equitable rights or interests in a defendant and that the court was not limited to declaring that such rights or interests existed in the plaintiff. The Court also held that, though the statement of claim was possibly deficient in some respects, the whole of the pleadings in the case were sufficient to raise a question for the decision of the court in relation to the declarations claimed. Leave was granted to amend the pleadings: *Hume* v. *Monro* (1).

The pleadings were not amended in pursuance of the leave so given, and the suit came on to be heard by *Roper* J.

The evidence was substantially as follows. The defendant company was the successor in title to two other companies. Certain leases were vested in the defendant company by transfer from the "new company" referred to in the private Act mentioned above. Under this Act the "new company" had (during its existence), and the defendant company has, certain powers to appoint long term leases subject to conditions as to rent, area and, in some cases, the consent

(1) (1941) 65 C.L.R. 351.

of persons interested in the reversion. One Marien applied to the original company for a lease of about 103 acres, 2 roods, 24 perches of the land for a period of ninety-nine years from 1st July 1899 upon terms and conditions set forth in his written application. This application was accepted by the company, and suitable records were made in its books. The statement of claim alleged the devolution of Marien's interest to the plaintiff Stanley William Huon Hume by means of various instruments communicated to the company and recorded in its books, the " transfer " to Hume being made in June 1921. No lease was executed. Rent was paid by Hume from time to time to the " new company " and also to the defendant company. Hume also applied to be recorded in the rate books of the Shire of Sutherland as the owner of the land and paid rates from time to time. The " new company " was dissolved and the defendant company was incorporated in 1933. Payment of rent and rates fell into arrears and in 1939 the defendant company sued Hume for the sum of £551, representing arrears of rent and rates. In the declaration it was alleged that the defendant company let to Hume the land in question for a period of seventy-seven years from 6th June 1921 and that he had agreed to pay rent and rates. Hume did not appear and the defendant company obtained judgment against him by default. Hume's solicitor had misappropriated moneys sent to him by Hume and apparently the solicitor did not inform Hume of the fact that he had accepted service of the writ in the action, so that Hume had no opportunity of defending the action. The solicitor died and another solicitor acting on behalf of Hume paid the amount of the judgment. In July 1940, Hume addressed to the defendant company a document in which he disclaimed any privity of estate or contract between him and the defendant company in respect of the land surrendered and disclaimed any interest in them, denied that he was, or ever had been, as tenant liable to pay money to the defendant company, and gave one month's notice in writing under sec. 127 of the *Conveyancing Act* 1919, determining any tenancy which might be held to exist. The defendant company acknowledged the receipt of this communication and stated that that company " does not accept this notice as being effective for any purpose and that it holds you to the terms of the lease." When Hume's solicitors pointed out that there was no lease, the defendant company, on 2nd September 1940, replied by saying that the word " lease " was used " to describe the arrangement which exists between your client and my company regarding the above land, which arrangement is evidenced by the documents which have been inspected by you."

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Roper J. refused to make the declarations asked and dismissed the suit: *Hume* v. *Munro* (1).

From that decision the plaintiffs appealed to the High Court.

Upon the hearing of the appeal the plaintiffs, other than the plaintiff Stanley William Huon Hume, and the defendants, other than the defendant company, not being interested, did not appear.

Further facts appear in the judgments hereunder.

Maughan K.C. (with him *McKillop*), for the appellant Stanley William Huon Hume. This appellant could not be successfully sued at law or proceeded against in equity or any jurisdiction. On the facts the respondent company could not have succeeded at common law. Under the New South Wales procedure the company, being merely the assignee of the benefit of the contract, could not sue at law. When lands are under the *Real Property Act* 1900 and the purported lease is an unregistered or informal document the person who styles himself lessor has no remedy for the rent at common law (*Davis* v. *McConochie* (2); *Hume* v. *Monro* (3)). The facts disclose several defences which would be available to the appellant in equity if he were sued. The document of assignment did not amount to novation as held by the trial judge, but only to an assignment. Therefore, there was no privity between the appellant and the old company. Assuming, however, that there was direct privity of contract between them the document whereby the interest was transferred to the appellant and accepted by the appellant is not sufficient to comply with the requirements of the Statute of Frauds (*Thomson* v. *McInnes* (4)). There is not any evidence of any assignment by the old company to the respondent company or its predecessor of the benefit of any contract. Estoppel which contradicts a fact admitted on the pleadings is not open to the respondent. In any event, the question of estoppel does not arise in this case. It is not open to the respondent to raise it; if it had been raised on the pleadings it would have involved an alteration in the pleadings. The question was not raised by the respondent and is not now open to it on the pleadings. What estoppel arises after a judgment by default was considered in *Irish Land Commission* v. *Ryan* (5) and *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (6), where a cautionary reference was made to *Hoystead* v. *Commissioner of Taxation* (7). The statement in *Howlett* v. *Tarte* (8) was too widely expressed

(1) (1942) 42 S.R. (N.S.W.) 218; 59 W.N. 132.
(2) (1915) 15 S.R. (N.S.W.) 510; 32 W.N. 172.
(3) (1941) 65 C.L.R., at p. 371.
(4) (1911) 12 C.L.R. 562, at p. 569.
(5) (1900) 2 I.R. 565.
(6) (1939) A.C. 1.
(7) (1926) A.C. 155, at p. 170.
(8) (1861) 10 C.B. (N.S.) 813, at p. 827 [142 E.R. 673, at p. 679].

(*New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (1)). The judgment only estops the appellant from setting up a traverse. He is not estopped from setting up anything by way of a special plea. A person who either at common law or in equity has allowed an allegation of fact to go by default is estopped from denying that fact, but he is not estopped from raising a matter by way of special plea which could not be raised as a matter of traverse. The appellant is not estopped from setting up a special matter by way of confession and avoidance by a special plea as in *Davis* v. *McConochie* (2), that the lands are under the *Real Property Act*: see also *Roach* v. *Bickle* (3) and *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* (4). In the light of *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (5) it is very questionable whether *Humphries* v. *Humphries* (6) is good law. The conditions imposed by the private Act entitling the company to lease were not fulfilled and cannot be fulfilled. The consent required by sec. 6 of that Act was not, and cannot now be, obtained. Its absence would prevent the making of any order for specific performance. In the circumstances the respondent company cannot rely upon the earlier documents. The respondent company, being the assignee of the contracting party, that is the proposed lessor, cannot succeed in specific performance or in giving a lease without joining the assignor (*Fry* on *Specific Performance*, 6th ed. (1921), p. 99; *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 419)—and see *Curtis Moffat Ltd.* v. *Wheeler* (7). This point is not concluded against the appellant by the decision in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) *Ltd.* (8). It is a question of the circumstances of each particular case. The respondent company has no claim against the appellant in any jurisdiction, therefore under sec. 10 of the *Equity Act* 1901 this Court can make a declaration. The fact that it is a negative declaration is irrelevant.

[STARKE J. referred to *Nixon* v. *Attorney-General* (9).]

Barwick K.C. (with him *Bridge*), for the respondent company. There is no jurisdiction to make a decree either as prayed or as now asked. Jurisdiction is in a proper case not a matter of discretion. The appellant has not negatived the existence of an agreement for lease. So far as the respondent company is concerned it is sufficient that the existence or possible existence of an agreement has been

(1) (1939) A.C., at pp. 21, 37, 38.
(2) (1915) 15 S.R. (N.S.W.) 510; 32 W.N. 172.
(3) (1915) 20 C.L.R. 663, at p. 670.
(4) (1937) A.C. 610.
(5) (1939) A.C. 1.
(6) (1910) 2 K.B. 531.
(7) (1929) 2 Ch. 224.
(8) (1903) A.C. 414.
(9) (1930) 1 Ch. 566, at p. 574.

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shown. That it may or may not be capable of performance at a future date is not material. The only claim made on the appellant was to hold him to the terms of what was regarded as a lease, not something which had to be specifically enforced. Upon the evidence the only inferences are that the appellant was in possession; he had taken an assignment of whatever interest there was in the land; and he was holding on behalf of a syndicate which desired to deal with the land by way of subdivision. No equitable claim was made by the respondent company before suit. In the circumstances the appellant is not entitled to a declaration (*In re Clay*; *Clay* v. *Booth* (1)). The evidence establishes, either actually or inferentially, novation of the agreement (*In re European Assurance Society Arbitration Acts and Wellington Reversionary Annuity and Life Assurance Society*; *Conquest's Case* (2); *In re Times Life Assurance and Guarantee Co.* (3); *In re Anchor Assurance Co.* (4)). It also shows that there is in all probability a legal assignment and tenancy by estoppel arising out of the declaration and judgment. The appellant would be unable to plead a plea inconsistent with any traversable allegation in that declaration (*Howlett* v. *Tarte* (5)). In *Humphries* v. *Humphries* (6) it was not a traverse that was subsequently sought to be pleaded. The effect of antedating the commencing date of a term was dealt with in *Cadogan* (*Earl*) v. *Guinness* (7) and *Jervis* v. *Tomkinson* (8). For forms of traverse applicable, see *Bullen and Leake's Precedents of Pleadings*, 3rd ed. (1868), pp. 630, 631. The appellant's suggested plea is only an argumentative traverse: see *Bullen and Leake's Precedents of Pleadings*, 3rd ed. (1868), p. 819, and *Betts, Louat and Hammond's Supreme Court Practice* (*N.S.W.*), 3rd ed. (1939), p. 55. The point in *Davis* v. *McConochie* (9) was that rent flows out of an estate in the land —no estate, no rent—and the finding was that the rent depended ultimately on the existence of an estate. This is not a case of estoppel against the statute, that point does not arise. It is sufficient that in a similar action the appellant could not traverse the allegation that the company had let to him (*Cooke* v. *Rickman* (10)). Having regard to the terms of sec. 4 and sec. 6 of the private Act, which is the later Act, the *Real Property Act* 1900 is no impediment to the granting of a lease for any term by deed. At this stage it is irrelevant

(1) (1919) 1 Ch. 66, at p. 76.
(2) (1875) 1 Ch. D. 334.
(3) (1870) 5 Ch. App. 381.
(4) (1870) 5 Ch. App. 632.
(5) (1861) 10 C.B. (N.S.), at p. 826 [142 E.R., at p. 678].
(6) (1910) 2 K.B. 531.
(7) (1936) 2 All E.R. 29.
(8) (1856) 1 H. & N. 195, at p. 207 [156 E.R. 1173, at p. 1179].
(9) (1915) 15 S.R. (N.S.W.) 510; 32 W.N. 172.
(10) (1911) 2 K.B. 1125.

for the appellant to state that the respondent company might not be able to perform the agreement when the appropriate time arrives, and the various difficulties suggested on behalf of the appellant either might not arise or can be surmounted.

Maughan K.C., in reply. If the court is seized with a transaction in which an equitable question arises the court can duly deal with legal disputes arising out of the same transaction as being within its jurisdiction (*Wright* v. *Carter* (1); *Tooth & Co. Ltd.* v. *Coombes* (2); *Want* v. *Moss* (3); *Hume* v. *Monro* (4)). The respondent company has debated its claim on the merits; therefore it is pressing its claim and, consequently, the appellant is entitled to a declaration as to whether the respondent has a claim or not. *In re Clay*; *Clay* v. *Booth* (5) should be read with *Nixon* v. *Attorney-General* (6). If the court thinks it should make a declaration it is at liberty to do so. The declaration sought by the appellant is based on par. 13 of the statement of claim. *Howlett* v. *Tarte* (7) must be read in the light of *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (8), in which it is pointed out that estoppel arising from a default judgment is on a different basis from estoppel arising by litigation *inter partes*. *In re European Assurance Society Arbitration Acts and Wellington Reversionary Annuity and Life Assurance Society*; *Conquest's Case* (9), *In re Times Life Assurance and Guarantee Co.* (10) and *In re Anchor Assurance Co.* (11) were decided purely as questions of fact and are not of any assistance in this case. Where there has been an assignment, either of the lessor's or lessee's interest, and a mere payment of rent, that is not sufficient to amount to novation even where it has been at the request of the other party (*Moore* v. *Greg* (12); *Friary Holroyd and Healey's Breweries Ltd.* v. *Singleton* (13); *Thornton* v. *Thompson* (14)). The respondent company has given some evidence but insufficient evidence of facts peculiarly within its own knowledge, therefore it is burdened with the onus of proof (*General Accident, Fire and Life Assurance Corporation* v. *Robertson* (15)).

Cur. adv. vult.

(1) (1923) 23 S.R. (N.S.W.) 555; 40 W.N. 99.
(2) (1925) 42 W.N. (N.S.W.) 93.
(3) (1891) 12 L.R. (N.S.W.) 101; 5 W.N. 76.
(4) (1941) 65 C.L.R. 351.
(5) (1919) 1 Ch. 66.
(6) (1930) 1 Ch. 566.
(7) (1861) 10 C.B. (N.S.) 813 [142 E.R. 673].
(8) (1939) A.C. 1.
(9) (1875) 1 Ch. D. 334.
(10) (1870) 5 Ch. App. 381.
(11) (1870) 5 Ch. App. 632.
(12) (1848) 2 De G. & Sm. 304 [64 E.R. 136]; 2 Ph. 717 [41 E.R. 1120].
(13) (1899) 1 Ch. 86.
(14) (1930) S.A.S.R. 310.
(15) (1909) A.C. 404, at pp. 413, 416.

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The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decree of the Supreme Court of New South Wales in its equitable jurisdiction (*Roper* J.) dismissing a suit in which the plaintiffs sought a declaration that the plaintiff S. W. H. Hume was not under any liability to the defendant company in respect of any agreement for a lease of certain lands which were subject to the *Holt-Sutherland Estate Act* 1900. In prior proceedings in this case—*Hume* v. *Monro* (1)—this Court held that under sec. 10 of the *Equity Act* 1901 (N.S.W.) as amended by sec. 18 of the *Administration of Justice Act* 1924 the Supreme Court of New South Wales in its equitable jurisdiction had power to make a declaration of the non-existence of equitable rights or interests in a defendant and that the court was not limited to declaring that such rights or interests existed in the plaintiff. This Court also held that, though the statement of claim was possibly deficient in some respects, the whole of the pleadings in the case were sufficient to raise a question for the decision of the court in relation to the declarations claimed. Leave was given to amend the pleadings, but no amendments were made in pursuance of such leave. The pleadings are sufficiently set out in the report of *Hume* v. *Monro* (2). After that decision the suit was heard by *Roper* J. and he refused to make the declarations asked.

The defendant company, Holt Sutherland Co. (1933) Ltd., is the successor in title to two other companies. Certain leases are vested in the defendant company by transfer from the " new company " referred to in the *Holt-Sutherland Estate Act* 1900. Under this Act the new company had (during its existence), and the present company has, certain powers to appoint long term leases subject to conditions as to rent, area and, in some cases, the consent of persons interested in the reversion. One Marien applied to the original company for a lease of about one hundred and three acres of the land for a period of ninety-nine years from 1st July 1899 upon terms and conditions set out in his written application. This application was accepted by the company, and suitable records were made in its books. The statement of claim alleged the devolution of Marien's interest to the plaintiff S. W. H. Hume by means of various instruments communicated to the company and recorded in its books, the " transfer " to Hume being made in June 1921. No lease was executed. Rent was paid by the plaintiff Hume from time to time to the new company and, as *Roper* J. found, also to the defendant company. Hume also applied to be recorded in the rate books of the Shire of Sutherland as the owner of the lands and paid rates from time to time. The

(1) (1941) 65 C.L.R. 351. (2) (1941) 65 C.L.R. 351.

new company was dissolved and the defendant company was incorporated in 1933. Payment of rent and rates fell into arrears and in 1939 the defendant company sued the plaintiff for a sum of £551, representing arrears of rent and rates. In the declaration it was alleged that the defendant company let to the present plaintiff Hume the land in question for a period of seventy-seven years from 6th June 1921 and that he agreed to pay rent and rates. The plaintiff Hume (defendant in the action of 1939) did not appear and the defendant company obtained judgment against him by default. Hume's solicitor had misappropriated moneys sent to him by Hume and apparently the solicitor did not inform Hume of the fact that he had accepted service of the writ in the action, so that Hume had no opportunity of defending the action. The solicitor died and another solicitor acting on behalf of Hume paid the amount of the judgment. In July 1940 the plaintiff Hume addressed to the defendant company a document in which he disclaimed any privity of estate or contract between him and the company in respect of the lands surrendered and disclaimed any interest in them, denied that he was, or ever had been, as tenant liable to pay money to the company, and gave one month's notice in writing under sec. 127 of the *Conveyancing Act* 1919, determining any tenancy which might be held to exist. The defendant company acknowledged receipt of this communication and stated that the company "does not accept this notice as being effective for any purpose and that it holds you to the terms of the lease." When the plaintiff's solicitors pointed out that there was no lease, the company on 2nd September 1940 replied by saying that the word "lease" was used "to describe the arrangement which exists between your client and my company regarding the above land, which arrangement is evidenced by the documents which have been inspected by you." There is no other evidence than that to which I have referred which indicates the character of any claim made by the company before the institution of this suit.

The declarations claimed by the statement of claim were as follows:—"(*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 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 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." The plaintiff was a member of a syndicate,

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and similar declarations were asked with respect to the syndicate and its members. The Holt Sutherland Co. Ltd. mentioned in the declarations is the company described as the "new company" in the *Holt-Sutherland Estate Act* 1900.

I call attention to the words "never at any time" in the declaration sought by the plaintiff. It is quite clear that declarations could not properly be made to the effect that there never had been any privity of interest between the plaintiff and the company, or any liability to pay moneys in respect of the subject land. The judgment obtained at common law against the plaintiff by the defendant company in 1939 for rent establishes the fact that at that time in the past there was, at least by reason of the estoppel arising from the judgment, privity of interest between the parties, and that there was liability to pay rent. In the face of this judgment it appears to me to be impossible for any court to declare that there never has been any such liability in the past. For this reason alone it is evident that the declarations asked for should not be made in the form set out in the statement of claim so far as they relate to past time. The procedure for obtaining a declaration in the equitable jurisdiction of the Supreme Court cannot be used as an indirect method of declaring that a judgment of the Supreme Court at common law from which no appeal has been brought is erroneous.

But the declarations claimed relate also to the present and to the future. If made they would become a binding decision between the parties that there was at the time of the institution of the suit no privity of *legal* interest between the parties in respect of the subject land and that the plaintiff was subject to no liability *at law*, present or future, in relation to the defendant in respect thereof. But the jurisdiction of the Supreme Court in its equitable jurisdiction does not extend to the making of declarations as to legal rights, except incidentally in proceedings for equitable relief or relating to equitable rights and interests (*Equity Act* 1901, secs. 8 and 10)—see *Tooth & Co. Ltd.* v. *Coombes* (1), approved in *David Jones Ltd.* v. *Leventhal* (2). In *Parker, Practice in Equity* (*N.S.W.*), (1930), p. 10, the law is, in my opinion, accurately stated as follows:—"The plaintiff must establish some recognized equitable ground for coming to the court and then all questions whether legal or equitable arising in the suit can be determined." The power of the court to decide common law questions extends only to common law questions incidentally arising in an equity suit. Accordingly, the declarations as set out in the statement of claim should not be made in the form in which they are claimed, because, plainly relating to legal rights,

(1) (1925) 42 W.N. (N.S.W.) 93. (2) (1927) 40 C.L.R. 357.

they cannot be said to be only incidental to the establishment of the existence or the non-existence of any equitable right or interest.

But it was definitely decided in the former proceedings in this Court in this case that there was jurisdiction to make a declaration as to the non-existence of an equitable right in a defendant. Before this Court upon this appeal the plaintiff has sought only a declaration rejecting a claim alleged in par. 13 of the statement of claim to have been made by the defendant company. This paragraph was not denied by that defendant in its defence and must therefore be taken to be admitted. Par. 13 is as follows :—" The defendant company claims that the plaintiff Stanley William Huon Hume is now and will 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 lands under and by virtue of the aforesaid instrument dated the eighth day of June One thousand nine hundred and twenty-one from the said Ralph Liddle Houston to the plaintiff and threatens and intends to hold the said plaintiff so liable."

The claim which is here set out is not clearly a legal claim and it is not clearly an equitable claim. It might conceivably be a legal claim based upon the documents by means of which Marien's rights descended to the plaintiff Hume—a claim which, in view of the provisions of the *Real Property Act* requiring registration of leases for more than three years, it would be difficult to support—or it might be a legal claim founded upon an estoppel alleged to have been created by the default judgment obtained in 1939. The claim might be an equitable claim for specific performance of the agreement evidenced by the documents mentioned, based also upon the payment of rent and of rates, which latter facts might be said to amount to the plaintiff entering into possession. The evidence as to the claims made by the company before the institution of the suit has already been stated. It consists of applications for payment of rent and rates, the judgment obtained for rent and rates, the demand by the company for payment of the amount of the judgment, and the company's answer to the repudiation of liability by the plaintiff. That answer, as has already been stated, amounted to a statement that the company was insisting upon its rights, whatever they might be.

In all of this material there is no formulation of any precise claim as an equitable claim. It cannot be said with definiteness that the company has made an equitable as distinct from a legal claim. There is jurisdiction to make a declaration of the non-existence of an equitable claim, but before this jurisdiction should be exercised,

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it should appear quite clearly that such a claim has been formulated in definite terms. The procedure enabling a court to make declarations of right without consequential relief is not to be used to enable a person who thinks that another person may make some kind of claim against him to make that person a defendant to proceedings for a declaration, so as to fix upon him the responsibility of supporting some claim which he may or may not determine to make: see *In re Clay*; *Clay* v. *Booth* (1). In an action for a declaration that a right alleged to be claimed by the defendant does not exist the onus rests upon the plaintiff of establishing first that a claim sufficiently definite and intelligible in its terms to be a proper subject of adjudication has been made against him by the defendant. In the case of such a proceeding in the equitable jurisdiction of the Supreme Court of New South Wales it is also necessary to show that this claim is an equitable claim. Next, the plaintiff seeking a declaration denying any possible foundation for the alleged claim of right must exhaust the possibilities and show that the claim cannot possibly be supported. It is not for the defendant in such a proceeding to make a claim and to justify that claim.

In the present case, in my opinion, the evidence does not show that a precise definable equitable claim has been asserted by the defendant company. It has been argued for the plaintiff that it is obvious that, in view of the provisions of the *Real Property Act*, of the fact that no lease has been registered, and of the further fact that the company has claimed payment of rent, the claim cannot be a legal claim and must therefore be an equitable claim, so that the court should make a declaration as asked, if satisfied that there is no foundation for any equitable claim. But there is a difference between, on the one hand, the actual making of a particular claim by a person and, on the other hand, an argumentative assertion by another person that any claim which the first-mentioned person may make must, if and when made, be a claim of a particular character. Further, in my opinion the plaintiff has not shown (what should have been shown) that there is no possibility of supporting an equitable claim in the present case, but, as the effect of the decision of this Court is to declare that *Roper* J. was right in declining to exercise the jurisdiction of the court in favour of the plaintiff, the result is that the defendant is left to bring such proceedings (legal or equitable) as it may think proper to enforce any rights which it conceives it may have. The decision upon this appeal should not prejudice either plaintiff or defendant if proceedings should be

(1) (1919) 1 Ch. 66.

instituted by the company. I therefore abstain from expressing any opinion upon either the existence or the character of any such rights.

In my opinion the decision of *Roper* J. was right and the appeal should be dismissed.

RICH J. I have had the advantage of reading the judgment of my brother *Williams* and concur in his reasons. I agree that the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales dismissing a suit brought in the equitable jurisdiction of that Court.

The nature of the suit is sufficiently stated in a report of the case at an earlier stage (*Hume* v. *Monro* (1)). But it is quite impossible to deal with this appeal without again adverting to the organization of the Supreme Court whereby law and equity are administered in separate jurisdictions of that Court. In its equitable jurisdiction that Court has only authority to deal with suits in equity, namely, suits for equitable relief or relating to equitable rights and titles and to legal rights if incidental to some equitable claim. " It cannot be successfully contended that a suit which asks merely for a declaration of a legal right is a suit for equitable relief " (*David Jones Ltd.* v. *Leventhal* (2) ; *Handover* v. *Langman* (3)). The pleadings in this case, according to the decision in *Hume* v. *Monro* (1), attracted the equitable jurisdiction of the Supreme Court. But that conclusion was reached in this manner :—The statement of claim alleged, and it was not denied by the defence, that the defendant company, Holt Sutherland Co. (1933) Ltd. (the respondent here), claimed that the plaintiff Hume (the appellant here) " is now and will . . . be liable to make payments by way of rent and otherwise to the defendant company in respect of the " lands mentioned in the statement of claim under and by virtue of an instrument dated 8th June 1921 from Houston to the plaintiff Hume " and threatens and intends to hold the plaintiff so liable." This document purported to be an assignment from Houston to the plaintiff Hume of all Houston's right, title and interest in the said lands leased from Holt Sutherland Co. Ltd. and directed the company to transfer the land in its books and to have the lease made out in the name of the plaintiff Hume.

(1) (1941) 65 C.L.R. 351.
(2) (1927) 40 C.L.R. 357.
(3) (1929) 29 S.R. (N.S.W.) 435, at pp. 447, 448 ; 43 C.L.R. 334, at p. 343.

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The Court said this and some other documents mentioned in the pleadings were ineffective to pass any estate or interest in the land at law. It necessarily followed, so the Court said, that the plaintiff Hume's claim was for specific performance of the agreement (if any) contained in those documents. But it could equally well have been asserted that the defendant company had no equitable right, therefore it necessarily followed that the plaintiff Hume's claim must be in respect of some legal right. And it was quite consistent with the allegation in the statement of claim that the defendant company was making a claim to a legal right, which according to the plaintiff Hume must fail, as that it was making a claim to some equitable right, which according to Hume must equally fail. The conclusion of the Court did not follow from the premises: it was a *non sequitur*. But the facts have now been investigated and the conclusion of the Court is, I think, displaced by the proved facts.

In July 1940 the plaintiff Hume gave to the company a notice set out in the statement of claim as follows:—"I . . . give your company notice—(1) That I deny and disclaim any privity whether by way of estate of contract or otherwise between your company and myself in respect of the above lands or of any part of the same; (2) that I surrender and disclaim all my estate right title and interest (if any) in and to the said lands and every part of the same; (3) that I deny I am now or ever have been at any time as tenant or otherwise under liability present or future, to pay money to your company, or otherwise in relation to your company in respect of the said lands or of any part thereof. Further and without admitting any tenancy from your company to me in respect of the said lands or any part thereof and without admitting the necessity for such or any notice I hereby give you one month's notice in writing under, pursuant to, in terms of, and for the purposes of section 127 of the *Conveyancing Act* 1919 (as amended) determining any such tenancy as may be held to exist."

The defendant company replied in August 1940 that it did not accept this notice as being effective and that it held the plaintiff Hume to the terms of the lease, which, it later explained, described the arrangement which existed between the plaintiff Hume and the defendant company evidenced by various documents inspected by the plaintiff's solicitors, namely, the "various documents relating to the taking up and the transfer of this parcel of land," which included, I take it, the documents mentioned in the statement of claim.

It is clear that the plaintiff Hume was asserting that the defendant company had no right, legal or equitable, against him, but the

defendant company asserted that it held the plaintiff Hume to the terms of the arrangement which existed between it and the plaintiff Hume, which is as consistent with a claim to a legal as to an equitable right.

But the real claim of the defendant company was made clear in an action which it brought in 1939 against the plaintiff Hume. The action was brought in the Supreme Court in its common law jurisdiction. The declaration in this action set forth that the defendant company let to the plaintiff Hume certain land (the land mentioned in the statement of claim) for a period of seventy-seven years at a rental of £116 12s. 2d. per annum payable quarterly and that Hume agreed to pay the said rent and the municipal rates on the said land but of the said rent payable up to the date of the issue of the writ of summons, as altered by law, the sum of £244 8s. 5d. remained due and unpaid and of the said municipal rates payable up to the said date £307 1s. 11d. remained due and unpaid. And the defendant company claimed the sum of £551 10s. 4d. together with interest at the rate of five per cent per annum on £215 3s. 3d. of the above amount from 16th May 1939 until judgment.

This is the defendant company's interpretation of its rights under the various documents and transactions mentioned in the statement of claim in this action. It may have been unfounded as a matter of law, but at all events the plaintiff Hume allowed judgment to go by default for £563 8s. 10d. (debt, £551 10s., costs, £10 10s., interest, £1 8s. 10d.) after his solicitors had investigated the claim. And the sum recovered by the judgment was ultimately paid. This interpretation of the claim of the defendant company is supported by its allegation in par. 5 of its defence in the suit: "The company says that upon the lodgment with the company of the instrument of transfer" (that is, the document of June 1921 whereby Houston purported to transfer to the plaintiff Hume all his right, title and interest in the land in the statement of claim mentioned) "the company accepted the same and did transfer the said land in its books and records out of the name of" Houston "into that of the" plaintiff Hume "and the company further says that thereupon the" plaintiff Hume "entered into possession of the said land in pursuance of the said instrument of transfer and the acceptance thereof by the company and not otherwise and thereafter paid rent taxes and rates . . . and so continued in possession and so continued to pay the said rent up to" 30th June 1939 "and some part of the said taxes and rates." It appears that Holt Sutherland Co. Ltd., which was the predecessor of the defendant company, was wound up and that the defendant company succeeded to its

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rights. The former company had so transferred the said land in its books to the plaintiff Hume.

The land was vacant land, but the plaintiff Hume was rated as the person liable to pay rates in respect thereof and did so pay some, if not all, that fell due. And so too he paid rent, if not all, that fell due to the defendant company. The defendant company has never specifically asserted any equitable right or title against the plaintiff Hume despite the interpretation given to the pleadings by this Court, and, if the plaintiff Hume be right, the defendant company has no equitable right which it can assert. The defendant company has asserted and enforced a claim to a legal right and no other. Under these circumstances the equitable jurisdiction of the Supreme Court of New South Wales is not, I think, attracted in the suit now before this Court on appeal. But, even if it were attracted, the Court should not in the exercise of its discretion make any declaration of right. No consequential relief of any sort is claimed. And in New South Wales the Supreme Court cannot make declarations of the existence or the non-existence of any legal right for the reasons already mentioned. Its authority extends only, as already mentioned, to suits for equitable relief or relating to equitable rights and titles and legal rights if incidental to some equitable claim. But I agree that there is no objection to making declarations denying the existence in the plaintiff of such rights. But such declarations, as was said in *Gray* v. *Spyer* (1), "should be carefully watched. Properly used, they are very useful; improperly used, they almost amount to a nuisance." In my opinion they should not be made unless the controversy between the parties is clearly formulated and defined (*In re Clay*; *Clay* v. *Booth* (2)) and the declaration sought clearly subject matter for the exercise of the jurisdiction of the Supreme Court in its equitable jurisdiction. The object of the suit before this Court is to establish that the defendant company has no rights whatever against the plaintiff Hume, whether legal or equitable, and incidentally, I apprehend, to establish that the default judgment obtained against the plaintiff Hume was the result of a misapprehension of his rights or a want of proper consideration of his case. A declaration to that effect should not be made.

Swinfen Eady M.R., in *In re Clay*; *Clay* v. *Booth* (3), made the following observations upon a rule corresponding to Order XXV., rule 5, of the English Judicature Rules:—"It is claimed under those rules that although no right of the petitioners has been interfered with, and although no claim has been made against them, and

(1) (1922) 2 Ch. 22, at p. 27.
(2) (1919) 1 Ch. 66.
(3) (1919) 1 Ch., at p. 76.

although in their view they have no claim against the defendant Booth, the petitioners are nevertheless entitled to come into court and ask for a declaration that the defendant Booth has no claim against them in respect of the matter in question. I pointed out the fact that he had not made any claim. But, under those circumstances, are they entitled to come and have it determined that he has no claim? In my opinion they are not."—And see *Ruislip-Northwood Urban District Council* v. *Lee* (1).

Since the common law action in 1939 the defendant company has formulated no other claim and taken no further action. When the plaintiff Hume repudiated any liability all the defendant company said was that it held the plaintiff Hume to the terms of his arrangement with it. But the plaintiff Hume nevertheless comes into court, although he has not been attacked, and although he asserts that the defendant company has no claim against him whatever, and that he has a good defence both at law and in equity to any claim that the defendant company may hereafter make, and seeks a declaration that the plaintiff Hume is not now and 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 any part thereof. That declaration ought not to be made. So far as legal rights are concerned the court has no jurisdiction to make it. And the court ought not to make declarations as to equitable rights or the want of equitable rights in the air but only in respect of claims carefully formulated and capable of specific statement or negation.

In this view the long and technical arguments addressed to us were all irrelevant and for the reasons which I have stated, the action was, in my opinion, rightly dismissed.

WILLIAMS J. This is an appeal by the plaintiffs against a decree made by the Supreme Court of New South Wales in equity dismissing with costs a suit which they brought against the respondent Holt-Sutherland Co. (1933) Ltd. and certain other defendants.

The nature of the suit is fully explained in the report of the previous proceedings in this Court which appears in *Hume* v. *Monro* (2), and in the judgment of the learned trial judge. In the previous proceedings this Court ordered that the determination of the point of law raised in par. 23 of the statement of defence should stand over until the evidence had been taken at the hearing. Pursuant to this order the learned judge heard the evidence and dismissed the suit on the merits.

(1) (1931) 145 L.T. 208, at p. 214. (2) (1941) 65 C.L.R., at pp. 357 et seq.

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. As appears from his Honour's judgment, there have been three Holt-Sutherland companies. The first company was named Holt-Sutherland Estate Land Co. Ltd. It was to this company that in the years 1881, 1884 and 1887 Thomas Holt granted the memoranda of lease of the lands now under the provisions of the *Real Property Act* 1900 referred to in the preamble to the *Holt-Sutherland Estate Act* 1900, hereinafter called the private Act. Lots 86 and 87, the subject matter of the suit, form part of the land comprised in memorandum of lease dated 1st September 1881 which was registered upon certificate of title vol. 4976, fol. 20, on 7th September 1881 and numbered 50,990.

The second company, Holt-Sutherland Estate Co. Ltd., appears to have been incorporated in the year 1900. Memorandum of lease No. 50,990 was transferred from the first company to the second company by a memorandum of transfer dated 17th June 1900 and registered on 9th November 1900.

On 20th August 1918 one Sebastian Marien made the following request in writing to the second company :—" I Sebastian Marien of Miranda Orchardist hereby request the company to lease to me for the period of ninety-nine years from the first day of July 1899 lot Portion 86 and 87 containing 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. S. Marien." Marien's offer was accepted by the second company, the evidence of the acceptance being the entry of Marien's name in the company's books and the payment by Marien to and acceptance by the company of sums equivalent to the amount of the rent referred to in the request.

On 1st September 1919 Marien assigned his rights under the contract to Swan ; on 5th August 1920 Swan assigned to Houston ; and on 8th June 1921 Houston assigned to the plaintiff Hume.

The assignment by Houston to Hume was in the following terms : —" I Ralph Liddle Houston of Strathfield near Sydney Solicitor in consideration of the sum of Ten shillings this day paid to me by Stanley William Huon Hume of Rushcutters Bay near Sydney gentleman the receipt whereof I hereby acknowledge do hereby assign and transfer unto the said Stanley William Huon Hume all my right title and interest in Portions 86 and 87 of the Holt-Sutherland Estate

situate in Parish of Sutherland as shown on Parish Map and containing 103 A. 2 R. 24 P. or thereabouts, leased by me from the Holt-Sutherland Company Limited at a rental of £116/12/2 per annum, and I hereby direct and request the said Company to transfer the said land in its Books and to have the Lease made out in the name of the said Stanley William Huon Hume.

Witness Cecil W. Peck Ralph L. Houston Transferor
„ Cecil W. Peck S. W. H. Hume Transferee."

The second company accepted all these assignments by entering the names of the assignees in its books and accepting sums equivalent to the rent from them respectively. I agree with his Honour that the effect of the successive assignments was in each case to novate the existing contract into a fresh contract between the company and the new assignee.

From the date of the assignment from Houston to Hume until the second company went into liquidation, Hume paid the rent of £116 12s. 2d. per annum to this company which it accepted, but no indenture of lease in favour of Hume was ever executed by the company.

On 29th May 1923, Hume's solicitor gave notice to the Shire of Sutherland of the transfer from Houston to Hume of a leasehold interest in lots 86 and 87 as from 1st June 1922. Thereafter Hume, (until he fell into default some years after the incorporation of the defendant company), paid the rates on the two lots to the shire council.

In 1933 the second company went into voluntary liquidation with a view to reconstruction and the transfer of its assets to the defendant company, which was incorporated about the same time. Memorandum of lease No. 50,990 was transferred from the second company to the defendant company by a memorandum of transfer dated 8th December 1933 which was registered on 2nd January 1934. Par. 3 of the statement of claim, which is admitted, alleges that upon this reconstruction the defendant company became entitled to the right, title and interest of the second company in lots 86 and 87, and that the defendant company has, since that time, continued to be entitled to these lots and to deal with them as provided by the private Act and the memoranda of lease as varied by that Act and not otherwise. Considerable argument was addressed to this Court upon the scope of this admission. The statement of claim sets out the whole of the transactions which took place with respect to lots 86 and 87 between Marien and the subsequent assignees and the second company prior to the date of the incorporation of the defendant company, so that, at the date of the reconstruction, the

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right, title and interest of the second company in these lots was subject to Hume's rights under the contract existing between him and that company. It appears to me, therefore, that, in the context of the whole of the statement of claim, his Honour was justified in reading the admission as meaning that it was this right, title and interest which was assigned to the defendant company upon the reconstruction.

Mr. *Maughan* contended that the defendant company as the assignee could only enforce the contract in a suit to which the assignor was a party, so that, as the previous company had been dissolved and could not be joined, the defendant company could not sue to have the contract specifically enforced. It is no doubt the general rule that the assignor should be made a party to the suit, but it is clear that, where the assignor being a company has been dissolved, the court of equity can in a proper case specifically enforce a contract in its absence (*Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) *Ltd.* (1)). The defendant company is now the registered proprietor of memorandum of lease No. 50,990. It has at least the same powers as the second company under the private Act to grant the lease, and, once the lease is granted, there would be no covenants to be entered into by the lessor which the defendant company would be unable to fulfil. In fact all the obligations of any substance after the granting of the lease, namely, the payment of rents and rates, would have to be fulfilled by the lessee, so that Hume could not be prejudiced by the absence of the second company as a party to the lease.

At the date of the registration of the transfer of memorandum of lease No. 50,990 from the second company to the defendant sec. 42 of the *Real Property Act* (as amended) provided that: "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same, subject to such encumbrances, liens, estates or interests as may be notified on the folium of the register-book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever except— . . . (*d*) a tenancy whereunder the tenant is in possession or entitled to immediate possession, and an agreement or option for the acquisition by such a tenant of a further term to commence

(1) (1903) A.C. 414.

at the expiration of such a tenancy, of which in either case the registered proprietor before he became registered as proprietor had notice against which he was not protected: Provided that—(i) The term for which the tenancy was created does not exceed three years; and (ii) in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years; and (iii) the registration of the proprietor is after the commencement of the *Conveyancing (Amendment) Act* 1930."

Sec. 43 provides that: "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

As Hume had not lodged a caveat on the memorandum of lease to protect his unregistered contract with the second company, the effect of secs. 42 and 43, in the absence of fraud, of which there is no evidence, would be to give the defendant company a title to the memorandum of lease free from any rights that Hume had thereunder (*Wicks* v. *Bennett* (1)). In order that a contract may be specifically enforced, it must be capable of being enforced by either party against the other (*Fry* on *Specific Performance*, 6th ed. (1920), p. 219; *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 335). In the absence of a novation of the contract between the defendant company and Hume, Hume could not specifically enforce the contract against the defendant company, so that it is open to argument that the defendant company, in the absence of such a novation, could not specifically enforce the contract against Hume. But it is sufficient if the contract is capable of being enforced by either party at the time the suit is brought (*Macaulay* v. *Greater Paramount Theatres Ltd.* (2)). If, therefore, the defendant company as the assignee of the contract with the second company brought a suit for specific performance against Hume, he would thereby become entitled to have the contract specifically enforced against the defendant company, although memorandum of

(1) (1921) 30 C.L.R. 80.

(2) (1921) 22 S.R. (N.S.W.) 66, at p. 74.

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lease No. 50,990 is not subject to this unregistered contract. On this point, as at present advised, I adopt with respect the law as stated by the Chief Justice of the Supreme Court of New South Wales in *Queensland Insurance Co. Ltd.* v. *Australian Mutual Fire Insurance Society Ltd.* (1). The contrary view was not submitted to this Court by either party during the argument. On 22nd July 1940 Hume caused to be delivered to the defendant company a notice signed by him: (1) denying and disclaiming any privity whether of estate or of contract between that company and himself in respect of the subject land or any part of it; (2) surrendering and disclaiming all his estate, right, title and interest if any to the land or any part of it; (3) denying that he was then or ever had been as tenant or otherwise under any liability to pay money to the defendant company in respect of the land or any part of it; and further, without admitting any tenancy from the defendant company in respect of the land or any part of it, and without admitting the necessity for the notice, giving the company one month's notice in writing under the terms and for the purposes of sec. 127 of the *Conveyancing Act* 1919, determining any tenancy which might be held to exist.

The defendant company by its secretary wrote to Hume on 5th August 1940 referring to this notice and concluding: "I am directed to inform you that my company does not accept this notice as being effective for any purpose, and that it holds you to the terms of the lease."

Hume's solicitors replied pointing out that on their instructions there was no lease, and asking for inspection of the lease referred to. On 2nd September 1940 the defendant company by its secretary replied as follows:—"In reply to your letter of 6th ultimo I have to inform you that the word 'lease' mentioned in my letter to Mr. Hume of 5th August last was used by me to describe the arrangement which exists between your client and my company regarding the above land, which arrangement is evidenced by the documents which have been inspected by you."

If Hume had called upon the defendant company to execute a lease in accordance with the contract with the second company, and the defendant company, relying upon its rights under secs. 42 and 43 of the *Real Property Act*, had refused to do so, Hume would have been entitled to repudiate the contract, but Hume did not adopt this course. Instead, in his notice of 22nd July 1940 he claimed that the defendant company had no contractual rights against him. The defendant company in its reply insisted that it

(1) (1941) 41 S.R. (N.S.W.) 195, at pp. 200-202; 58 W.N. 182, at pp. 185, 186.

had rights under the documents in its possession relating to the lots. The plaintiffs then launched the suit. The defendant company did not counterclaim for specific performance of the contract, but it was not, in my opinion, compelled to do so. It has never claimed that secs. 42 and 43 of the *Real Property Act* would debar Hume from enforcing the contract, so that want of mutuality is not finally established.

Apart from an estoppel, which was not pleaded, and leaving out of account the tenancy at law which was determined by the notice under sec. 127 of the *Conveyancing Act* 1919 before suit brought, the legal relationship which existed between the defendant company and Hume on 22nd July 1940 was, in my opinion, as follows.

The defendant company was entitled to enforce the contract against Hume provided that it had the power to execute in his favour a valid lease binding on the beneficiaries in the Holt estate for a period of ninety-nine years computed from 1st July 1899. Sec. 4 of the private Act relates to the extended term for which the second company and its assignee the defendant company can by deed appoint leases. Sec. 6 confers a power to appoint by private contract as well as by public auction. Although the words " and the new company " at the commencement of the second sentence in sec. 6 are not followed by the words " and its assigns," it would appear that the whole section, including this sentence and the provisoes which follow, must be read as applying to the second company and its assigns. This sentence prescribes the extent of the power of appointment, whether by public auction or private contract, so that the power with which it is dealing is the power conferred upon the second company and its assigns. The provisoes must also relate to the exercise of the power by either the second company or its assigns. Although the provisoes are somewhat inaptly worded, they require, in my opinion, that the consent therein mentioned should be given both to a tenant holding a greater area than fifteen acres and to the fixing of a lower rent than the minimum rental prescribed by the memoranda of lease. It follows that the defendant company could not execute a deed of appointment by way of lease to Hume which complied with the private Act without the consent of the persons referred to in sec. 6, and that, even with their consent, it could not appoint a lease of more than fifteen acres after 30th June 1939.

On 10th August 1937 a document was executed by one Thomas Samuel Holt and one Thomas Allison Holt in the following form :— " We, the undersigned, Thomas Samuel Holt of Burwood, near Sydney in the State of New South Wales, Gentleman, and Thomas

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Allison Holt, the eldest son of the said Thomas Samuel Holt, respectively the tenant for life and the remainderman under the will of Thomas Holt deceased (the said Thomas Allison Holt being of the full age of twenty-one years) do and each of us doth hereby respectively consent to the Holt-Sutherland Company (1933) Limited leasing to Stanley William Huon Hume of Sydney in the State of New South Wales, Gentleman, his executors, administrators and assigns, all that piece of land comprised in the schedule hereunder written for the residue of the term of ninety-nine years from the first day of July 1899."

The schedule contains a description of the land as being portions 86 and 87.

The defendant company tendered this document, but made no attempt to prove that Thomas Samuel Holt and Thomas Allison Holt were the life tenant and remainderman respectively under the will of Thomas Holt or that Thomas Allison Holt had attained the age of twenty-one years. If he had attained this age, then his estate tail in remainder under the will would have been converted into an estate in fee simple by the *Conveyancing Act* 1919, sec. 19 (2) (a). But the document, having become part of the evidence, is entitled to some probative value in relation to the facts which it asserts (*Walker* v. *Walker* (1)). In the absence of any evidence to the contrary, therefore, his Honour was entitled to hold that on 10th August 1937 the life tenant and remainderman had consented to the defendant company leasing the lots to Hume for the then residue of the term of ninety-nine years. The consent does not mention the terms and conditions on which the lease could be granted, but, since Hume is nominated as the lessee, it is permissible to infer that it was intended to cover the terms contained in Marien's request.

I agree with his Honour that, having this consent, the defendant company has power to grant the lease without reference to the private Act at all, because the only two persons beneficially interested in the lots have concurred in the granting of the lease. Since they are the only persons beneficially interested in the land, there is no reason why there should be read into the consent a limitation that the appointment must be made before 30th June 1939.

Apart from this consent, and the conversion by the *Conveyancing Act* of the estate tail of Thomas Allison Holt into an estate in fee simple, Hume would have been entitled to repudiate the contract summarily on 22nd July 1940, on the ground that, after 30th June 1939, the second proviso to sec. 6 of the private Act would have prevented the defendant company from being in a position to make

(1) (1937) 57 C.L.R. 630.

title (*Bell* v. *Scott* (1)). But, as a result of this consent and conversion the defendant company was in a position to make title on 22nd July 1940, so that this ground was not available to Hume.

Mr. *Maughan* contended that there is no memorandum of the contract signed by Hume sufficient to satisfy the Statute of Frauds (now the *Conveyancing Act*, sec. 54A). It is doubtful whether it would ever be proper to make a declaration of non-right on this ground, as the statute might or might not be raised by a party sued. But it is unnecessary to decide the point, or to decide whether the transfer from Houston to Hume is a sufficient memorandum in writing to satisfy the section, because the evidence of the payment of rent and rates by Hume on the vacant land; the notice of alienation to the shire council; and the formation of the Oyster Bay Syndicate, of which Hume was a member, and for which he held the lots as trustee, with a view to the immediate sale of the lots, is sufficient evidence that Hume had entered into possession of the land. There is evidence, therefore, of part performance of the contract, and this would let in oral evidence to prove its terms. The fact that Hume had entered into possession distinguishes the case from that of *Chaproniere* v. *Lambert* (2). His entering into possession and payment of rent and rates was unequivocably and in its nature referable to some contract such as that alleged (*Cooney* v. *Burns* (3)).

For these reasons the plaintiffs have failed to prove, in my opinion, that the defendant company is not entitled to have the contract which Hume made with the second company specifically performed and the suit must fail on this ground.

It is therefore unnecessary to express any opinion upon the alleged estoppel arising out of the default judgment signed by the defendant company against Hume on 4th July 1939.

The appeal should be dismissed.

Appeal dismissed with costs.

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

J. B.

(1) (1922) 30 C.L.R. 387, at pp. 392, 399.
(2) (1917) 2 Ch. 356.
(3) (1922) 30 C.L.R. 216, at pp. 233-236.