EQUITABLE DEFENCES AT COMMON LAW — APPLICATION OF PROMISSORY ESTOPPEL IN NEW SOUTH WALES

The decision of the Full Court[1] of the New South Wales Supreme Court in the *Rutile Case*[2] will be of interest to the profession in New South Wales as the first consideration by the Full Bench of the operation of the new s.98 of the Common Law Procedure Act, 1899-1957, (Act No. 21, 1899 (N.S.W.) as amended), relating to the pleading of equitable defences at common law, and of perhaps more general interest for its consideration as to whether promissory (or equitable) estoppel is available as a defence to a common law claim in this State. It is intended to deal only with those two aspects of the case in this Note.

I. *Pleading of Equitable Defences to a Common Law Action in New South Wales*

The plaintiff brought an action in the common law jurisdiction of the New South Wales Supreme Court for damages for non-acceptance by the defendant of certain quantities of rutile sand agreed to be bought by it from the plaintiff. The defendant filed fifteen pleas to the declaration, five of which were expressed as pleading defences on equitable grounds. On the basis of these equitable pleas the defendant moved a motion under s.98 of the Common Law Procedure Act[3] asking that the action be transferred into the jurisdiction of the court in equity. The plaintiff filed with his replication a demurrer to the pleas, and by consent the motion and the demurrer were heard together. The operation of s.98 was thus squarely raised.

The history of the legislation whereby the strict division between common law and equity in this State has been lessened is discussed in a previous issue of this *Review*[4] and was fully canvassed by each member of the court in the case itself. The position regarding the pleading of equitable defences at common law prior to the 1957 amendment, assuming some "equity" in the defendant,

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[1] Sugerman, Else-Mitchell, and Herron, JJ.

[2] *N.S.W. Rutile Mining Co. Pty. Ltd.* v. *Eagle Metal and Industrial Products Pty. Ltd.* (1960) 77 W.N. (N.S.W.) 447.

[3] "S.98(1). Any such equitable plea or equitable replication may be pleaded notwithstanding that upon the facts pleaded the relief on equitable grounds would not be an absolute, perpetual and unconditional injunction, but if upon the facts pleaded that relief would not be such an injunction, the Court or Judge shall make an order that the action be transferred into the jurisdiction of the Court in equity.

The Court or the Judge when making the order may impose such terms as to costs and otherwise as to the Court or Judge seems reasonable.

(2) Where an order is made under subsection one of this section the whole record of the action shall be transferred into the jurisdiction of the Court in equity.

(3) After an action has been transferred into the jurisdiction of the Court in equity under this section—

(a) any Judge exercising that jurisdiction may, from time to time make such orders as he considers necessary relating to amendments, the filing of fresh pleadings, the settling of issues for trial, or otherwise to enable the action to be disposed of in that jurisdiction;

(b) the action shall, subject to paragraph (a) of this subsection, be disposed of according to the practice and procedure of the Court in equity; and

(c) the Court in equity may make such decree, declaration or order as appears just and may in addition thereto or in substitution therefor direct judgment to be entered on its verdict or finding and for costs in the manner prescribed."

[4] K. S. Jacobs, "Law and Equity in N.S.W. after the Supreme Court Procedure Act, 1957, Section 5" (1959) 3 *Sydney L.R.* 83.

depended upon whether that "equity" entitled the defendant to unconditional injunctive relief against the common law action or judgment if he had approached the equity court as plaintiff seeking such relief, and three types of situation could arise. These were:
1. Where the defendant's "equity" would not entitle him to *any* injunctive relief against the common law action or judgment it could not be pleaded to a common law claim, or if so pleaded would be struck out.
2. Where the defendant's "equity" would entitle him to an absolute perpetual and unconditional injunction either staying the common law action or the execution of a common law judgment, it could be pleaded in a common law action and be determined by a common law court under s.95[5] of the Common Law Procedure Act.
3. Where the defendant's "equity" would entitle him to injunctive relief against the common law action or judgment which would not be absolute, perpetual and unconditional, it could not be pleaded to a common law claim. As Sugerman, J. in the instant case has emphasised, this would not affect the defendant's right to go to equity in an independent action and obtain such injunctive relief as was available.

The Court decided that the amendment to s.98 in 1957 does not alter situations 1 and 2 but is directed to situation 3.[6] Its effect is to allow pleading at common law of the defendant's "equity" entitling him to relief other than an absolute, perpetual and unconditional injunction, and directs the transfer of the action, if a *prima facie* right *(semble)* to such relief is established, to the equity jurisdiction. In other words, it dispenses with the necessity for a separate approach to equity in situation 3 and enables the issues to be determined in the one action. Thus the general scope of the section has been affirmatively pronounced but certain textual difficulties are left unresolved.

One learned commentator[7] prior to the decision drew attention to two such difficulties:
1. "*. . . upon the facts pleaded . . .*" Mr. Jacobs suggested that (on the wording of the section) in cases where no summary judgment procedure is available the court when determining the appropriate equitable relief available prior to transfer could only have regard to the facts pleaded, and the only course open to the other party where the equitable pleading was baseless in fact would be to apply to strike out the pleading as vexatious.

Else-Mitchell, J. tentatively suggested[8] that a plea must not be fictitious or vexatious but indicated that such must in fact be alleged before the court could go behind the facts pleaded. When the procedures by which the matter may come before the court for determination are examined,[9] Mr. Jacobs' contention is given support. The fictitiousness of facts could hardly be appropriately raised on demurrer, and Sugerman, J. suggested[10] that the equitable rights involved are more properly determined on demurrer or application to strike out than on motion to transfer or upon the court's own motion.

Thus by a process of elimination it would seem that it is only upon an application to strike out that the fictitiousness or vexatiousness of a plea could be properly raised.

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[5] "S.95(1). The defendant or plaintiff in replevin, in any action in which if judgment were obtained he would be entitled to relief against such judgment on equitable grounds may plead the facts which entitle him to such relief by way of defence, and the Court may receive such defence by way of plea.

(2) Such plea shall begin with the words 'for defence on equitable grounds', or words to the like effect."

[6] See particularly Sugerman, J., (1960) 77 W.N. (N.S.W.) 447, 457.

[7] K. S. Jacobs, *op. cit. supra* n. 4, at 86-87.

[8] (1960) 77 W.N. (N.S.W.) 447, 463.

[9] Demurrer, application to strike out, motion or summons for transfer and, *semble,* on the court's own motion.

[10] (1960) 77 W.N. (N.S.W.) 447, 457.

2. *The determination of the equitable principle involved in the plea by the common law court prior to transfer may be res judicatae.* Mr. Jacobs argues[11] that it is the duty of the common law court to determine, before a transfer can be ordered, that an injunction upon terms or conditions could be obtained in equity upon the facts pleaded, thus necessitating a determination of the equitable principle involved which will bind the equity court once the action is transferred.

Else-Mitchell, J.'s view is in direct opposition to this argument. He states that ". . . the conclusion . . . that on the facts pleaded the defendant would be entitled to some relief in equity other than an absolute perpetual and unconditional injunction can be *prima facie* only; that conclusion cannot have the effect of creating an estoppel *inter partes,* nor constrain the subsequent exercise of the equity court's wide discretionary jurisdiction in favour of or against a party to the action after transfer".[12] He stresses that the equitable jurisdiction to grant injunctions is discretionary and can only be exercised after consideration of all the facts adduced in evidence.

Perhaps his Honour's view does not meet the unlikely case when there are no facts adduced in evidence outside the pleadings. However, it can be argued with much force that as the court when making its decision prior to the transfer could never know what the facts adduced in evidence will be, it is never in a position to make a final determination of the rights of the parties. In other words, where a discretion depending upon the facts is involved, until the court is in a position to know those facts, any determination must be *prima facie* only and cannot be *res judicatae,* whether or not, in the event, facts additional to the pleadings are adduced.

As his Honour's opinion was not necessary to his decision, and as the other members of the court did not advert to the problem, the matter cannot be taken as settled. However, in addition to the weight which must be given to such a considered judicial pronouncement, it does "agree generally with the judgment of Walsh, J. in *Boag* v. *Lee*".[13] Furthermore, it would overcome the practical difficulties which Mr. Jacobs recognised would follow from his view.[14]

One other aspect, and one which all members of the court stressed, was that it is a *common law action* which is "transferred into the jurisdiction of the court in equity" to be disposed of according to the practice and procedure of the court in equity (s.98(3)(b)), subject to the power of the judge exercising equitable jurisdiction to make procedural orders enabling "the action to be disposed of in that jurisdiction" (s.98(3)(a)). The fact that by s.98(3)(c) "the court in equity may make such decree . . . as appears just" is "no warrant for regarding a claim for damages at Common Law for breach of contract or tort . . . as transmogrified by the transfer into a claim for equitable relief".[15] The common law action remains a common law action with the qualifications that equitable defences may be relied upon, and a plaintiff successful on a pure money claim may be put on terms, having regard to such equitable defences.

II. *The Pleading of Equitable or Promissory Estoppel as a Defence at Common Law in New South Wales*

Five of the pleas alleged, as the answer to the instant cause of action, a

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[11] K. S. Jacobs, *op. cit. supra* n. 4, at 87.
[12] (1960) 77 W.N. (N.S.W.) 447, 463.
[13] (1958) 75 W.N. (N.S.W.) 77.
[14] The common law court would make a binding determination of the equitable principle involved leaving the equity court to merely find facts.
[15] (1960) 77 W.N. (N.S.W.) 447, 458.

promise without consideration by the plaintiff on the faith of which it is said that the defendant acted and conducted its business affairs, thus raising the defence of promissory or equitable estoppel.

The court followed its own previous authority that such a plea could not be entertained at common law in New South Wales "as it furnishes no ground for relief, conditional or otherwise, to a person who seeks equitable relief as a plaintiff".[16] Else-Mitchell, J. and Sugerman, J. considered that in the circumstances they should not review the previous decisions to this effect in *Perpetual Trustee Co. Ltd.* v. *Pacific Coal Co. Pty. Ltd.*[17] and *Gray* v. *Lang*,[18] particularly as the third member of the court, Herron, J., had been a member of the court in the two previous decisions. Herron, J., however, further developed the substantive reasons for his view stated in the *Pacific Coal Company Case.* His view, broadly put, is that if a promise is given without consideration, or if a statement not amounting to a promise gives rise to an estoppel, then the person to whom the statement is made has no cause of action upon which to found an affirmative right to equitable relief; and, as discussed above, an affirmative right to equitable relief is necessary before an equitable plea may be entertained at common law in this State.

It is submitted that a strong line of English authority is inconsistent with this view. In the case of *Hughes* v. *Metropolitan Railway Co.*,[19] decided in 1875, a landlord after serving a notice to repair had entered into negotiations with the tenant regarding purchase of the property. The landlord later issued a writ in ejectment claiming forfeiture for failure to comply with the notice within the time specified, and succeeded. The tenant then applied under s.24(5) of the Judicature Act for a stay of proceedings on equitable grounds, and on appeal it was held by the House of Lords that because of the negotiations between the parties it was inequitable that the exact period specified in the notice for repairs should be insisted upon, and the action was stayed. Lord Cairns said[20]

> . . . but it is the first principle upon which *all Courts of Equity proceed,* that if parties who have entered into definite and distinct terms involving certain *legal results*—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the *strict rights arising under the contract* will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

It is true that the case was decided subsequent to the Judicature Act. However, Lord Cairns was obviously referring to separate administration of law and equity as is shown by his reference to "courts of equity" preventing enforcement of "strict rights arising under the contract".

Furthermore, an applicant for a stay of proceedings on equitable grounds under s.24(5) of the Judicature Act[21] would have had to show an affirmative

[16] *Id.* at 464 *per* Else-Mitchell, J.
[17] (1955) 55 S.R. (N.S.W.) 495.
[18] (1956) 56 S.R. (N.S.W.) 7.
[19] (1877) 2 A.C. 439.
[20] *Id.* at 488.
[21] (1873) 36 & 37 Vict. c.66, s.24, subs. 5: "No cause or proceeding at any time pending in the High Court or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to

equitable right to such relief.[22] That subsection abolished the procedure of restraint of a common law action by injunction and made provision for pleading the "equity" as a defence whilst saving the power to stay proceedings. It has been held that this proviso "simply keeps alive the jurisdiction which existed prior to the passing of the Act".[23] In *Birmingham and District Land Co.* v. *London and North Western Railway Co.*[24] Bowen, L.J., in a passage which received the express approval of the House of Lords in 1955,[25] interpreted the principle in these words:

> It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before. That is the principle to be applied.

The principle has been applied in a number of English authorities[26] and has received considerable attention recently, in large measure through the judgments of Lord Denning when sitting on the Court of Appeal. In fact the principle has become so identified with these recent decisions and with the learned judge that it has become known as the "High Trees doctrine",[27] and has been viewed as one arrow in his quiver in the battle against consideration. This, it seems, has obscured the true authoritative basis of the principle, and is perhaps the explanation for what are, it is submitted, certain misconceptions regarding the basis and nature of the principle, misconceptions acted upon by the New South Wales Supreme Court. These are, particularly, first, that it is a product of the Judicature Act system of courts, and second, that its nature is purely that of a defensive equity in the sense that it can only be a defence to an equitable claim.

Examination of the judgments of the New South Wales Supreme Court in the *Pacific Coal Company Case* shows that *Hughes' Case* was not seriously considered. In Owen, J.'s shortly stated rejection of the principle[28] in New South Wales, his Honour refers only to certain of the recent English Court of Appeal decisions and bases himself squarely on the two misconceptions set out above. Herron, J. in his more lengthy rejection merely cites *Hughes' Case* without discussion.[29] The broad position of Herron, J. has been shown above and his arguments in support of the position as expounded in the *Pacific Coal Company Case* are:[30]

1. That equity will not intervene in commercial dealings merely on the grounds of unconscientiousness but will leave the parties to their rights at law, and, particularly, will not prevent the enforcement of legal rights. The remedies of

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restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just."

[22] *Brooking* v. *Mandslay Son & Field* (1886) 38 Ch. D. 636 *per* Stirling, J. at 644.

[23] *The James Wesboll* (1905) P. 47 (C.A.) *per* Stirling, L.J. at 51.

[24] (1888) 40 Ch. D. 268.

[25] *Tool Metal Co.* v. *Tungsten Electric Co.* (1955) 2 All E.R. 657, esp. *per* Viscount Simonds at 659 and Lord Cohen at 685.

[26] Including *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (1947) K.B. 130; *Combe* v. *Combe* (1951) 2 K.B. 215; *Panoutsos* v. *Raymond Hadley* (1917) 2 K.B. 473; *Salisbury* v. *Gilmore* (1942) 2 K.B. 38; *Buttery* v. *Pickard* (1946) 62 T.L.R. 241.

[27] A reference to *Central London Property Trust Ltd.* v. *High Trees House Ltd.* *supra* n. 26. For Lord Denning's own account of the evolution of the doctrine see his article "The Way of an Iconoclast" (1960) 3 *Sydney L. R.* 209-11.

[28] (1955) 55 S.R. (N.S.W.) 495, 508.

[29] In fact it was cited in support of a proposition seemingly directly opposed to the decision in the case.

[30] (1955) 55 S.R. (N.S.W.) 495, 518, 519.

specific performance and injunction are restricted to the enforcement of negative agreements and the protection of proprietary rights.
2. That the recent English decisions are not authority for the proposition that a promise made without consideration or an estoppel found a cause of action.
3. That the recent English decisions show that consideration is still necessary to the formation of a contract, although not to its modification or discharge.
4. The true position is that a promise without consideration or an estoppel can never amount to more than a defence to an equitable claim based upon the principle that he who comes to equity must come with clean hands.[31]

It is with respect submitted that propositions 1 and 4 are inconsistent with the decision of the House of Lords in *Hughes' Case* and later English authority. It is further submitted that the same authorities establish that proposition 2 is only true if the words "at law" are added. It is further submitted that proposition 3 is a correct statement of the law but, rather than supporting Herron, J.'s main conclusion, it points to its inadequacy. Whenever a situation gives rise to promissory estoppel, of course, a contract must be in existence. The very function of promissory estoppel is to prevent the promisor enforcing an otherwise enforceable contract. In other words, promissory estoppel relates to the modification or discharge of a contract, for which no consideration is necessary, not to its formation. Thus the arguments in favour of the proposition that promissory estoppel does not found an affirmative right to equitable relief adduced in the *Pacific Coal Company Case* do not distinguish or suggest reasons for not following the English authorities.

That this is so is further supported by the decision of the New South Wales Court in *Gray* v. *Lang*[32] which recognised the principle of promissory or equitable estoppel, in these words:[33]

> That there is a relevant principle of equitable estoppel cannot be disputed. In equity a waiver of performance of a contract is justified by the rule stated by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.* in words that were re-affirmed by Bowen, L.J. in *Birmingham and District Land Co.* v. *London and North Western Railway Co.* This principle is that if one party acts in such a way as to lead another to suppose that the strict rights under a contract will not be enforced, or will be temporarily suspended, the latter will not be held to his strict obligations wherever it can be said that it would be inequitable to do so. In other words, a waiver raises an equity against the party who granted it and *a fortiori*, against the party who requested it.

Several lines further on, however, it is stated that *Combe* v. *Combe*[34] restricted the principle "to raising a defence in courts which applied the principles of equity as distinct from allowing a plaintiff to sue on a promise made without consideration". Here it should be pointed out that although it is true that the defensive nature of the principle was stressed in *Combe* v. *Combe* the learned Lords Justices were referring to a Judicature Act system of courts. In such a system the *Hughes Case* principle can be used effectively by the promisee

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[31] Herron, J. based his view upon the decision of Long Innes, J. in *Greater Sydney Development Association Ltd.* v. *Rivett* (1929) 29 S.R. (N.S.W.) 356, where it was held that where a person entitled to the benefit of a restrictive covenant has made a positive representation to another person that the covenant will not be enforced against him, and has thereby induced that other person to alter his position for the worse, the representation raises an equity which debars a claim for equitable relief based on the covenant, at the suit of the person making the representation. It should be noted that the learned Judge who was sitting in equity and dealing with equitable remedies, considered his decision as merely an application of the maxim "he who comes into equity, must come with clean hands". The decision was not concerned with the position at law, and, it is submitted, any statements by his Honour in the course of his judgment supporting Herron, J's. position are *obiter* and do not purport to be an authoritative statement of the common law position.

[32] *Supra* n. 18.

[33] (1956) 56 S.R. (N.S.W.) 7, 13.

[34] *Supra* n. 26.

purely as a defence. The promisor could never insist upon his strict legal rights without beginning an action as plaintiff and it is only when the promisor is insisting on his strict legal rights that the *Hughes' Case* principle arises. The position in New South Wales, however, is quite different. The promisor could insist upon his strict legal rights in a situation which in England would admittedly give rise to promissory estoppel, and the only method by which the promisee could give effect to the admittedly valid principle in *Hughes' Case* would be to approach "courts of equity" to obtain injunctive relief, or at least establish his right to do so. The principle as delineated by Lord Cairns must of its very nature always be defensive, be a "shield and not a sword", and the mere fact that to use it a common law defendant would have to go to equity as a plaintiff does not alter its defensive character.

The actual decision in *Gray* v. *Lang* refused to allow the defence to be pleaded, but on a different ground. In order to raise the equitable principle stated in *Hughes' Case* in an action for ejectment at common law in New South Wales, prior to 1957 the defendant would have needed to show that equity would grant him an unconditional injunction to restrain the proceedings in ejectment; but any injunction in such an action would be upon terms at least that he pay the rent due and owing.[35] As discussed above the new s.98 of the Common Law Procedure Act removes this "difficulty in the way of giving effect to the equitable principle stated in *Hughes' Case*", and *Gray* v. *Lang* can no longer be regarded as an authority against the pleading of promissory estoppel at common law in New South Wales.

Thus in the present case if Herron, J. wished to maintain his previous position, he should have distinguished the *Hughes' Case* and the decisions following it. To do this his Honour argued that *Hughes' Case* was not concerned with what has become known as promissory estoppel, or estoppel by representation as to intention, but rather with "relief against forfeiture on the basis of conduct of a party which misleads", an independent equity just as acquiescence, fraud and deceit base independent equities.[36] Herron, J.'s first assumption is that Lord Cairns' statement is restricted to relief against forfeiture for breach of a covenant. This was precisely the argument put by counsel in *Birmingham and District Land Co.* v. *London and North Western Railway Co.* Bowen, L.J. in reply said:[37] "I entirely fail to see any such possible distinction. The principle has nothing to do with forfeiture". He then went on to interpret the principle in the manner quoted earlier in this Note. The considered opinion of that eminent and learned Lord Justice as long ago as 1888 is high authority, but the matter is, it is submitted, put beyond all doubt by the approval of Bowen, L.J.'s interpretation of Lord Cairns' statement by the House of Lords in *Tool Metal Co.* v. *Tungsten Electric Co.* in 1955.[38]

Herron, J.'s second assumption is that there is a distinction between so-called "promissory estoppel" and "conduct which misleads", the latter being the equity applied in *Hughes' Case*. It is true that Bowen, L.J. referred to inducement by conduct and that Viscount Simonds has stated[39] that "the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position". However, what is the conduct which misleads? In *Hughes' Case* it was negotiations as to purchase; in the *Birmingham and District Land Co. Case* it was an agent's direction to suspend building; in the *Tool Metal Case* it was a voluntary suspension of compensation payments. The true elements of promissory estoppel are that it is a representation by one party to another that he will not insist on his strict legal rights against the other, a statement intended to be

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[35] (1956) 56 S.R. (N.S.W.) 7, 14.
[36] (1960) 77 W.N. (N.S.W.) 447, 453.
[37] (1888) 40 Ch. D. 268, 286.
[38] *Supra* n. 25.
[39] *Ibid.*

acted upon and in fact acted upon so that the other party alters his position. It is submitted that the "conduct" in the latter two cases falls within the defence of promissory estoppel, and each is within the broader principle relating to conduct which misleads, laid down by Lord Cairns as interpreted by Bowen, L.J., which Herron, J. said he adopted in the present case.

Conclusions

1. The principle in *Hughes' Case* establishes an affirmative right to equitable relief.
2. The principle as interpreted by Bowen, L.J. and adopted by the House of Lords in the *Tool Metal Case* is wide enough to include so-called promissory estoppel.
3. Therefore promissory estoppel founds an affirmative right to equitable relief.
4. Therefore promissory estoppel is an "equity" falling within Sections 95 and 98 of the Common Law Procedure Act, 1899-1957, and can be pleaded as a defence at common law in this State.

It is thus with respect suggested that if the question arises again in the New South Wales courts the decisions of the House of Lords in *Hughes* v. *Metropolitan Railway*, of the Court of Appeal in *Birmingham and District Land Co.* v. *London and North Western Railway* and of the House of Lords in *Tool Metal Co.* v. *Tungsten Electric Co.* should be followed in preference to the decisions of the New South Wales Supreme Court in *Pacific Coal Co.* v. *Perpetual Trustee Co.* and in the present case.

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