The attitude of the High Court is put most clearly in the test which was recommended by Dixon C.J. and McTiernan J.:[20]

> It appears to us that what must be found in order to justify an application of the provision is a distinct or sufficient indication of an intention to authorise the application of the income or corpus of the fund or other property to what is clearly a charitable purpose even although the description which embraces the purpose is so wide that it may go beyond charitable purposes or there is associated with the description a description of non-charitable purpose or purposes capable of going beyond the legal conception of charity.

It is interesting to note that despite the fact that they considered the opinion expressed in *re Hollole* to go too far, their Honours were in complete agreement that the actual decision was correct. In that case there was a gift to a trustee 'to be disposed of by him as he may deem best'. Kitto J. in explaining why the section would not apply to such a gift, made the illuminating comment[21] that 'for the section to apply, purposes must be designated as the objects of the trust, and they must be purposes not for the benefit of definite beneficiaries'. It may be seen, therefore, that the effect of the decision will be to save trusts for 'benevolent purposes', or for 'undertakings of public utility', the discretion of the trustee being limited to purposes considered by the law as charitable. Both examples would, under the test in *re Belcher,* have failed. It remains to be seen which of the two approaches the Privy Council will uphold.

S. P. CHARLES

BRAND v. CHRIS BUILDING CO. PTY LTD[1]

Injunction—Building erected by Mistake on Plaintiff's land—Right of Defendant to remove—Estoppel—Unjust Enrichment

The defendant building company was employed by P to build a four-roomed weatherboard house on the latter's land. In showing the builder the site on which the house was to be constructed P negligently pointed to an adjacent block of land instead of his own. The company then went ahead and did work to the value of two thousand pounds in erecting the house on the land which P had indicated. The plaintiff, who was the registered owner of this land, sought an injunction restraining the company from entering upon the land and demolishing or otherwise interfering with the house, and this injunction was granted.

The major part of the judgment of Hudson J. was concerned with arriving at a finding on the true nature of the facts, and in particular with determining whether or not the plaintiff knew that the house

[20] [1958] Argus L.R. 257, 266. [21] *Ibid.*, 283.
[1] [1958] Argus L.R. 160. Supreme Court of Victoria; Hudson J.

was being erected on his land and fraudulently refrained from bringing the true position to the notice of the defendant—in other words, whether he had 'acquiesced'. This finding was of immense importance in view of the fact that the first ground of defence taken was that of equitable estoppel. Hudson J. decided the issue in favour of the plaintiff and held that this meant that the requirements of equitable estoppel had not been made out, since that principle required the person estopped to know that his rights were being infringed and also to be aware of the mistaken belief of the person infringing them.[2] It was further necessary that the person estopped had encouraged the other in his expenditure in relation to the infringement[3] and as it was clear on the facts that not even the first of these requirements had been satisfied the case was obviously not within the principle. This was, with respect, the correct decision and in line with general equitable principles. The defendant, however, sought an application of equitable estoppel in conjunction with the maxim 'he who seeks equity must do equity', and he appeared to think that this would allow equitable estoppel to extend to the present case. If this was his belief, however, he must have misconceived the maxim, as the principle of equitable estoppel is no more than an instance of its operation.[4]

The defendant also sought to rely on the doctrine of unjust enrichment. Hudson J. dismissed the argument because 'he [the defendant] was not able to point to any case where it had been applied in circumstances such as the present, and to apply it would be to fly in the face of the highest authority'.[5] This, it is respectfully submitted, is undoubtedly correct, but in view of the wealth of literature on the subject over the past three decades one might have thought that the question of the relevance of the doctrine to the instant case could have been discussed somewhat more fully. The refusal of Hudson J. to enter such a discussion seems to indicate that Victorian courts will not entertain the doctrine as such. It must be admitted, however, that as authority stands at present, the law relating to 'unjust enrichment' falls far short of allowing a remedy to the defendant in the instant case, and that there *is* no *doctrine* of 'unjust enrichment'.[6] Remedies in cases which in many continental countries are treated under the heading of 'unjust enrichment' may or may not be given in English law according to whether our law has developed

[2] *Halsbury's Laws of England* (3rd ed.) xiv, 639; *Ramsden v. Dyson* (1886) L.R. 1 H.L. 129; *Willmott v. Barber* (1880) 15 Ch. D. 96; *Svenson v. Payne* (1945) 71 C.L.R. 531.

[3] Halsbury, *loc. cit.*

[4] Hanbury, *Modern Equity* (6th ed. 1952) 51-56; Keeton, *An Introduction to Equity* (1955) 141-142.

[5] [1958] Argus L.R. 163.

[6] W. Friedmann 'The Principle of Unjust Enrichment in English Law; a Study in Comparative Law' (1938) 16 *Canadian Bar Review* 243; W. S. Holdsworth 'Unjustifiable Enrichment' (1939) 55 *Law Quarterly Review* 37.

specific remedies to cover such situations,[7] such as, for instance, those in the area of constructive trusts.[8] The only such field into which the instant case could possibly fall is that of quasi-contract, but such an application is beset with many difficulties. It is impossible, for example, to find any basis for the implication of a promise, an essential element of the doctrine.[9] What is equally decisive is the rule that quasi-contract does not extend to the recovery of specific goods or things, but only to money, or goods which can readily be turned into money.[10] Thus it is submitted that the only available remedy would be damages, which, at least in the present case, would be almost impossible to compute. It would be highly unjust, for example, to force the plaintiff to pay two thousand pounds in damages, this sum representing the cost of materials and labour, for he may well have had other plans for the development of his land. The value of such a house on a plaintiff's land would vary from person to person according to what each individual liked or wanted upon his land. An enquiry concerned with determining *any* figure as just compensation would thus be essentially subjective and in the end could well produce greater injustice than the present situation in which a remedy is denied altogether. Thus even if the doctrine of 'unjust enrichment' did extend to the present case it is difficult to see that the remedy it afforded would be appropriate.

In the result, Hudson J. found for the plaintiff, noting that 'the result of the case seems very hard on the defendant',[11] but that 'the court must be guided in its decision by principles of law'.[12] What, then, it the solution to the injustice of the case? In the United States compensation is provided to the defendant through a combined application of the doctrine of unjust enrichment and the maxim 'he who seeks equity must do equity',[13] a basis strikingly similar to the argument of the defendant in the instant case. In many American jurisdictions the problem is solved by statutes called 'betterment acts' which give remedies to any adverse possessors who improve in good faith under colour of title.[14] A similar provision would seem to be the solution here, except that the only American remedy is compensation, which as suggested above, is not appropriate in these circumstances. No similar objections would arise, however, if the remedy

[7] A concise and helpful review of the categories may be found in John P. Dawson *Unjust Enrichment: A Comparative Analysis* (1951) 10-40.
[8] *Ibid.*, 26-33.
[9] *Anson's Law of Contract* (20th ed.) 422-441; *Sinclair v. Brougham* [1914] A.C. 398, 417, 452.
[10] *Halsbury's Laws of England* (3rd ed.) viii, para. 414.
[11] [1958] Argus L.R. 163.
[12] *Ibid.*
[13] William L. Ziegler, 'Good Faith and the Right to Compensation for Improvements on Land of Another', (1955) 6 *Western Reserve Law Review* 397.
[14] *Ibid.*, 398.

given were to allow the person creating the improvement to re-enter the land for the purpose of retaking the benefit (provided that he left the land in its original condition). In these days of compulsory acquisition of land, enforced zoning and master plans it may be that land has become somewhat less sacred so that the relaxing of both the law relating to trespass and the rule *'quicquid plantatur solo, solo cedit'* would be justifiable in harsh cases such as the present.

J. A. GRIFFIN

FREEMAN v. McMANUS[1]

Landlord and tenant—Unincorporated association—Cannot be lessee

In the considerable dispute which followed the breach within the Australian Labour Party in 1954, attempts were made by both factions to have themselves accepted as the legitimate body. Involved in this was the retention of the suite of offices, known as Room 2 in the Trades Hall, Melbourne, which had been for many years the headquarters of the party. Eventually in 1957 the new A.L.P. executive, in order to obtain possession, purported to surrender the 'lease' of the room to the Trades Hall Council, the alleged lessor, and the agent for the latter body then sought to obtain an order for the ejectment of the occupiers under the provisions of Part V of the Landlord and Tenant Act 1928.

A complaint was laid before a stipendary magistrate and he proceeded to hear the matter, but Mr P. D. Phillips Q.C., appearing for the defendants, preferred to argue at the outset that there could be no case to answer as there was no relationship of landlord and tenant present upon which such an order could operate. After rejecting this submission, the magistrate received evidence as to the relationship until Mr Phillips again requested that the complaint be dismissed, on the ground that there cannot be a lease to an unincorporated association, or that the hearing be otherwise adjourned. This would enable the ruling to be tested by way of an order to review. Mr Gillard Q.C., for the complainants, protested against this somewhat dubious procedure—'dubious' because it is a matter of doubt whether such a ruling is the subject-matter for an order within section 150 of the Justices Act 1928,[2] but the magistrate acceded to the defendants' request. An order *nisi* was obtained shortly afterwards, and a summons was taken out by the complainants to have it set aside as being premature. This issue did not arise before O'Bryan J.

[1] [1958] V.R. 15. Supreme Court of Victoria; O'Bryan J.

[2] The interpretation question here has been considered in relation to adjournments which are distinguished from other rulings in a series of cases, the most important of which are referred to in *Commissioners of the State Savings Bank of Victoria v. Rogers Bros. Motor Cycle Agency Pty Ltd* [1954] V.L.R. 149.