H. C. OF A. 1908.

DAVIDSON v. CHIRNSIDE.

Higgins J.

tion of property apart from any right of ownership that the appointor may have.

I concur in the opinion that stamp duty is not payable on this instrument, because of sec. 28.

Appeal dismissed with costs.

Solicitor, for appellant, *Guinness*, Crown Solicitor for Victoria.

Solicitors, for respondent, *Madden & Butler*.

B. L.

Cons *Sydmar Pty Ltd* v *Statewise Developments Pty Ltd* 73 ALR 289

Appl *J C Scott Constructions* v *Mernaid Waters Tavern (No1)* [1983] 2 QdR 243

Disod *Just Juice Corp Pty Ltd; James* v *Commonwealth Bank* (1992) 37 FCR 445

Appl *Walker* v *Department of Social Security* (1995) 36 ALD 513

Cons *Elphick* v *Elliott* [2003] 1 QdR 362

[HIGH COURT OF AUSTRALIA.]

HILL (ADMINISTRATRIX) . . . . . APPELLANT;
DEFENDANT,

AND

ZIYMACK . . . . . RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1907, 1908.

SYDNEY, 1907

Dec. 11, 12, 13, 19, 20. 1908

April 1.

Griffith C.J., Barton and Isaacs JJ.

Equitable set off—Damages in action of tort—Unsettled accounts between parties—Stay of execution by injunction in equity.

Action for conversion—Evidence in reduction of damages—Money expended by defendant in paying off mortgage on subject matter of action.

Administration—Money paid for benefit of estate before appointment of administrator—Ratification—Amendment of statement of claim.

Where a plaintiff has recovered damages in an action for conversion, equity will not, on the ground of equitable set off, restrain the plaintiff from issuing execution to recover the amount of the verdict merely because there

are unsettled accounts pending between the parties, although the subject matter of the accounts consists of dealings and transactions affecting the property in respect of which the action was brought.

Rawson v. *Samuel*, Cr. & Ph., 161, applied.

In an action for conversion the defendant is entitled, in reduction of damages, to have taken into consideration moneys voluntarily expended by him in paying off a mortgage debt secured upon the subject matter of the action for which the plaintiff would otherwise have been liable.

Peruvian Guano Co. v. *Dreyfus Bros. and Co.*, (1892) A.C., 166, at p. 170 (*n*), applied.

Moneys advanced for the benefit of an intestate estate before the grant of administration, even if advanced at the request of the person subsequently appointed administrator, cannot be recovered from the estate unless the prior request is ratified by the administrator after appointment.

In re Watson ; *Ex parte Phillips*, 19 Q.B.D., 234, followed.

A person who voluntarily pays off a mortgage over personal property belonging to another, under a mistake of fact not caused or contributed to by the mortgagor, has no lien on the property for the amount so paid.

Falcke v. *Scottish Imperial Insurance Co.*, 34 Ch. D., 234, applied.

Per Griffith C.J. and *Barton* J. :—A plaintiff in equity, respondent in an appeal to the High Court from the decision of a Judge of first instance, was refused leave to amend his claim where the amendment proposed would have converted the claim into one which the Court of first instance would probably, in accordance with the practice of the Court, have refused to entertain on the ground that the relief sought could have been obtained in a Court of law, and where the claim and the defences that might be set up in answer to it involved matters that had already been the subject of concluded litigation at law between the parties.

Decision of *A. H. Simpson* C.J. in Equity reversed.

APPEAL from a decision of *A. H. Simpson* Chief Judge in Equity of the Supreme Court of New South Wales.

This was a suit in equity by the respondent, Barbara Ziymack, against the appellant, widow and administratrix of the estate of W. C. Hill. At the hearing the respondent was successful, a decree being made by *A. H. Simpson* C.J. in Equity, in terms of the prayer in the statement of claim.

From that decision the present appeal was brought.

The material facts and the substance of the pleadings are stated in the judgments hereunder.

H. C. OF A. 1908.

HILL v. ZIYMACK.

Cullen K.C. and *Langer Owen* K.C. (*E. M. Mitchell* with them), for the appellant.

Gordon K.C. and *Lingen* (*Harvey* with them), for the respondent.

The arguments of counsel sufficiently appear from the judgments. [Reference was made to *Fraser* v. *Murdoch* (1); *In re Leslie*; *Leslie* v. *French* (2); *Peruvian Guano Co.* v. *Dreyfus Bros. & Co.* (3); *Wenlock* (*Baroness*) v. *River Dee Co.* (4); *Farhall* v. *Farhall* (5); *In re Johnson*; *Shearman* v. *Robinson* (6); *Labouchere* v. *Tupper* (7); *Wills, Probate and Administration Act*, No. 13 of 1898, sec. 44; *Stamp Duties Act*, No. 27 of 1898, sec. 50; *Conveyancing and Law of Property Act*, No. 17 of 1898, sec. 110; *In re Gregson*; *Christison* v. *Bolam* (8).

Cur. adv. vult.

April 1st, 1908.

GRIFFITH C.J. Before adverting to the form of the claim made by the respondent, the plaintiff in this suit, it will be convenient to state the relevant facts as they existed at the time of its institution.

The respondent, who is an illiterate woman, has been twice married. By her first husband, named Hill, she had five children, of whom W. C. Hill was the eldest. By her second husband, a Russian immigrant, she had one daughter. After living for many years in great poverty, she became entitled on the death of a relative to a sum of £80,000. Shortly afterwards, in May 1900, she purchased a pastoral property of about 7,000 acres, called Rockview. W. C. Hill, who was then about 22 years of age and had no means of his own, went to reside there, and carried on the business of a grazier until his death, which took place on 24th March 1903. In July 1902 he married the appellant, who is now administratrix of his intestate estate, administration having been granted to her in June 1904. There is one child of the marriage

(1) 6 App. Cas., 855.
(2) 23 Ch. D., 552, at p. 561.
(3) (1892) A.C., 166 at p. 170 (*n*).
(4) 19 Q.B.D., 155.
(5) L.R. 7 Ch., 123.
(6) 15 Ch. D., 548.
(7) 11 Moo. P.C.C., 198.
(8) 36 Ch. D., 223.

born in July 1903. The respondent made her son a present of £600 on his marriage.

During Hill's occupation of Rockview he had an account with the Bank of New South Wales at Junee, and at his death a sum of about £500 was standing to his credit. In November 1902 he bought a flock of 3,700 sheep from one Kiddle, giving in payment a sum in cash, and two promissory notes payable on 30th March 1903 for £500 and £469 19s. respectively, the due payment of which was secured by a stock mortgage given by him in his own name. He also incurred some debts on account of Rockview. At his death the amount owing on the promissory notes and secured by the mortgage was £792.

After Hill's death a dispute arose between the respondent and the appellant as to the ownership of the sheep. The respondent obtained possession of them under circumstances to be afterwards stated. While they were in her possession she had them shorn, sold the clip, and received the proceeds, the amount of which does not appear. She afterwards sold the sheep.

Shortly after obtaining administration the appellant brought an action in the Supreme Court against the respondent in which she claimed damages for conversion of the sheep and other property of Hill's left upon Rockview, but did not claim in respect of the wool previously shorn; she obtained a verdict for £3,114, which was finally upheld on appeal to this Court: *Hill* v. *Ziymack* (1). The case made by the appellant in that action was that the respondent had bought Rockview as an advancement for her son, that though he had no legal title to the land she had allowed him to have the usufruct for his life, and had advanced him considerable sums of money to enable him to carry on the business of a grazier there for his own benefit, and that Hill had bought the sheep for himself in the course of that business. The respondent's case was that the whole beneficial interest in Rockview and stock remained in her, that Hill was her manager only, and that the funds in the Bank to the credit of his account were held by him as her agent. There was a great conflict of evidence, and a majority of the Supreme Court thought that the verdict of the jury should be set aside.

(1) 3 C.L.R., 726.

H. C. OF A. 1908.

HILL v. ZIYMACK.

Griffith C.J.

It is now, however, accepted on both sides that the appellant's version of the facts as to Hill's connection with Rockview must be taken to be correct, and that Hill was not manager for his mother, but tenant of the estate and entitled to the profits for himself.

As soon as the appellant had established her right to the £3,114 this suit was instituted by the respondent, setting up several pecuniary claims against Hill's estate, and claiming that if the defendant should admit assets the amount of such claims should be set off against the verdict, and, if she should not, that the estate might be administered by the Court, and finally claiming an injunction to restrain execution on the verdict. On a motion for an injunction the amount of the verdict was ordered to be brought into Court.

To understand the case made in support of this claim it is necessary to go back to the events which happened after Hill's death and before the grant of administration to the appellant, bearing in mind that throughout these events the respondent was asserting her position, now admitted to be untenable, that Hill was her agent and manager.

After Hill's death the appellant, who was expecting shortly to become a mother, continued to live at Rockview. The promissory notes given to Kiddle, which fell due on 30th March 1903, and were not paid, were returned to the holder with a note: "Refer to Mrs. Ziymack: Maker deceased." On 29th April began a long course of negotiations, partly verbal and partly in writing, between the appellant's solicitors and the respondent's solicitors, all of which are admitted to have been without prejudice. They began with a letter from appellant's solicitors, referring, amongst other things, to the 3,700 sheep which she claimed as her husband's, and expressed a hope that matters could be amicably arranged without litigation. It was contended for the appellant that these communications, having been without prejudice, cannot be referred to for any purpose. The learned Judge of first instance thought, however, that they might be referred to for some purposes. It is common ground that no express agreement was concluded, although the basis of one was provisionally arrived at. Moreover, as will appear, the contemplated agreement would

have been void. The respondent nevertheless contends, and the learned Judge thought, that the negotiations may be referred to for the purpose of showing an agreement by implication resulting from an implied request by the appellant to the respondent to make certain payments on behalf of her husband's estate.

In the course of the negotiations reference was made to Kiddle's promissory notes. With regard to them the appellant's solicitors said that if the respondent did not dispute her title to the sheep their client would arrange to pay them as soon as administration should be granted. This was early in May. At an interview between the solicitors in June, respondent's solicitor said that as soon as they came to terms the respondent would take up the notes and save interest on them, and that when they paid the money they would see that the mortgage was discharged. Some other debts incurred by Hill in respect of Rockview, and for which, from the respondent's point of view, she was of course liable, were also mentioned. The agreement which was finally proposed, and which only fell through in consequence of a dispute as to some articles of trifling value, was to the effect that the appellant should leave Rockview forthwith, and give up all claim to the 3,700 sheep and other property purchased by Hill and then upon Rockview, and also to the money at his credit in the Bank of New South Wales, and that the respondent should give her an annuity of £160 a year for life or until marriage, and allow her to remove from Rockview her own and her husband's personal belongings. I pause to remark that no rights could be founded upon such an agreement, which, regarded as a compromise of disputed claims, would have been in fraud of the rights of the next of kin for the exclusive benefit of the widow. It could not, therefore, have been ratified by her after obtaining administration, even if the respondent had been willing to carry it out. There is another fatal objection to any claim being founded by the respondent upon the suggested agreement, namely, that she herself was not ready and willing to perform it, but in effect repudiated it.

The appellant's solicitors, however, apparently overlooking the objections to the proposed agreement, desired to carry it out. But they insisted upon a proper deed of covenant being executed

H. C. OF A. 1908.

HILL v. ZIYMACK.

Griffith C.J.

by respondent, and on 8th July they wrote saying that "until Mrs. Ziymack signs the deed of covenant things must be at a standstill." Nevertheless, on 14th July respondent paid the balance of £792 due on the promissory notes, which were thereupon handed to her agents, but she did not take an assignment of the mortgage. She also paid some other debts of Hill's. Throughout the negotiations she expressly repudiated any right whatever on the appellant's part, and offered what she did offer as a mere act of grace.

It is contended for the respondent that under the circumstances Hill's estate is liable to repay her the moneys so expended and of which Hill's estate obtained the benefit.

About 30th June 1903, no definite agreement having been concluded, appellant left Rockview, and respondent resumed possession. The flock of 3,700 sheep remained on the property, from which by the terms of the stock mortgage they were not to be removed without Kiddle's consent.

I have already called attention to the fact that the respondent in making these payments had no idea of benefiting Hill's estate, but on the contrary merely intended to discharge her own obligations.

Before considering the various ways in which her claim has been put forward and supported, it will be convenient to consider what rights she really had with regard to the money paid in discharge of the stock mortgage. So far as the other debts are concerned it is conceded that her rights, if any, must be founded upon a request by the appellant—express or implied, and followed by ratification and adoption after the grant of administration to her.

In my opinion it is clear that in the action for conversion the amount which the respondent had expended in paying off the mortgage debt might have been taken into consideration by way of diminution of damages. This, in my judgment, follows from the law as laid down by Lord *Macnaghten* in the case of *Peruvian Guano Co.* v. *Dreyfus Bros. & Co.* (1). The same speech shows that the respondent had no right to detain the sheep as security for the payment. But the respondent's right

(1) (1892) A.C., 166, at p. 170 (n).

was a weapon of defence and not of offence. *Non constat* that full advantage was not taken of it in the action. It is at least certain that the respondent had the opportunity of setting it up. We were, indeed, told that she tried to do so, but was unsuccessful. If that is true, she was entitled to a new trial, or, perhaps, to reduction of damages, but it is too late to raise that question now, and it is, of course, not competent to bring a suit in equity for the purpose of reducing damages awarded by a jury. The plaintiff's case must therefore be based on some positive right capable of being actively asserted in a Court of law or equity.

I proceed to consider in detail the claims made in the suit, and the arguments, not always consistent, by which it has been sought to sustain them. The statement of claim alleges that the plaintiff bought Rockview in May 1902, that W. C. Hill occupied and managed it from that time till his death, that the plaintiff's intention was that he should occupy and manage it on her behalf, and that up to his death she always regarded him as her manager. It then alleges that the defendant contends that the real arrangement and understanding upon which Hill went into occupation was that he should be entitled to retain for his own benefit any profits made from working the estate after payment of ordinary expenses of working, and that the plaintiff, notwithstanding her belief to the contrary, is willing that the defendant's alleged contention (which the defendant in her defence denies, setting up that which was accepted by the jury in the action for conversion) should be adopted, and that accounts between the plaintiff and Hill should be taken on that footing. It then charges that on a proper account being taken it will appear that Hill was at his death considerably indebted to the plaintiff.

The statement of claim then alleges that the plaintiff placed live stock and plant on the property, and advanced money to Hill to be employed by him in connection with it. After some other allegations relating to a claim now abandoned, it goes on to allege that there were on the station at Hill's death 3,700 sheep and some plant, of which the plaintiff, believing the property to be hers, took possession, that the defendant as administratrix recovered a verdict against her for £3,114 for the conversion of

H. C. OF A. 1908.

HILL v. ZIYMACK.

Griffith C.J.

this property, that the sheep were bought by Hill while in occupation of the estate, that he gave in part payment for the same the promissory notes already mentioned, and that the plaintiff, believing the sheep to be her property, paid the promissory notes. The stock mortgage is not mentioned. She further alleges that under the same belief she paid other debts incurred by Hill in connection with the estate and otherwise. She then claims that under the circumstances the defendant as administratrix must account for the value of the live stock put on the estate by the plaintiff, with their progeny, and also for all money advanced by the plaintiff both before and after Hill's death.

So far, the suit would seem to be intended as a suit for an account, although, if the relationship between the parties was such as that which the plaintiff herself admits for the purposes of the suit, it is hard to see how there was any other relation between her and Hill than that of debtor and creditor.

At this stage the statement of claim takes a new departure, and after alleging that the balance of accounts would be in plaintiff's favour, submits that if the defendant admits assets such balance should be set off against the amount of the verdict, and that pending the taking of the accounts the defendant should be restrained from issuing execution. This part of the claim seems to be founded upon some supposed right of equitable set off, such as was dealt with by Lord *Cottenham* L.C. in the case of *Rawson* v. *Samuel* (1). The headnote of that case, so far as regards this point is as follows:—"Equitable set off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient. Still less will the Court interfere, on the ground of equitable set off, to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him and the party against whom the action is brought, although the subject matter of the account consist of dealings and transactions arising out of the

(1) Cr. & Ph., 161.

contract, the breach of which is the subject of the action." The rule, of course, applies with no less force to an action for tort.

Lord *Cottenham* L.C. said in the course of his judgment (1):— "It was said that the subjects of the suit in this Court, and of the action at law, arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject matters are, therefore, totally distinct; and the fact that the agreement was the origin of both does not form any bond of union for the purpose of supporting an injunction.

"The question then comes to this: Is the defendant, in a suit in this Court for an account, the balance of which I will suppose to be uncertain, to be restrained from taking out execution in an action for damages against the other party to the account, until after the account shall have been taken, and it shall thereby have been ascertained that he does not owe to the defendant at law, upon the balance of the account, a sum equal to the amount of the damages? If so, it cannot be upon the ground of set off, because there is not at present any balance against which the damages can be set off; nor can it be because the damages are involved in the account, for certainly they can form no part of it.

"We speak familiarly of equitable set off, as distinguished from the set off at law; but it will be found that this equitable set off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient: *Whyte* v. *O'Brien* (2); although it is difficult to find any other ground for the order in *Williams* v. *Davies* (3), as reported. In the present case, there are not even cross demands, as it cannot be assumed that the balance of the account will be found to be in favour of the defendants at law. Is there, then, any equity in preventing a party who has recovered damages at law from receiving them, because he may be found to be indebted, upon the balance of an unsettled account, to the party against whom the damages have been recovered? Suppose the balance should be found to be due to the plaintiff at law, what compensation can

(1) Cr. & Ph., 161, at p. 178. (2) 1 S. & S., 551.
(3) 2 Sim., 461.

H. C. OF A. 1908.

HILL v. ZIYMACK.

Griffith C.J.

be made to him for the injury he must have sustained by the delay? The jury assess the damages as the compensation due at the time of their verdict. Their verdict may be no compensation for the additional injury which the delay in payment may occasion. What equity have the plaintiffs in the suit for an account to be protected against the damages awarded against them? If they have no such equity, there can be no good ground for the injunction."

This is sufficient to dispose of this part of the respondent's claim.

The statement of claim ends with a final claim (so far as it was not abandoned at the hearing) for: (1) a declaration that the defendant was liable to account to the plaintiff for all moneys advanced in payment of the promissory notes, (2) an account of all moneys advanced and paid by the plaintiff prior to and after the death of Hill in connection with his occupation and management of Rockview or otherwise, (3) a set off (if the defendant admits assets) of the amount found due against the amount of the verdict with an order for payment of the balance as found due, (4) an injunction to restrain execution on the judgment, and (5) an order (if the defendant does not admit assets) for administration of Hill's estate.

It will be noticed that the claim made (except so far as founded upon the untenable ground of equitable set off) relates to purely legal claims which could be enforced, if at all, by an action at law for money lent to Hill and for money paid for the estate at the request of the defendant as administratrix. So far, however, as regards the latter claim the statement of claim did not allege a request by the defendant, but alleges on the contrary that the plaintiff paid the debts, including the promissory notes, not on behalf of Hill's estate but on her own behalf. At the hearing the plaintiff was allowed to amend by alleging that the payments made in respect of the promissory notes and other debts of Hill were made with the authority or at the request, express or implied, of the defendant, and in order to preserve the property the subject of the mortgage, *i.e.*, the stock. The last words refer, of course, only to the amount due on the promissory notes. The evidence offered at the hearing established the facts which I have already stated.

The learned Judge said in the course of his judgment that two letters of 17th and 19th June 1903 seemed to him to amount to a concluded agreement (to the effect which I have already stated) although both parties treated it as cancelled, but he thought also that until cancelled it gave respondent implied authority to pay the promissory notes and other debts on behalf of the estate, and that it was impossible to contend that these payments were purely voluntary. I have already pointed out that on 8th July, before any payment was made by the respondent, she was informed that "things must be at a standstill" till she signed the proposed deed of covenant. It appears, then, that when the payments were made the parties, the present respondent and Hill's widow, who was not then administratrix, were at arm's length, each insisting on her own rights to the exclusion of the others. Under such circumstances the proper inference to be drawn is, in my opinion, that each party knew that whatever she might do would be at her own risk, and that she could not set up any privity, or contract, express or implied, between her and the other party. I leave out of consideration the difficulty arising from the illegality of the proposed bargain.

There still remains the fact that any implied agreement resulting from the implied request of Mrs. Hill was made by her when she was a stranger to the estate, and could not be binding on the estate (if at all) until it was ratified by the administratrix after appointment: *In re Watson*; *Ex parte Phillips* (1). No such ratification was alleged in the statement of claim, or by the permitted amendment. Moreover, it is abundantly clear that the respondent in making the payments, so far from purporting to act as the agent of the future administratrix, repudiated that position, and it is difficult to see how under such circumstances she can be allowed to set up a subsequent ratification. The plaintiff, however, ultimately relied upon a ratification by the appellant as administratrix. No positive act of ratification was alleged, but it was suggested that it might be inferred from the appellant's silence and inaction in not herself offering to pay Hill's creditors whom the respondent had already paid. These arguments were urged in vain in *In re Watson* (1). It was further suggested that, by bring-

(1) 19 Q.B.D., 234.

H. C. OF A. 1908.

HILL v. ZIYMACK.

Griffith C.J.

ing the action for conversion, appellant ratified the payment of the mortgage debt without which the mortgagee would, and she would not, have been entitled to possession of the sheep. To this argument there appear to me to be at least three answers: (1) By sec. 110 of the *Conveyancing and Law of Property Act* (N.S.W.), (No. 17 of 1898), it is provided that a mortgage of personal property shall not prevent the title of the mortgagor from being deemed a good title at law as against all other persons than the mortgagee. The respondent's right of action would not, therefore, have been affected if the mortgage had not been paid off: (2) Appellant must be taken to have known that respondent could claim to have the money which she had paid in discharge of the mortgage applied in diminution of damages, and she cannot be held to have elected to affirm the payment for any other purpose: (3) The respondent herself had, wrongfully, the greater part of the assets of the estate in her hands, and the administratrix had no sufficient funds out of which to offer to make payment.

Another contention was set up before the learned Judge, although not in any way made upon the pleadings, as to which he thus expressed himself:—"It was also contended on behalf of Mrs. Ziymack that, even if the letters of 17th and 19th June gave her no implied authority to pay the promissory notes, she *bonâ fide* believed they did, and if she paid off a mortgage given by the defendant or her predecessor in title under a mistake of fact which is caused or contributed to by the defendant, she is subrogated in this Court to the rights of the mortgagee against Mrs. Hill. Possibly this is so, but in the view I take it is unnecessary to decide the point." The point was pressed before this Court, but no authority was cited in support of it, and in my opinion the case of *Falcke* v. *Scottish Imperial Insurance Co.* (1) affords a complete answer to the argument. There is no evidence other than that already stated to show that the appellant caused or contributed to the mistake of fact. The only basis for a claim to recover the amount of these payments is a request or ratification, and there is no evidence of either.

With respect to the other debts paid by respondent the learned

(1) 34 Ch. D., 234.

Judge said:—"Hill was on the station as manager for his mother." I have already pointed out that this view is negatived by the facts found by the verdict of the jury, on the basis of which this suit was conducted. Having quoted from evidence given at the trial of the action for conversion in support of the respondent's case, and tending to show that Hill sometimes pledged respondent's credit, but which failed to satisfy the jury, he added: —"If this is so, Mrs. Ziymack was responsible for those debts to the creditors, though as between herself and Hill the ultimate liability was to fall on him. If so, Mrs. Ziymack was justified in paying off these debts without any request from Mrs. Hill and is entitled to be repaid out of the estate." No doubt, if she was liable for the debts this would be so, but the claim would be a purely legal claim. This, however, was not the case made by the statement of claim, nor was any evidence offered to show that she was liable in fact for the debts which she paid. She herself says that she paid the debts because she believed she was liable for them. It was not contended before this Court that there was any request by the appellant, either express or implied, to pay them.

The third ground of claim put forward by the respondent was in respect of four several sums of money advanced by the respondent to Hill in his lifetime which the appellant alleges to have been gifts, but which the respondent now claims to have been loans. She never set up any such claim until after the verdict in the common law action. Any such claim would, indeed, have been quite inconsistent with the case which she then made, that Hill was her manager, and that the money was given to him to be used by him as her agent. The real question is whether the advances were made to him under such circumstances as to give rise to an implied promise on his part to repay them on demand. No doubt there was evidence pointing either to the view that they were made to him for himself (whether by way of loan or gift) or to the view that they were made to him as respondent's agent. But if the latter view be rejected (as it was by the jury) there is nothing left but the bare facts to enable a decision of the question of loan or gift. Having regard to the position of mother and son, to the fact that after a life of

H. C. OF A. 1908.

HILL v. ZIYMACK.

Griffith C.J.

poverty respondent had recently come into the possession of a large fortune, and desired to give her eldest son a start in life in a business for which the command of considerable sums of money was necessary, the *primâ facie* presumption is, in my opinion, that repayment of the sums in question, which were advanced as follows, £150 in November 1900, £250 in April 1901, £150 in July 1901, and £200 in May 1902, was not contemplated by either party, and there is nothing to rebut this presumption. The learned Judge was inclined to think that the presumption was the other way, but did not decide the point. He further expressed the opinion that the respondent had a lien upon the fund in Court for the £792 (the amount due on the promissory notes), but that, as regards the other claims, if established she was merely a creditor of the estate and had no lien.

The decree directed that there should be paid to the plaintiff out of the moneys in Court the sum of £792 with interest at a specified rate, that £150 should be retained out of the balance to answer future orders for costs, and that the remainder should be paid out to the defendant. It then declared that the plaintiff was entitled to recover from the defendant all moneys paid by the plaintiff in discharge of Hill's liabilities in connection with Rockview, but subject to the right of the defendant to set up any defence legal or equitable by way of set off or cross claim to which she might be entitled: and the following inquiries were directed: (1) What debts incurred by Hill in respect of the station property were paid by plaintiff? (2) What sums were paid by plaintiff to Hill otherwise than by way of gift while he was manager of Rockview? (3) An inquiry as to what moneys are due from the plaintiff to the defendant upon any claim whether legal or equitable; and an injunction was granted against enforcing the execution on the judgment at law until further order. (I may remark incidentally as to the second inquiry that *ex concessis* Hill was never manager of Rockview).

In my judgment no part of this decision can stand. The only possible ground for directing payment of the £792 out of the fund in Court is that the plaintiff had a lien upon it, and no case of a lien was set up either in the pleadings or evidence, even

apart from the impossibility of attaching such a lien to a judgment debt in an action for conversion.

If, however, such a lien could be asserted, the respondent would be in the position of a mortgagee, who, having been in possession and received rents and profits, sues to recover the full amount of the mortgage debt. It is, of course, plain that in a Court of equity the only relief that he could obtain would be an account of what is due after giving credit for the profits received by him. I do not think that in any view this suit can be regarded as, or converted into, a suit for that purpose. The defendant was entitled on the evidence to judgment in her favour so far as regards the claims for money paid in respect of the other debts and for money lent. And the suit, regarded as a suit to establish an equitable set off, failed for reasons already given. There was therefore no foundation for the inquiries.

It was, however, strenuously contended for the respondent that on some ground or other she ought to get the benefit of the payments made in respect of the promissory notes.

Accordingly, at the last moment, a new phase of this kaliedoscopic case was suggested to this Court. It was said that the promissory notes were endorsed by the payee, and that the respondent is the holder of them, and that if she sued the appellant as administratrix of Hill there would be no defence other than set off. We were told further that the Supreme Court of New South Wales in its equity jurisdiction will entertain a suit to recover a purely legal debt from a personal representative, whether assets are or are not admitted, if only administration is formally asked for. It appears that such suits were not in fact entertained by the Court of Chancery in England after the 18th century, and in *Com. Dig. Chancery*, 3 B., 2, it is said that a bill does not lie against an executor or administrator for discovery of assets until assets are denied by a plea at law. The forms collected in the second edition of Van Heythuysen's *Equity Draftsman* (published in 1828) make no suggestion of such a suit. For myself, however, I do not see how, if the Supreme Court of New South Wales should entertain a suit instituted in the equity side of the Court upon a purely common law claim, any objection could be made except on the

H. C. OF A. 1908.

HILL v. ZIYMACK.

Griffith C.J.

ground of irregularity. But it is not necessary to pursue this inquiry.

It is possible that the respondent is the holder of these promissory notes, by endorsement after they were overdue, and after—apparently—a portion of one of them had been paid. But she never set up any such case, and it is quite consistent with the known facts that they were not indorsed to her. If, however, she sets up her legal claim as indorsee, the defendant will be entitled to set off the amount received by the plaintiff as the price of the clip of the wool wrongfully converted. We do not know whether this amount is greater or less than £792. We are told that the third inquiry directed by the decree was intended to cover this claim.

In my opinion to allow an amendment (even if this Court has power to allow it under the circumstances) for the purpose of converting this suit into an action on promissory notes, as to which there would be a known defence by way of set off as to a large portion if not the whole of the claim, would be an abuse of the power of amendment. It is obvious that the object of the suit was to escape from liability to pay the judgment debt. That object has entirely failed, and the several claims on which the attempt was based have equally failed. At best the plaintiff is in the position of an unsuccessful plaintiff in a common law action. I think that the suit should be dismissed, and that, since the matters in question were fully litigated, the judgment should be in such a form as to preclude further litigation on the same causes of action. The order dismissing the suit should therefore be prefaced by a declaration that in the opinion of the Court the plaintiff is not entitled to any relief at law or in equity against the defendant in respect of the several claims set up by her.

BARTON J. I concur.

ISAACS J. I agree that this appeal should be allowed. The ground of my opinion is that the facts disclose no liability by the administrator to the plaintiff. If a claim legal or equitable against the estate had been proved, the creditor would have had a right to ask for administration of the estate, and unless assets

were admitted, the Court could have granted it—or, assets being admitted, to make an order for payment, subject, of course, to any established claim *per contra*; see *Woodgate* v. *Field* (1) before *Wigram* V.C.

But in no instance in this case has any liability legal or equitable been proved. The claim as for loans is at variance with the probabilities of the case throughout as persisted in by the respondent. If the business was hers the money was in all probability either handed to her son to pay her debts or to keep as his own. It is unlikely in such circumstances to have been handed on the terms of a loan with an express or implied promise to return it. No substantive evidence is given of a loan, and having regard to the state of facts set up by the respondent and her relation to the deceased, no loan ought to be inferred.

As to the ordinary station debts and the sheep bill paid by the respondent, I can see no legal ground to fix a liability on the estate. It is, of course, *primâ facie* unfair that one person should benefit at the expense of another, but as Lord Chancellor *Halsbury* said in *Ruabon Steamship Co.* v. *London Assurance* (2):—"It seems to me a very formidable proposition indeed to say that any Court has a right to enforce what may seem to them to be just, apart from common law or Statute."

The respondent's right, if any, must depend upon some principle of the common law. If the debts had been paid by valid agreement express or implied between the respondent and either the deceased or the administratrix, the respondent would have a right to be reimbursed. I agree with the learned Chief Justice that no such agreement is made out on the facts, and that even if established the suggested agreement could not have been supported.

Again, if after the respondent had paid these debts under circumstances not amounting to a gift, the appellant after becoming administratrix had with knowledge of the circumstances adopted the payments and taken the benefit of them as by refusing to pay the creditors their debts if demanded, on the ground that the debts were already paid, then the case would have come within the principle enunciated by Lord *Selborne* L.C. in *Blackburn*

(1) 2 Ha., 211.

(2) (1900) A.C., 6, at p. 9.

H. C. OF A. 1908.

HILL v. ZIYMACK.

Isaacs J.

Building Society v. *Cunliffe, Brooks & Co.* (1):—"It is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts." And see also *Reid* v. *Rigby & Co.* (2). But here the circumstances negative any such adoption. The administratrix never had the means of paying the debts, and was by the act of the respondent prevented from having them, and so she was never called on to elect, and cannot be said to have elected, to treat the payments made by the respondent as advances on behalf of the estate.

Neither has the appellant been brought within any of the principles enumerated by *Fry* L.J. in *In re Leslie*; *Leslie* v. *French* (3), even as extended by *Lindley* L.J. in *Strutt* v. *Tippett* (4), and I agree with what the learned Chief Justice has said that *Falcke* v. *Scottish Imperial Insurance Co.* (5) is against her contention.

On the facts she was a mere volunteer, who paid her son's debts being under no legal obligation to pay his debts, thinking, doubtless, but erroneously, that she was bound in her own interests and for the preservation of what she believed to be her property to pay these debts on her own account, and so far as the evidence goes without taking any assignment or agreement for assignment of the creditors' debts against the deceased. Her erroneous belief, however, cannot give her any rights of reimbursement.

The action for trover and the recovery of damages for the full amount cannot be taken as voluntary acceptance of any benefit by payment because, if the payment had not been made, the administratrix in that action in the absence of any act on the part of the mortgagee taking possession would still, by virtue of the grant of probate and the effect of the *Wills, Probate and Administration Statute* have had the right to possession as against the respondent, and, I think, to recover from her the value of the sheep, leaving the sheep bill to be afterwards paid

(1) 22 Ch. D., 61, at p. 71.
(2) (1894) 2 Q.B., 40.
(3) 23 Ch. D., 552.
(4) 62 L.T., 475.
(5) 34 Ch. D., 234.

or arranged for by herself. So that, unless she otherwise adopted the payment of the sheep bill, in circumstances raising an implied promise to repay the amount of it, the mere action for conversion did not bind her to reimburse the respondent.

The promissory note was put in which she obtained from Kiddle, and which may or may not, so far as any testimony appears, have been indorsed to her by Kiddle.

Without proof of that indorsement, at any rate, she cannot succeed as the holder of the note *simpliciter*, and I agree that, having regard to the nature of the action and the purposes for which it was brought, the respondent should be left to whatever rights she can establish in respect of the transferred note another way.

These considerations dispose of the whole case, and in the result the judgment appealed from must be reversed and judgment entered for the appellant.

Appeal allowed. Judgment appealed from discharged, and suit dismissed with costs with declaration that in the opinion of the Court the plaintiff is not entitled to any relief at law or in equity against the defendant in respect of the several claims set up by her. Money in Court to be paid out to the appellant. Respondent to pay the costs of the appeal and such sum as will bring the interest on the judgment debt up to 4 *per cent.*

Solicitors, for the appellant, *Minter, Simpson & Co.*
Solicitors, for the respondent, *Pigott & Stinson.*

C. A. W.