the Supreme Court, and in the circumstances we see no reason why the unsuccessful party should not pay the costs of the motion.

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HOGAN v. OCHILTREE.

Cause remitted, defendant to pay costs of the motion.

Solicitor, for plaintiff, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for defendant, *Macnamara & Smith.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

CHARLES EDWARD SUTTON TURNER . APPELLANT;
PLAINTIFF,

AND

THE NEW SOUTH WALES MONT DE PIETE DEPOSIT AND INVESTMENT CO. LTD. . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 19, 20, 21, 22.

Griffith C.J., O'Connor and Isaacs JJ.

Pleading—Admission of balance due to mortgagor under bill of sale—Common counts.

Detinue—Property passing under bill of sale — Realization of security — Goods remaining in hands of mortgagee after satisfaction of mortgage debt—Provision that security should remain in force until memorandum of satisfaction signed—Waiver—Legal title to goods—Equitable replication—Departure.

Detention of business papers—Damages.

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Where the holder of a bill of sale, after realization of the security, has admitted that there is a balance due to the mortgagor, an action will lie against him for the balance so admitted.

The defendants having seized the plaintiff's goods under a bill of sale, after the sale of sufficient goods to satisfy the mortgage debt and leave a surplus, an employé of the defendants informed the plaintiff that he could obtain the rest of the goods by sending for them. The defendants having refused to deliver the goods, the plaintiff sued them in detinue. The defendants pleaded that the property in the goods passed to them under the bill of sale, and that it was a condition of the bill of sale that the security should remain in full force until a memorandum of satisfaction was signed by the defendants or their manager. The plaintiff replied on equitable grounds that after payment of the debt in full it was agreed by the plaintiff and defendants that the bill of sale should be deemed to be discharged and satisfied, and that the plaintiff should be freed from the necessity of obtaining a formal discharge of the security.

Held, that the replication, regarded as an equitable replication, would be a departure in pleading as setting up an equitable title to the goods in the plaintiff, but that it was good as a pleading in confession and avoidance, showing that by matter subsequent to the deed the legal title to the goods had reverted to the plaintiff.

In an action of detinue evidence was given that the defendants had detained from the plaintiff certain business papers and documents. It was agreed that damages should be assessed for the value of the goods. With the exception of a small amount the plaintiff did not prove any special damage from the loss of the documents. The jury having awarded the plaintiff £50 damages, *held*, that the damages were not unreasonable.

Decision of the Supreme Court of New South Wales: *Turner* v. *New South Wales Mont de Piete Deposit and Investment Co.*, 9 S.R. (N.S.W.), 754; 26 W.N. (N.S.W.), 170, reversed.

APPEAL from the decision of the Supreme Court of New South Wales setting aside a verdict for the plaintiff, and ordering a verdict to be entered for the defendants. The facts are sufficiently stated in the judgments hereunder.

Moriarty and *Bignold*, for the appellant. Upon sale of the plaintiff's goods, and realization of sufficient to pay the amount due under the bill of sale and costs, the plaintiff was entitled to get back the goods not sold, and the balance of the money realized by the sale. On payment of principal, interest and costs secured by a mortgage the mortgage contract is at an end, and the

property revests in the mortgagor. The stipulation in the bill of sale that a memorandum of satisfaction should be signed by the defendants' manager is a clog on the redemption, and therefore will not be enforced: *Bradley* v. *Carritt* (1); *Browne* v. *Ryan* (2); *British South Africa Co.* v. *De Beers* (3); *Biggs* v. *Hoddinott* (4); *Noakes & Co.* v. *Rice* (5). This doctrine applies to all mortgage transactions: *Samuel* v. *Jarrah Timber and Wood Paving Corporation Ltd.* (6). Further, the plaintiff's books and business documents were not included within the bill of sale.

The plaintiff was entitled to recover on the common counts, as there was evidence of an admission by the defendants that a debt was due: *Foster* v. *Allanson* (7). Assuming that the stipulation in the deed as to the memorandum of satisfaction was valid at law, there was evidence that the defendants had waived their right to insist on compliance with this stipulation: *Barns* v. *Queensland National Bank Ltd.* (8). There was evidence upon which the jury could find that the defendants had agreed to hold the goods as bailees for the plaintiff, and that the legal title to them had revested in the plaintiff.

Knox K.C. and *Ferguson*, for the respondents. The equitable replication as a plea to the count in detinue is bad as it is a departure. It admits the defendants legal title, and sets up an equitable right in the plaintiff. At law the plaintiff can only succeed by proving a legal title to the goods. The cases cited as to a clog on the redemption relate to a purely equitable doctrine, and have no application to an action at law in which the plaintiff must rely on a legal right to possession.

[ISAACS J.—Is there not evidence that the defendants ceased to hold the goods as owners and constituted themselves bailees for the plaintiff: *Elmore* v. *Stone* (9)?]

There was no evidence that the defendants had divested themselves of the property in the goods. The defendants' letter was a mere promise without consideration.

(1) (1903) A.C., 253.
(2) (1901) 2 I.R., 653.
(3) 26 T.L.R., 285.
(4) (1898) 2 Ch., 307.
(5) (1902) A.C., 24.
(6) (1904) A.C., 323, at p. 329.
(7) 2 T.R., 479.
(8) 3 C.L.R., 925.
(9) 1 Taunt., 458.

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[ISAACS J. referred to *Gillman & Spencer Ltd.* v. *Carbutt & Co.* (1); *Castle* v. *Sworder* (2).]

The terms of the bill of sale are sufficiently wide to include the plaintiff's papers and documents. The defendants were entitled to seize all the goods in the box at Gourlay's: *Congreve* v. *Evetts* (3); *Holroyd* v. *Marshall* (4). There was no evidence that the defendants' clerk was authorized to waive the benefit of the provision in the deed by which the plaintiff agreed that the security should remain in full force until a particular mode of acquittance was given. In any case the damages awarded were excessive. The plaintiff could not recover damages for the detention after the issue of the writ in the action: *Mayne on Damages*, 5th ed., p. 106; *Brasfield* v. *Lee* (5). The plaintiff has not proved that he sustained any damage beyond £2 1s.

[GRIFFITH C.J. referred to *Williams* v. *Archer* (6).

ISAACS J. referred to *Serrao* v. *Noel* (7).]

Moriarty, in reply. The plaintiff was deprived of books and documents which were necessary for the purpose of his business, and is entitled to recover substantial damages: *The "Mediana"* (8). The plaintiff claimed the goods or their value and damages for their detention. The plaintiff abandoned his claim to recover the goods, and was entitled to recover the value of the goods and damages for their detention. By the verdict the defendants are entitled to keep the goods: *Eberle's Hotels Co.* v. *Jonas* (9); *Chilton* v. *Carrington* (10). The defendants, having told the plaintiff that they had the goods, and induced him to bring an action against them, cannot be heard to say that they did not so hold them: *Hall* v. *White* (11); *Dirks* v. *Richards* (12). It is not necessary in the case of an equitable replication to prove that the plaintiff would be entitled to an unconditional injunction. This rule only applies to equitable pleas.

GRIFFITH C.J. In this case, although only a comparatively small sum of money is involved, questions of considerable

(1) 37 W.R., 437.
(2) 6 H. & N., 828.
(3) 10 Ex., 298.
(4) 10 H.L.C., 191, at p. 216.
(5) 1 Raym. (Ld.), 329.
(6) 5 C.B., 318.
(7) 15 Q.B.D., 549, at p. 559.
(8) (1900) A.C., 113.
(9) 18 Q.B.D., 459, at p. 466.
(10) 24 L.J. C.P., 78.
(11) 3 C. & P., 136.
(12) 1 C. & Mar., 626.

importance have been raised. That the plaintiff is, according to the law of New South Wales, entitled to all that he asks is not disputed. The defendants' case rests upon some supposed ancient technicalities of the law, which are said still to linger in New South Wales, after they have been abolished in, I believe, all the rest of His Majesty's dominions. The question is whether effect must be given to them. I feel almost disposed to quote the words of Lord *Westbury* in *Thompson* v. *Hudson* (1).

The relevant facts lie in a very small compass. The plaintiff carried on business as an advertising agent, and was the publisher of a directory. He borrowed a small sum of money from the defendants, and as security gave them a bill of sale, which included his household furniture at his then residence, or any future residence while the security stood. It also included after-acquired property. The goods which are the subject matter of this action, so far as it relates to goods, were not household furniture, or anything of that kind, but documents relating to the business that he carried on. Default having been made, the defendants took possession under their bill of sale of the plaintiff's goods, which had been removed to a store. The plaintiff was then absent from the State. They sold part of the goods and realized enough money to satisfy their debt and to leave a surplus, but did not sell the documents the subject of this action. On the plaintiff's return in April 1907 they sent him an account showing a balance in his favour of £7 8s. 9d. The plaintiff then wrote complaining that amongst the things taken were a number of private business papers, the loss of which had caused him serious inconvenience, and asking for an order for their delivery that day if possible, as they were urgently needed, and stating that he had not yet received their cheque for the balance due to him. In reply the defendants wrote on 26th April asking him "to make an appointment for delivery of the goods, and obtain the surplus."

He accordingly called upon them, they did not give him the money or the goods, and he brought this action.

There is no doubt whatever that he is entitled both to the money and the goods. The only question is whether he can assert his rights in this action.

(1) L.R. 4 H.L., 1, at pp. 27, 28.

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The declaration contained, first, a count for trespass, on which nothing now turns, a count for detinue, and the common counts for money received to the plaintiff's use, and for money due on an account stated. The learned Judge directed the jury that there was evidence of an account stated, and a verdict was given for the plaintiff on that count. With respect to the goods, the defendants denied the plaintiff's title, and also pleaded the bill of sale which, they contended, showed that although the goods had originally been the plaintiff's, the property in them had been divested and passed to the defendants, so that he could not maintain detinue for them. So far as justifying the detention of the papers, that plea was only relevant as showing that the legal title had passed out of the plaintiff to the defendants. At the trial, after the evidence was closed, a question seems to have been raised as to whether the plaintiff had established a legal as distinguished from an equitable title to the papers, and leave was given to add a replication on equitable grounds, which alleged that after payment of the mortgage debt in full it was agreed between the plaintiff and defendants that the bill of sale should be deemed to be fully discharged and satisfied, and that the property remaining in the hands of the defendants should be wholly discharged from the operation of the agreement, and should revert to the plaintiff, and that the plaintiff should be freed from the necessity of taking any steps to secure a formal discharge of the bill of sale as prescribed therein.

I think that this replication, regarded as an equitable replication, is bad, because in an action of detinue the plaintiff must rely on a legal title, and although a Court of Equity would prevent the defendants from setting up a mortgage if it had been paid off, yet if the property in the goods had been divested by the mortgage, the defendants' title to the goods would be an equitable and not a legal title. But I think the replication is good as an informal pleading of matter subsequent to the deed by which the legal title reverted to the plaintiff, as I will afterwards show, confession and avoidance. The jury found a verdict for the plaintiff. A question was raised whether these documents were included in the bill of sale at all. The learned Judge of first instance thought they were not, and I am disposed to agree

with him. He, however, left the following questions to the jury: —1. Did the defendants by their conduct and correspondence lead plaintiff to believe that the property not sold was the property of the plaintiff? 2. Did the defendants waive the necessity for a formal discharge of the bill of sale?

Both these questions were answered in the affirmative, and the jury assessed the plaintiff's damages for the trespass and detinue together at £50.

On an application for a new trial the Supreme Court set aside the verdict, holding that on the facts an action would not lie upon an account stated, and that the goods passed under the bill of sale.

I will deal first with the question of the account stated. The defendants relied upon the case of *Middleditch* v. *Ellis* (1), which was apparently accepted by the Full Court as governing the case. That was an action by a mortgagee against a mortgagor to recover a balance of the mortgage debt due under a covenant. The case has no application to an action by a mortgagor against a mortgagee to recover a surplus. The law is clear that an action will lie both for money received to the plaintiff's use and on an account stated under such circumstances as exist in this case.

In *Roper* v. *Holland* (2) the defendant, who was a trustee for the plaintiff, had promised to pay him £10 out of moneys which he had in hand. *Littledale* J. said (3):—"The defendant, by what he said, admitted that he had £10 in hand, and appropriated it to the plaintiff's use. He cannot then avail himself of his character as trustee."

The point made in that case was that the defendant was a trustee. The point has been frequently considered since. In *Bartlett* v. *Dimond* (4) *Pollock* C.B. said:—"We think that the moneys received were originally received in trust; and that the trust had not determined at the testator's death. If that trust was ended, and the testator had stated an account, or, in other words, had admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely, he would, with

(1) 2 Ex., 623.
(2) 3 A. & E., 99.
(3) 3 A. & E., 99, at p. 102.
(4) 14 M. & W., 49, at p. 56.

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respect to that sum, be a debtor, not properly a trustee, and then an action would have been maintainable against him."

In *Pardoe* v. *Price* (1) *Rolfe* B. said :—" When, indeed, there is no trust to execute, except that of paying over money to the *cestui que trust*, the trustee, by his conduct, as for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the *cestui que trust*, for money had and received, or for money due on account stated." In *Edwards* v. *Lowndes* (2) Lord *Campbell* C.J. said :—" If, indeed, the trustee, by appropriating a sum as payable to the *cestui que trust*, or otherwise, admits that he holds it to be paid to the *cestui que trust*, and for his use, the character of the relation between the parties is changed; and the trustee does not hold it as a trustee properly so called, but as receiver for the plaintiff's use, who may maintain an action at law for money had and received, founded upon the appropriation to his use and the liability thence arising." Lastly, in *Topham* v. *Morecraft* (3), which was the case of an executor (and which serves as a link between this and the other branch of the case), *Wightman* J. said :—" It seems to me to be impossible to maintain that, if a trustee, in possession of trust money, enter into an account with his *cestui que trust*, and thereupon expressly state an account, and acknowledge that he has a fund in hand applicable to the claim made on him, he does not thereupon put an end to his character of being a trustee merely, and become liable as a debtor to an action at law brought against him in his personal capacity." A mortgagee is, of course, a trustee for the mortgagor of any surplus in his hands after satisfaction of the mortgage debt. There is, therefore, no doubt that the plaintiff is entitled to recover the balance of £7 8s. 9d.

I now pass to the other branch of the case.

It is settled law that, although an action will not lie against an executor for a legacy until he has assented to the legacy, yet when he has assented it will lie. And there is no difference in this respect between a pecuniary legacy and a legacy of goods.

(1) 16 M. & W., 451, at p. 458. (2) 1 El. & Bl., 81, at p. 89.
(3) 8 El. & Bl., 972, at p. 983.

That law was laid down as long ago as 1744. In *Williams* v. *Lee* (1) a legatee applied for a legacy which the executor had assented to, and obtained a verdict in an action of trover against the executor. The executor then brought a bill in equity to set aside the verdict. Lord *Hardwicke* L.C. (2) said :—"It is very extraordinary if a legatee must in every instance bring a bill in this Court for the recovery of a legacy against an executor; for though it is said by the plaintiff's counsel, that after a testator's debts are paid the residue vests in an executor, and the legatee is not entitled to it at law, yet after an executor has assented, an action of trover will certainly lie for the legatee."

In the following year the same question came up for decision in the Court of King's Bench in *Atkins* v. *Hill* (3). Authorities going back to the time of Henry VII. were quoted by the counsel who argued the case for the plaintiff. Lord *Mansfield* C.J. treated a legacy of goods as being on the same footing as a pecuniary legacy. He said :—"No doubt then, but at any time after an executor has assented, the property vests; and if it be a pecuniary legacy, an action at law will lie for the recovery of it." The principle of the rule is that the executor is a trustee; and it was so put by *Wightman* J. in the passage I have quoted from *Topham* v. *Morecraft* (4). In my opinion the same principle applies to any other trustee who acknowledges that he is a bare trustee and holds goods for his *cestui que trust.* The nature of his title then becomes changed, if it is necessary to change it. He is no longer a trustee, but becomes a bailee in the case of goods and a debtor in the case of money. If a mortgagee of goods still holds the legal title after discharge of the mortgage debt he holds it as trustee for the mortgagor, and the principle applies.

In their letter of 26th April the defendants said in effect "will you come and take your goods ?" That was a plain change from the position of trustee (if that really was the position before) to that of bailee, and the plaintiff had a good legal title from that time.

One other point was made for the respondents. There was a

(1) 3 Atk., 223.
(2) 3 Atk., 223, at p. 224.
(3) Cowp., 284, at p. 288.
(4) 8 El. & Bl., 972.

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stipulation in the bill of sale that the security should be a continuing security until a memorandum of satisfaction had been signed by the defendants' manager. I think the true interpretation of that provision is that which was suggested by my brother *Isaacs* yesterday, viz., that it was intended that the deed should be a floating security, so that if the debt should be discharged and the plaintiff should afterwards obtain a further loan from the defendants their security should revive. But, even if it applied to prevent a revesting of the legal title to the goods on mere payment of the mortgage debt, then, at best, it was a condition precedent. If it was for the benefit of the defendants they could waive it, and such waiver requires no consideration. The jury found that it was waived by the defendants. If it was a condition for the benefit of the plaintiff, he could and did waive it, so that, in either view, the condition has been waived. It follows therefore that at the time of action brought the goods were at law as well as in equity the goods of the plaintiff.

The only other question is one of damages. It is contended that the plaintiff sustained no damage by the deprivation of the documents. The damage was by agreement assessed on the basis of total deprivation. Clearly it is not a case for vindictive or punitive damages. Nor is it a case for what are called nominal damages. It is difficult to show exactly what inconvenience a man may be put to by being deprived of his business papers. If a man's ledger is kept from him for a year it may be impossible to prove that he has sustained any definite pecuniary loss, but it cannot be said that in such a case he is only entitled to nominal damages. So if a man's horse is taken away he may be only put to the inconvenience of walking instead of riding, but it is impossible to say that in such a case he would be entitled only to nominal damages. In such cases the amount of damages is in the discretion of the jury within reasonable limits. The question is whether £50 is an amount that reasonable men could not give for the permanent deprivation of these documents. I think it is not an unreasonable amount.

The plaintiff is therefore entitled to maintain his verdict, and the appeal must be allowed.

O'CONNOR J. This case affords a strong illustration of how a simple business transaction may become enmeshed in legal technicalities under the system of procedure at present in force in New South Wales. A business man wished to obtain a small advance. It was made by the defendants upon a security in the ordinary form, by which the plaintiff transferred to them certain furniture and household property, with a power of sale. There was a provision for further advances, and it was stipulated that the security should be a continuing security, to be determined only in a formal way, by a memorandum of satisfaction entered on it and signed by defendants' manager. The plaintiff obtained a first advance, made repayments and obtained other advances. While the security was current he decided to go to New Zealand on some business, gave up his house and stored his furniture in a warehouse. With his household furniture he put a box containing some office requisites, papers and records. I may say at once that, in my opinion, the defendants were justified in seizing the box. It may be a question involving a good deal of consideration whether the proper steps were taken to vest the property in these goods in the defendants, but it is clear that if a man chooses to enclose goods, which may or may not be within the security, in a box and to store the box with his household furniture which is under the security, the person holding the security is entitled to assume *primâ facie* that the goods in the box are goods included in the security. It appears to me, therefore, that the plaintiff had no cause of action for trespass, and that there was nothing to complain of in the conduct of the defendants in their seizure and sale of the plaintiff's goods. The result was that, having realized on the goods seized, they had in their hands a balance of £7 8s. 9d. due to the plaintiff, and also the box containing the papers and other articles now in question which had not been sold. There is no doubt that both the money and the unsold goods belong to the plaintiff. The defendants having paid themselves out of the proceeds of sale had no right to hold them any longer. The plaintiff made a claim for the money and goods, and in reply received a letter from the defendants, asking him to call at their office, and make an appointment for taking delivery of the goods and payment

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of the surplus. In response to that letter the plaintiff went to the defendants' office and saw the person there, apparently in some authority, with whom he had always dealt before, and whom one would suppose from his position would be a proper officer to deal with on behalf of the company in a transaction of the kind. This officer told him that the defendants would hand over the goods to his carter if the plaintiff would sign an order directed to the company authorizing the carter to take possession of them. He signed an order accordingly in this form: "Deliver to bearer the two cases and contents you have at your store, of which receipt from him on my behalf will be sufficient discharge." He was told by the officer that on presentation of that document the carter would get the goods.

In my opinion there was sufficient evidence that the officer had authority from the defendants to make that statement, and I have no doubt that it was a distinct admission that the defendants thereafter held the goods for the plaintiff, whatever their strict rights may have been under the bill of sale. The defendants however afterwards refused to give the carter the goods, and the plaintiff went again to the defendants' office and saw the same officer. He said, "I am authorized to give you nothing unless you give me a full quittance for what we have done." The defendants had no right to impose any such condition. The bill of sale gave them no such right. It may be fairly argued that they had some right under the deed to ask for a formal discharge of their obligation, but they had no right to ask the plaintiff to give them a release for any unlawful act they may have done. The plaintiff very properly refused to give any such receipt. He demanded the return of his goods: this was refused, and he brought this action.

There is no doubt that if he had brought his action in a Court which administered together doctrines of law and equity as recognized by British law there would have been no answer to the action. But in New South Wales legal rights and equitable rights, speaking generally, are administered in two divisions of the Supreme Court. A party can obtain only legal rights in one division, and only equitable rights in the other division. To this there is an exception, which has existed for fifty years, by

which, in certain cases, equitable rights may be given effect to in a Court of Law. It is a condition precedent to giving effect to those equitable rights that they should be set out in the form of an equitable plea. We have had an interesting discussion as to the nature of the equitable rights upon which a plaintiff may rely, but we have nothing to do in this case with the general position. We have only to do with the particular equitable right claimed in the equitable replication. The only obstacle which even at law could stand in the way of the plaintiff's obtaining his goods and his money was the condition in the bill of sale that it should be treated as a continuing security, until the memorandum of satisfaction I have referred to had been signed by the defendants' manager. That was the only thing remaining to be done to entirely close the transaction. The declaration contained counts for trespass, detinue, and accounts stated. The trespass count must go; there is no evidence to support it. That leaves the detinue count and the common counts. The defendants in reply to the plaintiff's case set up the deed, to which the plaintiff pleaded an equitable replication, alleging that an agreement had been made to dispense with it. It seems to me that the equitable replication is open to the objection to which my learned brother, the Chief Justice, has referred, because it shows on the face of it that the plaintiff's title to the goods was not a legal, but an equitable title. Although the replication was not demurred to, yet if the plaintiff shows by his own pleading that his title is not legal but equitable, he cannot succeed at law in an action founded on his title. There is direct authority for this in *Thames Iron Works and Ship Building Co.* v. *Royal Mail Steam-Packet Co.* (1). *Willes* J. says:— "The replication in effect says that the defendants ought not in equity to be allowed to set up the want of a dispensation by deed, because they waived the performance of that condition. This replication, like the sixth count, fails to set up any new contract under which the defendants were to pay for the alterations and extra work; and, if it is to be sustained at all, it must be on the ground that the plaintiffs are entitled to recover the price of the alterations and extras under the deed, although they have not performed the stipulations on their part contained in the deed,

(1) 13 C.B.N.S., 358, at p. 379.

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and although there has been no dispensation by deed, because a Court of Equity would, under the circumstances disclosed upon this record, restrain the defendants from relying for a defence upon the want of a deed. All I can say to that is, that the replication departs in a substantial manner from the declaration—it contradicts the contract declared on." *Byles* J. said: "It occurred to me very early in the argument, that this was not a question whether the case was one for equitable relief, but whether it was a case in which an action would lie. I am not qualified to say whether or not the plaintiffs would be entitled to relief in equity; but, assuming that they are so, all that this replication shows, is, that the plaintiffs are entitled to some equitable relief, and that they never had any right of action at all."

For these reasons I am of opinion that the equitable replication was not sustainable, and that it can carry the plaintiff's case no further. But certain evidence was given on that plea. That evidence is before the Court, it can be applied to the issue raised on the plea of not possessed, and is very vital to the plaintiff's legal rights, and it is upon his legal rights alone that he can test his legal title. On his legal title I have no doubt that he is entitled to succeed both in the account stated and money had and received.

The defendants relied on *Middleditch* v. *Ellis* (1). But I do not think that decision has any application to the present case. That was an action by a mortgagee against a mortgagor for money lent and on an account stated. The defendant pleaded, first, never indebted; secondly, that the debt was secured by a bond. The property mortgaged had been sold by the plaintiff under a covenant in the deed, after default made, and the account of the sale, which was admitted to be correct, showed a deficiency. An interview afterwards took place between the plaintiff and the defendant, when an account was stated between them, charging the defendant with the full amount of principal and interest, and giving credit for the proceeds of the sale. What took place at the interview was relied on as evidence of an account stated. If it had not been for the continuing existence of the covenant to repay, no doubt this could properly have been relied on as

(1) 2 Ex., 623.

evidence of an account stated. But it was pointed out that the debt due was really the subsisting debt payable under the covenant, and that what took place at the interview did not affect that. It is quite a different thing when the action is by the mortgagor and the whole transaction is at an end. Here the goods have been sold and the mortgage debt satisfied, and the operation of the deed has been exhausted, and nothing remains but to pay over the balance. When an account is stated under these circumstances a new obligation arises at common law to pay the balance to the mortgagor.

I have some difficulty in understanding the grounds on which it could be held that there was no evidence of an account stated. I think the letter from the defendants' manager and the evidence of the conversation at the defendants' office amounted to an admission that £7 8s. 9d. was due from the defendants to the plaintiff, and was held by them for the plaintiff's use. The goods stand in a different position, but there is one point of view from which the goods and the money can be dealt with. The only thing that stands in the way of the plaintiff's right to recover them is the deed. But after payment they were clearly held by the defendants as trustees, and as bare trustees. As to the money it is obvious from the authorities that when a trustee admits he holds money for his *cestui que trust* the latter may sue at law to recover it. Although in the reported cases the principle has only been applied to the case of pecuniary legacies, it seems to me there can be no distinction in principle between pecuniary legacies and legacies of goods. The cases of *Pardoe* v. *Price* (1), *Edwards* v. *Lowndes* (2), and *Topham* v. *Morecraft* (3) conclusively establish the position that the admission made to the plaintiff by the authorized agents of the defendants, that the company held the money and the goods for the plaintiff, was sufficient to entitle him to sue at common law for the possession of both goods and money. The jury had all the facts before them on the issue raised by the plea of not possessed. I think on those facts the jury were entitled to find for the plaintiff.

The only other question raised is whether the damages are excessive. It seems to me that in this case it is very difficult to

(1) 16 M. & W., 451. (2) 1 El. & Bl., 81. (3) 8 El. & Bl., 972.

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say that the damages are unreasonable. These documents were business records. It might be difficult to show any particular loss by reason of their not being on the plaintiff's business premises, such as would arise for instance from the loss of ledgers or books of receipts. There would be a difficulty in supporting the verdict if the ordinary judgment for the return of the goods had been given. But in this case there was a general verdict, the effect of which is that for all time the defendants will retain the goods, and the plaintiff cannot have the use of them. Under these circumstances the damages cannot be measured merely by the special loss which the plaintiff may have established in evidence. The observations of Lord *Halsbury* in *The Mediana* (1) are very apposite to the condition of things here.

I therefore think that this is not a case in which the Court should interfere with the verdict of the jury upon the ground that the damages were excessive.

ISAACS J. Like my learned brothers I wish to begin by referring to the fact that in New South Wales, alone of all the Australian States, does there exist the antiquated separation of legal procedure which invites such technical expensive and protracted litigation as this case presents, and which might very easily have led to a gross miscarriage of justice. Fortunately the circumstances enable this Court to make law and justice coincide.

The first question is will the action lie for the £7 8s. 9d. for money received or upon accounts stated. It is objected that on the authority of *Middleditch* v. *Ellis* (2) it should have been brought in covenant. The Supreme Court agreed with this argument. With great deference I think it was well answered that such an action would not lie in this case because although the respondents had taken the benefit of the deed they had not in fact executed it. The rule is thus stated by *Holroyd* J. in *R.* v. *Arnesby* (3): "Where a party takes the benefit of a deed, but does not execute it, he will not be liable under it as for a covenant broken, but he may be liable under the implied contract raised by the acts

(1) (1900) A.C., 113, at pp. 116, 117, 118. (2) 2 Ex., 623.
(3) 3 B. & A., 584, at p. 587.

of benefit which he takes under it." See also *Burnett* v. *Lynch* (1) and *Formby* v. *Barker* (2). But in view of the argument I may go further and inquire what would be the position if the respondent is to be treated as having executed the deed.

If there had been a simple covenant by the respondents to pay over whatever surplus remains after exercise of their powers under the mortgage, I should have agreed that the two cases were parallel. But that is not so. In *Middleditch* v. *Ellis* (3) there was an existing covenant to pay the debt in full, and after realization of the security and accounts taken the debtor admitted a certain balance was still due, and promised to pay it. But he was already under covenant to pay it, and all that happened by parol was to ascertain how much still remained unsatisfied. Here, assuming the execution of the deed, the contents of the document are very different. There is no covenant simply undertaking a legal liability to pay the surplus. What the company chose to do was this. It was agreed and declared that the company should receive and take the moneys arising from realization of the property assigned to them, and therefore their own property at law, and stand possessed thereof *upon trust*, in the first place to retain or reimburse their costs and expenses; next in their absolute discretion to pay rent, rates, taxes and incumbrances on the premises where the goods might be; next to retain the amount of the mortgagor's debt, and lastly to pay the surplus, if any, to the mortgagor. So that they took up the position of trustees of all realization moneys, and might be compelled to account like any other person occupying a fiduciary position by a suit to enforce the trust, but were not liable to an action at law to pay over any specific sum as a clear and ascertained debt. The mortgagor's rights then depended so far entirely on the trust so created: *Pardoe* v. *Price* (4) is a case exactly in point. There by Act of Parliament it was enacted that certain turnpike trustees should apply moneys received by them, first in paying expenses, secondly in paying interest and so on, the last trust being to pay lenders of money borrowed the amounts due to them. It was held that an action would not lie at

(1) 5 B. & C., 589.
(2) (1903) 2 Ch., 539, at p. 549.
(3) 2 Ex., 623.
(4) 16 M. & W., 451.

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the suit of a lender against the trustees, even though it was shown there was a surplus in their hands beyond what was needed for the prior claims. But the circumstances which would have created a good legal claim were stated by the Court. Baron *Rolfe*, who delivered the judgment, said (1):—"It is quite clear that, so long as no other relation subsists between two parties except that of trustee and *cestui que trust*, no action can be maintained by the latter against the former for any money in his hands. The trustee is, in such a case, the only person entitled at law to the money, and the remedy of the *cestui que trust* is exclusively in a Court of Equity. When, indeed, there is no trust to execute, except that of paying over money to the *cestui que trust*, the trustee, by his conduct, as for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the *cestui que trust*, for money had and received, or for money due on account stated."

The circumstances here abundantly satisfy and precisely fit the conditions so enunciated, and therefore the verdict for £7 8s. 9d. upon accounts stated or money received ought to stand.

As to the claim for detention, I agree with Mr. *Knox* that the appellant was bound by some means to establish that at the date of the alleged detention he was entitled to immediate possession of the goods, and that in this case involved the legal title. For the purpose of my judgment I will assume, without in any way deciding, that the legal property in the goods, which were after-acquired goods, ultimately vested in the company by what Lord *Bacon* terms a *novus actus interveniens*. Two grounds were discussed during the argument for sustaining the contention that nevertheless the legal property must in this action be deemed to have revested in the appellant. One is that by the conduct of the parties the company legally restored them to him, and the other that by reason of the 97th section of the *Common Law Procedure Act* 1899 a Court of Law will now, equally with the Court of Equity, consider as the true owner of personal property a person who has mortgaged it and paid off debt, interest and costs, because it is said that equity will then

(1) 16 M. & W., 451, at p. 458.

unconditionally and absolutely enjoin the mortgagee from asserting any title to it. In the view taken by the Court of the first ground it is unnecessary to decide the second. If it were necessary to determine it I should require further time to consider the validity of an equitable replication in such a case as the present, because it is not pleaded to create or support the plaintiff's original case. That case does not rest for title on the deed, but on his original title antecedent to the deed. He wants to pass by the deed. The defendants set up that deed and plead it, and the equitable replication comes to destroy the plea, not to add to the declaration. If, as in the *Thames Iron Works and Ship Building Co.* v. *Royal Mail Steam-Packet Co.* (1), the plaintiff's case began and was limited by the document, I should have no doubt he could not rest on a title partly legal and partly equitable. As it is I have considerable doubt, but it is not necessary to resolve it.

Dealing now with the other ground Mr. *Knox* urged that at all events the express contract between the parties provided that "this security shall remain in full force until a memorandum of satisfaction thereof shall have been signed by the said company or the manager thereof for the time being." He contended that so far as legal rights were concerned the appellant was bound by this, and whatever rights he might have to bring an action for not reassigning, or a suit to compel reassignment, no legal title could be asserted by him while that condition remained in fact unfulfilled. Read as a bald stipulation that, notwithstanding full payment of all moneys owing on the security, and any settlement of accounts, the borrower is not to get his property until the company choose to execute a certain document in a particular way, it is both senseless and oppressive to say the least of it. I am glad to be able to read the clause in which the stipulation occurs as a practical, business-like, useful and fair provision. The indenture recites an application for a present advance, and possible future advances from time to time, and that the company has agreed to make the present advance, upon having that and any future advances it may at its option make secured in manner afterwards appearing. Then comes the

(1) 13 C.B.N.S., 358.

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clause in question in these terms :—"And it is hereby agreed and declared that this security shall be deemed a running and continuous security irrespective of any sums that may be from time to time paid to the said company by the said mortgagor and notwithstanding that it may appear at any time that the company has received all moneys then owing on the security and notwithstanding any settlement of accounts or any other matter or thing whatsoever and that this security shall remain in full force until a memorandum of satisfaction thereof shall have been signed by the said company or manager thereof for the time being."

The clause is intended to meet the case of continued advances, at different times—perhaps after all indebtedness for the time being is paid off, and a complete settlement made. In the case of the borrower again obtaining an advance, he agrees by the indenture that the loan is still to be secured by the deed—unless it has been for ever cancelled and put an end to by the company or their manager signing a memorandum of satisfaction. Should that take place the deed in the absence of indebtedness is no longer dormant, it is dead and a new loan does not revive it. But until that course is taken it operates to secure whatever indebtedness may at any time exist. That is what is meant by the words "this *security* shall remain in full force." You cannot have a security without something to secure, and if there is no debt it is idle to talk of a security. Something very similar came before the Privy Council in *Commercial Bank of Tasmania* v. *Jones* (1) where a creditor released a debtor for whom the respondent was surety and accepted another person as debtor in his stead. The Judicial Committee held that as the debt which was secured had been extinguished, the suretyship had gone also. Consequently the words are open to examination in order to give them a reasonable and sensible meaning, and one is found in the construction I have stated.

That technical obstruction to the passing of the legal title having disappeared, we have to see whether the facts amount to a retransference of the property at law. This depends on the evidence, which is brief. On 26th April the company received

(1) (1893) A.C., 313.

appellant's letter, Ex. C, demanding delivery of the goods that day if possible and complaining that he had not yet received cheque for balance.

The same day the manager wrote to appellant, Ex. D. That document is highly important because it yields to the demand of Ex. C. as to the goods, describing them as held by the company, and promises the surplus. The appellant called that day at the company's office as requested by the manager, and after an interview with the employé he had always dealt with, and who apparently was acting within the scope of his authority, he wrote out at the employé's dictation Ex. F. Reading that in conjunction with Exs. C and D, and the evidence of the interview, no other conclusion is reasonably possible than that the company in substance there and then abandoned any claim to hold the goods any longer adversely to the appellant, and acknowledged that henceforth they were mere bailees for him. The goods were in the company's own possession—not in that of any third party—and the transaction was not a mere promise to deliver, it was a constructive delivery. The company by its conduct changed the character of its possession and held for and not against the appellant. On the principle of *Castle* v. *Sworder* (1), a case of high authority in accord with *Elmore* v. *Stone* (2), and *Marvin* v. *Wallis* (3), this amply sufficed to transfer the legal right to immediate possession from the company to the appellant at his pleasure.

It was not a mere gratuitous or generous act on the part of the company. It had been paid all its demands in full, it had no just reason to withhold the property for an instant, and could have been compelled by appropriate proceedings to redeliver it. The learned Judges of the Supreme Court thought that the officer was waiving some right which the company then had under the bill of sale. But that is an error—it had none whatever.

In those circumstances it was natural and honest to accede to the appellant's demand, and having once assented to the goods being temporarily held by it as a mere depository on his behalf until he took them away, the company had no *locus pœnitentiæ* to do wrong.

(1) 6 H. & N., 828. (2) 1 Taunt., 458. (3) 6 El. & Bl., 726.

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On the question of damages, in view of the fact that by consent or without objection they were assessed to include the value of the goods, I agree that the amount is not so great as to provoke interference on the ground of their being excessive.

I concur in allowing the appeal.

Appeal allowed.

Solicitor, for appellant, *H. E. McIntosh.*

Solicitors, for respondents, *Dawson, Waldron & Glover.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

NELSON . . . . . APPELLANT;
DEFENDANT,

AND

WALKER . . . . . RESPONDENT.
PLAINTIFF,

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MELBOURNE, *May* 24, 25, 26; *June* 6.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Vendor and purchaser—Derogation from grant—Implied grant—Quasi-easement—Rain water flowing over surface—Adjoining owners—Natural servitude—Alteration of surface—Transfer of Land Act 1890 (*Vict.*) (*No.* 1149), *sec.* 89—*Conveyancing Act* 1904 (*Vict.*) (*No.* 1935), *sec.* 6.

In order that the grant to a purchaser of a right in the nature of an easement in respect of land of the vendor may be implied from a conveyance of part of a parcel of land of which the vendor retains the balance, it must appear, having regard to all the circumstances of the case, to have been in the contemplation of the parties that the grantor should not use the land which he retains in a manner inconsistent with the enjoyment of the alleged easement.