or peculiar advantage, or is of " that high degree of merit which, if everything else were satisfactory, would entitle the patentee to a prolongation " of his patent (*In re Saxby's Patent* (1)).

Under all these circumstances the petitions must be dismissed. The petitioner will pay the costs of the Commissioner of Patents.

Petitions dismissed with costs.

Solicitors for the petitioner, *Maddock, Jamieson & Lonie.*

Solicitor for the Commissioner of Patents, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

(1) (1870) L.R. 3 P.C., at p. 294.

[HIGH COURT OF AUSTRALIA.]

DAVIS . . . . . APPELLANT;
DEFENDANT,

AND

HUEBER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Supreme Court (N.S.W.)—Equitable jurisdiction—Plaintiff entitled to indemnity—Claim for accounts and injunction—Claim for delivery up of property—Breach of contract—Action at law—Parties—Equity Act 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *sec.* 16—*Common Law Procedure Act* 1899 (*N.S.W.*) (*No.* 21 *of* 1899), *sec.* 176.

The plaintiff, who carried on business in Australia as agent for the A company, which was a foreign company, in the course of carrying it on incurred on behalf of the A company certain debts for which he was personally responsible; and in respect of those debts he was entitled to an indemnity out of the

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assets of the business. The A company subsequently made an arrangement under which its business in Australia was to be carried on by another company, of which the defendant was the manager. The defendant thereupon entered into an agreement with the plaintiff under which the plaintiff handed over to the defendant the assets of the business upon the defendant agreeing to realize them and to pay the running expenses and undertaking not to hand over the proceeds of realization to the A company until the plaintiff's claim against that company was settled. The defendant having handed over some of the assets to the A company, the plaintiff brought a suit in the Supreme Court of New South Wales in its equitable jurisdiction against the defendant, claiming accounts of the defendant's dealing with the assets, an order that the defendant hand over to the plaintiff any balance of money the proceeds of realization of the assets, and any of the assets remaining in his hands, and pay to the plaintiff the balance found due to the plaintiff on the taking of the accounts, and also claiming an injunction restraining the defendant from dealing with the assets otherwise than in accordance with the plaintiff's directions. The Court made a decree as claimed. On appeal to the High Court,

Held, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that in the suit as framed a decree was properly made for accounts and the injunction.

Held, also, by *Knox* C.J., *Higgins* and *Starke* JJ., that, in the absence of the A company as a party to the suit, the Court had no jurisdiction to decree the handing over to the plaintiff of the balance of money the proceeds of the realization and any of the assets remaining in the defendant's hands.

Per Higgins J. :—The suit was based, not on any duty of the A company to indemnify the plaintiff, but on a special contract like a bailment, made by the defendant personally with the plaintiff ; for breach of the contract an action would admittedly lie at law ; there was no trust in the sense of equity ; there was no complication of accounts such as would justify the interference of equity ; the contract was not one that equity could specifically enforce ; and, therefore, under the New South Wales Acts the Supreme Court in Equity had no jurisdiction. If the A company be joined as a defendant, it would be a misjoinder of causes of action.

Decision of the Supreme Court of New South Wales (*Street* C.J. in Eq.) varied.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Theodore Hueber, carrying on business as Th. Hueber (representing Andersen, Meyer & Co. Ltd.), against Joseph Lewis Davis, in which the statement of claim was as follows :—

1. Prior to 4th October 1919 the plaintiff carried on business in Sydney under the style of Th. Hueber, representing Andersen,

Meyer & Co. Ltd., under an agreement with Andersen, Meyer & Co. Ltd., a company carrying on business in China. On the said day the assets of the said business consisted of stock, fixtures, stationery, deposits and pre-payments for goods, valued in all at the sum of £8,599 17s. 2d; there was also a bank credit with the Bank of Australasia, Sydney, amounting to £1,456 9s. 1d.—the total assets of the business on the said day amounting to £10,056 6s. 3d.

2. On 4th October aforesaid it was agreed by and between the plaintiff and the defendant that the defendant would on account of the plaintiff liquidate the firm "Th. Hueber," representing Andersen, Meyer & Co. Ltd., by taking over the assets and discharging the ordinary running expenses of the said business. It was further agreed by the defendant with the plaintiff that the defendant would not withdraw any of the capital invested in the said firm without the consent of the plaintiff.

3. No accounts of the liquidation of the said business have been rendered to the plaintiff by the defendant (although the plaintiff has requested such accounts), but the plaintiff believes that the net cash balance after deduction of current expenses and other payments under the said agreement will be about £5,000.

4. The plaintiff alleges that the defendant has without the consent of the plaintiff remitted to Andersen, Meyer & Co. Ltd. in China the bulk of the assets and capital handed over by the plaintiff to the defendant. The defendant is manager for a company known as the Pacific Commercial Co., who are the present agents of Andersen, Meyer & Co. Ltd. in Australia, and the plaintiff says that the defendant is wrongfully withholding from him assets of the plaintiff's business or has forwarded the said assets to Andersen, Meyer & Co. Ltd., in order to force the plaintiff to proceed against Andersen, Meyer & Co. Ltd. in China in respect of moneys which Andersen, Meyer & Co. Ltd. and the defendant wrongfully claim to be owing from the plaintiff to Andersen, Meyer & Co. Ltd.

5. The plaintiff says that the defendant has repudiated his agreement of 4th October 1919, and the plaintiff fears that unless restrained by the order of this Honourable Court the defendant by his said actions and breach of agreement will force the plaintiff to

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considerable expense and trouble in proceeding against Andersen, Meyer & Co. Ltd. in China, and will prevent the proper liquidation of the said business.

The plaintiff therefore claims :—

(1) That the defendant may be ordered to render an account of his dealings as liquidator with the assets of the said business and that the said accounts may be taken by or under the direction of this Honourable Court ;

(2) That the defendant may be ordered to pay the cash balance or any assets remaining in his hands in respect of the said business to the credit of the plaintiff in the Bank of Australasia, Sydney ;

(3) That the defendant may be ordered to return to the plaintiff the books of account and office records of the said business and to pay to the plaintiff the amount found to be due to the plaintiff on the taking of the said accounts together with interest ;

(4) That the defendant may be restrained from dealing with the assets of the business other than in accordance with the directions of the plaintiff ;

(5) That the defendant may be ordered to pay to the plaintiff the costs of the plaintiff of this suit ;

(6) That the plaintiff may have such further or other relief as the nature of the case may require.

The suit was heard by *Street* C.J. in Eq., who made a decree ordering (*inter alia*) (1) that the defendant deliver up to the plaintiff (a) any cash balance in the hands of the defendant or under his control in respect of his realization of the assets of the business, (b) any assets of the business remaining unrealized and (c) the books and office records of the business ; (2) that the defendant be restrained from dealing with the assets of the business otherwise than in accordance with the directions of the plaintiff ; (3) that it be referred to the Master in Equity to take accounts of the dealings of the defendant as liquidator with the assets of the business.

From that decision the defendant now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Innes K.C. and *T. P. Power*, for the appellant. The contract sued on was made by the respondent on behalf of Andersen, Meyer & Co., and he was not entitled to sue on it personally. If the respondent

should be regarded as a principal, the Supreme Court in its equitable jurisdiction had no jurisdiction; for the claim is one which should have been enforced in a Court of common law as an action for debt. The claims for accounts and for injunction are claims which should have been made in a Court of common law and not in a Court of equity (*Navulshaw* v. *Brownrigg* (1); *Moxon* v. *Bright* (2); *Phillips* v. *Phillips* (3); *Makepeace* v. *Rogers* (4); *Frietas* v. *Dos Santos* (5); *Fluker* v. *Taylor* (6); *Barry* v. *Stevens* (7); *Lane* v. *Hinks* (8)).

[HIGGINS J. referred to *Burdick* v. *Garrick* (9).]

The assets were, by the agreement, put into the hands of the respondent to be held on account of the respondent and Andersen, Meyer & Co. subject to the ascertainment of the rights of the parties. The respondent had a right of lien for his expenses properly incurred, but had no exclusive right to the possession of the goods (see *Watson* v. *Lyon* (10)). The most the respondent was entitled to was payment of money into Court.

Loxton K.C. (with him *Evatt* and *Lamaro*), for the respondent. The relation between the appellant and the respondent created by the contract was that of trustee and cestui que trust, and the only cestui que trust was the respondent. The appellant agreed that he would not part with the assets without the respondent's consent, and that is an agreement which equity will enforce (*Doherty* v. *Allman* (11)), and the parties between whom that matter is to be fought out are the respondent and the appellant (*Crawshay* v. *Thornton* (12)). [Counsel also referred to *Rogers, Sons & Co.* v. *Lambert & Co.* (13); *Lazarus* v. *Harris* (14).]

Innes K.C., in reply, referred to *Turner* v. *New South Wales Mont de Piété Deposit and Investment Co.* (15).

Cur. adv. vult.

(1) (1852) 2 DeG. M. & G., 441, at p. 458.
(2) (1869) L.R. 4 Ch., 292, at p. 295.
(3) (1852) 9 Ha., 471.
(4) (1865) 4 DeG. J. & S., 649, at p. 652.
(5) (1827) 1 Y. & J., 574.
(6) (1855) 3 Drew., 183.
(7) (1862) 31 Beav., 258.
(8) (1918) 35 N.S.W.W.N., 90.
(9) (1870) L.R. 5 Ch., 233.
(10) (1855) 7 DeG. M. & G., 288, at p. 297.
(11) (1878) 3 App. Cas., 709, at p. 719.
(12) (1836-37) 2 My. & Cr., 1, at p. 6.
(13) (1891) 1 Q.B., 318.
(14) (1888) 9 N.S.W.L.R. (L.), 148.
(15) (1910) 10 C.L.R., 539.

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April 26.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. Andersen, Meyer & Co. Ltd. carried on business in the East, and its head office was at Shanghai. It had an agency in Australia, which was conducted by the Pacific Commercial Co. The plaintiff Hueber was employed by Andersen, Meyer & Co. at a salary; and in 1918, under instructions from his employers, he came to Australia. Soon afterwards he was instructed to take away the agency from the Pacific Commercial Co. and conduct it himself. This he did, and the agency was thereafter carried on under the style "Th. Hueber, representing Andersen, Meyer & Co. Ltd.," because, apparently, the company did not desire to register in Australia. The profits and losses of the business were, however, for the account of the company. The business of the agency was the disposal of goods such as lace, hair nets and pongee, forwarded from the East to Australia. Sometimes these goods were supplied to meet the "firm orders" of customers, sometimes for stock, and sometimes on consignment for sale. Andersen, Meyer & Co. drew upon Hueber personally in many cases for the value of the goods, and confided to his discretion, as we find, the duty of making the necessary financial arrangements for meeting the bills. Hueber raised moneys to meet them on his personal credit, and from his wife, among others, he obtained about £4,600, which he put into the agency business. Under these circumstances we do not think it open to doubt that Hueber was entitled to an indemnity out of the assets of the business for the liabilities which he had thus incurred (*cf. Dowse* v. *Gorton* (1)). It is quite immaterial whether this right be called an "indemnity," a "lien," or a "charge"; it was certainly a right enforceable in a Court of equity.

Andersen, Meyer & Co. Ltd. resolved, in 1919, to make another change in its method of carrying on business in Australia. This change is explained in a letter of 25th June 1919 to Hueber :— "We have been in correspondence with our friends in New York" (the Pacific Commercial Co.) ". . . and the solution has now been reached which we believe will be entirely satisfactory. Mr. Davis, who has been connected with the Pacific Commercial Co. for a great many years, . . . has been selected to go to

(1) (1891) A.C., 190.

Australia and take over the management of the Pacific Commercial Co.'s office there and enlarge it with the object in view of making the Australian end of the business of our various companies a large and important unit." Davis is the defendant in this suit. He did come to Australia, and immediately proceeded to take over the management of the business theretofore carried on by Hueber. But it was at once pointed out that there were certain liabilities in connection with that business for which Hueber was personally responsible, among others the liability to his wife, and that he could not well part with all the assets (goods and book debts, &c.) of the business unless he were protected. Davis had no authority, he said, from the Pacific Commercial Co., or from Andersen, Meyer & Co. Ltd., to give such protection, but assured Hueber that he would give a personal undertaking that would serve the same purpose. This undertaking is contained in a letter dated 4th October 1919, which reads as follows :—" J. L. Davis Esq., Pacific Commercial Co., Pomeroy House, York Street, City.—Dear Sirs,—Attention of Mr. J. L. Davis : I herewith beg to confirm the verbal arrangement arrived at with you to the effect that in order to avoid unnecessary expense you will liquidate the firm ' Th. Hueber, representing Andersen, Meyer & Co. Ltd.' by taking over the assets and discharging the ordinary running expenses, but that you will not withdraw any of the capital invested in the firm without my consent. As correctly expressed by your Mr. J. L. Davis, we have agreed to let the matter remain in status quo antes pending a final agreement with Messrs. Andersen, Meyer & Co. Ltd.—Yours very truly, (Sgd.) Th. Hueber, representing Andersen, Meyer & Co. Ltd. Agreed.—J. L. Davis, Sydney, 4/10/19.—Witness : Leslie W. Hudson."

Now, taken in conjunction with the surrounding circumstances which are admissible for the purposes of construction, what does this letter mean ? On the part of Hueber it was contended that Davis thereby constituted himself a trustee for Hueber of the assets of the business and the proceeds therefrom. On the part of Davis the contention was that the letter recognizes his substitution as the manager of the agency business of Andersen,

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Meyer & Co. Ltd. in Australia, and contains, in addition, an arrangement whereby Hueber at once hands over the assets of the business, so that they might be realized, and a promise by Davis that Hueber's right of indemnity against the assets should not be prejudiced, but should remain *in statu quo* pending a final arrangement with Andersen, Meyer & Co. Ltd. And as security for this arrangement, Davis undertook that he would not withdraw any of the capital invested in the firm without Hueber's consent. We think the latter view is correct. Davis did not agree to stand possessed of the assets or their proceeds upon trust for Hueber, but simply to hold them subject to Hueber's right of indemnity or whatever claim he had, and not to part with them until a final settlement of that claim with Andersen, Meyer & Co. Ltd. Andersen, Meyer & Co. Ltd. had the advantage of the arrangement made by Davis, and must submit to its burdens. It cannot both approbate and reprobate the arrangement. Therefore, in our opinion, Hueber was entitled to enforce his right of indemnity against the moneys realized by Davis in disposing of, or, as it was called, liquidating, the assets of the Hueber agency. Davis, however, did not carry out his promise. He paid over to the Pacific Commercial Co., or to Andersen, Meyer & Co. Ltd., a considerable portion of the proceeds of the assets without Hueber's consent, and Hueber feared that Davis might dispose of all the assets or their proceeds without providing for Hueber's claim. Consequently Hueber instituted a suit against Davis in the Supreme Court of New South Wales in its equitable jurisdiction, wherein he claimed "(1) that the defendant may be ordered to render an account of his dealings as liquidator with the assets of the said business and that the said accounts may be taken by or under the direction of this Honourable Court; (2) that the defendant may be ordered to pay the cash balance or any assets remaining in his hands in respect of the said business to the credit of the plaintiff in the Bank of Australasia, Sydney; (3 that the defendant may be ordered to return to the plaintiff the books of account and office records of the said business and to pay to the plaintiff the amount found to be due to the plaintiff on the taking of the said accounts together with interest; (4) that the defendant may be restrained from dealing with the assets of the business

other than in accordance with the directions of the plaintiff; (5) that the defendant may be ordered to pay to the plaintiff the costs of the plaintiff of this suit; (6) that the plaintiff may have such further or other relief as the nature of the case may require."

The learned Chief Judge in Equity (*Street* J.), before whom the suit was tried, ordered Davis to deliver up to Hueber any assets, moneys and books of the before mentioned agency business remaining in his hands, restrained him from dealing with such assets otherwise than in accordance with the directions of Hueber, and directed certain accounts. The decree is based upon the view that the business belonged to Hueber, and that Davis was a trustee for him. We find ourselves unable to agree with this conclusion, for the reasons already given. But we think that Hueber might, in properly constituted proceedings, have enforced his right to an indemnity against the assets of the business and restrained Davis from parting with those assets contrary to his agreement. It is said, however, that the claim in the present suit against Davis made no such case, and must be treated as a claim against him personally, either for an ascertained sum of money, namely, a sum of £441 14s. 9d. in respect of the balance of the amount procured by Hueber from his wife for the business, or else for damages for the breach of his agreement. Consequently, it is contended that the claim is cognizable in a Court of law and not in a Court of equity. The argument is available because the jurisdictions of the Supreme Court of New South Wales in common law and in equity have not been combined, as under the Judicature system, and, generally speaking, must each be exercised by the appropriate branch of that Court and not by any other.

Looking at Hueber's claim in the suit, we think, badly as it is framed, that he was endeavouring to assert therein some right against the proceeds of the assets of the agency business carried on by him. This right could be enforced, if only he could get the proceeds of the realization into his own hands. So he pleaded the agreement of October 1919, and claimed, upon an erroneous view of the facts and of the proper construction of the agreement, that Davis must hand over these proceeds to him. But Hueber's right to

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indemnity could only be enforced, in our opinion, in proceedings in which Andersen, Meyer & Co. Ltd. were joined. The suit was, therefore defective both in statement and in parties.

The claim, however, against Davis for an account of the liquidation and an order restraining him from parting with the assets of the business without Hueber's consent was, we think, in the circumstances of this case, a proper subject for the exercise by the Court of its equitable jurisdiction. It is said that accounts of the liquidation were quite unnecessary, for there was admittedly a balance of liabilities of the old agency amounting to about £441 still undischarged, which represented part of the sum procured by Hueber from his wife, and which would have been paid over to Hueber but for the fact that Andersen, Meyer & Co. Ltd. had a cross-claim of equal amount in respect of transactions between them in the East. The suggestion does not quite meet the case. Hueber's right to indemnity was against all the assets, and his claim was not a mere debt. We think the Court had jurisdiction, if in its discretion it thought fit, to order, for the purpose of giving effect to Hueber's right to indemnity, an inquiry as to the realization of the assets and as to what had become of the proceeds. Again, Davis was wrongfully disposing of the assets, contrary to his agreement and in derogation of Hueber's right to an indemnity. An order restraining him was, we think, a proper and, in the circumstances of the case, a necessary exercise of equitable jurisdiction.

But what should be done with this appeal? We think that the order of the learned Chief Judge directing that Davis deliver up to Hueber cash, assets and books belonging to the business must be discharged. The order restraining the defendant from dealing with the assets can also be discharged, for Davis now offers to pay into the Supreme Court to the credit of the suit the sum of £613 0s. 7d., the balance of the assets in his hands or under his control, to abide the order of the Supreme Court in this suit. The ancillary order for accounts can, in the circumstances, also be discharged. And we think the plaintiff should have leave to join Andersen, Meyer & Co. Ltd. in the suit and amend his claim as he may be advised. Davis has undertaken that Andersen, Meyer & Co. Ltd. will appear forthwith, pursuant to process. Time, of course, must be given that

company to prepare its defence or cross-claim, but the Supreme Court can grant whatever time is reasonably required for this purpose. The judgment of this Court will enable the Supreme Court to dispose of the dispute as to £441.

We think the order of *Street* J. as to the costs of the suit should not be disturbed. Davis's action in both denying the fact of his agreement and breaking its terms (instigated no doubt by Andersen, Meyer & Co. Ltd.) rendered an injunction necessary, and the suit would not, in all probability, have been brought but for his wrongful conduct. The parties must abide their own costs of appeal, for neither has wholly succeeded.

HIGGINS J. I find myself in accord with my learned colleagues as to the facts of this case ; but ground 4 of the appeal seems to me fatal under the New South Wales law—" that the only relief (if any) to which the plaintiff was, on the evidence, entitled was at common law, and that the Supreme Court in its equitable jurisdiction had no jurisdiction."

In New South Wales the English Judicature system, now of fifty years' standing, has not been adopted ; and, unless the plaintiff Hueber can show that on the facts of the case as proved he was entitled to equitable relief, the Equity Court cannot make any decree in his favour.

The statement of claim shows that the plaintiff sought no relief against Andersen, Meyer & Co. Ltd. The only defendant is Davis —Davis personally ; and the claim is based on an agreement with Davis of 4th October 1919. Par. 2 of the statement of claim is as follows :—" On 4th October aforesaid it was agreed by and between the plaintiff and the defendant that the defendant would on account of the plaintiff liquidate the firm of ' Th. Hueber,' representing Andersen, Meyer & Co. Ltd., by taking over the assets and discharging the ordinary running expenses of the said business. It was further agreed by the defendant with the plaintiff that the defendant would not withdraw any of the capital invested in the said firm without the consent of the plaintiff."

The document drawn up by Hueber and signed by him and Davis on 4th October, was as follows :—" I herewith beg to confirm the

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verbal arrangement arrived at with you to the effect that in order to avoid unnecessary expense you will liquidate the firm 'Th. Hueber, representing Andersen, Meyer & Co. Ltd.' by taking over the assets and discharging the ordinary running expenses, but that you will not withdraw any of the capital invested in the firm without my consent. As correctly expressed by your Mr. J. L. Davis we have agreed to let the matter remain in status quo antes" *(sic)* "pending a final arrangement with Messrs. Andersen, Meyer & Co. Ltd." As applied to the facts, this means, according to the plaintiff, that Davis personally was to wind up the business, paying running expenses, and was not to hand over the proceeds of realization to Andersen, Meyer & Co. without the consent of Hueber. I am prepared to accept that as the true meaning. Andersen, Meyer & Co. in Shanghai wanted to transfer their Sydney agency from Hueber to the Pacific Commercial Co., of which company Davis was the agent, and Hueber, objecting to the assets of the business, or the proceeds thereof, being transferred to Andersen, Meyer & Co. unless his expenses and obligations as previous agent were satisfied, made this private, personal arrangement with Davis: no transfer to Shanghai until Hueber's claim be settled.

I shall assume that Hueber as agent for Andersen, Meyer & Co. had (according to the facts in evidence in this case) a right to be indemnified out of the assets of the Sydney business as to his expenses and obligations incurred in that business; but we have not heard what Andersen, Meyer & Co. can say on the subject; and the plaintiff makes no claim based on that right to indemnity. His claim is based expressly and solely on the special contract made between him personally and Davis personally.

Now, Davis did not observe the terms of his promise. He did transfer most of the proceeds of the liquidation of the business to Andersen, Meyer & Co.; and the question is what is the remedy of the plaintiff. Has he a remedy in a Court of equity?

If the only assets were stock-in-trade, an action at law would lie for breach of the contract of bailment; and it is not denied that the plaintiff could sue Davis for damages for breach of this special contract as to stock-in-trade and money in the common law Courts. Money damages are the cure-all medicine of the common law Courts.

Moreover, under the New South Wales *Common Law Procedure Act* 1899 (sec. 176) the plaintiff could seek, in addition to damages, an injunction forbidding the continuance or repetition of the breach. It is true that Davis was not, under the contract, to get any remuneration for his services as sub-agent for Hueber; but the confidence reposed in him is, according to the *Coggs* v. *Bernard* (1) doctrine, to be treated as a sufficient consideration to support the arrangement as a binding contract. But what jurisdiction has a Court of equity in the matter?

The plaintiff relied in argument on the jurisdiction of equity as to trusts; but a mere contract of bailment, or any contract of similar nature, does not create a trust. The property in the assets did not pass to Davis. He was in a position like a stakeholder; he was not even to pay the proceeds to Hueber; but he was to hold them until Hueber came to an agreement with Andersen, Meyer & Co. Ltd. The law of trusts has nothing to do with the matter. Every bailment probably involves in some sense trust or confidence reposed by the bailor in the bailee; but it is not necessarily a trust of property such as Courts of equity have jurisdiction to enforce. I know of no instance in which a carrier has been sued in equity for breach of trust.

But it is urged that Hueber is entitled to accounts in equity from his agent Davis. A Court of equity could make a decree for accounts under special circumstances only, as where the accounts are so complicated that the Courts of law are inadequate. As stated in *King* v. *Rossett* (2), "before" a Court of equity "will interfere, a ground for its interposition must be laid, by showing an account which cannot fairly be investigated by a Court of law." In this case, the only item of account in dispute was a definite sum of £441 14s. 9d., claimed by Andersen, Meyer & Co. Ltd. for an alleged debt owing to them by Hueber in respect of some previous dealing. There was no need for the assistance of a Court of equity in the ascertainment of this issue, debt or no debt. Such an issue is for the Courts of law, and for the Courts of law only. In their letter to Hueber, 26th September 1919, they say:—"We confirm our cable to you of this date, asking you to turn over our business there

(1) (1703) 2 Ld. Raym., 909.

(2) (1827) 2 Y. & J., 33, at p. 35.

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to Mr. Davis, of the Pacific Commercial Co., to be liquidated for our account. In your cable to us of 24th instant, you advised that we are indebted to you in the amount of £3,390, which amount you ask us to instruct Mr. Davis to pay you upon transfer having been completed. We have asked Mr. Davis to pay you the £3,390, if that balance is found to be correct" (that is, by the company's auditors), "less £441 14s. 9d. the amount of your indebtedness to us, as evidenced by statement herewith. We hope there will be no difficulty in effecting the transfer."

There is not the slightest evidence of any complexity in the accounts, even as to the transactions of Hueber with Andersen, Meyer & Co. Ltd. The fact that the accounts have not yet been audited by the latter's auditors does not give jurisdiction. Still less is there any difficulty or complexity, or pretence thereof, in the transactions between Hueber and Davis personally. There is no indication of any dispute as to accounts as between Hueber and Davis, the parties to this cause. Therefore, the equitable jurisdiction as to accounts does not justify this suit in equity against Davis.

The only other ground on which jurisdiction of equity is claimed is that the plaintiff is entitled to an injunction; and there is a prayer for an injunction restraining Davis from dealing with the assets of the business otherwise than in accordance with the directions of the plaintiff. In the contract in this case, there certainly is a negative term—a promise not to withdraw any of the capital without Hueber's consent. But Courts of equity do not grant injunctions against breach of a contract unless the contract is such that the whole contract can be specifically performed under the orders of the Court; and in this case equity could not take on itself to direct Davis how to "liquidate the firm," to realize the assets and discharge the running expenses. The case of *Lumley* v. *Wagner* (1) is treated now as an anomalous exception to the rule. The anomaly has "to be followed in cases like it, but an anomaly which it would be very dangerous to extend" (per *Lindley* L.J., *Whitwood Chemical Co.* v. *Hardman* (2); and see *Fothergill* v. *Rowland* (3)). In the *Whitwood Case* the manager of a manufacturing company agreed

(1) (1852) 1 DeG. M. & G., 604. (2) (1891) 2 Ch., 416, at p. 428.
(3) (1873) L.R. 17 Eq., 132.

to give during a specified term "the whole of his time to the company's business"; and the Court of Appeal held that the plaintiff was not entitled to restrain the manager from giving during the term part of his time to a rival company. It is a mistake to think that in every case of a negative covenant the Court of equity will grant an injunction against a breach; it certainly refuses to decree specific performance of contracts of personal service or to grant injunctions against the breach thereof. If a butler has contracted to give the whole of his service to A, A is not entitled to an injunction against the butler serving someone else. As *Kay* L.J. said (1), the case of *Lumley* v. *Wagner* (2) was the "extreme limit." In the present case, the contract of the defendant with Hueber is to "liquidate the firm," which is a contract of personal service. The statements of Lord *Cairns* in the case of *Doherty* v. *Allman* (3), which has been cited as an authority in favour of the plaintiff, related to a contract of which specific performance would be enforced in equity—a covenant in a lease of real estate. As Lord *Cairns* said, the question was as to "the specific performance, by the Court, of that negative bargain which the parties have made." Moreover, I very much doubt whether a mere voluntary bailment, without remuneration to the bailee, without consideration passing to the bailee other than the confidence reposed by the bailor, is a sufficient basis for the exercise of the special powers of the Courts of equity as to specific performance or injunction.

I should add that sec. 16 of the *Equity Act* 1901, enabling the Court to grant interlocutory injunctions where "just or convenient," does not alter the principles on which perpetual injunctions are granted.

In my opinion, therefore, the suit fails as not being within the jurisdiction of the Court of equity. If the English Judicature system were in force in New South Wales, such a fiasco would not occur; for, the plaintiff being entitled to some relief against Davis for breach of his contract, the Court could have jurisdiction to grant it. One is naturally desirous to prevent Andersen, Meyer & Co. Ltd. from taking advantage of Davis's breach of his duty towards Hueber; and therefore it is proposed, as I understand,

(1) (1891) 2 Ch., at p. 431. (2) (1852) 1 DeG. M. & G., 604.
(3) (1878) 3 App. Cas., at p. 720.

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to strike out from the decree of *Street* J. all the clauses except as to costs, &c., but to allow Hueber (1) to add Andersen, Meyer & Co. Ltd. as a party to this suit and (2) to amend his claim as he may be advised. From my point of view, of course, I concur in the view that the clauses are wrong, and ought to be deleted; but I cannot think that such an order as proposed is proper, or that it gives due effect to the fourth ground of appeal—"that the Supreme Court in its equitable jurisdiction had no jurisdiction." The course proposed is, substantially, to turn a suit against Davis as agent of Hueber into an action against Andersen, Meyer & Co. Ltd., based on Hueber's right as agent for that firm to be indemnified out of the assets of the business against his expenses and obligations incurred in that business. Assuming that such a suit could be maintained, it seems to me that such a suit would involve a misjoinder of causes of action, and even more—a confusion of equity with law; and although the powers of amendment conferred on the Equity Court are of the widest character, such an amendment as proposed would be an offence against the statute law of New South Wales. It is not even alleged that Davis broke his contract in collusion with Andersen, Meyer & Co. Ltd. In my opinion, the appeal should be allowed on ground 4, and the suit dismissed, without prejudice to any other action or suit that the plaintiff may be advised to bring.

Appeal allowed. Discharge the following order in the judgment of the Supreme Court dated 27th October 1922: "*And this Court doth further order that the defendant within seven days after service upon him or his solicitor of an office copy of this decree do deliver up to the plaintiff or as the plaintiff may direct* (*a*) *any cash balance remaining in the hands of the defendant or under his control in respect of his realization of the assets of the plaintiff's business referred to in paragraphs one and two of the statement of claim herein and* (*b*) *any assets of the said business remaining unrealized and* (*c*) *the books and office records of the said business.*" *Order that plaintiff Hueber have liberty to join Andersen, Meyer & Co. Ltd. as a party to this suit and that he be at liberty*

to amend his claim as he may be advised. And, the defendant Davis undertaking to pay into the Supreme Court of New South Wales in its equitable jurisdiction the sum of £613 0*s.* 7*d., proceeds of the business Th. Hueber, representing Andersen, Meyer & Co. Ltd., now in his hands or under his control, to the credit of this suit to such account as the said Court shall direct, and also undertaking that Andersen, Meyer & Co. Ltd. will upon joinder appear to this action in due course of law, discharge the following order in the judgment of the Supreme Court dated 27th October* 1922: "*And this Court doth further order that the defendant be and he is hereby restrained from dealing with the assets of the said business otherwise than in accordance with the directions of the plaintiff And this Court doth further order that it be referred to the Master in Equity to take an account of the dealings of the defendant as liquidator with the assets of the said business.*" *Judgment of Supreme Court otherwise affirmed. Parties to abide their own costs of appeal.*

Solicitor for the appellant, *W. H. Drew.*

Solicitors for the respondent, *John McLaughlin & Son.*

B. L.