[HIGH COURT OF AUSTRALIA.]

HEAVENER AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

LOOMES AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1924.

SYDNEY, *April* 3; *May* 2.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Mortgage Deed—Action for detinue by mortgagee—Verdict for amount made up of mortgage debt and interest—Payment by defendant of amount of verdict—Action by mortgagee against mortgagor to recover mortgage debt and interest—Suit in equity by defendant in action for detinue to restrain mortgagee's action—Refusal of interlocutory injunction—Subsequent payment by mortgagor to mortgagee—Appeal to High Court—Remedy on appeal.

In an action in the Supreme Court of New South Wales by a mortgagee against a firm of solicitors, who had charge of the mortgage deeds, for detinue of the deeds a verdict was given for return of the deeds or their value, being the amount of the mortgage debt and interest thereon up to the date of the writ, and also one shilling damages for detention of the deeds. The amount of the verdict was paid by the solicitors. Subsequently the mortgagee instituted an action against the mortgagors to recover the amount of the mortgage debt and interest thereon. A suit in equity against the mortgagee and the mortgagors was then brought by the solicitors, claiming (*inter alia*) a declaration that they were entitled to the benefits of the mortgage and the use of the mortgagee's name in enforcing the same; alternatively, that the mortgagee should be declared a trustee of the mortgage and of all the rights thereunder for the solicitors; an injunction restraining the mortgagee from receiving any of the moneys secured by the mortgage or from further proceeding with the action against the mortgagors; and an injunction restraining the mortgagors from paying any moneys to the mortgagee. Interim injunctions, in the terms mentioned, to continue until a fixed date

were granted, but the Court dismissed a substantive application to continue the injunctions until the hearing of the suit. Subsequently the mortgagors paid the amount of the mortgage debt and the interest thereon to the mortgagee. On appeal to the High Court from the order refusing to continue the injunctions,

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), without determining whether the order was rightly or wrongly made, that in the absence of evidence that the mortgagee was impecunious or in such a position that the moneys in question could not be recovered by the solicitors if they should establish any right to such moneys, the appeal should be dismissed without prejudice to the solicitors' right (if any) to the moneys in question in the suit.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Heavener* v. *Loomes*, (1923) 24 S.R. (N.S.W.) 104, varied and affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Bertram Theodore Heavener and Clarence Ernest Chapman against Johannah Loomes, Percy Victor Dennis, Daisy Margaret Dennis, Herbert William Dennis and Martha Dennis, in which the statement of claim was substantially as follows:—

1. The plaintiffs are solicitors of the Honourable Supreme Court of New South Wales and from 18th March 1920 till 31st March 1923 carried on business as such in copartnership in Sydney.

Pars. 2 and 3 stated that one George William Dennis died on 16th January 1904 intestate, leaving him surviving his widow, the defendant Martha Dennis, to whom administration was granted, and two sons, the defendants Percy Victor Dennis and Herbert William Dennis.

4 and 5. On 14th April 1916 the defendants Percy Victor Dennis and Daisy Margaret Dennis, his wife (who was a daughter of Johannah Loomes), by indenture of that date mortgaged the share of the said Percy Victor Dennis in the intestate estate of George William Dennis to one Alfred Speechley Loomes to secure the repayment of the sum of £809 (and interest) lent by Alfred Speechley Loomes to the defendants Percy Victor Dennis and Daisy Margaret Dennis at the request and by the direction of the defendants Herbert William Dennis and Martha Dennis.

Pars. 6, 7 and 8 alleged that certain statutory declarations had been made by Percy Victor Dennis, Herbert William Dennis and Martha Dennis.

H. C. OF A. 1924.

HEAVENER v. LOOMES.

9. The said Alfred Speechley Loomes died on 17th April 1917, and the defendant Johannah Loomes was appointed his executrix, and probate of the last will of the said Alfred Speechley Loomes was granted to her on 7th June 1917.

Pars. 10, 11 and 12 stated that on 11th July 1922 Johannah Loomes brought a common law action in the Supreme Court against the plaintiffs, alleging that the plaintiffs detained from her the indenture of mortgage and the statutory declarations, and claiming a return of such documents or their value and £1,500 damages for their detention; and that the plaintiffs pleaded *non detinent*.

13. During the hearing of the said action the defendant Percy Victor Dennis swore that he had in his possession the whole of the said documents at Goulburn. He was then subpœnaed to bring them to Court on the next sitting day, and on the next sitting day he said that he had returned to Goulburn and had searched in the place where he had had the said documents but that he could not find them.

14. The jury gave a verdict in the said action against the plaintiffs, directing a return of the documents claimed in the declaration or payment of £1,049 13s. 1d. their value, and one shilling damages for the detention of the said documents.

15. No part of the principal sum owing under the said indenture has ever been repaid to the said Alfred Speechley Loomes or the defendant Johannah Loomes, and the sum of £1,049 13s. 1d. awarded by the jury was made up of £809 principal and £240 13s. 1d. interest due thereon to date of writ.

16. An appeal was lodged against the said verdict but the same was withdrawn.

17. The amount recovered by the defendant Johannah Loomes under the aforesaid verdict and the costs of the said action have been paid by the plaintiffs to the defendant Johannah Loomes, and the said verdict and judgment have by them in every way been satisfied.

18. The plaintiffs have requested the defendant Johannah Loomes to assign or transfer her interest in the said mortgage and her rights thereunder to the plaintiffs, or to take steps towards obtaining for the plaintiffs the benefit of the said mortgage or to allow the

plaintiffs to do so in her name ; but the defendant Johannah Loomes has refused and still refuses to do any of these things.

19. The plaintiffs submit that, having discharged the whole claim of the defendant Johannah Loomes under the said mortgage, they are entitled to enforce the same against the mortgagors or to compel the said Johannah Loomes to do so for them.

20. The defendant Johannah Loomes has issued a writ against the defendants Percy Victor Dennis, Daisy Margaret Dennis and Herbert William Dennis and Martha Dennis out of this Honourable Court in its common law jurisdiction—the special indorsement on which writ stated that the claim was for £1,232 3s. 1d., which was made up of £809 for principal due under the mortgage of 14th April 1916 and £536 8s 1d. for interest thereon to 20th August 1923 for 7 years and 129 days at 7 per cent per annum, from the total of which two sums was deducted a sum of £113 5s. made up of two payments on account of interest each of £56 12s. 6d.

21. The plaintiffs fear that unless restrained by order of this Honourable Court the defendant Johannah Loomes will recover or attempt to recover from the defendants Percy Victor Dennis, Daisy Margaret Dennis, Herbert William Dennis and Martha Dennis the amount claimed in the said writ for her own use and that the said defendants or all or some of them will unless so restrained pay the said moneys over to the said Johannah Loomes.

The plaintiffs claimed (*inter alia*) :—

(1) A declaration that the plaintiffs are entitled to the benefits of the said indenture of mortgage dated 14th April 1916 and to the use of the name of the defendant Johannah Loomes in enforcing the same.

(2) Alternatively, a declaration that the defendant Johannah Loomes be declared a trustee of the said indenture and of all the right, title and interest thereby secured for the plaintiffs.

(3) That the defendant Johannah Loomes be restrained from assigning, mortgaging, enforcing or otherwise dealing with the said indenture or the right, title and interest thereby secured except under the direction of the plaintiffs, and from receiving any moneys thereby secured or from further proceeding with the

H. C. OF A. 1924.

HEAVENER v. LOOMES.

aforesaid common law action or from receiving any moneys thereunder.

(4) That the defendants Percy Victor Dennis, Daisy Margaret Dennis, Herbert William Dennis, Martha Dennis or any one or more of them or their solicitors, agents or servants be restrained from paying any moneys to the defendant Johannah Loomes.

(5) That an account may be taken of what is due to the defendant Johannah Loomes in respect of principal, interest and costs over the said indenture, and that in default of the defendants Percy Victor Dennis, Daisy Margaret Dennis, Herbert William Dennis and Martha Dennis paying to the plaintiffs or to the defendant Johannah Loomes as trustee for the plaintiffs, the amount so found to be due by a day to be named for that purpose the defendants Percy Victor Dennis, Daisy Margaret Dennis, Herbert William Dennis and Martha Dennis and each of them may thenceforth stand absolutely barred and foreclosed of and from all right, title and interest in an equity of redemption of in and to the interests contained in the said indenture.

(6) Or, alternatively to the claim as in prayer 5, that the defendants Percy Victor Dennis, Daisy Margaret Dennis, Herbert William Dennis and Martha Dennis be directed to pay to the plaintiffs the amount owing by the said defendants under the said indenture of mortgage.

(7) That for the purpose aforesaid all necessary and proper orders and declarations may be made, directions given and accounts taken.

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

On the application of the plaintiffs an injunction was granted restraining until 28th September 1923 the defendant Johannah Loomes from receiving any of the moneys secured by the mortgage of 14th April 1916 or from further proceeding with the action mentioned in par. 20 of the statement of claim, or from receiving any moneys thereunder, and also an injunction restraining until the same date the other defendants from paying any moneys to the defendant Johannah Loomes. These injunctions were continued from time to time until 26th October, when a motion was made to

continue them until the hearing of the suit. This motion was heard by *Harvey* J., who dismissed it: *Heavener* v. *Loomes* (1).

From that decision the plaintiffs now, by leave, appealed to the High Court.

After the institution of the appeal the mortgagors paid to Johannah Loomes the amount of the principal sum secured by the mortgage and the interest thereon.

Teece K.C. (with him *Collins* and *Spender*), for the appellants. The respondent Mrs. Loomes is not now entitled to say that the judgment she recovered in the common law action was wrong or that the ground upon which that judgment was based was wrong (*Roe* v. *Mutual Loan Fund Ltd.* (2); *Smith* v. *Baker* (3); *Gandy* v. *Gandy* (4)). That judgment can be supported only on two grounds—either that the appellants, having lost the documents, were bound to indemnify Mrs. Loomes against loss of the mortgage debt, or that the detention of the documents was equivalent to detention of the chose in action, so that on satisfaction of the judgment the property in the detained chose in action passed to the appellants. As to the first alternative, on paying the amount of the verdict the appellants, being sureties, were subrogated to the rights of Mrs. Loomes and, if she recovered the mortgage debt, the appellants were entitled to recover it from her (*Darrell* v. *Tibbitts* (5); *Castellain* v. *Preston* (6); *Rankin* v. *Potter* (7); *King* v. *Victoria Insurance Co.* (8)). If the damages had been calculated on the proper basis they would have been much less (*Clegg* v. *Baretta* (9)). The remedy in the case of loss of title deeds is indemnity (*Gilligan and Nugent* v. *National Bank* (10)). This Court should give the remedy which the Supreme Court should have given if the fact of payment by the mortgagors had been before it (*Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* (11)).

J. A. Browne, for the respondent Johannah Loomes. On a motion for an interim injunction it is not to be taken that anything

(1) (1923) 24 S.R. (N.S.W.) 104.
(2) (1887) 19 Q.B.D. 347, at p. 349.
(3) (1873) L.R. 8 C.P. 350.
(4) (1885) 30 Ch. D. 57, at pp. 77, 82.
(5) (1880) 5 Q.B.D. 560, at p. 567.
(6) (1883) 11 Q.B.D. 380.
(7) (1873) L.R. 6 H.L. 83.
(8) (1896) A.C. 250, at p. 255.
(9) (1887) 56 L.T. 775.
(10) (1901) 2 I.R. 513, at p. 541.
(11) (1912) A.C. 788, at p. 802.

H. C. OF A. 1924.

HEAVENER v. LOOMES.

in the statement of claim is admitted. The appellants must establish that they are in some way entitled to the benefit of the mortgage deed. They are not so entitled, either as trustees or as being entitled to an indemnity. The fact that the sum awarded as damages in the common law action is equivalent to the amount of the mortgage and the interest does not establish that the mortgage debt was paid. There is no difference between the verdict in this case and that in any other kind of action where the damages awarded turn out to be larger than they might otherwise have been. There is no principle upon which the damages can be recovered, once they have been paid. The interest which was included in the amount of the verdict was only up to the date of the writ in the common law action, and since that time further interest has accrued for which the mortgagors are responsible. Mrs. Loomes was entitled to sue the mortgagors for that interest. The action she brought against them was the only action that could be brought to recover the mortgage debt, and the fact that, if she succeeds, part of the sum she recovers may belong to the appellants, is not a ground for restraining her action.

Teece K.C., in reply. The appellants only ask for payment into Court of the actual sum they paid under the judgment in the common law action.

Cur. adv. vult.

May 2.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. A motion was made to the Supreme Court of New South Wales in its equitable jurisdiction to continue, until the hearing of this suit or further order, an injunction granted on 24th September 1923, whereby it was ordered that the defendant Loomes be restrained from receiving any of the moneys secured by a mortgage dated 14th April 1916 mentioned in the statement of claim in this suit, or from further proceeding with the common law action whereby the defendant Loomes sought to recover against the defendants Dennis the principal and interest due under the said mortgage, or from receiving any moneys thereunder, and an injunction granted on the said date whereby the

defendants Dennis were restrained from paying any money to the defendant Loomes.

The object of the motion was to preserve the moneys in dispute *in statu quo* until the hearing of the suit or further order. *Harvey* J., who heard the motion, dismissed it, because the plaintiffs had not, in his opinion, established any right to the moneys or any part thereof.

We do not feel called upon to say whether *Harvey* J. was right or wrong in denying the existence of any such right in the plaintiffs, because we can dispose of the action without doing so. The position has altered since the suit was before *Harvey* J. The money in dispute has actually been paid over by the defendants Dennis to the defendant Loomes, and there is no evidence which enables us to affirm that the defendant Loomes is impecunious or in such a position that the moneys cannot be recovered by the plaintiffs if they establish any right to them. We think the interests of justice are best served by giving them an opportunity of establishing that right at the hearing of this suit, without encumbering the defendants by unnecessary restrictions.

For these reasons we think the appeal should be dismissed with costs. But an addition to the order of *Harvey* J. ought to be made for the protection of the plaintiffs at the trial and to prevent the defendants from setting up that order as a bar to the relief claimed. Let there be added to the order of *Harvey* J., after the words "dismissed out of this Court," the following words: "Provided that this dismissal shall not prejudice the plaintiffs' right (if any) to the moneys in question in this suit."

ISAACS AND RICH JJ. The real question, divested of all technical phraseology, is whether, on the one hand, the Supreme Court of New South Wales, possessing both a common law and an equity jurisdiction, is bound in such a case as this, not only to permit, but even to assist, a suitor to act dishonestly; or whether, on the other hand, the moment it is appealed to and finds its forms of process are being used for such purpose it ought not to prevent the abuse by all means in its power. The respondent Mrs. Loomes' contention necessarily involves the first proposition; the appellants' maintains

H. C. OF A. 1924.

HEAVENER v. LOOMES.

Isaacs J. Rich J.

the second. We are called upon to determine which should prevail. For the credit of the law we rejoice to be able to hold that it is not so inferior to morality as the respondent would have us believe.

The question presents itself very concretely, and we are not able to concur in the view that the decision should be deferred. *Harvey* J., notwithstanding the motion was interlocutory, had before him the plaintiffs' statement of claim and their affidavit showing the fullest case they could ever make. If, on that case, sitting as a Judge of first instance, he felt unable to make up his mind as to the law, accepting the plaintiffs' facts at their fullest, he would, of course, have had to consider the question of discretion. But as his Honor took a clear view against the plaintiffs, he adopted what we venture to think a most commendable course in the public and private interests. Having formed a distinct opinion, he did not trouble himself with immaterial questions of discretion, and, believing the law to be against the plaintiffs, he said so, and dismissed the motion on that ground. Having made up his mind as to the law, any other course than that which he took would have been a hardship to the parties and obstructive to the business of his Court. It would have been leading the suitors on to pursue a litigation he felt to be useless and a squandering of public and private time and money. His decision, equivalent to a judgment on demurrer, if unappealed from, in effect ended the suit, and ended it mercifully and in accordance with all modern policy of shortening litigation. But the appellants have come to this Court, the highest Australian tribunal, to obtain a decisive ruling as to whether the law is, as held by *Harvey* J., fatal to their success in any case. If the law be so, then *Harvey* J. was right, and there remains nothing upon which discretion as to granting an injunction or its equivalent could operate. That discretion can only arise if *Harvey* J. be wrong. His Honor, as a Judge of first instance, had and exercised a discretion in one sense, a very different sense, and a very important one. He had a real discretion either to decide the point outright or to leave it undetermined. He chose the former course; and, unless he is to be denied the right of choosing that course and to be overruled as to that, this Court has, in our opinion, no option but to pronounce on the question of law.

We hold that the appellants, and indeed both parties, have a right to be told, without being put to greater and possibly ruinous expense, whether, on the plaintiffs' case as stated, further litigation is hopeless. They have a right to be told at once whether the law as solemnly held by *Harvey* J. is right or wrong, and not be put to a formal trial, and possibly one or two appeals, before the question already argued at length before us during two days is determined. We desire to make it clear that we are not deciding that either party is presently entitled to judgment. Formally, the respondent Mrs. Loomes would have the right to raise any new facts, not yet suggested by her, and those new facts, if any there be, might or might not alter the position in her favour. As to this we say nothing. It is all pure conjecture. But, if it be true, as *Harvey* J. has said, that without more than now appears, the appellants *must* fail, then in mercy to both parties let the proceedings end. If that be not true, the parties, instructed by this Court, will be able to determine whether the matter should cease at once or not. Acting on the principles we have stated, we proceed to consider the question of law on the same basis as *Harvey* J. did, namely, on the plaintiffs' own presentation of the facts, as that stands of itself, and so far as it is confirmed by the respondent's admissions.

A considerable number of authorities bearing on estoppel, subrogation and indemnity were cited; the contention of the appellants being that the respondent Mrs. Loomes could not be heard to say she had not received the amount of the debt and interest as calculated by the jury, that the appellants were in equity subrogated to her legal rights against her mortgage debtor, and that she had, in effect, compelled the appellants to indemnify her against the loss of the mortgage debt and interest by insisting on their paying the amount thereof to her. We do not deny that the decisions cited and others of a like nature and of great authority would lead eventually to the conclusions contended for, but we refrain from discussing them in detail, because those conclusions are, in our opinion, reached by a shorter and more direct and well-trodden course. Every branch contended for—estoppel, subrogation and indemnity—is sustained, not perhaps in name, but in legal effect,

H. C. OF A. 1924.

HEAVENER v. LOOMES.

Isaacs J. Rich J.

which is what the law looks to, by well-known rules and deeply-rooted principles. Without overturning very elementary learning that has been recognized for generations, it is impossible, as we think, to do anything but allow this appeal. Indeed, were it not for one unguarded step in the judgment of *Harvey* J., we feel confident that his Honor, on the everyday practice of equity, with which he is so deeply conversant, would have made this appeal unnecessary. *Harvey* J. said, as indeed it cannot fail to be recognized, that to allow the respondent to succeed " is grossly inequitable in the popular sense of that term " ; which, in plain English, means that every ordinary person would consider the respondent's attitude dishonourable. But for a technical reason his Honor thought he was unable to apply a remedy. That reason, happily, does not exist, and the way is clear to do real justice, even adhering most rigidly to strictest forms and rules of law.

The facts are these :—In 1916, a Mrs. Loomes by deed lent to a man named Dennis, on the security of a mortgage of his share under his late father's will, a sum of £809 repayable in 1922. The deed says " with interest," but does not, so far as appears from the copies we have, name any rate of interest, though Mrs. Loomes swears it did. That fact might have been important in other circumstances, because a point is raised, as will be seen, by the respondent as to surplus interest. But, in the view we take, it is immaterial, and for the purposes of this judgment we shall assume the deed expressly provided for the rate actually claimed, namely, 7 per cent per annum payable annually. Dennis paid two years' interest at 7 per cent per annum. In July 1922 the appellants, who are solicitors, by some means mislaid the deed and some declarations of Dennis accompanying it ; and on 11th July 1922 the respondent Mrs. Loomes commenced an action in the Supreme Court in detinue and claimed £1,500 for damages. The declaration was in detinue and the plea was *non detinent.* The trial took place in December 1922, and the jury gave a verdict for the plaintiff on which judgment was entered. It is of the highest importance to bear in mind what the verdict and judgment were. Let Mrs. Loomes herself tell the story of the verdict. In par. 3 of her affidavit she says : " On 11th December 1922 a verdict was returned in my

favour for a return of the said documents or their *value* £1,049 13s. 4d. *being amount of principal and interest due to the date of the writ* only and not to the date of the judgment and also *one shilling damages for detention* of the said documents." That is, as to the value, in accord with par. 15 of the appellants' statement of claim, allowing for a difference of threepence between the two statements. The judgment following the verdict was for the *return* of the deed and other documents or their *value* fixed at £1,049 13s. 4d., and for the sum of one shilling *damages for detention*. It is, therefore, incontestable, both from the statement of claim in this action and from the affidavits on both sides, that the sum of £1,049 13s. 4d. was made up by the jury by adding £809, the principal sum owing to Mrs. Loomes, to £240 13s. 4d. interest at 7 per cent per annum from the last payment of interest by Dennis up to the date of the writ, that is, over five years' interest, and fixed that as the " value " of the deed and other documents. Eventually, on 6th July 1923, Mrs. Loomes, in order to compel the respondents to pay the value so assessed, issued a bankruptcy notice claiming £1,216 9s. 9d., being, as she says, £1,049 13s. 4d. and £166 16s. 5d. for costs of action. The amount so claimed was paid to her personally. When that was paid, Mrs. Loomes had received back every penny she had lent, and every penny of interest she claimed up to the date of the writ, whether her deed entitled her to it or not. She had manifestly asked the jury to assess the value of her deed, &c., by the standard of repayment of the money owing by Dennis with interest to date of writ. She states in her affidavit that the jury did not give further interest because they could not go beyond the date of writ. That, which is obviously a swearing as to law, is an error; but, employing an argument she vainly, in our opinion, seeks to use against the appellants, if the value so assessed was less than she was entitled to, she did not appeal, and, on the contrary, accepted the assessed sum as the " value," which necessarily means in such a case as the present the full value, and she is bound by law to regard that as the true value. After paying that sum to Mrs. Loomes, Messrs. Heavener & Chapman wrote to her intimating that they proposed to take steps to obtain the amount from Dennis, and asked her to allow her name to be used, offering at the same time an indemnity. This was

H. C. OF A. 1924.

HEAVENER v. LOOMES.

Isaacs J. Rich J.

refused on 21st July, and on 20th August Mrs. Loomes, notwithstanding she had already been reimbursed her £809 plus £240 13s. 4d. for interest, and necessarily on the basis of her inability to get it from Dennis herself, began an action against Dennis to recover it all over again, together with some further interest. Heavener & Chapman, hearing of this, instituted proceedings in equity claiming in various ways to be entitled to the money secured by the mortgage deed and to the security it created. To put it shortly, they claimed what an assignee from Mrs. Loomes would be entitled to claim in equity, and this case really depends on whether in law or in equity, or both, their position is equivalent to that of assignees from her. On the most express authority, unchallenged up to now, they do stand in that position. As Mrs. Loomes was still proceeding in her action, an interlocutory injunction was, on 24th September 1923, applied for by the plaintiffs in the equity suit (1) to restrain her from receiving any of the moneys secured by the deed, or (2) from further proceeding with the common law action or receiving any of the moneys thereunder. Obviously some such precaution was necessary, unless the whole suit were allowed to become futile and a mere empty form, either by receipt and disposal of the money or by extinguishing the obligation of Dennis, and so destroying one source of Heavener & Chapman's recoupment. *Harvey* J., before whom the motion came, recognized the basis on which the sum of £1,049 13s. 4d., which he erroneously called "damages," had been assessed. He said that sum appeared "*to have been calculated on the basis that the loss of the documents was equivalent to the loss of the money secured thereby.*" In that he was clearly right, and in reality that decides the whole matter. But he said this: "I regret to say that I am of opinion I have no power to give the solicitors any relief." He thought that there was a miscarriage of justice in that the damages were erroneous, that they could have been appealed against, but though an appeal had been begun it was withdrawn. His Honor said that, though the property in the documents had passed, the chose in action had not, because the "damages" depend on a variety of circumstances which may be summed up in one word "impediments," that is, impediments to recovering the debt, but leaving the debt itself entirely outside the sphere of legitimate computation as "damages."

Ultimately he thought there was " no ground on which the plaintiffs can set up an equitable claim to the mortgage debt," and for this reason refused the motion. Before us the same contention was raised, and in addition it was said that the one shilling damages had not been paid, and, further, that, as a sum of £52 14s. for interest accrued between the issue of the writ and the payment of the bankruptcy notice, Mrs. Loomes was at least entitled to proceed on her own behalf for the later interest, and so the whole motion must fail—that is, even as to the £1,049 13s. 4d. which she had received from the appellants.

The whole contention is founded on a misconception. When the nature of the action of detinue is regarded and the relevant law applied, it will be seen that no such error was committed at the trial as to the amount of £1,049 13s. 4d. as was suggested; that if any error at all was committed it was that of the respondent in not asking for additional interest; that on the strictest principles of law she has no further right to that interest; that the one shilling for damages is immaterial, and that in equity the motion should have been granted as a matter of course.

The original action, as has been said, and cannot be too constantly remembered, was an action of *detinue*. What we are about to say as to this action, its nature and consequences, may appear commonplace, but the contentions raised seem to make it essential.

We go back first to 1850, *Phillips* v. *Jones* (1), which was an action in detinue for cattle, harness, &c., with special damages. The judgment of *Parke* B., among other things, states the law as it then was with reference to the right of a successful plaintiff in such an action. He says (2): " The plaintiff in detinue has a right to recover the goods in specie, and, in case of non-delivery, *the value*, and the option of giving up the goods or paying the value is in the defendant, who, by refusing to deliver the former, renders himself liable to pay the latter." And many former precedents are cited. The learned Baron makes it clear that the sum assessed for " value " is not " damages " but a mere substitution in money for the goods retained by the defendant, if he so elects. Damages for the " detention " are quite a different matter, and are additional. In

(1) (1850) 15 Q.B. 859.

(2) (1850) 15 Q.B., at p. 867.

H. C. OF A. 1924.

HEAVENER v. LOOMES.

Isaacs J. Rich J.

1852, in *Crossfield* v. *Such* (1), the same learned Judge pointed out that damages for detention means damages for *delay*, and the amount depends upon whether the plaintiff has sustained any damage. But, as he reiterates (2), " the plaintiff may have the usual judgment to recover them or their *value*, and *damages* for their detention." The judgment assumes as a basis that " value " is not " damages."

After the *Common Law Procedure Act* 1854 the law remained the same, except that the *option* was given to the plaintiff instead of to the defendant (see *Bailey* v. *Gill* (3)). That is to some extent reproduced in sec. 136 of the New South Wales Act. By sub-secs. 1 and 2 of that section the plaintiff may enforce specific delivery if that be possible. If, however, that is refused or impossible, then and then *only* can a writ of *fieri facias* be issued for the " *value* " of the goods without prejudice to issuing execution for costs and for " the damages awarded for the detention of the goods." The inherent distinction is thus maintained between the " value " and " damages." This law is very distinctly stated by *Mellish* L.J. in *In re Scarth* (4). That was a bankruptcy case. Green sued Scarth for detinue of a lease, and the value was found by the verdict to be £100. The plaintiff, without issuing execution, proved for £100 in the bankruptcy. Whether he had a right to do so depended on the nature of the verdict in detinue. The Lord Justice stated that nature; and proceeded (5) : " All this shows that until execution has issued, a judgment creditor in an action of detinue is unable to get the money, and that the property in the goods remains in him." And as, in the words of the Lord Justice, the plaintiff " could not be entitled to both the goods and the money," the Court held that prior to issue of execution no debt existed in respect of the £100. But the principle underlying *Scarth's Case* is still deeper than the facts there required. The mere issue of execution is not sufficient to divest the plaintiff of the property in the goods. *Brinsmead* v. *Harrison* (6) is a case of unquestionable authority. *Willes* J. held (and it is now a doctrine beyond question) that it is not judgment nor is it issue of execution, but it is the *payment of*

(1) (1852) 8 Exch. 159.
(2) (1852) 8 Exch., at p. 165.
(3) (1919) 1 K.B. 41, at p. 43.
(4) (1874) L.R. 10 Ch. 234.
(5) (1874) L.R. 10 Ch., at p. 235.
(6) (1871) L.R. 6 C.P. 584.

the full value as assessed, that vests the property in the defendant. But he also held, and this is the decisive factor in the case, that the principle was that it was in that case in effect *a sale of the goods*. He adopted the maxim *Solutio pretii emptionis loco habetur*. So it was also held by *Jessel* M.R. in *Ex parte Drake*; *In re Ware* (1), where he said of *Brinsmead* v. *Harrison* (2) that "the theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the plaintiff's goods to the defendant." That must always be so in detinue, because it is always the *value* and never damages, except for the detention. Mr. *Durnford's* note (*a*) to *Mockford* v. *Taylor* (3), as to the reason why trover and detinue could not be joined, says: "Not only the *pleas*, but the judgments also, are different: in trover, *only damages* can be recovered, but in detinue the *things* themselves, or their *value*, may be recovered." In trover the damages may or may not be the value. If the *value* is given as damages, then, as *Willes* J. says in *Brinsmead* v. *Harrison* (4), satisfaction of the damages will be *solutio pretii*. Such would be the case, as suggested by *Alderson* B. in *Loosemore* v. *Radford* (5), where the jury gives in detinue of deeds the full value of the estate to which they belong by way of damages, and the money is paid. But the damages in trover may not be the value of the property. They may be calculated on some other basis, as delay, injury or otherwise. Instances are given in the note to *Holmes* v. *Wilson* (6). But a point to be borne in mind is that the party who alleges that the full value has not been awarded must establish the fact. That is shown by one of the cases there cited, namely, *Field* v. *Jellicus* (7), where the question was whether the damages awarded for trespass in taking and carrying away cattle were based on the value of the cattle or were for the mere injury of trespass only. It is there said: "There is no averment that the damages in the first action were given for the trespass only, nor does it appear from what the forty shillings were given, but by supposal and conjecture." So that, even in trover, the argument addressed to us that the damages

(1) (1877) 5 Ch. D. 866, at p. 871.
(2) (1871) L.R. 6 C.P. 584.
(3) (1865) 19 C.B.(N.S.) 209, at p. 212.
(4) (1871) L.R. 6 C.P., at p. 588.
(5) (1842) 9 M. & W. 657, at p. 659.
(6) (1839) 10 A. & E. 503, at p. 511, note (*a*).
(7) (1684) 3 Lev. 125.

H. C. OF A. 1924.

HEAVENER v. LOOMES.

Isaacs J. Rich J.

might have been for some inconvenience or some doubt or difficulty in getting or giving secondary evidence, would have been without effect, for one sufficient reason that it is mere "supposal and conjecture." That is quite apart from the impossible notion that a jury could base anything on the probability or effect of secondary evidence, which depends for its admissibility on the opinion of the Court at the very trial where it is offered, and for its effect on the jury that hears it.

But over and above all that, the fact that it is not trover but detinue we have to consider, and not *damages* but *value*, precludes any entering upon the investigation at all. Besides, the appropriate place for such considerations would be in the "damages," that is, for detention. These were all included in the one shilling which was awarded for damages, showing that there was no real damage for detention, because the *value* was fixed at the full amount of debt and interest.

We thus arrive at the point that the mortgage was *valued* at £1,049 13s. 4d., that that value of the mortgage was incontestably fixed as its value, as representing, not the piece of paper, but the *debt and accrued interest to date of writ*; that Mrs. Loomes demanded that value in lieu of the mortgage deed, and issued a bankruptcy notice as a compulsory method in the nature of execution to recover the value; that she did so recover it, and thereby lost her property in the mortgage deed. The transaction was, in *Brinsmead* v. *Harrison* (1), regarded in law as a sale of the mortgage deed at a price based on the value of the debt and interest, and *it had the same effect in equity as if she had voluntarily sold it on those terms.* Equity would interfere to prevent a double satisfaction (see per *Bayley* J. in *Morris* v. *Robinson* (2)). The observations of the Court in *Coombe* v. *Sansom* (3) are in the same direction. What is the legal result? The fact that the value as assessed and acted on by the plaintiff proves to be less than the real value is immaterial. He cannot claim the excess if the value afterwards appears to be greater. This is established by *Buckland* v. *Johnson* (4). Accepting the "value" as assessed is an election to give up the "goods," whatever they may be, and *all* the benefit, whatsoever it may be,

(1) (1871) L.R. 6 C.P. 584.
(2) (1824) 3 B. & C. 196, at p. 205.
(3) (1822) 1 Dowl. & Ry. 201, at p. 202.
(4) (1854) 15 C.B. 145.

that inheres in them, even though it prove to be greater than the assessed value (*Smith* v. *Baker* (1)). It follows, therefore, that, strictly speaking, Mrs. Loomes, having accepted the " value " as fixed by the jury of £1,049 13s. 4d. as representing the " debt and interest " value of her mortgage deed, has no right to any more. She has, in point of law, sold it to Heavener & Chapman for that price and has received the price ; and they alone are entitled to whatever it may produce. It may produce nothing at all or something less than the debt, or it may produce the full amount due. They have to take that risk and they are entitled to the full benefit. Equity would certainly, on principles acknowledged for centuries, give the relief asked if there had been an actual sale (see *Hammond* v. *Messenger* (2)), and equally, we hold, when the law by *Brinsmead* v. *Harrison* (3) declares it to be a sale. Form is nothing provided the substance exists (see *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (4)). Mr. *Teece*, as we understood, assented, somewhat generously in view of the opposing attitude, to limiting the Court's protection to payment into Court of the sums his clients were actually out of pocket. To prevent misapprehension, Mr. *Teece* did not in any way bind his clients to accept, in such a position as the present, anything less than the full benefit to which the law entitles them.

On the facts before the Court on this interlocutory application, the appellants were, at the time the motion was dealt with, entitled to an injunction to restrain the respondent from receiving the money sued for. She has, it appears, since received it, and the protection should be moulded accordingly, for *actus curiae nemini facit injuriam.* This maxim is no mere form of words. Nor is it limited in its application to the primary tribunal. Twice have the Privy Council emphasized the importance of observing it. In *Jai Berham* v. *Kedar Nath Marwari* (5) Lord *Carson*, for the Judicial Committee, speaking of the duty of an appellate Court, when varying or reversing a decree, to place the parties in the position they would have occupied but for the decree or the part

(1) (1873) L.R. 8 C.P. 350.
(2) (1838) 9 Sim. 327.
(3) (1871) L.R. 6 C.P. 584.
(4) (1886) 34 Ch. D. 128, at p. 134.
(5) (1922) L.R. 49 Ind. App. 351, at pp. 355-356.

H. C. OF A. 1924.

HEAVENER v. LOOMES.

Isaacs J. Rich J.

varied, said :—" It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Lord *Cairns* in *Rodger* v. *Comptoir d'Escompte de Paris* (1) : ' One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression " the act of the Court " is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.' " The respondent, then, should be ordered to bring into Court the money she received from Dennis, or so much thereof as the appellants are willing to consider their indemnification, to abide the result of the suit or further order. The appellants should also, in our opinion, have their costs here and below.

There was an alternative argument addressed to us by Mr. *Browne* for the respondent. It was based on the assumption that, as to £52 14s. representing interest accrued between the date of the writ and the payment of the £1,049 13s. 4d., the respondent was entitled to receive it in her own right, and, therefore, too much was asked for and the motion should be refused. That is, she could not, on this application, be restrained from proceeding against Dennis at all, and also must be allowed to receive the *whole* amount claimed without reference to the appellants. We have indicated why we consider that basic assumption without foundation. But we desire to add a further reason why, even if the assumption were well founded, the appellants' motion should not be entirely dismissed but the relief should be moulded to meet the justice of the case. Very much the same objection as we refer to was relied on in *Brisbane City Council* v. *Attorney-General for Queensland* (2) and favoured by the majority of the Court (see pp. 711, 713, 714 and 736). At p. 735 this view was dissented from on the authority of cases there cited. The Privy Council (3) upheld the dissenting view.

In moulding the protection, there arises a somewhat important point from a general aspect, namely, what considerations should

(1) (1871) L.R. 3 P.C. 465, at p. 475.
(2) (1908) 5 C.L.R. 695.
(3) (1909) A.C. 582, at p. 596.

guide the Court? The precise form of injunction against receiving the fund then in the hands of Dennis cannot, of course, be followed now. But the same consideration that would have moved the Court to prevent that specific fund from being seized by Mrs. Loomes should prevail now that she has taken possession of it and holds it. There is no general rule that "irreparable damage" is essential to sustain an interlocutory injunction. The foundation of the doctrine of "irreparable damage" is the principle settled by the House of Lords as early as 1773 in *Welby* v. *Duke of Rutland* (1). The House accepted the argument of the respondent that, where the title sued upon is purely legal, some equity must be shown to justify the intervention of the Court, such as "an injustice irremediable by a Court of law" (2). That is, that the ancillary jurisdiction of the Court could not be invoked in the absence of some special circumstance creating an equity. There are a number of cases cited in *Halsbury's Laws of England*, vol. XVII., par. 483 (note (*h*)), and these, when examined, are illustrations of that principle. In *Attorney-General* v. *Hallett* (3) the interlocutory injunction was refused because compensation in damages could be given and would be sufficient. That, it needs scarcely be said, has no reference to the incapacity of the defendant to pay, but refers simply to the *nature* of the legal remedy. In *Attorney-General* v. *Sheffield Gas Consumers Co.* (4) *Turner* L.J. says: "The question important to be considered in the present case appears to me to be what is the general principle on which this Court interferes in cases of this description; and I take that *principle to be the inadequacy of the remedy which the law gives in such cases.*" The Lord Justice repeats this several times in the course of his judgment. The Lord Chancellor concurred with *Turner* L.J. In *Earl of Ripon* v. *Hobart* (5) Lord *Brougham* L.C. refused an injunction on the ground that the application "fails in the very point that forms the ground of the relief—the preventing irreparable mischief." Damages at law he held would afford adequate compensation. The other cases cited are only further examples of the same principle. In *Goodson* v. *Richardson* (6),

(1) (1773) 2 Bro. Parl. Cas. 39.
(2) (1773) 2 Bro. Parl. Cas., at p. 42.
(3) (1847) 16 M. & W. 569.
(4) (1852-53) 3 DeG. M. & G. 304, at p. 319.
(5) (1834) 3 My. & K. 169, at p. 174.
(6) (1874) L.R. 9 Ch. 221.

H. C. OF A. 1924.

HEAVENER v. LOOMES.

Isaacs J. Rich J.

before Lord *Selborne* L.C. and *James* and *Mellish* L.JJ., an injunction was upheld, because the defendant had placed waterpipes in the plaintiff's property without the owner's consent, and notwithstanding the plaintiff had suffered no real pecuniary injury. The principle of non-interference is stated by the Lord Chancellor at p. 225; and, in referring to a case before Lord *Cottenham*, he said (1) that he agreed that "there was no equity whatever to interfere, and that the case was a simple attempt to transfer the jurisdiction in ejectment from law to equity." But all that has no force when, as here, there is some circumstance creating an equity and calling for the interposition of the Court in its exclusive jurisdiction. Whether that equity, if eventually sustained, should be presently protected by interlocutory injunction depends, in no sense, on the doctrine of "irreparable damage" as a test but upon considerations summed up by *Cotton* L.J. in *Preston* v. *Luck* (2) in the following words:—"This is an application only for an interlocutory injunction, the object of which is to keep things *in statu quo*, so that, if at the hearing the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual. Of course, in order to entitle the plaintiffs to an interlocutory injunction, though the Court is not called upon to decide finally on the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiffs are entitled to relief." The plaintiff satisfies the condition as to probability when he shows that "if the evidence remains as it is" it is probable that at the hearing he will get a decree (*Challender* v. *Royle* (3)). That is certainly shown here. Then, what is the balance of convenience or inconvenience in granting or refusing the injunction, that is, supposing the money not yet recovered (*Shrewsbury and Chester Railway Co.* v. *Shrewsbury and Birmingham Railway Co.* (4); *Child* v. *Douglas* (5))? Clearly the convenience would be in favour of granting it to the extent that the money constituting the fund

(1) (1874) L.R. 9 Ch., at p. 226.
(2) (1884) 27 Ch. D. 497, at pp. 505-506.
(3) (1887) 36 Ch. D. 425.
(4) (1851) 1 Sim. (N.S.) 410, at p. 432.
(5) (1854) 5 DeG. M. & G. 739, at p. 741.

in dispute if received should not be received by the present respondent without some security that it would be preserved intact. Now that it has been received by her, where, in order to preserve that fund, is there any inconvenience in requiring it to be either paid into Court or into a bank in joint names or the name of an official, at interest if desired? Convenience distinctly and decidedly points that way, rather than leaving the specific fund—not a mere personal debt of the respondent—in her sole uncontrolled custody. She has shown no reason for this, and the authorities are distinct that the motion should succeed.

Order appealed from varied by adding after the words "dismissed out of this Court" the words "Provided that this dismissal shall not prejudice the plaintiffs' right (if any) to the moneys in question in this suit." Appeal dismissed with costs.

Solicitor for the appellants, *R. G. C. Roberts.*

Solicitor for the respondents, *L. L. Hogan*, Young, by *McElhone & McElhone.*

B. L.