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the members or any member of the respondent organization to strike by refusing to accept employment or by ceasing work in the service of the applicant by reason of the employment or continued employment by the applicant of Thomas Campbell or any other of the men suspended from membership of the respondent organization and named or referred to in the letter dated 12th August 1924 from William Raeburn to the general manager of the applicant. The organization to pay the costs of this application.

Solicitors for the applicant, *A. J. McLachlan, Westgarth & Co.*, Sydney, by *Blake & Riggall.*

Solicitors for the respondents, *Dawson & Herford*, Sydney, by *Frank Brennan & Co.*

B.L.

Dist *Langman v Handover* (1929) 43 C.L.R. 334

[HIGH COURT OF AUSTRALIA.]

SCHNELLE . . . . . APPELLANT;
DEFENDANT,

AND

DENT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 1, 2, 3, 1924; *May* 7, 1925.

KNOX C.J., ISAACS and GAVAN DUFFY JJ.

Money-lender—Bill of sale—Validity—Consideration—Transaction not at registered premises—Suit in Supreme Court of New South Wales in equity—Jurisdiction—Relief—Declaratory order—Bill of sale declared void—Imposing condition on relief—Payment of debt—Money-lenders and Infants Loans Act 1905 (*N.S.W.*) (*No.* 24 *of* 1905), *secs.* 1, 2—*Equity Act* 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *secs.* 8, 9, 10.

The plaintiff had given a bill of sale to the defendant, a money-lender, to secure repayment of advances made by the defendant to the plaintiff's husband. An arrangement was subsequently made between the plaintiff and the defendant

under which the plaintiff gave the defendant a mortgage over certain real estate to secure repayment of the amount of the plaintiff's then indebtedness, the defendant executed a release of the bill of sale and the plaintiff gave to the defendant another bill of sale over the same goods to secure the same amount as was due under the first bill of sale. Later the plaintiff gave a mortgage over other real estate to secure repayment of the advances made by the defendant to the plaintiff's husband. The defendant, purporting to act under the second bill of sale, seized the goods the subject of it. The plaintiff brought a suit in the Supreme Court of New South Wales in its equitable jurisdiction claiming, substantially, an injunction to restrain the defendant from dealing with the goods, a declaration that the second bill of sale was void, damages in respect of the wrongful seizure and accounts. Before the hearing of the suit the defendant sold the goods. The trial Judge held on the evidence that the first bill of sale and the earlier mortgage were void under the *Money-lenders and Infants Loans Act* 1905 (N.S.W.), the defendant having taken them when he was carrying on business at premises other than those in respect of which he was registered, that it was a security for the same amount as was due under the original bill of sale, and in his opinion the only consideration for the second bill of sale was the discharge of the first bill of sale, and, therefore, that the second bill of sale was void. He thereupon made a decree declaring that the second bill of sale was void and that the defendant was not entitled to seize or sell the goods comprised in it; directing an account of the damages sustained by the plaintiff and payable by the defendant in respect of the seizure and sale of the goods, and an account of what was due from the plaintiff to the defendant on the later mortgage; ordering the defendant to pay into Court the amount received by him from the sale of the goods; restraining the defendant from exercising his power of sale under the later mortgage without seven days' notice to the plaintiff, and reserving further consideration and liberty to apply. On appeal by the defendant to the High Court,

Held, by *Knox* C.J. and *Gavan Duffy* J. (*Isaacs* J. dissenting), that the trial Judge had jurisdiction under the *Equity Act* 1901 (N.S.W.) to make the decree, that on the evidence he was justified in his findings and his conclusions thereon, and that no condition should be imposed on the plaintiff requiring her to make some payment to the defendant in respect of the moneys secured by the second bill of sale.

Maiden v. *Maiden*, (1908-09) 7 C.L.R. 727; *Horsley* v. *Ramsay*, (1888) 10 N.S.W.L.R. (Eq.) 41, and *Thomas* v. *Stevenson*, (1914) 15 S.R. (N.S.W.) 78, applied.

Lodge v. *National Union Investment Co.*, (1907) 1 Ch. 300, distinguished.

Per Isaacs J.:—(1) On the facts as found by *Harvey* J., and as otherwise undisputed, the impeached transaction was substantially effected at the appellant's registered office, and therefore, on the authority of *Kirkwood* v. *Gadd*, (1910) A.C. 422, and subsequent cases, was not invalidated by the *Money-lenders and Infants Loans Act* 1905. (2) Apart from that Act, there were no circumstances avoiding the transaction. (3) *Chapman* v. *Michaelson*, (1909)

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1 Ch. 238, being inapplicable by reason of (*a*) the judicial system in force in New South Wales and (*b*) the actual relief granted, the principle of *Lodge* v. *National Union Investment Co.*, (1907) 1 Ch. 300, applied and required, as a condition of any equitable relief, that equitable terms should be imposed.

Decision of the Supreme Court of New South Wales (*Harvey* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Constance Etta Dent against Carl Ferdinand Schnelle (sometimes known as Charles Ferdinand Snell). By her statement of claim the plaintiff alleged that the defendant claimed to be the holder of a bill of sale over certain furniture and effects of which the plaintiff was the owner; that such bill of sale was void under the *Moneylenders and Infants Loans Act* 1905 (N.S.W.) on the grounds, amongst others, (a) that there was no consideration for the same, (b) that the transaction was not completed at the registered office of the defendant and (c) that the bill of sale was signed by the plaintiff in blank and subsequently filled in by the defendant without any authority on the part of the plaintiff; that the defendant, who had claimed to be entitled to certain securities including the bill of sale, agreed to accept a mortgage for £900 or thereabouts over certain real estate of the plaintiff in lieu of such securities and undertook to discharge such securities, including the bill of sale, when called upon to do so and to refrain from taking any steps in connection with the amount of the mortgage for a specified time; that the defendant, claiming to act under the bill of sale, had seized the furniture and effects comprised in the bill of sale, and threatened to take away and sell them; and that the plaintiff had offered to pay the balance due under the mortgage and had tendered to the defendant £617 10s., being more than such balance but the defendant refused to accept the same. The plaintiff claimed, so far as is material, (1) an injunction to restrain the defendant from dealing with the furniture and effects and an order that he withdraw from possession thereof, (2) an order to produce to the plaintiff certain documents, (3) a declaration that the bill of sale was void and inoperative as between the parties, (4) an account of the amount due by the plaintiff to the defendant and an order that on payment thereof the defendant should discharge all the securities mentioned in the statement of claim, (5) damages

in respect of the wrongful acts in the statement of claim mentioned. By the defence the defendant denied substantially every allegation in the statement of claim, and alleged that there was owing to the defendant on the mortgage £916 and interest and on the bill of sale £631 and interest, and offered to discharge those securities on payment of the amounts due thereunder. On this defence the plaintiff joined issue. An interlocutory injunction against the sale by the defendant of the furniture was granted on terms with which the plaintiff was unable to comply, and the defendant subsequently sold the goods comprised in the bill of sale.

The suit came on for hearing before *Harvey* J., who stated during the hearing that the only questions with which he proposed to deal at the hearing were the questions whether the bill of sale was void under the *Money-lenders and Infants Loans Act* and whether there was an agreement to discharge the bill of sale when the mortgage was taken, that is, on 22nd March 1922. As to the latter question the learned Judge found that the plaintiff had failed to establish that there was any such agreement. As to the validity of the bill of sale, which was executed by the plaintiff on 10th October 1921, the learned Judge stated the facts, his findings upon them and his conclusions of law as follows :—" It appears that Dent was getting into financial difficulties in December 1920 and that he then began to get seriously into debt with the defendant Snell, who was a money-lender. On 5th April 1921 Dent and his wife executed a bill of sale over the furniture in their house to Snell to secure the sum of £565 and further advances at 20 per cent interest. The furniture was apparently the property of Mrs. Dent. At this time Snell's registered address as a money-lender was at 17 Castlereagh Street, Sydney, but he had ceased to carry on business there for over two years and was in fact carrying on business at 2B Castlereagh Street. The result appears to me to be, on the authority of *Cornelius* v. *Phillips* (1), that that bill of sale was void and no money was recoverable from Dent or his wife. In fact no money lent by Snell to Dent or his wife prior to 4th October 1922, when he registered his new address, could be recovered from them. Neither party, however, was alive to this position at the time. In August 1921 Mrs. Dent gave a mortgage

(1) (1918) A.C. 199.

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over her house to secure £420. This was also void in law. In the month of September 1921 Dent began to be hard pressed by creditors; a judgment at law was recovered against him by a creditor, and, in pursuance of a *fi. fa.* upon the judgment, the sheriff seized the furniture in Dent's house. Dent thereupon prepared and presented to the sheriff an interpleader claim to the furniture in the name of his wife, who claimed the goods subject to Snell's bill of sale of 5th April. The sheriff refused to accept this claim; whereupon Dent saw Snell, and he agreed to make an interpleader claim based upon his property in the goods under the bill of sale. As it was necessary that some solicitor should be employed in the interpleader process and Dent's name had just been removed from the roll of solicitors, Mr. W. D. Schrader was instructed to act for Snell. He took out an interpleader summons, and on 28th September obtained the usual *ex parte* order for the lodging of security. Subsequently he went into the merits of the matter, and advised Snell that registration of his bill of sale was defective and that in consequence his interpleader proceedings would have to be dropped. The sequence of the events that followed and the dates of the various steps in the transaction are not clear from the evidence. Mr. Schrader has mislaid his call-book which might have enabled him to fix the dates on which he saw the various parties. His bill of costs for the work done for Snell indicates the successive stages of what was done by him, but gives no precise dates. From the evidence and the probabilities of the case these appear to be the facts:—After receiving Mr. Schrader's advice to drop the interpleader proceedings Snell proposed to Dent to let the execution creditor sell to satisfy her judgment, and that he, Snell, should take the balance of the proceeds of the sale towards the discharge of his bill of sale debt. Dent was anxious to save the furniture if possible. In order to permit Mrs. Dent to interplead he arranged with Snell that he should discharge his bill of sale so as to leave Mrs. Dent's title free. As a condition for the release of the bill of sale Mrs. Dent was to give Snell a security over an interest to which she was entitled in the Graham estate. A promise was also given that after Mrs. Dent's interpleader proceedings had been started she would give a fresh bill of sale to Snell. These various transactions were carried out,

and during their course Snell registered himself as a money-lender. The dates of the various documents are as follows :—On 4th October Snell registered himself as a money-lender ; the charge over Mrs. Dent's interest in the Graham estate, Snell's release of the bill of sale, the discharge of Snell's interpleader order, and the lodging of Mrs. Dent's interpleader claim by Mr. Schrader are all dated 6th October. Snell gave the required security of £400 for Mrs. Dent's interpleader order on 7th October, and the fresh bill of sale from Mrs. Dent to Snell was given on 10th October. That is the bill of sale now in question. The consideration for the second bill of sale is expressed to be the sum of £580 and further advances, which amount Snell deposed was made up of the £565 due under the original bill of sale together with £4 4s. paid to the sheriff on discharge of his interpleader and the sum of £10 10s. which he guaranteed to pay Mr. Schrader on account of out-of-pocket expenses to be incurred on Mrs. Dent's interpleader proceedings. Dent says the extra £15 was for moneys already due to Snell under the previous bill of sale, which was to be discharged. In this connection it is clear that the amount of the consideration of £580, whatever it was, had been arrived at before the charge on the Graham estate was drawn, because the same consideration appears in that document, where it is spoken of as a sum already advanced to Mrs. Dent. The crux of the case with respect to the bill of sale appears to me to be whether it was given for any other consideration than the amount already due under the void bill of sale of 4th April and, if so, whether that consideration was given before 4th October, when Snell registered himself under the Money-lenders Act. In my opinion the sum of £580 was neither more nor less than the amount then considered to be due under the previous bill of sale. Snell evidently is quite uncertain how it was made up. His counsel put the following question to Dent : ' Was it not a fact that there was £5 due for interest, there was a sum of £10 for sheriff's fees, and that these two amounts were added to the old amount (£565) to make up the amount to £580 ? ' Dent had sworn that it was made up of the old £565 and £15 for interest. When the receipt from the sheriff turned up it was found to be for £4 4s. Evidently Snell then revised his story, and when he came to give evidence he said the extra £15 was

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made up as to £4 4s. by the fees paid to the sheriff and as to £10 10s. by costs he had paid to Mr. Schrader and £1 1s. costs of keeping the Court open on the day the bill of sale was discharged. As a matter of fact, the £10 10s. was not paid to Mr. Schrader till months after and the necessity of keeping the Court open could not have been known when the sum of £580 was entered in the security over Mrs. Dent's interest in the Graham estate. Both that security and the subsequent bill of sale of 10th October treat the sum of £580 as already advanced and carrying interest. Under these circumstances I cannot accept Snell's evidence. The probabilities all support Dent's story that the £580 was treated as the amount due under the first bill of sale. I am also of opinion that the probabilities are that the whole arrangement in pursuance of which the security over the interest in the Graham estate and the second bill of sale were given was completed prior to 4th October, when Snell became registered, and that no proceedings subsequently took place at his registered office. The charge over the Graham estate bears date 6th October, but in my opinion it was probably executed in the first instance by Mrs. Dent on or prior to 4th October. Mr. Kemp, a clerk in Mr. Schrader's office and formerly in the employ of Mr. Dent, says that it was executed and an alteration initialled by Mrs. Dent in his presence on 6th October. In this statement I think he is clearly mistaken. The document was prepared by Mr. Dent and was executed by Mrs. Dent in the form originally drawn by him. Mr. Snell was then described as 'Charles Frederick Snell of Sydney, timber merchant.' As appears from Mr. Schrader's entries and his evidence, Snell took this document to Mr. Schrader to peruse. As a result of this perusal the description of Snell in the document appears to have been altered; if Mr. Schrader's evidence is correct it must have been altered on three separate occasions: first, the description 'timber merchant' was erased in ink and the word 'financier' apparently was written above; then the word 'financier' was erased and the description 'money-lender trading as C. F. Snell timber merchant' was typed and the name 'Ferdinand' was substituted for 'Frederick' in type; thirdly, the address No. 2B Castlereagh Street was inserted by Mr. Schrader in ink. I believe that it was in connection with the perusal of this document that Mr. Schrader

ascertained that Mr. Snell was not properly registered as a money-lender, and that it was in consequence of this discovery that Mr. Snell registered himself as a money-lender on 4th October; that Mr. Schrader then instructed his clerk to type in the registered description of Mr. Snell, and subsequently himself added the registered address; and that thereupon Mr. Schrader instructed Mr. Kemp to take the document back again to Mrs. Dent to get her to initial the alteration, which she did. I think the date was probably left blank in the first instance and was filled in on 6th October when the whole matter of the discharge of the original bill of sale was carried through. On 10th October the new bill of sale was executed by Mrs. Dent but no fresh negotiations of any sort took place. It was signed in pursuance of the arrangement come to before 4th October. It was for the same consideration as the charge over the Graham estate—i.e., it was a security for the same amount as was due under the original bill of sale. In my opinion it was without consideration, the only consideration being the discharge of a void security, and is therefore unenforceable by the bill of sale holder."

The learned Judge made a decree (1) declaring that the bill of sale was void and that the defendant was not entitled to seize or sell the goods comprised in it, (2) directing a reference to the Master in Equity to inquire as to the amount of damages sustained by the plaintiff and payable by the defendant in respect of the seizure and sale of such goods, (3) directing a reference to the Master in Equity to take an account of what was due by the plaintiff to the defendant upon the mortgage of 22nd March 1922, (4) directing that in taking such accounts all questions as to the effect of the *Money-lenders and Infants Loans Act* 1905 upon the right of the defendant to recover money lent to the plaintiff or her husband should be open to the parties, (5) ordering the defendant to pay into Court the amount received by him from the sale of the goods, (6) restraining the defendant from exercising his power of sale under the mortgage without seven days' notice to the plaintiff and (7) reserving all questions of costs and further consideration of the suit, with liberty to all parties to apply as they might be advised.

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

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Other facts are stated in the judgments hereunder.

Loxton K.C. (with him *Henry*), for the appellant. The bill of sale of 5th April 1921 was not void under the *Money-lenders and Infants Loans Act* 1905; for it was not proved that at the time of the transactions which led up to the taking of the bill of sale the appellant was a money-lender (see *Rabone* v. *Deane* (1); *Edgelow* v. *MacElwee* (2)). There was good consideration for that bill of sale. As to the bill of sale of 10th October 1921, when the appellant was registered as a money-lender, the finding that there was no consideration for it was not warranted, even if the first bill of sale was void. The second bill of sale was under seal, and there was also, within the meaning of the authorities, good consideration for it. Both parties then believed that the first bill of sale was valid and under the arrangement in October 1921 it was discharged, the loan was repaid and there was a new loan (*Haigh* v. *Brooks* (3)).

[ISAACS J. referred to *Credit Co.* v. *Pott* (4).]

The second bill of sale, being under seal, operates as an estoppel between the parties. There is nothing to prevent a person who has borrowed money from another from repaying it, although he is not legally bound to do so. Even if the second bill of sale is declared to be void, a condition should be imposed on the respondent as to repayment of the money lent to her, on the principle of *Lodge* v. *National Union Investment Co.* (5). [Counsel also referred to *Official Assignee* v. *Goldstein* (6); *Attorney-General* v. *Hollingworth* (7); *Chapman* v. *Michaelson* (8).]

Mann, for the respondent. On the evidence the first bill of sale was invalid and illegal under sec. 2 of the *Money-lenders and Infants Loans Act*, and the discharge of it was not a good consideration for the second bill of sale. There was no pre-existing valid debt as there was in *Credit Co.* v. *Pott* (4). Substantially the whole of the business which led up to the giving of the second bill of sale was transacted before the appellant had become registered, the result

(1) (1915) 20 C.L.R. 636, at p. 639.
(2) (1918) 1 K.B. 205.
(3) (1839) 10 A. & E. 309, at p. 320.
(4) (1880) 6 Q.B.D. 295.
(5) (1907) 1 Ch. 300.
(6) (1921) 29 C.L.R. 377.
(7) (1857) 2 H. & N. 416.
(8) (1909) 1 Ch. 238

being that that bill of sale was void under sec. 2 of the Act (*Cornelius* v. *Phillips* (1); *In re Campbell*; *Ex parte Seal* (2); *Levy* v. *Dott* (3)).

Loxton K.C., in reply, referred to *Kirkwood* v. *Gadd* (4); *Re Hockaday*; *Ex parte Nelson* (5).

Cur adv. vult.

May 7.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. In her statement of claim, so far as the same is now relevant, the plaintiff alleged that the defendant claimed to be the holder of a bill of sale over certain furniture and effects of which the plaintiff was the owner; that such bill of sale was void on the grounds therein alleged; that the defendant had accepted a mortgage over land of which the plaintiff was the registered proprietor in lieu of the said bill of sale and certain other securities to which the defendant claimed to be entitled and had undertaken to discharge the said securities including the bill of sale when called upon to do so and to refrain for a specified time from taking any steps in connection with the amount secured by the mortgage. She alleged further that the defendant claiming under the bill of sale had seized and threatened to take away and sell the furniture and effects comprised therein, that she had offered to pay the balance due on the mortgage and had tendered to him a sum exceeding such balance, which the defendant had refused to accept. She claimed relief as follows: (1) An injunction to restrain defendant from dealing with the furniture, &c., and an order that he withdraw from possession thereof; (2) an order to produce certain documents; (3) a declaration that the said bill of sale was void as between the parties; (4) an account of the amount due to the defendant, and an order that on payment thereof defendant should discharge all the securities in the pleadings mentioned; (5) damages in respect of the wrongful acts in the pleadings mentioned. An interlocutory injunction was granted, but on terms with which the

(1) (1918) A.C. 199.
(2) (1911) 2 K.B. 992.
(3) (1919) 35 T.L.R. 518.
(4) (1910) A.C. 422.
(5) (1886) 55 L.T. 819.

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plaintiff was unable to comply; and the defendant sold the goods comprised in the bill of sale. The defence set up by the statement of defence consisted of a denial of substantially every allegation in the statement of claim, an allegation that there was owing to the defendant on the mortgage £916 and interest and on the bill of sale £631 and interest, and an offer to discharge those securities on payment of the amount due to him. On this defence issue was joined. It was not suggested either in the pleadings or at the trial that the case set up by the plaintiff was one in which, if proved, the Judge sitting in equity either could not or should not give relief.

During the hearing *Harvey* J. intimated that the only questions with which he proposed to deal at that stage were (1) whether the bill of sale was void and (2) whether there was an agreement to discharge the bill of sale when the mortgage was taken; all questions as to other relief being reserved until the accounts should have been taken by the Master. The learned Judge held that the plaintiff had failed to establish an agreement for the discharge of the bill of sale when the mortgage was taken, and made a decree (1) declaring that the bill of sale was void and that the defendant was not entitled to seize or sell the goods comprised therein, (2) directing an inquiry as to the amount of damages sustained by plaintiff and payable by defendant in respect of the seizure and sale of such goods, (3) directing an account to be taken of what was due by plaintiff to defendant on the security of the mortgage, (4) ordering defendant to pay into Court the amount received by him from the sale of the said goods, (5) restraining defendant from exercising his power of sale under the mortgage without seven days' notice to plaintiff and (6) reserving all questions of costs and further consideration of the suit.

From this decree the defendant appealed to this Court, all the grounds stated in the notice of appeal being directed to the question whether *Harvey* J. was right in declaring that the bill of sale was void, and no question being raised as to the propriety of the decree if his decision was right in that respect. The learned Judge was sitting under the provisions of the *Equity Act* 1901. The jurisdiction conferred by this statute was considered and explained by this

Court in *Maiden* v. *Maiden* (1) and by the Supreme Court of New South Wales in a number of cases, beginning with *Horsley* v. *Ramsay* (2) and ending with *Thomas* v. *Stevenson* (3). Applying the decisions in these cases, we have no doubt that *Harvey* J. had jurisdiction to entertain the suit and to give the relief which he in fact gave. He was in a better position to estimate the value of the oral testimony than we are, and we therefore accept his findings of fact. Having regard to these findings, we think that the conclusion he arrived at and the reasons which caused him to arrive at that conclusion are unimpeachable.

But a point was argued before us which was not raised before the Supreme Court or in the notice of appeal to this Court. It was suggested, on the authority of *Lodge* v. *National Union Investment Co.* (4), that we should vary the decree by imposing on the plaintiff a condition that she should make some payment to the defendant in respect of the moneys secured by the bill of sale which is declared to be void. An examination of the pleadings and of the decree itself will show that it is unnecessary for us to consider whether the decision in that case should be followed in appropriate circumstances. The statement of claim, so far as it is relevant to this discussion, enumerates various securities held by the defendant, and asks that one of them, a bill of sale, should be declared void and inoperative, and that all of them should be discharged on payment of the amount found to be due by the plaintiff to the defendant. The defence alleges the validity of the impugned bill of sale but does not ask that any conditions should be attached to the declaration of its invalidity, if made. The decree, so far as it is relevant in this discussion, declares the bill of sale to be invalid, and orders an account to be taken of the moneys due by the plaintiff to the defendant under a mortgage of real property, which is one of the securities already mentioned. Further consideration is reserved. The decree does not and could not properly make the invalidity of the bill of sale dependent on any condition to be performed by the plaintiff, because it is, and must be, either valid or invalid irrespective of the performance of any such condition. In *Lodge's Case* the Court

(1) (1908-09) 7 C.L.R. 727.
(2) (1888) 10 N.S.W.L.R. (Eq.) 41.
(3) (1914) 15 S.R. (N.S.W.) 78.
(4) (1907) 1 Ch. 300.

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was not asked to impose upon the plaintiff a condition attendant on a declaration of invalidity, or on any order giving effect to the legal consequences of invalidity, but was asked to impose, and did impose, on him a condition as part of a further order that the defendant should deliver to the plaintiff certain securities held by him under an agreement which was pronounced to be void. In other words, the Court refused to exercise a discretionary and purely equitable jurisdiction founded on the invalidity of the bill of sale unless and until the plaintiff did what it considered equitable in the circumstances. Had the plaintiff in that case been satisfied with a declaration of the invalidity of the bill of sale, the question of imposing conditions would not have arisen (see *Chapman* v. *Michaelson* (1)).

In our opinion the appeal should be dismissed.

ISAACS J. This is an appeal from a decree in equity made by *Harvey* J. It is of considerable public importance both from the civil and the criminal aspect. Personally I should regard the legal result as determinable upon a comparatively small field of consideration. However, the points raised and relied on in argument and the difference of opinion that exists require me, since I maintain the negative to very general terms, to make a somewhat close examination both of the facts and of the law. For various reasons that will become apparent, they also render necessary some specific mention of decisions and principles generally taken for granted. To give effect to the respondent's arguments would, in my opinion, not only run counter to the many authorities on the Money-lenders Act but would work a revolution in equity law and practice as they have heretofore existed in New South Wales.

The respondent, Constance Ella Dent, by her statement of claim sued in respect of a bill of sale over her furniture and effects and also in respect of a mortgage. Nothing now turns on the mortgage except —and the exception is a very important one, since it virtually does what is said to be omitted by the declaration as to the bill of sale— the direction regarding the accounts, which this decision may seriously alter. Otherwise this appeal is nominally confined to the bill of sale. The statement of claim charged that the bill of sale is

(1) (1908) 2 Ch. 612; (1909) 1 Ch. 238.

void under the Money-lenders Act of 1905. *That was the only ground set up to avoid the bill of sale* and, as the learned Judge said in his judgment, the only question, apart from an alleged agreement to discharge the bill of sale when the mortgage was taken, with which he proposed to deal was "*whether the bill of sale was void under the Money-lenders Act.*" Upon his conclusion as to that, he made his declaration and *decreed relief.* It is therefore not a case where, as in *Chapman* v. *Michaelson* (1), there is a mere declaration that the bill of sale is illegal and void. The 4th paragraph of the statement of claim says: "The plaintiff charges and the fact is that the said bill of sale is void under the *Money-lenders and Infants Loans Act* 1905 on the following amongst other grounds namely: (a) there was no consideration for the same; (b) the transaction was not completed at the registered office of the defendant; (c) the said bill of sale was signed by the plaintiff in blank and subsequently filled in by the defendant without any authority on the part of the plaintiff." The plaintiff's claim was: (1) injunction against interfering with the furniture; (2) production of documents; (3) declaration that the bill of sale is void and inoperative between the parties; (4) account and on payment by respondent a discharge of the securities; (5) damages and reference to the Master; (6) costs; (7) further and other relief. It is unnecessary to state the defence in detail. It is sufficient to say the alleged grounds were denied. The learned Judge on 6th June 1924 made a decree by which it was (1) declared that the bill of sale was void and that the appellant was not entitled to seize or sell the goods; (2) referred to the Master in Equity to inquire as to damages in respect of the seizure and sale; (3) referred to the Master in Equity to take an account of sums due by respondent to appellant on the mortgage; (4) directed that all questions as to the effect of the Money-lenders Act 1905 upon the right of the appellant to recover money lent should be open to the parties; (5) ordered that the appellant should pay into Court to the credit of the suit the amount received by him from the sale of the goods; (6) ordered that the appellant be restrained from selling under the mortgage without seven days' notice to the

(1) (1909) 1 Ch. 238.

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respondent. The decree, therefore, as it stands is as complete a provision of equitable relief as can well be imagined.

The grounds upon which the learned Judge arrived at this result will be gathered from a statement of the material facts. These I narrate, accepting all as stated by *Harvey* J. and adding some important facts as to which the evidence is indisputable and unchallenged. The case therefore depends purely on considerations of law and not of facts.

I should first mention that an interim injunction against the sale of the furniture was granted in terms that the respondent was not able to comply with. Since the motion for injunction the appellant realized on the goods comprised in the bill of sale. The sale, therefore, was not in violation of any order of the Court, and "the position has altered" (*Heavener* v. *Loomes* (1)). Consequently we have to deal with the position as it is, and not as it was before the sale.

The appellant (who for convenience will be called Snell—as *Harvey* J. has called him) at all material times was a money-lender within the meaning of the Money-lenders Act, but until 4th October 1921 carried on the business of money-lending, so far as the transactions relevant to this case are concerned, in a way—that is, by actually trading at an address some doors away from his registered address—that rendered those transactions void by reason of sec. 2 (1) (*b*) of the statute. Those transactions prior to that date were as follows:—Roy George Ironside Dent, the respondent's husband, was a solicitor who had got into financial difficulties and by authority of his wife borrowed from the appellant £550 for a week to be repaid with £10 interest, the security being the deposit of his wife's certificate of title to a piece of land. On 5th April 1921 Dent and his wife executed a bill of sale to secure £565 and interest at 20 per cent. This bill of sale recited that "the said mortgagors have applied to the said mortgagee to advance or lend them the sum of £565 and also to make further and future advances from time to time and the said mortgagee hath agreed to advance the said sum" &c. In September 1921 Dent was pressed by creditors, a judgment was obtained against him and under a *fi. fa.* the sheriff seized the furniture comprised in the bill of sale. For this Mrs. Dent presented an interpleader claim

(1) (1924) 34 C.L.R. 306, at p. 312.

to the sheriff, which the sheriff refused to accept. Then Dent saw Snell, and at Dent's request the latter agreed to make an interpleader claim based on the appellant's property under the bill of sale. As Dent had been struck off the roll of solicitors and could not act as such, Mr. Schrader was instructed to act for Snell. Inspection of a document shortly before 4th October led Mr. Schrader to the conclusion that, owing as *Harvey* J. thinks—though that is not Mr. Schrader's evidence—to Snell's non-registration for the actual address where he carried on business, the bill of sale was valueless. Mr. Schrader thereupon advised registration, which was effected on 4th October 1921. Obviously this advice was in order that the very transaction now impeached might be valid and binding on all parties. In the meantime, in consequence of Mr. Schrader's advice, it was seen that the interpleader proceedings had to be abandoned. Dent proposed to Snell to discharge the bill of sale and take a charge over what is known as the Graham estate; this was to leave Mrs. Dent's title to the furniture free from all claim of Snell. A promise was given that after Mrs. Dent's interpleader proceedings she would give a fresh bill of sale to Snell.

These arrangements were made, and then the parties proceeded to carry them out. *Harvey* J. describes them in order of date as follows:—"On 4th October Snell registered himself as a money-lender; the charge over Mrs. Dent's interest in the Graham estate, Snell's release of the bill of sale, the discharge of Snell's interpleader order, and the lodging of Mrs Dent's interpleader claim by Mr. Schrader, are all dated 6th October. Snell gave the required security of £400 for Mrs. Dent's interpleader order on 7th October, and the fresh bill of sale from Mrs. Dent to Snell was given on 10th October." The learned Judge says the charge on the Graham estate was probably executed on or prior to 4th October and inspection of this document led Mr. Schrader to advise the registration under the Act. But the formal mortgage was executed on the 6th. The learned Judge finds, and I accept his finding, that the new bill of sale was executed by Mrs. Dent on 10th October, but no fresh negotiations of any sort took place. It was signed in pursuance of the arrangement come to before 4th October. It was for the same consideration as the charge over the Graham estate, that is, "it was a security for the same

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amount as was due under the original bill of sale." *Harvey* J. adds: "In my opinion it was without consideration, the only consideration being the discharge of a void security, and is therefore unenforceable by the bill of sale holder." The effect of this I shall presently discuss. In the meantime I may observe that *Harvey* J. in one passage says that "no proceedings subsequently" to 4th October "took place at his" (the appellant's) "registered office." I understand that observation to be confined, in view of the context, to the negotiations or arrangement for what was actually done as already described in the words of the learned Judge. If not, it could not stand because the unchallenged facts would establish the contrary.

Before dealing generally with the facts, I have to state some important added circumstances which are established beyond controversy by the evidence. The bill of sale of 10th October 1921 was prepared by the appellant's daughter *in the appellant's registered office* on 9th October by filling in everything except the date and the signatures. She then took it to Mr. Schrader's office and handed it to him for examination. Mr. Schrader looked through it and said it was in order. Miss Snell then took it back to her father at his office. On 10th October Dent *at the appellant's registered office* signed it as consenting to his wife's executing it. Dent there and then, still *at the registered office*, directed Kemp, who was his clerk, to take it to Strathfield to Mrs. Dent that she might execute it. Kemp did so; Mrs. Dent signed and sealed it at Strathfield, and Kemp brought it in to Snell *at his registered office* on 11th October. It was then sent to the Stamp Office and stamped.

It is evident that the whole of the transactions, beginning with the interpleader and ending with the new bill of sale, in the midst of which the effective registration took place, were for the mutual advantage of the husband, wife and money-lender. They were initiated by the Dents primarily for their benefit, because everyone then thought Snell was amply protected. He consented to a new arrangement at their request. That arrangement, unless a criminal conspiracy of all three, and eventually including Mr. Schrader, was, from a business point of view, substantially this: The April bill of sale was to be "discharged" and the Graham estate was to be taken as

security for £580, which was obviously the amount of the bill of sale plus accrued interest, &c. The discharge of the bill of sale is dated 6th October. The discharge is in these terms :—" Received this sixth day of October 1921 from Constance Etta Dent and Roy George Ironside Dent the within-named mortgagors the sum of £565 in full satisfaction and discharge of the within security. C. F. Snell.—Witness, W. D. Schraeder, solicitor, 4 Castlereagh Street, Sydney." The Graham mortgage recites that it is in consideration of £580 advanced, &c., which was covenanted to be repaid with interest at 6 per cent per annum at times mentioned. I give full faith to the parties and to Mr. Schrader as honestly intending to treat the sum of £565 under the April bill of sale as paid or cancelled by the new indebtedness undertaken, and the sum of £580 as in substance advanced afresh for the purposes of the new mortgage. True, it was in one sense the same sum, that is, the same amount, but only in the sense that it would have been had the formality been gone through of handing notes backwards and forwards. This is borne out by the notice by Snell of 6th October withdrawing his interpleader claim, in which he says the bill of sale is now " discharged." The word " discharged " relates properly to the debt (sec. 13 of the Act No. 10 of 1898). Then the arrangement to give the new bill of sale of 10th October 1921 was carried out also as part of the same arrangement, the sum of £580 being the new debt conventionally created by the discharge of the sum of £565 under the April document claimed and believed to be due when the arrangement was made. The same observations as to honesty or criminality apply to the October bill of sale as apply to the Graham mortgage. And in the October bill of sale it is expressly recited : " Whereas the said mortgagor has applied to the said mortgagee to advance or lend her the sum of £580 . . . Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the premises and of the sum of £580 sterling paid by the said mortgagor (the receipt whereof do hereby acknowledge) " &c. At the foot of the document is this statement : " Received at or before the execution of these presents and from the within-named mortgagee the sum of £580 being the

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full consideration money within expressed to have been paid by the said mortgagee to me Constance Etta Dent.—£580."

Taking the test stated in *Credit Co.* v. *Pott* (1), that in judging of the truth of the statement of consideration we are to have regard to the legal or mercantile effect of the statement, it appears to me that the consideration—reading both the mortgage and the bill of sale together—is that the £580 was as between the parties an advance after 4th October. It matters not for this purpose whether the money was or was not a debt under the April document. It was not illegal for Mrs. Dent to pay it if she chose ; it was not illegal to enter into the arrangement by which it should be treated as paid, with a promise of a new mortgage and a new bill of sale arrangement in which the same amount should by a species of novation be regarded as a new and independent debt. Any honest business man would so regard it; any honest solicitor familiar with the circumstances as Mr. Schrader was would so regard it, and the undeniable fact that he supervised the arrangements and approved of the bill of sale before its execution is decisive that he did so regard it. Apart from any invalidity of the bill of sale of 10th October by reason of the Money-lenders Act, that document is binding and is for a valuable money consideration, if any such consideration were necessary. But apart from invalidation by the Money-lenders Act, not of the April but of the October document, it is, notwithstanding the absence of any money consideration, enforceable both at law and in equity because it is under seal. There is no allegation or suggestion of any equitable circumstance such as overreaching, fraud, mistake or other improper dealing, or of the document being in reality anything other than it appears to be. For instance, it is not as if it were absolute in form and in reality a mortgage. Nor is it the case that there was a promise of a new advance in cash which had not been carried out, causing a failure of consideration. The deed is exactly as intended, and at law it estops the respondent from saying the advance was not in fact made. If it be conceded that the parties were to regard the transaction as if it were a new advance, as no doubt it conventionally was treated, then the advance must be regarded as given in the way adopted,

(1) (1880) 6 Q.B.D. 295.

namely, by appropriating the past actual advance to the double purpose of being notionally handed back and forwards. If that be not conceded, then the deed stands simply as a voluntary deed. But it is none the less binding. By a long series of cases, including *Williamson* v. *Codrington* (1); *Watson* v. *Parker* (2); *In re Lucan*; *Hardinge* v. *Cobden* (3); *Re Cavendish Browne's Settlement Trusts*; *Horner* v. *Rawle* (4) (a decision of Lord *Blanesburgh* (then *Younger* J.)), a voluntary deed may be enforced for a debt created by it or for damages for breach of covenant both in equity and at law.

I so far have—quite unnecessarily, I confess, but for the view presented as to the effect of absence of consideration—devoted some attention to an aspect which otherwise I should have thought almost elementary.

There remain, however, other points argued, namely:—(1) Is the bill of sale of 10th October 1921 invalid by reason of the Money-lenders Act? (2) If it is not so in itself, does the fact that the original advance was the subject of the bill of sale of April 1921 carry an invalidity to the October document? (3) Assuming the October bill of sale is void by reason of the Act, can the decree stand as made without conditions, as in *Lodge* v. *National Union Investment Co.* (5)? (4) Can the Equity Court, without giving relief, simply and unconditionally declare this bill of sale void; and, if so, what is the effect of such a declaration? The first of these four questions has a wide everyday importance both of a civil and a criminal character.

(1) As to the first point, it is clear to me, upon a careful examination of the authorities, that the Act, construed reasonably, does not invalidate the instrument in the circumstances of this case. The bill of sale, as already emphasized, is challenged simply because it is said to be contrary to sec. 2, sub-sec. 1, par. (*b*), of the Act, namely, that "a money-lender, as defined by this Act, . . . (*b*) shall carry on the money-lending business . . . at his registered address or addresses and at no other address." So far as I know, there is not, among the many cases upon the Act within the last twenty-four years, any one the decision of which would support the judgment here under appeal, or would justify under the law of New

(1) (1750) 1 Ves. 511.
(2) (1843) 6 Beav. 283.
(3) (1890) 45 Ch. D. 470.
(4) (1916) 61 Sol. J. 27.
(5) (1907) 1 Ch. 300.

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South Wales a simple substitution of a declaration that the bill of sale is void. On the other hand, there are several of great authority opposed to both. Recalling the relevant facts, the negotiations and arrangements for the bill of sale were completed before the registration of the money-lender on 4th October. But the arrangement was carried out afterwards and the principal parts of the transaction took place at Snell's registered office. These I have narrated in what I have called "added circumstances." It ought really to be sufficient for this first question—which in itself should end the matter—to cite *Kirkwood* v. *Gadd* (1). The effect of the Money-lenders Act of 1905 was fully argued, and I have not heard any valid reason why *Kirkwood* v. *Gadd* should not be followed. But, as the opinion from which I have the misfortune to differ seems to me to run counter to that decision and other decisions, I am compelled to examine generally the position for future guidance or future warning. It appears from the judgment of Lord *Loreburn* L.C. that "the agreement for the loan, the advance of the money, and the taking of the security were all transacted not at the money-lender's registered address but at the borrower's private residence" (1). Nevertheless the bill of sale was not invalidated because (still quoting from the judgment) "some letters making the appointment at the borrower's residence with a view to arranging the loan were written to and received from the registered address" (2). Lord *Loreburn* says further on:—"This Act of Parliament cannot mean that every stage and every incident of every piece of the money-lending business is to be transacted at the registered office. That would be impossible, for such things as making inventories or taking possession of furniture under a bill of sale are part of the business and must be done where the goods are situated. Nor can it be intended to prohibit the employment of clerks and agents, or the transaction outside the registered address of every single thing that could by possibility be transacted within it. That would be needlessly oppressive and would strain the words. . . . The mischief is that this dangerous business may be conducted by persons under false names or a variety of names without the security of an ascertained address, or at places where men may be taken

(1) (1910) A.C. 422. (2) (1910) A.C., at p. 423.

unawares or off their guard. The words, which are in terms general, must be applied accordingly." Lord *Loreburn* added (1): "It is always a question of fact, the answer to which depends on the circumstances of the case." Like all questions of fact it may be reasonably susceptible of only one conclusion; and that is what is, in my opinion, upon the authorities the position here. (See also per Lord *James of Hereford* (2), per Lord *Atkinson* (3) and similarly per Lord *Mersey* (4).) It will be observed that the case reverses the decision of the Court of Appeal. The reversal by the House of Lords of the decision appealed from establishes that the mere fact that all the preliminary arrangements were made elsewhere is not conclusive. It even goes further in that other important acts might be added and yet leave the business free from invalidity, and this, although the Court of Appeal thought that what was done elsewhere amounted, in the words of *Fletcher Moulton* L.J., to the whole of the money-lending transaction. The question of fact cannot be better stated than in Lord *Loreburn's* words, where he says (5): "If a money-lender *really deals with a borrower at his registered address*, whether by interview or correspondence, he may, without infringing the Act, transact negotiations, *or conclude the actual contract*, elsewhere." The governing expression is "deals with." It really comes to an inquiry whether in relation to the challenged transaction there was such a substantial part of it carried on at the registered address as to satisfy reasonably the words of the legislation as interpreted by Lord *Loreburn*. Carrying on a business is in truth flexible enough to accomodate itself to all the possible variation of circumstances that occur in the class of business under consideration in the given case. The case of *Whiteman* v. *Sadler* (6) turns on another provision, namely, the "registered name," which does not apply to this case. There is, however, one passage in that case in the judgment of Lord *Mersey* which is of some importance. That learned Lord says (7): "It is also, I think, to be remembered that this is a penal statute, and it seems to me that if each of two interpretations of it is reasonable, that one which protects the subject should be adopted rather than

(1) (1910) A.C., at p. 424.
(2) (1910) A.C., at p. 427.
(3) (1910) A.C., at pp. 432, 433 (particularly ll. 3-16).
(4) (1910) A.C., at p. 438 (ll. 1-10).
(5) (1910) A.C., at p. 424.
(6) (1910) A.C. 514.
(7) (1910) A.C., at p. 532.

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that one which may have the effect of sending him to prison." *Cornelius* v. *Phillips* (1) in no way detracts from *Kirkwood* v. *Gadd* (2). It decided that an isolated transaction could come within the provision, and that where that isolated transaction was wholly carried on elsewhere it was invalidated. There were some observations explanatory of *Kirkwood's Case*. Lord *Finlay* said (3): "All that was decided by the House of Lords in *Kirkwood* v. *Gadd* was that every stage and every incident of the money-lending business need not be transacted at the registered office." Lord *Finlay* said that it was enough if "the transaction had been substantially effected at the registered address of the money-lender." I am not prepared to place on those words a meaning that would reverse *Kirkwood* v. *Gadd* or that would invalidate a transaction formally carried out at the money-lender's office, from the preparation and execution of a security to the handing over of the money, merely because the lender and the borrower had previously met in the street and definitely arranged the terms. The "transaction" means the contract as finally constituted, and "effected," means everything that took place from the beginning of the negotiations to the final stroke of the pen. Lord *Dunedin* phrased it somewhat differently, saying (4): "*Kirkwood* v. *Gadd* only decided that if a particular transaction is substantially arranged and started at the money-lender's registered place of business, the mere fact that certain incidental proceedings are carried through at another place does not make the money-lender carry on business at that other place."

Reading those passages with that in Lord *Atkinson's* and Lord *Parmoor's* judgments relevant to the same case, I am of opinion that all those learned Lords were merely pointing out that *Kirkwood's Case* (2) was not decided on the ground that it was an "isolated case" and therefore did not of itself amount to carrying on business, but that, regarding it as a carrying on of business, it was examined for itself to see whether substantially it complied with the address provision. Their Lordships had no notion, in my opinion, of watering down either the law or the facts of *Kirkwood's Case*. To indicate

(1) (1918) A.C. 199.
(2) (1910) A.C. 422.
(3) (1918) A.C., at p. 204.
(4) (1918) A.C., at pp. 211, 212.

what I mean, let us look closely at the words quoted from Lord *Dunedin's* judgment. His Lordship must have recognized that the House in *Kirkwood's Case* (1) thought the facts showed that the "transaction was substantially arranged and started at the money-lender's registered place of business" and that the rest of the transaction was "incidental proceedings." Now, as stated above, all that took place there to start the business at the money-lender's office were letters written to and received from the registered address making an appointment at the borrower's residence. The agreement, the advance and the taking of the security were at the borrower's residence. Lord *Dunedin* does not say that these, if effected at the registered address, would have been insufficient.

I am supported in my view of Lord *Dunedin's* meaning by his own observations on *Kirkwood's Case* (1) and in *Hadsley* v. *Dayer-Smith* (2). They are very apposite here. Lord *Dunedin* said:—"It is a trite saying, my Lords, that all dicta of noble Lords or of any other Judges must always be taken *secundum subjectam materiam*. The point in *Kirkwood's Case* was to find what was the mischief which the Legislature had prohibited when it said that a money-lender should only carry on his business at his registered address, and *it was held that his doing certain acts incidental to his business at other places did not contravene that prohibition*." The combined effect of *Kirkwood* v. *Gadd* and *Cornelius* v. *Phillips* (3) is that even in what were once known as "isolated cases" the question is whether in respect of the transaction impeached the business of the money-lender was substantially carried on at his registered address. That principle was not previously universally recognized as to "isolated cases," but was certainly recognized and acted on in a considerable number of cases by very eminent Judges, and these cases are very clear illustrations of the principle now enunciated by the House of Lords as applicable to all transactions with a money-lender.

There have been many cases on the point under consideration, and where there is any conflict the House of Lords decisions of course must prevail. But among the cases which in my opinion are in

(1) (1910) A.C. 422.
(2) (1914) A.C. 979, at p. 983.
(3) (1918) A.C. 199.

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entire accord with the governing decisions are some which I shall quote in order of date. *Staffordshire Financial Co.* v. *Hunt* (1) and *Re a Debtor*; *Ex parte Carden* (2), are cases where no part whatever of the transaction took place at the money-lender's registered address. They are similar to *Cornelius* v. *Phillips* (3). *Blair* v. *Buckworth* (4) is mentioned for one reason only, as at that time the "isolated transaction" doctrine had not been definitely settled. The reason is independent of that. *Farwell* L.J. said (5): "The money-lending transaction apparently took place where the money was lent, and the documents signed, even if the negotiations might take place elsewhere." *King* v. *Massey* (6), where Lord *Darling* (then *Darling* J.) held valid a promissory note for a loan though the arrangements as to terms and the formal completion of the bargain both took place at the borrower's address. The transaction was held good because preliminary correspondence leading up to it was sent to and written from the registered address. That anticipated the House of Lords decision in *Kirkwood* v. *Gadd* (7). In *Levene* v. *Gardner* (8) Lord *Phillimore* (then *Phillimore* J.) upheld the validity of promissory notes signed by a defendant elsewhere than at the registered address, though of course that was one of the essentials of the transaction. The learned Judge said—ironically (9)—that, notwithstanding all other parts of the transaction took place at the registered office, "he did not doubt that it was possible to find otherwise, and to say that to post a letter outside the registered office made the transaction voidable." He meant, of course, that it was always a question of common sense whether in relation to the given transaction the intended protection to the borrower was substantially given. In *Jackson* v. *Price* (10), decided in 1909, *Darling* J. upheld a transaction though the money was not handed over to the borrower at the registered address. This case is, of course, less difficult than some others; but it is valuable, not merely as an illustration, but also for the observation of the learned Judge that the punishment of imprisonment with or without hard labour imposed by the statute

(1) (1907) W.N. 258.
(2) (1908) 52 Sol. J. 209.
(3) (1918) A.C. 199.
(4) (1908) 24 T.L.R. 474.
(5) (1908) 24 T.L.R., at p. 477.
(6) (1908) 24 T.L.R. 710.
(7) (1910) A.C. 422.
(8) (1909) 25 T.L.R. 711.
(9) (1910) 1 K.B., at p. 147.
(10) (1910) 1 K.B. 143.

(sec. 2, sub-sec. 2, of the New South Wales Act) is of assistance to understand the evil against which it is directed. Without quoting, I direct attention to the succeeding passage in the judgment, and would apply it by asking whether, after the express endeavour to comply with the Act on 4th October 1921, the present appellant, in carrying out the transaction afterwards, did what the Act provides, as a second offence and, it might be, so incurred three months' imprisonment with hard labour. In *Sadler* v. *Whiteman* (1) *Bray* J. held valid a bill of sale though the verbal arrangement was only definitely arrived at at the borrower's house, and the bill of sale executed there and the money paid over there. There had been at the registered address prior correspondence and interviews and the negotiations had proceeded there up to an inconclusive point. *Bray* J. expressly followed *Levene's Case* (2) and *Jackson's Case* (3). I may add that *Sadler* v. *Whiteman* (1) was ultimately upheld in the House of Lords (*Whiteman* v. *Sadler* (4)). In *Blaiberg* v. *Calvert* (5) Lord *Sumner* (then *Hamilton* J.) held the transaction valid because the "substantial negotiation" (by which I understand the greater part of the negotiations, which still remained incomplete) took place at the registered office. They appear to have been incomplete until the money-lender went to the borrower's house and there handed him the cheque and got the promissory note. *Hamilton* J. said (6)—and his interpretation of the cases is important: "There was a series of cases in which it was held that the money-lender had kept within the Act, if some part of the transaction was carried out at his registered address" (and he cites some of the above-mentioned cases). He was "bound" he said "to follow those authorities unless there was something in *Gadd* v. *Provincial Union Bank* (7) which prevented his doing so." He added: "A transaction which had its inception at that address could hardly be said to be such that the money-lender was carrying on business at an address other than his registered address." Substituting for the word "inception" the words "essential creation in legal form," Lord *Sumner's* observation applies exactly to the present case.

(1) (1910) 26 T.L.R. 255.
(2) (1909) 25 T.L.R. 711.
(3) (1910) 1 K.B. 143.
(4) (1910) A.C. 514.
(5) (1910) 26 T.L.R. 328.
(6) (1910) 26 T.L.R., at p. 329.
(7) (1909) 2 K.B. 353.

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It is also to be observed that *Gadd's Case* (1), as it stood then, was afterwards overruled as *Kirkwood* v. *Gadd* (2). In *In re Seed*; *Ex parte King* (3), Lord *Phillimore* (as *Phillimore* J.) held valid a transaction carried on entirely by correspondence. The borrower was never, from first to last, present at the lender's registered address. But, as the lender sent his letters and enclosures from that address, it was a valid transaction. *Phillimore* J. endorsed the observations of *Darling* J. in the case previously mentioned as to the effect of the statutory penalty on the construction of the section. In *Shaffer* v. *Sheffield* (4) the whole transaction took place at the St. Pancras Hotel, London, except that by letter the borrower opened a correspondence with the lender, whose registered office was at Manchester and who replied agreeing to lend on condition that he procured the defendant as endorser of the bill of exchange. The borrower invited the lender to come to London and the transaction was there carried through; the defendant, who was the endorser, never having met or negotiated with the lender or, so far as appeared, having any knowledge that the lender was a Manchester money-lender. *Channell* J. held the transaction valid, obviously on the principle of *Kirkwood* v. *Gadd* (2). In *H. Bowen & Co.* v. *Samuels* (5) the Court of Appeal (*Pickford* L.J. and *Bankes* L.J.) had this matter again under consideration several months after *Cornelius* v. *Phillips* (6). It was a striking case. The money-lenders, having their registered address in Bond St., London, lent money to a man at Manchester. A third person wrote to the money-lenders at their registered address, stating that the borrower wished a loan. The money-lenders wrote to the borrower asking for an appointment at Manchester. A telegram agreed to that. Except that, every part of the transaction took place in Manchester —that is, negotiations, agreement, advance, and promissory note; later, a further advance at the registered address of £115, and a promissory note for £150; later, a third advance at the registered office, when the two former notes were cancelled and a new note taken for £430, which was sued on. *Darling* J. held (7) that the

(1) (1909) 2 K.B. 353.
(2) (1910) A.C. 422.
(3) (1910) 1 K.B. 661.
(4) (1914) 2 K.B. 1.
(5) (1918) 34 T.L.R. 487.
(6) (1918) A.C. 199.
(7) (1918) 34 T.L.R. 228.

first transaction was valid, relying on *Kirkwood* v. *Gadd* (1). The Court of Appeal (2) agreed with that. *Pickford* L.J., as to *Cornelius* v. *Phillips* (3), said "there were no dealings at all nor was there any correspondence with the money-lender at his registered office." I may interpolate *Balkind* v. *Batchelor* (4), which I have just found. It was a decision of *Salmond* J. which was based on *Kirkwood* v. *Gadd*. The only parts of the transaction effected at the registered address were the receipt of a letter from the borrower and the preparation of the documents—promissory note and bill of sale. The reply to the letter of inquiry, the negotiations, the presentation of the documents, their signature, and the handing over of the loan, all took place elsewhere and mostly at the borrower's shop. The judgment, I observe, refers to some of the cases I have cited, and apparently takes the same view as above stated.

For those reasons I hold the bill of sale of 10th October 1921 not to be itself directly invalid by reason of the provision relied on in the Money-lenders Act.

(2) The next question is: Supposing that to be so, is it corrupted by reason of the invalidity of the April transaction? My answer is in the negative. The contract of April was a forbidden contract, it is true. It is also true that the law will not recognize any binding obligation in that contract or in anything—not collateral—that depends on it. But, although it was an offence for the money-lender, and therefore prohibited and unenforceable, it was made so for the protection of the borrower. Still, as *Kennedy* L.J. says in *In re Campbell*; *Ex parte Seal* (5): "The money-lender has thereby committed an offence; but participation in the agreement on the part of the borrower does not constitute either a crime or an offence on his part." It would not be an offence for him voluntarily to repay the money he had received—perhaps quite honestly lent and honestly borrowed. There is nothing in the law, so far as I can see, forbidding a man in such case to be honest. It is not like money lent for the commission of a crime, which in

(1) (1910) A.C. 422.
(2) (1918) 34 T.L.R. 487.
(3) (1918) A.C. 199.
(4) (1923) N.Z.L.R. 1122.
(5) (1911) 2 K.B., at p. 1000.

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no circumstances can be lawfully promised, paid or received. The subject was to some extent considered in *Campbell's Case* (1). *Cozens-Hardy* M.R. expressly refrained from expressing an opinion. *Farwell* L.J. was clear that the invalidity was carried on into the new contract. *Kennedy* L.J. was as clear the other way. In *H. Bowen & Co.* v. *Samuels* (2), as already cited, *Bankes* L.J. was clearly of the same opinion as *Kennedy* L.J. in the former case. He said, speaking of the third agreement :—" *That agreement formed no part of the original transaction* which was said to be illegal. Therefore, even assuming that the appellant was right in saying that the first transaction was illegal, that *did not affect the validity of the third transaction.*" *Pickford* L.J. said nothing as to that point. The reason given by *Bankes* L.J. appears to me on principle absolutely decisive, and I determine this point also in appellant's favour.

(3) This question involves the decision of Lord *Parker* (then *Parker* J.) in *Lodge* v. *National Union Investment Co.* (3). If that decision is sound, the answer to the third question must be that the decree must be amended by making it accord with that decision. *Parker* J. said (4) : " I do not think it is either *æquum* or *bonum* that the plaintiff, who has had the benefit of the £1075 and who is relying on the illegality of the contract and the exception enabling him to sue notwithstanding such illegality, should have relief without being put on terms by which both parties may be restored to the positions they occupied before the transaction commenced." The correctness of the decision was challenged before us. The authority of Lord *Parker*, on a question of equity, is itself no light matter. It is true that in the course of his judgment he considered that an action for money had and received was analogous to a claim for equitable relief, and it is also true that since *Sinclair* v. *Brougham* (5) that analogy cannot be maintained. But that only affects the judgment so far as it relates to the common law rights of the borrower, that is, as to the £150 there claimed. The rest of the action was expressly dealt with by the learned Judge as a purely equitable action (6).

(1) (1911) 2 K.B. 992.
(2) (1918) 34 T.L.R. 487.
(3) (1907) 1 Ch. 300.
(4) (1907) 1 Ch., at p. 312.
(5) (1914) A.C. 398.
(6) (1907) 1 Ch., at p. 311.

There is nothing in the present action standing in the position of the £150 there, but it is, as claimed, all equitable. And, for reasons presently appearing, the power of the Equity Court in New South Wales is not coextensive with the power of a Court in England or elsewhere in Australia. The part of Lord *Parker's* judgment which has relevance for us is that which concerns the claim for equitable relief, that is, as he puts it (1), " an appeal to the equitable jurisdiction of the Court." On that basis I regard the decision as unquestionably sound. It is an inherent doctrine of equity jurisprudence that the active assistance of equity is given only where the plaintiff is prepared himself to act conscientiously as to the matters in respect of which the assistance is invoked. In addition to the cases cited on this point by *Parker* J., I would instance the clear enunciation of principle by *Giffard* L.J. in *In re Cork and Youghal Railway Co.* (2): " Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a Court of equity as it is in a Court of law." The reason of the latter branch of the statement is stated by Lord *Hatherley* in the same case (3), that " if a thing be forbidden expressly " (and Lord *Dunedin* in *Whiteman* v. *Sadler* (4) adds " or impliedly ") " by Act of Parliament, that Act can no more be contravened by this Court than by any other Court of judicature in the kingdom." Actively to enforce an illegal contract would be to contravene the statute. To refuse to set it aside, either wholly or except on terms, and then to leave parties otherwise to their legal rights, is no contravention, because there is no *statutory* right to have the contract immediately set aside by decree. On principle, as settled by prior authority, *Lodge's Case* (5) so far as it relates to relief in equity is unassailable. And as to that it has never been questioned in any way. On the contrary, Lord *Phillimore* (when *Phillimore* J.) expressly approved of it. I find in a note in the book on the *Money-lenders Act* 1900 (ed. of 1910) by *Matthews and Spear*, at pp. 178-179, that *Phillimore* J. in *Furber* v. *Fieldings Ltd.*, reported in the *Times Law Reports* (6),

(1) (1907) 1 Ch., at p. 306.
(2) (1869) L.R. 4 Ch. 748, at p. 762.
(3) (1869) L.R. 4 Ch., at p. 758.
(4) (1910) A.C., at p. 525.
(5) (1907) 1 Ch. 300.
(6) (1907) 23 T.L.R. 362.

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added what is not there reported:—He said, referring to *Lodge's Case* (1), that "the point which *Parker* J. decided would be sufficient in this case, namely, that the man who seeks to recover that property, and who appealed to the *equitable provisions* of the Money-lenders Act, must do equity: *he must therefore offer to replace the grantee of the property in the position in which he was before the illegal contract was entered into.*" It is not a question whether the instrument is inherently bad, for, if it is, there is no need for equity to say so; nor is it a question whether the defendant claims in his defence to be replaced in his former position: it is an essential part of the plaintiff's duty to offer to replace him; and it is an inescapable duty of the Court to make its decree conform to equity and good conscience. That is the essence of a decree.

(4) The fourth question concerns a vital change in equity jurisdiction. It brings into prominence *the radical difference between the present judicial systems of England and New South Wales.* That difference makes the case of *Chapman* v. *Michaelson* (2) wholly inapplicable to this appeal; and yet, without it, a declaration *simpliciter* that the contract is void, clearly could not be made on the facts of this case. That decision rests on two considerations, namely, (a) the *Judicature Act* substituting one High Court for the former common law and chancery Courts and (b) Order XXV., rule 5, of the Judicature Rules. The first is wholly inapplicable in New South Wales; the second was inapplicable when the decree was made. The absence of either is fatal. It is, at all events, incontestable that the Chief Judge in Equity in New South Wales, exercising the jurisdiction of the Supreme Court, so far as that is conferred upon him by statute—*Equity Act* 1901—has an equitable jurisdiction only (see *Merrick* v. *Ridge* (3), *Brindley* v. *Scott* (4), *Maiden* v. *Maiden* (5) and *Cobar Corporation Ltd.* v. *Attorney-General for New South Wales* (6)). If, incidental to equitable relief, it is found necessary to decide legal rights, there is power by sec. 8 to do so. But the history of that section and of sec. 10 and the decisions upon them show that there is no jurisdiction in the Court of Equity to make a declaration of legal right *simpliciter.*

(1) (1907) 1 Ch. 300.
(2) (1909) 1 Ch. 238.
(3) (1897) 18 N.S.W.L.R. (Eq.) 29.
(4) (1902) 2 S.R. (N.S.W.) (Eq.) 49.
(5) (1908-09) 7 C.L.R., at pp. 742, 745.
(6) (1909) 9 C.L.R. 378, at pp. 402, 403.

First as to the English decisions. In *Birkenhead Docks Trustees* v. *Laird* (1), under statutory provisions substantially identical in effect and, in part, also in words, *Turner* and *Knight Bruce* L.JJ. held that a decree was not warranted that contained "a declaration of a mere legal right, and does not give any equitable relief." It was added: "If we should think that an injunction ought to be granted, the difficulty might be removed." In that case the injunction, being "relief," would be governed by equitable considerations, because a Court of equity is not, in regulating the rights of the parties, "entitled indirectly to effect that which you could not do directly" (Lord *Hatherley* L.C. in *Dolphin* v. *Aylward* (2)). In *Webb* v. *Byng* (3) the law as in *Birkenhead Docks Trustees* v. *Laird* was confirmed; so too per Lord *Cranworth* L.C. in *De Windt* v. *De Windt* (4). The same view is expressed in *Seton* (6th ed., p. 166) on the authority of *Birkenhead Docks Case*. See also *Brooking* v. *Maudslay, Son & Field* (5). Until the *Judicature Act* was introduced in England that was adhered to, and for some time afterwards the full effect of the change was not perceived. There never was previously to the *Judicature Act* "jurisdiction to entertain a species of action of declarator" which would enable the Court to make declarations on legal as well as on equitable questions (per *Kindersley* V.C. in *Jackson* v. *Turnley* (6) and per *Page Wood* V.C. in *Rooke* v. *Lord Kensington* (7)). It even required the Act 15 & 16 Vict. c. 86 to enable a declaration to be made in a purely equitable matter without giving consequential relief (8) (see per Lord *Davey* in *Barraclough* v. *Brown* (9)). And that is the law applicable to this case (sec. 10 of the *Equity Act* 1901). But, as explained by the Court of Appeal in *Chapman* v. *Michaelson* (10), the joint operation of the *Judicature Act* and the new Order XXV., rule 5, vests in the "High Court and not" in "one division of the High Court to the exclusion of the other" (11) a novel practice. That

(1) (1853) 4 DeG. M. & G. 732, at p. 738.
(2) (1870) L.R. 4 H.L. 486, at p. 502.
(3) (1856) 8 DeG. M. & G. 633, at pp. 638, 639.
(4) (1866) L.R. 1 H.L. 87, at p. 91 (last two lines).
(5) (1888) 38 Ch. D. 636, at pp. 643, 644.
(6) (1853) 1 Drew. 617, at pp. 626, 627.
(7) (1856) 2 Kay & J. 753, at pp. 760, 761.
(8) (1856) 2 Kay & J., at p. 761.
(9) (1897) A.C. 615, at p. 623.
(10) (1909) 1 Ch. 238.
(11) (1909) 1 Ch., at p. 243.

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novel practice is really what was formerly alluded to as " an action of declarator." It is statutory and general. It does not depend on equity practice, or on equity jurisdiction, or on equitable rights. The action in *Chapman* v. *Michaelson* (1), said the Master of the Rolls, " might perfectly well have been brought in the common law Courts." This view was really expressed by Lord *Macnaghten* in *Colls* v. *Home and Colonial Stores Ltd.* (2), and is distinctly recognized in the House of Lords in *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* (3). It is, of course, always discretionary in the judicial sense, and therefore is not necessarily accompanied with conditions. That depends upon the circumstances. But it is not in itself equitable relief "—it is not " equitable " jurisdiction at all—and, therefore, is not subject for *that reason* to the doctrine of *Lodge* v. *National Union Investment Co.* (4). The New South Wales cases and course of legislation conclusively establish that no reliance can be placed on the final clause in sec. 8 for a jurisdiction wide enough to cover a simple declaration of nullity on purely legal grounds. Forcible reasons of mere construction lead to this conclusion. If that clause were to be read as wide enough to enable the Court of Equity to declare any contract good or bad, binding or dissolved, and in whole or in part, simply on common law grounds without a recognized equitable basis of right or remedy, then the following results would ensue :—First, the rest of sec. 8 would be surplusage. Next, it would in many cases mean the abolition of juries, and would be enabling one Judge sitting in the Equity Court to do without a jury what a Judge sitting on the common law side could not—apart from consent—do even with a jury, namely, give a judgment on the claim. It would be strange indeed if, with or without some alleged equitable ground which if alleged failed, a plaintiff could obtain a declaration, say, that a " bill of exchange " or a commercial contract of sale of goods or a promise of marriage was or was not valid or binding, leaving for a common law Court nothing but to assess damages or enter up appropriate judgment. Those closing words mean merely that, when

(1) (1909) 1 Ch. 238, at p. 242.
(2) (1904) A.C. 179, at p. 188.
(3) (1921) 2 A.C. 438.
(4) (1907) 1 Ch. 300.

exercising the new common law powers permitted by sec. 8, no objection shall prevail that the *remedy* in respect of the common law rights so dealt with is to be found elsewhere. But the matter has gone far beyond conjecture. The final clause in question appeared as part of sec. 4 of the Act of 1880. In 1891 the Chief Judge in Equity (*Owen* J.) held (*Cameron* v. *Cameron* (1)) that "The Primary Judge sits in this Court to exercise the jurisdiction of the Supreme Court in equity, and it is only for that purpose that he can sit here, but under sec. 4 his powers in any suit or proceeding in equity are extended so as to *enable him to deal incidentally with matters arising in an equity suit, which but for that section must have been dealt with by the common law Courts.*" His Honor held, therefore, that he had no concurrent common law jurisdiction. That was followed in 1897, in terms which if possible are still more emphatic, in *Merrick* v. *Ridge* (2), by A. H. Simpson C.J. in Equity. The learned Judge says (*inter alia*): "The right to have purely legal questions decided is dependent upon the plaintiff having a good equitable right to start with." In 1901, with these distinct and definite decisions standing, unappealed from, and governing the daily practice of the Supreme Court, the Legislature re-enacted in sec. 8 of the new Act the identical provisions so interpreted. With such judicial and legislative authority before us, it seems to me impossible to maintain in New South Wales the doctrine of *Chapman* v. *Michaelson* (3). It is therefore a cardinal error to argue that the Equity Court of New South Wales, merely by making a declaration of avoidance, can affect the common law rights of the parties, or may disregard the most deeply-rooted equitable doctrines for securing justice between them. If it can, then by *Chapman* v. *Michaelson*, avowedly based on a totally different jurisprudence, an unexpected and vital innovation has been introduced in this State.

The declaration, then, must be taken either as made without jurisdiction or as an ordinary exercise of equitable jurisdiction with the consequence of *Lodge's Case* (4). And the fourth question should be answered, like the rest, adversely to the respondent.

(1) (1890-91) 12 N.S.W.L.R. (Eq.) 135, at p. 141.
(2) (1897) 18 N.S.W.L.R. (Eq.), at p. 30.
(3) (1909) 1 Ch. 238.
(4) (1907) 1 Ch. 300.

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In my opinion, on the whole case, the appeal should be allowed and judgment entered for the appellant, without prejudice to any proceeding that may be advised or desired, whether on the taking of the accounts or otherwise, to reopen the transaction on the ground of excessive interest or charges as provided by sec. 1 of the Money-lenders Act.

Appeal dismissed with costs.

Solicitors for the appellant, *W. D. Schrader & McFadden.*

Solicitors for the respondent, *Dawson & Herford.*

B.L.

Dist *Vic Employers Fed v Registrar of Industrial Relations* [1983] 2 VR 395

Cons *R v Sweenwy; Ex p Northwest Exports* (1981) 147 CLR 259

Cons *AMIEU, Re; Ex parte Aberdeen Beef Co* (1993) 67 ALJR 363

Cons *AMIEU, Re; Ex parte Aberdeen Beef Co* (1993) 176 CLR 154

Expl *R v Graziers Association of NSW; Ex parte Aust Workers Union* (1956) 96 CLR 317

Appl *Amalgamated Engineering Union v Metal Trades Employers' Assoc* (1935) 53 CLR 658

Cons *R v Kelly; Ex parte State of Victoria* (1950) 81 CLR 64

Cons *Metal Trades Employers Assoc v Amalgamated Engineering Union* (1935) 54 CLR 387

[HIGH COURT OF AUSTRALIA.]

BURWOOD CINEMA LIMITED AND OTHERS APPLICANTS;

AGAINST

THE AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION . . . . . RESPONDENT.

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SYDNEY, *Dec.* 8, 9, 1924; *May* 1, 1925.

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

Industrial Arbitration—Industrial dispute—Demand by organization of employees—Employer not employing members of organization—Employees satisfied with conditions of labour—Constitutional law—Extent of legislative power of Commonwealth—The Constitution (63 & 64 *Vict.* c. 12), *sec.* 51 (XXXV.)—*Commonwealth Conciliation and Arbitration Act* 1904-1920 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 4, 29, 40.

Held, by *Isaacs, Powers, Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that where a demand as to wages and conditions of labour is made on behalf of its members by an organization, registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1921, of employees in a particular industry upon a number of employers engaged in that industry, the fact that certain of those employers do not employ any members of the organization or that all