[HIGH COURT OF AUSTRALIA.]

LANGMAN . . . . . APPELLANT;
PLAINTIFF,

AND

HANDOVER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1929.

SYDNEY, *Nov.* 13, 14; *Dec.* 12.

Knox C.J., Isaacs, Rich, Starke and Dixon JJ.

Money-lender—Advances by unregistered money-lender—Securities therefor—Void transactions—Suit by borrower in New South Wales Supreme Court in equity—Pleading—Statement of claim—Demurrer thereto—Claim that securities be declared void—Allegations of fact—Claim for declaration of legal right—Equitable relief—No offer to repay advances—Consequential relief—Money-lenders and Infants Loans Act 1905 (*N.S.W.*) (*No.* 24 *of* 1905), *secs.* 2, 8—*Equity Act* 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *sec.* 10*—*Administration of Justice Act* 1924 (*N.S.W.*) (*No.* 42 *of* 1924), *sec.* 18*.

The statement of claim in a suit brought in the Supreme Court of New South Wales in its equitable jurisdiction alleged only that the defendant, while an unregistered money-lender within the meaning of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.), in the course of his business as a money-lender made certain advances to the plaintiff and obtained from her as security for the repayment thereof certain stock mortgages and a lien on certain crops. The plaintiff claimed declarations (1) that these transactions were transactions of money-lending by a money-lender and (2) that the securities given by the plaintiff were void; and the plaintiff also prayed that she might have such further or other relief as the nature of the case might require. The defendant demurred to the statement of claim. The Supreme Court (*Long Innes* J.)

* The *Equity Act* 1901 (N.S.W.) provides by sec. 10, as amended by the *Administration of Justice Act* 1924 (N.S.W.), sec. 18, as follows: "No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

overruled the demurrer, but the Full Court of the Supreme Court, on appeal, reversed the decision of the Court below. On appeal to the High Court,

Held, that the appeal should be dismissed on the ground that the statement of claim disclosed nothing more than a claim for the declaration of a legal right, and disclosed no equity inasmuch as it contained no offer to do equity by repaying the money borrowed.

Schnelle v. *Dent*, (1925) 35 C.L.R. 494, distinguished.

David Jones Ltd. v. *Leventhal*, (1927) 40 C.L.R. 357, followed.

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

Decision of the Supreme Court of New South Wales (Full Court): *Handover* v. *Langman*, (1929) 29 S.R. (N.S.W.) 435, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court of New South Wales in its equitable jurisdiction by Violet Ellen Ruth Langman against William Handover, in which the statement of claim was substantially as follows:—

1. From the year 1924 to the present date the defendant has carried on and held himself out as carrying on the business of a money-lender within the meaning of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.), but has never registered himself as a money-lender under the said Act.

2. In October 1925 the defendant in the course of his said business as a money-lender, in consideration of advances to the plaintiff to the amount of £80, obtained from her the security of a stock mortgage over 50 cattle dated 29th October 1925, which was filed and registered under the *Liens on Crops and Wool and Stock Mortgages Act* 1898 (N.S.W.) on 20th November 1925.

3. In April 1927 the defendant in the course of his said business as a money-lender, in consideration of advances to the plaintiff to the amount of £400, obtained from her the security of a stock mortgage over 650 sheep dated, filed and registered on 21st April 1927, under the *Liens on Crops and Wool and Stock Mortgages Act* 1898. The said advances were already partly secured to the defendant by a registered crop lien dated 30th September 1926 securing an advance of £300 and further advances, made and taken by the defendant in the course of his business as a money-lender.

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The plaintiff claimed :—

(1) That the above-mentioned transactions may be declared to be transactions of money-lending by a money-lender;

(2) That the said stock mortgages and crop lien may be declared to be and to have been void and of no effect;

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

In addition to entering an appearance and disputing the whole of the plaintiff's claim, the defendant demurred to the statement of claim, the grounds of the demurrer being (1) that the statement of claim discloses no equity to any relief in this honourable Court; (2) that this honourable Court has no jurisdiction to entertain this suit; (3) that this honourable Court has no jurisdiction to make a declaration of right except in proceedings for equitable relief or relating to equitable rights or titles. At the hearing before *Long Innes* J. a fourth ground was taken orally, that if the suit can be regarded as one for equitable relief it is demurrable because the plaintiff does not in the statement of claim offer to do equity.

During the hearing plaintiff's counsel disclaimed any intention of asking for any equitable relief under the third prayer in the statement of claim.

The demurrer was overruled, but an appeal from this decision was allowed by the Full Court of the Supreme Court: *Handover* v. *Langman* (1).

From the decision of the Full Court the plaintiff now, by special leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Hill, for the appellant. The statement of claim is not demurrable on the ground that a Court of equity has no jurisdiction to entertain it. This is a suit for equitable relief; although such relief was not asked for, it could have been granted by the Court. The securities being illegal, they would form a cloud on the title to the stock (*Halsbury's Laws of England*, vol. XIII., p. 53), and the appellant was entitled to come to equity and to ask for the documents to be delivered up, therefore the Equity Court could grant the relief sought.

(1) (1929) 29 S.R. (N S W.) 435.

It is not necessary for a party in such a position to wait until an action is commenced at law (*McDonnell* v. *Coles* (1); *Ryan* v. *Mackmath* (2)). The appellant has established an equity entitling her to come to the Equity Court for relief (*Tooth & Co.* v. *Coombes* (3)). The test as to whether a person is entitled to seek a declaratory decree is the jurisdiction of the Court to grant it (*David Jones Ltd.* v. *Leventhal* (4)). The question whether consequential relief could or could not be given is immaterial. If the appellant had a right to such relief under sec. 10 of the *Equity Act* 1901 (N.S.W.) it is not necessary for her to ask for it.

[ISAACS J. referred to *David Jones Ltd.* v. *Leventhal* (5).]

As the aid of the Court was properly invoked, the power conferred on the Court by that section might have been exercised. Although the appellant could have done so, she was not bound to ask that the documents be delivered up for cancellation. Consequential relief need not now be asked for (*Walsh* v. *Alexander* (6); *Jackson* v. *Turnley* (7)). On the statement of claim as now appearing the appellant could ask at the hearing for delivery up of the documents for cancellation. If the facts disclose that equitable relief could be asked for, that is sufficient to entitle the appellant to come to the Equity Court for relief. The appellant comes within the decision in *Rooke* v. *Lord Kensington* (8) inasmuch as although she could have asked for consequential relief she was not bound to do so and the Court was not bound to grant such relief. *Tooth & Co.'s Case* (9) did not say that the relief must be asked for. The appellant has only to disclose a right in her statement of claim to bring her within sec. 10 of the *Equity Act*. The statement of claim is not demurrable on the ground that it does not offer to do equity (*Daniell's Chancery Practice*, 4th ed., p. 354). The decisions in the cases of *Scott* v. *Nesbit* (10), *Whitmore* v. *Francis* (11) and *Mason* v. *Gardiner* (12) are distinguishable, as they were made prior to

(1) (1923) 23 S.R. (N.S.W.) 299, at p. 301.
(2) (1789) 3 Bro. C.C. 15, at p. 18; 29 E.R. 380.
(3) (1925) 42 N.S.W.W.N. 93, at p. 94.
(4) (1927) 40 C.L.R. 357.
(5) (1927) 40 C.L.R., at p. 368 (*Knox* C.J.).
(6) (1913) 16 C.L.R. 293.
(7) (1853) 1 Drew. 617; 61 E.R. 587.
(8) (1856) 2 Kay & J 753; 69 E.R. 986.
(9) (1925) 42 N.S.W.W.N. 93.
(10) (1789) 2 Bro. C.C. 641; 29 E.R. 355.
(11) (1820) 8 Price 616; 146 E.R. 1314.
(12) (1793) 4 Bro. C.C. 436; 29 E.R. 976.

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the *Chancery Procedure Act* 1852, and also because money was due in those cases whereas here no money is due because the securities are illegal. Neither in words nor in terms does the third prayer in the statement of claim make a claim for consequential relief, although perhaps such relief could be given under it. A claim for consequential relief must specifically set out the nature of the relief sought.

[ISAACS J. referred to *Cockerell* v. *Dickens* (1).]

In *Chapman* v. *Michaelson* (2) the plaintiff was not put upon terms as to doing equity although under the *Judicature Act* the rules of equity prevail.

[DIXON J. referred to *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.* (3).]

The granting of a declaration of a legal right is a matter of discretion and is quite apart from the question of jurisdiction (*Schnelle* v. *Dent* (4)). The securities are invalid, and on the facts before it the Court has power to make a declaration of right (*Chapman* v. *Michaelson* (5)). The power of the Court to order a plaintiff to do equity is a discretionary power, and therefore the question as to its exercise cannot arise on a demurrer. It is not necessary for the statement of claim to contain an offer to do equity (*Schnelle* v. *Dent*; *Chapman* v. *Michaelson* (6) ; *Whitmore* v. *Francis* (7)).

[STARKE J. referred to *Story* on *Equity Jurisprudence*, 3rd ed., pars. 698-701, as to the right to equitable relief.]

Browne K.C. (with him *Sheppard*), for the respondent. On a demurrer a Court is not entitled to draw any inferences of fact (*Lubrano* v. *Gollin & Co. Pty. Ltd.* (8)). There should have been an allegation of ownership on the part of the appellant at the time the securities were given, and that such ownership subsisted at the time the suit was commenced. Such allegations have not been made. The documents in question are not before the Court. An order to deliver up documents is made under the *quia timet* jurisdiction of the Court, and before such jurisdiction can be invoked there must

(1) (1840) 1 Mont. D. & DeG. 45, at p. 81.
(2) (1909) 1 Ch. 238.
(3) (1921) 2 A.C. 438.
(4) (1925) 35 C.L.R. 494.
(5) (1908) 2 Ch. 612, at p. 619.
(6) (1908) 2 Ch. 612; (1909) 1 Ch. 238.
(7) (1820) 8 Price 616; 146 E.R. 1314.
(8) (1919) 27 C.L.R. 113, at p. 118.

be an allegation of fear or danger (*Barrett* v. *Day* (1)). The allegation as to a blot on title has no relation to personal property. Material facts on which the claim is based must be alleged in the pleadings (*Daniell's Chancery Practice*, 5th ed., p. 267 ; *Mitford* on *Pleading*, p. 154). Where the jurisdiction of the Court depends on fear, facts showing such fear must be stated in the pleadings (*Story* on *Equity Jurisprudence*, 3rd ed., p. 296, pars. 700-702). Anticipation of a danger presupposes there is a danger existing, and that is an essential ingredient in a statement of claim (*Halsbury's Laws of England*, vol. XIII., pp. 42, 52). A right to a declaration is not itself an equity. There being no allegation as to fear, the claim is a purely legal one and cannot be founded in equity (*David Jones Ltd.* v. *Leventhal* (2)). The prayer for general relief must be included in the pleadings (*Equity Rule* 82 ; *Rich, Newham and Harvey, Practice in Equity* (N.S.W.), p. 116). Such prayer must be regarded as a claim for all appropriate relief other than the relief that has been specifically prayed for. The Court will take cognizance of the fact that in the Court of first instance the appellant, by her counsel, disclaimed any intention of asking for any equitable relief under the prayer for general relief ; the prayer could not be struck out as the statement of claim had been demurred to. In effect the appellant asked that the Court deal with the matter as if a claim for such relief were not included.

[STARKE J. referred to *Chapman* v. *Michaelson* (3).]

An allegation of invalidity and nothing more does not lay a foundation for a suit in equity. The procedure in the English Courts is different from the procedure in force in New South Wales, and therefore the case of *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.* (4) is distinguishable (*Tooth & Co.* v. *Coombes* (5)).

[DIXON J. referred to *Chapman* v. *Michaelson* (6) ; *Bromley* v. *Holland* (7).

[ISAACS J. referred to *Victorian Daylesford Syndicate Ltd.* v. *Dott* (8).]

(1) (1890) 43 Ch. D. 435, at p. 449.
(2) (1927) 40 C.L.R. 357.
(3) (1908) 2 Ch. 612 ; (1909) 1 Ch. 238.
(4) (1921) 2 A.C. 438.
(5) (1925) 42 N.S.W.W.N., at p. 94.
(6) (1908) 2 Ch. 612.
(7) (1802) 7 Ves. 3 ; 32 E.R. 2.
(8) (1905) 2 Ch. 624.

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It was decided in *Bromley* v. *Holland* (1) that money could be recovered at law even if the documents were not registered in accordance with the relevant Act and were therefore void. Under what are known as the "usury cases," and also in "annuity cases," relief was granted only on terms; which is in accord with the principle followed in *Lodge* v. *National Union Investment Co.* (2). The intention of the Legislature was that, when a money-lender lends money without complying with the provisions of the *Money-lenders and Infants Loans Act*, his chance of recovering the money so lent should not receive assistance by process at law but should depend on the moral obligation of the borrower.

[DIXON J. referred to *Hanson* v. *Keating* (3), followed and discussed in *Gibson* v. *Goldsmid* (4); *United States of America* v. *McRae* (5).]

There is no conflict between the decision in *Lodge* v. *National Union Investment Co.* (2) and the decision in *Chapman* v. *Michaelson* (6). In the latter case all three Justices point out that there was no equitable claim: the Court was simply administering legal rights and, of course, in those circumstances could not act on equitable principles. Similarly there is no conflict between the decision in *Schnelle* v. *Dent* (7) and *Lodge's Case*, as in the former case purely legal questions arose during the course of a suit in equity and were dealt with by the Equity Court by reason of sec. 4 of the *Equity Act*. As to whether it is necessary to allege in the pleadings an offer to do equity, see *Mason* v. *Gardiner* (8); *Ex parte Scrivener* (9). A person seeking relief must aver readiness and willingness to perform the contract (*Walker* v. *Jeffreys* (10), followed in *McDonald* v. *McMullen* (11)).

[KNOX C.J. But that was a suit for specific performance, where such an averment is essential.

[ISAACS J. referred to *United States of America* v. *McRae* (5).

[DIXON J. referred to *Jervis* v. *Berridge* (12).]

(1) (1802) 7 Ves. 3; 32 E.R. 2.
(2) (1907) 1 Ch. 300.
(3) (1844) 4 Ha. 1; 67 E.R. 537.
(4) (1854) 5 DeG. M. & G. 757; 43 E.R. 1064.
(5) (1867) 3 Ch. App. 79.
(6) (1908) 2 Ch. 612; (1909) 1 Ch. 238.
(7) (1925) 35 C.L.R. 494.
(8) (1793) 4 Bro. C.C. 436; 29 E.R. 976.
(9) (1814) 3 V. & B. 14; 35 E.R. 384.
(10) (1842) 1 Ha. 341, at p. 352; 66 E.R. 1064.
(11) (1908) 25 N.S.W.W.N. 142.
(12) (1873) 8 Ch. App. 351.

Hill, in reply. The Court can take cognizance of facts which may be implied from the facts alleged in the statement of claim (*Lubrano* v. *Gollin & Co. Pty. Ltd.* (1)). Facts not stated in the statement of claim which are matters of inducement need not be pleaded. As to whether the stock forming the security are still in existence, the doctrine of continuance would apply (*Taylor on Evidence*, 11th ed., pars. 196, 197). This is not a suit *quia timet*: it does not arise from any threat or menace to the appellant (*Halsbury's Laws of England*, vol. XIII., par. 59). Until cancelled the documents are a source of danger, which is distinguishable from a cause of danger (*Halsbury's Laws of England*, vol. XXI., p. 52, par. 100; *Victorian Daylesford Syndicate Ltd.* v. *Dott* (2)).

[ISAACS J. referred to *In re Robinson*; *Clarkson* v. *Robinson* (3), as to the rights of an assignee for value without notice.]

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered:—

KNOX C.J. This is an appeal by leave from an order of the Supreme Court allowing a demurrer to the statement of claim. The relevant portions of the statement of claim and the grounds of the demurrer are set out at length in the reasons of the Supreme Court (*Handover* v. *Langman* (4)) and need not be repeated here. The questions argued before this Court were (1) whether the allegations in the statement of claim disclose any right to equitable relief or relief relating to an equitable right or title, and (2), if so, whether the statement of claim is demurrable on the ground that it contains no offer to repay to the defendant the sums advanced by him to the plaintiff.

The statement of claim alleges no more than that defendant, while an unregistered money-lender within the meaning of the *Money-lenders and Infants Loans Act*, in the course of his business as a money-lender made certain advances to the plaintiff and obtained from her as security for the repayment thereof certain mortgages and a lien on crops. It claims declarations (a) that those transactions were transactions of money-lending by a money-lender and

(1) (1919) 27 C.L.R., at p. 118.
(2) (1905) 2 Ch. 624.
(3) (1911) 1 Ch. 230.
(4) (1929) 29 S.R. (N.S.W.) 435.

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(b) that the securities given by the plaintiff are void and of no effect. In compliance with the *Equity Rules* a prayer for further or other relief is added, but on the argument of the demurrer the plaintiff disclaimed any intention of asking for any equitable relief under this prayer. The facts alleged, if taken to be true, establish that the transactions and securities in question are void under the provisions of the Money-lenders Act, but they establish no more. The statement of claim contains no allegation that the animals comprised in the securities belonged to the plaintiff or that they or any of them were in existence at the time when the suit was instituted. Nor is it alleged that the defendant retained the securities or had refused to give them up or that he threatened or intended to enforce or assign his securities, or that he claimed any interest in the live-stock or denied the plaintiff's title thereto or that any facts existed which would entitle the plaintiff to come for equitable relief in the nature of an injunction. In my opinion the statement of claim, fairly construed, is nothing more than a claim for the declaration of a legal right, and the case is covered by the decision in this Court in *David Jones Ltd.* v. *Leventhal* (1). This is sufficient to dispose of the case, but as the other question was argued at length and is dealt with fully in the reasons given by my brothers *Isaacs*, *Rich* and *Dixon*, I think it right to say that I adhere to the principle on which *Lodge's Case* (2) was decided, namely, that where a borrower seeks *equitable* relief in respect of a transaction void under the Money-lenders Act, it is incumbent on him to offer in his statement of claim to do equity: Having had the advantage of reading the judgment about to be published by my brothers *Rich* and *Dixon*, I agree with the reasoning by which they support their conclusion on this point.

As I took part in the decision of this Court in *Schnelle* v. *Dent* (3) I may add that I agree with *Harvey* C.J. in Eq. in the reasons given by him for thinking that the decision of the Court in that case was not in any way inconsistent with the decision of *Parker* J. in *Lodge's Case* (2).

In my opinion the appeal should be dismissed.

(1) (1927) 40 C.L.R. 357.
(2) (1907) 1 Ch. 300.
(3) (1925) 35 C.L.R. 494.

Isaacs J. *Harvey* J., in delivering the judgment of the Full Court of New South Wales, said (1):—"It appears to me that the plaintiff is substantially in this dilemma: either this is not a suit for equitable relief, in which case his suit is demurrable under the authority of *David Jones Ltd.* v. *Leventhal* (2), or it is a suit for equitable relief, in which case it is demurrable for not containing an offer to do equity. It cannot be successfully contended that a suit which asks merely for a declaration of a legal right is a suit for equitable relief." That statement very properly looks at the real substance of the matter, and is a perfectly sound presentation of the situation.

As the suit is obviously not based on an equitable title or claim, but on the purely statutory ground of invalidity, the first branch of that statement is incontestable. Learned counsel for the appellant certainly endeavoured to escape from that position. It was said that, though there was not actually any claim for equitable relief, there might have been, and that was enough. That, even if the pleading sustained the assumption, is contrary to *David Jones Ltd.* v. *Leventhal* (2). According to that case, equitable intervention must be actually sought either to vindicate an equitable right or title, or to obtain equitable relief in relation to a legal right or title. The claim for a declaration of invalidity must be made in a "suit," and where the right insisted on is legal such a claim cannot itself constitute a suit. Nothing could place the position more clearly, may I add more accurately, than it is stated in the judgment of the learned Chief Justice in the case mentioned (3). The appellant's argument would open the door of the Equity Court to an endless variety of common law cases, merely because equitable intervention not asked for might have been sought. For instance, the vendor of land could sue on his contract for an overdue instalment of purchase-money *simpliciter*, merely because he might have claimed specific performance. Damages for trespass to land could be obtained without a jury on the ground that a claim for an injunction to restrain repetition could have been added. And so on *ad infinitum*. But does the pleading sustain the assumption that the facts stated raise

(1) (1929) 29 S.R. (N.S.W.), at pp. 447-448.
(2) (1927) 40 C.L.R. 357.
(3) (1927) 40 C.L.R., at p. 368.

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an equity on which a claim for equitable relief could have been founded ? I am of opinion that Mr. *Browne's* contention that they do not is correct. There is no allegation of any negotiable instrument, such as a promissory note or bill of exchange. There is no allegation or suggestion that the respondent intends, or that the appellant anticipates any intention on the part of the respondent, to assign the mortgages. The mortgages are not of land, and do not come within the doctrine of clouding a title. If they were assigned, we do not know their contents and, as *Long Innes* J. said, it cannot be held on the allegations in the statement of claim that they are a menace to the appellant. As to the necessity of danger, see *Fisher* v. *Hughes* (1). Sec. 15 of the *Liens on Crops and Wool and Stock Mortgages Act* merely places an indorsee in the same position as the original mortgagee as to right, title and interest. What that amounts to in this case is unknown to the Court. Further, sec. 166 of the *Conveyancing Act* 1919 (No. 6) would require the respondent to indemnify the appellant in case of assignment. But, still further, the mortgages were of live-stock. There is no statement as to whether the 50 animals mortgaged in October 1925, or the 650 sheep mortgaged in April 1927, ever belonged to the appellant; or, if they did, whether they are now in existence or have had any progeny. In my opinion, the statement of claim leaves the matter in conjecture, and consistent with there being no menace to the appellant if the mortgage documents remain in the possession of the respondent. I may add that the presumption of continuance of the life of the stock is one of evidence, and might serve at the trial to uphold an allegation of continued existence if that were found in the statement of claim. But, in my opinion, the allegation would be necessary if the relief of delivery for cancellation were claimed. The first horn of the dilemma is, in my opinion, fatal to the appeal (see *Maine and New Brunswick Electrical Power Co.* v. *Hart* (2)).

But the second has been vigorously argued, and is perhaps the more important, because it is not escapable by the mere use of words in the pleading. Though it has been split up in argument into two inquiries, namely, the necessity of an offer to do equity,

(1) (1820) 1 Coop. *temp.* Cott. 329; 47 E.R. 879. (2) (1929) A.C. 631, at p. 640.

and the correctness of *Lodge* v. *National Union Investment Co.* (1), it is really at bottom one only, namely, the duty of a plaintiff in entering a Court of equity to seek equitable relief on the ground of illegality to be ready to restore what he gained by the transaction. I must candidly confess that I do not understand, and have never understood, why there should be any hesitation in accepting *Lodge's Case* as good law. To differ from a considered judgment of Lord *Parker* on a principle of equity is in itself a formidable undertaking, to be justified only by a clear manifestation of error. His opinion has stood for twenty-two years, has never been seriously challenged, on the contrary has been approved of, and where distinguished it has been distinguished in a way that is rather a recognition of its accuracy; and, for my part, the exploration of foundations to which I have been driven by the arguments in this case, has satisfied my mind that the position of *Lodge's Case* is impregnable. If I am wrong, I must be content *cum Platone errare.* Lord *Parker's* opinion, after considering a great many relevant authorities, was expressed as late as the year 1907, and is contained in the following passage (2): "I do not think it is either *æquum* or *bonum* that the plaintiff, who has had the benefit of the £1,075 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.*" It will be observed that the £1,075 was not the "debt" created by the transaction, but the amount of money actually received. The terms imposed were therefore not in conflict with the Money-lenders Act: as the learned Judge said, it was placing both parties back as they were *before* the transaction commenced. Now, what fault can be found with that? I do not propose to re-examine all the authorities referred to in *Lodge's Case,* but some brief references may be usefully made before citing some other judicial pronouncements which fully support Lord *Parker's* decision. In the usury cases, so far as dealt with in equity, the *principle* was that the plaintiff seeking to be relieved had to do

(1) (1907) 1 Ch. 300.

(2) (1907) 1 Ch., at p. 312.

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"what was just" (see per *Thurlow* L.C. in *Scott* v. *Nesbit* (1)). The obligation to pay what was actually paid with legal interest was only a particular instance of the underlying principle. Courts of equity said the plaintiff must pay what was "due." That, it has been said, meant what was due at law. Nothing was due at law on a contract usurious and otherwise illegal *ab initio*. It was an inseparable transaction, and, so, bad throughout. No action could be founded on it (per *Littledale* J. in *White* v. *Wright* (2)), because it is void (per Lord *Mansfield* in *Floyer* v. *Edwards* (3)). Not even a bona fide indorsee without notice of a negotiable instrument given by the borrower upon the usurious consideration could recover anything upon it. (*Lowe* v. *Waller* (4); see also *Morse* v. *Wilson* (5) and per *Lawrence* J. in *Barnes* v. *Hedley* (6).) When, therefore, the word "due" is used by a Court of equity in this collocation, it means equitably due—due as a matter of honesty and conscience. In bankruptcy the rigid rule was adhered to of treating the whole obligation as void and unrelievable. (See *Ex parte Scrivener* (7) and *Ex parte Skip* (8).) This may, at least to some extent, have actuated *Fletcher Moulton* L.J. in *Chapman* v. *Michaelson* (9) on the point of discretion. But in equity, as seen in *Scrivener's Case* and *Skip's Case*, the borrower was compelled, as the price of relief, to pay what was "really due." Equity considered as "really due" in a case of usury, restoration of the money received with some fair interest as compensation for its use in the meantime. Restoration, so far as possible, to the *status quo ante* is the key-note of the doctrine. It is so in all cases of rescission. It is accepted by the House of Lords in *Savery* v. *King* (10). In the case of illegality, that is especially necessary, as Lord *Parker* observed in the passage quoted from *Lodge's Case* (11). A plaintiff, party to an illegality, can sue only in exceptional cases. Here, not being *in pari delicto*, the respondent is not entirely shut out of Court. But to be *rectus in curia*

(1) (1789) 2 Bro. C.C., at p. 649; 29 E.R. 355.
(2) (1824) 3 B. & C. 273, at p. 279; 107 E.R. 735.
(3) (1774) 1 Cowp. 112, at p. 113; 98 E.R. 995.
(4) (1781) 2 Doug. 736; 99 E.R. 470.
(5) (1791) 4 T.R. 353; 100 E.R. 1060.
(6) (1809) 2 Taunt. 184, at p. 190; 127 E.R. 1047.
(7) (1814) 3 V. & B. 14; 35 E.R. 384.
(8) (1752) 2 Ves. 489; 28 E.R. 313.
(9) (1909) 1 Ch., at p. 242.
(10) (1856) 5 H.L.C. 627; 10 E.R. 1046.
(11) (1907) 1 Ch., at p. 312.

he must divest himself as far as he can of all profit by the illegality he comes to disavow. In *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Wright* (1) there was cited a case of *Petherpermal Chetty* v. *Muniandi Servai* (2). It was a case of an illegal transaction and its general nature can be seen by reference to *Wright's Case.* From the judgment of Lord *Atkinson* I re-quote a few words presently apposite (3): "The plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking *to put, everyone as far as possible, in the same position as they were in before that transaction was determined upon.*" That being the true principle, how can a plaintiff coming into Court to claim absolute relief from what he and another have illegally done, manifest to the Court that he purges himself of the illegality in which he has participated and from which he has received a benefit, and so make clear that he comes into the Court of Conscience with clean hands? He certainly cannot, unless he offers to restore, so far as he can, the benefits he has had. The case of *Hanson* v. *Keating* (4) is especially valuable in this case. I shall quote a passage bearing only on the specific point to which I am immediately addressing myself. *Wigram* V.C. says (5):—"If a bill be filed by the obligor in an usurious bond, to be relieved against it, the Court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. . . . The equity of the obligor is to have the entire transaction rescinded. The Court will do this, so as to remit both parties to their original positions; it will not relieve the obligor from his liability, *leaving him in possession of the fruits of the illegal transaction he complains of.*" This has the indorsement of *Turner* L.J. in *Gibson* v. *Goldsmid* (6). *Story* on *Equity Jurisprudence*, par. 301, is to the same effect. See also per *Buller* J. in *Alexander* v. *Owen* (7). That is plain enough. The Court does not, aid illegality if it refuses relief and leaves parties as they already stand before the law. Each has voluntarily parted with property to the other, and the Act and the common law give to neither any

(1) (1917) 23 C.L.R. 185, at p. 197.
(2) (1908) L.R. 35 Ind. App 98.
(3) (1908) L.R. 35 Ind. App., at p. 103.
(4) (1844) 4 Ha. 1; 67 E.R. 537.
(5) (1844) 4 Ha., at pp. 5, 6; 67 E.R. 537.
(6) (1854) 5 DeG. M. & G., at p. 767; 43 E.R. 1064.
(7) (1786) 1 T.R. 225, at p. 227; 99 E.R. 1064.

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right to resume the property parted with (see *Bromley* v. *Holland* (1) and *Mason* v. *Gardiner* (2), in the Lord Chancellor's judgment). And so, to get back the securities given, the borrower must come to the Court of equity claiming to remove either a cloud on title or a danger of later litigation based on those securities. Then, says the Court: "He that will have equity to help where the law cannot, shall do equity to the same party against whom he seeks to be relieved in equity" (*Saint John* v. *Holford* (3)). In *In re Cork and Youghal Railway Co.* (4) *Giffard* L.J. said: "Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks." The conditions which may be imposed are, of course, not arbitrary. The rule as settled by the House of Lords in *Colvin* v. *Hartwell* (5) is that "A man, who comes to seek the aid of a Court of equity to inforce a claim, must be prepared to submit in that suit to any directions which the known principles of a Court of equity may make it proper to give." That accords with *United States of America* v. *McRae* (6), where the limitations are more precisely stated and certainly include the restoration of the money received. In this case, as seen, the directions are, so far, settled beforehand. For this reason the plaintiff must offer the restoration. *Story*, par. 301, already referred to, says so; and that is in accord with all relevant authorities. For instance, *Whitmore* v. *Francis* (7), *Mason* v. *Gardiner* (8). The judgment of Lord *Selborne* L.C. in *Jervis* v. *Berridge* (9) is most instructive as to this. There the Lord Chancellor stated the general rule that a plaintiff in equity suing upon equitable grounds is not bound to offer on the face of his bill to submit to the terms which the Court may think fit on the hearing to impose as the price of relief. No submission is necessary for this purpose, and, if it were, the general prayer for relief would include it. But, as the Lord Chancellor indicates (10), that general rule applies to cases where "the question of terms is one which ought to be determined at the hearing." That general class of suit is represented by

(1) (1802) 7 Ves., at p. 18; 32 E.R. 2.
(2) (1793) 4 Bro. C.C., at p. 438; 29 E.R. 976.
(3) (1668) 1 Chan. Cas. 97; 22 E.R. 712.
(4) (1869) 4 Ch. App. 748, at p. 762.
(5) (1837) 5 Cl. & F. 484, at pp. 522-523; 7 E.R. 488.
(6) (1867) 3 Ch. App., at p. 89.
(7) (1820) 8 Price 616, at p. 619; 146 E.R. 1314.
(8) (1793) 4 Bro. C.C. 436; 29 E.R. 976.
(9) (1873) 8 Ch. App. 351.
(10) (1873) 8 Ch. App., at p. 358.

the ordinary litigation in Courts of equity, such as specific performance, accounts, partnership suits, and so on, where the circumstances have to guide the Court as to the proper and just terms, if any, to impose, should relief be granted. In the course of those observations, it will be noticed, Lord *Selborne* says (1) that "if the relief asked were so certainly and necessarily conditional upon particular terms," then it is a proper matter for a demurrer to the bill for not offering them. That is why the two branches of inquiry as to terms and the necessity of each other, are really one. The Lord Chancellor then refers (2) to certain classes of cases which are outside the general rule and "stand on principles of their own." He says: "There are, indeed, certain cases where a defendant has incurred forfeiture or penalties, or where the controversy relates to usurious or other *unlawful transactions*, in which the whole *locus standi in curia* of the plaintiff is dependent *on an election, which must be declared by the bill, to forgo legal rights for the sake of equitable remedies.*" He goes on to instance still other cases, as redemption suits, in which, unless there be an offer to redeem, the plaintiff is not *rectus in curia*. That is to say, in those exceptional cases the plaintiff has no right to come into a Court of equity having jurisdiction only in equity, and invoke its interposition, unless he declares by his bill that he is prepared on his part to do the required equity in relation to the matter. Lord *Selborne*, as is seen, instances among those exceptional cases controversies relating to usurious and other unlawful transactions. That is direct authority for *Lodge's Case* (3). The "election, which must be declared by the bill, to forgo legal rights for the sake of equitable remedies" (2) is the plaintiff's election to surrender what the law would allow him to keep, if he wishes to obtain the equitable remedy he seeks. The Lord Chancellor in saying this, and Lord *Parker* in deciding as he did, were basing themselves on the fundamental principles already stated relevant to the special class of cases. In accord with this is the opinion of Lord *Phillimore* (then *Phillimore* J.) quoted in *Schnelle* v. *Dent* (4), who, referring to *Lodge's Case*, said that a plaintiff in the position of the present appellant "must do equity; he must therefore offer to replace the

(1) (1873) 8 Ch. App., at pp. 357-358.
(2) (1873) 8 Ch. App., at p. 358.
(3) (1907) 1 Ch. 300.
(4) (1925) 35 C.L.R., at p. 524.

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grantee of the property in the position in which he was before the illegal contract was entered into."

This is, of course, not weakened but rather strengthened by the amending legislation of 1919. That legislation takes the borrower out of the complete legal immunity in which he previously stood and places him in a position of possible responsibility to a third person, though covered by indemnity of the lender. He now comes to a Court of equity for something more than the law gives him. What does equity say in those circumstances? I think Lord *Cottenham* L.C. in *Sturgis* v. *Champneys* (1) answers the question. The Lord Chancellor, in words appropriate to the system still existing in New South Wales, and, after referring to the separate jurisdiction of law and equity, proceeds: "Hence arises the extensive and beneficial rule of this Court, that he who asks for equity must do equity, that is, this Court refuses its aid to give to the plaintiff what the law would give him, if the Courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which this Court would not otherwise enforce." Reading that in conjunction with the limitations to the object of the suit that are settled by *McRae's Case* (2), the rule so stated applies exactly to this case.

In my opinion the appeal should be dismissed.

RICH AND DIXON JJ. The plaintiff appeals, by special leave, from a judgment of the Full Court of the Supreme Court of New South Wales which, reversing the decision of *Long Innes* J., allowed the defendant's demurrer to her statement of claim.

The statement of claim alleges, in effect, that the defendant was an unregistered money-lender, and that in the course of his business he had obtained certain securities from the plaintiff in consideration of advances made to her, and it prays for declarations that these transactions are transactions of money-lending by a money-lender, and that the securities are void, and for such further and other relief as the nature of the case may require.

(1) (1839) 5 My. & Cr. 97, at pp. 101-102; 41 E.R. 308.
(2) (1867) 3 Ch. App. 79.

Upon the facts alleged the defendant would have taken the securities in the course of committing an offence against sec. 2 of the *Money-lenders and Infants Loans Act* 1905, and accordingly they would be void in his hands (*Victorian Daylesford Syndicate Ltd.* v. *Dott* (1); *Bonnard* v. *Dott* (2); *Whiteman* v. *Sadler* (3); *Cornelius* v. *Phillips* (4)). But by virtue of sec. 166 of the *Conveyancing Act* 1919 the securities would be validated in the hands of a bona fide assignee for value, who was not himself a money-lender, and upon the defendant making such an assignment the defendant would become liable to indemnify the plaintiff.

The ground upon which the Full Court held the pleading demurrable was that either it was not a suit for equitable relief or it sought equitable relief against a borrowing transaction, and, as an essential condition to that relief, the plaintiff must offer to do equity by repaying the money borrowed. In New South Wales declarations of right may be obtained in the equitable jurisdiction only, and therefore the curious consequence may appear to follow from the decision of the Full Court that, although the borrower and her property are absolved as a result of statute from repaying the money-lender his loan, and she is indemnified against liability to his assigns, yet, in effect, without renouncing these very rights, she cannot have their existence declared. The maxim, he who seeks equity must do equity, is not, according to *Knight Bruce* L.J., always easy to understand or apply (*Gibson* v. *Goldsmid* (5)), but it does not substitute moral for legal standards in the determination of the conditions of relief. The true meaning of the maxim is that one who seeks the aid of a Court of equity to enforce a claim, must be prepared to submit in that suit to any directions which the known principles of a Court of equity may make it proper to give (*Colvin* v. *Hartwell* (6)). "The rule, certainly, does not go so far as to entitle the Court arbitrarily to impose terms upon a plaintiff, who may be driven to ask for its assistance. It is restricted in its operation, and the true meaning of it, as I apprehend, is this, that those who ask for the assistance of the Court must do justice as to the matters

(1) (1905) 2 Ch. 624.
(2) (1906) 1 Ch. 740.
(3) (1910) A.C. 514.
(4) (1918) A.C. 199.
(5) (1854) 5 DeG. M. & G. 757, at p. 760; 43 E.R. 1064.
(6) (1837) 5 Cl. & F. 484, at p. 522; 7 E.R. 488.

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in respect of which the assistance is asked " (per *Turner* L.J., *Gibson* v. *Goldsmid* (1)).

It is, therefore, essential to ascertain what is the matter in respect of which the plaintiff is entitled to receive the Court's assistance. Her contention is that, because documents exist which, upon their face, bind her or her property but which, because of collateral facts, are void by statute, unless and until assigned to a bona fide purchaser for value, she has an equity to have them delivered up and cancelled and to obtain the substitutional relief of a declaration of right. If this be so, her equity is in aid of the legal right conferred by the statute. The statute having made the securities void in the hands of the party who committed the illegality, her alleged equity is to have remedies which will effectuate the rights or preserve the immunities which the statute gives her and safeguard her from the danger of " instruments pregnant with the seeds of suits " (the phrase of Lord *Eldon* in *Underhill* v. *Horwood* (2)). If this were her equity, it would, indeed, be incongruous for the Court which enforced it to do so only upon the terms that she forwent the most important of those rights or immunities, and repaid the money borrowed.

The jurisdiction of Courts of equity to direct delivery up and cancellation of instruments which, although good on their face, are, in fact, void, is thoroughly established by decisions. " And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose " (*Story, Equity Jurisprudence*, sec. 700). But the equity to have the document recalled does not necessarily arise from the mere fact that the document is void and is outstanding considered without regard to the reason for its invalidity, and irrespective of the position occupied by the parties. It might well be supposed that a party who escaped from obligations, which he voluntarily incurred, because his contract was infected with illegality, although not himself the object of the legislative

(1) (1854) 5 DeG. M. & G., at p. 765; 43 E.R. 1064.

(2) (1804) 10 Ves. 209, at p. 218; 32 E.R. 824.

sanctions, might be confined to the remedies which the statute creating the illegality gave him; and that he had no equity to any further relief whether preventive or remedial. But when a party to a contract finds that it is void by reason of the unlawfulness of the other party's conduct, there is clear reason for a Court of equity intervening if he seeks to be rehabilitated in the position he occupied before the transaction took place. This was the view adopted by the Court of Chancery in the case of usurious contracts forbidden by statute. Under the statutes 21 Jac. I. c. 17, sec. 2; 12 Car. II. c. 13, sec. 2, and 12 Anne Stat. 2 c. 16, no person might "upon any contract . . . take for loan of any moneys" above the specified rate of interest upon pain of forfeiting treble of the value of the moneys lent. The effect of this legislation was to make illegal a contract of loan with interest at more than the permitted rate, as well as to prohibit the mere taking of the interest. Money lent in consideration of the payment of such interest was not recoverable at law (in spite of the contrary statement in the *Encyclopædia of the Laws of England, sub voc.* "Usury") and securities for the loan were void. Although as a rule in the case of illegality "the Court will stand indifferent" an exception existed in the case of usury "in which equity suffers the party to the illicit contract to have relief. But that depends on a distinct reason: that whoever brings a bill in the case of usury, must submit to pay principal and interest due, on which the Courts lay hold and will relieve: with this farther reason, that is," the "Court considers usurious contracts in somewhat a different light from what the law does: which considers them upon the foot of the statutes: but this Court as a fraud and advantage taken on necessitous persons" (per Lord *Hardwicke, Henkle* v. *Royal Exchange Assurance Co.* (1)). In the important judgment which *Wigram* V.C. gave upon the maxim that he who seeks equity must do equity, in *Hanson* v. *Keating* (2), after instancing the necessity imposed upon a plaintiff in a bill for an account, of submitting himself to account in the same matter, and in a bill for specific performance, of submitting to perform the contract, he proceeds (3):—"In this, as in the former

(1) (1749) 1 Ves. 317, at p. 319; 27 E.R. 1055.
(2) (1844) 4 Ha. 1; 67 E.R. 537.
(3) (1844) 4 Ha., at pp. 5, 6; 67 E.R. 537.

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case, the Court will execute the matter which is the subject of the suit wholly, and not partially. So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the Court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reasoning is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The Court will do this, so as to remit both parties to their original positions: it will not relieve the obligor from his liability, leaving him in the possession of the fruits of the illegal transaction he complains of." In such cases the equity is founded, not upon the necessity of protecting the party's legal rights, but upon his willingness to resign them in order that he may be restored to the position he occupied before he embarked upon the transaction which turns out to be unlawful.

In the eighteenth century it became common for those in need of money and those ready to supply it to avoid the operation of the statutes against usury by adopting the expedient of selling and buying annuities instead of borrowing and lending money at a forbidden rate of interest. The usurer, as a rule, supplied the money in exchange for an annuity upon the life of his client calculated at six years' purchase. (See *Usury and Annuities of the Eighteenth Century*, by *Sybil Campbell*, 44 L.Q.R. 473.) Because of this traffic the *Annuity Act* 1777 (17 Geo. III. c. 26) was passed. It made the grant of the annuity null and void unless a full memorial of the transaction was registered in Chancery. Until this statute was replaced by the less stringent provisions of 53 Geo. III. c. 141, the Court of Chancery was often called upon to grant relief when annuities had not been registered in conformity with the statute. In granting relief to the seller of an annuity the same principle was adopted, namely, that the plaintiff's equity to a decree for the cancellation of his void grant to the defendant annuitant depended upon his readiness to restore the consideration he had received save in so far as he had repaid it in the guise of annuity payments. But in this case the principle upon which the Court proceeded rarely operated to impose upon the plaintiff the necessity of doing more than his legal duty; for at law the buyer of the annuity was entitled to recover the price he had paid for the annuity, less

annuity payments (*Shove* v. *Webb* (1)). A consideration of the cases on this subject, however, will show that the ground for the equitable relief was, not the legal right, but the rehabilitation of the parties in their former position. In *Simpson* v. *Lord Howden* (2) Lord *Cottenham*, in dealing with the cancellation of instruments, says :—"It is to be observed, as to one class of cases generally referred to upon this subject, viz., bills to set aside annuities, that they not only depend upon facts not appearing upon the face of the instrument, but that, except in those cases in which the statute gives authority to set aside the instrument, law affords a very inadequate remedy ; for, first, the annuitant may repeat his action as often as the annuity becomes payable, and if the invalidity of the annuity be fully established, still the consideration money would remain in hands which ought not to retain it ; and by the mode in which Courts of equity deal with the payments on account of the annuity as against the consideration paid for it, an account is raised which a Court of equity alone can properly take. It is not a mere declaration of the illegality of the instrument, but it involves the duty of restoring the parties, as nearly as possible, to their original situation, which a Court of equity alone can effect."

The annuity cases are numerous and exhibit some fluctuation of opinion upon incidental matters, such as the necessity of the plaintiff offering to pay life insurance premiums paid by the annuitant, and the question whether a Court of equity should adopt the legal rule that payments of the annuity should be treated as repayments on account of the consideration, a subject discussed in a way which may lead to misunderstanding, but they justify Lord *Cottenham's* statement. (See and compare *Duke of Bolton* v. *Williams* (3) ; *Byne* v. *Vivian* (4) ; *Byne* v. *Potter* (5) ; *Bromley* v. *Holland* (6) ; *Ex parte Shaw* (7) ; *Hoffman* v. *Cooke* (8) ; *Bromley* v. *Holland* (9) ; *Jones* v. *Harris* (10) ; *Bazzelgetti* v. *Battine* (11) ; *Davis* v. *Duke*

(1) (1787) 1 T.R. 732 ; 99 E.R. 1348.
(2) (1837) 3 My. & Cr. 97, at p. 106 ; 40 E.R. 862.
(3) (1793) 4 Bro. C.C. 297, and at p. 311 ; 2 Ves. Jun. 138, and at p. 155 ; 29 E.R. 901 ; 30 E.R. 561.
(4) (1800) 5 Ves. 604 ; 31 E.R. 762.
(5) (1800) 5 Ves. 609, and the note thereto in 5 R.R. 139 ; 31 E.R. 765.
(6) (1800) 5 Ves. 610, at p. 618 (Sir *Richard Arden*, afterwards Lord *Alvanley*) ; 31 E.R. 766.
(7) (1800) 5 Ves. 620 ; 31 E.R. 771.
(8) (1801) 5 Ves. 623 ; 31 E.R. 772.
(9) (1802) 7 Ves. 3 ; 32 E.R. 2.
(10) (1804) 9 Ves. 486 ; 32 E.R. 691.
(11) (1821) 2 Swanst. 156 (n) ; 36 E.R., at p. 576.

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of Marlborough (1), where at p. 157 a misstatement of Lord *Loughborough's* decision in *Duke of Bolton* v. *Williams* (2) occurs; and *Angell* v. *Hadden* (3)). In *Lodge* v. *National Union Investment Co.* (4) *Parker* J. decided that a borrower could not be relieved in equity against securities illegal and void under the Money-lenders Act "without being put on terms by which both parties may be restored to the positions they occupied before the transaction commenced" (5). This, in substance, adopted the view that, as in the case of the statute against usury, the illegality of the transaction embodied in the outstanding instruments gave the borrower no equity, save to be remitted to his former position. Indeed, there appears to be no sound distinction, in this respect, between the effect of the two pieces of legislation. In each case the borrower is absolved from his contractual obligation, because the lender has offended against statutory provisions directed to the protection or the advantage of the borrower or his class. In each case the borrower's equity must rest on some thing other than the legal right or immunity given by statute. It is the situation created by the statute which gives the innocent party an equity to be restored to his former position. But such a ground of equity involves an offer of restitution. This is made clear by Lord *Selborne* in *Jervis* v. *Berridge* (6). In dealing with a bill to rescind for fraud, he says:—"I confess I was surprised to hear the argument that, in such a case as the present, an offer, upon the face of the bill, to repay the moneys expended by the demurring defendant, was necessary; my impression, during many years' practice at the Bar, having always been to the contrary. In that impression, as to what is, at least, the modern practice of the Court, I am confirmed by several of the authorities which were mentioned at the Bar. . . . There are, indeed, certain cases where a defendant has incurred forfeitures or penalties, or where the controversy relates to usurious or other unlawful transactions, in which the whole *locus standi in curia* of the plaintiff is dependent on an election, which must be declared by the bill, to forgo legal rights for the sake of equitable remedies." The same view of the

(1) (1818) 2 Swanst. 108; 36 E.R. 555.
(2) (1793) 4 Bro. C.C. 297; 2 Ves. Jun. 138; 29 E.R. 901; 30 E.R. 561.
(3) (1817) 2 Mer. 164; 35 E.R. 903.
(4) (1907) 1 Ch. 300.
(5) (1907) 1 Ch., at p. 312.
(6) (1873) 8 Ch. App., at p. 358.

conditions of relief was taken by Chancellor *Kent*, who, in an elaborate discussion of the law of usury, said :—" The equity cases speak one uniform language ; and I do not know of a case in which relief has ever been afforded to a plaintiff seeking relief against usury, by bill, upon any other terms. It is the fundamental doctrine of the Court " (*Fanning* v. *Dunham* (1)).

It follows that, apart from the *Equity Act* 1901 as amended by sec. 18 of the *Administration of Justice Act* 1924, the statement of claim would be demurrable.

In *David Jones Ltd.* v. *Leventhal* (2) the decision of *Harvey* C.J. in Eq. in *Tooth & Co.* v. *Coombes* (3) was approved, and it was held that this statutory provision did not enable the Court to make a declaration of right, except in proceedings for equitable relief or relating to equitable titles. If the equity to relief rests upon the rehabilitation, it appears to follow that a declaration of right can only be made in a suit where a title to that relief is shown. It is, however, suggested that, if the subject of the suit is within the cognizance of the Court in its equitable jurisdiction, sec. 10, as amended, has the same effect as Order XXV., r. 5, of the English *Rules of the Supreme Court* has throughout the High Court of Justice, and creates a new statutory remedy, which is to be administered without regard to equitable principles, and that *Chapman* v. *Michaelson* (4) applies. The argument is not easy to apprehend, because it assumes that a claim may be within the equitable cognizance, although the plaintiff has no equity. If, however, the views already expressed are well founded, it can have no application to this case, because all that is within the cognizance of the Court in its equitable jurisdiction is the restoration of the party to his former position, which involves submission to refund what was paid.

For these reasons the appeal should be dismissed.

STARKE J. The demurrer in this case challenges the equitable jurisdiction of the Supreme Court of New South Wales to entertain the suit (*David Jones* v. *Leventhal* (2)). A fundamental rule is that a plaintiff must state a case by his pleadings within the jurisdiction

(1) (1821) 5 Johns. Ch. 122 ; 9 Am. Dec. 283, at p. 292.
(2) (1927) 40 C.L.R. 357.
(3) (1925) 42 N.S.W.W.N. 93.
(4) (1908) 2 Ch. 612 ; (1909) 1 Ch. 238 (C.A.).

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of the Court. The plaintiff here alleges no more in substance than that she gave certain stock mortgages and a crop lien to the defendant, which are registered under appropriate Acts, and that they are void by reason of the provisions of the *Money-lenders and Infants Loans Act* 1905. There is no jurisdiction in a Court of equity to order a legal instrument to be delivered up on the ground of illegality which appears upon the face of the instrument itself (*Simpson* v. *Lord Howden* (1); *Brooking* v. *Maudslay, Son and Field* (2)). But in many cases where the illegality was not apparent on the face of the instrument, the Courts of equity assumed jurisdiction and ordered cancellation and delivery up of the instrument. This jurisdiction attached in the case of misrepresentation or fraud, or if the instrument was one purporting to convey lands and hereditaments and necessarily had a tendency to throw a cloud over the title, or where probable mischief would result from a party being allowed to retain the instrument in his possession (*Duncan* v. *Worrall* (3); *Story's Equity Jurisprudence*, 3rd ed., par. 700, p. 297; *Story's Equity Pleadings*, pp. 7, 8). No express allegation of any threatened or probable mischief, or of any use of the instrument by the defendant, is made in the pleadings in the present case, and such mischief as exists or is threatened must be implied from the retention of the instruments in the defendant's possession. *Long Innes* J. disallowed the demurrer, but on appeal his decision was reversed.

The learned Judges who heard the appeal doubted if there was any sufficient allegation of fact express or implied of any actual or threatened mischief, which required the interposition of a Court of equity. In my opinion this doubt was well founded, especially as the plaintiff disclaimed the right to all relief other than a declaration that the instruments were void. The *Equity Act* 1901, sec. 10 (as amended by Act No. 42 of 1924), empowers the Court, in a proper case, to make a declaration of rights whether any consequential relief is or could be claimed or not. But if the plaintiff's allegations be insufficient to found a claim, if made, for delivery up or cancellation of the instruments, they are equally insufficient to found a claim for a declaration of the invalidity of the instruments. The learned

(1) (1837) 3 My. & Cr. 97; 40 E.R. 862.
(2) (1888) 38 Ch. D. 636.
(3) (1822) 10 Price 31; 147 E.R. 232.

Judges, however, upheld the demurrer upon a more important ground: they held that a plaintiff who comes into a Court of equity for equitable relief against an unregistered money-lender must offer to do equity in the form of paying to the lender the amount borrowed from him. Numerous cases were cited to us which entirely support this proposition. The judgments given by *Wigram* V.C. in *Hanson* v. *Keating* (1) and by *Parker* J. in *Lodge* v. *National Union Investment Co.* (2) and by *Lord Selborne* L.C. in *Jervis* v. *Berridge* (3) expound, and explain the reason of, this rule of equity. *Wigram* V.C. said:—"The equity" of the plaintiff "is to have the entire transaction rescinded. The Court will do this, so as to remit both parties to their original positions: it will not relieve" the plaintiff "from his liability, leaving him in possession of the fruits of the illegal transaction he complains of." A multitude of authorities confirm this view, and, while they make the rule no clearer, they show that it was constantly acted upon. The plaintiff, however, relied upon *Chapman* v. *Michaelson* (4) and *Schnelle* v. *Dent* (5). *Chapman* v. *Michaelson* is based upon the view that no equitable right or relief was claimed or involved, and the case is therefore not in point. *Schnelle* v. *Dent* is more difficult; but the learned Chief Judge in Equity, in delivering the judgment of the Full Court, thus distinguished the case: "It is clear from the authorities which were cited by the majority of the High Court that they were not considering the question of making declaratory decrees with consequential equitable relief, but that they recognized that, so far as the bill of sale was concerned, the Equity Court was simply dealing with it as a purely legal question with legal relief by way of damages, the Court's jurisdiction so to deal with it being based on sec. 4 of the Equity Act, which enables it to deal with legal questions arising incidentally in an equity suit, the equity suit at the hearing being the redemption of" a "real property mortgage." I understand that the Chief Justice of this Court, who was a party to the decision in *Schnelle* v. *Dent* agrees with this view of the case. And if it be the right view, then the case

(1) (1844) 4 Ha., at p. 6; 67 E.R. 537.
(2) (1907) 1 Ch. 300.
(3) (1873) 8 Ch. App. 351.
(4) (1909) 1 Ch. 238.
(5) (1925) 35 C.L.R. 494.

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does not conflict with the principle stated in *Hanson* v. *Keating* (1) and *Lodge* v. *National Union Investment Co.* (2), whatever may be said as to the jurisdiction of the Supreme Court in its equitable jurisdiction, in view of the decision in *David Jones Ltd.* v. *Leventhal* (3).

Consequently, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *W. P. Kelly*, Wellington, by *Maurice J. McGrath.*

Solicitors for the respondent, *McManamey & Jelf*, Dubbo, by *McLachlan, Westgarth & Co.*

J. B.

(1) (1844) 4 Ha. 1; 67 E.R. 537. (2) (1907) 1 Ch. 300.
(3) (1927) 40 C.L.R. 357.

[HIGH COURT OF AUSTRALIA.]

THOMSON . . . . . APPELLANT;

AND

DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1929. PERTH, *Sept.* 5, 6. Knox C.J., Gavan Duffy, Rich and Dixon JJ.

Income Tax (Cth.)—Assessment—Gain in the nature of income or of capital—Grazing lease—Sale of timber thereon—Income Tax Assessment Act 1922-1927 (*No.* 37 *of* 1922—*No.* 32 *of* 1927), *secs.* 16 (*d*),* 23 (1B)—*Land Act* 1898 (*W.A.*) (62 *Vict. No.* 37), *sec.* 68.

The proceeds of the sale of timber to be removed from land held by the appellant from the Crown under a conditional purchase grazing lease were assessed by the Federal Commissioner of Taxation as income.

* The *Income Tax Assessment Act* 1922-1927 provides by sec. 16 that the assessable income of any person shall include "(*d*) money derived by way of royalty or bonuses, and premiums fines or foregifts or consideration in the nature of premiums fines or foregifts demanded and given in connection with leasehold estates."