

so conveyed and transferred to the satisfaction of the judgment recovered by the plaintiff's intestate. In that decree, we think the former defendant is directly interested, so that if this were an original bill there could be no doubt that he ought to be made a party. If these conveyances and transfers are set aside, he must lose the advantage of them, and surely we cannot say that his interest could not be affected by it.

We are therefore of the opinion, that, for this cause, the supplemental bill is defective and must be amended.

The additional cause of demurrer assigned by A. W. Stearns, we have not considered, and it may not perhaps be necessary; but, upon the second and third causes, and the cause assigned *ore tenus* at the hearing.

The demurrer is allowed.

THE DERRY BANK *v.* A. C. HEATH & AL.

Where the principal defendant had filed his bill in equity, and obtained a temporary injunction to stay plaintiffs' action at law against him, and had also, agreeably to the rule of court in such cases, also filed his bond of indemnity with sureties; and where the principal defendant had failed to maintain his said bill, and thereby become liable on his bond of indemnity, as the reasonable damages which plaintiffs should recover under his said bond; *held*, that during the time plaintiffs were delayed by said injunction, they should be allowed to recover their legal taxable costs, both in the suit at law and the bill in equity, provided the plaintiffs have not or cannot realize the same on the original proceedings against the principal defendant; also, plaintiffs' reasonable counsel fees which they are liable to pay in both of the original cases, for the same time.

Plaintiffs should not recover, as damages under his bond, the interest accruing on the original note in the suit at law, unless they can show that the original defendants have become insolvent since the injunction, or that the plaintiffs have suffered some damage equal to such interest, without fault.

DEBT, on bond, dated February 11th, 1861, in the penal sum of \$500, with the following condition :

"The condition of this obligation is such, that, whereas an injunction has this day been issued by the Hon. J. E. Sargent, one of the Justices of the Supreme Judicial Court of said State, against said Derry Bank, upon the petition of said Albe C. Heath; now if the said Heath shall pay and satisfy to said Bank, all such damages as may be occasioned to the said Bank by reason of said injunction in case the proceeding in which said injunction has been issued shall be determined against himself, then this obligation shall be void, otherwise in force."

For the purposes of this decision, and no other, the following facts are agreed upon :

That the injunction spoken of in said condition was issued upon the filing of a bill in equity by said Heath against said Bank to stay a suit at law in favor of said Bank against said Heath as surety on a promissory note, and to obtain a decree, discharging him from the payment of

said note; that said suit in equity, after the taking of testimony and the hearing of the parties, was decided against said Heath, and the Bank recovered judgment in the suit at law for the amount of the note and interest and costs.

The plaintiffs claim to recover in this suit:

First. The interest on said note during the time that the bill in equity was pending and the suit at law stayed.

Second. The taxable costs and counsel fees in the suit at law during the same time.

Third. The taxable costs and counsel fees in the equity suit.

If, upon the foregoing facts, the court are of opinion that the action cannot be maintained for any of the claims stated, then the plaintiffs are to become nonsuit, but if it can be maintained, then the case is to be discharged.

A. W. Sawyer; for plaintiffs, referred the Court to *Blaisdell v. Blaisdell*, 14 N. H. 81; *Loomis v. Bedel*, 11 N. H. 74; *French v. Parish*, 14 N. H. 500; *Lyman v. Lull*, 4 N. H. 498.

Eastman & Cross, for defendant, referred to the Rule of Court, being the 36th Rule in Chancery, 38 N. H. 612.

NESMITH, J. In this action, the plaintiffs are entitled to recover whatever damages, they may in fact have sustained by reason of the forfeiture of the condition of the bond in suit. *Blaisdell v. Blaisdell*, 14 N. H. 81. The damages to the plaintiffs are such as naturally result from the dilatory operation of the bill in equity, and the injunction which stayed plaintiffs' suit at law, and the costs incident to such legal proceedings. It is understood that the decision of the court was adverse to the maintenance of the bill in equity by the defendant, because there was a full and adequate remedy at law for his complaint.

The first claim for damages made in this case by the plaintiffs is for such interest on their note in the suit at law, as accrued during the time of the pendency of the bill in equity, or the stay of the suit at law. We think, however, that, before the plaintiffs should be allowed for this item of their claim, they should make it appear by satisfactory evidence to the court, that the signers to the note of the plaintiffs embraced in their suit at law, had become insolvent; or, in some other way, without fault of the plaintiffs, they had suffered damage to an amount equal to such interest.

The plaintiffs should be allowed, during the time they were delayed by the defendant's injunction, their legal taxable costs both in the suit at law and the bill in equity, provided the same has not or cannot be realized, from the parties, defending the suit at law, or prosecuting the said bill in equity.

The plaintiffs should also be allowed, as damages in this case, such reasonable counsel fees as they have paid, or are liable to pay to their counsel, for the same time, in both cases.

In this class of injunction bonds, courts are authorized to proceed on liberal grounds, and upon such principles as will give adequate indemnity for the injury or loss, which has been occasioned to the innocent party who has suffered from unjust delay. Some of the rules applicable to this class of cases are well discussed in *Parish & al. v. French & al.*, 14 N. H. 497.

Under the agreement of the parties,

This case is discharged.

EBENEZER T. WHEELER v. EDWARD EMERSON AND B. F. EMERSON, TRUSTEE.

Where a trustee has been charged for or on account of certain promissory notes belonging originally to the principal defendant, and which were secured by mortgages of personal or real estate, and said promissory notes, under an order of the court, have been placed in the hands of a receiver, the deeds of mortgage also pass to the receiver under the power of this order, and are to be disposed of agreeably to the same.

Generally, a trustee is liable for whatever moneys, &c., may be in his hands at the time of the service of plaintiff's writ upon him, belonging to the principal debtor, subject to such legal and equitable set-off as the trustee may be entitled to have against said debtor.

The trustee cannot be permitted to purchase in from the funds in his hands at the time of the service of plaintiff's writ upon him, or accruing at any time before his disclosure, any outstanding claim against the principal debtor, to the prejudice of the attaching creditors.

FOREIGN ATTACHMENT. The court reserved two questions for the determination of the whole court; other questions upon the same disclosure in the same case have recently been decided at the law term. The former case and the disclosure are made a part of this case, and may be referred to in argument.

The trustee was charged for certain notes in his possession signed by other persons and payable to the defendant, and a receiver was appointed. The trustee had in his possession certain mortgages of real estate made by said other persons to the defendant, to secure said notes, and the first question reserved was, whether the trustee should be charged for said mortgages.

After the service of said writ on the trustee, he purchased certain notes against the defendant, and, after said purchase, received \$104.50, in pursuance of the power of attorney, under which he was acting for said defendant, and redeemed said sums under said power of attorney, and applied the \$104.50, by consent of defendant, in part set-off of said notes so purchased.

B. F. Emerson, for trustee, referred the court to *Haven v. Wentworth*, 2 N. H. 93; *Adams v. Barrett*, 2 N. H. 375; *Greenleaf v. Perrin*, 8 N. H. 273; *Boardman v. Cushing*, 12 N. H. 112; *Swamscot Machine Co. v. Partridge*, 25 N. H. 369; *Hills v. Smith*, 19 N. H. 381.