1947

*Mar. 3, 4
*Mar. 13

ASCONI BUILDING CORPORATION.... PLAINTIFF;

AND

J. PAUL VERMETTE (PLAINTIFF BY CONTINUANCE OF SUIT) ..... } APPELLANT

AND

DOMINIQUE VOCISANO (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Statute—Application—"Interest Act"—Mortgage—Agreed bonus to mortgagee—Interest on loan paid in advance—Blended payment of principal money, interest and bonus—Bonus and interest deducted from amount of principal money stated in deed—Evidence that parties agreed to same before signing of deed—Action to recover amounts of bonus and interest—Interest Act, R.S.C. 1927, c. 102, sections 6 and 9.

Section 6 of the *Interest Act* (R.S.C., 1927, c. 102) provides that "whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended * * *, no interest whatever shall be * * * recoverable * * *, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance."

The respondent agreed to loan to the plaintiff corporation, on mortgage of real estate, $15,000 and later $16,000. These sums were made payable as principal without interest until maturity by monthly instalments of $300 for 23 months and the balance at the end of the 24th. It appeared from the evidence that the amounts advanced were actually $12,500 and $13,500, there having been a deduction of $5,000 composed of $1,500 interest and $1,000 bonus for each loan. An admission of those facts was contained in the respondent's plea to the action. The two loans were fully repaid at the time the properties securing them were sold. Subsequently, the plaintiff corporation brought an action under section 9 of the *Interest Act*, which was continued by the trustee in bankruptcy, to recover the above sum of $5,000, on the ground that it had been paid in contravention of section 6 of the Act, the appellant contending that the payments of principal money and interest and bonus were blended and that the deeds of mortgage did not contain a statement of such principal sum, and the rate of interest chargeable thereon. The Superior Court maintained the action, but the appellate court, by a majority, reversed that judgment. On appeal to this Court,

*Present: Rinfret C.J. and Kerwin, Taschereau, Rand and Kellock JJ.

Held that the appellant could not recover. The agreement for the bonus and the interest was legal and enforceable.

Per The Chief Justice and Taschereau J.:—The principal money, or the interest or the bonus is not, upon the terms of the deeds, made payable pursuant to any of the methods mentioned in the statute. Therefore, there is no illegality if, before the mortgage has been given birth to, the parties have agreed to deduct or to pay in advance the interest and the bonus, and have stipulated in the deed of mortgage itself that no interest would be payable.

Per Kerwin J.:—As to the deduction of the bonus, the case is concluded against the appellant by the decision in the *Meagher's* case ([1930] S.C.R. 378). As to the deduction of the interest, its prepayment or retention, by a prior agreement of the parties, does not bring the case within the operation of section 6. The prime requisite for its operation is that, by the terms of the mortgage itself, the principal or interest secured thereby must be payable in one of the methods mentioned. In the present case, they are not so made payable and the result is that there is nothing to prevent the parties to a loan transaction agreeing, prior to the execution of the mortgage, to the deduction or payment in advance of interest for the term of the mortgage and then to provide by the mortgage document that there shall be no interest until default. The effect of such a collateral agreement is that the prepaid interest ceases to be such and becomes part of the principal advanced.

Per Rand J.:—Section 6 of the *Interest Act* is not designed to protect a borrower against agreeing to pay any particular rate or amount of interest. Its effect is that where repayment under a mortgage involves, in the forms mentioned, an increment of interest, it shall be made clear in the mortgage what the amount of the principal and the rate of interest are. Where the transaction is not either on its face or by the real intention of the parties within the section and the borrower is fully aware both of the actual amount of interest which he is paying, and the rate and principal with reference to which that calculation is made, the purpose of the section suffers no infringement. If, on the other hand, by that intention, the payments provided do involve interest within the section, then the form of words used would not ward off the penalties.

Per Kellock J.:—The present case, upon the evidence, is governed by the principle of *Meagher's* case ([1930] S.C.R. 378). There is no distinction to be drawn between the bonus and the interest paid in advance. Both became debts under the agreement for the loan and neither were at any time secured by the mortgage deed or included in any payment called for therein.

London Loan & Savings Co. of Canada v. *Meagher* ([1930] S.C.R. 378) followed.

Canadian Mortgage Investment Co. v. *Cameron* (55 Can. S.C.R. 409) discussed.

Singer v. *Goldhar* (55 O.L.R. 267) overruled by *Meagher's* case.

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Loranger J. and dismissing the appellant's action.

The material facts of the case and the questions at issue are stated in the above headnote and in the judgments now reported.

H. Gérin-Lajoie K.C. and *C. J. Gélinas* for the appellant.

John T. Hackett K.C. for the respondent.

The judgment of The Chief Justice and of Taschereau J. was delivered by

TASCHEREAU J.:—La Loi concernant l'intérêt, que l'on trouve au chapitre 102 des S.C.R. 1927, contient les deux articles suivants:

6. Lorsqu'une somme principale ou un intérêt garanti par hypothèque sur propriété foncière est stipulé, par l'acte d'hypothèque, payable d'après le système du fonds d'amortissement, ou d'après tout système en vertu duquel les versements du principal et de l'intérêt sont confondus, ou d'après tout plan ou système qui comprend réduction d'intérêt sur des remboursements stipulés, aucun intérêt n'est exigible, payable ni recouvrable sur une partie quelconque de la somme principale prêtée, à moins que l'acte d'hypothèque ne contienne un état de la somme principale et du taux de l'intérêt, calculé annuellement ou semi-annuellement et exigible sur cette somme, mais non d'avance. S.R., c. 120, art. 6.

* * * *

9. S'il est payé quelque somme à compte d'un intérêt, d'une amende ou peine qui ne sont pas exigibles, payables ou recouvrables, en vertu des trois articles qui précèdent, cette somme peut être répétée ou déduite de tout autre intérêt, amende ou somme pénale exigibles, payables ou recouvrables sur le capital. S.R., c. 120, art. 9.

Le demandeur, représenté devant cette Cour par Paul Vermette, syndic à la faillite, prétend que comme résultat de la violation de ces articles, il a droit de réclamer du défendeur intimé, la somme de $5,000.

Les faits sont les suivants:

Par acte authentique reçu devant le notaire Lavoie le 27 février 1941, l'intimé a prêté à Asconi Building Corporation, une somme de $15,000, remboursable en vingt-trois paiements mensuels de $300 chacun, donnant un total de $6,900. Quant à la balance de $8,100, elle devenait due et exigible le 1er mars 1943.

Par un autre acte authentique reçu devant le même notaire, le 17 juin 1941, l'intimé a également prêté à l'appelant un autre montant de $16,000 remboursable de la même façon, soit en vingt-trois paiements mensuels de $300 chacun, et la balance de $9,100, le ler juillet 1943.

Ces deux prêts étaient garantis par hypothèques, affectant des immeubles de l'Asconi Building Corporation, et chaque acte contient une clause à l'effet que dans le cas de vente, la balance due sur le prix deviendra exigible.

Quoiqu'il soit stipulé à ces deux actes que les prêts sont respectivement de $15,000 et de $16,000, payables sans intérêt, il est certain que le capital du prêt de $15,000 n'était que de $12,500, et que le capital de l'autre prêt de $16,000 n'était que de $13,500. Dans chaque cas, il y avait un montant de $2,500 représentant un bonus et des intérêts.

Le plaidoyer du défendeur ne laisse aucun doute sur ce point.

Le défendeur admet ce qui suit:

That the loan of February 27, 1941, was in fact of $12,500, which with interest of $1,500 and bonus of $1,000, made the total mentioned in the deeds of $15,000 payable by plaintiff to defendant without interest save in event of default;

That the loan of June 17, 1941, was in fact of $13,500, (whereof $11,100 cash and $2,400 representing eight monthly payments of $300 overdue on the first loan or to fall due on the two loans within two months and payable by plaintiff to defendant) which with interest of $1,500 and bonus of $1,000 made the total of $16,000 mentioned in the deed and payable by plaintiff to defendant without interest save in the event of default;

Le demandeur a donc reçu lors du premier prêt $12,500 et s'est obligé de rembourser $15,000, et lors du second, il a reçu $13,500 et a consenti à rembourser $16,000. Ces remboursements ont été faits par le syndic qui ignorait ces conditions qui n'apparaissaient pas aux actes reçus devant le notaire Lavoie, et le demandeur prétend maintenant, que les versements du principal et du bonus et des intérêts étant confondus, et que les actes ne contenant pas un état de la somme principale et du taux de l'intérêt, il a le droit de répéter, en vertu des dispositions de l'article 9, les intérêts et le bonus. La Cour Supérieure lui a donné raison, mais la Cour du Banc du Roi, les honorables juges Létourneau et Galipeault dissidents, a rejeté son action.

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

Taschereau J.

Une action en répétition de ce genre doit réussir quand on trouve dans l'acte de prêt les éléments suivants:

1°. Une somme principale et des intérêts.
2°. Une somme garantie par hypothèque.
3°. Un taux d'intérêt qui n'est pas calculé d'avance.
4°. Des versements de capital et d'intérêts qui sont confondus.

Cette loi, qui est d'intérêt public, a évidemment été adoptée afin que l'emprunteur connaisse exactement le montant d'intérêts qu'il aura à payer, et afin qu'on ne lui extraie pas des taux usuriers. Dans une cause de *Canadian Mortgage Investment Co.* v. *Cameron* (1), M. le juge Walsh a défini ainsi les buts de la loi:

> The evil which the section aims to prevent is the imposition of an extortionate rate of interest through the medium of blended payments of principal and interest. Under this system without the protection which this section affords a highly usurious rate of interest might be wrapped up in these innocent-appearing blended payments without the slightest suspicion on the part of an ignorant or careless borrower that he was being made the victim of it. And so parliament stepped in and decreed that such a mortgage should itself tell the mortgagor exactly how much of the aggregate of these blended payments represents principal and exactly the rate at which the interest included in them calculated yearly or half-yearly not in advance is charged under penalty of the loss of all interest for breach of this direction. I think that if such a mortgage gives all the information to which the mortgagor is entitled under the statute the exact form of words which it uses to convey it to him is absolutely immaterial. A statement is something which is stated. Surely if there is to be found within and as part of the mortgage something which states the amount of the principal money and the rate of interest chargeable thereon calculated in one of the methods prescribed by the section the mortgage does contain a statement of these things. The main thing, in fact the only thing, needed is to give to the mortgagor the information to which the section entitles him, and I think he can be given it just as effectually through the medium of his own covenants as he can by tabulating it in a formal statement.

Au cours de l'argument, quelques causes seulement ont été citées, car, quoique la loi soit ancienne, la jurisprudence n'est pas très abondante. Les deux premières causes présentaient peu de difficultés. Dans *Standard Reliance Mortgage Corporation* v. *St. George Stubbs* (2), le débiteur hypothécaire avait pris action afin qu'il soit déclaré qu'aucun intérêt ne pourrait être perçu. Dans l'acte d'hypothèque, il avait été convenu "the principal is $700 and the rate

(1) (1917) 30 D.L.R. 792; [1917] 2 W.W.R. 18.
(2) (1917) 55 Can. S.C.R. 422.

of interest chargeable thereon is 10 per cent per annum." Il a été décidé que les exigences de la loi étaient satisfaites, et l'action a été rejetée.

Dans cette cause de *Canadian Mortgage Investment Co.* v. *Cameron* (1), qui est également venue devant cette Cour, (2) l'acte d'hypothéque contenait les clauses suivantes:

First: That he will pay to them, the said mortgagees, the above sum of one thousand four hundred dollars and interest thereon at the rate hereinafter specified in gold or its equivalent at the office of the said mortgagees at the city of Toronto, in the province of Ontario, as follows: That is to say, in instalments of one hundred and seventy-nine 90/100 dollars half-yearly on the 24th days of June and December in each year until the whole of said principal sum and the interest thereon is fully paid and satisfied, making in all ten half-yearly instalments. The first of said instalments to become due and be payable on the 24th of December, 1907. All arrears of both principal and interest to bear interest at ten per centum per annum as hereinafter provided.

Secondly: That he will pay interest on the said sum or so much thereof as remains unpaid at the rate of ten per centum per annum by half-yearly payments on the twenty-fourth days of December and June in each and every year until the whole of the principal money and interest is paid and satisfied, and that after maturity interest shall accrue due at the rate aforesaid from day to day, and that interest in arrear, whether on principal or interest, and all sums of money paid by the mortgagees under any provision herein contained or implied or otherwise, shall be added to the principal money and shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the twenty-fourth days of the months of December and June in each year until all such arrears of principal and interest are paid; and that he will pay the same and every part thereof on demand.

Cette Cour en est arrivée à la conclusion que quand le débiteur hypothécaire convient de payer le principal et les intérêts en dix paiements semi-annuels, au taux de 10% le créancier a droit aux intérêts, vu que les exigences de la loi sont satisfaites.

Je suis porté à croire qu'il y a beaucoup de similitude entre la cause de *Singer* v. *Goldhar* (3) et celle qui nous est actuellement soumise. Dans la première, une somme de $3,500 avait été prêtée, mais une hypothèque de $4,700 avait été consentie, et faite remboursable par versements mensuels de $100 durant 11 mois, et la balance à la fin du douzième mois. La cour d'appel d'Ontario a décidé qu'il y avait confusion du capital et des intérêts, qu'aucun taux

(1) (1917) 33 D.L.R. 792; [1917] 2 W.W.R. 18.
(2) (1917) 55 Can. S.C.R. 409.
(3) (1924) 55 O.L.R. 267.

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

Taschereau J.

d'intérêt n'était stipulé et que la différence au delà de $3,500 ne pouvait être réclamée. M. le juge Masten parlant pour la Cour s'exprima ainsi:

> Mr. Brown's next point is a suggestion which he couples with the former argument, viz., that the agreement is one and single for a bonus of $1,200; that the $4,700 is by agreement of the parties made principal on the face of the mortgage; and that the 12 instalments by which this $4,700 is to be paid are all instalments of principal, and thus there is no blending of principal and interest; and that the statute applies only to cases where there are periodical payments involving interest and principal combined, but not to cases where a single or definite sum (designated by the appellant as a bonus) is agreed by the mortgagor to be paid for the accommodation afforded. With this he couples the further argument that the mortgagor is estopped by the terms of the mortgage and by its receipt-clause from claiming that the $4,700 is not wholly principal.
>
> Again I would agree but for the statute. Its provisions make it incumbent on the Court, if the issue is raised, to ascertain what in fact was actually the "principal money advanced," and what was the "interest" or compensation to the mortgagee for the advance.

Mais je crois que cette décision ne doit pas faire jurisprudence depuis le jugement rendu par cette Cour dans *London Loan & Savings Co. of Canada* v. *Meagher* (1). Dans cette cause, l'appelant avait prêté la somme de $30,000 avec intérêts au taux de 7½%, mais il avait été convenu qu'en considération de ce prêt, l'appelant recevrait un bonus de $3,000, que l'emprunteur a convenu de payer. L'acte d'hypothèque a été consenti pour la somme de $30,000 sans aucune référence au bonus de $3,000. L'appelant a émis un chèque en faveur de l'intimé pour la somme de $28,505.55, soit $30,000 moins certaines déductions pour les taxes, les primes d'assurance, les frais légaux, et a reçu un chèque de l'intimé pour le bonus de $3,000. L'appelant a poursuivi pour réclamer le bonus de $3,000 et a réussi devant le tribunal de première instance et devant la cour d'appel d'Ontario, mais ce jugement a été renversé par cette Cour, et M. le juge Smith rendant le jugement unanime de la Cour, s'exprima de la façon suivante à la page 382:

> The application of the act therefore must be confined to mortgages that come clearly within the description set out in the act itself.

Et encore à la même page:

> As already pointed out, the $3,000 that the mortgagor agreed to pay as consideration for the loan, *whether he got it as interest or as something different from interest,* could have been recovered as a debt,

(1) [1930] S.C.R. 378.

not under the mortgage, but under the agreement for the loan, and the full $30,000 was advanced, whether the bonus is taken as paid by the mortgagor's cheque or by retention from the loan, unless the act applies.

Et à la page 383, le juge Smith dit encore:

These considerations form an additional reason for confining the application of the act to mortgages coming strictly within the description in section 6. Taking the precise language of this section, it is only where any principal money or interest is, by the mortgage itself, made payable on any of the plans mentioned, that the section applies, the words being "is, *by the same,* made payable on the sinking fund plan," and it is only to mortgages described in the preceding part of the section that the final provision and section 9 apply. The proper conclusion seems to be that the provisions of the statute applied only to mortgages which on their face come within the description set out in section 6.

Dans le cas qui nous occupe, la somme principale ou l'intérêt ou le bonus, n'est pas, par l'acte même, fait payable suivant l'une des méthodes mentionnées au statut et, il s'ensuit qu'il n'y a pas d'illégalité si, avant la création de l'hypothèque, les parties ont convenu de déduire ou de payer d'avance les intérêts et le bonus, et ont stipulé dans l'acte d'hypothèque lui-même qu'aucun intérêt ne sera payable.

L'appel doit donc être rejeté avec dépens.

KERWIN J.:—This appeal involves the construction of section 6 of the *Interest Act,* R.S.C. 1927, chapter 102:

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

This section was considered by this Court in *London Loan and Savings Co. of Canada* v. *Meagher* (1), where, prior to the execution of a mortgage, it was agreed between lender and borrower that $3,000 should be paid as a bonus for the making of the loan, and the payment was made. This agreement was held to be no part of the mortgage document itself and therefore the principal "secured by mortgage" was not "by the same" made payable in any of the three methods described in the section. That is, the bonus became part of the principal advanced upon which

(1) [1930] S.C.R. 378.

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

Kerwin J

the agreed rate of interest was payable as a straight loan. The case of *Singer* v. *Goldhar* (1) was relied upon by the appellant in the present appeal. It was held in *Meagher's* case (2) that the result in *Singer* (1) was not in conflict with the decision announced by this Court but part of the reasoning in *Singer* (1) must be taken to be overruled and therefore those decisions in Ontario which followed the same line of reasoning.

In the case of each loan in question in this appeal, it appears from the evidence that the amount actually deducted was composed of interest and bonus. As to that part representing bonus, the case is concluded by the *Meagher* (2) decision. While it is true that the Court there treated the bonus as interest, there is a great deal to be said for the opinion that the two are entirely distinct, and in view of the fact that Parliament is restricted to legislation in relation to interest, that phase of the matter should be kept in mind. Treating as open the question whether what is undoubtedly interest may be prepaid (or deducted from the amount of the loan), such a prepayment or retention, by a prior agreement of the parties, does not bring the case within the operation of section 6. In construing an enactment by which Parliament sought to remedy an existing evil, the Courts must give it such a reasonable interpretation as will carry out that intention but that intention can only be gathered from the terms of the enactment. The prime requisite for the operation of the section is that, by the terms of the mortgage itself, the principal or interest secured thereby must be payable in one of the methods mentioned. Here, the principal or interest is not so made payable and the result is that there is nothing to prevent the parties to a loan transaction agreeing, prior to the execution of the mortgage, to the deduction or payment in advance of interest for the term of the mortgage and then to provide by the mortgage document that there shall be no interest until default. The effect of such a collateral agreement is that the prepaid interest ceases to be such and becomes part of the principal advanced.

The appeal should be dismissed with costs.

(1) (1924) 55 O.L.R. 267.
(2) [1930] S.C.R. 378.

RAND J.:—I take the facts in this appeal to be these: the parties intended that the respondent should lend and the appellant borrow the sum of $15,000, repayable in two years; that interest should be charged at the rate of 5 per cent per annum on the sum borrowed and in addition a premium or bonus of $1,000 be exacted; and that the interest for the two years so calculated and the premium should be paid in advance by way of deduction from the principal of the loan as in fact they were. The mortgage on its face, agreeably to that intention, declares the sum of $15,000 to be payable as principal without interest until maturity and thereafter at a rate specified, by monthly instalments of $300 for 23 months and the balance at the end of the 24th.

The question of law arising on these facts is whether section 6 of the *Interest Act* prevents what was intended from being done. The section reads:

> 6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The transaction can be viewed in either of two aspects: first, as a payment over of $15,000 and the return payment by the borrower, whether out of the loan or out of other moneys belonging to him, of the amount intended as interest and premium, effected by the equivalent retention of that sum by the lender; or as a loan only of what ultimately passed from the lender to the borrower, with the difference between that sum and the amount of the obligation of repayment representing interest and premium: two aspects of the same objective facts, one including the intention of the parties as an essential element and the other confining itself to the naked acts themselves.

Interest in its original sense is the consideration for the *use* of money, and strictly considered, the payment of interest in advance necessarily abstracts from the sum, the use of which is intended to be paid for; consequently

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

Rand J.

it cannot be said that such a payment is for the use of the whole of the principal sum. If, on the other hand, the deduction is said to be the consideration for the use of what is actually advanced, then that becomes principal, and the rate of interest will vary accordingly. From the standpoint of the lender, the so-called payment in advance reduces somewhat the risk of ultimate recovery of the principal, while exhibiting a lower rate for the same return in interest; and from the standpoint of the borrower, there is a loss of the use of the interest so deducted. The elusive difference between the two views lies in the converse mathematical interpretations to which the facts lend themselves; the basis of the calculation in principal and rate is modified, but the actual advance and the actual amount of interest to be received remain the same.

No doubt under the usury acts, the form which the loan or the consideration for interest might take played little part in the question of the real nature of the bargain. An agreement providing for interest at the maximum rate in advance was illegal *ab initio* regardless of its form; what the Court was concerned to ascertain was the actual loan and the consideration for its use. In the language of Lord Mansfield in *Floyer* v. *Edwards* (1):

> And where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money, nothing will protect the taking more than 5 per cent.

I think it too late, however, to question acceptance of the notion of interest payable in advance. In *Floyer* v. *Edwards* (1), Lord Mansfield says:

> Upon a nice calculation, it will be found that the practice of the bank in discounting bills exceeds the rate of 5 per cent; for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, viz., by deducting the interest first; yet this is not usury.

Then, in *Lloyd* v. *Williams* (2), Blackstone J. is reported to have

> conceived that interest may as lawfully be received before-hand for forbearing as after the term is expired for having forborne. And it shall not be reckoned as merely a loan of the balance: else every banker in London who takes 5 per cent for discounting bills would be guilty of usury.

(1) (1774) 98 E.R. 995, at 996.
(2) (1772) 96 E.R. 465, at 466.

Nothing in the French civil law contrary to these views has been suggested. A distinction might be urged between discounting negotiable paper and discounting a loan of money, but in substance the principle as it affects the consideration received is the same.

Now section 6 of the *Interest Act* is not designed to protect a borrower against agreeing to pay any particular rate or amount of interest; in fact, under section 2 of the Act there is complete freedom of action in a contract for interest. The object of section 6 is something quite different. It is that where repayment under a mortgage involves, in the forms mentioned, an increment of interest, it shall be made clear in the mortgage what the amount of the principal and the rate of interest are. Obviously no device to defeat that purpose could be tolerated; but where the transaction is not either on its face or by the real intention of the parties within the section and the borrower is fully aware both of the actual amount of interest which he is paying, and the rate and principal with reference to which that calculation is made, the purpose of the section suffers no infringement. If, on the other hand, by that intention, the payments provided do involve interest within the section, then the form of words used would not ward off the penalties.

This conclusion, I think, follows necessarily from *London Loan & Savings Company of Canada* v. *Meagher* (1). There, a bonus of $3,000 was retained from the loan; as here, the mortgagor knew the amount of principal and of the bonus and the actual agreement as to repayment was as expressed by the instrument; by the preliminary feature of the transaction the "amount advanced" was taken to be the original sum from which the deduction was made, in the conception of which the stipulations of the instrument were made and interpreted. Smith J. treats the mode of dealing with the advance for which Mr. Lajoie argues as "begging the question", which I take as meaning that the case is brought within section 6, where the language itself does not do so, only when the parties intend such terms as that section envisages. Certainly I

(1) [1930] S.C.R. 378.

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

Rand J.

am unable to agree that the validity of the provisions in the instrument depends on whether the advance deduction is described as a "bonus" or "interest".

As no other ground is suggested requiring us to ascribe to the written obligation an interpretation which contradicts its precise form, it must be taken and enforced according to that form. Its terms may, of course, be significant to the operation of other statutes ,but whatever consequences of that sort may follow, it is sufficient here that neither the letter nor the purpose of the *Interest Act* is violated by them.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.—This is an appeal from the Court of King's Bench, Appeal Side, of the province of Quebec, allowing an appeal by the respondent (defendant) from a judgment of the Superior Court.

By a deed of mortgage dated February 27, 1941, Asconi Building Corporation, now in bankruptcy and represented by its trustee the appellant Vermette, mortgaged certain real property in or adjacent to the city of Montreal to the respondent. By the deed the company acknowledged receipt of the sum of $15,000 and covenanted to repay the same in two years from March 1, 1941, by twenty-three consecutive monthly instalments of $300 each and the balance of $8,100 on March 1, 1943, all without interest. There is a provision in the deed that in the event of sale of the premises then the balance outstanding would immediately fall due and be payable. This event in fact happened in the month of April, 1942, and the full balance of the $15,000 then outstanding was paid to the respondent. In this action the company and its trustee seek the recovery of the difference between the sum of $12,500, which was the amount actually paid over to the company at the time of the execution of the deed, and the $15,000. In addition there was claimed a further sum of $2,500, resulting from a similar dealing in respect of a mortgage deed of June 17, 1941, in the sum of $16,000. I shall deal first with the mortgage of February 27, 1941.

The property mortgaged was, at the time of the deed, already heavily encumbered and that situation was prominent in the minds of the parties at the time of the negotiations for the loan. The judgment of the Superior Court proceeded upon the ground that section 6 of the *Interest Act*, R.S.C., cap. 102, applied and accordingly the appellant was entitled to succeed by reason of the provisions of section 9. The majority in the Court of King's Bench were, however, of opinion that the Act had no application.

Section 6 is as follows:

> Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

This section was considered by this court in *London Loan and Savings Co. of Canada* v. *Meagher* (1). In that case the Trans-Canada Theatres Ltd., the mortgagor, had applied to the appellant company for a mortgage loan of $30,000. The loan company agreed to make the loan at 7½ per cent, payable half-yearly, but stipulated that in consideration of the making of the loan, it should receive from the mortgagor a bonus of $3,000, which the mortgagor agreed to pay. The mortgage was dated the 15th of March, 1922, and on its face was for $30,000, with interest at 7½ per cent, but there was no reference to the bonus. The mortgagee issued its cheque to the mortgagor for the amount of the loan of $30,000, less certain expenses which were the obligation of the mortgagor, and took a cheque from the mortgagor for the $3,000 bonus, which last mentioned cheque the mortgagee agreed to hold until its cheque for $30,000 had been forwarded to the mortgagor. The mortgage, after some payments of interest were made, fell into arrear and the mortgagor became insolvent. The mortgagee advertised the property for sale, whereupon the liquidator of the mortgagor paid off the full balance of the

(1) [1930] S.C.R. 378.

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

Kellock J.

$30,000 then outstanding with interest without any knowledge of the bonus. He subsequently brought action to recover the $3,000 with interest.

It was held in this court that the action failed. The court was of opinion that (1) the full $30,000 was advanced whether the bonus was to be taken as paid by the mortgagor's cheque or by retention from the loan; (2) the mortgage there in question was not by its terms made payable on any of the plans mentioned in section 6 nor was there anything in the mortgage itself which brought it within the description set out in the section; and (3) the $3,000 agreed to be paid as consideration for the loan, whether regarded as interest or as something different from interest, could have been recovered as a debt, not under the mortgage, but under the agreement for the loan. The court therefore held the Act did not affect the mortgage.

Turning to the provisions of the statute and paraphrasing the section, it provides that whenever any principal or interest secured by a mortgage of real estate is by the terms of the mortgage itself made payable on any of the plans there mentioned, no interest may be recovered on any part of the principal money advanced unless the statement prescribed by the statute is contained in the mortgage.

For the purposes of the question with respect to interest with which it deals, the statute raises the question in every case as to what was in fact "the principal money advanced". In *Meagher's* case (1) the court held that the full face amount of the mortgage, viz., $30,000, had been in fact advanced, and it therefore followed that no part of the $3,000 bonus, even though it were regarded as interest in the sense of compensation for money lent, was interest "secured by" the mortgage and therefore no part of such bonus was included in any payment called for by the mortgage. Hence the statute did not apply.

Turning to the facts of the case at bar, the mortgage deed, considered by itself and without more, shows merely that it was given to secure the sum of $15,000 repayable as already stated. By reason of the statute, however, it is necessary to inquire what was the principal money actually

(1) [1930] S.C.R. 378.

advanced. It is objected by the respondent that as this is a matter of evidence the matter is governed by the provisions of article 1234 of the Civil Code and the mortgage deed must be taken as conclusive. However, this article is subject to the provisions of article 1245 C.C., by which a judicial admission is complete proof against the party making it. In his plea the respondent pleads:

That the loan of February 27, 1941, was in fact of $12,500 which with interest of $1,500 and bonus of $1,000 made the total mentioned in the deed of $15,000 payable by plaintiff to defendant without interest save in event of default.

Had appellant been content to rely upon this plea, then there was nothing else in the case to contradict the facts pleaded that the interest and the bonus were in fact secured by the mortgage. Appellant, however, was not content to rely upon this plea but called evidence to establish that the actual facts were to the contrary. This evidence, in my opinion, establishes that there was an agreement between mortgagor and mortgagee prior to the giving of the mortgage by which, by reason of the nature of the security or lack of it, the mortgagor agreed to pay in advance to the respondent the sum of $1,000 bonus and $1,500 for interest in consideration of the agreement of the respondent to make the loan at all, these amounts to be deducted from the proceeds of the loan, with the result that neither of these amounts was at any time secured by the mortgage deed.

The only evidence put in at the trial was put in on behalf of the appellant. Among the witnesses so called was the respondent who in chief said the following:

D. En réalité, il n'y avait pas de différence entre l'intérêt et le bonus? c'était tous les deux pour la même chose?

R. Non, non.

D. Comment calculez-vous quinze cents dollars à cinq pour cent?

R. Je vais vous dire: Monsieur Chait a calculé tout cela. C'était tout fait avant de terminer cette affaire-là.

* * * *

D. Pourquoi avez-vous fait une distinction entre les intérêts et le bonus?

R. Pour faire comprendre cela, cela a marché suivant les ordres de monsieur Chait.

D. Le plein montant de deux mille cinq cents dollars était en considération du prêt?

R. Non, non, non. Mille dollars, c'était pour le bonus et quinze cents dollars pour les intérêts.

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

Kellock J.

D. Mais les deux montants vous étaient payés pour vous faire consentir à faire le prêt?

R. Oui, certainement, certainement.

D. C'était une rémunération qui vous était donnée pour prêter votre argent à la compagnie?

R. Oui, certainement.

* * * *

It is true that the respondent also said at one point that the monthly payments of $300 included both "capital and interest" and at another that they were only capital. In my opinion such answers, and other of like import, directed to an interpretation of the effect of the mortgage deed do not militate against the evidence quoted above and were in fact inadmissible as trenching on the province of the court.

One Asconi, president of the appellant, who acted for the appellant in the negotiations with the respondent, gave the following evidence:

D. Sur quoi vous êtes-vous basé pour donner $1,000 de bonus?

R. C'est pour le bonus. Le bonus, c'était pour avoir l'argent direct de M. Dominic Vocisano.

D. Est-ce lui, M. Vocisano, qui a exigé un bonus de $1,000?

R. Oui, c'est lui.

D. Est-ce le défendeur qui a exigé le bonus et les intérêts pour faire le prêt?

R. Oui.

The appellant also put in evidence the receipt given by the mortgagor to the respondent at the time of the completion of the advance under the mortgage. It reads:

Montreal, February 27, 1941. Received from Dominic Vocisano, cheque of $12,500 being the amount of loan executed today before me, I. R. Lavoie, N.P., less interest and bonus totalling $2,500. Signed: Asconi Building Corporation per Orpheo Asconi.

The document indicates that the "amount of the loan" was the full sum of $15,000 and that the interest and bonus were paid in advance.

In the minutes of its Board of Directors, held on the day on which the mortgage deed is dated, there is the following:

It was moved, seconded and unanimously resolved that the Company do borrow from Dominique Vocisano, the sum of fifteen thousand dollars ($15,000) without interest, interest at the rate of five per cent per annum *being deducted from the principal,* and to repay the said sum as follows.

* * * *

Then follow the terms of the repayment already mentioned and the following:

All overdue instalments shall bear interest at the rate of six per cent (6%) per annum. And that the Company, for the security or repayment of the said sum of *capital and interest* as aforesaid, do hypothecate a certain area of rectangular figure forming part of that lot * * *

The interest here mentioned can only be the 6 per cent. as the interest of $1,500 was to be paid in advance by deduction. The whole $15,000 secured by the mortgage deed was the "capital".

With respect to the second loan of June 17, 1941, no receipt was produced and the minutes of the mortgagor company authorizing the second borrowing do not contain the extracts quoted above relating to the first loan. Otherwise however the considerations relating to the making of both loans are substantially the same and the evidence of the respondent quoted above was expressly with relation to both. The witness Asconi gave the following evidence also with respect to the second loan:

D. Est-ce le défendeur qui a exigé le bonus et les intérêts pour faire le prêt?
R. Oui.

Accordingly, in my opinion, on the above evidence the case, with respect to both loans, is governed by the principle of *Meagher's* case (1). There is no distinction to be drawn between the bonus and the interest paid in advance. Both became debts under the agreement for the loan and neither were at any time secured by the mortgage deed or included in any payment called for therein.

Counsel for the appellant relied upon *Singer* v. *Goldhar* (2). This decision is referred to in *Meagher's* case (1) where Smith J. at p. 385 said that the result reached was not in conflict with the construction placed upon the statute in *Meagher's* case (1). It is also stated on the same page that in *Singer's* case (2) the court was there dealing with a mortgage which had no provision for repayment on any of the plans described in section 6.

In *Singer's* case (2) the mortgage in question was for $4,000, repayable in eleven monthly instalments of $100, the balance to be repaid at the end of twelve months and there was no provision for the paying of interest. In the

(1) [1930] S.C.R. 378.
(2) (1924) 55 O.L.R. 267.

1947

ASCONI BUILDING CORPORATION AND VERMETTE v. VOCISANO

Kellock J.

action, which was one for foreclosure, there was no oral evidence but it was admitted that $3,500 only had been advanced, while $3,800 had been repaid. It was held that the mortgage was satisfied. As in Ontario a mortgagor is not estopped by the terms of the mortgage from showing the actual amount advanced, the decision could have been put on the ground that there was no liability upon the mortgagor beyond the amount actually advanced. This, however, was not the ground of the decision but that the difference between the amount advanced and the face amount of the mortgage was interest and could not be recovered by reason of the statute.

In *Meagher's* case (1) the court was not called upon to decide a case such as was involved in *Singer's* case (2), as in the latter the liability of the mortgagor for bonus could not have been placed upon any basis outside the terms of the mortgage itself. I think therefore that the statement in the judgment with respect to the mortgage in *Singer's* case (2) must be considered as *obiter*. In my opinion it is inconsistent with the actual decision in *Meagher's* case (1).

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lajoie, Gélinas and MacNaughton.*

Solicitors for the respondent: *Hackett, Mulvena, Hackett and Mitchell.*

---

(1) [1930] S.C.R. 378.
(2) (1924) 55 O.L.R. 267.