

1900 SAMUEL C. BIGGS (PLAINTIFF).....APPELLANT;

*April 23.

AND

1901

*Feb. 19.

THE FREEHOLD LOAN AND SAV- }
INGS COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Rate of interest—Payment by instalments.

A mortgage given to secure payment of \$20,000 with interest at nine per cent payable half yearly, contained these provisos: "Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable.** Provided that on default of payment of any of the instalments hereby secured, or insurance or any part thereof at the times provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid."

Held, reversing the judgment of the Court of Appeal (26 Ont. App. R. 232) that the principal sum of \$20,000 becoming due for non-payment under the first of the above provisos was not an instalment in arrear under the second on which the mortgagee was entitled to interest at the rate of nine per cent per annum.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the plaintiff.

The action in this case was brought for an account from the defendant company of the rents and profits received from mortgaged lands of which the company had taken possession as mortgagee and finally sold for an amount sufficient to pay all the mortgage monies. The mortgagor claimed that there would be a balance coming to him unless the mortgagee was entitled to

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 26 Ont. App. R. 232.

charge nine per cent interest on the principal after default in payment under the provisos set out in the above head-note. The right to this rate of interest was what the court had to decide on this appeal.

Bicknell for the appellant referred to *People's Loan Co. v. Grant* (1).

Armour Q.C. and *Bethune* for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed, the judgment of the Court of Appeal discharged, and a judgment entered declaring that the appellant is only liable for interest at six per cent per annum from and after the date fixed by the mortgage deed for the payment of the principal money for the reasons given in the judgment of Mr. Justice Gwynne in which all concur. The appellant to have his costs in this court and both courts below.

TASCHEREAU J. concurred in the judgment of Mr. Justice Gwynne.

GWYNNE J.—The only question upon this appeal is as to the construction of certain mortgages.

Upon the 29th day of December, 1882, the plaintiff executed and gave to the defendants a mortgage upon certain lands therein mentioned situate in the Province of Manitoba for securing the repayment to the defendants upon the 2nd day of January, 1885, of the sum of \$20,000, then advanced to the plaintiff, together with interest thereon payable half yearly. There were two other mortgages upon the same lands subsequently executed by the plaintiff for securing two other principal sums with interest. The principal sums secured by these two mortgages are made payable on the 14th

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June, 1891. In all other respects the terms of these mortgages are precisely the same as those of the mortgage dated 29th December, 1882. At some time not stated on the record the defendants entered into possession of the mortgaged lands and took and received the rents issuing thereout as mortgagees in possession for some default and continued in such possession and receipt of rents until the 20th of June, 1889, when they sold the whole of the mortgaged premises for an amount admitted by themselves to have been sufficient to pay and discharge all monies claimed by them to have been due upon the security of all three mortgages. The plaintiff however insists that the amount so realised was sufficient to leave a balance payable to him, and this suit was instituted to procure the taking of an account of all the monies received by the defendants on account of the mortgaged debts and to ascertain and determine whether any, and if any, what amount of the purchase money realised upon the sale remained after satisfaction of the monies secured by and chargeable upon the mortgaged premises. The sole question before us is as to the amount of interest chargeable on the taking of such account and upon the said principal sum of \$20,000 after the 2nd day of January, 1885, when the said sum was by the mortgage made payable, that is to say, whether or not there is any stipulation by the mortgagor contained in the mortgage of the 29th December, 1882, for the payment of interest at the rate of nine per cent upon the said principal sum after the said 2nd day of January, 1885, or whether from that date interest can only be allowed at the statutory rate of six per cent, as damages for breach of the covenant to pay contained in the mortgage. The whole difficulty arises by reason of a printed form containing clauses in use by building and loan societies and required by sec. 3 of

ch. 127 C. S. C. when principal money and interest are blended and made payable by instalments, having been used and adapted to this mortgage whereby the principal sum advanced is made payable in one sum at a prescribed date.

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By the mortgage under consideration it is witnessed that in consideration of the sum of \$20,000 therein acknowledged to have been advanced to the plaintiff, he did give and mortgage the lands therein mentioned to the defendant company, their successors and assigns forever. Then follows, in the printed form, a clause which is required by the statute to be inserted in every mortgage wherein the principal and the interest secured by the mortgage are blended together and made payable by instalments. It is as follows:

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The amount of principal money secured by this mortgage is twenty thousand dollars and the rate of interest chargeable thereon is nine per centum per annum payable half yearly not in advance. Provided this mortgage to be void on payment at the office of the company in the City of Toronto of twenty thousand dollars in gold coin if demanded.

Then follows a clause which is inserted in the mortgage in writing for the purpose of adapting the printed form used to a loan like the present where the principal sum is made payable in one sum at a prescribed date and the interest thereon in the meantime. The clause so written is as follows:

The said principal sum of twenty thousand dollars to become due and be paid at the expiration of two years from the date thereof, that is to say on the second January, A.D. 1885, together with interest thereon *in the meantime at the rate aforesaid half yearly* on the second days of July and January in each and every year, the first of such payments of interest to be made on the second day of July next, A.D. 1883, together with taxes and performance of statute labour.

The mortgage then contains two provisos in the printed form upon the construction of which the question before us turns. They are as follows:

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Provided that on default of payment for two months, of any portion of the money hereby secured, the whole of the instalments hereby secured shall become payable.

Provided that on default of payment of any of the instalments hereby secured or insurance or any part thereof at the times provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid.

The language of these provisos has very intelligible application to the case of the loan where the principal sum advanced and interest thereon at a rate agreed upon are blended together and the sum of the amounts so blended is made payable by instalments until the whole blended sum is repaid, and the effect of the first of these provisos in such mortgage plainly is, that upon any one of those instalments becoming in arrear and continuing so for two months after the day prescribed in the mortgage for payment thereof, then the whole of the subsequent instalments shall become immediately payable in advance. whereupon the mortgagee may exercise all the powers contained in the mortgage for the recovery of the whole amount remaining on the security of the mortgage in anticipation of the day specified in the mortgage for payment of the last instalment.

The natural construction of such a clause when applied to a mortgage wherein the principal sum advanced is made payable in one sum at a prescribed date and the interest thereon half yearly in the meantime, is, as it appears to me, very plainly to be, that upon default being made and continuing for two months in payment of any of the sums, which, by the immediately preceding clause (to which this proviso must be construed as having special reference) are made payable as half yearly interest, then the principal sum shall become payable in advance of the day appointed in the mortgage for the payment thereof. Thus effect

is given to an imperfect clause as applied to a loan not payable by instalments but in one sum at a prescribed date *ut res magis valent quam pereat*. The object of the second of the above provisos in a mortgage where the principal sum and interest thereon are blended together and made payable by instalments is to make interest, and that compound interest, become payable at the rate named upon all instalments coming due every half year, and also upon all sums, if any should be advanced by the mortgagees, by way of premiums of insurance. And the effect of that clause in a mortgage like the present, where the principal is made payable in one sum at a prescribed date and interest thereon in the meantime half yearly, is simply, as it appears to me, to make interest, and that compound interest, become payable upon all sums of the half yearly interest not paid at the days prescribed in the mortgage; this is the construction which can naturally and reasonably be put upon the words "any of the *instalments hereby secured*" as used in a mortgage like the present one. The provision as to interest upon insurance moneys has relation to a covenant in the mortgage whereby the mortgagor covenanted to insure and keep insured the mortgaged premises in the sum of six thousand dollars, and that in default thereof the mortgagee might insure the premises and charge the premiums to the mortgagor.

As to these insurance monies a very different provision is made in the next clause whereby it is agreed between the parties *that interest at the rate of one per centum per month* upon all moneys paid by the mortgagees for insurance and for taxes, and for incumbrances, if any, on the said lands, and for costs incurred by the mortgagees in recovering and keeping possession of the mortgaged premises shall be a charge on the lands.

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The only remaining clause is that which empowers the mortgagees, in case of any default aforesaid, by sale of the mortgaged premises to realise payment of the principal money and interest and all other moneys charged on the mortgaged premises. This clause in short substance provides that if default should be committed in payment of any of the sums becoming due half-yearly for interest or in payment of insurance moneys, or in payment of the principal sum, and that such default should continue for three months then the mortgagees

may sell any of the said lands, &c., &c., and that upon such sale should any surplus remain in the hands of the company after payment of all their claims for *principal, interest* and all other sums secured by the mortgage the mortgagor shall be entitled to such surplus.

Now in none of these clauses is interest upon the principal sum of \$20,000 stipulated for at the rate of nine per centum per annum, or indeed at any rate of interest after the 2nd day of January, 1885; interest *in the meantime*, that is to say up to that day, is stipulated for payable half yearly, and as the mortgagees were given power to sell the mortgaged premises in case of any default, to reimburse themselves before the expiration of another half year, it may have been deemed quite unnecessary to make any stipulation for interest on principal after the day prescribed for the payment thereof; but whether the not expressly providing for the payment of interest upon the principal sum after that day is attributable to inadvertence or design is of no importance, for none being stipulated for no more than six per cent (the amount by law allowable in the absence of stipulation) can be allowed. Take the case of the mortgaged lands proving insufficient to pay the whole of the mortgage security, and that after sale a large part of the principal should remain unsatisfied, it surely cannot be

held that nine per centum per annum would still be recoverable under the covenant or any stipulation contained in the mortgage.

The sole contention of the respondents has been that the principal sum of \$20,000 is comprehended in the words "*any of the instalments*" &c., &c., in the two provisos above mentioned. To this contention the Court of Appeal at Toronto have assented. One of the learned judges was of opinion that this construction might be *inferred* from certain words in column No. 2 of schedule B of the Act respecting short forms of indentures set opposite No. 13 of the Act of the Province of Manitoba, but as already shewn an express clause is inserted in the mortgage specifying all the powers given for sale of the mortgaged premises upon any default; and moreover a rate of interest in excess of the rate of interest allowed by law in the absence of stipulation cannot be inferred.

In fine the contention of the respondents cannot be maintained. The appeal therefore must be allowed with costs, and an order made for the allowance only of six per centum on the principal sum of \$20,000 after the second day of January, 1885, as the only sum allowable by law in the absence of a *stipulation* for a greater amount.

SEDGEWICK and KING JJ. also concurred in the judgement of Mr. Justice Gwynne.

Appeal allowed with costs.

Solicitors for the appellant: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Reid & Wood.*

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