1930
YORK
v.
KRAUSE.

was of opinion, in view of all that took place, that they should be taken to include the $200 deposit and the $2,500 paid at the time of the execution of the agreement, making $2,700 in all, but nothing more.

Appeal allowed in part, with costs.

S. L. Springsteen for the appellant.

J. H. Rodd K.C. for the respondent.

1930
*March 4.
*April 10.

THE LONDON LOAN AND SAVINGS COMPANY OF CANADA (DEFENDANT) ..... } APPELLANT;

AND

ROBERT K. MEAGHER, LIQUIDATOR OF THE ESTATE AND EFFECTS OF TRANS-CANADA THEATRES LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Mortgage—Agreed bonus to mortgagee—Right to bonus—Interest Act, R.S.C., 1927, c. 102, ss. 6 to 9.

Appellant agreed to loan to T. Co., on mortgage of real estate, $30,000, at 7½% interest, but stipulated that, in consideration of making the loan, it should receive a bonus of $3,000, to which T. Co. agreed. The mortgage on its face was one for $30,000, bearing interest half-yearly at 7½% per annum, and containing no reference to the bonus. Appellant issued its cheque to T. Co. for $28,505.55, being the $30,000 less deductions for taxes, insurance premiums and solicitors' costs, and took a cheque from T. Co. for the $3,000 bonus. Some payments were made, but T. Co. became insolvent, and, the mortgage being in arrear, appellant advertised the property for sale, and the liquidator paid off the amount owing, on the basis of the full face amount of the mortgage, without knowledge of the bonus. He sued to recover the $3,000, with interest paid thereon, invoking ss. 6 to 9 of the *Interest Act*, R.S.C., 1927, c. 102.

Held, that he could not recover. The agreement for the bonus was legal and enforceable. The $3,000 bonus could have been recovered by appellant as a debt, not under the mortgage, but under the agreement for the loan, and the full $30,000 was advanced, whether the bonus be taken as paid by the mortgagor's cheque or by retention

---

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

from the loan, unless the *Interest Act* applies (*G. & C. Kreglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd.*, [1914] A.C. 25, *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307, *Mainland* v. *Upjohn*, L.R. 41 Ch. D., 126, referred to). The Act does not apply; in view of the effect of the legislation in question, its application should be confined to mortgages coming clearly within its description; and, taking the precise language of s. 6, it applies only to mortgages which on their face come within the description in that section. In this case there is nothing in the mortgage itself that brings it within such description. Moreover, there was no offence against the spirit of the Act; the mortgage did not fail to disclose to an ordinary borrower what he was to pay for the loan; and the aim of the Act is, not to limit the rate of interest or recompense that lenders may exact, but to prevent the collection of interest provided for in the mortgage by plans which do not disclose to the ordinary borrower the real rate of interest being exacted by such plans.

The far-reaching consequences involved, if the legislation in question were held applicable against a transaction such as that in question, also form a reason for confining its application to mortgages coming strictly within the description in s. 6.

Singer v. *Goldhar*, 55 Ont. L.R., 267, and *Re Brown*, 61 Ont. L.R., 602, discussed; and the passage in the former case, at p. 271, where *Canadian Mortgage Invt. Co.* v. *Cameron*, 55 Can. S.C.R., 409, and *Standard Reliance Mortgage Corp.* v. *Stubbs*, 55 Can. S.C.R., 422, are cited, commented on.

Judgment of the Appellate Division, Ont., 64 Ont. L.R. 600 (affirming judgment of Wright J., *ibid*, p. 221) reversed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of Wright J. (2), holding that the plaintiff, liquidator of the estate and effects of Trans-Canada Theatres Ltd., was entitled to recover from the defendant the sum of $3,000 and interest thereon, the said $3,000 being the amount of a bonus paid to the defendant by the said Trans-Canada Theatres Ltd. on the making of a loan by the defendant to the said company secured by a mortgage on certain theatre premises in London, Ontario. The plaintiff relied on ss. 6 to 9 of the *Interest Act*, R.S.C., 1927, c. 102. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed and the action dismissed with costs throughout.

W. N. Tilley K.C. and *Hamilton Cassels* for the appellant.

R. V. Sinclair K.C. for the respondent.

(1) (1929) 64 Ont. L.R. 600. (2) (1929) 64 Ont. L.R. 221.

1930

LONDON LOAN & SAVINGS CO. OF CANADA v. MEAGHER.

The judgment of the court was delivered by

SMITH J.—The respondent (plaintiff) is the liquidator of the estate of Trans-Canada Theatres Limited, which company, in March, 1922, applied to the appellant (defendant) for a mortgage loan of $30,000. The appellant agreed to make the loan, at 7½ per cent. payable half yearly, but stipulated that, in consideration of making the loan, it should receive from the mortgagor a bonus of $3,000, which the mortgagor agreed to pay.

The mortgage is dated the 15th day of March, 1922, and on its face is a mortgage for $30,000, bearing interest half yearly at 7½ per cent., and containing no reference to the bonus.

The appellant issued its cheque to the mortgagor for $28,505.55, being the $30,000 less some deductions for taxes, insurance premiums and solicitors' costs, and took a cheque from the mortgagor for the $3,000 bonus. Some payments were made, but the mortgagor became insolvent, and, the mortgage being in arrear, the mortgagee advertised the property for sale, and the liquidator, about the 12th March, 1925, paid off the amount owing, on the basis of the full face amount of the mortgage, without knowledge of the bonus having been paid.

In this action, the liquidator sues to recover the $3,000 with interest paid thereon up to 12th March, 1925, claiming to be entitled to such relief by virtue of the *Interest Act*, R.S.C., 1927, ch. 102.

The trial judge (1) gave judgment in favour of the liquidator for the amount claimed, and this judgment was sustained in the Second Appellate Division of the Supreme Court of Ontario (2), the five judges being unanimous.

The portion of the *Interest Act* referred to, relating to the questions involved, reads as follows:

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.

(1) (1929) 64 Ont. L.R. 221. (2) (1929) 64 Ont. L.R. 600.

7. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in such statement.

8. No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage of real estate, which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrear.

2. Nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear.

9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under the three sections last preceding, such sum may be recovered back, or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

I am of opinion that the payment of the full amount of $30,000 by the mortgagee and payment of the bonus by the mortgagor's cheque, as arranged, had no different legal effect from payment of that bonus by simply deducting and retaining it from the loan. *Mainland* v. *Upjohn* (1).

If, as argued, the bonus became a debt owing by the mortgagor to the mortgagee as consideration for the loan outside of the mortgage, the liability would have been satisfied by retention of the amount from the mortgage moneys, just as any other debt that might have been owing by the mortgagor to the mortgagee might have been paid effectually in that way.

It was an unsettled question for a considerable period as to whether or not, in connection with a mortgage loan, there could be any other transaction between the mortgagor and the mortgagee that might secure any possible advantage to the mortgagee. The question is discussed at length in *Mainland* v. *Upjohn* (cited above) (2); *Biggs* v. *Hoddinott* (3), and *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* (4). The latter case, in the House of Lords, settles the question in the following paragraph, commencing at the bottom of p. 60 of the Report:

My Lords, after the most careful consideration of the authorities I think it is open to this House to hold, and I invite your Lordships to hold, that there is now no rule in equity which precludes a mortgagee, whether

(1) (1889) L.R. 41 Ch. D., 126, at pp. 143, 144.
(2) (1889) L.R. 41 Ch. D., 126.
(3) [1898] 2 Ch., 307.
(4) [1914] A.C., 25.

1930

LONDON LOAN & SAVINGS CO. OF CANADA v. MEAGHER.

Smith J.

the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem.

It is clear, therefore, that the stipulation for the $3,000 bonus in this case was legal and capable of being enforced, unless the *Interest Act* is a bar.

As to all mortgages that fall within the description set out in section 6, the Act takes away from the mortgagee part of what the mortgagor has agreed to pay, and would be obliged to pay, were it not for the Act. This results, quite irrespective of whether or not the terms are fair under the circumstances and have been agreed to by the mortgagor with full knowledge and appreciation of their meaning and effect, and irrespective also of whether or not the mortgagor would be entitled to relief under the ordinary rules of law. The application of the Act therefore must be confined to mortgages that come clearly within the description set out in the Act itself.

In this case the mortgage is not by its terms made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, nor on any plan which involves an allowance of interest on stipulated repayments, and does on its face contain a statement showing the amount of principal money and the rate of interest chargeable thereon calculated half yearly, not in advance. There is therefore nothing in the mortgage itself that brings it within the description set out in section 6. The argument is that, by evidence outside the provisions of the mortgage, it is established that it was agreed that the mortgagor should pay for the use of the money $3,000 in advance, in addition to the 7½ per cent. half yearly mentioned in the mortgage, so that the real terms of the loan were an advance of only $27,000, for which the mortgagor was to pay, as interest, $3,000 in advance, together with 7½ per cent. half yearly on $30,000, and thus the $3,000 of interest became blended with the $27,000 of principal under the covenant to pay $30,000. This, however, is begging the question, because it is only if the Act applies that the result follows. As already pointed out, the $3,000 that the mortgagor agreed to pay as consideration for the loan,

whether regarded as interest or as something differing from interest, could have been recovered as a debt, 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. To hold, therefore, that only $27,000 was advanced, it must first be determined that the Act does apply, and that any right to the $3,000 bonus was by its provisions prevented from arising.

The argument, if acceded to, involves very far-reaching consequences. An innocent third party purchasing such a mortgage as the one in question at its face value without notice would be entitled to collect on it only the actual amount advanced ($27,000 on this mortgage) and no interest. A very usual commercial transaction is, as pointed out on argument, a mortgage by a corporation on its assets, including real estate, made to a trustee to secure a bond issue, the bonds being sold to the public at a discount. The mortgagor in such a case receives only the face amount of the mortgage less the discount, and probably less also the charges and expenses of the trustee (mortgagee). It would be difficult to distinguish in principle such a mortgage from the one in question here. It might even be argued that the principle would extend to the common transaction of the retention by the mortgagee of the amount of his solicitor's bill for examining title and putting through the loan.

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," etc., and it is only to mortgages described in the preceding part of the section that the final provision and sec. 9 apply. The proper conclusion seems to be that the provisions of the statute apply only to mortgages which on their face come within the description set out in section 6.

If it be thought that this leaves open the door for making agreements similar in practical effect to the mortgages de-

1930

LONDON LOAN & SAVINGS CO. OF CANADA v. MEAGHER.

Smith J.

scribed in section 6 but not covered by it, Parliament can enlarge the scope of the Act, at the same time providing, as it may see fit, against any undesirable results such as I have indicated.

The Act, however, as it stands does not aim at controlling or limiting the rate of interest or recompense that lenders may exact for loans, and has no such effect if the last part of section 6 is complied with, except that no greater rate can be exacted than the rate mentioned in the statement thereby called for. The aim is to prevent the collection of interest provided for in the mortgage by plans described in section 6, which do not disclose to the ordinary borrower the real rate of interest being exacted by such plans. So far, however, as this Act is concerned, any rate of interest may be provided for by such plans, and enforced, if that rate is disclosed by a statement in the mortgage of the principal money and of the rate of interest, as provided in the latter part of section 6.

There is, therefore, in the mortgage in question, no offence against the spirit of the Act, because it does not fail to disclose to an ordinary borrower what he is to pay for the loan, though he might not realize what rate per cent. the $3,000 cash in advance, added to the 7½ per cent., would amount to. The $3,000 cash payment might, however, give him a clearer idea of what the loan was costing him than if provided for in terms of an added rate of interest.

There were previous decisions of the Appellate Divisions, which the learned trial judge and the Appellate Division thought were binding on them in this case, but one of the learned judges of the Appellate Division suggests a doubt as to their correctness. The first of these is *Singer* v. *Goldhar* (1). There the mortgage was for $4,700, to be repaid in eleven monthly instalments of $100 each, the balance to be paid at the end of twelve months. There was no provision for the payment of interest, but there was a provision that the mortgage, when executed and registered, should not bind the mortgagee to advance the money or, "having advanced a part, to advance the balance." The action was for foreclosure. There was no oral evidence, but it was admitted, for the purposes of the trial, that only

(1) (1924) 55 Ont. L.R. 267.

$3,500 was advanced and that the mortgagor had paid back $3,800, and it was held that the mortgage was satisfied. This result does not conflict with what I have indicated above to be the proper construction to place upon the Act.

There is, however, some conflict in the reasons given, and as two cases in this court are cited in support of these reasons, I deem it well to call attention to the particular passage where this appears. It is at page 271, and is as follows:

> But the essential thing is that the statute requires that the mortgagor shall be informed on the face of the mortgage not merely of the amount which he is to pay, but also of the *rate* of interest which he is to pay on the money lent, and this was not done: *Canadian Mortgage Investment Co.* v. *Cameron* (1); and *Standard Reliance Mortgage Corporation* v. *Stubbs* (2).

In these cases this court was dealing with mortgages which on their face had plans of repayment coming within the description in the first portion of section 6, and the question in dispute was whether or not the mortgage contained a statement in compliance with the provision of the latter part of that section. I have already pointed out that this latter part of the section applies only to mortgages that come within the description in the previous part of the section. The passage quoted above is dealing, as will be seen, with a mortgage which had no provision for repayment on any of the plans described in section 6. The two cases cited are authority for the proposition laid down only when it is limited to mortgages described in section 6.

Another case referred to is *Re Brown* (3). The terms of the mortgage are not set out, but in the reasons for judgment it is stated that there is a provision in the mortgage which "involves an allowance of interest on stipulated repayments." This brings the mortgage within the description in the first part of section 6, and this case, therefore, does not seem to be in conflict with the construction which I have placed upon the statute.

The appeal must be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Cassels, Brock & Kelley.*

Solicitors for the respondent: *McMaster, Montgomery, Fleury & Co.*

(1) (1917) 55 Can. S.C.R. 409. (2) (1917) 55 Can. S.C.R. 422.
(3) (1927) 61 Ont. L.R. 602.