THE UNION BANK OF CANADA (DEFENDANT) ..... APPELLANT;

AND

FELIX McHUGH (PLAINTIFF) ..... RESPONDENT.

1911
*Feb. 24.
*May 15.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Construction of statute—N.-W. Ter. Con. Ord., 1898, *c.* 34—*Extra-judicial seizures—Chattel mortgage—Sale through bailiff—Excessive costs—Penalty—Waiver—The "Bank Act," R.S.C.*, 1906, *c.* 29, *s.* 91—*Interest—Contract—Excessive charges—Settlement of account stated—Voluntary payment—Surcharging and falsifying—Reduction of rate—Removal of mortgaged property—Negligence—Measure of damages.*

The parties to a chattel mortgage may waive the provisions of the third section of the North-West Territories Ordinance, 1898, ch. 34, in respect to the expenses of the seizure and sale of the mortgaged property. *Robson* v. *Biggar* ((1907) 1 K.B. 690), followed. Judgment appealed from (3 Alta. L.R. 166) reversed.

Where interest in excess of the rate of seven per cent. per annum has been voluntarily paid upon the settlement of accounts stated between a bank and its debtor, the amount so paid cannot be recovered back from the bank by the payer. In respect of unsettled accounts between a bank and its debtor, charges of interest in excess of the rate limited by section 91 of the "Bank Act," R.S.C., 1906, ch. 29, made in virtue of an agreement between the parties, should be reduced to the rate of seven per cent. per annum upon the surcharging and falsifying of such accounts. Judgment appealed from (3 Alta. L.R. 166) affirmed, Idington J. dissenting.

Where loss occurs to mortgaged property in consequence of want of reasonable care in its removal from the place of seizure to the place at which it is sold under the authority of a chattel mortgage, the proper measure of the damages recoverable by the mortgagor is the amount of depreciation in value caused by the negligent manner in which the removal was effected. In the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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present case, the evidence being insufficient to justify the assessment made by the trial judge, it was referred back to have the damages properly assessed. Judgment appealed from (3 Alta. L.R. 166) varied, Duff and Anglin JJ. dissenting.

APPEAL from the judgment of the Supreme Court of Alberta(1), reversing, in part, the judgment of Beck J., at the trial(2).

The circumstances of the case are stated in the judgments now reported.

Ewart K.C. and *Walsh K.C.* for the appellant.

C. C. McCaul K.C. for the respondent.

THE CHIEF JUSTICE.—This appeal should be allowed as to the penalties. The cross-appeal should be dismissed. As to the rate of interest the judgment should be confirmed. The judgment of the court below should be varied by directions that, on a reference back to assess the damages, the measure of damages to be allowed should be the depreciation in value, if any, of the horses caused by the manner in which they were driven from the ranch to the place of sale. The whole should be with costs in favour of the appellant.

DAVIES J.—I agree that this appeal should be allowed as to the penalties and the judgment below confirmed as to the rate of interest allowed to the bank and that the cross-appeal should be dismissed. I agree with the reasoning of Duff and Anglin JJ. on these two questions of the non-liability of the appellant for the penalties prescribed by the Consolidated Or-

(1) 3 Alta. L.R. 166. (2) 2 Alta. L.R. 319.

dinance of the North-West Territories, 1898, ch. 34, and as to the right of the appellant, notwithstanding the provisions of section 91 of the "Bank Act," R.S.C., 1906, ch. 29, to retain the rate of interest on the basis of voluntary payment made by the respondent to the bank, which the court appealed from allowed.

As to the question of damages, I am unable to find any evidence justifying the amount at which the trial judge assessed them. In exercising the power of seizure and sale under the mortgage the bank was, of course, obliged to act reasonably in the circumstances. In driving the horses from the ranch to the place of sale their duty was to take reasonable care of the animals and not to over-drive them; and, for any damages caused by such breach of duty, the appellant would, of course, be liable. The necessary evidence to justify the recovery of any such damages as those assessed by the trial judge was wanting in this case. It seemed to me to be purely guess-work. On this question of damages there should be a reference back to the court below to assess the damages and the measure of such damages should be the depreciation in value, if any, of the horses caused by their having been improperly driven from the ranch to the place of sale.

IDINGTON J.—The respondent and another owed the appellant bank, and, on the 28th of May, 1907, gave a chattel mortgage upon a large number of horses and other chattels to secure the sum of $36,233, which was the sum supposed on that date to be due from them to said bank.

On or about the 6th of July, 1908, the bank mana-

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ger at Calgary instructed by letter one Smith to take possession of the horses and cattle and employ such men as necessary to round up or hold the stock of which sales were to be made.

This was done under a power of sale in the mortgage.

It is not denied that the respondent was in default and the mortgage enforceable by this means.

The horses taken possession of were found some fifty or sixty miles from Calgary and undergoing medical treatment known as "dipping" under the supervision of the veterinary authorities for the district.

The horses numbered from three hundred and fifty to four hundred and there were several hundred cattle also to be taken care of.

Before the horses could be taken out of quarantine and got into any shape for selling advantageously some weeks elapsed.

There were over three hundred taken to Calgary and finally entrusted to the Alberta Stock Yards Company in that city, to be sold. They were sold there.

After the sale of horses the assistant-manager of appellant at Calgary wrote the following letter to the respondent's solicitors there:

Calgary, Alta., September 9th, 1908.

Messrs. Reilly & McLean,
Calgary.

Dear Sir,—I am in receipt of your letter of the 8th instant and now beg to hand you statement shewing total receipts and expenses of the different sales of horses held on account of McHugh Brothers:

August 14th—163 head for	$ 8,920.50
Less expenses and 3½ per cent. commission..	375.50
Net result	$ 8,545.00

August 21st—177 head for		$12,278.00	
Less expenses and 3½ per cent. commission		503.20	
Net result			$11,774.80
Horses sold to Frank McHugh	$ 985.00	off	$10,789.80
Cash, $750, note	235.00		
August 28th—85 heads for	5,094.00		
Less expenses and 3½ per cent. commission	194.00		
Net result			$ 4,899.05
September 3rd—64 head for		$2,665.00	
Less expenses		120.75	
Net result			$ 2,544.25

With regard to the sale of cattle I might say that we are advertising a sale to be held at Strathmore on the 24th of this month.

Yours truly,

(Sgd.) C. F. PENTLAND,
Asst.-Manager.

Without asking for any further explanation this suit was brought for penalties under the ordinance I am about to refer to and for damages done the horses in the course of driving them to Calgary and for an account.

The North-West Territories Consolidated Ordinance, 1898, ch. 34, provides for fees, etc., to be taken in respect of distress or seizure made either by landlords or under chattel mortgage. Section one deals with the former and section two deals with the latter.

We are only directly concerned here with section three, which enacts:

If any person making any distress or seizure referred to in sections 1 and 2 of this ordinance shall take or receive any other or greater costs than are set down in the said schedule, or make any charge whatsoever for any act, matter or thing mentioned in the said schedule and not really performed or done, the party aggrieved may cause the party making the said distress or seizure to be summoned before the Supreme Court of the judicial district in which the goods and chattels distrained upon or seized or some portion thereof lie and

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the said court may order the party making the distress or seizure to pay to the party aggrieved treble the amount of moneys taken contrary to the provisions of this ordinance and the costs of suit.

The schedule is as follows:

SCHEDULE.

1. Levying distress $1.00
2. Man in possession, per day 1.50
3. Appraisement, whether by one appraiser or more, two cents on the dollar on the value of goods up to $500, and one per cent. on the dollar for each additional $500 or fraction thereof up to $2,000, and one-half per cent. on all sums over that amount.
4. All reasonable and necessary disbursements for advertising.
5. Catalogue, sale, commission and delivery of goods, three per cent. on the net proceeds of the goods up to $1,000 and one and one-half per cent. thereafter.

Now, it is to be observed this enactment does not deal with things outside the schedule and that does not pretend to cover the maintenance of or the removal of and fitting for sale of any such thing as stock when seized.

The power of seizure and sale in the mortgage is in that regard as follows:

And upon and from and after taking possession of such goods and chattels it shall and may be lawful, and the mortgagee, and each or any of them, is and are hereby authorized and empowered at his or their discretion to sell the said goods and chattels or any of them, or any part thereof, at public auction or private sale on the premises hereinbefore described, or elsewhere as to them or any of them may seem meet; and from and out of the proceeds of such sale in the first place to pay and reimburse all such sums and sum of money as may then be due by virtue of these presents, and all costs and expenses (including the costs (if any) of the solicitor of the mortgagee) as may have been incurred by the mortgagee, in consequence of the default, neglect or failure of the mortgagors in payment of the said sum of money with interest thereon as above mentioned, or in conquence of such sale or removal as above mentioned, or in consequence of failing in the performance of any of the covenants or agreements herein contained, and on the mortgagors' part to be performed and kept, and in the next place to pay unto the mortgagors all such surplus as may remain after such sale and after payment of all such sum or sums of money and interest thereon as may be due by virtue of these presents at the time of such seizure and after pay-

ment of the costs, charges and expenses incurred by such seizure and sale as aforesaid.

It seems abundantly clear that there is no substantial conflict between this and the penal enactment in section 3 and the schedule. It is true that there is room to argue that the language of the prior sections forbids any charges save and except as in the schedule, but there is no sanction annexed thereto save that in section three.

To my mind it is quite impossible, if we have regard to the law governing the construction and application of penal enactments, to read this one as extending to anything beyond the excessive taking of fees for the specified subjects named in the schedule.

Section four of the ordinance used the words "fees or costs."

The history of the legislation shews its purpose was such as to fix and limit the fees for specified services. And the enactment covers only excess thereof and acts not really performed or done, yet charged for.

Then, again, these enactments are not of such a general character, embodying a public policy that would render a contract anticipating their operation and providing against same as between parties concerned, illegal and therefore void.

The general purview of the legislation demonstrates this. The penalty can only be sought by an aggrieved person. How can a free person who has specifically agreed that these provisions shall not be applicable to a contract he has entered into be an aggrieved person under said section ?

At all events how can such a person, desiring to protect his own business and property from ruin in

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case a distress has to be made, not contract for any and every thing to be done outside the said schedule and its operation ?

Suppose a distress made by or with one man only, and no feed for stock so distrained, is this one man foreshadowed in the schedule to keep the stock without feed or drink ?

Is it to be illegal for tenant or mortgagor to bargain with the distrainor for either feeding or transportation to a suitable market ?

If not illegal after the seizure, what makes it, or can make it illegal to contract for and in anticipation thereof ?

But the absurdity of the contention appears when we consider the case of the landlord under section number one, and the law binding such an one distraining to proper treatment of stock when seized and to hold the chattels for specified terms before he can sell.

I should not have supposed this argument needed, but for the finding of the court below that this penal enactment leaves no room for the operation of the powers of removal and re-payment of the costs thereof even when expressly contracted for as above.

In my opinion such is not the law. The reasonable and necessary cost for the care and maintenance, and transportation, of the stock seized were all impliedly within the contemplation of the parties to the mortgage in question, and I think contracted for.

So holding, — what case is made out for adjusting a penalty ? The charges under the schedule seem blended with other expenses contracted for. How can a court pass judgment without knowing if the schedule has been transgressed ? What has happened and is in evidence in support of this penalty ?

How can we draw any inference such as cases like *Dickenson* v. *Fletcher*(1), for example, require to be drawn before penalties can be enforced ?

A statute may by its terms indicate that a *mens rea* is not essential to subjecting one to a penalty, but is this one of that nature ?

The appellant has not as yet taken anything; for the respondent confessedly on this evidence was when rendered this account indebted for a balance so great that all these charges even if trebled were negligible. It is not as if the debt were wiped out and a balance clearly coming to the respondent, but for the appellant insisting on keeping it.

The mortgagor is suing for an account and, without waiting to see the result of that account, the court has directed an inquiry to be made to see if by any possibility there can be found some ground for inflicting this penalty. Where is there any precedent for such a proceeding ?

So tender has the court ever been as to penalties, it has refused to aid in the discovery or grounds for inflicting them. The cases of *Hunnings* v. *Williamson* (2), and cases and principles there cited and discussed shew the attitude the courts have held and ought to hold relative to such analogous inquiries as therein treated of. How can such an inquiry be made with due regard to the observance of the principles of the law as laid down there, or what result can we reach but that such an inquiry and direction is improper ? The ordinary account and inquiry is quite proper, but it cannot be had for such a purpose or

(1) L.R. 9 C.P. 1. (2) 10 Q.B.D. 459.

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indeed efficiently conducted when hampered by such a pursuit.

I think the appeal should be allowed with costs.

A cross-appeal has been taken relative to a claim for damages found by the learned trial judge and set aside by the court of appeal and a reference directed in respect thereof.

I do not think we should interfere with this exercise of discretion in disposing of the trial judgment. The evidence does not warrant our reversing the court of appeal and restoring the trial judgment.

And when we look at its mode of disposing of the future trial it is a mere matter of procedure that is involved.

Indeed, in that regard it seems akin to the case of *Union Bank of Halifax* v. *Dickie*(1).

I agree, however, that the measure of damages referred to is not stated accurately.

The damages should be confined to and measured by the difference between the price for which the horses were sold, and what they should have been sold for, if they had been driven with due care, from the place where seized or held to Calgary.

As framed the judgment may permit of some other result than that of an allowance for damages caused to the horses by over-driving or an improper mode of conducting the transportation from one point to the other.

And there should be added to this or striken out of the bank's claim for expenses, any expense incurred in caring for and resting them longer than might have

(1) 41 Can. S.C.R. 13.

been necessary if they had not been over-driven or improperly driven. It is the depreciation and loss (if any) solely attributable to these causes that had to be considered on the inquiry and borne by the bank.

Another question raised is the taking of accounts between the parties. The court of appeal has interfered, erroneously, I think, with the disposition of such matters by the learned trial judge. That might have been improved, but this judgment in appeal seems worse.

There is no reason for treating a bank differently from other parties.

So far as the parties have settled their accounts from time to time they should be bound by that settling of accounts, even if there be covered thereby an allowance for a greater rate of interest than the rate recoverable by an action at law.

It is quite competent for the customers of a bank to agree to pay any rate of interest named. And when they have paid what they have promised they are bound by the payment and cannot recover it back any more than in the case of any other voluntary payment.

There is no law enabling the recovery back.

The payment by way of any settlement and striking of a balance clearly understood between the parties is good both in law and morals and ought not to be disturbed.

The parties surely must be taken to have stated their accounts up to the date of the last mortgage.

It is not clear how much further settlements proceeded, but if had, as likely, at each renewal of notes or otherwise, they must be respected even if including charges for interest beyond seven per cent. per annum.

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In the absence of definite evidence in this last regard, I would have the taking of accounts to begin with 28th of May, 1907, accompanied with a direction to observe duly stated accounts, if any, since that date, and that same be not disturbed merely because of a greater rate of interest having been charged than would be recoverable by an action.

The agreement of the parties so far as executed must not be disturbed for any other reason than fraud or mistake.

I do not understand fraud to be charged at all, and, that being out of the question now, the possibility of mistake is all that is left. And in regard to mistake the onus is always on the party to a settled or stated account claiming error to state it and prove it.

No one should be lightly deprived of this right and I would, therefore, feel inclined to give, as the learned trial judge gave, the right to impeach any stated account between the parties, and direct that upon proof of error the same be rectified, but in carrying out the rectification the calculations of interest shall proceed upon the basis of the general rate of interest, which defendant from time to time purported to charge. There is much force in the point made that no clear case of impeachment of the stated accounts was made by evidence at the trial. But the learned judge might have formally reserved this part at the outset. I think, though he did not do so quite according to the usual practice, his wishes might well be respected.

In so far as settled or stated accounts have not put an end to the question of the rate of interest to be charged or chargeable, a question arises upon this mortgage of May, 1907, which provided for eight per cent. interest, which is beyond the rate for which the bank can recover by action.

It is contended that the covenant is, therefore, void. I cannot see how it can be sued upon. Indeed, it is not claimed that it can serve for a recovery of eight per cent. But cases have been cited, which, it is urged, manifest that it is good for seven per cent.

None of the cases cited, when examined, so meet this condition of things we have to deal with as to produce such a result. It was not argued that the covenant was not intended to be read as referring to anything but the eight per cent. rate in the proviso for redemption. The language is not as express as the redemption proviso, to which it is a sequel, but obviously means such interest as therein provided for.

It is, therefore, to be treated as simply a covenant to pay eight per cent. The statute by its legal effect says that kind of contract is not one upon which the bank can recover. To read this covenant otherwise and as implying an alternative of the legal limit, seems against all principles of construction.

It is a cutting in two of that which in its very terms forbid such a thing being done. And if it can be read merely as a covenant to pay interest, that would mean interest according to the usual legal acceptation of the term.

If no action will lie on the covenant, what is the condition of things ?

It is clear from the nature of the transaction and the business of the parties that they intended that interest should be paid.

The covenant being set aside as invalid for purposes of this recovery, can it be looked at at all as evidence of the intention that interest should be paid ?

Can there be any doubt if a customer overdraws his account interest can be charged upon money so lent ?

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Is it because it is payable on demand ? If so, then could it be recovered without demand, or before demand ?

I cannot find it can be rested upon any satisfactory basis except the implied contract to pay interest by reason of the nature of the transaction and the universal understanding that such an implication is a term of the contract thus formed between the parties as banker and customer.

In *Marshall* v. *Poole*(1) it was held when goods were sold and delivered upon an agreement to pay by a bill due at a future day, and no such bill was given, interest ran from the date at which the bill should have fallen due, because it would have carried interest from such due date if it had been given.

It seems to rest upon nothing but an implied agreement; for interest would not in the then state of the law run on the price of the goods, but for that agreement giving room for such an implication.

Besides, I incline to think the covenant may be looked at for the purpose of settling the question of whether in fact it was a gratuitous loan, or to bear interest.

If an action cannot be founded upon the covenant it may be said the instrument cannot be looked at for any purpose.

Does not the principle upon which some of the cases cited from Leake, page 556, where the instrument is used for a collateral purpose, support this suggestion, that the covenant, though illegal, may form some evidence of the relation of the parties.

The subject is a difficult one, not fully argued, but

(1) 13 East 98.

though doubting, I conclude interest was an implied term of the contract of loan.

It was contended that the elementary principle that an express contract excludes an implied one, excluded the implication of interest in this case.

That, however, is beside the question, for if there was merely a void covenant, I fail to see how it could exclude anything.

If interest is to be allowed, at what rate ?

It is suggested that the statute, which is expressed as follows:

> The bank may stipulate for, take, reserve or exact any rate of interest or discount, not exceeding seven per centum per annum, and may receive and take in advance, any such rate, but no higher rate of interest shall be recoverable by the bank

enables a recovery at seven per centum. I cannot so read it. Indeed, it seems to me rather a far-fetched construction.

If good for anything it must mean that seven per centum is to be the rate in all cases of money due or accruing due to a bank, unless where an express contract exists between a bank and its customer fixing another rate.

I cannot assent to any such consequences as within the purpose of the legislature.

I think, therefore, the rate, where not provided for and disposed of by what I have already said, must be five per cent. This was and is the ordinary rule where a contract exists to pay interest, as I find, without stating its rate and is fixed by section 2 of the "Interest Act" for all such cases.

It is quite likely when all the facts are disclosed as to renewals, etc., it is only as to past due debts that there can be any question herein. And in such

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cases, of course, the usual damages on a five per cent. basis must be allowed.

It is to be observed that the learned trial judge allowed five per cent., and the only complaint made in the cross-appeal upon which this issue turns, is the raising of the rate by the appellate judgment to seven per cent., and hence cross appellant can hardly complain if interest allowed at five per cent.

I preferred, notwithstanding that ground, to investigate the matter, and see if I could rest it upon what the law gives the parties independently of the slip in the notice.

I think the appeal should be allowed with costs; and the cross-appeal allowed on the question of interest, but disallowed on the question of restoring the judgment for damages, and the form of judgment be varied so as to better define the operation of the sphere of the reference by measuring the alleged damages as above indicated. The cross-appeal having only succeeded in part should be disposed of as thus indicated without costs.

The judgment as it stands better be rescinded and framed anew on the lines necessary to effectuate the taking of the accounts between the parties, on the lines indicated by the majority of the court and the basis of the indebtedness being assumed (until a later settlement (if any) appear) to be that stated in the last chattel mortgage, subject to such impeachment for error in any of the items constituting the amount thereof and the accounts being surcharged and falsified; and that the clerk in taking the reference shall, if he find any later settlement of the accounts as a whole, confine the taking of accounts to the dealings subsequent to the latest of any such settlements, and

subject to the corrections of errors in like manner as above directed. A general declaration better be made directing him not to interfere with any allowance in the past of interest based on what the parties have agreed to, except for error in calculation, but where no agreement exists to take the account, it ought, in my opinion, to be on the basis of five per cent. per annum, as rate of interest to be allowed.

DUFF J.—Three questions are raised by this appeal. First, as to the effect of the Consolidated Ordinance of the North-West Territories (1898), ch. 34. There is no reason, I think, why a person employing a bailiff, or the person on whom the incidence of the charges ultimately falls, should not be at liberty to waive the benefit of the statute: *Robson* v. *Biggar* (1). Since the mortgage in question contemplates obviously that the mortgagee shall, when acting under the power of sale, make such expenditures as may reasonably be necessary for the proper care of the mortgaged property and for obtaining the most satisfactory results, I think we may properly imply an assent on the part of the mortgagor to such waiver by the mortgagee where, in the circumstances, it would be reasonable. That it was reasonable in the circumstances of this case cannot be disputed.

Secondly. — With respect to section 91 of the "Bank Act," R.S.C., 1906, ch. 29, I think the governing words of this section as regards its effect upon the obligations of the parties under a contract providing for the payment to a bank of a higher rate of interest than seven per cent. are these: "no higher rate of interest shall be recoverable by the bank."

(1) (1907) 1 K.B. 690.

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Where a sum in excess of the amount exigible according to that rate has been paid the circumstances of the case must determine whether that excess is or is not recoverable from the bank by the payer. I think the allowance made in the court below on the basis of voluntary payment is right and ought not to be disturbed.

Thirdly.—As to damages. The duty of the mortgagees in exercising the powers of taking possession and selling was to act reasonably. That involved, in the circumstances of this case, the duty of taking reasonable care of the appellant's cattle while on the way to the place of sale.

There was evidence that they failed in this duty, and sufficient evidence, I think, to support the finding of the trial judge as to the quantum of damages. On this point, I should allow the appeal and restore the judgment of the learned trial judge with this variation, viz., that the sum awarded as damages be allowed to the plaintiff in the mortgage account.

ANGLIN J.—In my opinion the Consolidated Ordinance of the North-West Territories (1898), ch. 34, is not applicable as between a chattel mortgagee, who sells through a bailiff, and his mortgagor. It is substantially a re-enactment of the English statute, 59 Geo. III. ch. 93. The preamble to this latter Act makes it reasonably clear that such a case would not fall within its purview. Although the territorial ordinance lacks this preamble, having regard to its history, to the unsuitability and incompleteness of its provisions and to the fact that the original Act, which deals only with landlords' distresses, appears to have been designed for the protection of the landlord as

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well as of the tenant against extortionate charges by bailiffs, I am satisfied that this legislation was not intended to govern such a case as that now before us.

But if it were, *quisque potest renunciare juri pro se introducto*. The mortgagor for whose protection the statute was passed could waive its provisions if he so desired. *Robson* v. *Biggar*(1). By the clause in the defendant's mortgage authorizing it to reimburse itself for

> all costs and expenses * * * incurred by the mortgagee * * * in consequence of sale or removal

of the mortgaged property, having regard to the nature of such property, the mortgagor must be taken to have sanctioned the outlays made by the mortgagee so far as they were reasonably necessary and proper for the care and disposition of it. Apart from the objection to them based on the statutory tariff the reasonableness of the charges made has not been challenged. The mortgagor has, in my opinion, by his agreement waived any right which he might otherwise have had to object to them because in excess of the tariff prescribed by the ordinance. The appellant is, therefore, entitled to a reversal of the judgment of the provincial appellate court in so far as it has been held liable to pay to the plaintiff

> treble such sum as may have been taken by the defendant for costs and charges in excess of the costs and charges allowed under the ordinance respecting distress for rent and extra-judicial seizure.

The plaintiff cross-appeals against the judgment of the court *en banc* setting aside the award of the learned trial judge in his favour for $2,800 for dam-

(1) (1907) 1 K.B. 690.

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ages for negligent driving of the plaintiffs' horses from their ranch to Calgary and for improperly selling them while suffering from the effects of such driving. I think there was clear evidence of negligence in the driving of the horses and of consequential injury to the plaintiff and sufficient evidence upon which the amount of the damages sustained might be estimated without merely guessing. There was evidence upon these issues which could not have been withdrawn from a jury. While it may be that, if ourselves assessing damages, we should not have allowed as large a sum as was awarded by the learned trial judge, if that award had been the verdict of a jury, I cannot understand on what principle it could be set aside as unsupported by evidence; neither would it, in my opinion, be deemed so clearly and grossly excessive that an appellate court would be justified in ordering a new trial on that ground. The finding of a trial judge resting upon oral evidence

> is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. *Lodge Holes Colliery Co.* v. *Wednesbury Corporation* (1), at page 326.

The trial judge in this case gave no reasons for his assessment. The court *en banc*, though not informed as to the basis on which the learned judge proceeded in arriving at the amount and unable to discover any method by which such an amount could properly be arrived at, should not have set aside the assessment unless, if it had been the verdict of a jury, it must have been set aside as clearly unwarranted by the evidence — in fact a mere guess, or as based upon an improper measure of damages, or the consideration of matters which

(1) [1908] A.C. 323.

should not have been taken into account. *Phillips* v. *London and South Western Railway Co.*(1). This, in my opinion, could not properly have been done. I would, therefore, restore the finding of Beck J. that the plaintiff is entitled to the sum of $2,800 for damages sustained through negligence of the defendant or its agents. But the plaintiff is not presently entitled to a judgment for this sum; his only right is to have it set-off against the defendant's claim in the taking of the mortgage account.

In the view I have taken it is not necessary to discuss the basis on which damages should be assessed by the referee under the direction of the provincial appellate court for a reference to ascertain them. I merely desire to say that as to what should be the basis of assessment I concur in the views of my learned brothers who are of opinion that the trial judge's assessment should not be restored, but that this reference should be had. Perhaps it is not surprising, in view of the rule which it prescribed for the ascertainment of the plaintiff's damages, that the provincial appellate court was unable to discover any method by which the sum allowed by Mr. Justice Beck could properly be arrived at.

The plaintiff further cross-appeals against the allowance to the bank of interest at 7 per cent. up to the 31st of December, 1904, at 8 per cent. from that date to the 28th of May, 1907, and at 7 per cent. thereafter. The allowance at 8 per cent. during the period specified rests on the basis of voluntary payments made by the plaintiff to the bank on the footing of an account stated when the second mortgage was executed on the 28th of May, 1907. I cannot find any

(1) 4 Q.B.D. 407; 5 Q.B.D. 78.

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reason for disturbing this direction. Neither do I disagree with the direction for the allowance of 7 per cent. during the other periods.

The "Bank Act," R.S.C., 1906, ch. 29, sec. 91, provides that:

> The bank may stipulate for, take, reserve or exact any rate of interest or discount, not exceeding seven per centum per annum, and may receive and take in advance, any such rate, but no higher rate of interest shall be recoverable by the bank.

I cannot understand the purpose or effect of the concluding clause of this section, unless its office is to define and express the consequence which a contract by a bank for a rate of interest in excess of 7 per cent. shall entail. The section itself is in form not prohibitive, but enabling. Its effect is not that the bank's contract for a rate of interest exceeding 7 per cent. is illegal, but that as to the excess it is *ultra vires*. Parliament has seen fit to express the consequence, viz., that the higher rate of interest, that is, the rate in so far as it exceeds a rate of 7 per cent., shall not be recoverable by the bank. This is, in my opinion, the proper construction of this important provision of the "Bank Act." If it had been intended to make any contract in which a bank should stipulate for more than 7 per cent. illegal and to deprive it of all right of recovery thereon, I cannot but think that Parliament would have expressed that intention in language very different from that which it has in fact used. I would, therefore, confirm the judgment in appeal upon this point.

Appeal allowed in part and cross-appeal dismissed with costs.

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Solicitor for the respondent: *H. W. McLean.*