ORIGINAL JURISDICTION.

Before Mr. Justice Telang.

HAJI ABDUL RAHMAN, PLAINTIFF, *v.* HAJI NOOR MAHOMED AND OTHERS, DEFENDANTS.*

1891. *July* 23.

Mortgage—Sale by mortgagee—Surplus proceeds of sale in hands of mortgagee—Suit by mortgagor for surplus—Interest charged against mortgagee on such surplus—Interest charged from date of sale—Tender—Tender of part of debt when good—Tender before suit must be followed by payment into Court after suit.

A mortgagee, who under his power of sale has sold the mortgaged property, must refund to the mortgagor any surplus monies remaining in his (mortgagee's) hands with interest at six per cent., *i. e.* the Court-rate, from the date of the completion of the sale.

The rule laid down in *Dixon* v. *Clark*(1), that the tender of only a part of debt must be treated as if it had never been made, applies only where the party making the tender admits more to be due than is tendered.

A plea of tender before action must be accompanied by a payment into Court after action, otherwise the tender is ineffectual.

ON Commissioner's report,

The plaint stated that on the 26th September, 1876, the plaintiff mortgaged certain immoveable property to the first defendant to secure the repayment of a loan of Rs. 6,000 with interest at twelve per cent. per annum, and that in October, 1886, the first defendant under his power of sale put up the property for sale by auction and sold it for Rs. 13,500. The plaintiff alleged that after paying off the claim of the first defendant in respect of the said mortgage there was a large surplus left, and he prayed that accounts might be taken and the surplus paid over to him.

Defendants 2, 3, and 4 were partners in the firm of Hakmá Manji and Co., to whom the plaintiff had purported to mortgage the same property on the 12th February, 1882, for another sum of Rs. 6,000. The plaintiff, however, alleged in his plaint that this mortgage was a sham transaction intended to protect his property from creditors, and that the said defendants had become sham mortgagees in consideration of a promise of Rs. 1,000, for which they took a promissory note, which was still

* Suit No. 450 of 1889.

(1) 5 C. B. 365.

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in their hands. The plaintiff complained that the said defendants now sought to take advantage of the said mortgage as if they had advanced money thereunder to him. He submitted that the said defendants 2, 3, and 4 had no claim against the said property or the sale-proceeds under the said mortgage, and he prayed that the mortgage-deed might be delivered up to be cancelled.

The prayer of the plaint was for (*a*) an account of the sale-proceeds against the first defendant, and for payment to the plaintiff of the surplus thereof, with nine per cent. interest after deducting what might be found due to the first defendant; (*b*) for a declaration that defendants 2, 3, and 4 had no interest in the sale-proceeds or under their said mortgage.

At the hearing on the 9th January, 1890, defendants 2, 3, and 4 disclaimed any interest in the suit and were dismissed from it, and an order was made referring the suit to the Commissioner to take accounts between the plaintiff and the first defendant. The Commissioner found that at the date of the completion of the sale, *viz.* the 14th December, 1886, the surplus sale proceeds remaining in the hands of the first defendant amounted to Rs. 5,061-9-4.

The case now came before the Court for confirmation of the Commissioner's report. The only questions in dispute were as to the rate of interest to be charged, against the first defendant as mortgagee, upon the surplus, and as to the effect of the tender of a part of that amount (*viz.* Rs. 2,301-1-11) which the first defendant had made in July, 1887, to the other defendants as the subsequent mortgagees of the same property.

Inverarity and *Jardine* for the plaintiff.

Lang (Acting Advocate General) and *Russell* for defendant.

TELANG, J.:—The facts of this case, which are material in relation to the only points now in controversy between the parties, may be shortly stated as follows. The plaintiff mortgaged certain property to the defendant on the 26th September, 1876, for Rs. 6,000, and on the 12th February, 1882, executed a mortgage of the same property in favour of Hakmá Manji and Co., who were originally parties to this suit. In the year 1883,

there was some correspondence between the defendant and Hakmá Manji and Co., which, however, appears to have ended in nothing. In April, 1886, the plaintiff filed his petition and schedule in the Insolvent Court, showing Hakmá Manji and Co. as his creditors in respect of the aforesaid mortgage.

On the 14th of December, 1886, the defendant sold the property under his power of sale, and in May, 1887, correspondence again commenced between the defendant and Hakmá Manji and Co. touching the amount due to the defendant on the mortgage, and the surplus proceeds of sale of the mortgaged property remaining in his hands. The result of that correspondence was, that though a claim of the Official Assignee was alluded to in the course of it, the defendant on the 20th of July, 1887, tendered to Hakmá Manji and Co. a sum of Rs. 2,301-1-11, with an account showing that that was the amount remaining in his hands. The tender was refused by Hakmá Manji and Co., and on the 8th of August, 1887, the defendant gave notice to them that the amount was lying idle in his hands.

Subsequently, that is to say, on the 7th of September, 1887, the insolvency proceedings terminated by a dismissal of the petition on that day, and on the 22nd of August, 1889, the plaintiff filed this suit for an account and for recovery of the surplus proceeds in the hands of the defendant.

Hakmá Manji and Co. were, as already stated, originally made parties to the suit. The plaint alleged that they claimed the surplus proceeds under the mortgage-deed of 1882, charged that such deed was a sham, prayed for a declaration that the said defendants had no interest in the surplus proceeds under that deed, and that the deed was void and inoperative, and it prayed further for an order that the instrument be delivered up to be cancelled.

On the 9th of January, 1890, the case came on for hearing before Parsons, J., when Hakmá Manji and Co. disclaimed, and by consent of all parties were dismissed from the suit paying their own costs. The suit was then referred to the Commissioner to take the accounts of the mortgage, and the Commissioner has found a sum of Rs. 5,061-9-4 to have been the amount of the

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surplus sale-proceeds remaining in the hands of the defendant on the 14th December, 1886.

No question now arises about that amount itself, but the plaintiff claims interest upon that amount from 14th December, 1886, at twelve per cent., and the defendant contends that he ought not to be charged with any interest at all.

Now, in the first place, with regard to the point made by Counsel that the defendant was placed in an embarrassing position by the act of the plaintiff in making the alleged mortgage to Hakmá Manji and Co., and therefore ought not to have any interest awarded against him; it does not appear that on the 14th December, 1886, or for some time afterwards, there was any competition between rival claimants to the surplus proceeds, and, as already stated, on the 20th July, 1887, the defendant actually tendered such surplus proceeds (according to his calculation) to Hakmá Manji and Co., a fact which entirely negatives the existence of any such embarrassment as is alleged. The defendant cannot therefore claim the benefit of the rule laid down in the case cited in argument—*Mathison* v. *Clark*[1]. Nor can he excuse himself by saying as he did that he had made no actual use of the money. Assuming his evidence on that point to be true, and assuming that the identical currency notes which he tendered to Hakmá Manji and Co. have remained idle in his hands to this day, that is not enough to absolve him from liability to the claim of the plaintiff for interest (Compare, as regards trustees in such a position, Lewin on Trusts, p. 339, 8th Ed.). He must, therefore, refund with interest the surplus monies found to be in his hands.

Next as to the rate of interest to be allowed. I find no authority for the impression which I had at the beginning of the argument in this matter, that the usual rule in such cases is to allow the mortgagor interest on the surplus due to him at the rate at which he is charged interest by the mortgagee, which would in this case have been twelve per cent. But seeing that the plaint only claimed nine per cent., the plaintiff could not in any event have obtained by the decree more than that rate,

[1] 25 L. J. Ch. 29.

as the prayer for further and other relief could not, as I indicated during the argument, be held to justify an award of interest at a higher rate than is specifically claimed. See Daniell's Chancery Practice (6th Ed.), p. 431; and *Weymouth* v. *Boyer* [1] there cited (where no interest at all was allowed as it was not claimed by the bill). But I find that, according to the authorities, even nine per cent. would be a higher rate than can be allowed in this case. Under the clause of the mortgage-deed which was relied upon for the plaintiff upon another point, the defendant was a trustee in respect of the surplus monies in his hands; and the ordinary rule in England in regard to trustees, as laid down in Lewin on Trusts, is that a trustee is charged interest at four per cent., which was the usual Court-rate in Chancery. Applying that analogy here, the plaintiff would not be entitled to more interest than six per cent., which is the established rate in this Court, on the surplus monies in the hands of the defendant.

The same conclusion follows from the specific authorities which I have examined regarding surplus monies in the hands of mortgagees. One of the earliest of these was *Quarrell* v. *Beckford* [2], where Sir T. Plumer, M. R., discussed the question on general principles, and came to the conclusion, that the mortgagee—whom he held to be a trustee of the surplus monies—should be charged only four per cent. on such monies in his hands, although the rates stipulated for in the mortgage-deeds were eight and ten per cent. respectively, and although the current rate in Jamaica, where the mortgaged property was situated, was six per cent. The last case on the point that I have been able to find is that of *Charles* v. *Jones*, [3] where Kay, J., allowed four per cent. to the mortgagor, although the mortgage-deed provided for five per cent. to be paid to the mortgagee. This appears to be the established rule in England, and in the absence of positive authority in India the other way, I think I ought, by analogy to that rule, to award interest at the rate of six per cent. per annum and no more.

The next point is to determine from what date the interest should begin to run. In Coote on Mortgage, p. 1193, it is said that

(1) 1 Ves. Jun., 416. (2) 1 Madd., 269.
(3) L. R., 35 Ch. D., 544.

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the interest should begin to run from the date of the suit or of the demand by the mortgagor or by some other incumbrancer. In *Jánoji* v. *Jánoji*,(1) Sargent, C. J., referring to Seton on Decrees, p. 469, observed that the general practice was to order interest to begin to run from the date of the institution of the suit. That doubtless is so stated in the old edition of Seton, but it is to be remarked that the passage in question is not repeated in the new edition (4th Ed., Vol. II, Part I, p. 1079), where it is simply said that "a mortgagee in possession who holds over after he has been paid his debt and all arrears of interest will be charged with the excess received and interest at four per cent. on the balance; *Quarrell* v. *Beckford*(2); *Lloyd* v. *Jones*(3); *Montgomery* v. *Calland*(4); and that this rule applies to a mortgagee not in possession who had been overpaid and resists redemption, see *Smith* v. *Pilkington*(5)." It is further to be noticed that in the old edition of Seton the case relied on in the passage referred to by Sargent, C. J., is *Quarrell* v. *Beckford*,(6) in which the Master of the Rolls said this (p. 284): "The next point to be considered is, from what period the interest is to be charged: with respect to that, I am of opinion it should be from the filing of the bill, for at that period the demand was made, and ought to have been complied with, according to the justice of the case." This justifies the rule in the alternative form laid down in Coote. In *Montgomery* v. *Calland*,(7) which is cited in Seton in the passage quoted above, the interest was directed to run from the date when the mortgage-debt was fully paid off by the rents and profits, as shown by the accounts taken. Lastly, in the latest case I know of on the point (*Charles* v. *Jones*,(8)), Kay, J., in circumstances very similar to those existing here, and after considering *Quarrell* v. *Beckford*(9) and other authorities, allowed interest from the date of the completion of the sale by the mortgagee, even though there was a suggestion that there was some doubt at the time as to the persons who were then entitled to

(1) I. L. R., 7 Bom., 185.
(2) 1 Madd., 269.
(3) 12 Sim., 491.
(4) 14 Sim., 79.
(5) 1 D. F. & J., 120.
(6) 1 Madd., 269 at p. 284.
(7) 14 Sim., 79.
(8) L. R., 35 Ch. D., 544.
(9) 1 Madd., 269.

receive the surplus. I think, therefore, that the observation of Sargent, C. J., which was made *obiter*, and was also very cautiously expressed, ought not to prevent my following the most recent authority in England, especially as it is based on and sufficiently supported by the older authorities. The interest then must be calculated at six per cent. and must begin to run from the 14th of December, 1886.

The next point in logical order arises in reference to the tender made by the defendant.

On the 20th of July, 1887, the defendant tendered Rs. 2,301-1-11 to Hakmá Manji and Co., with his attorney's letter of that date. I think I must hold that under the circumstances then existing, he was justified in making the tender to Hakmá Manji and Co., as the apparent owners of the equity of redemption; and if the question turned merely on the propriety of the tender to Hakmá Manji and Co., I should decide in favour of the defendant. But in fact the amount tendered is now proved to have been only a small fraction of the amount then due, and the question is, what is the effect of such a tender. It is quite plain that it ought not to prevent interest running on the portion of the amount due which was not covered by the tender. Even if the defendant had honestly believed that the amount tendered by him was all that was properly due by him, that circumstance ought not to affect the plaintiff's claim for interest on the amount, which was in fact wrongfully, though perhaps only through a *bonâ fide* mistake, withheld by the defendant from its lawful owner. Mr. Inverarity, however, asks the Court to go further, and to hold that the tender of only a part of a sum due must be treated as if it had never been made. He relies on Leake on Contracts, p. 858 (Ed. 1878), as an authority for that position; and there can be no doubt that the language there used does seem to support the argument. The rule is laid down in similar terms in Williams' Saunders, and in other text books. For the rule in Equity with regard to costs in cases of tender see Daniell's Chancery Practice, 1187-8. The case relied upon for the rule is *Dixon* v. *Clark*[1]. Wilde, C. J., delivering the judgment of the Court there,

(1) 5 C. B. 365 at pp. 376, 377; 16 L. J. C. P. 237 at p. 238.

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said: "The argument further involved the general question, whether a tender of part of an entire debt, is good; and several ancient and modern authorities bearing on this question were referred to but no case directly in point was cited, nor have we been able to find any. On consideration, however, we are of opinion upon principle that such a tender is bad." The rule in England seems, therefore, to be well established. One cannot, however, help feeling that it is hardly just to a defendant to charge him with interest on the entire debt in such a case. In *Dixon* v. *Clark*,(1) Wilde, C. J., observed as follows in reference to this point: "If it be said that the plea of tender is, in effect, only in preclusion of damages subsequent to the tender, and that it would be unjust to give the plaintiff those damages which have been incurred merely in consequence of his refusal to receive the money tendered, the answer is, that the same argument might be applied to the instance of the tender *post diem* of the amount of a bill or note, with the interest then due; but that, in each case, the defendant is unable to allege that he has performed the terms of his contract as far as the plaintiff would allow him, and is, therefore, disabled from pleading a tender." It may be permissible to doubt whether this is a thoroughly satisfactory argument, or whether it is entirely in harmony with the spirit of the rule which prevails in equity (Daniell's Ch. Pr. *loc cit.*) It may be submitted on the other side, that a defendant, who is unable to avoid a violation of his contract, ought not therefore to be prevented from doing what he can to minimize the damage resulting from such violation; and the case of the bill or note alluded to may be said to be one which, apart from authority, is another illustration of the same "injustice" as is here under consideration. In *Bowen* v. *Owen*,(2) however, the Court of Queen's Bench had to deal with a tender made in a letter in this form: "I have sent with the bearer the sum of £26-5-7½*d.* to settle one year's rent of Nant-y-pair." The jury having found that no more than that sum was due, although one year's rent admittedly would have been more, Rolfe, B., nevertheless held the plea of tender not

(1) 5 C. B. 365 at p. 379; 16 L. J. C. P. at p. 239.
(2) 11 Q. B. 130; 17 L. J. Q. B. 5; 11 Jur. 972.

proved, giving leave to the plaintiff to move to enter a verdict on that plea. The Court *in Banc*, however, dissented from Baron Rolfe's view, and held the tender sufficient, following *Bull* v *Parker*[1], and *Henwood* v. *Oliver*[2]. See also *Eckstein* v. *Reynolds*[3]. I cannot perceive any substantial difference between the terms of the letter in this case of the 20th of July, 1887, and the letter which the Court had to deal with in *Bowen* v. *Owen*[4]. Nor is the circumstance material, that the jury in that case found no more due than was tendered. The Court deals with the question independently of that circumstance, and in *Bull* v. *Parker*[5] which the Court approves, the amount tendered was less than what was found to be due. It would seem, therefore, that the rule in *Dixon* v. *Clark*[6] applies only where the party making the tender admits more to be due than is tendered, (cf. *Cotton* v. *Godwin*)[7]. It is not clear from the report of *Watson & Co.* v. *Dhonendro Chunder Mookerjee*[8], that that was not a case of the kind just mentioned, viz., of a tender of only part of what was admittedly due. It rather appears that it was. In such a case the tender would be bad, even according to the opinion of Patteson, J., in *Henwood* v. *Oliver*[9]. And the rule laid down in the text-books must, therefore, it would seem, be taken to be limited to such cases. If so, it cannot support the plaintiff's argument in the present case.

There is, however, another objection urged to the tender of the defendant being given effect to; and that is that such tender has not been followed up by a payment into Court in this suit. The passage in Leake on Contracts, already cited, was relied on as an authority for this argument also. The form of the plea as given in Bullen and Leake, p. 340, also affords support to it, and according to Order XXII, r. 3, under the Judicature Acts, a plea of tender before action must be accompanied by a payment

(1) 12 L. J. Q. B. 93; 7 Jur. 282; 2 Dowl. (N. S.) 345.

(2) 10 L. J. Q. B. 158; 1 Q. B. 409; 1 Gale & D. 25.

(3) 7 A. & E. 80; 2 N. & P. 256.

(4) 11 Q. B. 130; 17 L. J. Q. B. 5; 11 J 72.

(5) 12 L. J. Q. B. 93; 7 Jur. 282 2 Dowl. (N. S.) 345.

(6) 5 C. B. 365 at p. 377; 16 L. J. C. P. 237.

(7) 10 L. J. Ex. 242.

(8) I. L. R. 3 Calc. 6.

(9) 10 L. J. Q. B. 158; 1 Q. B. 409 1 Gale & D. 25.

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into Court after action. And this was the old rule as laid down in *Chapman* v. *Hicks*(1); see also per Wilde, C. J., in *Dixon* v. *Clark*(2). It appears to me that this rule applies in the present case, and that I must hold the tender to be ineffectual. It was argued that the defendant in his written statement expressed his willingness to pay the amount of Rs. 2,301-1-11 as the Court might direct. But I find that the view I expressed during the argument about such a bare expression of willingness being insufficient has received the sanction of express judicial decision. An expression of willingness to pay does not constitute even a legal tender, and *à fortiori* it cannot be held equivalent to a payment into Court (see *Kraus* v. *Arnold*(3); and *Leatherdale* v. *Sweepstone*(4).) It was, however, further argued that in the present case, when there were two claimants to the balance in his hands, viz. plaintiff and Hakmá Manji and Co., the defendant would not have been safe in paying the money into Court, as under Rule 11 of chap. III of the Rules of the Court, (Ed. 1866), the plaintiff would have been at liberty at once to take the money out of Court. But this argument is untenable, as Hakmá Manji and Co. being at that time parties on the record, a payment into Court by the first defendant with a statement of the conflicting claims of plaintiff and Hakmá Manji and Co. would have been perfectly safe as against the claims both of the plaintiff and Hakmá Manji and Co. The rule referred to applies in cases when there are no claims to be considered, other than those of the plaintiff and the party paying into Court. But in such a case as the present, where there are conflicting claims, the order of the Court would doubtless be required under section 377 of the Civil Procedure Code (Act XIV of 1882). Upon the whole, therefore, I must come to the conclusion that the defendant is bound to pay interest at six per cent. per annum on the sum of Rs. 5,061-9 from the 14th of December, 1886, till payment.

The next question is as to costs. Having regard to the correspondence which took place between Hakmá Manji and Co. and the defendant in 1887, and having regard to the allegation

(1) 2 Cromp. & M. 633.
(2) 5 C. B. 365 at p. 377; 16 L. J. C. P. 237.
(3) 7 Moore's Rep. 59. (4) 3 Car. & P. 342.

made by the plaintiff himself in the present plaint in respect to the position taken up by Hakmá Manji and Co., it seems to me that, so far as the question of costs is concerned, the defendant cannot be held to have been in default, at all events until he came to put in his written statement. He was entitled to be protected against any claim by Hakmá Manji and Co., when the plaintiff made a demand upon him in 1889, and such protection was not afforded him except by the constitution of the present suit to which Hakmá Manji and Co. were made parties. But as I have said, when the suit was so constituted, he was sufficiently protected, and the only question which he could then properly raise was as to the accounts. Those accounts have now been investigated according to the directions of the Court of Appeal, and the result has gone against the defendant's contention. I think that, under these circumstances, he cannot be allowed any costs incurred subsequently to the reference to the Commissioner. I think that I should follow *Charles* v. *Jones*[1] in giving him his costs up to that time, especially as the disclaimer by Hakmá Manji and Co. did not take place till the close of the trial before Parsons, J., and just before the reference to the Commissioner was ordered. And having regard to the fact that whether he is viewed as a mortgagee or as a trustee, there has been nothing which can be properly called misconduct on the part of the defendant, but merely a claim for a larger amount than the Court has held him to be legally entitled to, I am of opinion that he ought not be directed to pay any of the plaintiff's costs of this suit, except so far, of course, as he may have been already ordered to do so by prior orders of the Court still remaining in force.

The decree of the Court must therefore be for the plaintiff for Rs. 5,061-9 with interest thereon at six per cent. per annum from 14th December, 1886, till payment. The plaintiff to pay the defendant his costs of this suit up to and inclusive of the hearing of the 9th January, 1890, before Parsons, J. All other costs not already provided for to be borne by the parties respectively.

Attorneys for the plaintiff:—*Messrs. Conroy and Brown.*

Attorneys for the defendant:—*Messrs. Payne, Gilbert & Sayáni.*

(1) L. R. 35 Ch. D. 544.