ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

BAI RUTTONBAI, APPELLANT AND PLAINTIFF, *v.* THE FRASER ICE FACTORY, LIMITED, RESPONDENTS AND DEFENDANTS.*

1907. *December* 20.

Mortgagor and Mortgagee—Transfer of Property Act (IV of 1882), section 82—Requisites of valid tender—Mortgagee wishing to gain possession—Mortgagor's right to redeem—Construction of mortgage-deed.

In a mortgage-deed after enumerating several contingencies provision was made on the happening of any of them in the following terms :—

"Notwithstanding anything contained to the contrary the mortgage-debt for the time being owing on the security of these presents shall at once become payable as if the due date or extended date, if any, had elapsed and in such case all such rights and remedies shall be available to the Banker as will be available to her under the term of these presents upon default being made in payment of the principal moneys or interest and all other moneys thereby secured and the Banker may in such event in her discretion without any further consent on the part of the Company forthwith enter upon and take possession of the mortgaged premises or any of them of which she is not already in possession."

Owing to the happening of some of the contingencies the plaintiff, the mortgagee, claimed that the debt owing on the security of the mortgage-deed had become payable and that she was entitled to enter upon and take possession of the premises mortgaged to her. She contended that the expression "as if the due date had elapsed" not only served to accelerate the due date, but also to fix the amount of the mortgage money at what it would have been if in fact the due date had elapsed. The defendant alleged a tender of the mortgage money to the plaintiff's attorneys and a refusal to accept the same, and claimed to redeem the property.

Held (1) that the words "as if the due date had elapsed" were used merely to accelerate payment and they could not be construed to cover the further amount that would have been due on the expiry of the due date of the mortgage.

(2) That the tender was not good, as the plaintiff's attorney disclaimed authority to receive it.

(3) That the defendant was entitled to redeem the property.

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PER CURIAM.—A tender must be made either to the principal whose business it is to consider it or to his authorised agent, and a tender made to a person who disclaims authority to receive it is made at the maker's risk.

Watson v. *Hetherington*(1) and *Bingham* v. *Allport*(2), followed.

THIS was a suit brought by the plaintiff, a mortgagee, against the 1st defendant, the mortgagor, to have it declared that the debt owing on the security of the indenture of mortgage had become payable and that the plaintiff was entitled to enter upon and take possession of the premises mortgaged to her.

The 1st defendant Company by its written statement alleged a tender of the mortgage money and a refusal to accept the same and counterclaimed for redemption.

The main points in issue were :—

1. What was the amount of mortgage money payable ? and
2. Whether there had been a valid tender ?

The second respondent was the guarantor of the mortgage debt. The rest of the facts of the case are set out in the judgment.

Inverarity (with *Scott*, Advocate General, *Lowndes* and *Strangman*) for the appellant.

The defendant has not observed the covenants and under the provision in the mortgage-deed "as if the due date had arrived" the plaintiff requires possession.

We say "the moneys for the time being owing" means the moneys advanced with interest in terms of the mortgage up to 1917. The amount we claim might not have been due under a variety of circumstances. Our case is that interest is payable up to 1917. We also say even if he pays us the agreement and mortgage still subsist and we are liable to finance him up to 1917 and this will not put an end to the agreement and mortgage.

[JENKINS, C. J.—*Leggott* v. *Barrett*(3) says that an agreement for conveyance is superseded by a subsequent conveyance.]

(1) (1843) 1 C. & K. 36.
(2) (1833) 1 N. & M. 398.
(3) (1880) 15 Ch. D. 306.

Our mortgage would be still subsisting because they can call upon us to advance up to 1917. They should not be allowed to redeem. There is no provision for redemption. If they pay us the full amount we claim we will not question their right to redeem.

The decree of the lower Court leaves us out of possession and gives defendant no time to pay.

Their tender was undoubtedly not a good one. The tender, even if good, goes for nothing as it is not supported by payment into Court and by readiness to pay at any time. See Transfer of Property Act as to tender. In order to make interest cease you must make a good tender. On the construction of the Transfer of Property Act interest cannot cease until the person tendering is ready and willing to pay at all times, he should have the money ready at all times at his command and must follow it up by payment into Court.

If a lesser sum is tendered it would not of course be a proper tender. We dispute the Judge's ruling that there was a good tender or that further tender was dispensed with. If the tender of the 4th June was not good it goes for nothing. Similarly if there is again the same tender it cannot be good. A tender accompanied by a demand which would compel the other side to comply with conditions which would do away with his right to claim is not a good tender. The tender here made calling upon plaintiff to reconvey which must mean abandonment of his right to claim. See the correspondence which shows that interest only up to 4th June was tendered to us. So the tender of 5th June was bad.

The learned Judge has completely misapprehended *Bovill* v. *Endle*[1].

We don't dispute that taking possession entitles him to pay the mortgage debt. I am not aware of any case where the mortgagee having taken possession the mortgagor can pay: *Smith* v. *Smith*[2]. *Bovill* v. *Endle*[1] was decided on this. What the Court decides is that you are not entitled to the extra six

(1) [1896] 1 Ch. 648. (2) [1891] 3 Ch. 550.

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months' interest. As a matter of fact here the mortgagee does not make a demand for payment. In *Ex parte Wickens*(1), and *Letts* v. *Hutchins*(2) what is established is that the mortgagee is to accept the principal and interest till due date. As to their right to redeem see Transfer of Property Act, sections 83—84.

Interest does not cease because the tender is dispensed with. You must make a proper tender to stop interest.

[JENKINS, C. J.—See *Shriram Rupram* v. *Madangopal Gowardhan*(3).]

See Indian Contract Act, section 38.

Haji Abdul Rahman v. *Haji Noor Mahomed*(4), Leake on Contract p. 609 (5th edition). *Gyles* v. *Hall*(5) says money must be kept within call.

Tender properly made and improperly rejected is not equivalent to payment. *Bank of New South Wales* v. *O'Connor*(6).

Ex parte Ellis(7) is a case precisely in point It would be grossly unfair to the mortgagee to make him take interest only up to date of tender.

See also *Doe d. Roylance* v. *Lightfoot*(8), *Rogers* v. *Grazebrook*(9), Fisher on Mortgage (5th Ed.), section 879, p. 422, Coote on Mortgages, Vol. I (7th Ed.), p. 152.

Raikes (with *Setalvad*) for 1st respondent.

The question of the construction of the mortgage-deed is a vital one. If our construction is wrong we would have to pay a large sum which would be a large tax on the resources of the Company.

The proviso puts the mortgagor entirely at the mercy of the mortgagee. On breach of any of the covenants the mortgagee may enter.

As to the question of construction you cannot possibly say that future interest from 1907 to 1917 is interest "for the time being owing" within the meaning of the clause.

(1) [1898] 1 Q. B. 543.
(2) (1871) L. R. 13 Eq. 176.
(3) (1903) 30 Cal. 865 at p. 871.
(4) (1891) 16 Bom. 141.
(5) (1726) 2 P. Wms. 377.
(6) (1889) 14 App. Cas. 273.
(7) [1898] 2 Q. B. 79 at p. 81.
(8) (1841) 8 M. & W. 553.
(9) (1846) 8 Q. B. 895.

To stipulate for interest to continue after the principal has been paid off is illegal.

Mortgagor can't redeem mortgagee against his will even if mortgagor pays past interest and also future interest for the full period: *Brown* v. *Cole*[1].

This shows how strictly a mortgage is construed in case of mortgagee until the mortgagee takes steps to compel payment.

Smith v. *Smith*[2] is the same. A mortgagee selling under a power of sale could not claim interest for the full period: see section 21 (5) Conveyancing Act, 1881; *Banner* v. *Berridge*[3]; Coote on Mortgages, Vol. II, p. 814, Ch. 12, section 2; Robbins on Mortgage, p. 796.

In *Bovill* v. *Endle*[4] the mortgagee entered not to enforce payment but to preserve his security.

Ex parte Ellis[5] does not touch the matter at all.

As to tender see *Moffat* v. *Parsons*[6], *Wilmot* v. *Smith*[7]. We say tender was dispensed with. The money was brought into Court on the day of the motion when they could have had it. There is no practice to pay money into Court. The hearing was expedited and the money tendered in Court.

As to readiness and willingness see section 84, Transfer of Property Act. Interest ceases on tender. *Haji Abdul Rahman* v. *Haji Noor Mahomed*[8] was after the Transfer of Property Act came into force. The plaintiff has by his conduct excused the tender therefore under section 84 of Transfer of Property Act further tender is dispensed with, *Pestonjee Dadabhai* v. *Hormusji Maneckjee*[9]; *Gyles* v. *Hall*[10]; *Dixon* v. *Clark*[11]; *Tyler* v. *Bland*[12]; *Searles* v. *Sadgrave*[13].

(1) (1845) 14 Sim. 427.
(2) [1891] 3 Ch. 550.
(3) (1881) 18 Ch. D. 254 at p. 278.
(4) [1896] 1 Ch. 648.
(5) [1898] 2 Q. B. 79 at p. 81.
(6) (1814) 5 Taunt. 307.
(7) (1828) 3 C. & P. 453.
(8) (1891) 16 Bom. 141.
(9) (1903) 5 Bom. L. R. 387.
(10) (1726) 2 P. Wms. 378.
(11) (1848) 5 C. B. 365 at p. 377.
(12) (1842) 9 M. & W. 338.
(13) (1855) 5 Ell. & Bl. 639.

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As to the attorney's authority if he says he has no authority and you make a tender you do so at your risk: *Moffat* v *Parsons*[1]; *Bingham* v. *Allport*[2]; *Finch* v. *Boning*[3]. Mr. Payne makes a communication to Ruttonbai either as our agent or as Ruttonbai's agent and Ruttonbai refused to accept it. The conclusion is that the tender was communicated to Ruttonbai and she refused it. Ruttonbai refused the tender on the ground that the amount was insufficient or that she disputes our claim to redeem. Beaman, J., was right in holding that the tender was on the 5th. If the tender was not good it was dispensed with on the 6th or 7th.

As to dispensation of tender see *The Norway*[4] which decides that where the plaintiff claims a larger sum than is really due to him the defendant need not tender and further tender is dispensed with.

[JENKINS, C. J.—The question is whether there was a tender on the 5th. If there was not you cannot build up dispensation on it.]

Jayakar with *Mankar* for 2nd respondent:—They contended they should not have been made parties.

Inverarity in reply:—They must prove that Payne was authorised to execute a reconveyance and in the meantime to give a proper receipt of discharge of the mortgage debt up to date. The tender was made to Payne because according to Hormusji's idea he had taken possession on behalf of the plaintiff.

There is no authority for a solicitor to accept less than his clients instruct him to demand.

We never wanted to be paid off. We did not make a demand by entering into possession. We want to maintain our security. No suit had been filed and therefore there could be no solicitor on the record. Where is the authority to say that a solicitor can accept a less amount where there is no authority to sue for the money.

(1) (1814) 5 Taunt. 307.
(2) (1833) 1 N. & M. 398.
(3) (1879) 4 C. P. D. 143.
(4) (1865) Br. & L. 404.

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Why did they not tender the money to Ruttonbai. Hormusji knew Ruttonbai was in Bombay. If they took Payne to be Ruttonbai's agent they should have left the money with Payne.

JENKINS, C. J.:—This suit arises out of a mortgage-deed, dated the 30th of January 1907, and made between the defendant Company of the first part, the defendant Dayal Mulji of the second part, and the plaintiff of the third part in pursuance of an agreement of the 26th May 1906. The consideration for this mortgage-deed was a sum of Rs. 1,00,000 paid by the plaintiff to the Company and a further sum of Rs. 85,000 credited to it by the plaintiff in her books of account. The Company by this deed covenanted with the plaintiff to pay her on the 31st day of December 1917 the sum of Rs. 1,85,000 and in the meantime to pay interest at the rate of 7½ per cent. per annum, and in order to secure repayment of the sum advanced or to be advanced with interest the Company by the mortgage-deed demised to the plaintiff for the term of years expressed therein the premises therein described. The Company did also by the mortgage-deed charge with the payment of the mortgage debt the uncalled capital of the Company and all its other property and assets. It was provided by the mortgage-deed that the plaintiff should credit to the Company's account in her books a sum of Rs. 85,000 for making further advances to the Company as it might require, that the plaintiff should allow to the company interest on the sum of Rs. 85,000 or such other sum as the plaintiff might have credited to the Company in her books at the rate of Rs. 5 per cent. per annum from the date or respective dates of such credit or credits, and that the amount of interest payable by and to the company should be made up and adjusted and the balance of such interest paid to the plaintiff by the company on the 31st day of December every year. Liberty was also secured to the Company to repay in part the mortgage debt for the time being due in sums not less than Rs. 1,000 at a time and in the event of repayment the plaintiff was to receive and credit the same to the Company in part payment and to allow to the Company interest upon such part payments at the rate of Rs. 5 per cent. per annum from the dates

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of the respective payments until the expiration of the term, that is, the 31st day of December 1917; and it was provided that the plaintiff should be entitled to charge to the Company interest at the rate of Rs. 7½ per cent. per annum on the whole amount of Rs. 1,85,000 for the whole of the term up to the 31st day of December 1917 to the intent that the plaintiff should in any case earn up to the 31st day of December 1917 the difference between the rates of interest on the full amount of the sum of Rs. 1,85,000 and the payments made on account by the company and to the further intent that the Company should not undergo any loss of interest save and except the difference between the different rates of interest on the items on the debit and credit sides by allowing the monies available in its hands for payment towards the discharge of its liabilities to the plaintiff to remain unutilized. Then after enumerating several contingencies provision was made on the happening of any of them in the following terms: "notwithstanding anything herein contained to the contrary the mortgage debt for the time being owing on the security of these presents shall at once become payable as if the due date . . . had elapsed and in such case all such rights and remedies shall be available to the banker as will be available to her under the terms of these presents upon default being made in payment of the principal money or interest and all other monies hereby secured and the Banker may in such an event in her discretion without any further consent on the part of the Company forthwith enter upon or take possession of the mortgage premises or any of them of which she is not already in possession." By the mortgage-deed the defendant Dayal Mulji guaranteed payment of the mortgage-debt and all other monies due to the plaintiff by the Company. By an instrument of the 19th of March 1907 the mortgage-deed was rectified.

It is now common ground that events have happened which have brought into operation the provision contained in the words that I have cited from the mortgage-deed.

It is in these circumstances that the plaintiff has brought this suit and by her plaint she prays, among other things, that it may be declared that the debt owing on the security of the

mortgage-deed has become payable and that she is and was on the 25th April 1907 entitled to enter upon and take possession of the premises mortgaged to her, and that she may be placed in possession of these premises.

The Company has filed a written statement in which it alleges a tender of the mortgage money and refusal to accept the same, and counter-claims for redemption.

The written statement of the defendant Dayal Mulji calls for no comment.

The two principal points in contest between the parties are: first, what is the mortgage money payable in the circumstances by the Company to the plaintiff; and, secondly, whether there has been such a tender of that amount as would result in the cessation of interest.

The construction for which the plaintiff contends is thus formulated in her grounds of appeal to this Court.

"The learned Judge . . . should have found . . . that the amount for the time being owing on the mortgage-deed at the time of the plaintiff's attempting to take possession of the mortgaged premises was Rs. 1,00,000 with interest thereon at 7½ per cent. per annum till payment and 2½ per cent. from time of payment till 31st December 1917 and interest on Rs. 85,000 at 2½ per cent. per annum from the date of the mortgage-deed till 31st December 1917."

This contention rests principally upon the words "as if the due date . . . had elapsed"; this expression, it is argued, not only serves to accelerate the due date, but also to fix the amount of the mortgage money at what it would have been if in fact the due date had elapsed.

As supporting the argument stress is laid on the fact that the continuance of the loan until 1917 was an inducement to the plaintiff to enter into the transaction, and it therefore cannot have been intended that it should have been within the power of the Company to deprive her of this benefit by bringing about one of the accelerating events without any check on it or compensating advantage to the plaintiff; and therefore it was that

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the obligation was imposed on the Company of paying all that would have been payable had the due date actually passed, or *elapsed* as it is expressed in the mortgage-deed. But all these events were not within the control of the Company; thus one was "if the guarantor ceases to be a director of the Company", so that if he died this would enable the plaintiff to enforce the right she claims as hers on the true construction of the clause under consideration.

The ordinary purpose of a mortgage-deed is to secure repayment of advances with interest (see section 60 of the Transfer of Property Act). But the plaintiff's construction would involve much more: it would involve the payment of something in addition. How this further sum should be described Mr. Inverarity could not tell us, but it clearly would not be interest for that implies the continuance of the principal to which it is an accessory.

In my opinion the words *as if the due date had elapsed* were used merely to accelerate payment; that is the meaning they would ordinarily have, and it would be too forced a construction to hold that they also imposed on the Company the obligation to pay this further sum which the plaintiff claims.

Nor do I regard as sound the contention that present complete redemption is not possible because the Company would still have a right to demand advances till 1917. Redemption by the Company will end the mortgage for all purposes and the plaintiff will thereafter be under no obligations as to future loans.

On the true construction therefore of the clause the mortgage-debt for the time being actually owing in the shape of advances, interest accrued thereon and costs, has become payable; the plaintiff is entitled to enforce payment of that amount; and as a co-relative to this the Company is entitled to redeem the mortgaged property by payment of what is thus due.

It therefore becomes unnecessary to consider *Borrill* v. *Endle*[1] and that class of cases as the mortgage money has become presently payable on the terms of the mortgage-deed.

(1) [1896] 1 Ch. 648.

The Company's view therefore as to the construction of the clause being correct we next have to see whether there has been such a tender of the amount due as to effect a cessation of interest. This must be determined by reference to section 84 of the Transfer of Property Act, regard being had to the fact that a tender, in order to be valid must fulfil certain well recognised conditions. One of these conditions is that the tender must be made either to the principal whose business it is to consider it or to his authorized agent, and a tender made to a person who disclaims authority to receive it is made at the maker's risk: *Watson* v *Hetherington* (1), *Bingham* v. *Allport* (2). It is here I think that the tender of the 4th June fails. It was made to the attorney Mr. Payne, whose services had, no doubt, been engaged by the plaintiff, and who had been present assisting her agent in his attempts to obtain possession of the property. But no suit had been filed, and there was consequently no attorney on the record. The circumstances I have mentioned did not constitute Mr. Payne the plaintiffs' agent to receive a tender, and in fact Mr. Payne steadily disclaimed authority in this regard. On this plain ground the tender of the 4th June seems to us to have been invalid, and that was the only tender upon which the Company relied in its written statement and in the issues raised in the Court below. Before us a case is now sought to be made on the footing of a later tender made to the plaintiff herself on the 4th or 5th June—for the precise date is not assignable—and of the plaintiff's rejection of that tender in circumstances which, it is claimed, dispensed the Company from the obligation of making any further tender.

Now the first difficulty in the way of the allegation of a later tender being made to the plaintiff is that it is an after-thought. It was not pleaded, and no issue on the point was raised; indeed it is clear both from the oral evidence and from the correspondence, which is the main guide to a decision, that the company persistently relied on the validity of the only tender of which there is any actual evidence, namely, the tender to Mr. Payne on the 4th June. Upon this point we think that the learned

(1) (1843) 1 C. & K. 36. (2) (1838) 1 N. & M. 393.

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Judge below has not fully realised the position of the plaintiff's attorneys when he says that the question of Mr. Payne's authority on the 4th June is of no importance "since a day or two later it is admitted that Payne was authorised to refuse" the tender. That, we think, is not so; and as we read the evidence, Mr. Payne was on 5th and 6th June no more the plaintiff's agent to accept or refuse the tender than he was on the 4th. All that had happened was that Messrs. Payne & Co. agreed to communicate, and did communicate, with the plaintiff or her agent. But the subject of the communication was not a fresh tender; it was only the same tender of the 4th June, and Messrs. Payne & Co.'s letter of the 6th shows that it was rejected by the plaintiff's representative precisely because it had never been made to any person with authority to accept it: that as it appears to us, is the unmistakable meaning of the first of the three reasons which the letter assigns for the rejection of the tender. We are confirmed in this opinion by other contemporaneous letters of the Company's attorneys, in which they emphasise their contention that they rely upon the tender to Mr. Payne, adding that their clients distinctly refuse to pay any interest to the plaintiff "after the date of *the tender*," that is clearly, in the context, the tender of the 4th June. That tender being invalid for the reasons stated, its invalidity is not cured, or even affected, by the circumstance that it was afterwards brought to the notice of the plaintiff's agent, who at once regarded it as a bad tender.

But if we are right in thinking that there was no tender other than that of the 4th June, and that that was a bad tender, it will follow that there is no room for the application of such authorities as *The Norway*[1], or for the theory that the plaintiff ever dispensed with tender. It therefore becomes unnecessary to examine the counter-argument that section 84 of the Transfer of Property Act makes no provision for dispensation.

The result is that in our opinion there was no such tender as would effect the cessation of interest.

There remain one or two minor points which may be very shortly dealt with. Mr. Justice Beaman has directed that the

(1) (1865) Br. & L. 404.

agreement of 26th May 1906 be delivered over to the Company, but we think that the appellant is right in his contention that the Company is not entitled to this order. The agreement contains a provision which is not to be found in the mortgage, and though we do not now express any opinion as to the effect of this provision, its existence is sufficient justification for the plaintiff's claim to retain the agreement. As to the objection that possibly the Company might be prejudiced if the agreement were allowed to remain with the plaintiff, that, we think, can be removed, and to this end we direct that, in the event of the mortgage being redeemed, there will be an endorsement on the agreement recording the fact of the redemption.

Then the decree directs the discharge of the guarantor, the second defendant, and to this extent it is clearly erroneous. The guarantor is entitled to his discharge only on payment of the mortgage money and costs.

Lastly, the decree is wrong in form. The suit is one for possession, and there is a counter-claim for redemption. Therefore, after a direction as to the true construction of the mortgage-deed in regard to the sum due, there must be a decree for redemption upon those terms, giving to the guarantor also a right to redeem and in the event of redemption by him there will be liberty to apply. In the event of redemption within the period prescribed by section 92 of the Transfer of Property Act, the property deposited by the guarantor with the plaintiff will be returned to him. On failure to redeem within the time allowed, the decree will direct the recovery of possession by the plaintiff. The decree should be drawn in accordance with the above directions.

Attorneys for the appellant :—*Messrs. Payne and Co.*

Attorneys for the respondent :—*Messrs. Thakurdas and Co.* and *Smetham, Byrne and Noble.*

B. N. L.