Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Fenton v. *Blackwood and others from the Supreme Court of the Colony of Victoria; delivered* 29*th January*, 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE questions in this Appeal arise upon Exceptions to the Master's Report, made under a Decree for an Account obtained by the Appellant, the second mortgagee, against the Respondents, the first mortgagees. The Supreme Court of the Colony, on the hearing of the Exceptions upon Appeal from Mr. Justice Molesworth, allowed four of the items excepted to, which are the subject of the Appeal to Her Majesty.

Mr. Frederick Fenton, a brother of the Appellant, was the owner of a station or run called Reedy Lake, and of a large stock of horses, cattle, and sheep. The Respondents, who used the style of Dalgety, Blackwood, and Co., were his mercantile agents, and in that character made advances and received and paid money for him.

On 2nd August, 1866, Frederick Fenton, in consideration of an advance of 17,765*l*., executed two mortgages to Dalgety and Co., one of the station, and the other of the stock, to secure the advance and interest at 12½ per cent.

The principal Exception, viz., that to the allowance of interest, arises on the mortgage of the station, the other three arise on that of the stock.

The station was mortgaged to Dalgety and Co., subject to a proviso for reconveyance on payment by the mortgagor, on the 5th February, 1867, of 18,700*l.*, this sum including interest to that date. The deed contains a power of sale in default of payment, and trusts for the application of the proceeds in payment of principal and interest at 12½ per cent. It also contains the following provision :—

"And whereas, on the treaty for the said loan, it was also agreed that the said sum of eighteen thousand seven hundred pounds should be secured to the said Mortgagees by a bill of exchange, to be dated the second day of August, one thousand eight hundred and sixty-six, and drawn by the said Mortgagees by their style or firm of 'Dalgety, Blackwood & Co.' upon and accepted by the said Mortgagor for the sum of eighteen thousand seven hundred pounds, and payable six months after date; and, accordingly, the said Mortgagor has accepted such bill of exchange and delivered the same to the said Mortgagees. Now this indenture further witnesseth, and it is hereby covenanted, agreed, and declared by and between the said parties hereto that these presents and the several powers, provisos, declarations, and agreements herein contained shall extend and be applicable to secure the payment of any bill or bills of exchange or promissory note or notes, or other negotiable security which the said Mortgagees, or the survivor of them, his executors or administrators, their or his assigns, or the said firm of Dalgety and Co., shall or may at any time hereafter receive or take, make or endorse, either by way of renewal of, or in substitution for, or in payment or satisfaction of the said bill of exchange for eighteen thousand seven hundred pounds, or on account of all or any part of the sum therein mentioned, or on any other account whatsoever incidental thereto or consequent thereon, and so on from time to time until the whole of the said sum of eighteen thousand seven hundred pounds and interest thereon shall be actually paid, and that these presents and the specialty hereof shall not merge or prejudice the remedy of the said Mortgagees, or the survivor of them, his executors or administrators, their or his assigns, or the said firm of Dalgety & Co., to sue the said Frederick Fenton and recover judgment against him upon the said bill of exchange or otherwise in respect thereof."

The advance of the 17,765*l.* was made in cash by Dalgety and Co., being, in fact, the proceeds of the discount of a bill for 18,700*l.* at six months, drawn by Dalgety and Co. upon F. Fenton, in conformity with the mortgage. This bill was discounted by Dalgety and Co. with the London Chartered Bank of Australia; but the discount was not charged to the mortgagor, nor could it have been charged to him, because, by the terms of the advance, the bill

included interest calculated up to the day fixed for the redemption of the mortgage, and if it had been paid at maturity, the mortgage debt would have been satisfied, and the mortgagor entitled to a reconveyance. But it was not so paid, and on the 5th of February, 1867 (the day it became due), a renewed bill was accepted by F. Fenton for 18,700*l.*, and given by Dalgety and Co. to the bank, who charged a discount of 10 per cent., viz., 937*l.* 11*s.* upon it, which Dalgety and Co. paid. On the 8th August, 1867, a second renewed bill was in like manner given to the bank, and a like discount of 10 per cent. paid to them by Dalgety and Co. A third renewal on similar terms took place, and another bill was given on the 11th of August, 1867. This bill matured on the 13th of August, 1868, and was then paid by Dalgety and Co.

During the currency of this last bill, viz., on the 28th May, 1868, F. Fenton assigned all his estate to trustees for the benefit of his creditors.

In August, 1868, Dalgety and Co., in the exercise of their power of sale, sold the mortgaged property; whereupon the Appellant, as second mortgagee, obtained the Decree for an account against them, under which the questions in the Appeal arise.

The Master's Report allowed a sum of 3,688*l.* 15*s.* 2*d.* for interest on the 18,700*l.* from the 5th August, 1867, at the mortgage rate of 12*l.* 10*s.* per cent. On exception being made to this item of the Report, Mr. Justice Molesworth sustained the exception; but the Supreme Court overruled it, and confirmed the Master's Report. The first question in the Appeal is, whether this interest was rightly allowed.

F. Fenton, in point of fact, paid off no part either of the principal or interest secured by the mortgage, unless, as was contended by the Appellant, the interest was virtually satisfied by the discounts paid to the bank on the renewed bills, which had been debited to F. Fenton by Dalgety and Co. in their general accounts with him. It was contended that, although Dalgety and Co. had in fact found the money, they ought to be considered as having paid the discounts as Fenton's agents, and that the money advanced by them for the purpose ought to be treated as loans to him on his personal security. The accounts rendered by Dalgety and Co. supported, it was said, this view of the transaction;

and undoubtedly Dalgety and Co., who acted as mercantile agents for F. Fenton in selling produce and making advances, included these discounts in the same account with their other transactions, debiting him with interest and mercantile commission upon them.

It was properly conceded by the Counsel for the Respondents, that if the discounts had been really paid by F. Fenton, such payments would have enured in satisfaction of the interest on the mortgage debt; because payments of the discounts by him would have been a mode of paying interest on the amount of the bill, and the bill was only another security for that debt. But their Lordships think it cannot possibly be affirmed that payments made by the mortgagees themselves for discounting the bills would so operate.

Nor can the contention in their Lordships' view be sustained, that the discounts should be treated as new loans made by Dalgety and Co. to F. Fenton on his personal security, so that payment by them of the discounts became equivalent to payment of these charges by him. The accounts referred to no doubt afford some evidence to this effect; but when it is considered that the mortgage deed provides that a bill should be given for the debt, and contemplates renewals of it, and that the mortgage was given for the purpose of securing not only the principal debt represented by the bill, but the interest upon it, it cannot be presumed that Dalgety and Co. by rendering these accounts meant to abandon the security of the mortgage, and trust only to the personal credit of their mortgagor for the interest. The accounts appear to have been made out in ordinary course as between merchants, to show the general state of their dealings, but it ought not to be presumed that this form of statement was intended to alter the substance of the transactions between them, so as to make the debit of the sums paid for discount operate as satisfaction of the interest secured by the mortgage.

If the account containing the charges for discount had been paid by F. Fenton, such payment would, no doubt, have been equivalent to his having himself discounted the bills; and, upon this view, it was contended as a further point by the Appellants' Counsel, that there were entries in the accounts of moneys received from F. Fenton

subsequent to the entries of the discounts, which, according to the principle of Clayton's case, operated as payment of them. But on an examination of the entries referred to during the argument, it appeared that the moneys to which they related ought to be appropriated to other specific advances, and this contention consequently failed upon the facts.

The result is that, in their Lordships' opinion, the Respondents are entitled to the benefit of the mortgage in respect of the interest on the principal debt secured by it, and that the exception to the Master's Report allowing such interest has been rightly overruled by the Supreme Court.

The questions on the other three items excepted to, arise under a covenant in the mortgage of the stock, which provides that certain payments, if made by the mortgagee, shall become a charge on the stock. It is as follows:—

"And, further, that the said Mortgagor, his executors or administrators, shall and will, during the continuance of this security, well and truly conform to observe, perform, and comply with all the laws and regulations for the time being in force and operation, within the said Colony of Victoria, for the management of runs, or the stock and animals for the time being thereon, or in relation thereto respectively, including (amongst others) 'The Prevention of Diseases of Animals Statute, 1864,' and particularly so far as such laws and regulations respectively shall or may apply to the said station or run called Reedy Lake, and the sheep, cattle, horses, and other live stock depasturing thereon. And also will, from time to time, pay all license fees or rents, assessments, fines, penalties, and other charges, which shall become payable in respect of the said station or run, or the stock for the time being thereon, or in relation thereto. And will not do or suffer to be done, or omit to do, any act, matter, or thing, whereby the said license of the said station or run may become or be liable to become void or avoidable, or liable to be withdrawn or forfeited, or the said sheep, cattle, horses, and other live stock, chattels, effects, and things, may be or be liable to be levied or destrained upon by any process of law or otherwise, And if default shall be made in payment by the said Mortgagor, his executors or administrators, of the license fee or rent, charges, fines, penalties, and assessments aforesaid, it shall be lawful for (but not obligatory on) the said Mortgagees, or the survivor of them, his executors or administrators, their or his assigns, to pay the same, and the said run, sheep, cattle, horses, chattels, and premises expressed to be hereby assigned, as well as those which shall be taken possession of under the power hereinbefore contained, shall be charged and chargeable with, and be a security for the repayment to them or him of all such sum or sums of money as they or he shall pay or expend for or in respect of such license fee, rent, charges, fines, penalties, and assessments, together with interest on the same sum and sums at the rate of

twelve pounds ten shillings per centum per annum, to be computed from the time or respective times of payment thereof. And the said run, sheep, cattle, horses, and premises shall not be redeemable until payment as well of such sum or sums and interest as of the other moneys hereby secured."

First, as to rent. The Master allowed the mortgagees three payments they had made on this account, amounting together to upwards of 1,200*l.*

It was not denied that the mortgagees had power by the above clause to pay the rent and add it to their mortgage debt, if the mortgagor failed to pay it. But it was said that there was no evidence that the rent was, in fact, paid by Dalgety and Co., because of the default of the morgtagor; and, further that, as in the accounts above referred to, these payments were debited to the mortgagor, with interest and commission thereon, Dalgety and Co. must be taken to have paid the rent as agents merely for Fenton, and not as mortgagees under the clause above set out.

Their Lordships find little difficulty in coming to the conclusion of fact that F. Fenton failed to pay the rent. Thereupon Dalgety and Co. had authority, under the mortgage, to do so, and did, in fact, pay it to prevent forfeiture. It would require strong evidence to prove that, having the power to get the benefit of the mortgage security, they, in fact, made the payments, not as mortgagees, but as agents of Fenton, on his personal credit only. The accounts in which these payments are debited, with charges for interest and commissions, are relied on for this proof. But it seems to their Lordships it would be giving a greater effect to these accounts than the parties intended if such a conclusion were to be drawn from them. They appear, as already stated, to be made out according to the custom of merchants acting for a principal, to show the general state of the account; aad it ought not to be inferred from them, without other evidence, that Dalgety and Co. intended to give up the special securities they might have in respect of any items contained in them. There is no evidence that Fenton instructed them to pay the rents as his agents; and, in the absence of such instructions, their Lordships think it cannot be inferred that they made the payments merely as such agents, and elected to abandon their right to resort to their mortgage security in respect of them. They

are of opinion, therefore, that the Supreme Court was right in overruling the exception to the allowance of the rent.

The two remaining items excepted to, viz., the sums paid for scab licenses and for sheepwash, raise the further question, whether they are payments that the mortgagees had authority to make, upon the mortgagor's default, under the above clause.

With respect to the scab licenses. The words "license fees" in the clause do not, in their Lordships' opinion, include sums paid for such licenses, but refer to fees in the nature of rents payable in respect of land or pasturage licenses. The other words of the clause which are, it was contended, sufficient to comprehend them are, "charges which shall become payable in respect of the said station or run, or the stock for the time being thereon, or in relation thereto." The construction may admit of some doubt, but, their Lordships, on the whole, think that the sums paid for the scab licenses are charges payable in respect of the stock within the meaning of these words. The provisions of the Colonial Act, "The Prevention of Diseases of Animals Statute, 1864," sections 15 and 16, require owners of infected sheep to obtain licenses from the Inspector to keep them, and to pay certain fees upon such licenses, and in default a penalty of 2*s*. for each sheep is imposed on such owners; and, by the 25th section, in case the penalty is not paid, two justices may order the sheep to be sold. It appears to their Lordships that these provisions imposed a statutable obligation on the mortgagor to obtain licenses for the infected sheep and to discharge the fees payable upon them, and that these sums are, therefore, charges payable in respect of the stock, which the mortgagor was by law bound to pay, and, on his default, the mortgagees were authorized to pay by virtue of the clause. The exception to their allowance has, consequently, been rightly overruled by the Supreme Court.

The exception to the sums paid for sheepwash must, their Lordships think, be allowed. These payments are clearly not within the terms of the clause in question; and, as the mortgagees had not taken possession at the time they were made, there is no ground on which they can be considered to be a charge on the mortgaged property.

Their Lordships will humbly advise Her Majesty *that the* Order of the Supreme Court ought to be varied as to the payments for sheepwash, and so much of the Order as overruled the exception to them reversed, and such exception allowed; and that, as to the rest of the Order appealed from, that it ought to be affirmed.

The Appellant, although failing in his appeal upon the most important exceptions, has succeeded upon one, involving a substantial amount. Under these circumstances, their Lordships think that each party should pay his own costs of this Appeal.

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