Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Felix A. McHugh, since deceased (now represented by Felix Alexander Joseph McHugh and others) v. The Union Bank of Canada; and of Thomas P. McHugh, since deceased (now represented by Felix Alexander McHugh and another) v. The Union Bank of Canada, from the Supreme Court of Canada (P. C. Appeal No. 93 of 1911); delivered the 17th February 1913.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD MOULTON.

[DELIVERED BY LORD MOULTON.]

These are consolidated Appeals in two cases in which Felix A. McHugh and Thomas P. McHugh were respectively the Plaintiffs and The Union Bank of Canada was the Defendant. They are brought by Special Leave from judgments of the Supreme Court of Canada in the two cases dated the 15th of May 1911. The original Plaintiffs, Felix A. McHugh and Thomas P. McHugh, have died during the pendency of the actions, and the present Appellants are in each case the personal representatives of the original Plaintiffs.

The Appeals were directed to be heard together. The points raised in them are substantially the same with the exception of the point as to amount of damages which turns upon the facts in the two cases which, though similar,

are not identical. For the purposes of their Lordships' judgment it will be convenient however to deal with the actions separately, taking first the action of *Felix A. McHugh* v. *The Union Bank of Canada*. The decision in that case will necessarily govern the decision in the case of *Thomas P. McHugh* v. *The Union Bank of Canada* with the exception of the question as to damages which will be dealt with separately.

The action of *Felix A. McHugh* v. *The Union Bank of Canada* arose out of the following circumstances:—Felix A. McHugh was a rancher carrying on business in the province of Alberta with his brother Joseph McHugh, under the name of McHugh Brothers. On the 31st December 1904 this firm executed a chattel mortgage to The Union Bank of Canada on a number of horses and other chattels to secure a principal sum of $24,000, with interest at the rate of 8 per cent. per annum, with rests every three months. This chattel mortgage was held by the Bank as collateral security for its advances to the firm, and continued so to be held until the 28th May 1907, when the firm executed another chattel mortgage to the Bank on the same terms on certain horses and other chattels, to secure a principal sum of $36,223, in substitution for the former mortgage. This sum represented the admitted indebtedness of the firm to the Bank at the date on which it was executed, and was intended to be treated as collateral security for the advances to the firm in the same way as the mortgage of the 31st December 1904 had been treated.

Subsequently to the making of the last mentioned mortgage, and prior to any of the events hereinafter referred to, Felix A. McHugh acquired the partnership business and assumed the liability to the Bank. Early in July 1908 Felix A. McHugh was in default under the chattel mort-

gage, and accordingly the Bank, by a certain authority dated 6th July 1908, directed Alden B. Smith to seize the mortgaged horses under the mortgage, and such seizure was thereupon made by him on behalf of the Bank. The horses in question were at the time of the seizure upon Felix A. McHugh's ranch, situated about 55 miles from Calgary. Some of the horses on the ranch were suffering from mange, and therefore the whole of the horses were in quarantine, and according to the regulations prevailing in the province at the time no horses could be removed from the ranch either for the purpose of sale or otherwise until after they had been dipped in a bath of sulphur and lime. Accordingly the Bank caused the horses to be so dipped, and, after all the quarantine regulations had been duly complied with, had them driven to Calgary in two or three lots. It is not necessary to go into the detail of the collection and treatment of the horses on the ranch, or of the way in which they were driven into Calgary for sale, excepting to say that the Plaintiff complained that they were driven too hurriedly and that by reason thereof some of them died and others were put out of condition, and it is in respect of these that the claim for damages is made. It is, however, admitted that it was proper for the Bank so to collect, treat, and send to Calgary these horses in order to effect a proper realisation of the mortgaged chattels. The only other alternative would have been to sell them to some buyer who would have been content to take them at the ranch under quarantine, and it is obvious that such a proceeding would have involved ruinous loss to the Plaintiff, who was interested in their fetching as high a price as possible seeing that he was entitled to have the amount realised by the sale put to his credit in reduction of the amount due by him to the Bank.

The horses were sold by public auction by the Alberta Stock Yards Company, Limited, at their stock yards at Calgary at various dates ranging from 14th August to 3rd September 1908. No suggestion is made in the evidence that this was not a proper and prudent mode of conducting the sale nor was any objection made to it at the time or subsequently. Indeed, from the evidence their Lordships would conclude that it was practically essential thus to sell the horses at the stock yards at Calgary in order to get the benefit of a market. The charges of the Alberta Stock Yards Company, Limited, for conducting the sale were their usual and customary charges, namely, expenses and 3½ per cent. commission, this commission including the necessary advertising. The Company also according to their practice wrote round to such customers as they thought likely to become customers, giving them special notice of the proposed sales, and no complaint is made in this action of any lack of diligence on their part or on the part of the Bank in advertising and otherwise making known such sales. The accounts of the Alberta Stock Yards Company, Limited, in respect of such sales are set out in a letter from the Company to the Assistant Manager of the Bank, dated 9th September 1908.

The present action was commenced in the month of September 1908, the Statement of Claim being delivered on 11th September. In substance the relief claimed was threefold :—

(1) A taking of accounts between the Plaintiff and the Defendant Bank under the mortgages.

(2) Damages to the amount of $8,000 for the Defendant's negligence and want of care and skill in connection with the realisation of the horses.

(3) Upon an allegation that the Defendant Bank had charged for expenses and commission

on the sales a larger sum than that which could be properly charged under the provisions of the Ordinance respecting distress for rent and extra-judicial seizure, a claim is made for the sum of $2,232. 12, being treble the amount of the alleged excess.

At the trial an application was made to amend the Statement of Claim by adding an allegation to the effect that the rate of interest provided to be paid by the said mortgage was illegal and in excess of the rate which the Bank was entitled to stipulate for, take, reserve, exact, receive or recover under the Bank Act. The learned Judge did not allow the amendment, taking the view that the Plaintiff was estopped on the point so far as related to matters previous to the mortgage of the 28th May 1907, and that the question of the rate of interest to be charged under the later mortgage would probably be raised on taking the accounts. But although the amendment was not formally allowed the effect of the Judge's action and that of the Judges in the Superior Courts has been to make the question as to the proper rate of interest a question to be decided by their Lordships as well as the question of the extent to which past payments and statements of account are to be affected by their decision.

The questions thus raised between the parties are so distinct and so diversified in their nature that it will conduce to clearness if they are taken separately both in dealing with the history of the litigation and in deciding the questions raised.

Accounts.—The learned Judge at the trial, by a judgment dated 12th July 1909, directed the Bank to file its account beginning at the 28th May 1907, the date of the latter mortgage. But inasmuch as the Plaintiff had shewn that certain arithmetical errors had been made in the calculation of interest in the accounts between the

Plaintiff or his firm and the Defendant Bank prior to the 28th May 1907, which affected the amount due to the Defendant Bank on that day, he gave leave to the Plaintiff to surcharge and falsify such accounts in respect of those arithmetical errors and not otherwise so as to correct the calculation of the amount due to the Defendant Bank on the 28th May 1907, it being admitted that it was the intention of the parties that the sum therein named should be the sum actually due to the Defendant Bank at that date. In the accounts to be taken under the said mortgage, he directed that the amount so corrected should be taken to be the principal sum secured by the mortgage of that date, and should bear interest according to the terms of the said mortage, *i.e.*, at 8 per cent., but that it should be open to the Plaintiff to contend on taking the accounts that the interest should be calculated at the rate of 5 per cent. and not more. On the appeal from the judgment of Mr. Justice Beck to the Supreme Court of Alberta that Court varied these directions by substituting a direction that in taking the accounts between the Plaintiff and the Defendant Bank up to the 31st December 1904, the date of the first mortgage, the Plaintiff should not be charged with a higher rate of interest than 7 per cent. per annum. From the 31st December 1904 to the 28th May 1907 they permitted the interest to be charged at 8 per cent. per annum—in this respect agreeing with the judgment of Mr. Justice Beck—but they directed that subsequent interest should be taken at the rate of 7 per cent. per annum. They also directed that no accounts should be opened or enquired into for any period prior to six years previous to the date of the writ in the action.

The judgment of the Supreme Court of Alberta was unanimous, and was delivered by

Mr. Justice Scott. The reason that he gives for fixing 7 per cent. is that it is the highest rate per cent. which by the Bank Act the Defendant Bank is entitled to charge. He also considered that he was entitled to find that prior to the first mortgage the Plaintiff was not aware that he was paying an excessive rate, but that from and after signing that mortgage promising definitely to pay 8 per cent. the payments were voluntary and could not be recovered back.

An appeal and a cross appeal were brought from this decision to the Supreme Court of Canada, and these directions as to accounts were affirmed so far as the method of taking them is concerned. Mr. Justice Idington appears to have dissented from the judgment of the rest of the Court on this point.

Reserving for consideration later the question of the proper rate of interest to be allowed, their Lordships are of opinion that the mortgage of the 28th May 1907 was intended to be a settlement of accounts between the parties, and that no case has been made out by the Plaintiff for disturbing the accounts so settled otherwise than that he should have liberty to surcharge and falsify previous accounts with regard to arithmetical errors. In this respect, therefore, their Lordships agree with the judgment of Mr. Justice Beck at the trial.

Damages.—At the trial Mr. Justice Beck considered all the evidence and came to the conclusion that there was negligence in connection with bringing some 360 of the horses to Calgary considering their condition, the time of the year, and the road over which they were driven. He was of opinion that they should not have been driven so soon after they had been dipped, nor in so large a band, &c., and he assessed the damages at $2,800. On appeal to the Supreme Court of Alberta that Court set

aside that assessment on the ground that it was unable to discover any method by which such an amount could properly be arrived at upon the evidence, but it granted to the Plaintiff the option to have it referred to the Clerk of the Court at Calgary to take an account of what damage, if any, the Plaintiff had suffered by the negligence of the Defendants, but limiting such damages to the difference between the sums of money received by the Defendants from the sale of the horses, and what was a fair and full value of the horses as they stood before they were seized or handled at all while in the Plaintiff's possession at his ranch, still ungathered and still in quarantine.

From this decision the Plaintiff appealed to the Supreme Court of Canada. On such appeal the order directing a reference at the Plaintiff's option was affirmed by a majority of the Court, but the direction as to the mode of assessing damages of such reference was varied, the Court declaring that the measure of damages to be allowed should be the depreciation in value if any of the Plaintiff's horses caused by the manner in which they were driven from the Plaintiff's ranch to the place at which they were sold. Duff and Anglin, JJ., who constituted the minority of the Court, were of opinion that the judgment of the Judge at the trial for $2,800, in respect of damages should be restored.

Their Lordships are of opinion that the assessment of damages by the learned Judge at the trial should stand. There was evidence on which the learned Judge could come to the conclusion that by the negligent behaviour of the Defendant's agent the mortgaged property had become deteriorated so that it realised less than it ought to have realised upon sale. The assessment of the damages suffered by the Plaintiff from such a cause of action is often far

from easy. The tribunal which has the duty of of making such assessment whether it be Judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Mr. Justice Beck's assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal.

Penalties.—Before dealing with the decision of the Courts upon this point it is necessary to explain in greater detail the nature of the claim under this head.

The claim is based upon the provisions of the North-West Provinces Consolidated Ordinances, 1898, Ch. 34. By this Ordinance statutory limits are prescribed for costs and charges in respect of seizures in chattel mortgages, bills of sale, or any other extra judicial process whatsoever. This is done by means of a schedule to the Ordinance setting out the charges for certain specific acts in connection with such seizures, namely: (1) levying the distress; (2) the man in possession; (3) appraisement; (4) advertising; (5) catalogue, sale, commission, and delivery. By the third section it is enacted that if greater or other costs be taken by the person making the distress, the party aggrieved may summon him before the Supreme Court of the Judicial district where the seizure is made, and that Court may order him to pay to the party aggrieved treble the amount of monies taken in excess and costs of suit.

The contention of the Plaintiff is that the schedule is inclusive, and that in return for the costs and charges specified in the schedule the party making the seizure must bear all costs connected with it whether for the matters named in the schedule or otherwise, and further that it is impossible contractually to exclude the operation of the statute, so that whatever be the provisions of the chattel mortgage with regard to the rights of the mortgagee to be reimbursed necessary expenses in the realisation of the mortgaged property in case of default, he can under no circumstances receive more than the sums set out in the schedule of the Ordinance. The Plaintiff also contends that if he does take or receive anything in excess of the scheduled sums the Court has no option but to inflict upon him the payment of treble the excess by way of penalty.

The Defendants, on the other hand, contend that the statute deals only with the costs of certain matters which are, so to say, the ordinary and almost universal features of realisation by seizure and sale, viz., seizure, possession, appraisement, advertisement, and sale, but that it does not refer to the costs of other acts which may be necessary and proper for the right realisation of the property seized and which as between the mortgagor and the mortgagee would on well-recognised principles of equity be regarded as costs of realisation which would be a first charge on the sums realised by the sale. They further contend that it is open to parties to insert provisions in the mortgage deed entitling the mortgagee to other and different costs, and that such provisions are valid between the parties notwithstanding the Ordinance. And finally they contend that the infliction of the penalty is permissive only and not obligatory, and that if in the present case the Ordinance applies and

there has been an infraction of it, the circumstances are such that the Court ought not to impose the penalties.

The Judge at the trial appears to have adopted the Plaintiff's contention that the schedule was inclusive, but he declined to impose the penalties for a reason which is now admitted to have been based on a mistake of fact and therefore need not be examined. On appeal to the Supreme Court of Alberta the Court affirmed his judgment as to the schedule being inclusive, and further found in favour of the Plaintiff with regard to the penalties. They held that it was obligatory on the Court to inflict the penalties where any excess above the schedule had been charged, and referred it to the Clerk of the Court of Calgary to ascertain the excess and to tax the costs "allowable under "a schedule to the said Ordinance upon which "the Plaintiff may move before a Judge for "judgment for treble the excess shown to have "been taken"—language which it is difficult, if not impossible, to construe, and which leads their Lordships to the conclusion that there must be some misprint in the record.

On appeal to the Supreme Court of Canada the judgment on this point was not affirmed, the Court being unanimously of opinion that the Defendant Bank ought to be allowed its reasonable and necessary costs for care, maintenance and removal of the horses seized by it under its said chattel mortgage. Inasmuch as there was no evidence or even contention that if this was the legal position of the Defendant Bank it had taken or received more than it was entitled to, the Court did not deal with the question as to whether the imposition of penalties by the Court was permissive or obligatory.

Their Lordships agree with the judgment of the Supreme Court of Canada on this point. It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold. But such a doctrine recognises as a necessary corollary the right of the mortgagee to treat the reasonable expenses of such realisation as a deduction from the amount realised, and indeed, unless this is done, the sale price does not truly represent the value of the property sold, because it is a sum which the owner could not have obtained for it without paying the necessary costs of realisation. In the case of chattel mortgages it may frequently happen that some of the goods may not at the moment of seizure be in a condition which permits of immediate sale, or, in other words, that no reasonable man would attempt to sell them without previous preparation if they were his own. For example, the goods may be in process of manufacture, and may be so unfinished that they would be incapable of being transported without deterioration unless some further operation was performed upon them, or they might require to be baled before they could be put into the market, or they might require to be sent a substantial distance by rail to some place proper for the sale of such goods. Other possibilities of a like kind will readily suggest themselves. But for this purpose it is not necessary to travel beyond the circumstances of the present case. No better instance could be found than that which we have here. The horses were in quarantine on a ranch situated at a considerable distance from any market. They had therefore

to be dipped and then kept for a time, and then taken a considerable distance before they could reach a market. During all this time they must be fed and tended. All this is admitted by the Plaintiff, his only complaint being that they were not kept for a longer time, and in reality he is claiming in this action damages because the Defendant did not perform these duties more thoroughly, and in a manner involving greater outlay. But all these operations cost money, and it is common ground that it is only by going to this cost that any realisation of the mortgaged property which is fair to its original owner can be obtained. Yet the contention of the Plaintiff is that although as a mortgagor he is entitled to require that the mortgagee shall incur all these costs in order to increase the amount which the chattels will bring on sale, these costs are not to be a deduction from the sale price, but must come out of the pocket of the mortgagee, and that it is actually illegal even to provide that it shall be otherwise.

In the present case the relevant provisions of the mortgage deed are as follows :—

" And upon and from and after taking possession of such " goods and chattels it shall and may be lawful, and the mort- " gagee, and each or any of them, is and are hereby authorised " 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 consequence of such sale or removal as " above mentioned, or in consequence of failing in the perform- " ance of any of the covenants or agreements herein con- " tained, 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 payment of the costs, charges, and
" expenses incurred by such seizure and sale as aforesaid."

There is nothing unreasonable in these provisions which probably add but little to what the law would imply in any case of sale by a mortgagee under a power of sale. Yet, if the contention of the Plaintiff on this point be correct, all such provisions are made inoperative and illegal by the Ordinance.

It would require clear language to lead their Lordships to hold that it is the object and effect of any statute to render it impossible for the parties to a chattel mortgage to provide that the mortgagee in realising the mortgaged property in case of default shall be allowed the fair and necessary cost of so doing. On examining the language of the Ordinance their Lordships can find nothing which when reasonably construed points to anything of the kind. Taken in connection with the Schedule, the only effect of Section 2 of the Ordinance is, in their Lordships' opinion, to fix a statutory scale of costs for certain acts which ordinarily must be performed in connection with any seizure or sale. For such acts it limits the charges, or rather statutorily ascertains them. But it does not deal in any way with other expenses of realisation which are reasonable and necessary in the interest of both parties, and therefore in respect of such charges the ordinary rules of law prevail and the parties are free to contract, and must be held to the bargain they have made.

This being their Lordships' interpretation of Section 2 of the Ordinance it may well be that no question will arise under the penalty clause when the accounts are taken. But it may also happen that some case of an excess charge with

regard to a schedule item may be found, and therefore it is necessary to consider the question whether the infliction of the penalties in such a case is obligatory or permissive. In deciding this question the dominating consideration is that the Ordinance, which is Chapter 34 of the Consolidated Ordinances of the North-West Territories of Canada passed in the year 1898, is subject to the Interpretation Ordinance, which is Chapter 1 of the same year, and must be interpreted accordingly. By Section 8 Sub-section 2, of the Interpretation Ordinance it is expressly provided that the expression "shall" shall be construed as imperative, and the expression "may" as permissive. It is true that (as is customary in Interpretation Clauses) these sub-sections are prefaced by the words "unless "the context otherwise requires," but that does not take away from the authority of the express direction as to the construction of the words "shall" and "may." The Court is bound to assume that the Legislature when it used in the present instance the word "may" intended that the imposition of the penalties should be permissive as contrasted with obligatory unless such an interpretation would be inconsistent with the context, that is, would render the clause irrational or unmeaning. But there is nothing in the context which creates any difficulty in accepting this statutory interpretation of the word "may." The clause is just as intelligible with the one interpretation as with the other. So far from creating any difficulty the interpretation which leaves it permissive appears more reasonable seeing that there is no exception in the clause for cases where the excess has been taken either under mistake or by inadvertence, and it is not likely that the Legislature would insist on penalties being enforced where no blame attached. Be this as it may, there is nothing in the clause which will permit their

Lordships to depart from the express provision of the Interpretation Ordinance stating that " may " shall be construed as permissive.

This being the case, it is not necessary to examine the English decisions which establish that in certain cases " may " must be taken as equivalent to " must." In the light of those decisions it is often difficult to decide the point, and in their Lordships' opinion the object and the effect of the insertion of the express provision as to the meaning of " may " and " shall " in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes.

Should any case of excess be found to have occurred their Lordships are of opinion that in view of all the circumstances, and especially of the fact that the conduct of the Defendant Bank in the course they pursued was reasonable and calculated to obtain the best price for the chattels sold, there is no ground for imposing the penalty.

Interest.—The contention of the Plaintiff with regard to the interest chargeable to the Bank is that it is *ultra vires* on the part of the Bank to charge a higher rate than seven per cent. and that their stipulation in the mortgage of 28th May 1907 that interest shall be charged at the rate of eight per cent. was *ultra vires* and void. But he does not contend that the Bank is entitled to no interest, but admits that it is entitled to five per cent. which is the legal rate of interest where no special rate of interest is fixed. The Defendants admit that they cannot recover interest at a higher rate than seven per cent., but claim that they are entitled to recover interest at that rate.

The statutory provisions applicable to the case are to be found in the Bank Act, 1906, which enacts, in Section 91, 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 recover-
" able by the Bank."

Their Lordships are of opinion that the express provisions of the first portion of this clause rendered it *ultra vires* on the part of the Bank to insert in the chattel mortgage of 28th May 1907 the stipulation that interest should be payable at the rate of eight per cent., and that therefore that stipulation is inoperative. They are of opinion, therefore, that the contention on behalf of the Plaintiff in this respect is right, and that the interest under that mortgage must be calculated at the rate of five per cent. per annum.

It was further sought by the Plaintiff to apply this principle to the earlier mortgage, and to the various bills or notes of hand which preceded it, but in their Lordships' opinion the mortgage of 28th May 1907 amounted to a settlement of accounts between the parties, having the same effect as payment would have had with regard to the question as to the interest charged between the parties. The Plaintiff must be taken to have known that the Bank had no right to stipulate for and no power to recover interest at eight per cent., but he voluntarily assented to that which was equivalent to payment of interest at that rate, and he has no right to recover back any excess which he thus voluntarily paid.

Inasmuch as their Lordships are of opinion that the Plaintiff should only be allowed to surcharge and falsify in respect of arithmetical mistakes in the calculation of interest in accounts prior to 28th May 1907, their Lordships do not think that in so doing he should be limited to a period of six years before the beginning of the action. The Statute of Limitations was not pleaded, and such mistakes are of a character which common honesty would desire should be rectified whenever they are discovered.

Thomas P. McHugh v. *The Union Bank of Canada.*

In this case the Plaintiff executed a chattel mortgage on the 17th December 1907 for an amount which, as in the previous case, represented the indebtedness of the Plaintiff to the Defendant Bank at that date. He made default at or about the same time as Felix A. McHugh, and there was a seizure and sale by the Defendant Bank. But in this case the complaint against the Defendant Bank with regard to the sale of the horses is not that there was any negligence in over-driving them, &c., but that the sales were not sufficiently advertised. Mr. Justice Beck at the trial considered this contention established and awarded damages to the amount of $2,175. On appeal however to the Supreme Court of Alberta this part of his judgment was reversed, and the action, so far as it relates to damages for an improvident sale, was dismissed. The Supreme Court of Canada agreed with the Judgment of the Supreme Court of Alberta in this respect, and their Lordships see no reason to doubt that they were right in so doing.

Their Lordships will therefore humbly advise His Majesty as follows :—

(1.) That as regards the Appeal of the said Felix A. McHugh (since deceased), that the same ought to be allowed in part, that the Judgment of the Supreme Court of Canada, dated the 15th day of May 1911, and the Judgment of the Supreme Court of Alberta *en banc*, dated the 24th day of June 1910, ought to be respectively set aside, and that the Judgment of the Supreme Court of Alberta, dated the 12th day of July 1909, ought to be restored, subject to the following variations :—

(1) That the directions as to taking accounts under (*a*) of the said Judgment shall be varied

by directing that the interest on the sum secured by the Mortgage of 28th May 1907, shall be taken at the rate of five per centum per annum, instead of as in the said judgment directed.

(2) That the directions for taking accounts under (*b*) of the said judgment shall be varied by adding thereto the words "so far as such "costs, commission, and charges are in respect "of matters to which the Schedule to the said "Ordnance relates."

(3) That a declaration should be inserted in the said judgment to the effect that the Defendants are not liable to pay to the Plaintiff any penalties under the provisions of the said Ordinance in respect of the matters to which the suit relates.

(4) That it ought to be further declared that the sum of $2,800 damages is to be set off against such sum as may be found due from the Appellants to the Respondents on taking the accounts referred to.

And that the Respondents should pay to the Appellants all their costs in the Courts below, and that there should be no costs of the Appeal to this Board.

(2.) That as regards the Appeal of the said Thomas P. McHugh (since deceased), that the same ought to be allowed in part, that the Judgment of the Supreme Court of Canada, dated the 15th day of May 1911, and the Judgment of the Supreme Court of Alberta *en banc*, dated the 24th day of June 1910, ought to be respectively set aside, and that the Judgment of the Supreme Court of Alberta, dated the 13th day of July 1909, ought to be restored, except so far as it relates to the award of $2,175 damages, as to which the said Judgment of the Supreme Court of Canada ought to be affirmed, and subject (*mutatis*

mutandis) to the variations set out in the first paragraph of this Report, and that the Respondents should pay to the Appellants all their costs incurred in the Courts below, other than the costs of the proceedings before Mr. Justice Beck relating to the claim for damages, and that the Appellants should pay to the Respondents their costs of such proceedings, and that there should be no costs of the Appeal to this Board.

In the Privy Council.

FELIX A. McHUGH, SINCE DECEASED (NOW REPRESENTED BY FELIX ALEXANDER JOSEPH McHUGH AND OTHERS)

v.

THE UNION BANK OF CANADA;

AND OF

THOMAS P. McHUGH, SINCE DECEASED (NOW REPRESENTED BY FELIX ALEXANDER McHUGH AND ANOTHER)

v.

THE UNION BANK OF CANADA.

DELIVERED BY LORD MOULTON.

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