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THE VALIDITY OF BONUSES IN MORTGAGES OF REAL ESTATE.

When may a mortgagee of land, by virtue of the mortgage transaction, stipulate for the deduction by him from the amount of the advance or for the payment by the mortgagor of a bonus or commission in addition to the interest payable under the mortgage? This is a question which in recent years has frequently come before the Canadian courts for determination.

As the usury laws were repealed in England by 17 & 18 Vict., c. 90, and as the Interest Act[1] now provides that any person may, except as otherwise provided therein or by any other Act of the Parliament of Canada, stipulate for, allow and exact on any contract or agreement whatsoever any rate of interest or discount which is agreed upon, no consideration will be given to decisions which are directly governed by the usury statutes then in force.[2]

It is proposed to treat the problem arising out of this question: (*a*) according to the equitable principles affecting it; (*b*) the effect of the Interest Act.[3]

(*a*) *Equitable Principles.*

It was laid down in the case of *Jennings* v. *Ward*[4] that "a man shall not have interest for his money and a collateral advantage besides for the loan of it or clog the redemption with any by-agreement." Lord Romilly, 158 years later, decided that this rule was not affected by the repeal of the usury laws and he disallowed a com-

[1] R.S.C., 1906, c. 120, s. 2.

[2] There are restrictions on the rate of interest in regards to advances by pawnbrokers, money-lenders and banks. See the Pawnbrokers' Act, R.S.C., 1906, c. 121; The Money-Lenders' Act, R.S.C., 1906, c. 122; The Bank Act, 1923, c. 32, s. 91.

There was a series of usury statutes in force in Upper Canada and the late Province of Canada.

[3] *Supra.*

[4] (1705), 2 Vern. 520.

mission for which the mortgagee had stipulated in addition to the principal and interest.[5] In 1889, Kay, J., decided in the case of *James* v. *Kerr*[6] that a provision for a bonus of £225 on an advance of £100 was unenforceable. However, in 1857 it had been held in the case of *Potter* v. *Edwards*[7] that the mortgagor was only entitled to call for redemption on payment of £1,000 under a mortgage securing the payment of that amount, despite the fact that only £700 had been advanced by the mortgagee. Kindersley, V.C., who decided the case, said in part: "The security appeared and with justice to be of a questionable character and the defendant in fact agreed to lend no more than £700 upon having a mortgage for £1,000 in consideration of the risk and hazard attending the transaction."[8]

The case of *Potter* v. *Edwards* was followed, by the same judge who decided *James* v. *Kerr*, in *Mainland* v. *Upjohn*.[9] Kay, J., allowed the mortgagee, in taking the accounts in a redemption action, sums actually deducted by him for commission or bonus at the times of making the advances, having regard to the risk incurred by the mortgagee in taking the security on a building estate of a speculative character, and to the fact that the bargain was deliberately entered into by the parties on equal terms.

The sweeping statement, in *Jennings* v. *Ward*,[10] that any collateral advantage above and beyond interest for the benefit of the mortgagee is void was based on the policy of the usury laws. In *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*,[11] Lord Parker of Waddington remarked: "I can find no instance of the rule which precludes a mortgagee from stipulating for a collateral advantage having been applied to a mortgage other than a mortgage to secure borrowed money, and there is the authority of Lord Eldon in *Chambers* v. *Goldwin*[12] for saying that this rule was based on the usury laws. The right (notwithstanding the terms of the bargain) to redeem on payment of principal, interest and costs is a mere corollary to this rule and falls with it."

It has been repeatedly held that one great effect of the repeal of the usury laws was to bring into operation to a greater extent, than formerly, another phase of the jurisdiction of the Chancery Court, which had existed long before the usury laws. This was the juris-

[5] *Broad* v. *Selfe*, (1863), 11 W.R. 1036.
[6] (1889) 40 Ch. D. 449.
[7] 26 L.J. (Ch.) 468.
[8] *Ibid* at p. 469.
[9] (1889), 41 Ch. D. 126.
[10] *Supra.*
[11] [1914] A.C. 25, at 55.
[12] (1804), 9 Ves. 254 at 271.

diction based upon the principle which prevented any oppressive bargain or any advantage exacted from a man, under grievous necessity and want of money, prevailing against him.[13]

This paternal jurisdiction of the Chancery Court has been manifested, in the case of a mortgage claiming a bonus or commission, by that court inquiring whether the bonus or commission was commensurate with and reasonable in respect to the risk and speculative character of the security.

It is significant that, throughout the cases above mentioned, bonus or commission is treated by the courts as a collateral advantage to the mortgagee, as something distinct from principal and interest. The Court of Chancery appears to have differentiated between bonus or commission on the one hand and interest on the other.

The Canadian courts have followed the precedents of the English courts. In refusing to relieve against a proviso for redemption, in a mortgage to secure an advance of £3,500 which required the mortgagor to pay on a fixed date £6,000 and the transfer of shares to the value of £5,000 in a company to be promoted by the mortgagor, the Court in Equity of New Brunswick said: "The difference between the sum loaned and the sum secured may and, in fact, does seem large even where the security (the land mortgaged was an undeveloped salt spring) is as speculative as the evidence shews this was. And, if the validity of the transaction were being impeached on the ground of oppression or surprise, or any other similar ground, this difference would be an important factor in the determination of that question. But no such defence is set up here, and, if it were, there is no sufficient evidence whatever to support it."[14]

The rule in equity may be stated thus: When money is lent on a security of a speculative or unsatisfactory nature the mortgagee may stipulate for the deduction by him from the amount of the advance or for the payment by the mortgagor of a bonus or commission in addition to the interest payable under the mortgage.[15] However, the discount, bonus or commission must not be exorbitant having regard to the risk or hazard attending the transaction and the contract must have been freely entered into by the mortgagor.[16]

[13] See Stuart, V.C., in *Barrett* v. *Hartley*, (1866), L.R. 2 Eq. 789 at 795; *Croft* v. *Graham*, (1863), 2 DeG. J. & Sm. 155; *Earl of Aylesford* v. *Morris*, (1873), L.R. 8 Ch. 484.

[14] *Buchanan* v. *Harvie*, (1904), 3 N.B. Eq. 61 at 67; see also *Gardiner* v. *Munro*, (1896), 28 O.R. 375; *Farrell* v. *Caribou Gold Mining Co.*, (1897), 30 N.S.R. 199; *Singer* v. *Goldbar*, (1924), 55 O.L.R. 267 at 269.

[15] See The Law of Mortgages: Falconbridge, p. 45.

[16] Halsbury, Laws of England, vol. xxi., p. 144.

(*b*) *The Effect of The Interest Act.*

Effect of Section Two.

The Interest Act in part represents the statute 43 Vict. c. 42. The Dominion obtains legislative jurisdiction over this matter from the B.N.A. Act, sec. 91, "Interest."

Section two provides that, except as otherwise provided, "any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest *or discount* which is agreed upon." In view of the fact that there were usury laws in force, in parts of what is now Canada, before Confederation, it may appear that the primary object of section two was to negative the continuance of these laws and not to abrogate any of the principles regulating the exercise of the paternal jurisdiction of the equity courts. It should be noted, on the other hand, that the section allows not only any rate of interest but also *any discount* which is agreed upon by the parties. In *Singer* v. *Goldhar*,[17] the court analogized the exacting of a bonus to the discount of a bill of exchange. It might well be argued successfully that the words "or discount" are wide enough to support the conclusion that an inquiry into the proportion of the amount of the bonus to the risk attending the security is unnecessary. The bonus then could always be recovered provided that no such defence as misrepresentation, duress, undue influence or mistake could be made out by the mortgagor.[18]

Legislative Object of Section Six.

Sections six[19] and seven of the act have given rise to the most difficult problems. A better understanding of section six will result from a realization of its legislative purpose. Mr. Justice Walsh in the case of *Canadian Mortgage Investment Co.* v. *Cameron*[20] said: "The evil which this section aims to prevent is the imposition of an extortionate rate of interest through the medium of blended payments of principal and interest. Under this system, without the pro-

[17] (1924), 55 O.L.R. 267 at 271 (App. Div.)

[18] This seems to be the conclusion reached by MacDonald, J., in *Cummings* v. *Silverwood*, [1918] 3 W.W.R. 629 at 633; 11 Sask. L.R. 407 at 410.

[19] R.S.C., 1906, c. 120.

(6) Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

[20] [1917] 2 W.W.R. 18; 33 D.L.R. 792.

tection which this section affords, a highly usurious rate of interest might be wrapped up in these innocent-appearing blended payments without the slightest suspicion on the part of an ignorant or careless borrower that he was being made the victim of it."

Plan for Blended Payments.

It is only proposed, in this article, to investigate the effect of the clause " or on any plan under which the payments of principal money and interest are blended." If there is not a plan for the blended payments of principal money and interest, section six does not apply and any bonus may be exacted and recovered by the mortgagee under the principles enunciated by the equity courts subject to the bearing of section two of the Act thereon.

The first inquiry in the case of a mortgage by which a bonus is exacted is: Is there a plan for blended payments of principal and interest? In the *Singer* v. *Goldbar*[21] case there was an actual advance of $3,500 by the mortgagee, but the proviso in the mortgage-deed was that the mortgage should be void upon payment of $4,700 in eleven monthly instalments of $100 and the balance at the end of twelve months from the date of the execution of the mortgage. Section six would never apply to this mortgage if the proviso had read: " Provided this mortgage to be void on payment of $4,700 in twelve monthly payments of $100 and the balance at the end of thirteen months from the date of this mortgage. The first twelve payments to be interest and the final payment shall be principal." There is no plan for blended payments in such a proviso.[22] It is submitted that if the mortgage had contained the following proviso: "'Provided this mortgage to be void on payment of $4,700 in eleven monthly instalments of $100 and the balance at the end of twelve months from the date of this mortgage, $3,500 to be paid as principal and $1,200 as interest," section six would not apply. True, the mortgagor by cheque or otherwise might blend the payments of principal and interest, yet the mortgage shows $3,500 is to be paid as principal and $1,200 as interest and there is no plan that the payments of principal and interest should be blended. Section six restricts the rate of interest if there is " *a plan* under which the payments of principal money and interest are blended." A fortiori, if one mortgage were taken as security for $3,500 and interest thereon

[21] *Supra.*

[22] The argument that the payments in *Singer* v. *Goldbar* were not to be blended was addressed to the Appellate Division, which decided that case, but Masten, J.A., held (55 O.L.R. at 271): "Nothing appears on the face of the mortgage to support such a contention."

and another mortgage were taken for $1,200 with interest there would be no plan for blended payment of $3,500 as principal and $1,200 as interest.

An interesting case[23] on what constitutes a plan for blended payments has come out of the west. In an agreement in writing, dated April 9, 1914, which the Court assumed was a mortgage without deciding the point, there was a recital that the obligor was indebted to the obligee in the sum of $12,000. In the same agreement, the obligor undertook in consideration of the $12,000 to pay the obligee on June 25, 1914, $12,000 without interest, but if the $12,000 was not then paid, the obligor was to pay $13,000 on or before July 25, 1914, with interest on $13,000 at 6 per cent. per annum from July 25, 1914. The facts were that only the amount of $10,000 was advanced on April 9, 1914. The obligor maintained, *inter alia*, in an action brought by the obligee, that by virtue of section six he was only obliged to pay $10,000. The Court decided that the sums of $2,000 and $3,000 were interest on the $10,000 actually advanced, yet held that section six did not apply as there were no blended payments of principal and interest. The Court said: "I do not think it can be said that payments of principal and interest are 'blended' under the agreement in question. It is true that the amount of $12,000 payable on June 25, 1914, is arrived at by adding together the $10,000 principal and $2,000 interest, but mere addition is not blending. *Murray's English Dictionary* states that the most frequent use of 'blend' is in the sense "to mix (components) intimately or harmoniously so that their individuality is obscured in the product.' "[24]

It is difficult to follow this line of reasoning. There was nothing on the face of the agreement shewing that $10,000 was the actual advance. There was nothing to indicate that $10,000 was to be paid as principal. When the obligor would pay over $12,000, would he pay the interest first or last? The individuality of either the principal or interest would surely seem to be obscured in the plan for payment.[25]

The case of *Singer* v. *Goldhar*,[26] the facts of which are given above, was the first to arise under section six in Ontario. The Court held that the mortgagor was not estopped by a recital in the mortgage

[23] *Cummings* v. *Silverwood*, *supra*.
[24] [1918] 3 W.W.R. at 632; 11 Sask L.R. at 410.
[25] Although it is not definitely stated in the report that the Court allowed the plaintiff $13,000, such is the irresistible inference. Such a result is a direct contravention of sec. 8 of the Interest Act which provides that no fines on payments in arrears shall be taken or reserved.
[26] *Supra*.

that $4,700 was received by him from shewing the actual amount advanced.[27] The Court adopted the following as definitions for principal and interest: "Now the ordinary meaning of 'principal' is the capital sum of money placed out at interest, in other words, the sum actually lent or advanced. 'Interest,' when considered in relation to money, denotes the return, or compensation, for the use or retention by one party of a sum of money or other property belonging to another." As $3,500 was advanced and $4,700 was to be repaid, the Court concluded that there was a plan for blended payments and the mortgagor having in fact paid $3,800, had satisfied the mortgage. It should be noted that no attempt was made in this mortgage to comply with section six. No rate of interest either on $3,500 or $4,700 was mentioned.

In *Laster* v. *Poucher*,[28] decided by Hodgins, J.A., in Weekly Court on appeal from a decision of the Assistant Master, we find another instance of, what the Court held was, a mortgage providing for a plan of blended payments. The amount actually advanced by the mortgagee to the mortgagor upon a second mortgage was $3,000. The mortgage was, however, given to secure $5,000 of principal and interest thereon at seven per cent. per annum. By an agreement entered into between the parties to the mortgage, including the mortgagee's husband, prior to the mortgage, it was contracted that the mortgagee should pay on behalf of the mortgagor $2,000 out of the first proceeds of the loan of $5,000 to the mortgagee's husband, a commission of $2,000 for obtaining and arranging the loan.

An ingenious attempt to evade section six and to justify the exacting of a bonus was made on the ground that the bonus was made payable by a *bona fide* agreement and that it was not secured by a mortgage of real estate. However, the Court held that the agreement was part of the mortgage transaction and therefore could not be separately considered.[29] It may be inferred that if a bonus is to be given for some consideration independent of the advance of the principal it cannot be said to be a remuneration for the retention or use of that amount advanced and cannot be interest within the dictionary meaning adopted by the Appellate Division of Ontario in *Singer* v. *Goldhar*.[30] On the other hand, it is utterly useless to try to fool the Court by pretending that a transaction is other than it

[27] This is also established in England, see *Mainland* v. *Upjohn*, (1889), 41 Ch. D. 126 at 136.

[28] [1926] 2 D.L.R. 993; 58 O.L.R. 589. The very full opinion of the Assistant Master is not given in the first mentioned report.

[29] See the opinion of the Assistant Master, 58 O.L.R. 589 at 594.

[30] *Supra.*

really is. The Court will go behind the mortgage and endeavour to ascertain the true nature of the transaction.

The Court in *Laster* v. *Poucher,* in deciding that there was in the mortgage a plan for blended payments of principal and interest, went further than the Court in *Singer* v. *Goldhar,* for in the last mentioned case there was no stipulation whatever for any rate of interest.

How may Section Six be Complied With?

Having considered what is or is not a plan for blended payments of principal money and interest within section six, let us assume that we have a mortgage containing such a plan and ask how may section six be complied with, and if not complied with, what is the penalty?

To comply with section six there must be a prescribed statement showing "(*a*) 'the amount of such principal money advanced,' i.e., the amount of the principal money secured which has been advanced and is to be repaid in the blended payments; (*b*) 'the rate of interest chargeable thereon,' i.e., the rate at which the interest to be paid is to be computed. (*c*) The section further prescribes that such interest shall be ' calculated yearly or half-yearly not in advance ' and that the 'statement' shall shew that it is intended to be so computed." [31] If no such statement is contained in the mortgage, "no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced."

It has been held that it is not necessary in a mortgage containing a plan for blended payments to have a statement therein shewing separately in every blended stipulated payment how much principal and how much interest the payment comprises and the rate of interest at which the calculation was made yearly or half-yearly not in advance.[32] Sir Charles Fitzpatrick has remarked that if such a detailed statement were necessary to comply with section six " it would seem doubtful whether they could then be called blended payments at all, and as it is only with such blended payments that the Act is dealing, it might then have no application to the mortgage at all."[33]

[31] Anglin, J., in *Standard Reliance Mortgage Corporation* v. *Stubbs,* (1917), 55 Can. S.C.R. 422 at 429.

[32] *Canadian Mortgage Investment Co.* v. *Cameron,* (1917), 55 Can. S.C.R. 409, reversing 11 Alta. L.R. 441; *Standard Reliance Mortgage Corporation* v. *Stubbs, supra,* reversing 27 Man. R. 272; *Canadian Mortgage Investment Co.* v. *Baird,* (Alta.), (1916), 30 D.L.R. 275. *Colonial Investment Co.* v. *Borland,* (Alta.), (1912), 6 D.L.R. 211, *contra. Cf.* annotation, 32 D.L.R. 60; Falconbridge: Law of Mortgages, p. 601.

[33] *Standard Reliance Mortgage Corporation* v. *Stubbs,* (1917), 55 Can. S.C.R. 422 at 426.

Some of the judges of the Supreme Court of Canada have experienced difficulty with the clause: "The rate of interest chargeable thereon, calculated yearly or half-yearly not in advance." It would appear that "calculated" is not the same as "payable" and that there is nothing in the Act which prohibits monthly payments of blended principal and interest. Anglin, J., in discussing this clause[34] said: "The adjective 'chargeable' clearly relates to and qualifies the word 'rate.' The participle 'calculated' equally clearly relates to and qualifies the word 'interest.' It cannot apply to the word 'rate'; a 'rate of interest' is not 'calculated.' But the 'rate' is distinctly affected by the frequency with which it is calculated or computed and interest in advance is appreciably more advantageous to the lender than interest not in advance. Ten per cent. per annum computed monthly is a rate materially higher than ten per cent. per annum computed yearly. . . . But however frequently the payments are to be made, not only must the rate of interest chargeable be stated, but it must also appear that such interest is to be 'calculated' (i.e., computed) 'yearly or half-yearly not in advance.'" Anglin, J., concludes that if a rate be stated, say, ten per cent. per annum, that is in itself sufficient to indicate that the interest is to be computed yearly and not in advance.

The Court in *Laster* v. *Poucher*, having decided, as pointed out above, that the mortgage was one containing a plan for blended payments of principal and interest, allowed the mortgagee seven per cent. per annum on the actual amount advanced, $3,000.[34a] There was only a statement providing for interest at seven per cent. per annum on $5,000. The Assistant Master said in this regard: "The rate shewn in this mortgage is 7 per cent.; and, while sec. 6 states that no interest shall be chargeable, these sections (six and seven) are plainly contradictory, and the only reasonable interpretation of sec. 7 is that the interest rate properly shewn is chargeable 'on the principal advanced,' while that which would be chargeable by the other provision is not recoverable."[35] It is extremely difficult to follow this reasoning. There is a condition precedent to the applicability of section seven[36] indicated by the first clause thereof, "when-

[34] *Ibid* at 429 *et seq.*

[34a] A like result was reached in *Prousky* v. *Adelberg*, (1926); 59 O.L.R. 71; [1926] 4 D.L.R. 866.

[35] 58 O.L.R. at 593.

[36] R.S.C. 1906, c. 120: (7) Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in such statement.

ever the rate of interest shewn in such statement." What statement? The statement as prescribed by section six which, *inter alia,* must show the amount of the principal money advanced.[37] Therefore section seven cannot be applied in such a case as *Laster* v. *Poucher* and the penalty provided by section six follows and it is respectfully submitted that no interest whatever should have been allowed in this case.[38]

The function of section seven is best set forth in the words of Davies, J.: "Section seven refers specifically to the 'statement' required by section six in the absence of which 'no interest shall be chargeable.' It contemplates that there may be a difference between the rate of interest shewn in the statement and the rate stipulated for in 'any other provision, calculation or stipulation in the mortgage,' and provides that in such a case there shall not necessarily be a forfeiture of all interest but that no greater rate than that shewn in the 'statement' required by the sixth section shall be recoverable."[39]

The recent case of *Ring* v. *Rosenfield*[40] illustrates how a mortgage providing for a bonus may be so drawn as to comply with section six. The case also illustrates the danger to the mortgagee in using this particular mode of complying with the section six. The mortgage was made to secure payment of $3,500 with interest half-yearly at seven per cent. per annum. The actual amount advanced by the mortgagee was $2,500 and not $3,500. It appeared that by an agreement between the mortgagor a bonus of $1,000 was to be allowed to the mortgagee. By a clause in the mortgage it was declared that "the true rate of interest on the amount of money actually advanced, $2,500, is 24 13/31 per cent. per annum. This interest was calculated by spreading $1,000 over five years and adding the rate so arrived at on $2,500 to seven per cent. thereon having regard to payment by instalments. By an acceleration clause in the mortgage, the mortgagee, on default by the mortgagor, brought an action for foreclosure within six months of the execution of the mortgage. Grant, J., held in taking the mortgage account that the statement complied with section six and allowed the mortgagee interest at the rate of 24 13/31 per cent. per annum on $2,500 from the date of the mortgage. The mortgagee thus lost *pro tanto* his

[37] See the excerpt from the opinion of Anglin, J., *supra,* footnote 31.

[38] See opinion of Anglin, J., in *Standard Reliance Mortgage Corporation* v. *Stubbs,* (1917), 55 Can. S.C.R. 422 at 431-2.

[39] *Canadian Mortgage Investment Co.* v. *Cameron,* (1917), 55 Can. S.C.R. 409 at 415.

[40] (1926), 30 O.W.N. 76.

bonus as he sued for foreclosure before the expiration of the term of five years.

Are Sections Six and Seven Intra Vires?

It hardly seems possible that the courts would hold that sections six and seven are *ultra vires.* The sections are skilfully drawn. They legislate in relation to interest and the mere fact that they may affect property and civil rights is not enough to render them *ultra vires.*

Contracting out of Section Six.

Is it possible for the mortgagor to contract out of the operation of these sections? The answer to this question would seem to depend on the answer to another, were these sections passed in the interests of the public and not alone in the interests of individuals?[41] Or whether the object of Parliament in enacting sections six and seven was the maintenance of public order or safety or the protection of mortgagors?[42] Does there appear to be at stake any public interest in allowing or prohibiting mortgagees from recovering the principal and interest thereon which the mortgagor has undertaken to pay? The mortgagor has always the defences of fraud, undue influence, duress, mistake and *non est factum,* in cases where he asserts that he did not enter at all or freely into the mortgage transaction. The mortgagor, subject to the application of section two of the Act, may resist the payment of a particular bonus on the ground that it is exorbitant in respect to the hazard attending the security. Admitting for the purposes of this article the adequacy of the foregoing test, yet in view of the absolute positive direction: "no interest whatever shall be chargeable, etc.," it is submitted that there is implied a negative stipulation to the effect, that in no other way than by having the prescribed statement as required by section six may interest be chargeable or recoverable where there is a plan for blended payments of principal and interest.

Bonus as Distinguished from Interest.

In view of the decisions in *Singer* v. *Goldhar, Laster* v. *Poucher,* and *Prousky* v. *Adelberg,* it is no longer possible in Ontario to regard a bonus as anything else than interest within section six. The interpretation of the word "interest" in section six has not directly come before any other provincial courts except Saskatchewan[43] or the Supreme Court of Canada. As noted above, the Court of Chancery

[41] *Dewhurst* v. *Salford Guardians,* [1925] Ch. 655 at 665.
[42] *Robson* v. *Biggar,* [1907] 1 K.B. 690.
[43] See *Cummings* v. *Silverwood, supra.*

and the courts administering equity in England seemed to regard a bonus as something distinct from principal and interest. The decisions of the Ontario courts may be questioned on the ground that there was in these cases a confusion of interest with bonus.

It is well settled that a mortgagee may stipulate for in a mortgage a collateral advantage above and beyond the mere repayment of principal and interest. In *Biggs* v. *Hoddinott*[44] it was provided in a mortgage that the mortgagor should during the continuance of the security deal exclusively with the mortgagee for all beer and malt liquors sold on the mortgaged premises. The Court of Appeal upheld this agreement. This collateral advantage could be reduced to dollars and cents. Would the Supreme Court of Canada regard it as interest within section six? The collateral advantage was a remuneration for the use or retention of the money advanced to the mortgagor. May it not be argued that the dictionary meaning adopted by the Court in *Singer* v. *Goldbar* for the word "interest" is too wide? Common instances of a loan with a bonus are debentures issued at a discount.[45] Will the courts only allow the debenture holder say $97, the amount that was advanced, and treat the $3 as interest within section six?

The Court of Appeal in England in 1883 decided that a premium stipulated for in a building society mortgage was not interest.[46] A member of a building society borrowed from the society, on the security of a mortgage, £1,200, for which he was to pay £144 premium and interest at five per cent. per annum. It was necessary for the Court to decide whether the premium was interest, for if it were, upon a liquidation petition being filed by the mortgagor, the mortgagees could not prove for so much of it as accrued due after the filing of the liquidation petition. Cotton, L.J., one of the members of the Court, said: "Is, then, this premium . . . really interest? In my opinion it is not. The debtor, who was a member of the society, applied for an advance of £1,200, which they agreed to give him, he agreeing to pay £144 as and by way of commission for the advance. . . . What is done with the premium in this case. It is added to the £1,200, and the debtor agrees to pay the two sums of £1,200 and £144, making the aggregate sum of £1,344, together with interest thereon from the date of the mortgage deed; that is on both sums he pays interest. . . . But the premium is a certain sum which is covenanted to be paid, and a debt is created at once, although

[44] [1898] 2 Ch. 307.

[45] See Halsbury, Laws of England, vol. xxi., p. 145; *Re Anglo-Danubian Steam Navigation and Colliery Co.*, (1875) L.R. 20 Eq. 339.

[46] *Ex parte Bath, In re Philips*, 27 Ch. D. 509.

the society agree that they will not require the payment of it to be made, as they agree not to require repayment of the money actually advanced, except by certain instalments. It is clear to my mind that this premium is not interest under another name, but that it was agreed to be paid as a principal sum due by the person applying for the loan as that which the advance was worth to him over and above any interest which the society might require."[47] Lindley, L.J., said: "If you look at the deed it is quite plain that it is not treated as interest because the deed draws a distinction between the actual sum advanced, the £1,200, the premium, and the interest. The advance and the premium are first capitalized, and interest is charged on the aggregate sum, and then there is the clause which provides for the application of the instalments."[48]

Singer v. *Goldbar* may be reconciled with the English case, for in the mortgage in that case there was no mention of interest whatever. However, the cases of *Laster* v. *Poucher* and *Prousky* v. *Adelberg*, in holding that bonus was interest, seem to be at variance with the Court of Appeal in *Ex parte Bath*.[49]

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[47] *Ibid* at 513-4.
[48] *Ibid* at 515.
[49] *Supra*.