Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the London Chartered Bank of Australia v. *White and others, from the Supreme Court of the Colony of Victoria (in Equity); delivered 23rd May* 1879.

Present:

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

THE material facts of this case may be thus stated: In the year 1858 one Glass became (if he had not been before) a customer of the Appellants the London Chartered Bank of Australia, and entered into an agreement with them on the 3rd May 1858 embodied in the following letter to the manager:—"In consideration of your "from time to time discounting on my request such "bills of exchange or promissory notes as I may "hand to you for that purpose, and which you may "approve, or granting me an advance in the "shape of an overdrawn account, I hereby "undertake and agree that the bank shall have "a lien on all securities that may belong to me, "and which may be in the hands of the bank at "the time of the discounting for me of any bill "or note, or that may come to the hands "of the bank during the currency of any bill or "note as a security for the due payment at "maturity of the same, or for the repayment of "any amount I may be overdrawn." He continued to be a customer of the bank from that time up to the year 1868, upon the terms of this note, and considerable transactions took place between them. On the 8th April 1868

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Glass gave the bank the following memorandum, endorsed on the mortgage deed to which it refers: "In consideration of the sum of 40,000*l.* sterling "(less discount thereon) this day advanced and "paid to me by the London Chartered Bank of "Australia, the receipt whereof I hereby "acknowledge, I hereby transfer the within "written mortgage, and all my right, title, and "interest therein, and moneys thereby secured, "unto the said London Chartered Bank of "Australia, its successors and assigns. As "witness my hand this 8th of April 1868." This memorandum was subsequently registered on the 29th of May. The mortgage referred to in it was from one Nash of an extent of country which may be called the Clare run, with a large amount of stock upon it, which Nash had mortgaged to Glass in consideration of a sum of 63,000*l.* due from Nash to him; and Nash had at the same time given Glass four bills of exchange notes amounting to the sum of 63,000*l.*, which at the same time Glass deposited with the bank. On the same day Glass also gave to the bank this letter addressed to the Chief Commissioner of Crown Lands, Sidney: "Sir. I hereby notify to you that I have assigned "and transferred to the London Chartered Bank "of Australia all my right, title, and interest "in and to the run of Crown lands situate "in the district of Murrumbidgee, and known "as Nouranie or Nowcronie, now held by me "under promise of lease from the Crown, and I "hereby relinquish in favour of the said London "Chartered Bank of Australia all and any rights "or privileges of occupation or of pre-emption "which may belong or accrue to me as the "holder of a promise of lease of the said run "under the laws and regulations for the time "being. As witness my hand at Melbourne this "8th day of April 1868." The bank upon these

securities discounted a promissory note of Glass's at four months' date for 40,000*l.*, and subsequently, when that note was renewed, they discounted the renewal of it, and they discounted further renewals crediting him with the amount, less discount, and debiting him with the 40,000*l.* It appears that in September 1868, upon the first renewal of the note, they took from him a further memorandum. It is in these terms: "2nd September 1868. In "consideration of your having discounted at my "request my promissory note in favour of the "bank for 40,000*l.*, say 40,000*l.* sterling, dated "1st August 1868, and payable five months "thereafter, I hereby, in security of its due "payment or of any renewals thereof, deposit "in your hands transfer of license of Nowcranie "run, in the Murrumbidgee district in the "colony of New South Wales, together with "an assignment of a mortgage executed in my "favour by William Nash over Clare blocks, "known as Clare A, Clare B, Clare C, North "Clare A, and North Clare B stations in "the Darling district in the colony of New "South Wales, dated the 8th April 1868; also "license of said stations. And I also under-"take, when called upon so to do, to make an "assignment to you of the above mortgage, "with all my interest and powers conferred "therein." The next date material to notice is the 22nd May 1869, when an assignment of whatever right and interest Glass had in the Nowcranie run was transferred by him to Messrs. Blackwood and Co.; and on the 31st of May 1869 Glass executed a second mortgage of the Clare run to Messrs. Andrew Bridges White and James White, the Plaintiffs in this suit. Notice of their second mortgage was given to the bank by the Messrs. White on the 3rd day of June 1869, and of theirs by the Messrs. Blackwood and Co. on the 27th day of July 1869.

Messrs. White being desirous that the bank should not exercise their power of sale of the Clare run, as it appears they were disposed to do in June 1869, came to an arrangement with the bank, (upon which nothing in this case turns,) that half the expense of the run should be divided between them. The bank took possession about the beginning of July 1869. Glass became a bankrupt on the 3rd December 1869, and subsequently the bank sold the Clare stations and stock for the sum of 26,692*l.*, and its interest in the Nouranie station for 15,000*l.*, making together a sum above 40,000*l.* In the year 1876 Messrs. White instituted the present suit, in which they stated the facts which have been mentioned, and prayed that accounts and inquiries should be made for the purpose of ascertaining the net proceeds of the Nouranie station received by the bank, and for the purpose of ascertaining the net profits and proceeds of the Clare stations and stock, and of the sale thereof, received by the said bank after deducting all charges and expenses of the said bank while mortgagee in possession, including all moneys paid by the Plaintiffs; and also "an account of all moneys which "became due to the said bank for principal "and interest on the security of the indenture "of transfer of mortgage of the 8th April 1868 "in the bill mentioned, such account not to "include any principal moneys exceeding 40,000*l.*, "or any advances which may be claimed to "have been made by the said bank subsequently "to the 3rd June 1869, or interest upon any "interest converted into principal; and in cal-"culating interest on the principal moneys due "to the said bank, regard being had to the "date at which the said principal moneys were "in fact paid off by the receipt of the proceeds "of sale of the Nouranie station and of the

" Clare stations and stock;" and further " that it " may be declared that the net proceeds of the " Nouranie station, and the net proceeds of the " Clare stations and stocks to be ascertained by " the accounts herein-before prayed, are to be " deemed to have been applied by the said " bank rateably in satisfaction of the debt due " to the said bank"; and they further prayed for the payment to the Plaintiffs of the balance of the net proceeds of the Clare station and stock which remained after such rateable deduction.

The case of the bank, as far as it is material to notice it at present, was chiefly this, that the effect of the letter of 1858, coupled with the transactions in 1868, and indeed all their dealings with Glass, had the result of the bank being entitled to treat the above-mentioned securities as applicable to the balance of the general account, and not only to the specific sums which it was contended on the other side they were given to secure.

Their Lordships adopt the law which is thus very shortly and clearly stated by Lord Campbell as applicable to questions of bankers lien in the well-known case of *Brandao* v. *Barnett and others*, Manning, Granger, & Scott's Reports, 531, "Bank- " ers most undoubtedly have a general lien on " all securities deposited with them as bankers " by a customer, unless there be an express " contract or circumstances that show an implied " contract inconsistent with lien."

But though the law is sufficiently clear, its application to the facts of this case involves a question of some nicety, viz., whether the transactions should be treated as governed by the letter of 1858, or by the principle of general lien; or whether the memorandum of 1868 and the subsequent letter of September of that year did not effect a contract, express or implied, inconsistent with the letter of 1858, or with a general lien. In

the view which their Lordships take of the case it appears to them unnecessary to decide this question.

The case came in the first instance before Mr. Justice Molesworth. The question which has been just referred to was undoubtedly argued before him, and appears to have been decided by him adversely to the bank. Their Lordships observe that in the course of his judgment he uses the following expressions: "The bank's original dealing as creditors was "with interest at 8 per cent., and that is the "Court rate of interest; so that is the rate which "I shall hold it entitled to receive and be "charged when overpaid. The bank pass book "running to about 1st July 1869 mixes all "dealings up to that date. If Glass had reduced "the debt of 40,000*l*., his second mortgagees "would be entitled to the benefit. I have stated "that the bank would not be entitled to subse-"quent advances." (It may be here observed that there is no question but that after the notices received from the bank by the different mortgagees, the one dated the 3rd June, and the other the 27th of July 1869, the bank could not make any subsequent advances which would be chargeable as against the mortgagees who had thus given notice.) "If Glass had reduced the "debt of 40,000*l*., his second mortgagees would "be entitled to the benefit. I have stated that "the bank would not be entitled to subsequent "advances; still, a question would remain as to "appropriating Glass's payments to such "advances, or to the interest on the 40,000*l*. "I cannot connect the pass book with the "account of the bank sought to be relied on in "this suit. I take it from the pass book that "about the 40,000*l*. was due on the mortgage "securities of April 1868 when the bank became "mortgagees in possession, July 1869; that

" since then it has been paid off by receipts as " mortgagees in possession, and by selling the " corpus of the two several securities; and that " there have not been subsequent direct dealings " between it and Glass which should be brought " into account, and shall frame a decree on that " basis subject to such objections as I may hear, " refer it to the Master to take an account of the " mortgage debt due to the Defendant the " London Chartered Bank of Australia, taking " it as on 1st July 1869 as 40,000*l.*, bearing " interest at 8 per cent., and of the sums received " by the said bank in satisfaction thereof as " mortgagees in possession or as sellers of the " corpus of the securities the Clare stations in " the bill mentioned, and the stock therein, and " the Nouraine station; . . . . . and direct " that the account be taken with convenient rests, " reducing principal, but that no interest on " interest be allowed," and the decree is in substance in accordance with the judgment upon this point.

The first ground upon which the Banking Company appealed from this judgment to the Full Court was this: "That in taking the account " of the mortgage debt in the said decree " mentioned, the Defendant Bank is entitled " to make half-yearly rests, converting interest " into principal, and his Honor ought so to " have declared in lieu of directing that no " interest upon interest should be allowed;" the second ground refers to the rate of interest. "That in taking the said account the " said bank is entitled to charge interest at the " current bank rate on overdrafts, and his Honor " ought so to have declared instead of allowing " interest at 8 per cent. only."

It appears to their Lordships that if the bank had desired to contest the finding of Mr. Justice Molesworth on the subject of the

principal sum secured by the mortgages, their grounds of appeal would have been totally different. Their contention would have been that instead of taking the principal sum of 40,000*l.* as that due on the 1st July,—which their Lordships cannot help thinking he does to a certain extent in favour of the bank,—their contention would have been that the bank's general account, as it stood at the time of the insolvency, should have been looked into, and that it should have been ascertained how much Glass was then indebted to them, no advances subsequent to the reception of notice by them being allowed. Their Lordships are by no means satisfied that if the account had been so taken it would not have been less favourable to the bank than the way in Mr. Justice Molesworth dealt with the debt; but, be that as it may, the bank seem to have, probably for good reasons, acquiesced in his finding of the amount of 40,000*l.* as the principal of the mortgage debt.

Such undoubtedly appears to have been the view of the High Court, for the High Court stated that they were not agreed upon the main question as to whether the bank was or was not entitled to treat the securities as deposited with them in respect only of specific sums or on their general account, but they treat that difference of opinion as immaterial, inasmuch as all they had to do with was the question of interest.

That being so, it appears to their Lordships that the bank must be confined to the grounds which they took before the High Court and on which the High Court decided, and that the bank having been then satisfied that the mortgage debt should be taken to be the specific sum of 40,000*l.* and not the balance of the general banking acccount, must be satisfied to take the consequences, namely, that they

should be allowed simple interest only upon that amount, as they would be as mortgagees. They also think that the rate of interest to which the bank objected was the proper one.

It remains only to notice the other grounds of appeal. Nothing arises upon the third ground in which the judgment was modified The fourth ground is, "That the said bank "ought not to be charged with interest on "the amount of its overpayment or subse- "quent receipts, or, if charged with any interest "thereon, ought not to be so charged for any "period prior to the commencement of this "suit, or at a higher rate than 4 per cent. "per annum." The judgment of Mr. Justice Molesworth, which went to the extent of directing that the Master should "fix the time when "the bank should be deemed to be overpaid, "and compute the sum which the bank should "be deemed to be overpaid, charging interest on "that overpayment and all subsequent receipts," the Full Court has modified, probably on the ground, which has been properly argued, that the bank were, as it were, between two fires,—there were two claimants, and it was very difficult for them to determine what they should pay over and to whom. The decree of the Full Court stands thus: "And this Court does further "order that the said decree be further varied "by striking out so much of the said decree "as directs the said Master to charge the said "bank with interest on the overpayment to "the said bank therein mentioned, and on all "subsequent clear receipts, at the rate of 8 per "cent. per annum to the making of his report, "and in lieu thereof this Court doth direct the "said Master to charge the said bank with "interest at the rate aforesaid on so much "only of the said overpayment as the said bank "has heretofore claimed to retain as mortgagee,

" but to which, upon taking the accounts " directed by the said decree, the said bank " shall appear not to have been entitled." This, at all events, would confine the chargeability of interest to such sums only as in the opinion of the Master the bank had improperly, or without title, retained, claiming them on their own account, and not merely on account of any difficulty as to who should be entitled to receive them. It appears to their Lordships very difficult to say that this direction is wrong, or that it is not possible that such a case may be made out before the Master, of withholding or delaying payments, as would justify him in acting upon this direction.

It was further argued before their Lordships that the decree was wrong in a comparatively small point which may be thus stated: It seems that Messrs. Blackwood had brought an action against the bank in which the Messrs. Blackwood claimed to have the first security upon the Nouranie run. The bank succeeded in the Courts in the colonies and also in the appeal to Her Majesty, and Mr. Justice Molesworth appears to have intimated that they were entitled, as against the Plaintiffs, to their costs as between solicitor and client in the Courts of the Colony, but not before the Privy Council, inasmuch as the Privy Council had directed a specific sum to be paid. There is no ground of appeal applicable to this point, and their Lordships are therefore unable to deal with it; but they may observe that they cannot concur in the distinction taken by Mr. Justice Molesworth between the two sets of costs. As the decree stands, it may possibly be open to the Master to take the view which is contended for on behalf of the Appellants.

The only remaining question is as to costs. The Judge of the Court below has reserved the

costs of the suit. Their Lordships are unable to see that he was wrong in doing so. It may be (though it is impossible to predict this) that the bank in the end may get all their costs. It does not appear to their Lordships that any inflexible rule, such as it has been contended prevails in mere redemption suits, applies here. This is not, strictly speaking, a mere redemption suit, and under the circumstances their Lordships do not think any case has been made out so strong as would induce them to exercise a discretion, which they very seldom do, of interfering with the judgment of the Court below on the question of costs. With respect to the costs in the Appeal below, both parties to a certain extent succeeded, and it seems fair to have made each party pay their own costs.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the Court below be affirmed, and that this Appeal be dismissed with costs.