Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bucknell v. *Vickery, from the Supreme Court of New South Wales; delivered 9th May* 1891.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.
MR. SHAND (LORD SHAND).

[*Delivered by Lord Hobhouse.*]

The sole question in this appeal is whether, in taking certain mortgage accounts in a redemption suit, a sum claimed for commission by the mortgagee should be allowed to him. The Respondent, who was Defendant below, is the mortgagee. The Appellant, who represents the Plaintiff below, is entitled to the equity of redemption.

The Defendant is the transferee of two mortgages of the Plaintiff's property, and the question arises upon the second of those mortgages, which was made on the 26th March 1868. The deed states that the mortgagor had borrowed 14,251*l.*, and had given the mortgagee a promissory note for 15,500*l.*, payable six months after date. It contains a proviso for redemption if the mortgagor shall pay the promissory note at maturity, and any further advances, "together "with interest and commission at the rate

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" herein-after mentioned," and also if he shall duly observe the other conditions of the deed. Amongst other things, it is agreed that the promissory note when due, and all other moneys due on the mortgage, shall carry compound interest at 10 per cent., with half-yearly rests; " and that the said mortgagor will pay to the " said mortgagee a commission of two pounds " ten shillings per centum per annum upon any " renewal or renewals of the said promissory note " which the mortgagee may accept, and an equal " commission " upon further advances.

The Plaintiff did not pay off the mortgages; and either by reason of default in payment or of some other default, the Defendant entered into possession of the mortgaged property on the 17th March 1869.

It was then, or soon afterwards, agreed that the amount due on the two mortgages on the 1st March 1869 should be taken as 33,000*l.*; and on the 31st July 1869 the parties executed a deed stating that agreement, and providing for various things not material to the present question. It is ascertained in this suit that, of the 33,000*l.*, 25,500*l.* is to be apportioned to the second mortgage.

In February 1873 the Plaintiff commenced the present suit for redemption of the mortgages, which the Defendant opposed on the ground that his possession was that of an owner and not of a mortgagee. The Primary Judge decided in favour of the Plaintiff, and on the 26th February 1875 made the decree under which the mortgage accounts are now being taken. The Defendant appealed to the Full Court, who dismissed his appeal, and then to Her Majesty in Council, who dismissed his appeal on the 26th July 1877.

It would seem that there was some miscarriage in taking the accounts, for on the 7th

March 1882 the Court ordered that the consideration of the debtor and creditor account be reopened, and declared that it ought to commence with the debit item of 33,000*l.* on the 1st March 1869; and it was referred to Mr. Littlejohn, a member of a mercantile firm, in lieu of the Master in Equity, to take the accounts directed by the decree of the 26th February 1875, and to certify the Court of his finding thereon.

On the 13th April 1882 Mr. Littlejohn reported that the Plaintiff had propounded certain queries which he had answered. One of them was whether Mr. Vickery was entitled to charge any commission at all, and if so, what. On which Mr. Littlejohn found that he was entitled to charge 2½ per cent. upon any renewal or renewals of promissory note by the Plaintiff under the second mortgage.

After that Mr. Littlejohn examined the Defendant further, and he made a further report on the 21st August 1882. He stated that the Plaintiff's solicitor had put a further question as to commission, in answer to which he found that the Defendant was entitled to charge commission at the rate of 2½ per cent., at intervals of six months, from the 1st March 1869, upon the account beginning with 20,500*l.* on that date. This answer appears to be founded on a statement made by the Defendant on the 18th April 1882, for the first time alleging an oral agreement that commission should be so charged.

This question of commission was so important that it was thought better not to proceed with the accounts till it should be finally determined by the Court. The matter was at once taken before the Primary Judge, who thought the Defendant was not entitled to commission, and ordered accordingly. The Defendant ap-

pealed to the Full Court, consisting of three Judges, of whom one was for upholding the decision of the Primary Judge, and the other two were of a contrary opinion. Therefore Mr. Littlejohn's finding stands confirmed by the order of the Full Court, from which the present appeal is brought.

It seems to have been one of the main arguments for the Plaintiff in the Lower Court that commission could not be claimed by a mortgagee in possession, or under the usual mortgage accounts. The learned Judges rejected this contention, and their Lordships concur with them. If the contract between the parties entitles the mortgagee to commission on any ground, he can claim it, either in taking the account of what is due on his mortgage, or under the head of just allowances. But here the mortgagee is seeking to charge commission by setting up a new and separate contract, which though now alleged to be made long before the suit, was not proved or alleged when the decree was made. Nothing was referred to Mr. Littlejohn but to take the accounts directed by the decree. And their Lordships must look to the decree to see what those accounts are.

After declaring that the Defendant is mortgagee in possession, the decree directs the usual account of what is due for principal and interest on the mortgage, and it is ordered that all just allowances be made. There is nothing else in the decree material to the present question. The accounts therefore on the second mortgage are to follow the terms of that mortgage, which the Defendant did not seek to vary or add to by his pleadings or his evidence at the hearing, and which the decree does not vary or add to. The material terms of the mortgage have been stated already. They do not entitle the mortgagee to any commission except

the commission of 2½ per cent. upon any renewal of the mortgagor's promissory note which the mortgagee may accept, and upon further advances. Nothing is said in these proceedings as to further advances. There was no renewal of the promissory note subsequent to the agreement of July 1869, when the parties stated an account and ascertained the balance due.

The main reason which led the learned Judges of the Full Court to decide in favour of the commission was that, as long as the Defendant did not demand payment, the Plaintiff was placed in as beneficial a position as if the note had been actually renewed. But their Lordships find themselves unable to concur in that view. As long as the note was running there could be no default in payment, and the mortgagee could not take possession on the ground of such default, nor put in force any other remedy for his debt. Moreover, if he had renewed the note, he could not possibly have claimed any other title than that of mortgagee. Now not only did he take possession, for what precise cause does not appear, but he claimed to have that possession as absolute owner, and it was only after a long litigation that the Plaintiff was able effectually to assert his right to redeem. It is quite true, as the learned Chief Justice says, that the fact of the mortgagee taking possession does not deprive him of any of his rights under his mortgage. But he is contending that he did, not what the mortgage says shall entitle him to commission, but something equivalent. And the fact of his taking possession and alleging that he held it as owner is destructive of his present contention, because it shows that what he did was something quite different from, and indeed inconsistent with, the renewal of the note. Their Lordships must hold that, as there has been no renewal in fact since the settled

account, and nothing equivalent to a renewal, the Defendant's contract does not entitle him to the commission which he claims.

Their Lordships consider that the Full Court should have dismissed the Defendant's appeal with costs, and that an order should now be made discharging the order of the Full Court, and dismissing the appeal to them with costs, and affirming the order of the Primary Judge. The Defendant should also pay the costs of this appeal. Their Lordships will humbly advise Her Majesty in accordance with this opinion.