

1890
 Jan. 20.

THE QUEEN ON THE INFORMATION OF }
 THE ATTORNEY-GENERAL FOR } PLAINTIFF;
 THE DOMINION OF CANADA..... }

AND

THE GRAND TRUNK RAILWAY }
 COMPANY..... } DEFENDANTS.

*Bond for the payment of money on a day certain with interest—
 Non-payment of bond at maturity—Claim for interest thereafter at
 rate reserved in bond—Damages in the nature of interest.*

Upon a bond for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest cannot be implied, and thereafter interest is not recoverable as interest but as damages. *Goodchap v. Roberts* (14 Ch. D. 49) referred to.

2. In assessing damages in the nature of interest on a bond payable at a particular place reference should, in general, be had to the rules in force at the place where the same is so payable.

THIS was an information filed by the Attorney-General for the Dominion of Canada, on behalf of the Crown, to recover from the defendants a sum of \$20,206.41, as a balance due upon a certain preferential bond of The Northern Railway Company of Canada, to the liability of the said railway company thereon the defendants had succeeded.

The bond declared on in the information, is as follows:—

“PROVINCE OF CANADA.

SECOND PREFERENTIAL BOND.

No. 4,639.

£50,000 sterling.

“By virtue of an Act of the Legislature of the Province passed in the twenty-second year of the reign of Her Majesty Queen Victoria, and an order of His Excellency the Right Honourable the Governor-General-

"in-Council, requiring The Northern Railway of Canada
 "to call in all their existing bonds and authorizing the
 "Company to issue to the holders second preferential
 "bonds in lieu thereof, The Northern Railway of
 "Canada hereby promises to pay to bearer fifty
 "thousand pounds sterling on the thirty-first day of
 "July in the year one thousand eight hundred and
 "eighty-four at the office of the Commercial Bank in
 "London, England, with interest thereon at the rate
 "of six per cent. per annum, payable half yearly. The
 "said principal and interest being by virtue of the said
 "Act and order a preferential charge on the said rail-
 "way and the earnings thereof, payable next after an
 "issue of first preferential bonds not exceeding two
 "hundred and fifty thousand pounds sterling, also au-
 "thorized by the said Act and order.

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Statement
 of Facts.

"Dated in Toronto this 1st day of August, 1859."

(Sgd.) FRED. CUMBERLAND,

(Sgd.) GEO. BEATTY, *Vice-President.* [L.S.]
Secretary.

The information set out, *inter alia*, that the Crown, at the date of the filing thereof, was the holder of such bond; that The Northern Railway Company of Canada, before suit, had become a part of The Grand Trunk Railway of Canada,—the latter company becoming responsible for the former's liabilities; and that defendants, having only paid £57,000 sterling upon the bond, were then indebted to the Crown thereon in a balance of £4,153.8.6 sterling. The particulars of claim are as follows:

CLAIM.

"Her Majesty's Attorney-General on behalf of Her Majesty the Queen claims as follows:—

1. Judgment for the sum of £4,153.8.6 sterling, equal to \$20,206.41, being the balance due on the said bond.
2. Judgment for the costs of this suit."

1890 The defendants, in their statement of defence, pleaded
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“The defendants say that on the said 19th day of April, 1888, they paid the said principal money as mentioned in the said information; that interest, as interest, ceased to be payable on the bond after the 31st July, 1884, when the said bond fell due, and that after said date all the defendants were, or are, liable to pay to the holder of the said bond, over and above the principal money, was, and is, a reasonable sum as damages for the non-payment of said money for such time as it remained unpaid, and this irrespective of the rate of interest payable on the bond from time to time before the principal money fell due; that the said bond was payable in England (and not in Canada) where the rate of interest then was, and now is, less than six per cent.”

“That on account of said damages for non-payment of the said principal money after it fell due, the defendants paid to Her Majesty the Queen, over and above said principal money, the sum of £7,000 sterling money of Great Britain, which in said information is admitted; and they now bring here into court the further sum of £441.2.0 sterling equal to \$2,146.60 currency, and they say that the plaintiff has sustained no greater damage than the said sum so paid and said sum now brought into court, together, and they are ready and willing to pay the costs of this suit to this time, and they pray that they may be further dismissed therefrom.”

Issue joined.

The facts of the case appearing upon the trial are recited in the judgment.

October 1st, 1889.

Bell, Q. C. for defendants: Inasmuch as it is admitted by the plaintiff that the principal money of the bond has been paid, as well as all interest due thereon up to its maturity, the plaintiff has no *locus*

standi and is out of court. The information claimed a specific sum as a balance due upon the bond, while, as a matter of fact, the bond was fully satisfied, and could not be held to support the claim in any sense. (Cites *Dixon v. Parkes* (1); *Cook v. Fowler* (2).) [*Hogg*, Q. C. for the Crown: We claim the balance due as damages.] That is not your case as shaped in the information. [*Hogg*, Q. C.: The particulars of claim are adequate to cover it. Besides, you have paid money into court, which admits our claim so far as it goes.] If we take the ground put forward by the learned counsel for the Crown, and look at this as an action for damages for the detention of the money, even then the plaintiff cannot succeed, because such an action will not lie where the principal money has been paid and accepted. Again, the contract was to be performed in England, and its validity and interpretation must be governed by the law of the place of performance. (Cites *Story's Conflict of Law*. (3)). In England damages are recoverable for the detention of money after a day certain, but the rate of such damages is determined with a view to the circumstances of each particular case. (Cites *Addison on Contracts* (4); *Watson's Principles of Equity* (5); *Rothschild v. Currie* (6); *Dixon v. Parkes* (7); *St. John v. Rykert* (8); *Power v. Peck* (9)). The bond having to be performed in England, the measure of damages should be the reasonable rate of interest there at the present time. The reasonable rate in Canada would be six per cent., but money is lower in England. We have paid four per cent. into court, and the plaintiff is not entitled to receive more than that.

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(1) 1 Esp. 110.

(5) Ed. 1886, p. 74.

(2) L. R. 7 H.L. 27.

(6) 1 Q. B. 43.

(3) Secs. 278 a, 280, 281. (8th ed.) (7) 1 Esp. 110.

(4) Abbot's Am. ed. 1888, p. 195. (8) 10 Can. S.C.R. 278.

(9) 15 Ont. App. 138.

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Hogg, Q. C. for the Crown: The evidence shows that the sum paid was not accepted in full ; nor was the matter settled by such payment. The receipt given by the Crown was merely *pro tanto*, and did not relate to the whole claim. [BURBIDGE, J.—Must I not find that there is now nothing due upon the bond ?] That would not be, I submit, a proper finding upon the facts. The bond was for £50,000 and interest at 6 per cent. On the 19th April, 1888, there was due upon the bond £61,153.8s. 6d. sterling, and they only paid £57,000 sterling. We claim a balance due us as damages in the nature of interest for the detention of the money. The defendants have acknowledged and paid part of our claim ; we are entitled to the balance. He cited *Addison on Contracts* (1) ; *Leake on Contracts* (2) ; *Goodchap v. Roberts* (3) ; *Mounson v. Redshaw* (4) ; *Price v. The Great Western Railway Co.* (5) ; *Keene v. Keene* (6) ; *Simonton v. Graham* (7) ; *Cooper v. Earl Waldegrave* (8) ; *Gibbs v. Fremont* (9) ; *Allen v. Kemble* (10).

BURBIDGE, J. now (January 20th, 1890) delivered judgment.

This is an information, filed by Her Majesty's Attorney-General for Canada, upon a bond made on the first of August, 1859, by The Northern Railway of Canada (to whose liabilities the defendants have succeeded) whereby The Northern Railway Company promised to pay to bearer fifty thousand pounds sterling on the thirty-first day of July, 1884, at the office of the Commercial Bank in London, with interest thereon at the rate of six per centum per annum, payable half-yearly,

(1) 8th Ed. 196.

(2) Pp. 1105-6-7.

(3) 14 Ch. D. 49.

(4) 1 Saund. (W. N.) 185.

(5) 16 M. & W. 244.

(6) 3 C. B. (N.S.) 144.

(7) 8 Ont. P. R. 495.

(8) 2 Beav. 282.

(9) 9 Ex. 25.

(10) 6 Moo. P. C. 314.

such principal and interest constituting a second preferential charge on such company's railway and earnings. 1890
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The interest was duly paid according to the tenor of the bond, but the principal was not paid until the year 1888, at which time the plaintiff claimed to be paid in addition thereto interest at the rate of six per centum per annum. The defendants were willing to pay interest at the rate of four per centum per annum, and as to the difference between four and six per centum invoked the indulgence of the Crown. Pending negotiations between the President of the company and the Minister of Finance with respect to this matter, the defendants, on the nineteenth of April, 1888, paid to the plaintiff the sum of fifty-seven thousand pounds sterling, of which the sum of seven thousand pounds was intended to represent the interest at four per centum per annum on the principal sum from July 31, 1884, to the date of payment. It will be observed, however, that this amount falls short of representing such interest by the sum of four hundred and thirty-five pounds twelve shillings and five pence sterling. Reasons
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In the result, the Governor-in-Council declined to authorize the Minister of Finance to waive the Crown's claim to the difference between interest at four and six per centum per annum, and before their cheque for fifty-seven thousand pounds was cashed the defendants were, by letters of the 29th May and the 3rd July, respectively, informed that such amount would not be accepted as a settlement in full, but that it would be used as a payment on account.

To the information filed on behalf of the Crown to recover the sum of twenty thousand two hundred and six dollars and forty-one cents, alleged to be the equivalent of four thousand one hundred and fifty-three

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pounds eight shillings and six pence sterling, representing the difference between the interest due on the bond referred to on the 19th April, 1888, and the sum of seven thousand pounds sterling so paid, the defendants in their statement of defence allege that interest as interest ceased to be payable on the said bond after the thirty-first of July, 1884, when the said bond fell due; and that after that date all they were and are liable to pay to the holder of the bond, over and above the principal money, was and is a reasonable sum as damages for the non-payment of said money for such time as it remained unpaid, and that irrespective of the rate of interest payable on the bond from time to time before the principal money fell due; that the bond was payable in England (and not in Canada) where the rate of interest then was and now is less than six per centum per annum. The defendants also brought into court in satisfaction of the plaintiff's claim the sum of four hundred and forty-one pounds two shillings sterling, equal to two thousand one hundred and forty-six dollars and sixty cents currency, which, with the seven thousand pounds theretofore paid, was intended to represent interest on the principal sum at the rate of four per centum per annum from the date when the same became due until it was paid; and they further stated that the plaintiff had sustained no damages beyond this, and that they were ready and willing to pay the cost of the suit to the time when the statement in defence was filed.

On this statement of defence the plaintiff has taken issue.

Upon the question raised by the statement of defence as to whether or not upon a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied, the

defendants must, I think, succeed. In such a case it is clear that interest after such day certain is not recoverable as interest but as damages (1).

In *Goodchap v. Roberts* (2), the law which, I think, governs the case under consideration is stated concisely and clearly by Sir George Jessel, M. R. Speaking of the case then before him, he says:—

The question before us arises on the proof of debt by a creditor in an administration suit. The case stands on the same footing as if this was an action on the covenant in the mortgage deed, and we are now really sitting as a jury to assess the damages for breach of covenant in not paying £5,000 on the day named in the covenant. The agreement was to pay ten per cent. up to a certain day, and then to pay £5,000, and the only point we have to decide is, what is the proper amount of damages for the non-payment of that debt. Now in an action at law for the non-payment of money on a day certain, where it is an interest-bearing debt, the rule has always been to recommend the jury to give five per cent., because that is the usual commercial value of money. If there ever should come a time when it fell very much, juries might give less, or if it rose very much they might give more, but that is the reason of the rule. The fact of the parties having bargained for a higher or a lower rate of interest for a time certain is always to be taken into consideration as showing the value of money, but it does not decide the question. It appears to me that no jury would give more than five per cent. in such a case as this, and sitting as a jury we ought not to give more.

With respect to another question discussed at the hearing as to whether or not an action would lie for interest not payable by contract but as damages for the detention of a debt, or money claim, where the principal sum had been paid to and received by the plaintiff before action brought, the defendants relied

(1) *Mounson v. Redshaw*, 1 L. R. 7 H. L. 27; *Dalby v. Hum-Saund* (W.N.) 204 note (t); *Dixon v. Parkes*, 1 Esp. 110; *Dickenson v. Harrison*, 4 Price 282; *Atkinson v. Jones*, 2 Ad. & El. 439; *Cooper v. Earl Waldegrave*, 2 Beav. 282; *Price v. The Great Western Ry. Co.* 16 M. & W. 244; *Cook v. Fowler*, (2) 14 Ch. D. 51.

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upon *Dixon v. Parkes*, (1), and the plaintiff upon *Hellier v. Franklin* (2). If it were necessary to decide that question it would not be unreasonable, I think, to conclude as suggested in *Mayne on Damages* (3), that in *Hellier v. Franklin* the action was in fact on a bond given with a penalty in a larger amount to secure payment of a sum of money; in which case the principal money due, and the interest thereon, might have been considered as part of the penalty. But in view of the admission of the plaintiff's right of action contained in the pleadings, it is not, I think, necessary to come to any conclusion on that question, or to consider how far the rule laid down in the earlier case of *Dixon v. Parkes* (4) is supported by later cases (5).

With reference to the amount of damages, I think that the contention of the defendants that the court should have regard to the rules in force at the place where the bond was payable, must prevail (6). Having reference then to such rules, the form of the action and all the circumstances of the case, I am of opinion that I ought to assess the damages at an amount that will represent interest on the principal sum at five per centum per annum from the thirty-first July, 1884, to the 19th April, 1888.

There will be judgment for the plaintiff for eleven thousand one hundred and sixty-six dollars and sixty-four cents, with costs; and the sum of money paid into court may be taken out of court by the plaintiff and applied in reduction of the amount of the judgment.

Judgment for plaintiff with costs.

Solicitors for plaintiffs : *O'Connor & Hogg.*

Solicitor for defendants : *John Bell.*

(1) 1 Esp. 110.

(2) 1 Starkie 291.

(3) 4th ed. 149.

(4) *Cited ante.*

(5) See *Beaumont v. Greathead* 2 C. B. 494; *Leake on Contracts* 885.

(6) *Story on the Conflict of Laws* 8th ed. s. 291, and *Leake on Contracts* 1106, and cases there cited.