Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Daniell v. *Sinclair, from the Court of Appeal of New Zealand, delivered 22nd February* 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.

This was a suit instituted for the redemption of a mortgage, and an account of the principal and interest due. The Defendant contended that compound interest was due, and whether the interest was to be simple or compound was the only question in the cause. The Court of First Instance gave judgment in favour of the Plaintiff, with the exception of a small sum of compound interest, which the Plaintiff by the deeds of further security to be afterwards referred to had converted into principal. This judgment was affirmed by the Supreme Court. From the latter judgment the present appeal is preferred.

The Plaintiff is a merchant in New Zealand, the Defendant a merchant in London. The declaration sets out a mortgage bearing date the 11th of May 1865, for the purpose of securing payment of 2,000*l.*, advanced by the Defendant to the Plaintiff for two years, and of all such further and other sums, if any, as may at any time hereafter be due and owing by the mortgagor to the mortgagee on the balance of any account current hereinafter existing between the said parties

hereto, or in respect to any future advances to be made between the said parties in any account whatsoever; then follows a covenant to pay interest at the rate of 10 per cent. on the balance of account current after demand in writing, and to pay the principal sum on the 11th of May 1867, and interest thereon at 10 per cent. in quarterly payments.

The declaration further sets out two conveyances, dated the 4th January 1869, to one Stuart, for the purpose, in the first place, of securing a debt to Stuart; and, secondly, of further securing the debt to the Defendant, which the Plaintiff acknowledged then to amount to 2,487*l.* 12*s.* 2*d.* (which addition of 487*l.* 12*s.* 2*d.* to the principal was composed partly of compound interest), with a power of sale to Stuart, for, in the first place, paying himself, and then making payments to the Defendant. The declaration alleges sales by Stuart and the Defendant, and some payments by Stuart to the Defendant, and prays for an account of the principal and interest due on the mortgage, and a reconveyance.

The material pleas by the Defendant are, 1, that the moneys advanced by him were advanced on a mercantile account current; 2, that it was agreed between Plaintiff and Defendant, both at the time of and immediately after the execution of the deed set out in the first paragraph of the Plaintiff's declaration, that in taking and keeping the account current between the Plaintiff and Defendant half-yearly rests should be taken, and that the interest due on the half-yearly rests should be added to and become part of the principal moneys, and bear interest accordingly; and the accounts have always been so kept with the consent of the Plaintiff, who has from time to time ratified accounts so kept, and admitted his indebtedness

to the Defendant of the whole amount shown in such accounts, where interest has been computed upon half-yearly rests.

The Defendant submitted to the taking of the accounts as prayed.

The Plaintiff in reply denied the agreement.

The following are the material issues in the case, and the findings upon them by the jury :—

Was the amount of the Plaintiff's indebtedness to the Defendant on the 4th January 1869 the sum of 2,487*l.* 12*s.* 2*d.* ?—Yes.

If so, was the said sum of 2,487*l.* 12*s.* 2*d.* composed of the principal sum of 2,000*l.* mentioned in the said deed of mortgage, and 487*l.* 12*s.* 2*d.* interest due in respect of the said principal sum ?—Yes, except 15*l.* 7*s.* 8*d.*, deficiency in proceeds of wool consigned by Plaintiff to Defendant.

Was the said principal sum of 2,000*l.* advanced by the Defendant to the Plaintiff on a mercantile account current?—By direction, No.

Was any portion of the said sum of 2,487*l.* 12*s.* 2*d.* advanced by the Defendant to the Plaintiff upon a mercantile account current, and, if so, how much ?—Yes, the said sum of 15*l.* 7*s.* 8*d.*, and no more.

Was it agreed by and between the Plaintiff and Defendant, after the execution of the deed set out in the first paragraph of the declaration, that in taking and keeping the accounts between the Plaintiff and the Defendant half-yearly rests should be taken, and that the interest due at such half-yearly rests should be added to and become part of of the principal moneys, and bear interest accordingly ?—No, unless such agreement ought in law to be implied from the Plaintiff's accounts being so kept. But we find that he so consented on the supposition that a deed in the terms of the mortgage of the 11th May

1865 authorized the Defendant to charge compound interest.

Have the accounts always been so kept?—Yes.

Has the Plaintiff consented to the accounts being so kept, and has he ratified and confirmed in writing accounts so kept, and admitted his indebtedness as appearing by such accounts?—Yes.

No attempt was made at the trial to prove an actual agreement, either written or oral, to change the interest, as stipulated in the mortgage deed, from simple to compound, and it seems clear that no such agreement was ever made. But it appeared that the Plaintiff, under the belief that he was bound to pay compound interest on the mortgage, assented to accounts made out on the footing of half-yearly rests, and that, in particular, on an account being sent to him stating a balance of 3,464*l.* 16*s.* 2*d.* as due on the 11th of May 1872, part of which consisted of compound interest charged on the footing of half-yearly rests, he signed it as correct, and that in 1876 he sent to the Defendant what he termed a sketch account, in which compound interest with yearly rests was calculated.

A Judge sitting in Banco adopted the finding of the jury, that no actual agreement to pay compound interest had been come to; he further came to the conclusion that both parties wrongly understood the mortgage deed as requiring the payment of compound interest, and that no agreement to pay it could be implied from the transactions between the parties, such interest having been charged by the Defendant and paid by the Plaintiff under a common misapprehension of their rights. He therefore gave effect to the rule of law, which was undisputed, that without such an agreement simple interest only can be charged on a mortgage account. He

treated, however, the deeds which stated that 2,487*l*. 12*s*. 2*d*. was due by the Defendant on the 4th of January 1869 as binding on him, and directed the Master to commence the account from that day, treating the whole of that sum as principal.

The judgment of the Court in Banco was confirmed by the Court of Appeal.

It appears that the Defendant insisted, independently of the main question, that a direction should be given that the account prior to the 11th of May 1872 should not be reopened, contending that, even upon the assumption of there having been no agreement to vary the rate of interest under the mortgage, the account up to that time was settled, and could not be disputed. The Judge sitting in Banco declined to give such a direction, observing, "In my opinion, this is "nothing more than a particular instance of that "general acquiescence on the part of the "Plaintiff in the Defendant's mode of stating "the account between them with which I have "already dealt; and, for the reasons already "given, and on the authority already cited, his "approval of the account on this occasion does "not conclude him."

The same view is taken by the Court of Appeal.

On the appeal before this Board, this last is the only point now relied on, it not being contended that the settlement of account, if it were such, would not prove a contract to pay compound interest for the future.

Undoubtedly there are cases in the Courts of common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the

subject of set-off. (Skyring *v.* Greenwood, 4 B. & C., 281.) But in Equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. In Earl Beauchamp *v.* Winn, 6 Law Rep., E. & I. Appeals, 234, Lord Chelmsford observes, "With regard to "the objection, that the mistake (if any) was "one of law, and that the rule '*ignorantia juris* "'*neminem excusat*,' applies, I would observe "on the peculiarity of this case, that the ignorance imputable to the party was of a matter "of law arising upon the doubtful construction "of a grant. That is very different from the "ignorance of a well known rule of law; and "there are many cases to be found in which "Equity, upon a mere mistake of the law, without the admixture of other circumstances, has "given relief to a party who has dealt with his "property under the influence of such a mistake."

In Cooper *v.* Phipps, 2 L. R. E. and I. App., p. 170, Lord Westbury says:—"Private right of "ownership is a matter of fact, it may be also the "result of matter of law, but if parties contract "under a mutual mistake as to their relative "and respective rights, the result is that the "agreement is liable to be set aside, as having "proceeded upon a common mistake."

In M'Carthy *v.* Decain (2 Russ. and Mylne, 614), where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, the Lord Chancellor observes, "What he has "done was in ignorance of law, possibly, of fact, "but, in a case of this kind, this would be one "and the same thing."

In Livesey *v.* Livesey (3 Russ., 287), an executrix who, under a mistake in the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments.

Undoubtedly the signature by the Plaintiff of the account in question, if it stood alone, unexplained, would afford a strong presumption that an agreement to substitute compound for simple interest under the mortgage had been come to, and it was for the purpose of proving the agreement which the Defendant had pleaded that the account was relied upon. Their Lordships accept the finding of the jury that no such agreement was in fact made; indeed there would seem to have been no consideration for it, because, although the Defendant did not exercise his power of sale as soon as he might, there is no evidence that he ever bound himself or promised to show any forbearance or indulgence to the Plaintiff. Their Lordships further agree with the Courts below, that both parties may be taken to have misunderstood the effect of the mortgage deed. This being so, there was no intention to make a change in the rate of interest—no such question was discussed or considered. The accounts were drawn up and assented to by the parties under a common mistake as to their respective rights and obligations. Their Lordships are therefore of opinion that the signature of a particular account occurring in a series of accounts, all alike drawn up in error does not prevent it being reopened upon the accounts under the mortgage being taken.

They will, therefore, humbly advise Her Majesty that the judgment appealed against be affirmed, and the appeal dismissed, with costs.