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*Mar. 4
Apr. 6

EDMONTON AIRPORT HOTEL CO. LTD. AND JAKE SUPERSTEIN (*Defendants*) ..... APPELLANTS;

AND

CREDIT FONCIER FRANCO-CANADIEN (*Plaintiff*) ..... RESPONDENT;

AND

ECONOMY PLUMBING LTD. AND IDEAL PAVING AND CONSTRUCTION CO. ALBERTA LTD. (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mortgages—Guarantee—Mortgage on land and buildings—Collateral mortgage on chattels—Whether collateral chattel mortgage unenforceable as being an infringement of s. 34(17) of The Judicature Act, R.S.A. 1955, c. 164—Liability of guarantor—The Guarantees Acknowledgment Act, R.S.A. 1955, c. 136.

The plaintiff sued the defendant hotel company on two mortgages for foreclosure or sale. One mortgage was on the land and buildings and the other on chattels. The individual defendant S was sued as guarantor of these mortgages. The trial judge gave judgment against the corporate defendant for foreclosure or sale and against S for the full amount owing under the guarantee. The Appellate Division, by a majority, dismissed the appeal but varied the judgment against S to provide that he should only be liable for the deficiency after the security had been realized. The defendants appealed to this Court.

Held: The appeal should be dismissed.

The taking of security on chattels did not offend in any way against the restriction in s. 34(17) of *The Judicature Act,* R.S.A. 1955, c. 164, of the right of the mortgagee to the land. He was seeking to enforce his security on chattels outside the terms of s. 34(17). He was enforcing his security on the land and he was enforcing his security on the chattels. In neither case was he attempting to get a personal judgment either directly or indirectly.

The submission that S was under no liability as guarantor since, under s. 34(17)(*a*), there was no debt owing by the principal debtor failed. There was a borrowing which was neither illegal nor *ultra vires* and there was an unenforceable debt which would not disappear by the terms of s. 34(18) until a vesting order was made. As to the ground that the certificate required by s. 4 of *The Guarantees Acknowledgment Act,* R.S.A. 1955, c. 136, contained the name of the hotel company rather than that of S, the plain and unmistakable meaning of the certificate was that S knew and understood what obligations he was incurring in executing the guarantee of the recited mortgage and this was compliance

*PRESENT: Cartwright, Martland, Judson, Hall and Spence JJ.

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with the Act. The defence that any guarantee of any mortgage indebtedness was void under the terms of s. 34(17) as an indirect method of attempting to impose personal liability under the mortgage also failed. The guarantor was liable on his guarantee and his liability in no way depended upon the fact that his guarantee contained a waiver of the provisions of s. 34(17) of *The Judicature Act*. No opinion was expressed on the question whether a person entitled to the benefit of the Act could waive its provisions. A guarantor was not so entitled.

Swan v. Bank of Scotland (1836), 10 Bli. N.S. 627, distinguished; *Macdonald v. Clarkson et al.*, [1923] 3 W.W.R. 690, discussed; *Krook et al. v. Yewchuk et al.*, [1962] S.C.R. 535, followed.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], dismissing an appeal from a judgment of Kirby J. Appeal dismissed.

Hon. C. H. Locke, Q.C., and *G. H. Steer, Q.C.*, for the defendants, appellants.

W. G. Morrow, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Credit Foncier Franco-Canadien sued Edmonton Airport Hotel Co. Ltd., on two mortgages for foreclosure or sale. One mortgage was on the land and buildings and the other on chattels. Jake Superstein was sued as guarantor of these mortgages. Judgment was given against both defendants in accordance with the claim. The Appellate Division[1] dismissed the defendants' appeal and they now appeal to this Court. We are not concerned here with the rights of certain lienholders who were brought into the litigation.

Superstein was the owner of a parcel of land and applied to Credit Foncier for a loan to assist in the construction of a hotel. The loan was to be for $300,000 with interest at 8 per cent, and was to extend over a period of 10 years. Edmonton Airport Hotel Co. Ltd. was to be incorporated to take title to the land and 10 per cent of the shares of the company were to be given to Credit Foncier. The hotel company was to give a charge under *The Land Titles Act* on the land and buildings and a chattel mortgage on all furnishings and equipment. Superstein was to give a personal guarantee of the loan. These securities were duly delivered, together with 15 per cent of the shares of the company, the extra 5 per cent being in consideration of an immediate advance of $50,000 to release the land from a charge held by a bank.

[1] (1964), 48 W.W.R. 641, 47 D.L.R. (2d) 508.

Credit Foncier started its action after there had been default in payment of principal, interest, taxes and insurance premiums and failure to clear the property of mechanics' liens which had been filed. The company's defence was that the chattel mortgage was unenforceable as being an infringement of s. 34(17) of *The Judicature Act,* R.S.A. 1955, c. 164. Superstein set up the same defence against the enforcement of his guarantee. In addition, he said that the guarantee was a nullity because it was not correctly certified in accordance with *The Guarantees Acknowledgment Act,* R.S.A. 1955, c. 136. The trial judge gave judgment against the hotel company for foreclosure or sale and against Superstein for the full amount owing under the guarantee. The Appellate Division, by a majority, dismissed the appeal but varied the judgment against Superstein to provide that he should only be liable for the deficiency after the security had been realized. There is no appeal from this variation. The dissenting reasons of Johnson J.A., concurred in by Porter J.A., would have allowed the appeal and dismissed the action against both defendants.

Sections 34(17)(*a*) and 34(18) of *The Judicature Act* read as follows:

> 34. (17) In an action brought upon a mortgage of land whether legal or equitable, or upon an agreement for the sale of land, the right of the mortgagee or vendor thereunder is restricted to the land to which the mortgage or agreement relates and to foreclosure of the mortgage or cancellation of the agreement for sale, as the case may be, and no action lies
>
> (*a*) on a covenant for payment contained in any such mortgage or agreement for sale.
>
> 34. (18) . . . and upon the making of any such vesting order or cancellation order, every right of the mortgagee or vendor for the recovery of any money whatsoever under and by virtue of the mortgage or agreement for sale in either case ceases and determines.

The first question that arises under this legislation is the company's defence that where a mortgage of land is involved, a collateral chattel mortgage for the same indebtedness or part of it is necessarily void because in an action upon a mortgage of land, the right of the mortgagee thereunder (*i.e.,* the mortgage of land) is restricted to the land, and that to enforce the security of the chattel mortgage would be another way of enforcing personal liability on the covenant to pay. In my opinion, which coincides with that of

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the trial judge and the majority in the Appellate Division, this submission was rejected by this Court in *Krook et al. v. Yewchuk et al.*[1]

I cannot accept the distinction drawn in the dissenting reasons in the Appellate Division between this case and *Krook et al. v. Yewchuk et al.* It is true that *Krook et al. v. Yewchuk et al.* was a vendor and purchaser situation. The vendor was selling a hotel property comprising land and chattels and he took back security on both, the chattel mortgage being expressed to be collateral to the land mortgage for the full amount. The present transaction is one between borrower and lender, mortgagor and mortgagee. The lender will not lend unless he gets certain security both on land and chattels. I can see no possible distinction between the vendor and purchaser and mortgagor and mortgagee relationships.

It is additional security that the lender wants. He would not lend without it. He is not interested in the personal covenant but in property. It is true that if the lender took security only on the land, he could not reach the chattel property by way of execution because he could not get a personal judgment. The lender is under no obligation to go into a transaction with these limitations and takes the security as part of the loan transaction. Under this legislation, he is and can only be interested in the taking of security. The taking of security on chattels does not offend in any way against the restriction in s. 34(17) of the right of the mortgagee to the land. He is seeking to enforce his security on chattels outside the terms of s. 34(17). He is enforcing his security on the land and he is enforcing his security on the chattels. In neither case is he attempting to get a personal judgment either directly or indirectly. The company's defence fails.

As to the guarantee, Superstein submitted that he was under no liability as guarantor since there was no debt owing by the principal debtor. He said that the effect of s. 34(17)(*a*) was to render it impossible that there should be any debt owing by the hotel company. The simple answer is that the hotel borrowed money from Credit Foncier on the security of land and chattels. This borrowing was neither illegal nor *ultra vires* and gave rise to a debt. *Swan v. Bank*

[1] [1962] S.C.R. 535, 34 D.L.R. (2d) 676.

of Scotland[1] does not apply. It was a case of illegality. But here, s. 34(17) is a procedural limitation. There was a borrowing and there was an unenforceable debt which will not disappear by the terms of s. 34(18) until a vesting order is made.

The second ground on which the guarantee is disputed is *The Guarantees Acknowledgment Act*. Section 4 provides:

> 4. No guarantee executed after the first day of July, 1939, has any effect unless
>
> (*a*) the person entering into the obligation created thereby appears before a notary public and acknowledges his execution thereof, and
>
> (*b*) the notary public, being satisfied by examination of that person that the person is aware of the contents of the guarantee and understands it, issues a certificate under his hand and seal of office in the form set out in the Schedule.

There is no dispute over compliance with subs. (*a*). The dispute is over subs. (*b*). The certificate reads in full as follows:

> CANADA
> PROVINCE OF ALBERTA
>
> THIS IS TO CERTIFY THAT JAKE SUPERSTEIN of the City of Edmonton in the Province of Alberta, WHO IS KNOWN TO ME and is named as a party in a certain instrument in writing dated the 8th day of February, A.D. 1961, made between EDMONTON AIRPORT HOTEL CO. LTD. and CREDIT FONCIER FRANCO-CANADIEN this day appeared in person before me and acknowledged that he had executed the same and that I satisfied myself by examination that he was aware of and understood the contents of the said instrument.
>
> GIVEN at the City of Edmonton, in the Province of Alberta, this 8th day of February, A.D. 1961.
>
> (sgd) *E. A. D. McCuaig*
>
> A Notary Public in and for the Province of Alberta.

The certificate should have read that the instrument was made between Jake Superstein and Credit Foncier, and not between Edmonton Airport Hotel Co. Ltd. and Credit Foncier. The trial judge and the majority in the Appellate Division have held that as it stands, the certificate, in the circumstances of the case, is in compliance with the Act. As to Superstein's perfect understanding of the transaction there can be no doubt. Oral evidence of the Notary Public was admissible and relevant. If the certificate is questioned, that official is entitled to testify why he certified that he had satisfied himself by examination that he (Superstein) was aware of and understood the contents of the "said instrument".

[1] (1836), 10 Bli. N.S. 627.

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The "said instrument" was, of course, the mortgage. But the guarantee was attached to the mortgage and incorporated it by reference. It recites that in consideration of the advance of $300,000 made by the within named mortgagee (Credit Foncier) to the mortgagor (Edmonton Hotel) he, Superstein, guarantees payment of any money "that shall be payable under the terms of the within mortgage". I think that the plain and unmistakable meaning of the certificate is that Superstein knew and understood what obligations he was incurring in executing the guarantee of the recited mortgage and that this is compliance with the Act.

Superstein's third defence is that any guarantee of any mortgage indebtedness is void under the terms of s. 34(17) as an indirect method of attempting to impose personal liability under the mortgage. To me this defence cannot be distinguished from that put forward against the chattel mortgage. The guarantor is not and cannot be the mortgagor. Action is taken by the mortgagee to enforce the security. The enforcement of rights against a guarantor is another matter entirely. It is true, however, that before the decision of this Court in *Krook et al. v. Yewchuk et al.*, there were Alberta decisions, which were reviewed in the reasons of Martland J. in *Krook et al. v. Yewchuk et al.* indicating that to enforce a guarantee of mortgage indebtedness was the same thing as enforcing a personal covenant. The origin of this theory seems to be in the judgment in *Macdonald v. Clarkson et al.*[1] The legislation, as it then stood, permitted a personal judgment against a mortgagor to the extent of a deficiency after realization of the security. The actual decision was that a covenant by a mortgagee, contained in an assignment of a mortgage, to indemnify an assignee in the event of failure by the mortgagor to pay the debt, involved an infraction of the predecessor of s. 34(17). With that I do not agree. Here was a mortgagee who wanted to realize on his security. To dispose of it to advantage he had to agree with an assignee of the mortgage that he would pay the mortgage debt. How could this affect a mortgagor who, under the legislation, was not so liable but only to the extent of the deficiency after realization of the security. The assumption of the mortgage indebtedness or covenant to pay if the mortgagor did not pay was a matter entirely between the mortgagee and the proposed assignee. If the mortgagor

[1] [1923] 3 W.W.R. 690, 4 D.L.R. 898.

did not pay, the mortgagee could be compelled to take his mortgage back. His rights and those of the assignee of the mortgage against the mortgagor are throughout governed by the terms of the legislation and there could be no enlargement of these rights by the giving of this covenant between the mortgagee and assignee.

The case was a very insecure foundation for what was subsequently built upon it. It emphasizes the need for an examination of the particular facts in each case, but if the subsequent cases do say that s. 34(17) prevents a guarantee of a mortgage indebtedness, then they must be related, in turn, to *Krook et al. v. Yewchuk et al.*, the reasoning of which, in my opinion, is directly contrary to any such proposition.

I therefore think that the guarantor is liable on his guarantee and that his liability in no way depends upon the fact that his guarantee contains a waiver of the provisions of s. 34(17). I express no opinion on the question whether a person entitled to the benefit of the Act can waive its provisions. A guarantor is not so entitled.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: McLaws, McLaws, Deyell, Dinkel, Floyd and Moore, Calgary.

Solicitors for the plaintiff, respondent: McCuaig, McCuaig, Desrochers, Beckingham and McDonald, Edmonton.