ANDREW KROOK, BARBARA KROOK, IVAN KROOK, AND GEORGE KROOK (*Plaintiffs*) .. APPELLANTS;

1962
*Feb. 27
June 11

AND

PETER YEWCHUK AND MIKE PANAS (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mortgages—Sale of lands and chattels—Mortgage on lands and collateral mortgage on chattels—Default in payments—Foreclosure proceedings—Whether chattel mortgage invalid by reason of provisions of s. 34 (17) of The Judicature Act, R.S.A. 1955, c. 164—The Seizures Act, R.S.A. 1955, c. 307—The Conditional Sales Act, R.S.A. 1955, c. 54.

By an agreement in writing the plaintiffs agreed to sell to the defendants an hotel together with the furnishings, fixtures and equipment therein for $90,000. The initial payment was $20,000, and the defendants agreed to execute and deliver to the plaintiffs a first mortgage on the lands and premises to secure payment of the balance owing and a chattel mortgage on the other property transferred as collateral thereto. Later, by a bill of sale, the plaintiffs transferred to the defendants the goods and chattels for an expressed consideration of $20,000. Subsequently the defendants executed a mortgage on the lands for $70,000, and a collateral mortgage on the goods and chattels. The mortgage on the lands contained a personal covenant for payment. The defendants fell into arrears in respect of the stipulated monthly payments, and in foreclosure proceedings brought by the plaintiffs in respect of the lands and the personal property the trial judge held in favour of the plaintiffs. On appeal from this judgment, the Appellate Division of the Supreme Court refused foreclosure of the goods and chattels, holding that the chattel mortgage was invalid. The plaintiffs appealed to this Court.

Held: The appeal should be allowed.

It was not intended under the agreement between the parties that the initial payment should be applied solely in respect of the purchase of the chattels, leaving the balance relating entirely to the land, and the intent of the agreement was not affected by the fact that the bill of sale showed as its consideration the amount of the down payment under the agreement.

The plaintiffs were possessed of two securities for the defendants' indebtedness, and the question was as to whether s. 34(17) of *The Judicature Act*, R.S.A. 1955, c. 164, precluded the enforcement of the security on the chattels. This section of the Act limits the right of a mortgagee of land who brings action upon the mortgage to the right to the land conferred by that mortgage. The effect of para. (*a*) is that in an action on a mortgage of land no action lies on a covenant for payment "in any such mortgage". This takes away the right to bring action on the covenant for payment in a land mortgage. There was nothing in this

*PRESENT: Locke, Abbott, Martland, Judson and Ritchie JJ.

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provision which forbids a debtor to give security for a debt on property in addition to a mortgage on land or which forbids the creditor to enforce such security.

Here the taking of the chattel mortgage was not an indirect method of attempting to enforce the personal covenant contained in the land mortgage, nor was this action, in so far as it sought foreclosure of the chattel mortgage, an action based on a mortgage of land, whose purpose was to recover the debt referred to in the land mortgage. The essence of the transaction was that it consisted of a sale of a totality of assets, consisting partly of land and partly of chattels, under the terms of which the vendor was to be entitled to security on all assets sold. The chattel mortgage was a security upon a specific part of those assets and its enforcement was not merely an indirect attempt to enforce the covenant for payment contained in the land mortgage.

Macdonald v. Clarkson, [1923] 3 W.W.R. 690; *Holland-Canada Mortgage Co. Ltd. v. Hutchings,* [1934] 2 W.W.R. 137; *British American Oil Co. Ltd. v. Ferguson* (1951), 1 W.W.R. (N.S.) 103; *Crang v. Rutherford,* [1936] 2 W.W.R. 205, distinguished; *Martin v. Strange and Stocks Co-op. Credit Society,* [1943] 2 W.W.R. 123, referred to.

The additional contention that the Supreme Court of Alberta did not have jurisdiction to foreclose the chattels secured by the chattel mortgage because of the provisions of *The Seizures Act,* R.S.A. 1955, c. 307, and of *The Conditional Sales Act,* R.S.A. 1955, c. 54, was rejected. *The Seizures Act* restricted the plaintiffs' rights regarding the taking of possession of the chattels mortgaged under power of distress. It did not, however, expressly or by implication, purport to prevent proceedings for the foreclosure of a chattel mortgage. Section 19 of *The Conditional Sales Act* did nothing more than limit the remedy of the plaintiffs, in respect of the chattel mortgage, to the chattels mortgaged. The plaintiffs were not, in these proceedings, seeking anything more than foreclosure of the land and of the chattels. They did not ask for a judgment over in respect of any deficiency and the judgment given by the trial judge did not purport to give them anything more.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], allowing an appeal from a judgment of Primrose J. Appeal allowed.

W. G. Morrow, Q.C., for the plaintiffs, appellants.

J. W. K. Shortreed, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—By an agreement, in writing, dated June 30, 1959, the appellants agreed to sell to the respondents, who agreed to purchase from the appellants, an hotel, situated at Cold Lake, Alberta, with the furniture, furnishings, fixtures and equipment therein, for a total price of $90,000. The initial payment was $20,000, paid partly in cash and partly by the transfer to the appellants of some lands in Edmonton, subject to mortgage. The remaining

[1] (1961-62), 36 W.W.R. 547, 30 D.L.R. (2d) 754.

balance of $70,000 was to be paid, with interest at the rate of 7 *per cent per annum,* by monthly payments of $1,000, commencing on September 1, 1959.

It was agreed that on September 1, 1959, the appellants would transfer clear title to the respondents of the lands on which the hotel was situated and would give a bill of sale of the goods and chattels clear of all liens, charges and encumbrances. The respondents agreed to execute and deliver to the appellants a first mortgage on the lands and premises to secure payment of the balance owing and a chattel mortgage on the other property transferred as collateral thereto. It is clear that these mortgages were to be delivered to secure payment for both the land and the chattels.

Pursuant to the agreement, a transfer of the lands was registered, and on November 5, 1959, a mortgage from the respondents to the appellants, executed on August 31, 1959, was duly registered, securing the payment of the sum of $70,000.

On August 25, 1959, the appellants executed a bill of sale of the goods and chattels in favour of the respondents, who, on August 31, 1959, executed a chattel mortgage on the same goods and chattels, in favour of the appellants, to secure payment of the sum of $70,000. Both these documents were registered on November 4, 1959.

The bill of sale stated that the goods and chattels were transferred in consideration of the sum of $20,000 paid by the respondents to the appellants. There is no evidence as to how this figure was determined, but it is the amount of the initial payment made under the agreement of June 30, 1959. There is no evidence as to the consideration disclosed in the transfer of the land, which was not filed as an exhibit at the trial.

The chattel mortgage recited the indebtedness of the respondents to the appellants in the amount of $70,000 under the agreement for the sale of the hotel, and recited that it was a term of that agreement that that sum should be secured by a mortgage on the land and a collateral mortgage on the personal property, included in the sale. It was stated in the chattel mortgage that it was collateral to the mortgage on the land.

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The respondents fell into arrears in respect of the stipulated monthly payments and the appellants commenced foreclosure proceedings in respect of the lands and the chattels. A judgment was obtained declaring that, as at its date, June 19, 1961, there was due and owing by the respondents the sum of $67,954.82 to be realized by sale of the mortgaged lands, goods and chattels, in default of which foreclosure might be ordered. A six months period of redemption was fixed, with a provision that this might be extended to twelve months if the respondents paid to the appellants $750 per month commencing July 1, 1961, with a right to apply for a further extension.

On appeal from this judgment, the Appellate Division of the Supreme Court of Alberta[1] refused foreclosure of the goods and chattels, holding that the chattel mortgage was invalid.

The main issue in this appeal is as to whether the chattel mortgage was invalid by reason of the provisions of s. 34(17) of *The Judicature Act*, R.S.A. 1955, c. 164, the relevant portions of which provide as follows:

> (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,

The Court below has stated its conclusions in the following terms:

> It seems to me that the only logical conclusion in relation to the facts of the present case is that it is an action based upon a mortgage of land. While it is true that the original transaction was one in which both lands and chattels were agreed to be sold, nevertheless the chattels were paid for in full, according to the consideration expressed in the bill of sale dated the 25th day of August 1959. Having obtained clear title to the chattels, the appellants several days later gave a chattel mortgage to the respondents expressed to be collateral to the land mortgage. The position of a mortgagee under that chattel mortgage cannot be any higher than if the mortgagors had pledged goods other than those they had obtained under the bill of sale.
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> The land mortgage contains a personal covenant requiring the appellants to pay to the respondents the sum of $70,000 in lawful money of Canada, together with interest as stipulated in the mortgage.

[1] (1961-62), 36 W.W.R. 547, 30 D.L.R. (2d) 754.

The chattel mortgage is, in my view, an indirect method of attempting to enforce the personal covenant contained in the land mortgage. That phase of the present action by which the mortgagees endeavour to foreclose under the chattel mortgage is in reality an action based upon the mortgagors' covenant to pay and as such is in direct contravention to Section 34 (17) of The Judicature Act, being Chap. 164, Revised Statutes of Alberta 1955. See the reasoning of Clarke, J.A., in Macdonald v. Clarkson [1923] 3 W.W.R. 690, and of Frank Ford, J., in Holland-Canada Mtge. Co. Ltd. v. Hutchings [1934] 2 W.W.R. 137, and also the judgment of Macdonald, J.A. in British American Oil Company Limited (1951) 1 W.W.R. (N.S.) 103. See also Crang v. Rutherford [1936] 2 W.W.R. 205.

It follows that the order nisi of foreclosure granted by the learned trial judge respecting the chattels must be set aside. It also follows that the respondents' aforesaid chattel mortgage is invalid.

With respect, I do not agree that subs. (17) of s. 34 of *The Judicature Act* renders the chattel mortgage invalid.

The reasoning in the Court below would appear to be based upon the view of the transaction between the appellants and the respondents expressed in the first paragraph of the portion of the reasons for judgment above quoted; namely, that the chattels had been paid for in full and that thereafter the appellants' position was no different from what it would have been if the respondents had pledged goods other than those which they had obtained under the bill of sale. I do not share this view of the arrangement. The transaction between the appellants and the respondents is set forth in their agreement of June 30, 1959. It was, essentially, for the sale of an hotel business as a going concern, including both land and chattels. It was not intended under this agreement that the initial payment should be applied solely in respect of the purchase of the chattels, leaving the balance relating entirely to the land, and I do not think that the intent of the agreement is affected by the fact that the bill of sale showed as its consideration the amount of the down payment under the agreement. Under that agreement title to the chattels was to be vested in the respondents, but the bill of sale which transferred that title must be considered as being only one stage in the total transaction, which contemplated payment for both the land and the chattels in instalments, with security being given to the appellants for payment in the form of mortgages upon both the land and the chattels.

It is true that both the agreement and the chattel mortgage refer to that mortgage as being collateral to the land mortgage, but, as used in those documents, this does not

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mean anything more than that the security on the chattels is in addition to that on the land. I do not construe it as meaning that this security was subordinate to that upon the land. (See Earl Jowitt's Dictionary of English Law, p. 403.)

In my opinion, the appellants were possessed of two securities for the respondents' indebtedness, and the question then is as to whether s. 34(17) of *The Judicature Act* precludes the enforcement of the security on the chattels.

It provides that in an action brought upon a mortgage of land the right of the mortgagee *thereunder* is restricted to the land to which the mortgage relates and to foreclosure of the mortgage. In its context, the word "thereunder" must refer to the mortgage, for it is by virtue of the mortgage, not the action, that the mortgagee has a "right". The section, therefore, limits the right of a mortgagee of land who brings action upon it to the right to the land conferred by that mortgage.

The effect of para. (*a*) is that in an action on a mortgage of land no action lies on a covenant for payment contained "in any such mortgage". This takes away the right to bring action on the covenant for payment in a land mortgage.

I do not find anything in this provision which forbids a debtor to give security for a debt on property in addition to a mortgage on land or which forbids the creditor to enforce such security. It derogates from the common law rights of a mortgagee of land and, consequently, I see no reason to read into it any intention beyond what is to be determined by a strict consideration of the words actually used.

The cases mentioned in the portion of the judgment of the Appellate Division, previously quoted, do not deal with this issue.

Macdonald v. Clarkson[1] dealt with an earlier provision of *The Judicature Act,* R.S.A. 1922, c. 72, s. 37(*o*)(i), which stated that, unless otherwise ordered by the Court or a judge, a judgment in an action brought on a mortgage of land should provide for realization, in the first instance, *pro tanto,* by a sale of the mortgaged land. A mortgagee, who had transferred his mortgage to the plaintiff, with a covenant to pay the mortgage if the mortgagor made default, was sued on that covenant. The mortgagor was a defendant in the same action to a suit brought in respect of

[1] [1923] 3 W.W.R. 690.

the mortgage. The case held that the action was an action on a mortgage, within the subsection, and that personal judgment could not be obtained on the covenant for payment until after sale of the land.

This decision was applied in *Holland-Canada Mortgage Co. Ltd. v. Hutchings*[1], in an action brought on a bond by which the defendant became a surety for the repayment of a mortgage. It was held that he had the right to compel the plaintiff to add the mortgagors as parties to the action.

British American Oil Co. Ltd. v. Ferguson[2] related to the application of the provisions of the predecessor of the subsection involved in the present case, but related to an action on a bond given by the individuals who, as a partnership, had agreed to purchase lands, whereby they were obliged to pay the amount of the purchase price if the partnership failed so to do.

Crang v. Rutherford[3] dealt with the earlier provision of *The Judicature Act,* and involved a "guarantee" by the mortgagors to pay the mortgage debt, without the mortgagee having to resort to foreclosure. This covenant was given in consideration of an extension by the mortgagee of the time for payment of the mortgage debt. It was held that the action, so far as it was based on the so-called guarantee, was an action brought on a mortgage of land, within the section.

Each of these cases was an action on a separate covenant for the payment of the amount payable either under a mortgage or an agreement for sale of land. In two of them the covenant was given by a surety. In the other two it was given by the debtors themselves. The reasoning in these cases may be summarized in the following extracts from two of them.

In the case of *Macdonald v. Clarkson,* at p. 692, Clarke J.A. said:

> I think there can be little doubt that the substance of the action is the recovery of the mortgage debt, it is immaterial how or by whom paid, if paid in any way the action is at an end. The personal liability of the mortgagor arises from his covenant to pay contained in the mortgage and that of the appellant from his covenant to pay contained in the transfer, but in either case it is the mortgage debt that is to be paid. The plaintiff could not succeed without establishing the mortgage and the amount owing upon it. The covenants are the means of fastening liability for the mortgage

[1] [1934] 2 W.W.R. 137. [2] (1951), 1 W.W.R. (N.S.) 103.
[3] [1936] 2 W.W.R. 205.

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debt upon the covenantors. Certainly an action against the mortgagor alone upon the covenant in a mortgage under *The Land Titles Act* would be an action brought upon a mortgage and if the covenants of the appellant were contained in the mortgage it would be an action upon the mortgage. What difference does it make that the covenant is contained in another instrument? It is still a covenant to pay the mortgage debt.

In *British American Oil Co. Ltd. v. Ferguson*, at p. 110, W. A. Macdonald J.A. said:

> It seems to me that the whole transaction and the only transaction between the parties was one relating to the sale of land. This transaction, at plaintiff's insistence, was expressed in two documents, and the two together constitute the agreement covering the sale of the land. They should be read and considered together.

In vol. II, *Corpus Juris (Secundum)*, under the title "Bonds," para. 43, the following proposition, for which a number of authorities are cited, appears:

> It may be stated generally that, where a bond and another contract or instrument relate to and form one and the same transaction or the bond refers to such other instrument or is conditioned for the performance of specific agreements set forth therein, such instrument with all its stipulations, limitations, or restrictions becomes a part of the bond, and the two should be read together and construed as a whole.
>
> In form, the liability of the defendants in this action arises under the obligation imposed by the terms of the bond, but in substance it is an action based on an agreement for the sale of land and its purpose is to recover the purchase-price of the land. When the two documents are read and construed as a unit, the action on the bond comes within the scope of *The Judicature Act*, RSA, 1942, ch. 129, sec. 36 (*o*), as completely as would an action based on the purchaser's covenant to pay.

In another decision of the Appellate Division, in the case of *Martin v. Strange and Stocks Co-op. Credit Society*[1], the Court expressly reserved the question of the applicability of the predecessor of the present subsection in respect of security collateral to an agreement for sale of land.

In my opinion the taking of the chattel mortgage in the present case was not an indirect method of attempting to enforce the personal covenant contained in the land mortgage, nor was this action, in so far as it sought foreclosure of the chattel mortgage, an action based on a mortgage of land, whose purpose was to recover the debt referred to in the land mortgage. The essence of the present transaction is that it consisted of a sale of a totality of assets, consisting partly of land and partly of chattels, under the terms of which the vendor was to be entitled to security on all assets sold. The chattel mortgage was a security upon a specific

[1] [1943] 2 W.W.R. 123, 4 D.L.R. 367.

part of those assets and its enforcement is not, in my view, merely an indirect attempt to enforce the covenant for payment contained in the land mortgage.

The respondents also contended that the Supreme Court of Alberta did not have jurisdiction to foreclose the chattels secured by the chattel mortgage because of the provisions of *The Seizures Act*, R.S.A. 1955, c. 307, and of *The Conditional Sales Act*, R.S.A. 1955, c. 54. In view of the decision of the Appellate Division on the first point, it did not have to deal with this issue.

The former statute, as its title indicates, is "An Act respecting Executions, Seizures under Writs of Execution, and Seizures under Powers of Distress". Clearly the present case does not relate to an execution or a seizure under a writ of execution.

"Power of distress" is defined in s. 2(*h*) as follows:

> (*h*) "power of distress" means the right that a person has to enforce the payment of any claim against, or the taking of any goods or chattels out of the possession of, another person by the taking of a personal chattel out of the possession of such last mentioned person otherwise than by the authority of a writ of execution or other process of a similar nature;

"Distress" is defined in s. 2(*d*):

> (*d*) "distress" means any and all acts or things done in the exercise of a power of distress;

Section 22 provides:

> 22. No distress shall be made and no levy shall be made under any distress unless the person entitled to cause the distress and levy to be made or his duly authorized agent has executed and delivered to some person authorized by this Act to make and levy a distress a proper warrant in that behalf.

The Act contains provisions as to the procedure to be followed where goods have been seized under a distress warrant.

The Act restricts the appellants' rights regarding the taking of possession of the chattels mortgaged under power of distress. It does not, however, expressly or by implication, purport to prevent proceedings for the foreclosure of a chattel mortgage.

I agree with the statement made in Barron & O'Brien on "Chattel Mortgages & Bills of Sale", 3rd ed., p. 128, that "It seldom happens in practice that a mortgagee of personal chattels seeks the assistance of the Court by foreclosure, yet

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such a course is open to him." In my opinion the Supreme Court has jurisdiction to entertain such proceedings and there is nothing in *The Seizures Act* which precludes it from so doing.

The provisions of *The Conditional Sales Act* on which the respondents rely are the following:

> Proceedings for Purchase Price
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> 19. (1) When any goods or chattels are hereafter sold and after delivery the vendor has a lien on them for all or part of the purchase price, the vendor's right to recover the unpaid purchase money, if he seizes or causes the said goods or chattels or a portion thereof to be seized under a conditional sale agreement, is restricted to his lien on the goods or chattels and his right to repossession and sale thereof, in which case no action is maintainable for the purchase price or any part thereof notwithstanding anything to the contrary in any other Act or in an agreement or contract between the vendor and purchaser.
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> (2) Instead of seizing or causing to be seized the goods or chattels or any of them under the provisions of the conditional sale agreement, the vendor may elect to bring an action against the purchaser for the purchase price or part thereof of any of the goods or chattels so sold.
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> (3) If the said goods or chattels or any of them are seized under an execution issued pursuant to a judgment obtained in the said action, then the vendor's right to recover under the said judgment in so far as it is based on the purchase price of the said goods or chattels is restricted to the amount realized from the sale of the said goods or chattels so seized and the said judgment, to the extent that it is based upon the purchase price of the said goods or chattels and the taxed costs, shall be deemed to be fully paid and satisfied.
>
> (4) This section applies to all instalment sales whether effected by way of a conditional sale agreement or lien note or by way of an agreement or arrangement made at the time of sale or subsequent thereto whereby the purchaser gives to the vendor a chattel mortgage or bill of sale covering the whole or part of the purchase price of the goods or chattels sold.

If, by virtue of subs. (4), the provisions of s. 19 are applicable in the present case to the agreement of June 30, 1959, I do not see how, in the present proceedings, that section does anything more than to limit the remedy of the appellants, in respect of the chattel mortgage, to the chattels mortgaged, just as s. 34(17) of *The Judicature Act* limits their rights, in respect of the land mortgage, to the land. The appellants are not, in these proceedings, seeking anything more than foreclosure of the land and of the chattels. They do not ask for a judgment over in respect of any deficiency and the judgment given by the learned trial judge does not purport to give them anything more.

I would, therefore, allow this appeal and restore the judgment of the learned trial judge. The appellants should be entitled to their costs in this Court and in the Court below.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitors for the defendants, respondents: Shortreed, Shortreed & Stainton, Edmonton.