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*May 12.
*May 31.

ANTON J. KUPROSKI AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

ROYAL BANK OF CANADA (PLAINTIFF) ..... } RESPONDENT.

AND

WILLIAM YOUNG AND OTHERS (DEFENDANTS).

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Bankruptcy—Guarantee—Creditor proving claim in bankruptcy and valuing security—Retention of security at assessed valuation—Subsequent recovery against guarantors.

Directors of a company guaranteed payment of its liabilities to a bank. The company went into bankruptcy and the bank, pursuant to the Bankruptcy Act, proved its claim and valued its security consisting of an hypothecation of collateral notes. The bank was allowed to retain its security at the valuation placed upon it. The bank subsequently sued the guarantors for the balance unpaid of the company's debt.

Held, that s. 46 (6) of the *Bankruptcy Act* did not have the effect of vesting in the bank the complete ownership of the collateral notes and of reducing the company's debt for all purposes by the amount at which the notes were valued; and the guarantors were not relieved from liability on their guarantee to the extent of such assessed value.

Canadian Bank of Commerce v. *Martin* ([1918] 1 W.W.R. 395), distinguished. *Bank of Hamilton* v. *Atkins* ([1924] 1 W.W.R. 92), overruled.

Judgment of the Appellate Division of the Supreme Court of Alberta (21 Alta. L.R. 553) aff.

APPEAL by certain of the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which (Beck and Hyndman JJ.A. dissenting) dismissed an appeal from the judgment of Ives J. (2) in favour of the plaintiff.

In consideration of the plaintiff agreeing or continuing to deal with Progressive Farmers' Co., Ltd., in the way of its

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) 21 Alta. L.R. 553; [1925] 3 W.W.R. 417.

(2) [1925] 2 W.W.R. 586.

business as a bank, the defendants jointly and severally guaranteed (to a certain limit) payment to the plaintiff of the liabilities which the company had incurred or was under or might incur or be under to the plaintiff. The guarantee was dated September 9, 1920. The company made an assignment in bankruptcy in April, 1921, and on May 21, 1921, the plaintiff filed a claim showing an indebtedness by the company to the plaintiff of $3,857 as of the date of the assignment in bankruptcy. The plaintiff held as security an hypothecation, dated September 9, 1919, of collateral notes amounting, according to its proof of claim, to $4,408.55 and interest, and in its proof of claim it assessed the value of the notes at $2,290. It was allowed to retain its security at the said valuation. It subsequently sued the guarantors for the full unpaid amount of its claim, and recovered judgment therefor. The appeal was limited to the amount of $2,290, at which the plaintiff valued its security, the appellants contending that they were relieved from liability on their guarantee to the extent of such assessed value.

N. D. McLean K.C. for the appellants.

Hon. R. B. Bennett K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

RINFRET J.—In consideration of the Royal Bank of Canada agreeing or continuing to deal with Progressive Farmers' Co., Limited, "in the way of its business as a bank," the appellants jointly and severally guaranteed payment to the bank of the liabilities which the company had incurred or was under or may incur or be under to the bank. The guarantee was in writing and dated the 9th September, 1920.

The bank accordingly did business with the company and the latter became indebted to the bank in the sum of $3,866.10, for which a note was made by the company and remitted to the bank. The bank now seeks to recover from the guarantors the sum remaining overdue and unpaid in respect of such note. But, some time after having incurred this debt, the company went into bankruptcy. The bank,

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as required by sections 45 and 46 of the *Bankruptcy Act*, filed with the trustees a statutory declaration verifying its debt, stating that it held, as security therefor, an hypothecation of collateral notes amounting to $4,408.55 and assessing the value of those notes at $2,290. At a subsequent meeting of the inspectors of the bankrupt estate, the bank was allowed to retain its security at the valuation thus placed upon it.

The guarantors now contend that, by force of subsection (6) of section 46, of the Act, this had the effect of vesting in the bank the complete ownership of the collateral notes, and of reducing the company's debt for all purposes by the amount at which these notes were valued, and that they are accordingly relieved from liability on their guarantee to the extent of such assessed value.

This, in effect, would mean that the notes are to be treated no longer as security, but as if they had been collected by and paid to the bank for the total amount of their valuation and quite irrespective of what they may eventually realize.

Such is not, in our view, the purport of section 46 of the *Bankruptcy Act*. The Act deals with the relations between the bankrupt and his creditors. The particular subsection declares what will happen, as between the secured creditor and the bankrupt or his trustee, if the creditor retains his security at "the value at which he assesses it." For purposes of dividend, the value so assessed must be deducted and "the amount of the debt shall be reduced" accordingly.

As was said by Lord Watson in *Deering* v. *Bank of Ireland* (1):—

> *So far as concerns the proceedings in bankruptcy,* the security is dealt with as having been realized and paid to the creditor, and his debt to the extent of its valuation or actual proceeds is extinguished, the balance unpaid being then treated as unsecured, and therefore admitted to proof.

But this is only "so far as concerns the proceedings in bankruptcy." These proceedings do not affect the agreement between the creditor and the sureties or guarantors. No mention, nor reference is made to the latter in section 46.

(1) [1886] 12 App. Cas. 20, at p. 27.

The bank merely fulfilled the requirements of the Act in filing and proving its claim, and in assessing the value of the security it held. No mistake or fraud in the valuation is even suggested. There is not the slightest evidence of improper appraisal. The assessment is not the voluntary act of the bank, but was done in compliance with the statute. This is not a case where the creditor becomes party to a composition or a deed whereby the principal debtor is discharged and the position of the surety is altered. Such was the situation in *Canadian Bank of Commerce* v. *Martin et al.* (1), where, upon the voluntary winding-up of a company under the *Companies' Act* of British Columbia (R.S.B.C. 1911, c. 39), a creditor, making his claim as such, valued his securities at a certain sum and accepted for that sum certain book debts of the company, the price thereof being deducted from the creditor's claim. This transaction was regarded as a purchase of the book debts and as being "in substance a contract between the assignee and the plaintiff." There was no provision in the *Companies' Act* of British Columbia for valuing securities. The composition with the principal debtor was therefore unaffected by statute and it was there held that the portion of the company's debt represented by the price of the book debts was satisfied and that the sureties thereon were released.

Under section 46 of the *Bankruptcy Act,* however, the debt is, for the purpose of the Act, restricted to the unsecured portion of the creditor's claim not by the voluntary deed or agreement of the creditor, but by operation of law. *In re Jacobs* (2); *In re London Chartered Bank of Australasia* (3); *Stacey* v. *Hill* (4); and, in the words of Bramwell L.J. in *Rainbow* v. *Juggins* (5).

> Where a man enters into a contract of suretyship, he, it is true, bargains that he shall not be prejudiced by any improper dealing with securities to the benefit of which he as surety is entitled; but he makes that bargain with reference to the law of the land, and if the law of the land says that under such and such circumstances certain things must take place in order to enable the creditor to do the best he can for his own protection, then the contract of suretyship must be taken to be made subject to the liability of those things taking place.

(1) [1918] 1 W.W.R. 395.
(2) 10 Ch. App. 211, at pp. 213-214.
(3) [1893] 3 Ch. 540, at p. 546.
(4) [1901] 1 K.B. 660.
(5) 5 Q.B.D. 422, at p. 423.

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For that reason, the principle of the decision in *Canadian Bank of Commerce* v. *Martin* (1), should not be extended to the case where, as here, a company having gone into liquidation and made an authorized assignment under the *Bankruptcy Act,* a creditor, in putting in his claim, values his securities and the valuation is accepted, by operation of the Act.

With great respect, we cannot, in such a case, accept the view of the law laid down in *Bank of Hamilton* v. *Atkins et al.* (2), that the creditor has thereafter no claim *pro tanto* against the sureties who had guaranteed the debt. The *Bankruptcy Act,* as it stands, does not deal with the obligations of the guarantors. On the contrary, it may well be said that the possibility of a loss through the bankruptcy of the debtor and the operation of the *Bankruptcy Act* is precisely one of the contingencies against which the agreement of guarantee was meant to provide.

It is therefore to the agreement itself that we must turn to find out whether, in the event, the sureties have been relieved as they claim. It clearly appears by the terms of the document that not only is it not so, but that, quite independently of the *Bankruptcy Act,* the bank would have had ample authority to act as it did. The bank could refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges, and otherwise deal with the customer and with other parties and securities as the bank may see fit, and may apply all moneys received from the customer or others, or from any securities upon such part of the customer's indebtedness as it may think best, without prejudice to or in any way limiting or lessening the liability of the (sureties) under this guarantee.

And this guarantee shall not be considered as wholly or partially satisfied by the payment or liquidation at any time or times of any sum or sums of money for the time being due to the bank, and all dividends, compositions and payments received by the bank from the customer or any other person or estate shall be applied as payments in gross without any right on the part of the undersigned to claim the benefit of any such dividends, compositions or payments or any securities held by the bank until payment to the bank of the amount hereby guaranteed, and this guarantee shall apply to and secure any ultimate balance due to the bank, and the bank shall not be bound to exhaust its recourse against the customer or other parties or the securities it may hold before being entitled to payment from the undersigned of the amount hereby guaranteed.

Another clause says that the guarantors "specially waive and renounce any benefits of discussion and division."

(1) [1918] 1 W.W.R. 395. (2) [1924] 1 W.W.R. 92.

In the premises, we cannot see how the appellants can escape their liability and we think the judgment maintaining the action of the bank ought to be confirmed.

IDINGTON J.—This is an appeal from the Appellate Division of the Supreme Court of Alberta (1) dismissing an appeal from the judgment of the learned trial judge hereinafter referred to.

The four appellants being directors of a joint stock company doing business with the respondent, all, together with the three other parties referred to above, as defendants, gave a guarantee to the said respondent assuring it the payment of all the indebtedness due, or to become due, by said company, but limited to $4,000. Collateral securities had been given the respondent from time to time for said indebtedness, or parts thereof.

The said company having become bankrupt, prior to May, 1922, and passed under the operation of the Bankruptcy Act, the Canadian Credit Men's Trust Association, Limited, became the trustees of its estate under said Act.

The respondent proved its claim, as one of the creditors, against said company, and, in accordance with the requirements of said Act, valued the collateral securities it held in accordance with the provisions of said Act at $2,290.

Beyond that nothing more was done by respondent, in that connection, than comply with the requirements of section 45 in that regard.

The respondent having sued the appellants and others on their said guarantee, the said appellants set up a curious contention: that under section 46, subsection (6) of said Act, which reads as follows:—

(6) Notwithstanding subsections four and five of this section the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

(1) 21 Alta. L.R. 553; [1925] 3 W.W.R. 417.

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the indebtedness due by said company under and by virtue of said guarantee to the respondent, could not be recovered from them as guarantors, save and except for the excess of the same beyond the value of the said collateral securities, declared in and by the proof of respondent, in making its claim filed with the trustee.

The learned trial judge, Mr. Justice Ives, dealt in his judgment with that pretension, as follows:—

> Under s. 46 the valuation made by the creditor when the claim is filed is not final. There may be a revaluation before or after the security is realized.
>
> Also the section provides that if certain formalities, which are conditions precedent are complied with by the creditor and the trustee the former may become the owner of his security at a valuation which thereupon is applied as payment of the debt to that extent. But this surely is not the effect of a bare compliance with that requirement of the Act which calls upon the creditor to file and prove his claim in the first instance. And that is all that this plaintiff did.

I accept his findings of fact for I cannot see them controverted and no proof of compliance with said conditions precedent has been pointed out.

I, therefore, cannot find any error of law in his judgment for recovery of the full indebtedness covered, as originally intended, by the guarantee sued upon, and would therefore dismiss this appeal with costs.

Of course the appellants or others of the guarantors paying the entire debt will be entitled to be subrogated to the respondent in respect of all said collateral securities or the proceeds thereof.

I pass no opinion upon the strict meaning of the phrase at the end of the said subsection (6), which I have quoted, for I see no necessity for doing so in this case.

Appeal dismissed with costs.

Solicitor for the appellants: *M. J. O'Brien.*

Solicitor for the respondent: *H. A. White.*