

CAMILLE THIBAUT (*Defendant*) . . . . . APPELLANT;

AND

THE CENTRAL TRUST COMPANY OF CANADA,  
Trustee of the estate of Thibault Auto Limited, in Bank-  
ruptcy (*Plaintiff*) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK,  
APPEAL DIVISION

*Companies—Mortgage executed by company as security for payment of its shares by officer of the company—Statutory prohibition—Mortgage void—Covenant as to payment of taxes on land described in mortgage also void.*

The defendant agreed to sell his garage and automobile sales business to one C for a certain sum secured by a mortgage. For the purpose of obtaining tax advantages the parties were advised that instead of making the sale direct to C, a company should be incorporated and the property transferred to it. This arrangement was followed and the defendant received the preferred shares of the company in exchange for his business. It was agreed that C would purchase these shares. The defendant and other members of the company's board of directors subsequently resigned and were replaced by a new board with C as president. After the new directors had assumed office the company executed a mortgage to the defendant to secure payment by C of the purchase price of the shares. The company later went into bankruptcy and the trustee sought to have the mortgage set aside on the grounds that it was *ultra vires* of the company, having been given in contravention of s. 37(1) of the *Companies Act*, R.S.N.B. 1952, c. 33. The trial judgment, which held that the mortgage should be wholly sustained, was reversed by the Court of Appeal. On appeal to this Court the defendant contended that even if he failed on the main issue, there had been error in the Court below in declaring the mortgage void in so far as it secured the defendant for taxes imposed upon the land described in the mortgage, which he had paid.

*Held:* The appeal should be dismissed.

For the reasons given by Ritchie J.A. in the Court below, the covenant for payment of the entire principal amount was invalid. If the mortgage was invalid as to the principal amount secured, then the covenant in respect to taxes could not come into operation at all, because there was then no obligation resting upon the mortgagor company toward the defendant to pay taxes upon the property described in the mortgage, and, unless there was such an obligation, the defendant was not enabled, by paying the taxes owed by the company, to obtain security upon its property for the amount which he had paid.

*Northern Electric and Manufacturing Co. Ltd. v. Cordova Mines Ltd.*, (1914), 31 O.L.R. 221; *Re Johnston Foreign Patents Co. Ltd.*, [1904] 2 Ch. 234, distinguished.

\*PRESENT: Taschereau, Cartwright, Abbott, Martland and Ritchie JJ.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division<sup>1</sup>, reversing a judgment of West J. Appeal dismissed.

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*C. J. A. Hughes, Q.C.*, for the defendant, appellant.

*E. J. Mockler*, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—In my opinion, for the reasons given by Ritchie J.A., who delivered the unanimous judgment of the Appeal Division of the Supreme Court of New Brunswick<sup>1</sup>, this appeal should be dismissed.

The only point on which further comment is required is with respect to the appellant's contention that, even if he failed on the main issue, there had been error in the Court below in declaring the mortgage void in so far as it secured the appellant for taxes imposed upon the land described in the mortgage which he had paid in 1957, amounting to \$3,940.

The appellant relied upon that clause in the mortgage whereby Thibault Auto, Limited covenanted with the appellant that it would pay all taxes imposed upon the mortgaged premises and which further provided that, in the event of the failure of that company to pay the same, it would be lawful for the appellant to pay them and to add the amount to the principal sum secured by the mortgage as a further charge upon the mortgaged premises. It was urged that, even if the mortgage were invalid in relation to the principal sum which it purported to secure, it could yet be upheld in respect of this covenant.

The cases cited by the appellant, *Northern Electric and Manufacturing Co. Limited v. Cordova Mines Limited*<sup>2</sup> (reversed on other grounds under the title *Hughes v. Northern Electric and Manufacturing Co.*<sup>3</sup>), and *Re Johnston Foreign Patents Company Limited*<sup>4</sup>, do not support his contention. In the former case, the Court of Appeal of Ontario held that a mortgage given by a company could be upheld to the extent of the amount due to the mortgagees as advances to the company, even though it was *ultra vires* of

<sup>1</sup> (1962), 33 D.L.R. (2d) 317.

<sup>2</sup> (1914), 31 O.L.R. 221.

<sup>3</sup> (1914), 50 S.C.R. 626, 21 D.L.R. 358.

<sup>4</sup> [1904] 2 Ch. 234, 73 L.J. Ch. 617.

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the company in so far as it was given to secure payment of purchase moneys for its shares being purchased by a third person from a shareholder. In the latter case, each of three companies had become parties to joint debentures binding them jointly and severally. It was *ultra vires* of each company to charge its assets for funds advanced to another company. It was held that, to the extent to which the moneys advanced had come into the hands of each company, the debentures were a valid charge upon the assets of that particular company. It will be observed that in neither of these cases was the mortgage security entirely invalid. In each case the mortgage was valid with respect to a certain part of the principal sum secured by it, even though invalid with respect to the remaining portion of it.

In the present case, however, the covenant for payment of the entire principal amount was invalid. The covenant upon which the appellant relies in this case is by way of additional security to the main covenant to pay, and is subordinate to it. The main covenant has been found to be completely invalid. If the mortgage is invalid as to the principal amount secured, then the covenant in question could not come into operation at all, because there was then no obligation resting upon the mortgagor company toward the appellant to pay taxes upon the property described in the mortgage, and, unless there was such an obligation, the appellant was not enabled, by paying the taxes owed by the company, to obtain security upon its property for the amount which he had paid.

For these reasons, in my opinion, the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitor for the defendant, appellant: J.-M. Michaud, Edmundston.*

*Solicitors for the plaintiff, respondent: Hanson, Rouse, Gilbert & Mockler, Fredericton.*