not be allowed to hold back any facts which are quite material to the decision and still be allowed to come forward and claim compensation, as these facts will be material to the plaintiff's decision to obtain or continue the interlocutory injunction.[27]

Thus the interlocutory injunction is an unique remedy, issuing before the conclusion of the right upon which it is based. The remedy has arisen due to the inability of the judicial process to conclude the right in time to prevent irreparable damage[28] However, it is necessary to point out that the inability to compensate adequately for injury incurred is not infrequent in the law; and although unfortunate, does not of itself justify interference with another man's rights. Unlike most remedies, which issue to correct a wrong which has already occurred, the injunction issues to prevent the occurrence or continuance of the wrong. Surely it is encouraging to see positive steps in the form of preventive law, but this is not so where a remedy like the interlocutory injunction is allowed to do damage where the basic reason for its existance (the plaintiff's right) does not, in fact, exist.

In conclusion, it is submitted that the existence of the interlocutory injunction is commendable, but those seeking its benefit do so at their own risk. As stated by James, L. J. in *Graham* v. *Campbell:*

> If any damage has been occasioned by an interlocutory injunction, which, on the hearing is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so.[29]

Hopefully the plaintiff's rights can receive increased protection through alleviation of some of the risk involved by increased certainty and predictability in the law; although absolute certainty will never be achieved if law is to keep pace with social change. Thus, it is felt that *Vieweger Construction Co. Ltd.* v. *Rush & Tompkins Construction Ltd.*[30] has brought a desirable change to the law of Alberta and, although it may be said absolute justice does not exist, certainly the case has left the law more just.

—Carole Smallwood*

[27] *Montreal Street Railway Co.* v. *Ritchie* (1889), 16 S.C.R. 622 felt that where a party had notice of an application for the issue of a writ of injunction and did not chose to repudiate he brings any damage suffered on himself.
[28] When the interlocutory injunction first developed, the time factor was extremely more important in that it took longer to obtain a hearing of the merits.
[29] *Supra*, at n. 10.
[30] *Supra*, at n. 1.
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MORTGAGES—LAND MORTGAGE—PERSONAL GUARANTEE OF DEBT—COLLATERAL CHATTEL MORTGAGE—PROTECTION GIVEN TO PURCHASERS AND MORTGAGORS BY JUDICATURE ACT, S.A. 1964, C.40, S.34(17)—*CREDIT FONCIER FRANCO-CANADIAN* v. *EDMONTON AIRPORT HOTEL CO. LTD.* and *SUPERSTEIN.*

The case of *Credit Foncier Franco-Canadian* v. *Edmonton Airport Hotel Co. Ltd. and Superstein*[1] and the resulting amendment to *The*

[1] [1965] S.C.R. 441, affirming (1964), 48 W.W.R. 641, (1965), 47 D.L.R. (2d) 508 (Alta. C.A.), varying (1964), 43 D.L.R. (2d) 174.

Judicature Act[2] were to have thrown some light on what protection is given by the Act to purchasers and mortgagors. Instead, they have cast the shadows of new problems. The results are important for lawyer and layman alike who are engaged in dealings with real property. As the case has been a protracted one, it is proposed here to follow the course of the main action and to avoid the paths of incidental issues and the labyrinth of interlocutory proceedings. Briefly, the facts were as follows:

The Edmonton Airport Hotel Co. Ltd., of which Jake Superstein was president and majority shareholder, was the registered owner of some land on which it wanted to build an hotel. Prior to the commencement of construction, Superstein made the necessary financing arrangements with Credit Foncier which granted a loan of $300,000 at 8% interest and, through a subsidiary, 15% of the Hotel Company's stock. Among the conditions on which Credit Foncier approved the loan were that it receive as security: (1) a mortgage of $300,000 at 8% interest registered against the land; (2) a chattel mortgage on the furniture and fixtures of the Hotel as collateral security; (3) Superstein's personal guarantee of payment. Superstein himself held assets well in excess of the amount of the mortgage, and it was clear that in the absence of his personal guarantee the loan would not have been made. All three securities were given in separate but contemporaneously executed documents.

By his guarantee Superstein covenanted that in consideration of the $300,000 loan to the Hotel Company, he would pay any arrears should the Company default. He stated that he had been instructed as to the meaning of section 34 (17-18) of *The Judicature Act* and:

> I DO HEREBY WAIVE all rights and benefits that I may have under and by virtue of the said provisions of *The Judicature Act* as amended [i.e. to February 8, 1961] and agree that the Mortgagee shall have the right to recover from me personally all losses . . . by reason of the non-payment of the mortgage moneys.

On the same page which contained this guarantee was a Notary Public's certificate in the form set out in the Schedules to *The Guarantees Acknowledgement Act*.[3] It was contended by Superstein, but not accepted by the courts, that this Act was not properly complied with.

The Hotel proved unprofitable and default was made in payment of the mortgage instalments. At trial before Kirby, J.,[4] Credit Foncier were granted an order declaring the entire amount secured was due and payable; an order fixing the period of redemption and in default foreclosure or sale of the land and chattels; and a personal judgment against Superstein for the amount owing, plus interest, being $338,056.85.

On appeal to the Supreme Court of Alberta,[5] the trial decision was upheld, but varied to provide that the personal liability should be only for the deficiency remaining after the realization on the other securities. Macdonald and McDermid, JJ., concurring, felt bound by *Krook* v. *Yewchuk*:[6]

> A vendor of an hotel property took security on the land and the chattels. The Supreme Court found that the provisions of *The Judicature Act* did not forbid

[2] S.A. 1964, c. 40.
[3] R.S.A. 1955, c. 136.
[4] *Supra*, at n. 1.
[5] *Ibid*.
[6] (1962), 34 D.L.R. (2d) 676 (S.C.C.). A discussion of this case is to be found in (1958), 3 Alta. L. Rev. 143.

a debtor to give security on property in addition to the mortgage on land, nor did they forbid the creditor from enforcing such security.

Further, it was held that the provisions of *The Judicature Act* have no application to the guarantor irrespective of his waiver. They refused to decide whether or not the Act could be validly waived.[7]

Kane, J. A. also followed the *Krook* case, but assumed for the purpose of his decision that no personal judgment could be obtained without such a waiver being executed, and unless section 34 (17) could be validly waived.[8]

Johnson and Porter, JJ. concurirng, dissented,[9] holding that a third party guarantor could contract out of the protection of section 34 (17), without deciding whether a mortgagor could do so. They distinguished *Krook* v. *Yewchuk* and followed the earlier case of *British American Oil Co.* v. *Ferguson*:[10]

A purchaser under an agreement for sale also signed a bond for the payment of the purchase price and the court read the two documents together as one agreement and held the action on the bond was not permitted by *The Judicature Act.*

They held that the guarantee was not enforceable unless the Act could be waived, and it could not, such waiver being contrary to public policy.

Thus, three of the five justices based their decisions in part on the question of waiver.

The appeal to the Supreme Court of Canada was dismissed.[11] Judson, J. delivered the judgment for the five justices who sat on the appeal. The court held that the mortgagee was merely enforcing a valid security on the chattels, as well as his security on the land; the former being outside the terms of section 34 (17). As to Superstein's defence that this section made enforcement of his guarantee void as an indirect method of imposing personal liability, it was held

. . . 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 mortgages to enforce the security. The enforcement of rights against a guarantor is another matter entirely.[12]

The dissenting judgments below were expressly rejected, and *Krook* v. *Yewchuck* followed. Judson, J. further held that Superstein's 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.[13]

In March 1964, a year before this judgment, and a few months before the decision of the Supreme Court of Alberta, Appellate Division, the Legislature amended *The Judicature Act*[14] by adding the following subsection to section 34:

(21) Any waiver or release hereafter given of the rights, benefits or protection given by subsections (17) and (18) is against public policy and void.

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7 (1965), 47 D.L.R. (2d) 508, 523.
8 *Id.*, at 543.
9 Support for their position is to be found in a casenote on the Supreme Court of Alberta decision in 23 Toronto Faculty L. Rev. 166.
10 [1951] 2 D.L.R. 37.
11 [1966] S.C.R. 441. Present were Cartwright, Martland, Hall, Spence and Judson, J.J.
12 *Id.*, at 446.
13 *Id.*, at 447.
14 An Act to amend *The Judicature Act*, S.A. 1964, c. 40.

Section 35 was struck out and the following substituted:

35. Clauses (h) and (i) of section 32 and subsections (17) to (21) of section 34 do not apply to an action, cause, matter or proceeding for the enforcement of any provision

(a) of an agreement for sale of land to a corporation, or

(b) of a mortgage given by a corporation.

This amendment resulted from the litigation in the *Superstein* case, although too late to be of assistance there. Moreover, in the light of the remarks of Macdonald, J. A.,[15] and Judson, J.[16] that the Act did not apply and it was therefore unnecessary to decide on the question of waiver, it seems that the case would have gone the same way even if the amendment had then been in force.

The purpose of the legislation is clearly to protect purchasers. The courts previously never permitted this protection to be abrogated directly or indirectly. A history of this legislation and a discussion of the Alberta practice of taking waivers, which existed prior to the *Krook* case, can be found elsewhere.[17] It is proposed here to consider the effects of these recent cases and the present legislation.

The *Superstein* case was cited in *Ross* v. *Harris*[18] which used the "magic of merger" to lessen the protection given by the Act.

Under an agreement for sale the greater part of the purchase price was paid in cash, and the remainder secured by a promissory note. After the vendor had transferred the property he brought an action on the note. The purchaser claimed that this was an action on the covenant for payment and forbidden by the Act. The Supreme Court of Alberta allowed the vendor to succeed on the grounds that the agreement for sale merged and no longer existed when the transfer was made, therefore an action could be brought on the promissory note.

Whether the doctrine of merger was properly applied is open to question;[19] its effect however is clear. In circumstances where there has been a transfer of property, the protection of the Act is ousted.

Not only does the Act fail to achieve its purpose, but it leaves the door open to unfortunate abuses, for instance in the following example.

A corporation wishes to re-zone and develop land for an apartment in a single-family residential district. It takes an agreement for sale on the lots it wants. Most homeowners are willing to sell at a profit to a commercial enterprize, but few homeowners want an apartment next door. The corporation, acting through a 'man of straw' to avoid the provisions of section 37(a), approaches the objectors and takes an agreement for sale on their property for an attractively large amount, but with a small down payment. Having thus silenced objection, the re-zoning is obtained. The corporation keeps the few lots it needs and quit-claims the rest. The rights of the disappointed vendors are restricted to the land by the provisions of section 34(17). As no action lies on the covenant for payment, all that the homeowners realized from what appeared to be a profitable sale is the small down payment

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15 *Supra*, at n. 7.

16 *Supra*, at n. 13.

17 E. A. D. McCuaig and D. McDonald, *Waiver of Statutory Rights and The Judicature Act*, (1960) 5 Alta. L. Rev. 439 (McCuaig and Co. acted for Credit Foncier in this action).

18 (1966), 55 D.L.R. (2d) 511. See casenote. (1959), 4 Alta. L. Rev. 469. The *Superstein* case was also affirmed in *Industrial Acceptance Corp'n. Ltd.* v. *Hepworth Motors Ltd. and Hepworth* (1965), 52 W.W.R. 55, as to compliance with *The Guarantees Acknowledgement Act.*

19 *Supra*, at n. 18.

less the cost of discharging any caveat placed against the property as a result of the agreement for sale.

The provisions of the Act, as now amended, do not apply where the purchaser or mortgagor is a corporation. This denies the protection to the large number of farmers and small businesses who are incorporated.

A common practice, relating to builder loans, is for a finance company to take the mortgages as security when lending to construction companies. When the transfer is made to an individual purchaser he may be required to assume the mortgage. As the mortgage was given by a corporation, it is outside the protection of the Act.

A perennial abuse not caught by the amendment occurs in dealings with second mortgages. A company holds a first mortgage which covers the property almost to the hilt and then takes a large second mortgage on the property. This second mortgage may then be sold to a *bona fide* purchaser. On foreclosure and sale he has very little security on his investment in the second mortgage.

The conclusion is that the Act does not accomplish its purpose. It does not apply in circumstances where its protection is deserved, and where it does apply it is easily circumvented.

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COMPANIES—COMPULSORY TRANSFER OF SHARES BY DISSENTING SHAREHOLDERS—S. 128 CANADA CORPORATIONS ACT R.S.C. 1952 C. 53—*RE CANADIAN BREWERIES LIMITED.*

The comparatively recent decision by F. T. Collins, J. in *Re Canadian Breweries Limited,*[1] does little to clarify the law respecting compulsory transfer of shares by dissenting shareholders as provided for in section 128 Canada Corporations Act. Section 128 provides as follows:

> (1) *Notice to dissenting shareholder.*—Where any contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to any other company (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected, or not less than nine-tenths of each class of shares affected, if more than one class of shares is affected, the transferee company may at any time within two months after the expiration of the said four months, give notice, in such manner as may be prescribed by the court in the province in which the head office of the transferor company is situate, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee company is, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the transferee company.
>
> (2) *Shares acquired by transferee company*—Where a notice has been so given and the court has not ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice was given, or, if an application to the court by the dissenting shareholder is then pending, after the application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company

1 [1964] Que. C.S. 600.