JAMES P. STEEDMAN (DEFENDANT).....APPELLANT;

AND

WILLIAM SPARKS AND WILLIAM A. McKAY, CARRYING ON BUSINESS AS BUILDING CONTRACTORS UNDER THE NAME, STYLE AND FIRM OF "SPARKS & McKAY (PLAINTIFFS)..... } RESPONDENTS;

AND

WILLIAM J. LORD, AND OTHERS.....(DEFENDANTS)

1929
*Nov. 5.
1930
*Feb. 26.

JAMES P. STEEDMAN (DEFENDANT).....APPELLANT;

AND

DOMINION LUMBER AND COAL COMPANY LIMITED (PLAINTIFF).. } RESPONDENT;

AND

WILLIAM J. LORD, AND OTHERS.....(DEFENDANTS)

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

Mechanics' liens—Mortgages—Priorities—Lien for erection of building—Land against which lien to be registered—Land "occupied thereby or enjoyed therewith"—Severance of land—Mechanics' Lien Act, R.S.O., 1927, c. 173, ss. 5, 7 (3)—Sale of land under power of sale in mortgage—Effect on lienholders' rights—Title of purchaser.

The *Mechanics' Lien Act*, R.S.O., 1927, c. 173, s. 5, gives to one who erects a building a lien on the owner's estate or interest in the "building and appurtenances and the land occupied thereby or enjoyed therewith." It is a question of fact in each case what land this includes, to be determined from all the circumstances. The fact that an owner has acquired land in one connected parcel by a single conveyance and has included it all in one or more mortgages does not necessarily imply that those entitled to liens in connection with a building erected on a part of it are entitled to place their liens on the whole parcel. In the case in question it was held that the land to be enjoyed with the building erected for the owner had been severed from the rest of the property by the owner and leased, to be occupied and enjoyed by the lessee, separate from the rest of the owner's property, and this leased land (and including, with regard to the lien, one half of the wall of an adjoining building, which wall was used as a wall

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

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of the new building) was the only land upon which the lien was acquired, and therefore the claim of lien, which was filed against it only, was properly so confined, the contention of appellant, second mortgagee of all the land and purchaser thereof at a sale made under power of sale in the first mortgage, that the lien should have been filed against all the land, being rejected.

It was further held that the judgment at trial sustaining another claim of lien, which had been filed against the whole property, but which was for materials furnished for construction on some part of the land other than where the building above mentioned was erected, should be set aside and that it should be referred back to the trial judge to ascertain the particular part or parts of the property upon which this claimant was entitled to a lien.

It was further held that the appellant, who, subsequent to registration of claims of lien and with notice thereof, purchased the land at a sale by the first mortgagee (whose mortgage was registered long prior to when the liens arose) under the power of sale in the mortgage, did not thereby acquire a title free from the liens.

APPEAL by the defendant Steedman from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing his appeal from the judgment of His Honour Judge Brandon, Deputy Judge of the County Court of Wentworth, in favour of the respondents Sparks & McKay, as lienholders, in one action, and in favour of the respondent Dominion Lumber & Coal Co. Ltd., as lienholder, in the other action. The two actions were mechanics' lien actions and were tried together.

The defendant Lord had owned certain land on the southwest corner of Barton and Ottawa streets in the city of Hamilton, Ontario. It was subject to three mortgages: (1) To the Canada Permanent Mortgage Corporation, dated August 10, 1925, for $80,000; (2) To one Richardson, trustee, dated August 18, 1925, for $30,000; (3) To one Mills, dated September 19, 1925, for $10,000.

By deed, not registered, dated May 6, 1926, Lord conveyed the land to the defendant the East End Markets, Ltd., subject to the mortgages.

The northerly part of the frontage on Ottawa street, which runs north and south, was occupied by a market building. To the south of this was a store, and to the south of the store some land upon which there was no building, but some excavation and foundations.

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On August 19, 1927, the East End Markets, Ltd., leased to the F. W. Woolworth Co., Ltd., the northerly part of the said vacant land (immediately south of the store) and agreed to erect, for the use of the lessee, a building upon the land leased. The East End Markets, Ltd., then contracted with the plaintiffs (respondents), Sparks & McKay, for the latter to erect the building.

Sparks & McKay commenced work early in October, 1927, and on December 12, 1927, registered a claim of lien against the land on which the new building was constructed, including the southerly half of the south wall of the building immediately to the north thereof, which wall, so far as it extended, was used to provide the northerly wall of the new building, the joists of the new building being inserted six inches into the southerly wall of the old building. (The land against which Sparks & McKay registered their lien is hereinafter referred to as the "Woolworth lot").

The second and third mortgages had been assigned to defendant (appellant) Steedman on March 25, 1927. The Canada Permanent Mortgage Corporation, the first mortgagee, had taken proceedings under the power of sale in its mortgage, offering the land for the first time in April, 1927, and the sale being postponed from time to time. On December 15, 1927, Steedman bought the land at the mortgage sale for $125,000.

The trial judge held that the lien of the respondents Sparks & McKay had been validly registered and ordered a sale. He found that when their lien arose the actual value of the Woolworth lot was $7,900. He therefore held that, under s. 7 (3) of the *Mechanics' Lien Act*, R.S.O., 1927, c. 173, the first mortgage had priority to the extent of $7,900, and that Sparks & McKay ranked next for the amount of their lien.

The appellant, Steedman, contended that the lien of the respondents, Sparks & McKay, was not validly registered against the Woolworth lot, and should have been registered against the whole of the land. This contention was rejected by the Appellate Division (1). He also contended that the lien had been extinguished by the sale

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under its power of sale by the first mortgagee, and that the lien claimants were relegated to the purchase money on that sale, in lieu of the land, and, since the purchase money was not sufficient to satisfy the claims of the first mortgagee and of the appellant, there was nothing to which the lien claimants could resort. This contention also was rejected by the Appellate Division (1) on grounds (adopted by reference by this Court in the judgment now reported) which were stated as follows:

> It is argued that the sale by the Canada Permanent under the mortgage has had the effect of preventing a sale of the property in these proceedings. I am unable to follow this contention. Of course, if such is the law, we should have the anomaly of a statutory lien wiped out by acts over which the lienor has no control. If such a sale could under any circumstances have any effect, it certainly could not in a case in which, as here, the purchaser bought with full statutory notice of the liens encumbering the property.

The respondent, Dominion Lumber & Coal Co. Ltd., on January 13, 1927, filed a claim of lien against the whole land, for $367.46, the price of materials used for some part or parts of the northerly buildings on the land, but none of which, of course, went into the Woolworth building, which was erected later. The trial judge fixed the value of all the said land when this lien arose at $160,000, directed a sale, and found that the claims of the Canada Permanent Mortgage Corporation and Steedman, as mortgagees, amounted to $92,796.50 and $37,583.40 respectively, and that they should rank in priority to the lien (of the Dominion Lumber & Coal Co. Ltd.) in respect of $84,796.50 and $35,329 respectively, and that, subject to said priorities, the lien should rank in priority to any other claims of the said mortgagees.

The appellant contended, similarly as in the other action, that the effect of the sale under the power of sale in the first mortgage was to defeat the lien and to relegate the lien claimant to the purchase money, and since this was insufficient to satisfy the mortgagees' prior claims (which, he contended, should have been allowed at larger sums) and since the trial judge had found the value of the mortgaged lands to be $160,000 at the time when the first lien arose, the lien claimant was entitled to no relief as against the mortgagees.

(1) (1929) 63 Ont. L.R. 393, at p. 397.

There were also certain questions in regard to the amounts and priorities allowed to the mortgagees, as follows:

The appellant alleged error in the trial judge's finding as to the time of advancement of an amount of $8,000 by the first mortgagee, and that the allowance of the latter's priority over the lien should have been larger.

The trial judge found that the second mortgagee, Richardson, was a trustee for certain creditors of Lord; that, although the face value of the mortgage was $30,000, it was only security for $28,183.59; that the appellant, on the assignment of the mortgage to him, paid only 70% of this latter amount, the creditors receiving only 70% of their respective claims; and he held that the appellant was only entitled to be credited to the extent of the amount actually advanced, viz., 70% of $28,183.59, plus interest. The appellant contended that he was entitled to hold the second mortgage for the full amount for which the mortgage was originally security.

The trial judge found that the third mortgage, which represented only an actual advance of $8,000, was assigned to the appellant for its full face value, without knowledge by the appellant that less than $10,000 had been advanced on it. He held, however, that the third mortgagee had only priority for $8,000, the amount advanced, and, as the assignment to appellant was after the registration of the Dominion Lumber & Coal Co.'s lien, the appellant could be in no higher position in regard to that lien. The appellant claimed that he was entitled to priority, in respect of the third mortgage, to the full sum of $10,000 and interest.

G. Lynch-Staunton K.C. and *H. A. F. Boyde* for the appellant.

C. C. Robinson K.C. and *E. G. Binkley* for the respondents Sparks & McKay.

H. E. B. Coyne for the respondent Dominion Lumber & Coal Co. Ltd.

The judgment of the court was delivered by

SMITH J.—The defendant Lord was the owner of a property in the city of Hamilton, bounded on the north by Barton street and on the east by Ottawa street. The northerly

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part of the frontage on Ottawa street was occupied by the Market Building, to the south of which was a store, and to the south of that store there was no building, but some excavation and foundations.

There were three mortgages on the property prior to the registration of any lien, namely:

(1) To Canada Permanent Mortgage Corporation, dated 10th August, 1925, for $80,000;

(2) to Sinclair G. Richardson, dated 18th August, 1925, for $30,000;

(3) to William R. Mills, dated 19th September, 1925, for $10,000.

Lord conveyed these lands, subject to the mortgages, to the East End Markets Limited, but the conveyance has not been registered. On the 19th of August, 1927, the East End Markets Limited leased to the F. W. Woolworth Co. Ltd., for ten years, the northerly 32 feet of the vacant portion of their lands referred to, lying immediately south of the line of the southerly wall of the store building mentioned, and, by the terms of the lease, agreed to erect a building upon the land so leased, for the use of the lessee, and entered into a contract with the plaintiffs Sparks & McKay for the erection of such building, pursuant to the terms of the lease.

The plaintiffs Sparks & McKay registered a lien on this 32 feet for the amount owing to them in connection with the construction of this building, in pursuance of their contract.

The building occupied the full width of the 32 feet except six inches south of the southerly wall. The pre-existing store was made use of to provide the northerly wall of the new building, as far as it extended, the joists of the new building being inserted six inches into the southerly wall of the old building. The new building on this 32 feet extended westerly beyond the older store to the north of it, but not all the way to the alleyway at the west, which is the westerly boundary of the lands described.

The appellant attacked the validity of this lien of the plaintiffs Sparks & McKay, on the ground that it should have been registered against the whole mortgaged prop-

erty, whereas it is limited to the 32 feet on which the building was erected.

The learned deputy judge seems to have thought that these plaintiffs acquired a lien on the whole mortgaged property, but held that they had the right to sever the 32 feet from the whole and register their lien against that part only. In the Appellate Division the opinion is expressed that,

> the lien attaches in whole and in part to all parts of the property liable to it so that every cent is a lien on every inch; and that he may abandon his lien on any part without interfering with his right in respect of the rest or any part of it.

It is, however, immediately pointed out that it is unnecessary to decide that point. I agree that there is no such necessity, and refrain from expressing an opinion in reference to it. It is manifest, however, that grave complications as to the rights, not only of the owner but of encumbrancers and other lienholders, might arise in connection with enforcement of liens by sale of the property if the opinion alluded to is correct. Such complications would arise, for example, in a supposed extreme case where an owner, having mortgaged his building lot with a view to erecting a dwelling house on it, finds at the completion of the building that a number of liens have been registered against the whole lot and some against only a part of the lot, including only part of the house.

The statute gives a lien on the estate of the owner, in the building and appurtenances and the land occupied thereby or enjoyed therewith, and it is a question of fact in each case what land this includes, to be determined from all the circumstances. The fact that an owner has acquired land in one connected parcel by a single conveyance and has included it all in one or more mortgages does not necessarily imply that those entitled to liens in connection with a building erected on a part of it are entitled to place their liens on the whole parcel. Here, as pointed out in the reasons of the Appellate Division, the land to be enjoyed with the building that was erected had been severed from the rest of the property by the owner and leased to the F. W. Woolworth Co. Ltd., to be occupied and enjoyed by them, separate from the rest of the owner's property, and was, in my opinion, the only land upon which

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these plaintiffs and others having claims in connection with the erection of the building acquired liens.

The appellant, however, further contends that by his purchase subsequent to the registration of the liens at the mortgage sale under the first mortgage, he acquired a title free from these liens. This contention also fails, upon the grounds set out in the reasons for judgment in the Appellate Division (1).

The deputy judge therefore proceeded properly in ascertaining and fixing the value of the land described in the lien of the plaintiffs Sparks & McKay at the time the first lien arose. Having fixed this value at $7,900, he has properly held that to that extent the mortgages have priority over the liens, and that the lienholders have priority over the mortgagees as to the surplus that may be realized from the sale of that land with the building; and has properly ordered such sale in default of payment into court of the amount found owing. The only lien found under this judgment is that of Sparks & McKay; but by the judgment in the other case he finds the plaintiff in that action also entitled to a lien on this property.

The Dominion Lumber & Coal Co., Ltd., registered a lien against the whole mortgaged property and brought a separate action to enforce the same. The formal judgment in that action declares that this plaintiff company is entitled to a lien on this whole property for the sum of $450.83, and finds that The Canada Permanent Mortgage Corporation ranks in priority to this lienholder in respect of the sum of $84,796.50, and that the appellant Steedman ranks in priority to the lienholder in respect of the sum of $35,329, and that the lienholders have priority over the mortgages as to the balance of purchase money to be realized.

We have, then, as a result of the two judgments, a direction for the sale of the Woolworth lot and building and a direction to apply the whole proceeds on the mortgages and on Sparks & McKay's lien, according to the priorities already referred to, and without reference to any lien of the Dominion Lumber & Coal Co. Ltd.; and then we have, in the other action, a judgment for sale of this same land as

(1) (1929) 63 Ont. L.R. 393.

part of the whole, and a direction that the whole amount of the purchase money be paid to the mortgagees and to the Dominion Lumber & Coal Co. Ltd., without any reference to the lien of Sparks & McKay. It is evident that both of these judgments cannot be carried out, and it seems equally evident that the Dominion Lumber & Coal Co., Ltd., was never entitled to any lien on the Woolworth lot and building, because the evidence establishes that no part of the material in that company's account went into the construction of that building. The judgment therefore, in the action in which the Dominion Lumber & Coal Co., Ltd., is plaintiff, must be set aside, and it must be referred back to the deputy judge to ascertain the particular part or parts of the mortgaged property upon which the plaintiff in that action is entitled to a lien.

According to the evidence of Lord, these materials went into the East End Market building. If that is so, as indicated above, the lien should be confined to the estate of the owner in that building and appurtenances and the land occupied thereby or enjoyed therewith; and it will be for the deputy judge to ascertain what that includes. Having decided that question, he should ascertain, as in the other case, the value of the portion of the property to which he finds the lien attaches at the time the lien arose, and fix the priorities on the same principle as in the other case. One would think, however, that the plaintiff would regard it as rather a hopeless task to establish that the sale value of this market building and the lands enjoyed with it was much increased by the $367 worth of lumber that went into it, probably for repairs. Apparently this plaintiff's hope was to share in the increased value that arose from the Woolworth building, to which he had contributed nothing.

The deputy judge, it seems, made a mistake in holding that $8,000 of the Canada Permanent Mortgage Corporation mortgage moneys was not advanced till after the registration of the liens, and will make the necessary correction accordingly.

There is no evidence on which the finding of the deputy judge that the appellant is entitled under the second mortgage only to the amount he paid for it, can be disturbed. In the evidence it is sometimes stated that the mortgage

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was given to secure creditors and in other places that it was for subscriptions. Whether the appellant was buying the full rights of the creditors or subscribers from the trustee and settling with them at a discount where he could, or the creditors were reducing their claims and thus reducing the mortgage, so that the appellant was buying the mortgage thus reduced, does not appear. The mortgage on its face was for $30,000, but the appellant knew that this was more than the real amount.

Mills took the third mortgage on the property for $10,000, but advanced only $8,000, and, after the registration of the liens, assigned it to the appellant for the full face amount. The appellant had no notice that the full amount had not been advanced, and acted in good faith. The answer to the question raised as to the respective rights of the mortgagees and lienholders under these circumstances is that the mortgage has priority over the liens only on the basis of the amount advanced prior to the first lien, but that, subject to this, the appellant is entitled to the full amount against the mortgagor and the land.

Both cases are referred back to the deputy judge, to be proceeded with as indicated above.

The appellant will pay the costs of this appeal of the respondents Sparks & McKay in the action brought by them.

In the other case, the plaintiffs claimed a lien on the whole property, and the judgment is set aside because the lien does not extend to the whole property. The appellant, however, contended here that this plaintiff had properly registered its lien on the whole property, and attacked it on the ground that he had, by his purchase under the first mortgage, acquired title free of all liens, and that in any case he had priority for the full amount of the mortgages; and moreover, that in any event there was no power to order a sale of the property. He has failed on all these contentions, but has succeeded on his contention that there cannot be two sales under separate judgments of the same property.

There should therefore be no costs of either appeal in the action of the Dominion Lumber & Coal Co. Ltd.

Steedman v. Sparks et al.: Appeal dismissed with costs.

Steedman v. Dominion Lumber & Coal Co. Ltd.: Appeal allowed; judgment at trial set aside, and matter referred back to trial judge to proceed as directed herein.

Solicitors for the appellant: *Bruce, Counsell & Boyde.*

Solicitors for the respondents, Sparks & McKay: *Langs, Binkley & Morwick.*

Solicitors for the respondent, Dominion Lumber & Coal Co. Ltd.: *Gibson, Levy, Inch & Coyne.*

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.