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*Mar. 21, 22, 23, 24.
*June 28.

*Oct. 3.
*Dec. 22.

IN THE MATTER OF THE MECHANICS' LIEN ACT, ONTARIO

THE HONOURABLE FRANK CARREL (MORTGAGEE) ..... } APPELLANT;

AND

ALBERT A. HART (LIEN CLAIMANT).. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Mortgages—Priority as between lien and mortgage—Priority as between lien and mortgagee's expenditure in completing building—Lien chargeable as general lien against several buildings—Mechanics' Lien Act, R.S.O., 1927, c. 173, ss. 5, 32 (2), 7 (3), 13 (1).

Respondent, who had a contract "to do the brickwork and supply the bricks for five" adjoining detached duplex houses at a price of "$4,080 per building or a total of $20,400 for the complete contract," performed it and registered a lien, under the *Mechanics' Lien Act*, R.S.O., 1927, c. 173, for the balance due him. Subsequently, one of the houses, hereinafter called the "corner house," being in an unfinished state, appellant, who held a mortgage, originally made to one R., on the property, started foreclosure proceedings and, under a writ of possession, went into possession of it and completed it, a covenant in his mortgage entitling him to complete it and to add the cost thereof to his mortgage debt. A question arose as to priority between his cost of completion and respondent's lien. Also a question arose as to priority between respondent's lien and a certain mortgage on the corner house lot, made and registered prior to commencement of the building, to one W., assigned to one A., and, after the trial herein, assigned to appellant. This mortgage, while held by A., was, on the making of the mortgage to R. above mentioned, postponed, under an agreement by A., to the mortgage to R., which mortgage to R. (assigned to appellant) was that on which appellant, as aforesaid, took proceedings and went into possession of, and completed, the corner house.

Held (1) On construction of respondent's contract, as a whole, it showed the intention of the parties thereto to treat it as one entire contract covering all the buildings.

(2) Respondent's lien was chargeable against all the land, irrespective of the work and materials which went into each building. In applying the Act the court may and should have regard to the contract under which the work or materials claimed for were provided; and where the parties by their contract have treated several buildings upon contiguous lots belonging to the same owner as upon one property, the lien claimant is entitled to have the lien applied as a general lien upon all the land. However difficult it may be to find a satisfactory basis for this principle in the words of the Act itself (i.e., in s. 5, the controlling section, which creates the right of lien; if the lien were for supply of material only, the right to maintain it as a general lien upon all the buildings

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

would exist under s. 32 (2)), the principle has been so long and so generally recognized that it must now be taken as settled law. (*Ontario Lime Assn.* v. *Grimwood,* 22 Ont. L.R. 17; *Polson* v. *Thomson,* 29 D.L.R. 395, at 401, and other cases, cited and discussed).

(3) Respondent's lien (extending to the amount owing him for work and material on all the buildings) had priority over appellant's claim for cost of said completion. The intention of the Act, as disclosed by ss. 7 (3) and 13 (1), was clearly to limit the security of a registered mortgage, as against lien claims, to the actual value of the property as at the time the first lien arose, and to exclude from the operation of that security all payments and advances made thereunder by the mortgagee after such lien claims have been registered. And the payments and advances so excluded would include the cost of completion in question.

(4) Respondent, though not having brought an action to enforce his own lien, could, to hold his lien in its priority, rely upon the statement of claim of another lien claimant whose claim was dismissed.

(5) The said mortgage to W., assigned to A. and later to appellant, had priority over respondent's lien; such priority was not lost by the said agreement of postponement of it to the mortgage to R. (On this point, the judgment of the Court of Appeal was reversed; Crocket J. dissenting).

Except as above stated, the judgment of the Court of Appeal, Ont., [1932] O.R. 617, was affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario (1), in so far as it allowed the present respondent's claim for a lien under the *Mechanics' Lien Act,* R.S.O. 1927, c. 173, and held that such lien had priority over moneys expended by the present appellant (a mortgagee) in the completion of a certain building, and in so far as (by its formal judgment, as settled) it gave to the said lien priority over a certain mortgage, formerly held by one Albrechtsen, and acquired, since the commencement of the action, by the present appellant.

The material facts of the case are sufficiently stated in the judgments now reported.

The judgment of this Court was first delivered on June 28, 1933, and it was directed that the appeal be dismissed with costs; but the reasons for judgment did not deal with one of the matters in issue (the question of priority between the respondent's lien and the said mortgage formerly held by Albrechtsen) and this matter was later brought up by way of a motion to vary the judgment, and judgment on this motion was delivered on December 22, 1933, granting the motion and varying the judgment so that in respect

(1) Sub. nom. *Boake* v. *Guild,* [1932] O.R. 617; [1932] 4 D.L.R. 217.

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of the issue raised by the motion the appeal was allowed; the appellant to have half of his costs of appeal to this Court. (Crocket J. dissented on the question dealt with on the motion).

The present report gives in the following order: the reasons for judgment as first delivered, the statement of the motion, and the reasons for judgment (on the further issue) delivered on the motion.

S. A. Hayden and *Woods Walker* for the appellant.

R. Kellock and *H. P. Edge* for the respondent.

In the judgment first delivered, reasons were delivered by Smith J. and by Crocket J.; the Chief Justice and Rinfret and Lamont JJ. concurring with each.

SMITH, J. (concurred in by Duff C.J. and Rinfret and Lamont JJ.)—The respondent's lien is for a balance owing under a contract by respondent to do the brickwork and supply the bricks for five four-family duplex houses. The appellant had advanced, on a first mortgage of the corner duplex numbered 2 and 4, the sum of $6,500, and also held a third mortgage on the whole five duplexes for $10,511.53, for which amounts it is admitted the appellant has priority over the lien of the respondent.

The owner ran short of funds before the buildings were completed, and further work was abandoned. Duplex 2 and 4 being, as winter approached, in such an incomplete state, including the lack of any heating plant, that it was in danger of being greatly damaged during winter if left in this uncompleted state, and being also incapable of producing revenue, the appellant completed the building at a cost of $12,500. Before this expenditure, the respondent's lien, which was subject to the mortgages to the amount mentioned, was practically worthless.

The judgment appealed from holds that the respondent's lien attaches to the value added to the building by appellant's expenditure in priority to the portion of appellant's mortgage represented by this expenditure, which was expressly authorized in such event by the terms of the mortgage. Respondent's priority over this part of the mortgage moneys extends not only to the amount owing to him for work done and material supplied for this duplex 2 and 4,

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but to the amount owing him for work done and material supplied on the other buildings as well. A more inequitable result, I think, it would be difficult to conceive. It is, however, a result brought about by express statutory enactment, coupled with the appellant's failure to be guided by the provisions of the statute.

Long before commencing work for completion of the building, the appellant had brought an action for foreclosure of his mortgages, by which he could have obtained immediate possession. In this action the lienholders could have been made parties as subsequent encumbrancers, and on proper proof of danger of destruction of his security by delay, the court would have given him protection, perhaps by giving him immediate foreclosure or sale. He saw fit, however, to take the remedy into his own hands, disregarding the terms of the statute, with the result that his expenditure enures to the benefit of the respondent, instead of to himself. It is with regret that I find myself forced to the conclusion that the judgment giving the respondent the benefit of the appellant's expenditure of $12,500 is in accordance with the provisions of the statute. I can find no ground for differing from the reasoning of Mr. Justice Grant in the Court of Appeal and from that of my brother Crocket.

I therefore agree that the appeal must be dismissed with costs.

CROCKET, J. (concurred in by Duff C.J. and Rinfret and Lamont JJ.)—This appeal involves the question of the validity of a contractor's lien purporting to be registered by the respondent under the provisions of the *Mechanics' Lien Act*, c. 173, R.S.O., 1927, for work and materials provided in the construction of a row of 5 four-family detached duplex houses in the city of Toronto, and also the question of its priority in respect of an expenditure of approximately $12,000 made by the appellant, to complete one of the houses, after going into possession of the same as mortgagee.

The work and materials claimed for were done and furnished by Hart under a contract entered into by him in September, 1929, with one Guild, a builder, whereby he agreed to do the brick work and supply the brick on and

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for the five houses at a price of "$4,080 per building or a total of $20,400 for the complete contract," as a letter of September 15 confirming the contract stated it, exclusive of brick and labour for mantels and garages, which was left to be arranged by the architect.

Guild's wife had a few weeks before purchased from one Watt and taken in her name the deed of the land on which it was proposed to erect the five houses. It was situated on the north side of Castle View avenue, and included 31 feet 9 inches of lot No. 3, and the whole of lots 4, 5, 6, 7 and 8, running easterly to Spadina road, having a total frontage of 253 feet 9 inches on Castle View avenue, and a uniform depth of approximately 106 feet. For the purpose of the duplexes building scheme it seems that the land was subdivided into five new lots, the side-lines of which overlapped the side-lines of the original lots, and that the most easterly of the new lots, with which the appellant's mortgages are here particularly concerned, and upon which the duplex, 2-4, was built, comprised 7 feet 9 inches of the original lot No. 7 and the whole of lot No. 8, with a right of way over a driveway between it and the adjoining lot on the west.

Mrs. Guild, having paid part of the purchase price of the land in cash, gave Watt five separate mortgages for $3,612.50 each, presumably one on each of the five lots as subdivided for the building scheme. Four of these mortgages were transferred to one Arthur, and the fifth, covering the corner or most easterly lot, was assigned to one Albrechtsen. Building loans were arranged on mortgages on the four westerly houses, two with the Canada Life Assurance Company for $22,000 each, and two with Confederation Life Assurance Association for $18,000 each, Arthur waiving in favour of these his four $3,612.50 mortgages. On the corner lot Mrs. Guild gave a second mortgage to one Alberta Gibbons for $6,500, which was transferred subsequently to the appellant.

In October the Guilds procured the incorporation of City Duplexes Limited, which took over all these properties from Mrs. Guild and assumed all outstanding obligations thereon, Guild continuing, however, as before to manage the undertaking. Finding the moneys available under the mortgages already mentioned insufficient to enable it to meet the

rapidly increasing claims, City Duplexes Limited, on February 25, 1930, when all five houses were in various stages of construction—the four westerly more nearly completed than the most easterly building, 2-4,—executed a mortgage covering the latter property as well as the four adjoining lots to one Florence Ready to secure a further loan of $10,000. The appellant shortly afterwards acquired this mortgage, Albrechtsen waiving in its favour his $3,612.50 mortgage on this lot and building.

Hart went to work immediately upon entering into his brick contract, which called for its completion on or before February 1, 1930, starting with the most westerly building and proceeding with the others in their order, west to east. There were some delays, occasioned by the weather, and others which it appears were chiefly caused by the difficulties which the Guilds and City Duplexes Limited were having in financing the undertaking, with the result that about the middle of May, although the four westerly houses were substantially completed, and Hart had finished the brickwork under his contract on the house 2-4, there remained a considerable amount of work to be done in the latter in order to complete it. Several liens had been registered against the whole property and at this juncture negotiations took place between the different mortgagees, lien claimants and other creditors with a view to securing the outstanding indebtedness to the various creditors. These negotiations proved abortive on account of Arthur, who held the second mortgages on the four westerly lots, refusing to enter into the arrangement which was proposed.

Arthur subsequently, on June 11, went into possession of these houses as mortgagee and the same day Hart registered his lien against the estate of Mr. and Mrs. Guild and of Watt, Albrechtsen, Arthur, City Duplexes Limited and Mortgage Discount Limited, in the entire parcel of land which Mrs. Guild had purchased from Watt and which the lien claim described as the easterly 31 feet 9 inches of lot No. 3 and lots Nos. 4, 5, 6, 7 and 8. It claimed a balance due of $12,200 for work done on brick contract for City Duplexes Limited and R T. Guild on or before May 15, 1930.

At that time the $6,500 secured by the Gibbons mortgage had been fully advanced and approximately $8,500

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of the $10,000 secured by the Ready mortgage, both of which were now held by the appellant. The latter started foreclosure proceedings, and about the same time, it appears, City Duplexes Limited went into bankruptcy. Negotiations were then entered into by some of the lien claimants with the appellant's solicitor, with a view to the completion of the corner building, 2-4. These negotiations also fell through, and on August 12, 1930, the appellant went into possession of this house under a writ of possession obtained in his foreclosure action. He proceeded to complete the building and expended approximately $12,000 for that purpose, notwithstanding the prior registration of Hart's and other liens. It is in respect only of this $12,000 expenditure and of Hart's lien that the question of priority arises.

On the trial of the respondent's and several other lien claims in a consolidated action before the Assistant Master of the Supreme Court, under the provisions of the *Mechanics' Lien Act,* the appellant relied upon four main objections: first, that the respondent's lien was not registered within time; second, that in the course of the negotiations referred to he had waived his lien or estopped himself by his conduct in connection therewith from relying upon it as against the appellant; third, that the lien was not chargeable as a general lien against all or any of the buildings or lots without proof of the particular balances which were or may have been due the claimant in respect of each separate house; and, fourth, that, in any event, the lien was subject to the expenditure which the appellant had made for the completion of the house, 2-4, after he had gone into possession in exercise of his rights as assignee of the Ready mortgage.

The Master found against the first two objections, but disallowed the lien on the ground that the work and materials were not done and furnished under an entire contract, within the meaning of sec. 32, subsec. 2, of the Act, and were therefore not chargeable against all or any of the buildings without proof of the balances which were due in respect of each of the five buildings.

The respondent appealed to the Court of Appeal, which sustained the lien and held that it was entitled to priority

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over the moneys expended by the present appellant for the completion of the house, 2-4, as mortgagee in possession.

The same grounds which were taken before the Master and the Court of Appeal were argued before this Court.

As to the lien not being registered within time, the Master found that Hart performed work under his contract on the house, 14-16, on May 14, 1930, and on the house, 2-4, on May 17, within thirty days of the registration of his lien. This finding, involving as it did, a consideration of the good faith of the claimant, is a finding upon what is peculiarly a question of fact, which we think, in the circumstances, should be regarded as conclusive.

The second ground was disposed of during the argument, the Court stating its opinion that there was no evidence, either of a waiver of the lien on the part of the respondent, or of an estoppel against him in connection with the futile negotiations above referred to.

The third ground involves two questions: first, whether the contract under which Hart provided the work and materials was an entire contract for a gross price for the brick and brick work for all the five houses; and, second, if it were such a contract, whether the lien was maintainable for the general balance due thereunder upon all or any of the houses and lots without proof of the particular balances which were due in respect of the different buildings.

We think that the Court of Appeal rightly construed the contract between Guild and Hart, as evidenced by the letter of September 15, 1929, as a single contract for the brickwork and the supply of bricks upon and for all the five buildings at a total price of $20,400, exclusive of brick or labour for mantels and garages, which were to be dealt with as extras and arranged by the architect.

The appellant's counsel, in support of his contention that the contract was severable in respect of the five houses, mainly relied upon the inclusion in the price sentence of the figures and words "$4,080 per building" and the following passage:—

* * * and the terms of payment will be as I receive the second draw on the Permanent Trust mortgages which are being placed on the different buildings as they are erected.

together with the fact that the mortgages which were arranged for building loans with Canada Life Assurance

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Company and Confederation Life Assurance Association were separate mortgages on the four westerly buildings.

It will be observed that the figures and words "$4,080 per building," in the price sentence are immediately followed by the words and figures "or a total of $20,400 *for the complete contract*"; also, that Hart's contract is expressly stated in the first sentence of the letter to be a contract "to do the brick work and supply the bricks for 5 four-family duplexes," and that Hart also undertakes to have "all brick work completed on said contract" on or before February 1, 1930. The letter clearly shews, in my opinion, that the intention of the parties was to treat the contract as one entire contract covering all five buildings.

Was, then, Hart's lien for work and material provided under such a contract upon and for all five houses, a lien which was chargeable under the *Mechanics' Lien Act*, against all or any of the buildings, irrespective of the work and materials which went into each?

There can be no doubt that if the lien were for the supply of material only, Hart would have the right under sec. 32, subsec. 2, of the present Act to have his lien maintained as a general lien upon all the buildings. This subsection, however, is distinctly limited to entire contracts for the supply of material only, and cannot in itself be relied upon to support a lien claimed under an entire contract for the performance of work as well as the supply of material. The respondent does not pretend to rely upon this subsection, but claims that sec. 5 of the Act—the controlling section, which creates the right of lien—itself contemplates a general or joint lien in such a case as well as a separate lien enforceable against the particular property in which the work or material claimed for have been incorporated in cases where the work is done or the materials are furnished under separate contracts with different owners.

Omitting words that have no bearing on the question under consideration, this section reads as follows:—

5. Unless he signs an express agreement to the contrary * * * any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, * * * of any erection, building, * * *, or the appurtenances to any of them for any owner, contractor, or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the estate or interest of the owner in the erection, building, * * *, and appurten-

ances and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used.

There is no trouble in construing this section as applicable to the construction of a single building, or to any number of single buildings as separate undertakings, but when one endeavours to apply it to the construction of several separate buildings under a single contract and in such circumstances as we have in this case, I confess that I cannot find any very satisfactory basis for doing so in the language of the enactment itself.

It is only when one looks beyond the section to the contract between the parties that any support can be found for the proposition contended for. Yet there is no reference in the section to any other agreement than that mentioned in the first line, viz: the agreement by which the person to whom the lien is given may waive it. It is true that there can be no liability on the part of anyone for the price of work or materials without a contract, either express or implied, and that so far as the estate or interest of the owner is concerned, its liability to the lien depends, under clause (*c*) of the interpretation section of the Act, upon the work or materials being done or furnished at his request, though, once this liability attaches, it passes to all persons whose rights are subsequently acquired through him. It is also true that on the trial of a lien claim against the estate of the owner there must be proof of a request on the part of the owner sought to be charged. To this extent it is necessary for the Master or Judge trying the claim to look to the contract between the parties, but whether he is to look to it for the purpose of determining whether, if there be the necessary request to create the lien, the lien is to be applied as a severable or a general lien, is the problem that presents the real difficulty.

No one, I think, can seriously challenge the proposition that the form and effect of the lien must be found in the statute itself by which the lien is created or the proposition that the lien is enforceable only against such property, and only in such manner and under such limitations as the statute provides. The intention of the parties, as evidenced by the contract between them, clearly cannot change the intent of the Act and cannot, in my opinion, be considered for the purpose of ascertaining the form and effect

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of the lien unless the Act itself makes the form and effect of the lien depend upon the form and effect of the contract. In this view the crucial question is: Does the section give a lien, the character and scope of which is determinable according to the form of the contract under which the work or materials are provided? Whether it does or does not do so, there is an impressive line of United States cases, notably in New York and Massachusetts, in which under similar statutes courts have brought lien claims in circumstances similar to those obtaining in the case at bar within the terms of the statute creating the lien by reference to the form and terms of the contracts between the parties. The trend of judicial opinion in Canada for many years past has undoubtedly been to follow these United States decisions in this regard. It may be said, too, that in both countries the courts have shewn a growing tendency to turn away from the proposition that a statute creating such a right of lien must be strictly construed, whether the provisions in question relate to the creation of the lien or to its enforcement.

Although it was the decision of a single judge (Middleton J.) on a chambers motion to vacate a lien, *Ontario Lime Association* v. *Grimwood* (1) appears to be the leading Canadian case on the question of the application of a general lien to several separate buildings belonging to the same owner for material furnished under an entire contract. That decision has not only been uniformly followed in the courts of Ontario, but the principle as there enunciated was embodied in the revision of the *Mechanics' Lien Act* thirteen years afterwards in the precise language used by that learned judge in his reasons for judgment, and is found in sec. 32, subsec. 2, of the present Act, already referred to. The case is quoted in the great majority of mechanics' lien cases which have since come before the courts of the other provinces. The decision was unanimously approved by the Court of Appeal of Manitoba in *Polson* v. *Thomson* (2), in 1916, and has nowhere, as far as I can discover, been disapproved or questioned.

The principle, as it was put by Middleton J., was that where one owner enters into an entire contract for the supply of material to be used upon several buildings, the

(1) (1910) 22 Ont. L.R. 17. (2) 29 D.L.R. 395, at 401.

claimant can ask to have his lien follow the form of his contract and that it be for an entire sum upon all the buildings, and that if the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building the onus is upon him to shew the facts which must be peculiarly within his own knowledge. "From the nature of the contract," His Lordship held, "the onus is shifted." Manifestly the decision proceeded from a consideration of the contract between the parties as well as of the language of the section itself.

In his reasons the learned judge referred to three United States cases, viz: *Livingston* v. *Miller* (1); *Wall* v. *Robinson* (2); and *Lewis* v. *Saylors* (3), in all of which the same principle was applied. *Livingston* v. *Miller* (1) was a decision of the Supreme Court of New York, expressly holding that a mechanics' lien for materials furnished for the erection of several houses for a gross sum attached to all the buildings. In *Wall* v. *Robinson* (2), several buildings were built on one parcel of land, consisting, as here, of several lots, upon which the claimant performed labour under an entire contract for an entire price. The Massachusetts court held that the case was "within the purpose of the statute and the intention of the Legislature" because "the parties by their contract have connected the several buildings and treated them as one estate." The reason stated by the Massachusetts court seems to be the only logical ground upon which a general lien upon several separate buildings can be harmonized with the language of sec. 5 of the Ontario Act, and I have no doubt that Middleton J., in maintaining the lien, as he did, in the *Ontario Lime* case (4) as a general lien upon four separate houses, treated them as one property for the same reason.

The only difference between the language of sec. 5 of the present Act, as I have quoted it, and the language of sec. 6 of the Act of 1910, which Middleton, J., was required to construe, together with sec. 8, subsec. 1, is that the words "the estate or interest of the owner in," did not appear in

(1) (1863) 16 Abbott's P.R., 371.
(2) (1874) 115 Mass., 429.
(3) (1887) 73 Iowa, 504.
(4) (1910) 22 Ont. L.R. 17.

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sec. 6. They were contained, however, in sec. 8, subsec. 1, of the former statute which read:—

> The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6.

so that sec. 6 and subsec. 1 of sec. 8 of the former Act were precisely identical in their effect with sec. 5 of the present Act.

It is true that the contract in *Ontario Lime Association* v. *Grimwood* (1) was a contract for materials only and that the principle affirmed by the decision is consequently confined to entire contracts for materials. The basis as well as the effect of the decision, however, clearly was that the words of the controlling section of the statute are to be interpreted in the light of the contract between the parties and that where the parties have, by entering into an entire contract, treated several buildings and lots as one property for the purpose of such contract, the courts may treat them likewise. If this be a correct exposition of the law, then manifestly the entire contract principle must apply quite as fully to entire contracts for the performance of labour or for the performance of labour and the furnishing of material, as to entire contracts for the supply of material only. The suggestion of greater difficulty on the part of the material dealer in identifying his material with the different buildings than on the part of one who contracts to provide labour in proving the value of the labour performed upon each house, does not touch the root of the principle of the decision. In *Polson* v. *Thomson* (2), in which, as already mentioned, the Manitoba Court of Appeal in 1916 expressly approved the decision of Middleton, J., the lien was for work, as it was also in the Massachusetts case of *Wall* v. *Robinson* (3) above cited, in which the entire contract principle was acted upon as far back as 1874.

The late Mr. Justice Grant, who wrote the reasons for the judgment now on appeal, refers to a case of *Morris* v. *Tharle* (4), in which the former Chancery Division of the Supreme Court of Ontario sustained a lien which seems to

(1) (1910) 22 Ont. L.R. 17.
(2) 29 D.L.R. 395.
(3) 115 Mass. 429.
(4) (1893) 24 Ont. R. 159.

have been registered against two separate buildings for materials supplied for both of them. The only question argued in that case was whether the plaintiff, who had supplied the contractor with a variety of materials on a number of separate orders, was entitled to claim as upon one general account and thus avail himself of the delivery of the material upon the last order within 30 days of the registration of his lien to bring his whole account within the lien. The evidence shewed that before any of the materials were ordered the contractor had promised the plaintiff that he would get from him all material of the kinds in which the plaintiff dealt which he should require for the erection of the two houses. The Divisional Court (Boyd, C., and Ferguson, J.), on appeal from a contrary decision of Meredith, J., held, notwithstanding neither the quantities nor the prices of the different materials were defined until the different orders were given, and though the contractor's promise was not legally binding, that all deliveries were referable to an entire transaction for the supply of materials for the buildings in question, applying to the case the principle of a running bill with a tradesman as expounded by Pollock, C.B., in *In re Aykroyd* (1). Although the case cannot be said to have expressly decided that a general lien could be maintained upon two separate houses belonging to the same owner for material supplied for use in their construction, for the reason that this question was not considered, the fact that it was not mooted either by counsel or in the reasons of the two eminent judges who took part in the judgment, notwithstanding the lien under review was a general lien claiming a general balance on two separate houses, has much significance. Moreover, the case does decide that in applying the Act the courts should have regard to the contract between the parties, under which the materials claimed for are furnished, and to the dealings between them in reference thereto.

Grant, J.A., also refers in his reasons to the judgment of the Appeal Court of Saskatchewan delivered by Lamont,

(1) (1847) 1 Ex. 479.

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J., in *Whitlock* v. *Loney* (1), which was approved in *Fulton Hardware Co.* v. *Mitchell* (2), and which considered the question as to whether the materials claimed for in the lien under review were delivered under separate and distinct agreements or as upon a continuous account—practically the same question dealt with in *Morris* v. *Tharle* (3)—and for the same purpose, viz: to enable the plaintiff, by virtue of a delivery of materials under the last agreement within the prescribed 30 days of the registration of the lien, to bring earlier deliveries and his whole account within the lien. The Saskatchewan Court of Appeal held that the plaintiff was entitled to recover the general balance due upon the whole account and sustained the lien for the entire balance.

That the courts in applying the statute by which such liens are created may and should have regard to the contracts between the parties under which the work or materials claimed for are provided, must, I think, now be taken as settled law. However difficult it may be to find a satisfactory basis for it in the words of the statute itself, the principle of applying the lien created by the Act as a general lien upon several buildings and lots belonging to the same owner as upon one property where the parties have by their contract so treated them—in cases at least where the lots are contiguous—has been so long and so generally recognized that it cannot at this time well be reversed. The respondent's lien must therefore be sustained.

There remains the question of priority as between the lien and the appellant's claim in respect of the moneys expended by him in completing the house 2-4 after he went into possession of it as assignee of the Ready Mortgage.

Sec. 7, subsec. 3, of the Act provides that where land, upon or in respect of which any work is performed or materials are furnished to be used, is encumbered by a prior mortgage existing in fact before any lien arises, such mortgage shall have priority over all liens under the Act to the extent of the actual value of such land at the time the first lien arose, such value to be ascertained by the judge or officer having jurisdiction to try the action, while

(1) (1917) 38 D.L.R. 52. (2) (1923) 54 Ont. L.R. 472.
(3) (1893) 24 Ont. R. 159.

sec. 13, subsec. 1, provides that the lien shall have priority over all judgments, executions, assignments, etc., issued or made after such lien arises and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien.

The intention of the Act, as disclosed by these two sections, was clearly to limit the security of a registered mortgage as against lien claims to the actual value of the property as at the time the first lien arose, and to exclude from the operation of that security all payments and advances made thereunder by the mortgagee after such lien claims have been registered.

Counsel for the appellant contended that the moneys expended in completing the house were not payments or advances within the meaning of sec. 13, subsec. 1, not having been made on account of the principal amount stated in the mortgage. The section does not say on account of the principal sum but on account of any conveyance or mortgage, and has the same effect, it seems to me, as if it had used the word " under " or the words " upon the security of." Payments and advances on account of the principal amount stated in the mortgage would unmistakeably be barred from priority in respect of the lien. To interpret the section as barring payments and advances made on account of the principal amount for which the mortgage is expressed to be a security, but not as barring payments or advances made under a covenant giving the mortgagee the right in certain contingencies to undertake the completion of the house for his own protection and to add the cost of doing so to his mortgage debt, would give a result which could hardly be said to accord with reason.

The fact that the moneys were paid by the appellant for the completion of the house in order to protect his security, while undoubtedly entitling him under the mortgage covenant on which he relies to add them to his mortgage debt as a further charge upon the land, would not in any event avail to give him priority over the liens for such payments in the face of the provisions of sec. 7, subsec. 3. This section, as already pointed out, limits the security of a prior registered mortgage as regards all liens to the actual value

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of the land at the time the first lien arose. The Appellate Division of the Supreme Court of Ontario expressly and, we think, rightly so held in *Inglis* v. *Queen's Park Plaza Co. Ltd.* (1).

I therefore agree with the opinion of the Appeal Court that the respondent's lien is entitled to priority over the appellant's claim for this expenditure.

As to the objection that the respondent, not having brought an action to enforce his own lien, could not rely upon the statement of claim of another lien claimant (one Dorsy), which was dismissed by the Master, to hold his own lien, we think that Grant, J.A., in his reasons satisfactorily disposes of this also.

The appeal should be dismissed with costs.

Subsequently the appellant moved for an order that, in so far as it affirmed the judgment of the Court of Appeal, which by a paragraph in its formal judgment gave the respondent priority over the prior mortgage originally held by Albrechtsen, the judgment delivered by this Court be varied, and that the appellant as prior mortgagee, having since the commencement of the action acquired the prior mortgage held by Albrechtsen on No. 2-4 Castleview Avenue, be found to be prior to the claim of the respondent, and to this extent the appeal be allowed.

The paragraph in the formal judgment of the Court of Appeal, above referred to, read as follows:

AND THIS COURT DOTH FURTHER DECLARE that the said Defendant, The Honourable Frank Carrel, having acquired since the commencement of this action by way of assignment a mortgage held by the Defendant, Oluf Albrechtsen, on the said corner building known as No. 2-4 Castleview Avenue, shall be entitled as a prior mortgagee to priority to the claims of all persons entitled to liens to the extent of his said mortgage, save and except the liens of Enoch Crummy, James Fiddes and Albert J. Jackson, trading as Fiddes & Jackson, and Albert A. Hart, whose said liens shall have priority over this said mortgage.

S. A. Hayden for the motion.

R. Kellock contra.

The judgment of the majority of the court (Duff C.J. and Rinfret, Lamont and Smith JJ.) was delivered by

(1) [1932] O.R. 110.

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SMITH J.—The appellant moves to vary the reasons for judgment of this Court delivered the 28th of June, 1933, in so far as they affirmed the judgment of the Court of Appeal for Ontario, which, by paragraph 1 (6) thereof, gave to the respondent Hart priority over the prior mortgage originally held by one Albrechtsen, assigned to the appellant since the commencement of this action.

The respondent Hart's claim to a lien is in respect of his contract entered into by him on September 20, 1929, to do brick work and supply brick for five double duplex houses on the north side of Castleview Avenue, which were numbered from east to west as 2-4, 6-8, 10-12, 14-16 and 18-20.

One Millie Guild purchased the land from one Watt and gave the mortgage registered No. 24677 W. A., dated 29th October, 1929, to one Alberta Gibbons, for $6,500, covering the corner lot, numbered 2-4, only. This mortgage was assigned on the same day to the appellant, and on the same day Millie Guild made a mortgage on No. 2-4, registered No. 24681 W. A., to William W. Watt, which mortgage was assigned by Watt on the 5th November, 1929, to one Oluf Albrechtsen.

At the same time Millie Guild made four separate mortgages on the other four buildings to William W. Watt, her vendor, and these four mortgages were all assigned to one Arthur.

A joint stock company called City Duplexes, Limited, was then formed, and the whole property, subject to these mortgages, was transferred by Millie Guild to the company; and on the 13th December, 1929, this company made a mortgage to Luiggi Agnaluzzi and others, which mortgage covered the whole property, and was for $3,055. On the 25th February, 1930, they made another mortgage on the whole property to one Florence Ready, for $10,000, and this mortgage was assigned on the same day to Discount Limited, and again, on the same day, to the appellant.

The Albrechtsen mortgage, subsequent to the original judgment herein, namely, on the 19th February, 1932, was assigned to the appellant.

Building loans were obtained on the westerly four houses by two mortgages to the Canada Life Assurance Co. for $22,000 each, and two with the Confederation Life Assurance Co. for $18,000 each, to which mortgages Ernest

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Arthur postponed his four mortgages referred to, and Albrechtsen, by a similar agreement, dated the 25th day of February, 1930, postponed his mortgage to the $10,000 mortgage given to Florence Ready on that date.

There was a provision in the Ready mortgage by which the mortgagee was entitled to make advances beyond the $10,000 for completion of the building in case the mortgagor should fail to complete same; and under this provision the appellant, as assignee of the mortgage, completed the building, advancing for that purpose some $12,500.

The Assistant Master had held that the respondent Hart was not entitled to any lien, but this was reversed in the Court of Appeal, which also held that Hart's lien had priority over the $12,500 advanced for completion of the building subsequent to the filing of the first lien, which judgment has been upheld by the judgment of this Court referred to.

The Court of Appeal also held, as stated above, that Hart's lien had priority over the Albrechtsen mortgage assigned to the appellant.

The appeal to this Court included an appeal against this finding of the Court of Appeal, but was not dealt with in the judgment handed down on the 28th June last.

This Albrechtsen mortgage and the four mortgages given to Watt and assigned to Arthur were all made and registered prior to the commencement of the building, and the learned Assistant Master holds that they were such, and that Arthur was entitled to priority to all the lien holders for his four mortgages, to the amount of $765.63 for each of the four parcels covered by his mortgages; and that Albrechtsen's mortgage on No. 2-4 is a prior mortgage, entitled to priority to all lien holders save Enoch Crummy and Fiddes & Jackson Ltd., to the amount of $8,600. He gives no reason for giving priority to Crummy's and Fiddes & Jackson Ltd.'s liens over the Albrechtsen mortgage. Having held that the respondent had no lien, he, of course, did not deal with the question of priority as between Hart and the Albrechtsen mortgage. His reasons for giving priority to Crummy and Fiddes & Jackson Limited deal entirely with the question of their priority over the appellant as to the $12,500 advanced for completion of the building.

There can be no doubt that the Albrechtsen mortgage, like the Gibbons mortgage for $6,800 and the Ready Mortgage for $10,000, were all prior mortgages originally, and entitled to priority over all liens; and the only ground upon which it is urged that its priority over Hart was lost is because of the agreement made by Albrechtsen postponing it to the Ready mortgage.

The same objection was raised to the four mortgages on the other properties that were assigned to Arthur; and as to them the point is dealt with in the Court of Appeal in the reasons of Mr. Justice Grant, as follows:—

"(2) The learned Assistant Master erred in law in finding that the four mortgages of the mortgagee Arthur were prior to the lien holders to the extent of the value of the lands at the time the first lien arose."

I have carefully read and considered the argument advanced in support of this point in the appeal, but am unable to give effect to it. I think the law is quite clear, and too well established to justify any interference with it at this time. The mortgages held by Arthur were given back to Watt the vendor to secure part of the purchase price of the land; Watt postponed his mortgages to mortgages which were given to The Canada Life Assurance Company and The Confederation Life Assurance Company which companies advanced moneys to enable buildings to be erected, but the postponements were not given for any other purpose, nor could they have any effect such as is contended for by this appellant. As to all other parties the mortgages held by Arthur stood just as they had stood originally and, in the absence of any evidence to the contrary, their postponement was for the benefit of those only who were thereby made first mortgagees upon the respective properties. It would be unjust and inequitable to find otherwise unless there was evidence establishing it; and no Court would hold otherwise unless the statute made it perfectly clear that such was intended. Upon this point, therefore, the appeal should be disallowed.

It is argued that this reasoning does not apply to the Albrechtsen mortgage, because of the advances made under the Ready mortgage to complete the building. I am quite unable to agree with this contention. The question of how the matter would have stood as between Albrechtsen and the appellant as assignee of the Ready mortgage is not involved in the question of priority as between Albrechtsen and Hart. Albrechtsen had priority from the first over Hart's lien, and he never surrendered any priority to Hart.

I can see no distinction between the effect of the agreement by Albrechtsen and the agreement by Arthur. In neither case did these agreements confer any priority on Hart, who was no party to them, and who had no lien at the time they were made.

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For these reasons, I am of opinion that the appeal upon this branch of the case should be allowed, and the motion for the amendment of the judgment granted.

CROCKET J. (dissenting on the question now dealt with) —This is a motion to vary the judgment of this Court, delivered on June 28th last, so as to reverse that portion of the formal judgment of the Ontario Court of Appeal, which declares that the lien of the respondent, Hart, shall have priority over a mortgage which the appellant, Carrel, acquired by assignment from one, Albrechtsen, after the trial and pending the appeal to the Ontario Court of Appeal.

As between Carrel and Hart, the argument in the Appeal Court, as in this Court, was principally directed to two main questions: first, the validity of the Hart lien, and second, the priority as between the lien and payments made by Carrel to the amount of over $12,000, under the terms of a mortgage acquired by him, as assignee, from one, Florence Ready, and registered prior to the lien—payments made by him after the registration of the lien for the completion of a building on the land described.

In its reasons for judgment, written by the late Mr. Justice Grant, there was no reference to the question of priority as between these payments and the Albrechtsen mortgage, but this point was argued by counsel on the settlement of the minutes of judgment before the Chief Justice of Ontario and Mr. Justice Masten, and decided in the respondent's favour by the inclusion in the formal judgment of the declaration objected to.

There is no doubt that the Albrechtsen mortgage, which was for $3,612.50, and originally made in favour of one Watt, and subsequently assigned by Watt to Albrechtsen, was registered before Hart's lien, and also before the Ready mortgage, and that up to February 25, 1930, the Albrechtsen mortgage was an encumbrance on the land prior to both the lien and the Ready mortgage. On that date, however, Albrechtsen executed an instrument under seal, by which he waived the priority to which he was then undoubtedly entitled, in favour of the Ready mortgage. By that instrument, which is called an Agreement Postponing

Mortgage, and was registered on March 3rd—two days after the registration of the Ready mortgage—Albrechtsen covenanted and agreed with Ready that the Ready mortgage "shall be an encumbrance upon the said lands prior to" his mortgage "in the same manner and to the same effect as if it had been dated and registered prior to the said firstly mentioned mortgage," and, in order to effectuate the same, he purported to grant and release unto Ready, in fee simple, all the land described therein with habendum to Ready, her heirs and assigns, subject only to a reservation of his right, as mortgagee of the equity of redemption subsequent to the Ready mortgage. By this document, therefore, he distinctly waived the priority to which he had been previously entitled, in favour of the Ready mortgage, whether in the hands of Ready or Carrel, as her assignee, or of any subsequent purchaser.

It is not questioned that as between the parties this document divested Albrechtsen of the priority to which he was entitled previously over the Ready mortgage, but it is contended that it was an agreement intended only for the benefit of the parties and one which could not enure to the benefit of subsequent lien-holders.

In my view the document operated to give to Ready and her assigns the right to have all claims under her or their mortgage satisfied in full before the Albrechtsen mortgage should rank upon the estate; and, as the Ready mortgage acquired by Carrel contained a provision making all advances which might be made by the mortgagee for the completion of the building part of the indebtedness under that mortgage, and as such, chargeable upon the land, Carrel thereby obtained the right to charge the land as against Albrechtsen and his assigns, not only with the $10,000 principal sum stated in the mortgage, but with the $12,000 (odd) which he advanced thereunder for the completion of the building. When, therefore, Carrel acquired from Albrechtsen his mortgage after the trial and pending the appeal, he acquired no priority that he did not at that time already possess, that having been fully secured to him by the so-called postponement agreement of February 25, 1930, and the assignment to him of the Ready mortgage. The only estate which Albrechtsen then had to convey was an estate subsequent to the Ready mortgage.

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The Ontario Court of Appeal held, and this Court affirmed its decision distinctly in that regard, that, Hart's lien having been filed before the payment of the $12,000 (odd) house completion moneys, he was entitled to priority over these advances under s. 13, subs. 1, of the *Mechanics' Lien Act.*

This Ready mortgage was also an encumbrance upon the land prior, in point of registration, to the Hart lien, but only to the extent of moneys which had been advanced prior to registration and notice of the lien claim. Hart by registration of his lien undoubtedly became entitled to rank for his lien immediately after the moneys which had actually been advanced under the Ready mortgage and before the moneys which were advanced thereunder after the registration of the lien. Was Carrel, by subsequently acquiring the Albrechtsen mortgage, entitled to divest the lien-holder of his priority over the $12,000 (odd) advance made by him under the terms of the Ready mortgage after registration and notice of the lien, to the extent of the full amount due under the Albrechtsen mortgage, in the face of the fact that when he took over the assignment of the latter mortgage it stood upon the records as a mortgage subsequent to the Ready mortgage? In my opinion he is not, and Hart's lien should have priority, not only over all advances made under the prior registered Ready mortgage after registration of the lien, but over the Albrechtsen mortgage, whose priority had been completely waived, in favour of the Ready mortgage, and the assignment of which conveyed to Carrel nothing but the right to rank upon the land after the Ready mortgage which he already possessed.

I think that the declaration in the formal judgment of the Appeal Court that the Hart lien should have priority over the Albrechtsen mortgage is right and that the motion should be refused with costs.

Appeal allowed in respect of issue raised by the motion; otherwise appeal dismissed. Appellant to have half of his costs of appeal to this Court.

Solicitor for the appellant: *Roy Henderson.*

Solicitor for the respondent: *H. Percy Edge.*