1953
*Sept. 30
*Oct. 1
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IN THE MATTER OF *The Mechanics' Lien Act*, R.S.O. 1950, c. 227.

COUPLAND ACCEPTANCE LIMITED ...APPELLANT;

AND

EDWIN ALEXANDER WALSH carrying on business under the name of W. J. Walsh and Company, and others } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Mechanics' Lien—Priority—Lien registered after mortgage but before money advanced to pay off prior mortgage—Subrogation—Whether lender entitled to priority over liens of general contractor and subcontractors—The Mechanics Lien Act, R.S.O. 1950, c. 227, ss. 13 (1), 20—The Registry Act, R.S.O. 1950, c. 336, s. 69.

Section 13(1) of *The Mechanics Lien Act*, R.S.O. 1950, c. 227 gives priority to the lien over all payments or advances made under a mortgage after registration of the lien. The section does not apply however, where, as here, advances are made by a third party for the purpose of paying off a prior mortgage. In such case the lender is entitled in equity to stand as against the property in the shoes of the first mortgagee and need not rely upon the subsequent mortgage for priority. *Crosbie-Hill* v. *Sayer* [1908] 1 Ch. 866; *Whiteley* v. *Delaney* [1914] A.C. 132 (applied in *Gordon* v. *Snelgrove* [1932] O.R. 253) followed.

The appellant, incorporated under the Companies Act (Ont.) to carry on the business of automobile and insurance adjusters, was empowered to invest the moneys of the company not immediately required for the purposes of the company in such manner as from time to time might be determined. By supplementary letters patent its powers were extended to permit it to purchase and deal in property, real and personal, but not directly or indirectly to transact any business within the meaning of *The Loan and Trust Corporations Act,* R.S.O. 1950 c. 214.

By an agreement in writing made with two named individuals the appellant took in its own name a mortgage on an apartment house property as security for an advance of $28,000 made by it and an equal amount by them, and undertook to hold half of the proceeds of the mortgage in trust for them. The courts below having held that the respondents' claims for liens were registered after the appellant's mortgage but prior to the advances made under it, the respondents contended that the appellant was without capacity to accept the mortgage under the *Companies Act* and that its undertaking to act as trustee was prohibited by *The Loan and Trusts Corporations Act,* R.S.O. 1950, c. 214.

Held: further, that as to its own money the appellant must be presumed in the absence of evidence to the contrary to be investing moneys of the company not immediately required for the purposes of the company, and in agreeing to hold the proceeds of the mortgage in trust for its co-investors, to be acting under the express powers given by s. 23 (1) (*p*) of the *Companies Act*. *Re Mutual Investments Ltd.* 56 O.L.R. 29; *Re York Land Co. Ltd.* [1939] O.W.N. 229, distinguished.

Decision of the Court of Appeal for Ontario [1952] O.W.N. 665, reversed in part.

APPEAL by Coupland Acceptance Limited, sued as second mortgagee, from a judgment of the Court of Appeal for Ontario (1) which allowed in part its appeal from a judgment of Schwenger J., County Court Judge, (sub-nom *Walsh* v. *the King et al; Bowser et al* v. *Dyer et al*) in consolidated actions under *The Mechanics' Lien Act.*

J. J. Robinette, Q.C. and *P. B. C. Pepper* for the appellant.

G. D. Watson, Q.C., J. A. Sweet, Q.C. and *Walter Fraser* for the respondents.

The judgment of the Court was delivered by

KELLOCK J.:—The finding in the courts below that no advance was in fact made under the appellant's mortgage until after registration of the claim for lien disposes of the appeal except as to the contention that the appellant is entitled to stand in the place of the mortgagees under the

(1) [1952] O.W.N. 665.

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Kerbel mortgage with respect to the sum of $46,782.50 paid by the appellant to the said mortgagees, which, with other moneys paid by the mortgagor, effected the retirement of that mortgage.

The evidence is clear that it was agreed that the moneys obtained from the appellant were to be used, as they were in fact used, to pay off the existing second mortgage held by Kerbel and that the mortgage to be given to the appellant was to be in replacement of that mortgage. While the appellant's mortgage was registered on May 4, 1951, Kerbel was not paid off until May 9th and, in the meantime, the respondents' lien had been registered on the 5th of May. A discharge of the Kerbel mortgage, although delivered to the appellant, was not registered and, consequently, had no operation beyond that of a receipt or acknowledgment. It is only when registered that such a document becomes operative as a discharge of the mortgage; s. 69 of *The Registry Act,* R.S.O. 1950, c. 336; *Ross and Colclough* (1).

The appellant claims to be subrogated to the rights of the Kerbel mortgagees. It seems plain that, apart from any provisions of *The Mechanics Lien Act,* the appellant would be so entitled. In *Crosbie-Hill* v. *Sayer* (2), Parker J., at 877, stated the law as follows:

> . . . where a third party at the request of a mortgagor pays off a first mortgage with a view of becoming himself a first mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee. Even in the case of a purchase of an equity of redemption, where the first mortgagee is at the same time paid off and joins in a conveyance of the property to the purchaser, so that questions of merger arise, it will require strong evidence of contrary intention to preclude the Court from holding that the first mortgage debt is still alive for the purpose of protecting the purchaser of the equity of redemption from mesne incumbrances, whether at the time of purchase he knows of such incumbrances or otherwise.

In that case Parker J., held that mesne incumbrancers who were not parties to the transaction under which the first mortgage was paid off were not entitled to avail themselves of that fact in order to defeat the real intention of the parties, thereby obtaining priority for themselves by a

(1) (1925) 28 O.W.N. 364. (2) [1908] 1 Ch. 866.

mere accident at the expense of other people who never intended to benefit them. Reference may also be made to *Whiteley* v. *Delaney* (1).

The law thus laid down was applied by Sedgewick J., in *Gordon* v. *Snelgrove* (2), in favour of a plaintiff who had paid off a prior mortgage with knowledge at the time of the registration of his mortgage that there was a registered second mortgage.

While s. 13(1) of *The Mechanics Lien Act*, R.S.O., 1950, c. 227, gives priority to the lien over all payments or advances made under a mortgage after registration of the lien, the section is not to be construed as affecting the right relied upon here by the appellant. The appellant does not rely upon its mortgage for priority as to the moneys here in question but upon the equitable right to stand in the place of the Kerbel mortgagees whose priority to the lien is unquestionable. The position of the lienholder remains the same as it was before the appellant intervened and it would, in my opinion, require more than is to be found in the section to bring about a result so unjust that it would, to paraphrase the language of Parker J., in the *Crosbie-Hill* case, permit the lienholder, by a mere accident, to obtain priority at the expense of people who never intended to benefit him. Had the appellant been in fact aware of the registration of the lien, it could have purchased the Kerbel mortgage, in which event no possible question could have arisen.

Nor do I think that s. 20 is relevant. The respondents refer to *Cook* v. *Koldoffsky* (3), where it was pointed out that the section (then s. 21) enables a lienholder, by registration, to secure the advantages given under the decisions upon the *Registry Act* which prevent a prior registered instrument from holding its position if the person claiming under it had actual notice of the lien before its registration. As stated by Hodgins J. A., at p. 562, the *Registry Act* "deals solely with priorities as between instruments" and s. 20 gives only the status of a purchaser *pro tanto* to a lienholder

> whose right to interfere with a prior instrument depends upon actual notice of the instrument, i.e., the lien when registered (sec. 72 of the Registry Act, R.S.O. 1914, ch. 124) or upon the absence of actual notice to him of a prior unregistered instrument.

(1) [1914] A.C. 132. (2) [1932] O.R. 253; 2 D.L.R. 300
(3) (1916) 35 O.L.R. 550; 28 D.L.R. 346.

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Once it is clear that s. 13 does not apply there is, in my view, nothing in s. 20 which interferes with a right of the nature of that here in question.

The respondents contend in any event, however, that the appellant's claim is to be reduced by the sum of $2,126.25, representing interest at the rate of 2 per cent per month for the two months following the maturity of the Kerbel mortgage to the time of its payment off, as recovery of any amount beyond the rate of 5 per cent payable before maturity is prohibited by s. 8 of the *Interest Act*, R.S.C. 1927, c. 102. To this the appellant objects that the payment of this amount is not to be ascribed to any moneys advanced by it but that the mortgagor, who provided the sum of $8,500 over and above the amount advanced by the appellant, must be taken to have made this payment. I think this objection is well taken but nonetheless, following the terms of s. 8, the appellant may not rely upon the provisions of the Kerbel mortgage with respect to interest beyond a rate of 5 per cent from May 9, 1951.

It is further contended by the respondents that, by virtue of certain statutory provisions to be referred to, the appellant was without capacity to accept a mortgage of real estate. The appellant was incorporated in 1927 under *The Companies Act*, R.S.O. 1927, c. 218, *inter alia*, for the purpose

(*a*) of carrying on the business of automobile and insurance adjusters, etc., and "to conduct the general business of a holding, investment, promoting, brokerage and trading corporation and real estate agency", and

(*b*) "to invest and deal with the moneys of the company's *not immediately required* for the purposes of the company *in such manner* as from time to time may be determined.

By supplementary letters patent issued in 1949, the powers and objects of the company were extended "subject to the provisions of any statute or regulations passed thereunder in that behalf" so as to permit the company to purchase or otherwise acquire and to deal in property, real and personal, but not directly or indirectly to transact or undertake any "business" within the meaning of *The Loan and Trust Corporations Act*. This prohibition recognized the restriction on the authority to incorporate contained in s. 2(1) of *The Companies Act* which provides that the

Lieutenant-Governor in Council may incorporate by letters patent for any of the purposes to which the authority of the legislature extends except, *inter alia,* those of "corporations within the meaning of *The Loan and Trust Corporations Act.*" It would, however, appear that to the Lieutenant-Governor in Council, at least there was no conflict inhering between the prohibition in the charter and the express power "to invest and deal with the moneys of the company not immediately required . . . in such manner as may be from time to time determined".

Under the provisions of s. 1(*c*) of *The Loan and Trust Corporations Act* (and it will be convenient to refer to R.S.O. 1950, c. 214) "corporation" is defined to mean

> a loan corporation, a loaning land corporation, or a trust company.

A "loan corporation" is defined by clause (*h*) as every incorporated company, association or society, constituted, authorized or operated "for the purpose of" loaning money on the security of real estate or for that and any other purpose. A "loaning land corporation" is defined by clause (*i*) to mean a corporation incorporated "for the purpose of" lending money on the security of real estate and of carrying on the business of buying and selling land. "Trust company" is defined by clause (*r*) as a company constituted or operated "for the purpose of" acting as trustee, bailee, agent, executor, administrator, etc. Section 129, s-s (1), provides that no corporation, unless registered under the Act or a person duly authorized by it, shall undertake or transact in Ontario the "business" of a loan corporation or a loaning land corporation or a trust company.

In my opinion the appellant did not, by reason of the mortgage here in question, carry on the "business" of any of the corporations mentioned in *The Loan and Trust Corporations Act.* What it did do was, upon the terms of an agreement in writing between it and two named individuals, to take in its own name a mortgage in respect of which it had advanced $28,000 of its own moneys and the two individuals an equal amount, the appellant agreeing to hold half of the "proceeds" of the mortgage in trust for the individuals. In thus investing its own money it is to be presumed, in the absence of evidence to the contrary,

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that the appellant was investing moneys "not immediately required for the purposes of the company". In agreeing to hold the proceeds of the mortgage in trust for its co-investors, the company was acting under the express power given by s. 23(1)(*p*) of *The Companies Act*. There is no evidence that the company was in the "business" of investing in mortgages on real estate. The fact that the mortgage in question was for a short term only, four months, would rather indicate that the appellant was "turning to account", to employ the language of paragraph (*o*) of s. 23, moneys it did not need immediately. It was for the respondents to show, if it were the fact, that the character of the transaction was other than as above.

The respondents also rely upon s. 2(2) of *The Companies Act,* which authorizes, notwithstanding anything in s-s (1), the incorporation of a private company with power to lend and invest money "on mortgage of real estate or otherwise". By so doing, such a company "shall not by reason thereof be deemed a corporation within the meaning of *The Loan and Trust Corporations Act.*" It will be observed that this provision authorizes not an isolated act but a practice or "business". It is thus in keeping with the provisions of *The Loan and Trust Corporations Act* already referred to, under which corporations incorporated "for the purposes of" that statute are authorized to carry on "the business" described by the statute, while others are prohibited therefrom.

Reliance is also placed by the respondents upon s-s (2) of s. 129 of *The Loan and Trust Corporations Act,* by which it is provided that "any collecting or taking of money on account of . . . loans or advances" shall be deemed "undertaking the business" of the corporations with which that statute deals.

In the case at bar, however, while the $28,000 of the two individuals was paid over by them to the appellant and by it disbursed to the mortgagor, I think it clear that what is struck at by the statute is the collecting or taking of money by a corporation to be by it, in turn, lent out to borrowers, the "collecting or taking" constituting the corporation a debtor of the person or persons advancing the money. It was not intended in the present instance that the appellant

should become a debtor of these moneys. Under the agreement already referred to, that of which the appellant was to become trustee was half of the "proceeds" of the mortgage. If, after receiving from the named individuals their $28,000, the appellant had misappropriated them, no doubt it would thereby become a debtor, but apart from such an eventuality, the appellant was merely an agent to pay over the moneys and accept the mortgage. I do not think, therefore, that the appellant has invaded the prohibited area. It therefore seems to me that it was competent for the appellant to take the mortgage for its own behoof and to agree to become trustee for the individuals concerned of one half of the proceeds as and when received.

In *Re Mutual Investments Limited* (1), to which we were referred by counsel for the respondents, the company there concerned was authorized by its charter to act as agent for the investment of funds, *inter alia,* on mortgages of real estate but apart from the holding of mortgages on its own behalf for unpaid purchase money of real property it had sold, it was prohibited from transacting or undertaking any business within the meaning of *The Loan and Trust Corporations Act.* It was held by a single judge, Riddell J., that the only power given to the company by its charter was to "negotiate" investments, not to make them in its own name, and that in doing what it did, it was violating the provision of what is now s. 129, s-s (1) of the statute. It would appear that the company was purporting to carry on "business" in this manner and accordingly was in breach of the statute.

In *Re York Land Company Limited* (2), it was held by Middleton J. A., that a company, incorporated under the Ontario Companies Act with power to deal in real estate and to take mortgages for any unpaid balance of purchase money, did not lack capacity to accept as purchase moneys for lands sold, a transfer of a charge upon lands it had not owned. Middleton J. A., relied upon s. 24(1)(*q*) of the statute, now s. 23(1)(*q*), which authorizes the company to do all such things as are conducive to the objects set forth in the section and in the letters patent. The learned

(1) (1924) 56 O.L.R. 29; [1924] 4 D.L.R. 1070.

(2) [1939] O.W.N. 229; 2 D.L.R. 775.

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judge evidently did not regard s. 2(2) of *The Companies Act* nor any of the provisions of *The Loan and Trust Corporations Act* as in any way operating to the contrary.

I would therefore allow the appeal to the extent indicated, with costs throughout.

Appeal allowed in part.

Solicitor for the appellant: *H. J. Waldman.*

Solicitor for the respondent, E. A. Walsh: *J. A. Sweet.*

Solicitor for the respondent, H.M. the Queen in Right of Canada represented by Central Mortgage & Housing Corporation: *Christilaw, Gage & Wigle.*

Solicitor for the respondents, Charles Bowser *et al: S. R. Jefferess.*

Solicitor for the respondent, Lawson Lumber Co.: *Walter Fraser.*

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*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Locke and Cartwright JJ.