NATIONAL MORTGAGE CO. (PLAINTIFF)..... } APPELLANT;

1917
*Feb. 14, 15.
*May 1.

AND

HENRY S. ROLSTON (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Lien—Unregistered purchaser—Priorities—Cancellation of application to registrar—"Land Registry Act," R.S.B.C., 1911, c. 129, ss. 22, 35; and ss. 104 and 108, as amended by (B.C.) 1912, c. 28 —"Mechanics' Lien Act," R.S.B.C., 1911, c. 154, ss. 9, 19.

P., a beneficial but unregistered owner of land, agreed to sell the land to B. who never registered his agreement, J. being then the registered owner. P. shortly afterwards let contracts to four contractors for the clearing of the land. On May 3, 1912, P. made an application for a certificate of indefeasible title which was granted. A report, dated May 23, 1913, made upon a reference as to title ordered in a mechanics' lien action taken by the labourers who had cleared the land certified that "there are no charges of any kind whatsoever against the title" except the liens. On May 18, 1912, P. conveyed the land to N.M. subject to the agreement with A. and also assigned to him this agreement. On May 20, 1912, N.M. applied to register the assignment as a charge, but, not until October 31, 1913, did N.M. make any application to be registered under the grant. On January 6, 1914, the sheriff sold all the right title and interest of P. to R. The Court of Appeal held that this sale was a sale of the fee in the lands charged only by the liens.

Per Fitzpatrick C.J.—When N.M. acquired title from P. the land was already impressed with the mechanics' liens.

Per Duff J.—Where an application to the registrar has been cancelled under the provisions of sec. 108 of the "Land Registry Act," the application must be deemed, for the purposes of the "Land Registry Act" and particularly for the purpose of applying sec. 28 of the Act of 1912, to have been void *ab initio;* and it follows that when the lien affidavits were registered there was, in contemplation of law, no application for registration of the N.M. interest "pending."

Per Duff J.—N.M. was not in the position of a mortgagee but of a person "claiming under" P. and a person "whose rights are acquired after the work of service, in respect of which the lien is claimed, is commenced."

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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Per Duff J.—N.M. lost its status with respect to the registered title by its acquiescence in the registrar's notice of cancellation, given on July 10, 1913.

Per Anglin J.—N.M. had "no estate or interest either at law or in equity," in the land in question which made it a proper or necessary party to the mechanics' lien action under the judgment in which R. derives his title; nor had it any estate or interest of which the plaintiffs in that action or R. should be deemed to have had "any notice, express, implied or constructive." "Land Registry Act," secs. 104, 108.

Judgment of the Court of Appeal, 32 D.L.R. 81; [1917] 1 W.W.R. 494, affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Hunter C.J., and dismissing the appellant's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. for the appellant.

W. C. Brown for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs. It seems to be abundantly proved that when the appellant company acquired title from Passage, the common auteur, the land was already impressed with the mechanics' liens which are the foundation of the respondent's title. Passage had a certificate of indefeasible title which, under the "Land Registry Act," dates from May 3rd, 1912. He conveyed the land to the plaintiffs subject to the Patterson agreement on the 18th May, 1912, and at that date the work in respect of which the mechanics' liens were created was commenced. The contracts under which the work was done are admitted, the land is identified, and the date at which work started is also proved.

(1) 32 D.L.R. 81; (1917), 1 W.W.R. 494.

DAVIES J.—I think this appeal should be dismissed with costs.

IDINGTON J.—I think the appeal herein should be dismissed with costs.

DUFF J.—On two distinct grounds I think this appeal must be dismissed. First: The services in respect of which the lien-holders acquired their liens were performed in execution of the contract between Passage and certain contractors, dated the 30th of November. The work was begun within the first week in May and whether the appellant company did or did not become, by virtue of the transfers under which it claims, entitled to registration as owner in fee or as mortgagee, admittedly the instruments were not executed until the 18th of May and no advance was made by the appellant company before that date. By section 9 a mortgagee is entitled to the benefit of that section or to the status of a mortgagee under it only in respect of the principal sum actually advanced to the borrower at the time the works or improvements in respect of which the lien is claimed, are commenced; the appellant company is therefore not in the position of a mortgagee but of a person "claiming under" Passage and a person "whose rights are acquired after the work or service in respect of which the lien is claimed, is commenced," that is to say, of an "owner."

This is not a case therefore in which any difficulty could arise as to compliance with the provisions of section 19 (a) and the interest of the appellant company was therefore bound by the filing and registration of the affidavit required by that section.

Second: The filing and the registering of the lien affidavits on the 15th Oct., 1912, established the

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priority of the lien-holders over the interest the appellant company then had or any right the appellant company then had in relation to the land or the title to the land. I am not at this moment satisfied that the appellant company would not acquire in virtue of the transfers of the 18th of May, 1912, the right to register a charge. It may well, I think, be doubted whether sec. 35 of the "Land Registry Act" has any application to such a case. There is authority for the proposition that a vendor under a contract for the sale of land is not entitled to transfer his title in such a way as to put it out of his power to carry out his contract with the vendee and that the vendee may obtain an injunction to restrain him from doing so. *Echliff* v. *Baldwin*(1); *Spiller* v. *Spiller* (2), and if that be the correct view of the vendor's position it is perfectly clear that the registrar having notice of the agreement for sale with Patterson could not properly register the appellant company as owner in absolute fee subject to a charge in favour of Patterson; while on the other hand there could be no doubt of the right of the vendor to charge the interest in the land held by him as security for the payment of the purchase money subject to the rights of the purchaser. However that may be, it is very clear to my mind that the appellant company lost its status with respect to the registered title (which I am inclined to think it might have maintained) by its acquiescence in the registrar's notice of cancellation of the 10th of July, 1913. My reason for thinking so is this. The lien-holders by registration under sec. 19 of the "Mechanics' Lien Act" acquired the status of incumbrancees, a status recognized by sec. 22, 1 g., of the "Land Regis-

(1) 16 Ves. 267.
(2) 3 Swans. 556.

try Act" and became at least on the registration of the lien affidavits on the 25th Oct., 1912, the holders of a charge or incumbrance on "registered real estate" and therefore by force of sec. 28, ch. 15, British Columbia statutes of 1912 they were unaffected by any notice, expressed, implied or constructive of any unregistered title, interest or disposition in or relating to the property in question unless an application for the registration of such interest or disposition was then "pending." I have come to the conclusion and in this I concur with what I take to be the opinion of the Chief Justice of the Court of Appeal, that where an application to the registrar has been cancelled under the provisions of sec. 108 of the "Land Registry Act," the application must be deemed, for the purposes of the "Land Registry Act" and particularly for the purpose of applying sec. 28 of the Act of 1912, to have been void *ab initio;* and it follows, of course, that when the lien affidavits were registered there was, in contemplation of law, no application for registration of the appellant company's interest "pending." We may therefore put aside as having no bearing on the question of law raised for decision, any considerations based upon suggestions of notice by reason of the presence in the Land Registry Office of the application of the 22nd of May and the documents by which it was supported.

The effect of section 104 seems to be conclusive in point of law against the appellant company. The instruments of the 18th of May could not in the sense of that section "pass any estate or interest either at law or in equity." It is quite true that they confer a right to registration but there can be no manner of doubt, I think that this right to be registered can only take effect as against registered interests through

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the instrumentality of an application to register consummated by registration.

It follows that, if the appellant company had been made a party to the proceedings, its claim of priority must have failed; and it has therefore suffered no substantial wrong calling for the intervention of this court.

ANGLIN J.—Having regard to the provisions of sec. 104(1) and (2) and sec. 108(1) and (2) of the "Land Registry Act," R.S.B.C., 1911, ch. 127, as amended by ch. 15, sec. 28 of the statutes of 1912 and ch. 43, sec. 63, of the statutes of 1914, the appellant company, in my opinion, had "no estate or interest either at law or in equity," in the land in question which made it a proper or necessary party to the mechanics' lien action under the judgment in which the respondent derived his title. *Levy* v. *Gleason*(1); *Goddard* v. *Slingerland*(2). Nor had it any estate or interest of which the plaintiffs in that action or the present respondent should be deemed to have had "any notice express, implied or constructive."

The plaintiffs in the mechanics' lien action were "holders of a charge or incumbrance" on the registered land in question, their liens having been duly filed against it in the Land Registry Office on the 25th of October, and action thereon commenced on the 31st of October, 1912. Neither of the "title (or) interest" asserted by the appellant, nor of the "disposition" under which it claims, was "the registration * * * pending" when the mechanics' liens arose, when they were registered, when action on them was brought, when judgment therein was recovered, when sale of the land was ordered, or when it was effected and conveyance thereof was made to the respondent.

(1) 13 B.C. Rep. 357. (2) 16 B.C. Rep. 329.

(May, 1912—March, 1914.) This I take to be the effect under sec. 108(2) of the final refusal of the appellant's two applications for registration made respectively on the 22nd of May, 1912, and the 31st of October, 1913. They thereby became "cancelled and void" and questions of title must, as to "strangers," be dealt with as if they had never been made. The conveyance of March, 1914, transferred to the respondent whatever estate or interest in the lands in question any of the defendants to the mechanics' lien action had. One of them, Passage, was the registered owner of an indefeasible fee and the holder of the only estate or interest in the lands in question of which, under the circumstances of this case, the "Land Registry Act" permits the courts to take cognizance. By that transfer the respondent obtained "the right to apply to have such conveyance registered," which, by his application of the 26th of June, 1914, he asserted prior (see sub-secs. 72-3) to the only application for registration of the appellant company now extant—that made on the 13th of August, 1914. That company is, *quoad* the respondent, a "stranger," in the same position as if the instrument under which it claims had been executed on the date on which that application was made.

The authorities cited on behalf of the appellant appear to be readily distinguishable from the case at bar. It has no equity such as was recognized in *Barry* v. *Heider, et al.* (1). There was no fraud such as formed the ground of relief in *McEllister* v. *Biggs*(2); and in *Chapman* v. *Edwards*(3). The unregistered conveyance on which it founds its claim was not made prior to the 1st of July, 1905, as was that recognized

(1) 19 Commonwealth Law Rep. 197. (2) 8 App. Cas. 314.
(3) 16 B.C. Rep. 334.

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in *Howard* v. *Miller*(1). Section 104(1) applies to it and not sec. 105 (formerly sec. 75).

Moreover, although the appellant holds a transfer absolute in form, the interest which it asserts is only that of a chargee or mortgagee. The advance in respect of which that interest is claimed was made on the 18th of May, 1912—the date of the transfer. The work for which the mechanics' liens were claimed began between the 1st and the 15th of May, 1912. Although it is somewhat obscurely framed, the probable purpose of clause (a) of sec. 9 of the "Mechanics' Liens Act," R.S.B.C., 1911, ch. 154, would seem to be to postpone the claim of a mortgagee in respect of advances made subsequently to the commencement of the works to the rights of the lien-holders. If the appellant had duly applied for registration it might nevertheless as a subsequent incumbrancer have been entitled to be given an opportunity in the lien action to redeem the lien-holders. Any such right which it might otherwise have had, however, it lost through failure to make an effective application for registration until after the land had been sold to the respondent.

I would, for these reasons, dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. W. St. John.*
Solicitors for the respondent: *Ellis & Brown.*

(1) 22 D.L.R. 75; [1915] A.C. 318.