CLUTE, J. MARCH 17TH, 1916.

HENDERSON v. MORRIS.

Mortgage—Enforcement by Foreclosure—Claim of Lien-holder under Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 8(3)—Lien upon Increased Value in Priority to Mortgage—Realisation of Lien—Lien-holder Foreclosed unless he Proceeds to Sale — Rights of Mortgagee — Costs of Sale.

Appeal by the mortgagee from the report of the Local Master at Ottawa in a mortgage action for foreclosure.

The appeal was heard in the Weekly Court at Ottawa.

G. F. Henderson, K.C., for the appellant.

J. E. Caldwell, for the respondent, a lien-holder.

CLUTE, J., said that the question in appeal arose in a contest between the mortgagee and a lien-holder under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 8, sub-sec. 3, where the selling value of the land was admitted to have been increased to the extent of $300 for materials placed thereon, sub-sec. 3 providing that "the lien shall attach upon such increased value in priority to the mortgage or other charge."

The priority of the lien upon the increased value being admitted, the question raised was as to the respective rights of the parties arising thereon. The mortgagee contended that the right of the lien-holder was limited to his priority in respect of the increased selling value; and that, having a lien in respect of the $300 only, it was his duty to realise that lien by proceeding to a sale of the property in the usual way, and that, in default of his so proceeding, he should be foreclosed. The mortgagee relied on Patrick v. Walbourne (1896), 27 O.R. 221.

The learned Judge said that, having regard to the statute and its construction, so far as indicated by the case cited, the clause of the report objected to was erroneous, inasmuch as it gave the lien-holder priority to the mortgagee, not limited, as it should be, to the increased selling value, out of which only the lien could be realised. The report should limit the right of the lien-holder accordingly.

The statute does not cast upon the mortgagee the duty of realising the lien-holder's claim. If the lien-holder desires to realise, he must take the necessary steps to do so either by asking a direction to proceed with the sale himself or by paying into Court $80, in the usual way, to have a sale by the mortgagee.