

to one Rosenfeld; out of the moneys secured by his two mortgages the appellant James Kaake retained \$1,050, the amount of what was called a temporary mortgage, which was prior to the four mortgages referred to; and \$803.20 was paid to one George Kaake out of the mortgage moneys also.

As to the \$1,618.13, the learned Judge said, it was not a "payment or advance" under the mortgages, but its inclusion therein meant that the mortgagee took another security for its payment. When the work began, it formed a prior charge, and the right of the lien-holders in this action to have it so treated could not be modified by the action of the mortgagee, who released his vendor's lien as against the owner of the land; and its satisfaction by the taking of the subsequent mortgages could not prevent it from being, as to lien-holders, a prior charge within sec. 8: see *Locke v. Locke* (1896), 32 C.L.J. 332.

The allowance as against the mortgagees of the whole amount of the liens as a prior charge on the increased selling value was equivalent to a finding that the selling value was increased to that extent. No claim in this respect was made in any lien or by any statement of claim, but the mortgagees were parties to the proceedings, and the appeal was argued as if the question had been properly before the Referee. No evidence was given, however; and, if the parties desired, there should be a reference back to take the evidence, upon this head.

The learned Judge then referred to and discussed secs. 2(c), 6, 8(3), 14, and 21 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140; he also referred to *Kennedy v. Haddow* (1890), 19 O.R. 240; *Cook v. Belshaw* (1893), 23 O.R. 545; *McVean v. Tiffin* (1885), 13 A.R. 1; and said (1) that the appellant E. J. Kaake must be regarded, as to the \$1,618.13, as the holder of a prior charge to that extent; (2) that the same appellant, as holder of two mortgages for the two west houses, had priority, to the extent of \$631.87, over all liens other than the Brown lien; (3) that the appellant James Kaake was holder of a mortgage on all the houses for \$1,050, or so much thereof as may be proved to have been in fact advanced to or on account of the mortgagor or Rosenfeld, as to which he was prior to all liens; (4) that the same appellant was holder of a mortgage for \$1,200 on the two east houses, prior to all the liens except the Brown lien.

Appeal allowed, and judgment below set aside except in so far as it finds the amounts of the liens, which are not disturbed. Reference back to enable the Referee to deal with the claim