ALEXANDER L. MONTREUIL AND OTHERS (PLAINTIFFS) } APPELLANTS;

AND

THE ONTARIO ASPHALT COMPANY AND THE CALDWELL SAND AND GRAVEL COMPANY (DEFENDANTS)..... } RESPONDENTS.

1921
*Nov. 11.
1922
*Feb. 7.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Statute—Application—Lessor and Lessee—Lessee's option to purchase—Improvements by lessee—Mistake as to lessor's title—Action for possession—Retention of land—Belief in ownership—Equitable relief—R.S.O. [1914] c. 109 s. 37.

R.S.O. [1914] ch. 109 sec. 37 provides that a person who makes lasting improvements on land under the belief that it is his own is entitled to a lien thereon for the enhanced value given it by such improvements or may retain it on making compensation to the owner.

Held, Idington and Duff JJ. dissenting, that a lessee of land with an option to purchase at the end of the term is not entitled to the benefit of this statute. As lessee he could not believe the land to be his own and the option does not warrant such a belief before it is exercised.

The lessee in such a case may obtain, as equitable relief, compensation for his improvements to the extent to which they enhanced the value of the land. His mistaken belief that the lessor owned the fee which he could acquire on expiration of the term was such a mistake of title as to bring him within the equitable doctrine applicable.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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To entitle the lessor to such compensation where the owner has not encouraged nor acquiesced in the expenditure therefor it is necessary that the latter must himself be asking some equitable remedy, but

Held, that in Ontario, in the common law action of ejectment and for mesne profits the compensation so made for improvements may be set off against the allowance for such profits.

Held also, that no compensation can be allowed for improvements made after the lessee was aware that the lessor's title was questionable.

Judgment of the Appellate Division (47 Ont. L.R. 227) which reversed that on the trial (46 Ont. L.R. 136) varied.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial (2) in favour of the Appellants.

The material facts and the question of law raised on the appeal sufficiently appear from the above head-note.

Armour K.C. and Bartlet K.C. for the appellants. The respondents are not entitled to the benefit of the Act. They could not have believed that the lessor had a title in fee.

The cases of *Gummerson* v. *Bunting* (3) *and Bright* v. *Boyd* (4) have no application. In both cases there was an actual purchase and justification for the belief that the vendor could convey the title.

Nor are they entitled to equitable relief. The belief in ownership is essential to this also. And there is no evidence that lasting improvements were made.

In any event no compensation can be granted for improvements made after respondents became aware of the lessor's want of title.

(1) 47 Ont. L.R. 227.
(2) 46 Ont. L.R. 136.
(3) 18 Gr. 516.
(4) 1 Story 478; 2 Story 605.

Rodd K.C. and Fripp K.C. for the respondents. The appellants are stopped from disputing the claim as they must be held to have acquiesced in the placing of improvements on the land. The judgment of the trial judge should be restored.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, I am of the opinion that the judgment of the Appellate Division appealed from should be varied by striking out sub-paragraph 2 of paragraph 3 and substituting a direction for a reference to ascertain (1) to what amount the plaintiffs are entitled for mesne profits; (2) by what amount the value of the property has been enhanced by reason of permanent improvements effected by the defendants before the 2nd of October, 1908; (3) what balance, (if any) the plaintiffs should recover as their actual damages.

No costs of main appeal.

IDINGTON J. (dissenting)—The result of this appeal and cross-appeal, in my opinion, should turn upon the question of whether or not section 37 of the Conveyancing and Law of Property Act, being chapter 109 of the Revised Statutes of Ontario, should govern the rights of the parties concerned.

That section reads as follows:—

37. Where a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct.

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I shall revert presently to the history of that enactment but meantime may be permitted to state the outline of the story out of or in relation to which its relevancy has to be considered.

By a lease of the 2nd February, 1903, the late Luc Montreuil demised to the Ontario Asphalt Block Company certain parcels of land for ten years at an annual rental of one thousand dollars a year, and thereby gave it an option to purchase same on giving six months notice during said period at the price of $22,000.

The said company thereby bound itself not only to pay said yearly rental but also to build a dock to cost not less than $6,000.00, which, if the option not exercised within said period, was to become the property of the said lessor.

The said lessee at once proceeded to erect upon said property a building and factory for the purposes of its business at a cost of eighty thousand dollars, or more, and the said dock at a cost much exceeding said $6,000.00 and added to such equipment, year by year, a great deal in way of improvement.

After this expenditure it was discovered, in October, 1908, in regard to some other property which had been held by said lessor, upon an identical title by which part of that, covered by said lease and agreement, was held by him, that his title was found to be only that of a tenant for life and that the remainder would go to his children.

He made good to other purchasers by inducing appellants to release their claims therein.

Upon learning of this, on the 2nd October, 1908, the respondent Asphalt Company's secretary wrote the said lessor as follows:—

Windsor, Ont., Oct. 2nd, 1908.

Luc Montreuil, Esq.,
Walkerville, Ont.

Dear Mr. Montreuil:—

I understand that some question has arisen with reference to your right to sell the farm property at Walkerville, and it occurs to me that being the case, you should get from your children a confirmation of the lease that you made to The Ontario Asphalt Block Company, Ltd., of the premises they now occupy. In case of your death the children might repudiate the lease and as we have spent a very large sum of money on the building, etc., we would be obliged to hold your estate liable on your covenant for quiet enjoyment, in case any trouble arose, and all this can be avoided now by your getting from the children some documents confirming the lease.

Yours truly,
O. E. Fleming,
Secretary.

And not receiving any reply again wrote him the following:—

Windsor, Ont., Dec. 24th, 1908.

Luc Montreuil, Esq.,
Walkerville, Ont.

Dear Sir.—

It would be very much more satisfactory to us and also to yourself if you would have your children convey to you the property leased by you to the Asphalt Block Company, and under which lease you are bound to convey to them at the expiration of the lease.

We would feel very much more satisfied if you would do this.

Yours truly,
O. E. Fleming,
Treasurer.

The writer of said letters was called as a witness on the trial of this action brought by appellants to eject respondents from the possession of that part of said lands for which the said lessor had failed to get the said deed from appellants, as requested, and in course of his explanatory reason for writing said letters, testified as follows:—

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Mr. Rodd: You had made a large expenditure? A. Yes, and we had not any idea but what when we spent the first dollar on the property that we had purchased under the option we could not afford to spend the money without doing that.

Q. You say that was the intention of the company from the outset? A. Yes.

Q. Why did you take the lease instead of buying out-right at the first? A. Because $1,000 a year is less than 5% on the purchase price of $22,000, and in addition to that $22,000 meant a lot to us in establishing a plant of this sort.

Q. At any rate that was the reason you wrote the letter? A. Yes.

Q. Did you ever get any reply to those letters? A. No, no reply.

Q. You were going to tell me what you had spent up to December 31st, 1912, on the plant? A. $159,126.18, and on the 31st December, 1917, $174,354.78.

HIS LORDSHIP:—And then you went on after the discovery; after 1908 you went on? A. Yes, my Lord, we had to take care of the business; it was a case of necessity.

MR. RODD:—What position would your client have been in if you had not gone on? A. We would not have been able to have taken care of the increase of business; business has to grow or go back; we could not stand still.

This evidence seems to have been overlooked by the court below when quoting part of the evidence given on cross-examination by the same witness, in the judgment appealed from.

Taken together therewith and the other facts in evidence to which I will presently refer, I respectfully submit that it seems to me that the conclusion reached resting upon said cross-examination is far from convincing.

Passing meantime from that to relate what ensued, the respondent Asphalt Block Company continued in possession of said premises, enlarging and improving the factory so built, and in course of so doing making it quite evident that its owners were determined to enforce the option of purchase contained in the said lease. And in due course of time the respondent Asphalt Block Company served the lessor, on the 5th January, 1912, with notice pursuant to the terms of said

option, that it intended to exercise the right to purchase said lands and premises according to the terms in the said lease provided, at the end of the said term of ten years.

The said notice recited the facts of the lease for ten years from the 2nd day of February, 1903; the going into possession; the option given of purchase at the expiration of said term upon giving six months previous notice in writing of its intention to do so.

The said lessor refused to carry out his agreement and the respondent Asphalt Block Company brought an action on the 10th February, 1913, for specific performance which was tried on the 27th of following May. Judgment was given therein directing specific performance of so much of the interest in said lands as the lessor could convey and allowing an abatement of price for what he could not convey, and damages for breach of his contract.

On appeal to the Appellate Division of the Supreme Court of Ontario that judgment was modified as appears in the report of the case (1). And an unsuccessful appeal therefrom to this court was heard in 1916.

I understand counsel agreed in the statement that the reference directed thereby has never been proceeded with.

Luc Montreuil, the said lessee when this case was before the said Appellate Division, as directed by that court, filed an affidavit shewing that he got a grant to himself of part of the lands covered by said lease in 1874 and giving in detail the ages of his children, from which it appears that the present appellants were each at the time of his making the lease in question over twenty-one years of age.

(1) 29 Ont. L.R. 534.

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They are shewn also to have made at his request conveyances of their interests to other purchasers from him of property held upon the same title as in question herein.

They also are shewn to have known of the improvements made by the appellant Asphalt Block Company, now in question, but never objected or in any way protested or warned the said company of their claim to be entitled to the remainder of said property, upon which they rest herein, asserting the right to eject the respondents from that part of the premises now in question.

The lessor and vendor Luc Montreuil, died in January, 1918.

And in the following August, his children, the appellants, brought this action of ejectment.

The Asphalt Block Company, respondent, in reply set up the salient facts which I have set forth above and rely thereon, by way of counter claim, upon estoppel and seek a declaration to that effect, and next a declaration

> that this defendant upon making proper compensation is entitled to retain the lands in question or in the alternative a lien thereon in respect of the improvements made under mistake of title as claimed in paragraph thirteen hereof.

The appellants joined issue thereon and the case went to trial before the late Chief Justice Falconbridge who gave effect to the latter contention. And in doing so of course rested entirely upon the section I have quoted above.

The First Appellate Division quoting, as already stated, the cross-examination of the secretary of the Asphalt Block Company, overlooking his examination in chief and, I respectfully submit, also overlooking the weight to be given the actual facts of such a large

expenditure as made upon lasting improvements and all implied therein, and which testify, in my appreciation of fact, much more forcibly than the mere words, of doubtful import, upon which the Appellate Court relied, to the existence of the realities required by the statute, of belief in the efficacy of an option as a means or method of ownership.

Such is, I submit, the attitude which the court should hold in trying to solve the question of fact as to belief in ownership.

And when we come to consider what the quality of ownership may be upon which such a belief may be reasonably founded, certainly we are not to bind him seeking relief under the statute in question to prove an actual absolute ownership or its equivalent, for then the statute would be rendered meaningless.

We may, first recalling that in our English law there is no such thing as any absolute ownership of land except in the Crown, properly turn to the many varying meanings which the word "owner" may present.

We find in Bouvier's Law Dictionary the following:—

> *Owner.*—He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.

Surely a man having an option to purchase can well believe himself such a person as therein and thus defined.

Clearly a man possessed of such an option as the opinion expressed in *London and South Western Ry. Co.* v. *Gomm,* (1) demonstrates, has an interest in land and the extent thereof may be demonstrated by the acts of the optionee evidencing this intention to exercise, long before the actual notice of acceptance as foundation for an assertion of belief in his ownership.

(1) [1882] 20 Ch. D. 562.

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The right of dominion over the land in respect of which he has such an option of absolute purchase is as absolute as any man may desire and the only question remaining, I submit, is whether or not at the time when he acts on his alleged belief, that is, under all the circumstances, an honest belief, in other words, an honest determination to exercise the option.

There are also cases cited in Stroud's Judicial Dictionary in which, though turning (in some of the cases cited) possibly on legislative interpretation, yet in the mode of reasoning adopted in disposing of same, are worthy of note.

The judgments in the cases of *Ramsden* v. *Dyson*, (1) and *Plimmer* v. *Mayor, etc., of Wellington*, (2) may also be advantageously referred to for an elucidation of the principles upon which the courts of equity act in protecting the parties making improvements under the belief that they have such an interest in the property or right to acquire same, as entitles them to rely thereon in making substantial improvements.

Surely one is, in such a case as presented herein, in just as good a position as the vendee paying a mere nominal deposit and that test seems to me to be important and ought to be observed as a guide, for such was the chief basis of the recognized law; and springing from that the doctrine so grew as to cover other like cases. Possibly prevention of fraud was the earlier basis.

The sole reason for the statement of the first part of the statute in question as it appeared in 36 Vict. c. 22, s. 1, was doubtless to render clear and of universal application by the imperative requirement of a statutory law, a doctrine developed in courts of equity and not so uniformly observed even there as was desirable, and seemed even to startle learned judges in common law courts.

(1) [1866] L.R.I.H.L. 129. (2) [1884] 9 App. Cas. 699.

For example, though the doctrine had been enunciated and applied by the Chancellor of Upper Canada in the case of *Bevis* v. *Boulton*, (1) his successor, only four years later, in the case of *Kilborn* v. *Workman*, (2), refused to apply it, and nine years thereafter in the case of *Gummerson* v. *Banting* (3), after reviewing many of the then leading cases in point, applied the doctrine.

In doing so it may be observed that he referred to the said *Kilborn* v. *Workman* (2) and excused its non-application there by referring to the case of *McKinnon* v. *Burrows*, and mentioning that a later case in England had shown he was in error. The only *McKinnon* v. *Burrows* case I can find is a common law action in (4)

Clearly there was an error in failing to observe the English decision in the case of *Bunny* v. *Hopkinson*, (5) perhaps excusable if regard is had to the changed conditions from then to now. And, I submit, that the right therein recognized was no higher than the right of him possessed of an option upon which he might reasonably act and assert as a basis of honest belief in ownership as above defined.

My own impression is that there was another case in Ontario which in a more remarkable degree brought to public attention the want of uniformity in applying the law and led to the enactment of the first part of the clause now in question. I cannot find it reported, and my memory does not serve me to recall the name thereof.

(1) [1858] 7 Gr. 39.
(2) [1862] 9 Gr. 255.
(3) [1871] 18 Gr. 516.
(4) 3 U.C.Q.B. (O.S.) 114.
(5) [1859] 27 Beav. 565.

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Illustrative, however, of the state of, even the judicial mind, in the common law courts, then being constrained to apply some equitable doctrines and procedure, I find the new enactment referred to as follows in the case of *Carrick* v. *Smith* (1), at page 399:—

> 36 Vic. ch. 22, O., declares that: "In every case in which any person has made or may make lasting improvements on any land under the belief that the land was his own, he or his assignee shall be entitled to a lien upon the same, to the extent of the amount by which the value of such land is enhanced by such improvement." This is a very extensive protection, and perhaps it may be called very advanced legislation to give a lien *in every case* to a person who has made improvements, ments, even *lasting* improvements, on any land, *under the belief* that the land was his own.

I think these several decisions and judicial expression show how much need there was for an enactment of the kind now in question not so much as an advancement in legislation, as the need of having the law well understood and of universal application.

It was much needed. It was introduced, I believe, by the late Hon. Edward Blake, a master of law and language, well knowing what he was about, and was aptly entitled

> An Act for the protection of persons improving Land under a Mistake of Title.

The case of *Gummerson* v. *Banting* (2), cited above, is relied upon in the judgment appealed from to give herein the measure of relief which, in principle, was on all fours with the said enactment passed a couple of years after said decision. I am unable to distinguish the doctrine applied in the said decision, from the principle sought to be enforced by the enactment as it first stood.

(1) 34 U.C.Q.B. 389. (2) 18 Gr. 516.

And all that was done thereafter was to add thereto by an enactment passed on the eve of the 1877 Revision of the Statutes of Ontario, which reads as follows:—

> or shall be entitled or may be required to retain the land if the Court is of the opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct.

If justice is to be done in many cases in applying either the doctrine in *Gummerson* v. *Banting*, (1) or the statute of 1872, which in principle are, I think, identical, this addition was necessary, otherwise, innocent men might suffer unduly.

The later enactment confers on the courts the power to avoid and avert such possible injustice.

I think we have presented in this case a state of actual facts which call for such a legislative enactment, and that its efficacy should not be rendered futile or entirely nullified by reason of a witness hesitating under pressure of cross-examination to give the true and obvious meaning of what respondents claim and that too when at the very outset he had declared what he meant.

I think the late Chief Justice Falconbridge was absolutely right and that his judgment should be restored.

The appeal should, I therefore hold, be dismissed with costs and the cross-appeal so far as seeking that alternative should be allowed with costs save so far as same increased by the contention that there never was a mere life estate but an estate tail or otherwise.

I have not perhaps examined the lastly mentioned question as thoroughly as it may deserve. It seems, however, untenable and to have been abandoned since argument.

(1) 18 Gr. 516.

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DUFF J. (dissenting).—The enactment to be considered, (sec. 37 R.S.O. ch. 109) is in these words:

> 37. Where a person makes lasting improvements on lands under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by the improvements or shall be entitled as may be required to retain the land if the Court is of opinion or requires that this should be done according as may under all the circumstances of the case be most just making compensation for the land, if retained, as the Court may direct.

It should first be noticed that the draftsman of this enactment has carefully avoided technical legal nomenclature. "Under the belief that the land is his own" does not contain a single word (except the word "land") having a definite legal meaning. The word "owner" itself is indeed a word of very flexible signification. *Lister* v. *Lobley* (1); *Phyn* v. *Kenyon*, (2) *United States of America* v. *99 Diamonds* (3). The appellant company, that is to say the officers of the appellant company, believed that company was entitled to possession under a lease for a defined period under which the company had the right to make improvements and to remove them at the expiration of the term; and under it also the company was entitled to receive a conveyance of the fee simple from the lessor (who, it was believed, was the owner of the title in fee simple subject to the lease) upon the payment of a fixed sum of money and upon notice by the company exercising its option not later than a prescribed date. Treating the assumptions upon which all the parties were proceeding as facts, the company, it having been decided that the option should be exercised and the necessary moneys being available,

(1) [1837] 7 A. & E. 124 at pp. 127-9.

(2) [1905] 42 Scotch L.R. 382 at p. 384.

(3) 2 L.R.A. N.S. 185 at p. 193.

had not only the necessary means within its hands but had all the necessary legal rights vested in it to acquire at its sole discretion the full title in fee simple. In a practical business sense the company was in control of the property. It could sell, investing the purchaser with not indeed a title in fee simple in possession, but the absolute right to acquire such a title on the payment of a specified sum of money. It had possession with full power to use the property for all the purposes of its business and particularly for the purpose of making the improvements over which the dispute arises. It may be open to argument whether or not the company, so long as its option was not exercised, could by legal process prevent the lessor from transferring his title, but by exercising the option, that is to say, by binding itself to take the property on the stipulated terms, such a right would immediately become vested in it. A lessee invested with such a measure of control occupies a position which I think is not in any practicable way distinguishable (discarding of course the technical legal point of view) from that of a mortgagor in possession of property held by him subject to a mortgage securing a debt equal almost to the pecuniary value of the property and still less from a purchaser who has bound himself to buy but has paid only a small sum on account of the purchase money. In all these cases the person in possession has, subject to one condition, the payment of a sum of money, the same power of control over the property as that possessed by the owner in fee simple. If he makes improvements under the belief that his rights are in fact what they appear to be he does so in the belief that he possesses powers of control that will enable him to make full use of the improvements so long as his rights remain vested in him and

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which at the same time will enable him to transfer his powers and rights to another and on such transfer to obtain in the ordinary course the enhanced value of the property due to the improvements.

I repeat, the language of the enactment is not lawyers' language, and construing the language according to the usage and understanding of men who are not lawyers I think the appellant company has brought itself within the condition expressed in the words above quoted.

I am unable to agree that anything in Mr. Fleming's evidence creates any obstacle in the way of giving effect to this view. Mr. Fleming, a member of the bar, was being pressed on cross-examination to give an answer which would involve an expression of opinion on a question of law, namely, the construction of the statute now under consideration. He gave the only answer that could be given, that is to say could properly be given if he was to answer the question at all; and in effect his answer is that he believed that the rights which the lease purported to give to the company were in fact vested in the company.

This is sufficient to dispose of the appeal. In view of the ground upon which, however, the majority of the court has proceeded I think it is important to make an observation or two upon the rule respecting the measure of damages in an action to recover mesne profits. In the American courts a rule has been adopted (the effect of which is stated in a well known text book Sedgewick on Damages, sec. 915) that the action for mesne profits is a liberal and equitable action and one which will allow of every kind of equitable defence and in particular that improvements made by the occupant may be the subject of set off. This is based upon reasoning derived in part from the rules of the civil law. But the reasoning is also

based upon the supposed effect of earlier English decisions. The case principally relied upon in support of it, see *Putnam* v. *Ritchie*, (1) *Jackson* v. *Loomis* (2), is *Coulter's Case* (3) in which a set off was allowed of rent payable under a rent charge and the decision is explicitly put upon the ground that the disseisor might have recovered what he had paid in an action and the set off was allowed for the purpose of avoiding circuity of proceedings.

The American authorities appear also to proceed to some extent upon the analogy of the ancient real actions in which Mr. Sedgewick says, the set off was always allowed. Sec. 915. It would be profitless to follow the American authorities into this discussion. At common law damages were not recoverable in the real actions generally. They were recoverable in the assize, because it was regarded as a mixed action and by the Statute of Gloucester, VI Ed. I, this procedure was made applicable and this right given to the plaintiffs in real actions generally; Booth, Real Actions. But in ejectment which was a development of the old action of trespass *de ejectione firmae* damages, that is to say, damages in the nature of reparation for deprivation of possession or compensation for use and occupation were not recoverable prior to the statute of Geo. IV (I Geo. IV, c. 87 sec. 2); for this relief the plaintiff was obliged to resort to a supplementary action in trespass—trespass for mesne profits. And the law governing the measure of damages in such an action was well settled. It is stated in these terms in Mr. Justice Lush's book on Practice, vol. 2 p. 1012:—

(1) 6 Paige Ch. R. 390 at p. 401. (2) 4 Cowen 168 at p. 171.
(3) 5 Co. 30a.

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The measure of damages is the yearly value of the land, subject to such deductions for ground rent, taxes &c., as were chargeable thereon, and as the defendant necessarily paid, and the costs of such proceedings as were necessarily taken in order to obtain possession, and in case of judgment by default, the costs of ejectment to be taxed as between party and party. If any special damage had been sustained this also may be recovered if specially laid in the declaration.

To the same effect it is given in Selwyn's Nisi Prius at p. 685, in Roscoe's Nisi Prius at p. 947 in Tidd's practice vol. 2 p. 889 and in Cole on Ejectment at pp. 642 & 643. Under the head of special damage a jury might take into consideration the plaintiff's trouble and inconvenience by reason of being kept out of possession and the costs of ejectment. The "yearly value of the land" is calculated as in an action for use and occupation, Cole, 643. The rule is and has long been settled that the measure of damages in such an action is the value of the mesne profits calculated as mentioned subject to deductions of the character mentioned plus special damage if any be alleged and proved and it is a claim for such damages so measured which by the statute of Geo. IV and the Common Law Procedure Act (1852 sec. 218) the landlord might at his option add to a claim in ejectment against an overholding tenant and which under the Judicature Act of 1875 might and under the existing practice may now be joined to a claim to recover possession of land. In Ontario the statute of Geo. IV was adopted and re-enacted in 1856; it was reproduced in the C.S.U.C. ch. 27 sec. 60 and remained the law in Ontario until the passing of the Ontario Judicature Act of 1881 when the English rule of 1875 above referred to was reproduced as marginal rule 116, the rule which is now in force.

The claim for mesne profits authorized by the Upper Canada statute of 1856 and by the Ontaro rule just

mentioned of 1881 was a claim the plaintiff was entitled to assert prior to the statute of Geo. IV in England and prior to the statute of 19 Vict. in Upper Canada in an action of trespass for mesne profits and it is such a claim and only such a claim that the plaintiff is now under the English Judicature Act and under the practice in Ontario entitled to join to an action for the possession of land.

It can I think be conclusively shewn that in passing upon such a claim whether under the existing procedure or under the old procedure the courts in England have never admitted the right of the defendant by the law of England to a set off for the cost of improvements except of course in a case in which (under the existing procedure) an equitable right arises, for example, from the conduct of the owner in encouraging the defendant to make such improvements relying upon a supposed title or right of possession. That is made quite clear by reference to the well known text books referred to above as well as by the decision of the Court of Exchequer in *Cawdor* v. *Lewis* (1), which is a decisive authority upon the point.

I call attention to the law in this point because it is important in view of the course which has been taken in respect of the appeal, to make it quite clear that whatever be the law in Ontario the rule in other provinces where the law of England prevails in relation to these matters is definitely settled.

As regards the rule in Ontario, no point having been raised as touching the common law right of set off either in the court below or in this court and not having had the benefit of any argument upon it I should have required something much more convincing than

(1) 1 Y. & C. Ex. 427.

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anything I have seen to induce me to concur in laying down a rule for the guidance of the Ontario courts on this subject which diverges in a very marked way from the law governing the rights of the parties in the common law action of trespass for mesne profits as uniformly laid down in all the recognized books on procedure and as accepted and administered by the courts in England. The legislature of Canada in making provision for the joining of a claim for mesne profits in a landlord's action of ejectment reproduced the statute of Geo. IV *ipsissimis verbis* and in 1881 in providing for joining such a claim in all actions to recover possession of land the legislature of Ontario reproduced the English rule on the subject also *ipsissimis verbis*. *Prima facie* the claim thus dealt with by the legislature was the claim known to lawyers by the designation trespass for mesne profits and governed by long established rules, (rules as I have said expounded in all the recognized books of practice) governing the disposition of such a claim by the English courts. *Prima facie* that seems to be so and the presumption that it is so could only be displaced by shewing a continuity of decision and a settled practice in accordance with such decisions which it would be the duty of this court to respect as establishing a divergence between the Ontario and the English law. I find no evidence of any such course of decision. Two cases have been cited in which the court *en banc* refused to interfere with the verdict of a jury although the jury had evidently taken into account the improvements made by a trespasser in passing upon the question of damages but I cannot find any evidence that these decisions have been regarded as laying down any definite rule which has since been followed. They are not referred to in the

latest books on practice, they are not cited in Mr. Justice Maclennan's book on the Judicature Act or in Holmested & Langton's book. They are referred to in one or two subsequent cases in an incidental way but in a manner which goes to indicate a considerable doubt as to the precise effect of them. Mr. Justice Osler, whose knowledge of practice must have been exact, says in *McCarthy* v. *Arbuckle* (1) at p. 415 that these decisions apply only where the possession is not tortious meaning apparently that they are limited to cases where the plaintiff's conduct has been such as virtually to amount to a licence.

An observation or two upon the grounds upon which the court below has proceeded. The view taken appears to be that the decision of the Court of Chancery in Ontario in *Gummerson* v. *Banting* (2) and of Mr. Justice Story in *Bright* v. *Boyd* (3) constitute a sufficient weight of authority to establish the proposition that according to the law of Ontario a person in possession of land under an honest belief that he has a title to it who expends money upon it in such a way as to enhance its value has apart from statute a charge upon the land to the extent of such enhancement. I do not think that principle is part of the law of Ontario except to the extent to which as a principle of law it is supported by the statute already discussed. It is the opinion of Mr. Justice Osler as expressed in *McCarthy* v. *Arbuckle* (1) that the object of the statute was to enable a person expending money in such circumstances to assert in a substantive action against

(1) 31 U.C. C.P. 405.
(2) 18 Gr. 516.
(3) 2 Story 605.

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the true owner his right to a lien to the same extent to which he could have done so in answer to an equitable claim by the true owner to recover the land. If Mr. Justice Osler's view be the right view of the statute then, of course, no difficulty arises; it is quite clear that where the owner was obliged to resort to the Court of Chancery for the purpose of asserting his title against a person in possession who in good faith had expended money in effecting improvements increasing the value of the land, the court would require the plaintiff as a condition of equitable relief to make such compensation as might in the circumstances be just. The principle is well settled and it is unnecessary to elaborate it. It is sufficient to refer to *Murray* v. *Palmer* (1) at p. 490 and to Sudgen, Vendor and Purchaser (9th ed.) at p. 266. *Bright* v. *Boyd* (2) was such a case.

On the other hand the law is clear that where the plaintiff seeks the enforcement of his strictly legal rights and consequently does not require the aid of a court of equity this principle has no application. If the aid of a court of equity is not required then to cite from the work just mentioned "and a person can recover the estate at law, equity, unless there be fraud, cannot, it is conceived, relieve the purchaser on account of money laid out in repairs and improvements, but must dismiss a bill for that purpose with costs".

ANGLIN J.—In 1903 Luc Montreuil, believing himself to be the owner thereof in fee under his father's will, leased to the defendants for ten years the land in question, together with an adjoining water lot of which he was in fact owner in fee under a Crown grant

(1) 2 Sch. and L. 474. (2) 2 Story 605.

to himself. The lease contained an option to purchase for $22,000 the entire property leased, exercisable at the end of the term on giving six months' previous notice; it also provided, in the event of the option not being exercised, for a renewal for ten years on like terms in other respects, but without the option to purchase; and it reserved to the lessees the right to remove all buildings and plant to be erected by them on the demised premises, except a dock, which they covenanted to build at a cost of not less than $6,000. It was expressly provided that, if the option were not exercised, this dock should become the property of the lessors on the expiry of the term or of any renewal thereof.

The defendants took possession under the lease and before October, 1908, expended on the dock and on buildings $80,000, or possibly a somewhat larger sum. How much of that expenditure was made on the part of the demised lands here in question does not appear.

In October, 1908, doubt first arose as to the extent of Luc Montreuil's interest. In litigation commenced then or shortly afterwards between him and the late Hiram Walker, over a piece of property held by the same title as that here in question, it was determined, in October, 1911, that under his father's will, Luc Montreuil was not an owner in fee but merely a life tenant (1) the remainder in fee having been devised to his children. Up to that time the evidence makes it abundantly clear that the children of Luc Montreuil (the present plaintiffs) had believed that their father owned in fee the lands devised to him. They appear to have acquired knowledge of their possible

(1) 3 Ont. W.N. 166; 20 Ont. W. R. 259..

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interest in remainder about the same time and probably in much the same way that their father's lessees learned of it. No investigation of Luc Montreuil's title had been made on behalf of the defendants either when they took their lease or before they began their large expenditures on the property.

With knowledge of the doubt cast upon the title of their lessor, the defendants made further large expenditures on the leased premises and in January, 1912, gave notice to Luc Montreuil of their intention to exercise the option to purchase. Montreuil having refused to convey an action for specific performance ensued in which his limited title to the land now in question was recognized. Specific performance of the option as to the other demised land held under Crown grant was ordered and, as to the land now being dealt with, the defendant was required to convey his life interest therein and the plaintiffs (the present defendants) were allowed an abatement in the purchase money (the amount thereof to be fixed on a reference)in respect of the interest in remainder which Luc Montreuil could not convey. (1)

Luc Montreuil died in January, 1918. The defendants continued to hold possession of the entire property. The present action was begun in August, 1918, by the children of Luc Montreuil, the devisees in remainder under the will of their grandfather. By their statement of claim they demand (1) possession of the said (devised) lands; (2) mesne profits; and (3) their costs of the action."

The statement of defence sets forth the terms of the lease and option, the exercise of the latter, the expenditure made by the defendants in improvements and the

(1) 29 Ont. L.R. 534; 52 Can. S.C.R. 541.

refusal of Luc Montreuil to convey to them. It alleges that the present plaintiffs were aware of the terms of the lease, that all or some of them took part in the negotiations leading to the making of it, and that they all stood by without protest while the improvements were being made and that they are therefore estopped from denying the defendants' right to hold the lands or alternatively are liable to them in damages. The R.S.O., ch. 109 (s. 37) is also pleaded and under it the relief is claimed either of the defendants being allowed to retain the land, making compensation to the plaintiffs for their interest therein, or of their being awarded compensation for the amount by which the value of the land has been enhanced by their improvements.

The late Chief Justice of the King's Bench, who tried the action, held that the case fell within the purview of the statute pleaded and gave judgment allowing the defendants to retain the land and referring it to the master to ascertain what compensation should be made by them to the plaintiffs (1).

On appeal by the plaintiffs the Appellate Divisional Court held that the case did not fall within the statute because the defendants never believed that the land was their own; but, following *Bright* v. *Boyd* (2) and *Gummerson* v. *Banting* (3), also held that, while the plaintiffs should recover the land, the defendants were entitled to equitable relief for the amount by which lasting improvements, made by them while under the impression that Luc Montreuil was owner in fee, had enhanced its value. (4)

(1) 46 Ont. L.R. 136.
(2) 1 Story R. 478; 2 Story R. 605.
(3) 18 Gr. 516.
(4) 47 Ont. L.R. 227.

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From this judgment the plaintiffs appeal asserting a right to recover the land unconditionally. The defendants cross-appeal claiming to have the judgment of the learned trial judge restored; they also sought to reopen the question of the extent of Luc Montreuil's interest, contending that it was an estate tail.

By notice given since the appeals were heard, the last mentioned contention has been abandoned in view of the futility of pressing it in the absence of any conveyance sufficient to bar the entail. The case must therefore be dealt with on the basis that Luc Montreuil had merely a life estate.

The statutory provision invoked by the defendants reads as follows:—

> 37. Where a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct.

The part of this section which precedes the semicolon was originally enacted in 1873 by 36 Vict., ch. 22; the part following the semicolon was added in 1877 by 40 Vict. ch. 7, in preparation for the revision of that year in which the complete section appears as section 4 of chapter 95.

This statute gives the court the extraordinary power of depriving a lawful owner of his property against his will, although for a compensation. *McCoy* v. *Grandy* (1). The conditions on which a jurisdiction so much in derogation of common law right is conferred must be strictly construed and fully satisfied. *Hughes* v. *Chester & Holyhead Ry. Co.* (2);

(1) 3 Ohio St. Rep. 463, 468-9. (2) 31 L.J. Ch. 97, 109.

Wright v. *Mattison* (1); *Osterman* v. *Baldwin* (2); *Rigor* v. *Frye* (3); *Wheeler* v. *Merriman* (4); *Hollingsworth* v. *Funkhouser* (5); *Van Valkenburg* v. *Ruby* (6). *White* v. *Stokes* (7), closely resembles the case at bar, although the wording of the statute, as in the other American cases, is somewhat different.

Did the defendants when making their improvements believe that the land in question was their own? Unless they did they cannot invoke the statute just quoted. They had a lease with an option to purchase. They had neither legal nor equitable ownership. They no doubt believed that their lessor owned the fee of the property and that they could acquire it by an exercise of the option. But even if they intended to exercise the option the belief that Luc Montreuil actually owned the land excluded belief that it was theirs. Until they actually gave notice of intention to exercise the option, assuming its validity, they had merely a right of election either to acquire the land or not to do so. It is impossible to conceive that they could have believed under these circumstances that the land was their own. They might never have acquired its ownership. *Young* v. *Denike* (8), relied on by the late Chief Justice of the King's Bench, was a case of contract for sale under which, if the vendor had title, the purchaser would have become the equitable owner. Belief of the purchaser that the land was his own by equitable title was apparently regarded as sufficient to bring the case within the statute, although this is not mentioned in the judgment. No such belief could exist here.

(1) 18 How. 50.
(2) 6 Wall. 116.
(3) 62 Ill., 507.
(4) 30 Minn. 372, 376.
(5) 85 Va. 448, 454.
(6) 68 Tex. 139, 143.
(7) 67 Ark. 184.
(8) 2 Ont. L.R. 723.

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Moreover the provisions of the lease for its renewal, and that the dock to be built on the premises should belong to the lessor and that all other buildings erected by the lessees might be removed in the event of the option not being exercised certainly do not indicate that when the defendants leased the premises they had definitely determined that they would eventually purchase them. But, whenever the definite intention to purchase may have been formed, until the option was in fact exercised, whatever may have been their interest in the land (*London and S.W. Ry. Co.* v. *Gomm* (1); *Davidson* v. *Norstrant* (2)) they could not have believed it to be their own. The portion of the evidence given by Mr. Fleming, the secretary-treasurer and legal advisor of the defendant company quoted by the learned Chief Justice of Ontario, read with the rest of his testimony, is conclusive that they had in fact no such belief.

> Q. Did you believe you owned it then?
> A. No, we could not own it. The only right we had was under the lease.

It is therefore, I think, quite clear, as held by the Appellate Divisional Court, that the defendants are not entitled to the benefit of the statute they invoke and that their cross-appeal fails.

Are they entitled, as equitable relief, to the allowance in respect of lasting improvements which they have been accorded in that court?

I should perhaps first consider the two objections chiefly pressed by Mr. Armour, (a) that because they merely held an option and did not believe themselves to be actual purchasers or owners of the property the defendants do not fall within the class of persons

(1) 20 Ch. D. 562. (2) 61 Can. S.C.R. 493, 509.

entitled to equitable relief in respect of improvements made in mistake of title; (b) that no actual enhancement in value was proved at the trial and the defendant's plea for compensation should therefore have been rejected.

(a) I think effect should not be given to this objection. The evidence of Mr. Fleming makes it reasonably clear that when the expenditure for improvements was made the defendants had determined to exercise their option to purchase. They made improvements in the full belief that they could on the expiry of their lease acquire title to the land from their lessor. In this they were mistaken, and that mistake in my opinion was such a mistake of title as brings them within the equitable doctrine which they invoke. The cases are numerous in which an expectation of acquiring title has been held sufficient to support a claim for an allowance in respect of improvements made while it was reasonably entertained. *Plimmer* v. *Wellington* (1); *Biehn* v. *Biehn* (2); *Unity Joint Stock Banking Assoc.* v. *King* (3). But see *Smith* v. *Smith* (4). Nor does the fact that they were undoubtedly careless in making such expenditure without a proper investigation of their lessor's title disentitle them to such relief. So long as the mistake was *bona fide* the fact that it may have been due in part to carelessness does not debar the defendants from redress.

(b) As to the second point, it is within the power of the Ontario courts under section 64 (1) of the Judicature Act to try one or more of the issues in any case and to refer any other issue or issues to a master for inquiry and report. That apparently has been

(1) 9 App. Cas. 699, 710.
(2) 18 Gr. 497.
(3) [1858] 25 Beav. 72.
(4) 29 O. R. 309; 26 Ont. App. R. 397.

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done here by the Appellate Divisional Court as the form of the inquiry directed—"what, *if any*, lasting improvements were made" and "the amount, *if any*, by which the value of the said lands was enchanced"—indicates. A passage from the judgment of Kay J. in *Shepard* v. *Jones*, (1) at page 472, is relied upon by the appellants. There were in that case, however, other grounds as well as lack of proof of actual enhancement assigned by the learned judge for the refusal to order an inquiry as to improvements. Reference may also be made to the direction for inquiry formulated the by Privy Council in *Henderson* v. *Astwood*, (2) at page 164, viz.,

> an inquiry whether *any* and what sum ought to be allowed * * * in respect of lasting improvements.

In the present case however there was evidence of enhancement in value given at the trial. Thus Mr. Fleming on cross-examination would place an additional value of $1,200 or $1,000 on the land in consequence of a shed standing upon it. Mr. Warden states that the land is really only good for manufacturing purposes and that for such purposes the Grand Trunk spur built upon it gives it additional value. In his opinion the buildings on the land make it worth $1,500 more than it would be without them. In the course of the trial the learned trial judge expressed the opinion that it was a self-evident proposition that this land, if intended for manufacturing purposes, would be benefited by the railway siding. In the view taken by him that the case fell within the Ontario statute and that the defendants were entitled to retain the land no actual determination that there had been enhancement in value was necessary. But upon the evidence in the

(1) [1882] 21 Ch. D. 469. (2) [1894] A.C. 150.

record there might well be an adjudication that there had in fact been some enhancement in value. How much is quite another question.

If the defendants' right to equitable relief rests only on the authority of the decisions in *Bright* v. *Boyd* (1) and *Gummerson* v. *Banting* (2), cited by the learned Chief Justice of Ontario, I should, with respect, regard it as not established. In so far as those cases maintain the proposition that, "without any contract or encouragement or standing-by" on the part of the true owner and although he has not sought the aid or intervention of a court of equity and there is no trust or other matter cognizable only in equity (see *Bevis* v. *Boulton* (3)), he may be compelled at the suit of a person who has made improvements under mistake of title to compensate him to the extent to which the value of the land has been thereby enhanced, they would seem to carry the law farther than is warranted by English equity jurisprudence. (*Beaty* v. *Shaw* (4). In the civil law the broad doctrine enunciated in *Gummersons' Case* (2) no doubt obtains and the decision of Mr. Justice Story in *Bright* v. *Boyd* (1) in the United States Circuit Court, would rather seem to have involved an extension of the English equity doctrine by introducing into it the principles of the civil law. The distinction between the two systems is clearly pointed out in that learned judge's work on Equity Jurisprudence, (14 ed. vol. 2, pars. 1089 and 1090), citing the case of *Putnam* v. *Ritchie* (5) where Chancellor Walworth of New York had expressed an opinion as to the state of the law contrary to the view acted upon by Mr. Justice Story. See also vol. 3, par. 1654.

(1) 1 Story's R. 478; 2 Story's R. 605.
(2) 18 Gr. 516.
(3) 7 Gr. 39.
(4) 14 Ont. App. R. 600, 605, 607, 609.
(5) 6 Paige, 390, 403-5.

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Whatever authority the *Gummerson Case* (1) may have had was practically destroyed by the observations made upon it in the Court of Appeal in *Beaty* v. *Shaw* (2). Hagarty C. J. O. there said, speaking of the judgment of Spragge C. in *Gummerson's Case*:(1)

> The learned Chancellor appears to me to state the rule of equity too broadly.

Mr. Justice Burton added that

> It took the profession a good deal by surprise and was supposed to carry the law in reference to allowance for improvements, where there was no privity between the parties, no fraud, no standing by and suffering the improvements to be made, much farther than any previous decision either here or in England; and the passage of the 36 Vict. c. 22 (O) very shortly afterwards, probably prevented the point being further considered in a Court of Appeal.

Again the same learned judge said:

> The case of *Gummerson* v. *Banting* (1) was a peculiarly hard case, one of those cases which it is proverbially said are apt to excite the sympathies of a Judge, and lead to the making of doubtful law.

The equitable jurisdiction to provide for compensation in respect of improvements made under mistake of title is old and well known. *Edlin* v. *Battaly* (3) and *Clavering's Case*, mentioned in *Jackson* v. *Cator* (4) at page 689, may be referred to. The bases of the jurisdiction, however, and the circumstances under which it will be exercised are sometimes not so well remembered or appreciated. It may conduce to a clearer understanding of the ground on, and of the extent to, which I would vary the judgment in appeal if I should briefly examine them at the risk of appearing to make a pedantic parade of learning, some of which is, no doubt, quite elementary.

(1) 18 Gr. 516.
(2) 14 Ont. AR. 600, 605, 607, 609.
(3) (27 Car. II.) 2 Levinz, 152.
(4) 5 Ves. 688.

Apart from the old and very meagre report of *Edlin* v. *Battaly*, (1) where a compromise was eventually reached, I have found no English decision, old or modern, that goes so far as either *Gummerson* v. *Banting* (2) or *Bright* v. *Boyd*. (3) In England the equitable jurisdiction to relieve a person who has made improvements under mistake of title by requiring compensation to be made him for enhancement in value seems to have been rested either on the power of the court of equity to compel the legal owner, when seeking its aid as a plaintiff, to do equity, or on the existence of a situation creating such a personal equity against the legal owner, when defendant, as would make his insistence on his legal right without submitting to compensation a constructive fraud. It is only in cases of the latter class that a person seeking the relief of compensation can do so as an *actor*. Sugden on Vendors and Purchasers, (14th ed.) ch. 23, s. 1, nos. 29 and 31.

When the legal owner seeks the aid of a court of equity however, that court will compel him to compensate the defendant for enhancement in value through lasting improvements made by the latter under mistake of title, although no conduct on the part of the plaintiff, active or passive, can be relied upon as giving rise to such a personal equity against him. *Neesom* v. *Clarkson*, (4) is usually cited as authority for this proposition. It can scarcely be said to be satisfactory, for two reasons: first, because, as stated in a foot note, the right of the defendants to an account of the moneys expended on lasting improvements was conceded at the original hearing (2 Hare,

(1) (27 Car. II.) 2 Levinz, 152.
(2) 18 Gr. 516
(3) 1 Story's R. 478; 2 Story's R. 605
(4) [1845] 4 Hare 97.

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163) without argument and was not in question on the rehearing; and secondly, because, in delivering his judgment, Vice-Chancellor Wigram expresses the view that a defendant should not be granted this relief unless the equity which he claims is one that he himself might have enforced by bill. More satisfactory authority is to be found in *Mill* v. *Hill*, (1) which in some respects closely resembles the case at bar. The life tenant under an equitable settlement, which he suppressed, had conveyed to the defendant what purported to be an estate in fee. On his death the remainder man, who was entirely innocent in the matter instead of bringing action at common law in ejectment, as in the case at bar, filed a bill in equity to set aside the deed to the defendant. As a condition of being given relief he was required to submit to a decree for compensation for permanent improvements made by the defendant to the extent to which the value of the land was thereby enhanced. The defendant was, it is true, treated as a trustee for the plaintiff. Reference may also be made to *Attorney-General* v. *Baliol College* (2); *Cooper* v. *Phibbs* (3); and *Davey* v. *Durrant* (4). *Carroll* v. *Robertson* (5) is an instance of this jurisdiction being exercised in the Court of Chancery of Upper Canada. See too *Munsie* v. *Lindsay* (6).

On the other hand where the legal owner has not by invoking its aid submitted himself to equitable jurisdiction, a clear case of encouragement of, or acquiescence in, the expenditure made under mistake of title must be made out by the person seeking com-

(1) [1852] 3 H. L. Cas. 828, 869.
(2) 9 Mod. 407, at pages 411-12.
(3) [1869] L.R. 2 H.L. 149, 167.
(4) [1857] 1 De G. & J. 535.
(5) 15 Grant, 173.
(6) 1 O.R. 164.

pensation in equity in respect of it. 3 Story's Equity (14th ed.) par. 1645. Fry. J. in *Willmott* v. *Barber* (1), at page 105, thus states the essential elements of such a case in terms which have become classic.

It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendants land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his right. If he does not, there nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

As put by Lord Eldon in *Dann* v. *Spurrier* (2)

This Court will not permit a man knowingly, though but passively to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement * * * . Still it must be put upon the party to prove that case by strong and cogent evidence, leaving no reasonable doubt that he acted upon that sort of encouragement. * * * It must be shewn that, with the knowledge of the person under whom he claims, he conceived he had that larger interest, and was putting himself to considerable expense, unreasonable compared with the smaller interest; and which the other party observed, and must have supposed incurred under the idea, that he intended to give that larger interest, or to refrain from disturbing the other in the enjoyment.

(1) [1880] 15 Ch. D. 96. (2) 7 Ves. 231.

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Cotton L. J. in *Falcke* v. *Scottish Imperial Ins. Co.* (1) at page 243, emphasizes two of the requirements of such a case:—

> But in order to make this doctrine applicable there must be not only knowledge on the part of the person having the real title that the man whom he sees so acting believes he has a title and acts in consequence of that belief, but also a knowledge that the title on the faith of which he is acting is a bad one.

Again in *Proctor* v. *Bennis* (2) at page 760, the same learned judge said:

> It is necessary that the person who alleges this lying-by should have been acting in ingorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title.

Ramsden v. *Dyson* (3) and *Plimmer* v. *Mayor of Wellington* (4) are well known instances of the exercise of this jurisdiction.

And when the case is clear and the circumstances are such that complete justice cannot otherwise be done the court does not stop at ordering compensation by the owner but will give the relief provided for by the addition to the Ontario statute of 1873 made in 1877, and, preventing his asserting his legal right to recover the property, allow the person whose expenditure he had encouraged to retain it making such compensation to the owner as may be fair. *East India Co.* v. *Vincent* (5); *Duke of Beaufort* v. *Patrick* (6); *Atty. Gen. for the Prince of Wales* v. *Collom* (7); *Davis* v. *Snyder* (8); Story's Equity (14th ed) vol. 1, no. 517.

(1) [1886] 34 Ch. D. 234.
(2) [1887] 36 Ch. D. 740.
(3) L.R. 1 H.L. 129.
(4) 9 App. Cas. 699, 710.
(5) 2 Atk. 83.
(6) [1853] 17 Beav. 60, 74-5.
(7) [1916] 2 K.B. 193, 203.
(8) 1 Grant 134.

It can scarcely be necessary to state that for outlay after they became aware that their lessors' title was questionable (October, 1908) the defendants can have no equity for compensation, even though steps to establish the adverse claim were deferred. *Russell* v. *Romanes* (1); *Master of Clare Hall* v. *Harding* (2); *Rennie* v. *Young* (3). Relief in such a case may possibly be given under very exceptional circumstances. *Corbett* v. *Corbett* (4).

In addition to the authorities already cited reference may be had to Smith's Principles of Equity (5 ed.) page 211; Snell's Principles of Equity (18 ed.) page 338; Pomeroy's Equity Jurisprudence, vol. III., par. 1241 and note; Ruling Case Law, vol. 14, vbo. Improvements, s. 6.

In the case at bar the evidence conclusively establishes that there was no sort of active encouragement by any of the plaintiffs of the defendants' belief in the ownership of the fee by Luc Montreuil. It is also made abundantly clear that prior to October, 1908, the present plaintiffs were quite as ignorant as were the defendants themselves that Luc Montreuil was not the owner of the lands in fee. All alike believed him to be so and that the present plaintiffs had no interest in the property. There was therefore neither knowledge by them of their own right nor of the defendants' mistaken belief of their right. The plaintiffs could not have known that

> the title on the faith of which (the defendants were) acting was a bad one.

The defendants are therefore driven to invoke the other head of equitable jurisdiction, viz., that the plaintiffs are actively seeking the aid of equity.

(1) 3 Ont. App. R. 635.
(2) [1848] 6 Hare, 273.
(3) [1858] 2 DeG. & J. 136.
(4) 12 Ont. L.R. 268.

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They are not helped by the fact that the Supreme Court of Ontario, in which they sued, is a court of equity as well as of law. The Judicature Act did not confer any new right of relief. Equitable relief may be granted by that court under section 16 (R.S.O. ch. 56) only where, and to the same extent as, the former Court of Chancery ought to have given such relief in a suit in that court. In order that the defendants should have an equitable right to the relief they seek, no case of constructive fraud having been made, it must still appear that the plaintiffs have invoked the equitable jurisdiction of the court.

The action brought by the plaintiffs is in fact purely a common law action for ejectment and mesne profits. Although before the time of Henry VII. an action in which damages for disseisin, of which the measure was the mesne profits, were awarded, when ejectment in a fictitious form with a nominal plaintiff came into use for the recovery of the term, or possession of the land, that only was recoverable in it, with nominal damages, but not with mesne profits, *Goodtitle* v. *Tombs* (1), which then became the subject of a supplemental but distinct action in trespass, in which it was necessary to shew a prior recovery of the possession in ejectment. *Aslin* v. *Parkin* (2). Obviously the nominal damages given in ejectment did not afford a subject for set-off of compensation for improvements. Since the 19 Vict. ch. 43, sec. 267, however, (see now Ont. Con. R. no. 69) mesne profits may be recovered in ejectment (though not specifically demanded, at least where the plaintiff is a landlord suing his overholding tenant, *Smith* v. *Tett* (3) and without the plaintiff having obtained possession. *Dunlop* v. *Macedo* (4).

(1) [1770] 3 Wilson K.B. 118, 120.
(2) [1758] 2 Burr. 665.
(3) [1854] 9 Ex. 307.
(4) [1891] 8 Times L.R. 43.

What is sought in the present action is not an accounting for the rents and profits of the plaintiffs' lands while in the defendants' possession. Such an accounting would seem to involve an exercise of equitable jurisdiction and the correlative right of the defendants to an equitable allowance for enhanced value due to their improvements would thereupon ensue. Story's Equity Jurisprudence (14 ed.) section 1089. When they obtained the decree for specific performance, the defendants became tenants of the property *pur autre vie*. After the death of the *cestui que vie* their occupation was that of trespassers and they became liable to the owners for damages accruing during the continuance of their wrongful possession. The plaintiffs claim for mesne profits is nothing else than a demand for those damages.

Where a plaintiff sued at common law for mesne profits I have found no case in England where a set-off for improvements was allowed; and, upon the defendant shewing that he had an equitable claim in respect of improvements, a plaintiff's action at law for mesne profits was, in at least one instance, stayed "because in an action for mesne profits no set-off is allowed." *Earl Cawdor* v. *Lewis* (1). See also Mayne on Damages (9 ed.) 476. But see too *Putnam* v. *Ritchie* (2) at page 404. Mr. Sedgewick, however, in his valuable treatise on Damages (9 ed.) vol. 3, sec. 915, says:

> The action for mesne profits is everywhere held to be a liberal and equitable action, and one which will allow of every equitable kind of defence. Among the most important considerations that a defendant can urge, in answer to the claim for the rents and profits received by him, is that which the common law has, to a certain extent, adopted

(1) 1 Y. & C. (Ex.) 427, 433-4. (2) 6 Paige 390.

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from the civil law, and which grows out of permanent improvements made by him upon the premises during his occupancy. The civil law treats the occupant in good faith with lenity. The reasoning of the civilians has so far obtained in many of our tribunals, that a *bona fide* occupant of lands is allowed to mitigate the damages in the action brought by the rightful owner by offsetting the value of his permanent improvements made in good faith, to the extent of the rents and profits claimed.

In a case noted in Viner's Abridgment, vbo. "Discount", no. 3, recoupment of damages was allowed by the assize "because the land was sown and the house well amended"; and in *Coulter's Case* (1), it was held that

> the disseissor shall recoupe all in damages which he hath expended in amending of the house.

See too Brooke's Abr., vbo. "Damages", no. 7, fol. 202. Citing these authorities Mr. Sedgewick in his work on Damages adds (ibid.) that

> in our own ancient real actions the improvements of the tenant appear always to have been the subject of set-off or recoupment. The set-off however cannot go beyond the value of the rents and profits; the defendant is never allowed to recover a balance, unless * * * the recovery * * * is allowed by statute. This principle, however, properly applies only to the case of a *bona fide* possessor, or one without notice.

This doctrine was approved in the United States Supreme Court in *Green* v. *Biddle* (2).

Under the Ontario statute (R.S.O. ch. 109, sec. 37), when it applies, the dispossessed occupant is given a lien enforceable at common law for the enhanced value created by his improvements and the court is empowered, and indeed required, after setting-off mesne profits, if any, to award him judgment for the balance. *McCarthy* v. *Arbuckle* (3). No existing right of redress either at common law or in equity was affected.

(1) 5 Co. 30 (b).
(2) [1823] 8 Wheaton, 1, 81-2.
(3) 31 U.C.C.P. 405, 409.

As early as 1818 statutory provision was made in Upper Canada (59 Geo. III., ch. 14, sec. 2) for compensation to defendants in ejectment for improvements made by them in consequence of erroneous surveys, whether made before or after the passing of the Act *Gallagher* v. *McConnel* (1). The statutory right remained confined to such cases until 1873. But the common law courts of Upper Canada, influenced no doubt by the consideration shewn in the civil law for the occupant in good faith, in actions brought for mesne profits held that evidence of substantial improvements made by the defendant was admissible in mitigation of the plaintiffs' damages. Thus in *Lindsay* v. *McFarling* (2) where such evidence had been rejected by the trial judge, the Court of King's Bench directed a new trial, the Chief Justice saying:—

> I think this evidence proper to have gone to the jury; it would most probably have materially affected the verdict,

Again, in *Patterson* v. *Reardon* (3) in an action for mesne profits the jury gave a verdict for nominal damages only, evidence having been given at the trial that the defendant had made substantial improvements on the lot from which he had been ejected. The court followed *Lindsay* v. *McFarling* (2) and refused to hold the verdict perverse. In *McCarthy* v. *Arbuckle* (4) at page 411, Wilson C. J., citing *Green* v. *Biddle* (5) and Sedgewick on Damages (ubi. sup.) says:

> In the former case (i.e. that of a possessor in good faith) the defendant in an action for mesne profits was allowed to set-off the value of his improvements.

This right of the defendant in an action to recover mesne profits is also recognized by Burton J. A. in *Beaty* v. *Shaw* (6) at page 609.

(1) 6 O.S. 347.
(2) [1829] Draper's K.B. Rep. 6.
(3) [1850] 7 U.C.Q.B. 326.
(4) 31 U.C.C.P. 405.
(5) 8 Wheaton 1.
(6) 14 Ont. App. R. 600.

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The action at bar was tried by a judge sitting without a jury. Under the modern Ontario practice the master may, in such a case, where the power conferred by section 64 (1) of the Judicature Act (R.S.O. ch. 56) is exercised, be required to perform some of the functions of a jury. I think he may and should be called upon to do so here. There is no reason why he should not inquire and report, (1) to what amount the plaintiffs are entitled for mesne profits, of which apart from special circumstances, a fair occupation rent for the land is the usual measure (*Commissioners Niagara Falls Park* v. *Colt* (1); but see *Munsie v. Lindsay*, (2); (2) what amount, if any, should be allowed as compensation to the defendants for enhancement in value of the property by reason of permanent improvements thereon effected by them prior to the 2nd of October, 1908; and (3), making the necessary set-off, what balance, if any, the plaintiffs should be allowed to recover as their actual damages. The defendants have no right in this common law action to any allowance in respect of improvements made after the 2nd of October, 1908, any more than they would have had if entitled to equitable relief. I cannot understand why in the judgment appealed from an inquiry was directed as to such subsequent improvements. It was apparently by inadvertence, as the learned Chief Justice of Ontario had distinctly indicated that as to such subsequent expenditures there could be no equity. Moreover, whatever might have been the case in granting equitable relief, the right of recovery here in respect of improvements being entertained merely in mitigation of damages cannot exceed the amount which the plaintiffs may be found entitled to under their claim for mesne profits. The purpose of allowing the set-

(1) 22 Ont. App. R. 1. (2) 11 O. R. 520.

off is to restrict the plaintiff's recovery to the actual damages they have sustained. I would therefore modify the judgment pronounced by the Appellate Divisional Court by striking therefrom sub-paragraph 2 of paragraph 3 and substituting a direction for a reference in the terms above indicated.

While the cross-appeal should clearly be dismissed with costs, the proper disposition of the costs of the main appeal is not so obvious. The appellants have established that the respondents are not entitled to the equitable relief accorded them in the Appellate Division. On the other hand the direction for a reference to fix the compensation which the respondents should be allowed in respect of improvements should be maintained in a modified form and as relief at common law, to which they did not assert a right, although their pleadings contain averments of the facts essential to support such an allowance. On the evidence now before us it may well be that the difference in the monetary result will be comparatively slight. On the whole, I think at least approximate justice will be done if no order is made as to the costs of the main appeal.

MIGNAULT J.—I concur with my brother Anglin J.

Appeal dismissed without costs.

Cross appeal dismissed with costs.

Solicitors for the appellants: *Bartlet, Bartlet, Urquhart & Barnes.*

Solicitors for the respondent Ontario Asphalt Block Company: *Rodd, Wigle & McHugh.*

Solicitors for the respondent Caldwell Sand and Gravel Company: *Fleming, Drake & Foster.*