

The action was tried without a jury at Belleville on the 19th, 20th, and 21st November, and at Toronto on the 24th December, 1901.

A. B. Aylesworth, K.C., and W. N. Ferguson, for plaintiff.

E. D. Armour, K.C., and E. G. Porter, for defendant.

MACMAHON, J.—The properties now owned by the plaintiff and defendant respectively were on the 5th January, 1867, conveyed in one parcel to the late Ellis Burrell and William Bleecker. . . . In July, 1870, Bleecker conveyed to Burrell his interest as a tenant in common. In the conveyance Bleecker covenanted to keep in repair the north part of the mill dam across the Moira, and Burrell to keep the south part in repair. Burrell died in 1882, and by his will devised to his son, the plaintiff, a portion of the property, called "the foundry property," and described as lying to the east of the lane leading from Mill street in the direction of the mill dam, and situate on the north side of Mill street, extending to the centre of the river, with the right to use the lane in common with the owners of the property to the west thereof; also the right to use the waters of the river to the extent of one-third thereof, flowing to the south of the river, and to discharge the waste water into the river at the most convenient place therefor, and subject to the charge of keeping the south half of the mill dam in repair to the extent of one-third of the expense thereof, etc. The testator also directed that, if his son-in-law Campion desired to purchase the property to the west of that devised to plaintiff, it was to be conveyed to him by the executors at the price of \$20,000. The executors, on the 11th April, 1882, conveyed the same to Campion. The description in this conveyance covered the whole lot, but there was excepted thereout the land devised to plaintiff. The conveyance was subject to the covenants in the deed from Bleecker to Burrell. In 1876 defendant Lott became the tenant from Ellis Burrell of the foundry building and water power, and continued as such till the latter's death in 1882; after which (the plaintiff then being 12 years old), his guardian leased the foundry proper to Lott, who remained tenant thereof till 1893, when he surrendered possession to plaintiff. Burrell's executors, under the power of sale in a mortgage made by Campion of the property conveyed to him, sold and conveyed to W. H. Potter and the defendant Lott in 1885, and Potter conveyed his interest to Lott in 1888.