

defendant. After the case was set down for trial the plaintiff applied to the referee in Chambers for leave to amend his statement of claim by adding the defendant's wife as a party and by alleging that the land in question was the defendant's property and had been mortgaged by the defendant with other lands to a bank ; that after the bank had commenced an action for foreclosure of the mortgage, it was agreed between it and the defendant that the bank should take a final order apparently foreclosing the defendant's title to all of the mortgaged lands, but should accept in actual satisfaction of its claim the mortgaged lands other than the parcel in question and should hold the latter for the defendant ; that such agreement was carried out ; and that after getting such final order the bank at the defendant's request conveyed the parcel in question to defendant's wife who gave no consideration for it, but received and has always since held it solely as a trustee for the defendant. When he began the action the plaintiff had knowledge of the facts thus sought to be set up by amendment. The referee dismissed the application with costs.

*Held*, that the application should have been granted and the amendment asked for allowed on payment of costs. If the plaintiff had originally brought the action in the form in which he now seeks to put it the defendant and his wife should both have been made parties. The wife would not be brought in as having derived title through her husband's deed, but would appear as having acquired her title through parties who, so far as the apparent or registered claim of title is concerned, had acquired title adversely to and in extinguishment of, that of the husband. *Bank of Montreal v. Black*, 9 M.R. 439, distinguished, as in that case the grantor was held not to be a necessary party because he would be estopped by his own deed. Here, however, there was nothing that would prevent the husband from claiming that the wife held the land as a trustee for him or that would protect her from possible liability to him if she were sued alone and did not claim that he should be made a party. The fact that the husband in his statement of defence had denied that he had any interest in the land could not afterwards be set up as an estoppel against him in favour of his wife or even in favour of the plaintiff, but would only be evidence that at one time, and for certain purposes, he had repudiated having any such interest.

Amendment allowed on terms of paying defendant's costs of the application to the referee against which should be set off the plaintiff's costs of the appeal. Costs of the day and all other costs reserved until the trial.

*Edgett*, for plaintiff. *Phillips*, for defendant.