

sum of \$411.10 on account of arrears—which was paid. This was never apparently registered, and plaintiff has no recollection of having had the duplicate. But in this I think he is mistaken, as the solicitor who was acting for the company wrote to plaintiff's solicitor a letter dated 31st March, 1898, saying he enclosed "copy agreement re Toronto Granite Co. Limited." This is produced by plaintiff on his examination on this motion, but he says he cannot find any copy of the agreement with the papers he got from Mr. English, his then solicitor. . . .

The question then is whether the suit is defective by reason of the omission to make the company party to these proceedings.

I think there can be little doubt that as between the mortgagee and the other parties there was not any binding foreclosure at the time it was made, and if the present motion had been made a year earlier it would have been successful. But the case is different now, because the lease to the company from Thorne of 1st October, 1895, expired on 30th September, 1905, and from that date the company ceased to have any rights in the matter. It is just as if the wife of a mortgagor had not been made a party. Though she might successfully apply, yet if she died no one else could have any right consequent on the omission to make her a party.

It is stated that the property has considerably risen in value in the last 2 or 3 years, which, no doubt, explains the launching of the motion.

In these circumstances, I think the motion should be dismissed without costs. I feel less reluctance in this disposition of the matter because, if successful, the motion would enure not to the benefit of the creditors of the company, but of Mr. Thorne and the Dominion Bank. And it is to be observed that Mr. Thorne, as vice-president of the company, and Mr. Anderson, the president, had ample knowledge of the facts of the foreclosure, even though the company technically had no notice of the proceedings.

On the other hand, there is undoubtedly such a substantial margin in the property that plaintiff may well be left to pay his own costs of a proceeding which has only perhaps failed of success by the delay of a year in moving against a clear irregularity.