

advances made after the registration of the lien, but, we take it, though the finding was formally defective, the Referee adjudged the lienholders to have priority to Mrs. Hyslop only in respect of the advances made by her after the registration of the lien; this, it appears to us, he was justified in doing under sec. 14 (1) of the Act, which seems to have escaped the notice of the Court, but the manner in which the Referee proposed to enforce this priority, by a sale of the mortgages, the Divisional Court found, and, we should say, quite correctly, was not warranted by the statute.

The defeat of the Eaton claim as against Mrs. Hyslop may, however, be probably justified in this way. The lien of Eaton is a lien against the estate or interest of the "owner"; but in this case the "owner" has successfully cut out the lien as against him by conveying his estate to the purchaser without notice, and, as the lien, therefore, fails against the "owner," it fails also as against his mortgagee. But whether this ingenious argument is a true interpretation of the Mechanics' and Wage Earners' Lien Act, we venture to doubt.

This case is, we see, referred to by Riddell, J., in *Marshall Brick Co. v. Irving*, 9 O.W.N. 429, as authority.

There is another recent case in a Divisional Court of Ontario also deserving of remark.

It used to be, and we believe it is still, a sound rule of law that a suitor can only recover upon a case alleged in his pleading and proved. To put the point in an extreme way—If a man sues another for seduction he cannot properly recover in the action on a promissory note which he happens to state in the course of the trial that he holds against the defendant.

No doubt with the passing of the Common Law Procedure Act in 1856, a great change was wrought in the matter of pleading, and the powers of amendment were so much enlarged that it came to be a common rule for a Judge to hear the evidence and then, if need be, make such amendments in the pleadings as might, upon the evidence, appear to be necessary in order to entitle the plaintiff to recover or to enable the defendant to defeat the action, as the case might require.