

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div

CHANCERY DIVISION.

Proudfoot, J.]

[April 28.]

PLATT V. THE GRAND TRUNK RY. CO. OF
CANADA.

*Covenant for quiet enjoyment—Covenant for title
—Breach—Damages—Set off of arbitration
damages—Different causes of action—Mortga-
gees—Parties.*

On February 3rd, 1873, the company granted to A. T. P. (through whom S. P., the original plaintiff in this action, claimed) a certain mill site on the River Maitland, with certain easements, one of which was the right to erect a dam across the river, high enough to take up eight feet of the fall of the river, the location of the dam being defined by the deed, and covenanted that they had the right to convey and for quiet enjoyment. The company had previously granted (without reserving any of the easements granted to A. T. P.) an island in the river, called "Island C.," and two parcels of land, one on each bank immediately opposite to each other, and adjoining the property of the plaintiff, called respectively "The Grant Meadow" and "Block F.," all three of which were above the land granted to A. T. P., and subsequently became the property of H. T. A. In an action by S. P., who died after action brought, M. A. P. was made plaintiff by order of revivor against the company, it was alleged and proved that a dam could not be maintained across the river high enough to take up eight feet of the fall of the river without submerging a great part, if not the whole, of "Island C.," and penning back water and ice on "The Great Meadow" and "Block F.," and encroaching upon the rights of H. T. A. as riparian proprietor of the said lands. It was contended on the part of the defendants that the mortgagees of the property should be made parties.

Held, that O. J. A. sec. 17, sub-sec. 3, enables a mortgagor entitled to the possession of land as to which the mortgagee has given no notice of his intention to take possession, to sue, to prevent, or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail.

Held, also, that in an action on a covenant for quiet enjoyment a plaintiff must show an interruption, or obstruction of the easement, in order to entitle him to recover, and that S. P. not having attempted to enjoy his easement by building a dam in the place and manner specified, and been interrupted, he could not succeed on the covenant for quiet enjoyment.

Held, also, as to the covenant for title, that as the Supreme Court had decided in *Platt v. Attrill*, 10 S. C. R. 425, that the company had no right to grant the easement to A. T. P., that decision was binding here, although the company were not parties to the suit and that the covenant was broken as soon as it was made, and the plaintiff entitled to such damages as accrued during the life of S. P., and following *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, that the damages would be the value of the estate that had passed, and that which the deed purported to convey, and the company covenanted they had the right to convey. It appeared that during S. P.'s ownership the government had constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater, and forcing them back on S. P.'s property," and on another account not material to this action.

Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration showed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company are not entitled to set off the money recovered from the government against their liability for damages for their breach of contract.

Held, also, that the registration of the previous conveyances, even if that was notice, was no bar to a recovery on the covenant. The plaintiff, therefore, was held entitled to damages for breach of the covenant for title, and a reference was directed.

MacLennan, Q.C., and *M. G. Cameron*, for the plaintiff.

S. H. Blake, Q.C., *Cassels*, Q.C., and *Garrow*, Q.C., for the defendants.