

From STREET, J.]

[Jan. 12.

McKIBBON v. WILLIAMS.

*Improvements under mistake of title—Mortgage by person making them—Enforcement thereof against true owner—Interest—Set-off of rents and profits—Occupation rent—Assigns—R.S.O., c. 100, s. 30.*

A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee, and then made a mortgage in favor of a person who took in good faith under the same mistake as to title. Subsequently it was decided that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession.

*Held*, 1. That the mortgagee was an "assign" of the person making the improvements within the meaning of s. 30 of R.S.O., c. 100, and had a lien to the extent of his mortgage, which he was entitled to actively enforce.

2. That the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits, or a charge of occupation rent only from that date till the date of the mortgage.

3. That interest should be allowed on the enhanced value from the date of the death of the tenant for life.

Judgment of STREET, J., affirmed.

J. W. Nesbitt, Q.C., for the appellants.

W. S. McBrayne, for the respondent Williams.

H. Cassels, for the respondent McKibbon.

From BOYD, C.]

[Jan. 12.

IN RE FERGUSON, BENNETT v. COATSWORTH.

*Will—Construction—"My own right heirs"—Condition precedent.*

A testator, who left him surviving his widow and one daughter, devised by his will specifically described property to his daughter, and devised the residue of his estate to his executors upon trust for his widow and daughter in certain events, with limited power to the daughter to dispose thereof by will. He then directed that "in case my daughter shall have died without leaving issue her surviving, and without having made a will as aforesaid, my trustees shall (after the death of my wife, if she survive my said daughter,) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, which ever may last take place."

The daughter died unmarried in her husband's lifetime, having made a will assuming to dispose of the residue.

*Held*, that the daughter was entitled to take as the "right heir" of the testator.

*Bullock v. Downes*, 9 H.L.C. 1; *Re Ford, Patton v. Sparks*, 72 L.T.N.S. 5; *Brabant v. Lalonde*, 26 O.R. 379; and *Thompson v. Smith*, 23 A.R. 29, referred to.

MACLENNAN, J.A., held also that upon the language of the will, apart