

money, or at least to have taken upon himself the risk of the failure of the purchaser to pay. . . .

[*Bank of Upper Canada v. Wallace*, 16 Gr. 280, and *Willes v. Levett*, 1 De G. & S. 392, distinguished.]

Plaintiff is not, I think, chargeable with rents and profits for the period which elapsed after defendant left the Province to the time of sale, or for any part of that period.

He did not, as I have said, occupy the premises, and is, therefore, not chargeable with any occupation rent; he received no rents and profits, and is not, in my opinion, chargeable for rents and profits which he might have received but for his wilful neglect or default. He was not bound to take possession, and did not, I think, do so, at all events until he made the agreement with Mitchell. The key of the premises was in the possession of one Lane, with whom it had been left by defendant, and all that plaintiff did was to send the auctioneer to the factory when the sale was about to take place, to make an inventory of the chattels which were in it. The fact that Lane, by the direction of plaintiff, gave the auctioneer the key to enable him to enter the factory for that purpose, or the fact that Lane was asked by plaintiff to look after the property for him, or both of these facts combined, did not constitute a taking possession by plaintiff so as to charge him with liability for the rents and profits which he might have received from the property, if indeed he could have rented it, which is upon the evidence quite problematical.

Upon the whole, I am of opinion that the judgment appealed from should be reversed, and in lieu of it judgment should be entered for plaintiff for the mortgage money and interest (including the costs of exercising the power of sale, which may be taxed if defendant so desires), less the amount of Mitchell's purchase money (\$750), treating it as a sum received on 7th August, 1902.

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FEBRUARY 6TH, 1905.

DIVISIONAL COURT.

SCOTT v. SPRAGUE'S MERCANTILE AGENCY OF  
ONTARIO, LIMITED.

*Fraud and Misrepresentation—Action for Damages for  
Fraudulent Representations Inducing Contract—Failure  
to Prove Actual Fraud.*

Appeal by plaintiff from judgment of TEETZEL, J., 4 O.  
W. R. 454, dismissing action.

J. H. Rodd, Windsor, for plaintiff.

J. A. MacIntosh, for defendants.