

(2) That the defendant is entitled to have a fence on the same land and in the same place as the fence that was torn down by the plaintiff.

(3) An injunction restraining the plaintiff from interfering with, tearing down, damaging or destroying defendant's fence, and from trespassing upon the defendant's lands.

(4) \$5 damages for tearing down the fence and tearing up defendant's cement walk.

(5) The costs of this action and counterclaim.

Thirty days' stay.

HON. SIR JOHN BOYD, C.

DECEMBER 23RD, 1913.

CROFT v. McKECHNIE.

5 O. W. N. 606.

Trial — Admission by Counsel — Mortgage Action — Right to Redeem — Settlement of Judgment — Right to Recede from Admission — Costs.

BOYD, C., *held*, that where counsel at the trial for the mortgagee in a mortgage action admitted defendant's right to redeem he could not later seek to be absolved from this admission.

Motion by the plaintiff to vary the minutes of a judgment as settled.

J. P. Ebbs, for the plaintiff.

J. I. MacCraken, for the defendant.

HON. SIR JOHN BOYD, C.:—I do not think that I should consider the cases put in in order to determine whether the plaintiff can recover on the covenants and refuse to be redeemed. When I looked at the record and my notes at the trial, I found that the defendant set up that the exercise of the power of sale by the first mortgagee was fraudulently procured by the plaintiff. But, on the opening examination of the plaintiff as his own witness, it was stated by his counsel that "the plaintiff admits the right to redeem as to the land and as to purchase by Croft," whereupon I ruled that the onus rested on the defendant to make out that he was not bound by his mortgage.

The course of the trial was stopped and changed by this admission, and I do not think that the plaintiff should be