

vendor covenanted upon payment to convey. The agreement gave the purchaser the right of immediate possession to continue until default in payment, subject to impeachment for voluntary or permissive waste. Mitchell took actual possession about 1st March, 1903. He subsequently made an oral agreement for sale of the premises and plant to a creamery company, for \$1,250, payable \$150 in stock of the company and \$1,100 in cash, within two weeks. The creamery company paid nothing to Mitchell at the time, nor have they since paid him anything. They, however, caused the plant and equipment of the cheese factory to be taken out and the factory itself to be taken down, and removed the whole to Dacre, a village some six miles distant from Mount St. Patrick, where it still remains. Mitchell swears that he was wholly unaware of this dismantling of the property.

Mitchell has paid no part of his own purchase money to plaintiff, and apparently no attempt has been made to compel him to make payment. Though no definite agreement has been come to between plaintiff and Mitchell for the abandonment or cancellation of the contract, Mitchell appears to have no intention of carrying it out, and plaintiff seems to have no idea of endeavouring to compel him to do so, probably because of the financial inability of Mitchell, suggested in argument, but not established by any evidence.

The contract for sale to Mitchell and the giving to him of possession do not amount to an exercise of his power of sale by plaintiff sufficient to extinguish the defendant's equity of redemption: *Bank of Upper Canada v. McLeod*, 16 Gr. 280. This precludes any disposition of the action on the footing of a completed sale to Mitchell, entitling defendant to credit on a cash basis for its proceeds.

The right of defendant to redeem still subsisting, plaintiff remains mortgagee, and, his mortgages being in default, is, if in a position to reconvey upon payment, entitled to a judgment to enforce defendant's covenant. It is obvious that plaintiff cannot now reconvey the security as it was when he took possession or when he gave possession to Mitchell. Is the plaintiff so far accountable for the present position of the mortgaged premises that his consequent present inability to reconvey should be a bar to his recovery in this action? In my opinion, he is not entitled to recover upon the covenant of the defendant unless within a reasonable time he can put himself in a position to reconvey the mortgaged property substantially restored to its former condition, i.e., with the factory re-erected and the plant and equipment re-installed: *Re Thuresson*, 3 O. L. R. 271, 1 O. W. R. 4.