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OCTOBER 18TH, 1902.

DIVISIONAL COURT.

CHAMBERS v. McCOMBS.

Mortgage—Mortgagee in Possession—Statute of Limitations—Payment by Rents and Profits—Account—Reference.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., at the trial, in favour of plaintiff in ejectment. Plaintiff, as mortgagee, went into possession of certain land, chiefly pasture, but with a small house upon it, in 1871, and had the rents and profits of it. He removed the house, and, there being no one on the premises, the defendant, who acquired the interest of the mortgagor, in 1901, went into possession, and the plaintiff brought this action.

G. Lynch-Staunton, K.C., for defendant, contended that the plaintiff's claim had been paid off by the rents and profits and the removal of the house, and that that was such a payment as stopped the running of the Statute of Limitations, the plaintiff having then gone out of possession. He urged that an account should be taken to shew whether plaintiff's claim had been paid.

S. H. Bradford, for plaintiff, contra.

The judgment of the Court (BOYD, C., MOSS, J.A.) was delivered by

BOYD, C.:—The issues raised by the pleadings and which appear to be necessary to make a final determination of this case, have not been elucidated by evidence, nor are they dealt with in the judgment. The judgment is merely for possession, and, though that is in accord with the outstanding legal title, that legal title may not be of importance if the defendant can establish his defence as to the payment of the mortgage and the non-possession of plaintiff thereafter. The prosecution of the case at the hearing was intercepted by the hypothetical cases put by counsel, and we do not know what the real facts are. To save the expenses of a re-trial it is better to let the judgment stand for possession to plaintiff, subject to the report of the Master and judgment thereon