

FEBRUARY 6TH, 1905.

DIVISIONAL COURT.

MENDELS v. GIBSON.

Mortgage—Action on Covenant for Payment—Attempted Exercise of Power of Sale—Agreement for Sale on Credit, not Carried Out—Removal of Building from Land—Inability to Reconvey Property in Original Condition—Liability of Mortgagee to Account for Price, though not Paid—Possession—Rents and Profits.

Appeal by plaintiff from judgment of ANGLIN, J., 4 O. W. R. 336.

G. H. Watson, K.C., for plaintiff.

T. D. Delamere, K.C., for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), was delivered by

MEREDITH, C.J.—The action is brought on a covenant by defendant for the payment of \$700 and interest, contained in a chattel mortgage from him to plaintiff, bearing date 20th April, 1899.

Defendant sets up in answer to plaintiff's claim that the chattel mortgage was given as collateral security to a mortgage on a cheese factory and the land on which it stood, which he had given to plaintiff, and on which there remained due the \$700 secured by the chattel mortgage; that plaintiff took possession of the property covered by both mortgages and sold it on 7th August, 1902, under the power of sale which the mortgages contained, to Alvin W. Mitchell, for \$750; that Mitchell subsequently sold the property for \$1,000; that the machinery contained in the factory was immediately removed by Mitchell or his grantee; that the factory was dismantled by Mitchell, and "removed piecemeal several miles from the original location;" and that plaintiff, by these dealings with the mortgaged property, "is estopped from proceeding with an action on the covenant."

According to the evidence given at the trial, defendant left Ontario and went to the North-West Territories immediately after the chattel mortgage was given, without making any provision for payment of the mortgage money or for the care of the property, which was left vacant, and he has remained in the North-West Territories ever since. Plaintiff in the following year took proceedings under his powers of sale, and after advertisement of the intended sale put up