

BRITTON, J.—As this matter now stands Thomas Atcheson is not a creditor of the deceased. *Campbell v. Bell*, 16 Gr. 115, and the other cases cited in *Holmested and Langton*, are against applicant. If Thomas Atcheson sues and recovers judgment against the executor, he will bring himself within *Glass v. Munson*, 12 Gr. 77.

I refuse the motion. Thomas Atcheson can, if necessary, sue the executor. This application is notice to the executor and to W. J. Atcheson of the claim; and my decision is without prejudice to any future application, if Thomas Atcheson deems it necessary to make one. No costs.

BRITTON, J.

OCTOBER 16TH, 1903.

CHAMBERS.

MENDELL v. GIBSON.

*Summary Judgment—Motion for—Defence—Conditional Leave to Defend—Terms—Payment into Court—Costs.*

Appeal by defendant from summary judgment granted by local Judge at Perth.

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

Grayson Smith, for plaintiff.

BRITTON, J.—The action is brought upon the covenant of defendant contained in a chattel mortgage dated 20th April, 1899, upon the plant contained in a cheese factory, the chattel mortgage being collateral to a mortgage to plaintiff upon the factory land and building. The writ of summons was specially indorsed for the full amount of mortgage and interest.

On behalf of defendant, George M. Gibson, a brother of defendant, states that in 1900 the plaintiff took proceedings to sell the factory and its contents; that no sale was then effected, but plaintiff took possession; that on or about 7th August, 1902, plaintiff made an agreement for sale of factory and contents to one Alvin W. Mitchell for \$750; that Mitchell in March or April, 1903, removed the machinery from the factory and removed a portion of the factory itself; and that no portion of the chattels are at present on the premises or anywhere in the vicinity. The plaintiff replied to this affidavit by saying that he was only in possession of the property "to preserve the same." He