GENTRY HARDWARE COMPANY *v.* GRAY.

4-3030

Opinion delivered June 5, 1933.

1. REPLEVIN—TAKING BY CONSENT—INSTRUCTION.—In an action by a mortgagor to recover from the mortgagee property alleged to have been wrongfully taken, refusal to give an instruction that, though the property was not included in the mortgage, yet, if the mortgagor consented to the taking, the jury should find for the mortgagee, *held* error where the mortgagee pleaded and testified that the mortgagor voluntarily surrendered the property in discharge of the debt.
2. REPLEVIN—DAMAGES—EVIDENCE.—In an action by a mortgagor to recover a spray rig alleged to have been wrongfully taken by the mortgagee, testimony that the mortgagor's apple crop was damaged because he could not spray the orchard was inadmissible.

Appeal from Benton Circuit Court; *J. S. Combs*, Judge; reversed.

STATEMENT BY THE COURT.

On October 7, 1930, appellee, F. E. Gray, executed and delivered to the Gentry Hardware Company his promissory note in the sum of $143 with interest thereon from date, and, to secure the due and prompt payment of said note, he executed, acknowledged and delivered his chattel mortgage with power of sale, whereby he conveyed to appellant, Gentry Hardware Company, certain personal property.

After the maturity of the note, the property described in the mortgage was taken possession of by the Gentry Hardware Company without process of law, and this suit was instituted by the maker of the note and mortgage to recover "one power spray rig, Myers."

It was the theory of appellee on the trial of the case that the mortgage, executed at the time and in the manner aforesaid, and after its execution and delivery, was materially altered in this, that "one power spray rig, Myers" was inserted in said mortgage without the knowledge or consent of appellee. It was admitted by appellant that the mortgage was altered by the addition of the words, "one power spray rig, Myers," but was affirmatively alleged that this was done with the knowledge and consent of appellee. Appellant further defended the suit of appellee on the theory that appellee had voluntarily turned over and surrendered the property to it in satisfaction of the note and mortgage, and that the same was accepted by it in full settlement and satisfaction of the debt and mortgage.

Mr. Marvin Carl, one of the partners in appellant Gentry Hardware Company, testified that he went out to see Mr. Gray after the debt became due, and that Mr. Gray voluntarily surrendered the property to him in satisfaction of the note and mortgage. The witness testified in reference to the delivery of the property as follows: "I said, 'How will it suit to give us this plow, spray rig and harrow, and we will give you your note and mortgage and we will call it even?' He said, 'All right.' "

Appellant requested the court to give to the jury its instruction No. 4, as follows:

"It is alleged by the defendant that the plaintiff turned over the property to him in settlement of the indebtedness secured by the mortgage, and, if you find that the plaintiff did turn over and deliver the spray rig, plow and harrow to the defendant in settlement for the indebtedness, your verdict should be for the defendant, though the spray rig was not included in the mortgage by consent of the plaintiff."

The court refused to give appellant's requested instruction No. 4, and proper objections and exceptions were preserved thereto. The jury returned a verdict in favor of appellee, from which this appeal is prosecuted.

It will not be necessary to state in further detail the testimony introduced in said cause nor the instructions given and refused, because of the view which this court takes of the controversy which will appear in the opinion.

W. A. Dickson, for appellant.

JOHNSON, C. J., (after stating the facts). From the foregoing statement of facts it appears that appellant affirmatively pleaded that appellee had voluntarily surrendered the property in controversy to it in satisfaction of its debt. The testimony on behalf of appellant was amply sufficient to have sustained a verdict in its behalf on this issue, but the trial court refused to submit this issue to the jury under appellant's requested instruction No. 4, which has been copied in the statement of facts. We think this is reversible error. Appellant's instruction No. 4 was not covered by any other instruction given by the trial court, and the case must be reversed because of this error.

In view of the fact that this case must be remanded for a new trial, it is proper to express our views in reference to certain testimony offered on the trial of the case in behalf of appellee. This testimony was to the effect that his apple crop had been damaged because appellant had taken his spray rig away from him, and he was thereby deprived of spraying his orchard. This testimony was incompetent and inadmissible on the trial of this case and should not have been introduced.

Other errors are argued in appellant's brief, but we do not deem them of sufficient importance to discuss in this opinion, and they will probably not occur on a retrial of the case.

Let the judgment be reversed, and the case remanded.