counterclaim and establish fraud if they can—and the plaintiffs should pay in any event the costs of the trial and appeal.

The plaintiffs should have fifteen days in which to elect—unless they elect within that time, the main appeal should be dismissed with costs, and the appeal on the counterclaim allowed with costs, in both cases here and below.

DIVISIONAL COURT. JANUARY 7TH, 1911.

*MICKLEBOROUGH v. STRATHY.

Landlord and Tenant—Lease—Termination—Temporary Occupation—Eviction—Surrender by Act and Operation of Law—Statute of Frauds—Intention.

Appeal by the plaintiffs from the judgment of TEETZEL, J., 21 O.L.R. 259, 1 O.W.N. 846, dismissing the action and allowing the defendant's counterclaim.

The action was for a declaration that a certain lease was determined by the acts of the defendant, and that the plaintiffs were no longer liable for rent in respect thereof. The counterclaim was for rent.

The appeal was heard by FALCONBRIDGE, C.J., LATCHFORD and RIDDELL, JJ.

A. C. McMaster, for the plaintiffs.

George Bell, K.C., for the defendant.

RIDDELL, J.:—Upon the argument it was not all, or, if at all, but feebly, contended that on the question of eviction strictly so-called the law was not correctly apprehended by my learned brother or had not been correctly applied. I add to the cases cited by him Ball v. Carlin, 11 O.W.R. 814.

But it was contended that the case was one of surrender by act and operation of law, and that intention had nothing to do with the matter. . . .

[The learned Judge then set out the facts.]

It seems to me that Ritter (the person temporarily placed by the defendant in the premises leased to the plaintiffs) could not be called the servant of the defendant, nor was he simply a bailiff

*This case will be reported in the Ontario Law Reports.