of the plaintiff as executor as aforesaid—with counts for interest and upon an account stated.

Pleas.—1. Never indebted. 2. Payment. 3. Statute of Limitations. 4. Set-off.

The plaintiff's particulars of demand were for nine years' rent due upon the north half of lot No. 2, in the 1st concession of Tecumseth, from the 1st of April, 1854, to the 1st of April, 1863, at the rate of £30 per annum.

The trial took place at the city of Toronto, in November, 1863 before Adam Wilson, J.

The testator, Samuel Harrold, died about the 20th of August, 1862, and the action was commenced on the 4th of July, 1863. At the opening of the plaintiff's case, it was objected that the defendant could not be liable in this action for the use and occupation of the land after the testator's death, and the learned judge so ruled. It did not appear certainly when the defendant first took possession, but in the result that became immaterial. He left the farm in the autumn of 1862, after his father's death. Evidence was given to establish the annual value of the place.

On the defence it was proved that a year or eighteen months before the testator's death he stated to a witness (his brother-in-law) in speaking of his sons, William and the defendant, that William was on one farm and defendant on the other: that William had paid him all up, and that all he expected from defendant was what he had to live upon, pork, flour, and so on: that he got pork, flour, and butter from defendant: that he did not expect money from defendant; William was to pay money, and defendant to give provisions. This witness said he was aware that testator was continually getting flour, pork, butter and so forth from defendant.

There was other evidence clearly shewing that defendant had been in the habit of *delivering flour, pork, &c., to* the testator in Newmarket, up to the year 1862; and William Harrold, the defendant's brother, stated that he understood from the testator that he was not to get any money from the defendant for the farm, and he also said he was certain there never was a bargain that defendant should pay any certain amount for the place. A receipt signed by the testator was proved, as follows: "Tecumseth, March 16th, 1861. Received from Nelson Harrold half barrel of flour, being the amount of rent due up to date."

The learned judge ruled that there was evidence to go to the jury in support of the action. He left to the jury to fix a reasonable annual compensation for the use of the farm—to say whether it was payable in money or in kind—whether any part had been paid—and whether the receipt of March, 1851, was signed by testator and given in settlement up to that date, telling them that the plaintiff could not recover for more than six years preceding April, 1862.

The jury found that the receipt of March, 1861, was a settlement up to that time: that the rent from 1861 to 1862 was £27: that there was an agreement the rent should be paid in kind and not in money, and that five hundred pounds of flour had been delivered after the date of that receipt; and they gave a verdict for the plaintiff for $95.50.

Leave was reserved to the defendant to move to enter a nonsuit.

In Michaelmas Term *Robert A. Harrison* obtained a rule to shew cause why a nonsuit should not be entered pursuant to leave reserved, or a new trial be granted, the verdict being contrary to law and evidence. He cited *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932; *Churchwardens* v. *Ford*, 2 H. & N. 446; *Osborne* v. *Jones*, 15 U. C. Q. B. 296; *McAnnany* v. *Tickell*, 23 U. C. Q. B. 22; *Hellier* v. *Silleox*, 19 L. J. Q. B. 295; *Denniston* v. *Digan*, 10 Jr. C. L. Rep. Ap. 7; *Champion* v. *Terry*, 3 B. & B. 295; Ch. Plg., vol. 1, p. 350.

McMichael showed cause, and cited *Cripps* v. *Hartnell*, 8 L. T. Rep. N. S. 765, S. C., 2 B. & S. 697; *McDonald* v. *Glass*, 8 U. C. Q. B. 245; *Gerow* v. *Clark*, 9 U. C. Q. B. 219.

DRAPER, C. J., delivered the judgment of the court.

We do not find that one of the cases cited bears upon the question whether an ordinary action for use and occupation will lie where the premises were occupied under an agreement that the tenant should pay his landlord in produce and not in money; and this is the question upon which the motion for nonsuit must be decided, for we have no doubt that executors may maintain an action upon any contract, express or implied, made between the testator and a third person.

The finding of the jury establishes the existence of a special contract between the testator and the defendant to pay rent in produce, not in money, for the use of the farm which the defendant occupied. This finding consequently negatives any implied or express contract to pay in money, and as the declaration is framed it requires proof of an express or implied contract to pay money. The rule for nonsuit must therefore be made absolute.

Rule absolute.

KONKLE v. MAYBEE.

Mortgage—Lease by mortgagor—Ejectment—Month's notice.

In April, 1861, R mortgaged the land in question to defendant for $1000, payable on the 23rd of April, 1863, with interest in the meantime half yearly, covenanting that after default defendant might enter, that if he should make default and defendant should after expiration of the time for payment have given written notice demanding payment, and a calendar month should have elapsed without payment, defendant might enter and lease or sell; and defendant covenanted that no sale or lease should be made, nor any steps taken by him to obtain possession, until such notice should have been given. There was a proviso that until default after such notice R. might hold possession. In May, 1861, defendant assigned this mortgage to the plaintiff. R. in November, 1862, being in possession, leased to defendant for two years, and in December following he conveyed his equity of redemption to the plaintiff. Nothing appeared to have been paid on the mortgage. In July, 1863, the plaintiff brought ejectment.

Held, that the plaintiff might recover without having given the month's notice, for having acquired the land, and lost his claim to the debt, there was no one on whom a demand of payment could be made.

[Q. B., H. T., 27 Vic., 1864.]

Ejectment for one acre and twenty perches in the township of Grimsby, described by metes and bounds.

The plaintiff's notice of claim was under two deeds from William H. Rogers, one in favour of defendant, the other in favour of plaintiff, and under a deed from the defendant to the plaintiff. Defendant's notice of title was under a lease from William H. Rogers to defendant, dated the 1st of November, 1862. The summons in ejectment was tested on the 7th of July, 1863.

The case was tried at Niagara, in October, 1863, before Richards, C. J.

The defendant was called as a witness for the plaintiff, and stated that he got possession of the property in question from W. H. Rogers.

By indenture dated the 23rd of April, 1861, William H. Rogers and Alice his wife, in consideration of $1000, granted and sold to the defendant the premises in question, *habendum* in fee, with bar of the wife's dower; subject to a proviso that if Rogers should pay to defendant $1000, with interest at ten per cent., the principal on the 23rd of April, 1863, the interest half-yearly on the 23rd of October and on the 23rd of April in each year, the same should be void. And Rogers covenanted that after default in payment it should be lawful for defendant, his heirs and assigns, peaceably to enter into, have, hold, &c., the premises, without the let, suit or hindrance of him (Rogers), his heirs or assigns, or any person whomsoever; and if Rogers should make default in paying the principal and interest, and the defendant should, after the time for payment had expired, have given notice in writing demanding payment, and one calendar month should elapse after notice without payment being made, defendant, his heirs and assigns, might enter into possession and take the rents and profits, and make leases, and sell and convey the premises. And defendant, for himself, his heirs, executors and administrators, covenanted with Rogers, that "no sale or notice of the lands, hereditaments and premises, shall be made or given, or any lease made, or any steps taken for obtaining possession thereof by" defendant, "until such time as one calendar month's notice in writing as aforesaid, shall have been given," &c. Provided, that until default should be made in payment of principal and interest after notice in writing demanding payment of the same, as before provided, it should be lawful for Rogers, his heirs and assigns, to hold, &c., the lands, without interruption from defendant, his heirs and assigns: and provided always, that until default should be made in payment of the said sum of $1000, after notice in writing demanding payment, Rogers, his heirs and assigns, might hold, &c., the lands without hindrance from the mortgagor, his heirs or assigns.