

## TRIAL.

## CLERGUE v. PRESTON.

*Amendment—Addition of Defendant after Trial—Specific Performance  
—Terms—Parties.*

Motion by plaintiff (heard at Sault Ste. Marie as if at the trial) for leave to amend by adding one Heath as a party defendant. The case had been tried out. There was great delay in proceeding with the action, the writ not having been served until a year after its issue had all but elapsed. No application to amend was made at the trial, although the objection to Heath's absence from the record was taken there.

N. Simpson, Sault Ste. Marie, for plaintiff.

W. H. Hearst Sault Ste. Marie, for defendants.

OSLER, J.A.—Prima facie Heath is not shewn to be a purchaser pendente lite, as his deed is dated prior to the issue of the writ, and, even if it was not executed till the 29th May (the date of swearing the affidavit of execution, as well as that of the issue of the writ), it may have been actually prior in point of time to the latter act. There appears, however, to have been some business connection between Heath and defendant Preston, and it is not unreasonable on the whole that plaintiff should have leave to prove, if he can, that the former had actual notice of the alleged contract between Preston and plaintiff, specific performance of which is sought in this action, or that it was not made for valuable consideration, or was in fact made pendente lite. Heath's presence in the action would be necessary in any event, as he is the holder of the legal estate. As a condition of the relief, plaintiff must pay Preston's costs of the trial at Sault Ste. Marie, and he must determine within two weeks whether he will amend on these terms. If the parties desire it the case will be tried out when ripe for trial against Heath. If leave to amend is not accepted the action will be disposed of on that being intimated to me. The defendant Annie McKay should not have been made a party, and as against her the action may now be dismissed with costs.