

The action came on for trial at Sault Ste. Marie in November, 1902. The only persons then defendants were Annie McKay and Thaddeus D. Preston. The action was dismissed as against the former, and in the course of the trial it appeared that, after the making of the contract sought to be enforced, and before action, defendant had conveyed the land in question to one W. B. Heath. The plaintiff had registered a certificate of *lis pendens* two or three days before the registration of Heath's deed. Leave was given to add Heath as a party: see ante 50; he was added, and the pleadings were amended.

The trial was resumed at Toronto on the 10th July, 1903, on the amended record.

J. M. Clark, K.C., and N. Simpson, Sault Ste. Marie, for plaintiff.

G. H. Watson, K.C., and W. H. Hearst, Sault Ste. Marie, for defendants.

OSLER, J.A.— . . . The title of defendant Preston to the property at the date of the alleged agreement was not in dispute, and both defendants were then and still are residents of the city of Iona, in the State of Michigan.

Plaintiff proved (1) an instrument in writing dated 1st November, 1899, signed by defendant Preston, authorizing Mr. John McKay to sell and dispose of his undivided two-thirds share or interest in the lots in question for \$750 or such greater price and on such terms as he might think proper, and to execute such agreements for sale as might be requisite. (2) A formal power of attorney under seal, dated 21st November, 1899, from defendant Preston to McKay, authorizing the latter to sell the land at such price and on such terms as he might think proper, and to execute such deeds and conveyances thereof as might be necessary.

Soon after becoming possessed of those powers, interviews and discussions took place between McKay and one W. H. Plummer as to the sale of the lots. According to the evidence of the latter, McKay asked him if he could make a sale. Plummer said he thought he could make one for \$1,200, but wished to know whether there was any commission in it for him. McKay said there might be \$50, which would come out of the purchase money, and McKay, who was a member of the firm of Hearst & McKay, defendant Preston's solicitors, then wrote and handed to Plummer a letter addressed to Plummer, dated 13th December, 1899, as follows: "A client of ours who owns an undivided two-thirds interest in water lots 21 and 22, South Bay street, is willing to sell such interest for \$1,200 cash, which is slightly