some time before the alleged promise, that he had got 50 acres off his father's land and owned it,

Held, sufficient to sustain both counts.

B. H. Doyle, for the plaintiff.

Falconbridge, for the defendant.

NORTH OF SCOTLAND CANADIAN MORTGAGE CO., (LIMITED) v. GERMAN.

Mortgage—Release of equity of redemption.

Where a mortgagor, unable to pay his interest, gave a release of his equity of redemption to the mortgagees by ordinary short form "to save the costs of a sale," and it was proved that if there were any surplus after a sale it was to have gone to defendants.

Held, (GALT, J. dissenting) that there was no merger of the mortgage debt.

Per WILSON C. J. From their liability to account for the surplus the plaintiffs had, from being mortgagees strictly, become trustees substantially.

Per OSLER, J. Whether there was a merger of the mortgage debt is a question of intention; what the intention of the parties was is a question of fact.

Bethune, Q. C., for the plaintiff.

Crickmore, for the defendant.

MITCHELL v. MCDUFFY.

Illegal distress—Trespass—Damages—2 W. & M., Sess. I, ch. 5.

Defendant leased land to plaintiff for a term, during which the latter was to make improvements, and at the end of the term the amount of rent payable to the defendant was to be fixed by arbitration. Defendant distrained during the term. The action was tried twice in each case, the jury finding for the plaintiff and assessing damages at double the value of the goods.

Held, that the defendant having no right to distrain on account of there being no fixed rent agreed upon, he was a trespasser and liable to damages, but not to pay double the value of the goods; as it was not a case coming within the Statute 2 W. & M., Sess. I. ch. 5, which refers to a wilful abuse of the power of distress; and it could not be said that in this case there was nothing due, *i. e.*, payable, until the accounts had been taken by arbitration.

J. K. Kerr, Q. C., for the plaintiff.

Ferguson, Q. C., for the defendant.

NEILL v. THE TRAVELLERS' INSURANCE COMPANY.

Accident policy—Violation of conditions—Death from voluntary exposure to unnecessary danger.

I. N. being insured with defendants against death by accident was killed by a railway train in the yard of the Northern Railway Company at Toronto, which it was unlawful for him, not being an employee of the company, to enter, and into which he had unaccountably driven. He was last seen by a witness who watched him driving over and among a network of tracks, and who, while he was entangled in the switch gate, warned him not to go further as he would be killed, to which deceased made no answer. By certain of the conditions of the policy it was stipulated that it should not "extend to any bodily injury where the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure, or of violating the rules of any company, etc., or while engaged in or in consequence of any unlawful act." The jury found a verdict for plaintiff.

Held, on motion for a nonsuit pursuant to leave reserved, that the plaintiff could not recover and a non suit was entered.

Ferguson, Q. C., and *Watson*, for the plaintiff.

McCarthy, Q. C., and *Creelman*, contra.

MCCARTHY v. ORBUCKLE.

Ejectment—Mesne profits—Improvements under mistake of title—Referring back to Master in Chancery.

In an action of ejectment where the defendant claims a lien for improvements under R. S. O. cap. 95, sect. 4,

Held, that the plaintiff is entitled to account of rents and profits to be set off against the value of the improvements.

Where it was referred to the Master in Chancery to ascertain the value of the defendant's improvements and he simply reported their value, being of opinion that under the terms of the rule he could not take an account of mesne profits,

Held, that the court had power to refer the matter back to him for this purpose.
