grantee. They claim a survey and grant or damages. The defendant admits the agreement, the setting apart of the right of way and the use thereof by the plaintiffs with his assent—but alleges that the obligation to survey rests upon the plaintiffs, and that he is not called upon to make a grant until after the survey has been made. He says he was not tendered a deed, but is willing to execute a proper deed if tendered to him.

The case came on for trial before His Honour Judge Leask, in the District Court of Nipissing, 6th October, 1910. The learned Judge reserved his decision until May, 1912, when he gave judgment dismissing the action with costs.

The plaintiffs now appeal.

The ground of the decision is that "the plaintiffs could not . . . be excused from the duty of preparing and tendering a conveyance of the right of way for execution by the defendant before action could be brought, and if it were necessary for the preparation of such conveyance that a survey be made then the survey should be made by them."

I am of opinion that the judgment is wrong on both points.

Assuming, without deciding, that this conveyance of the right of way should have been prepared by the purchaser, I think that as matters were at the date of the writ—and in strictness that is what we most consider—the tender of the conveyance was waived. *McDougall* v. *Hall* (1887), 13 O. R. 166, decides that where if a tender had been made it would have been refused, the tender should since the Judicature Act be considered as waived—at least if that appear from the pleadings. I do not think there is any need to wait for the pleadings to determine whether it is safe to proceed without formal tender if it sufficiently appear that a tender would have been a mere useless formality.

In the present case, too, the defendant should not be allowed to be in better case than he would have been had his representations upon, or at least, after which the action was brought been true. He said that he could not give a deed because he had sold the land. If he had sold the land so as to incapacitate himself from giving the deed, it is plain that no tender of the conveyance was necessary before bringing an action on the agreement.

Knight v. *Crockford* (1794), 1 Esp. 190; *Lovelock* v. *Frankly* (1846), 8 Q. B. 371.