

FEBRUARY 26TH, 1905.

DIVISIONAL COURT.

DOLAN v. BAKER.

*Timber—Sale—Contract—Time for Removing not Specified
—Attempt to Remove after Ten Years—Construction of
Contract—Reasonable Time—Injunction.*

Appeal by defendants from judgment of MACMAHON, J., 3 O. W. R. 833, in favour of plaintiff in an action for trespass to land.

The appeal was heard by BOYD, C., ANGLIN, J., MAGEE, J. C. E. Hewson, K.C., for defendants.

F. E. Hodgins, K.C., and T. E. Godson, Bracebridge, for plaintiff.

BOYD, C.—The sealed instrument is expressed in the form of a grant in fee simple, but it is not intended to create a perpetuity in the thing granted—it contains inherent limitations. The subject dealt with—"timber" to be cut—savours of the realty, and for that reason the contract requires to be manifested in writing so as to satisfy the Statute of Frauds. The grant or sale is not of *all* the trees, but of so much timber as the purchaser, his heirs, &c., may see fit to remove. It is further limited to "all the first class sound merchantable saw logs and firewood timber *now upon*" the lots described.

There is further given the right of entry "at all times" until the said timber shall have been removed.

There is a special provision in these words, "the vendors before cutting or clearing hemlock on said lands shall give the purchaser written notice in each year of such intended cutting—to be given in each year and to apply only to the then ensuing season's cutting or clearing; and will not fall bark trees in bad places to the injury of the purchasers removing the same."

The price was to be 50 cents a thousand b. m., except hemlock, which was to be 25 cents, and for No. 1 firewood 10 cents a cord.

This deed was made on 13th December, 1889, and was registered 24th March, 1898. This action was begun in 1904—the date of the issue of the writ is not given as it should be on the record—to restrain the cutting and removal of the timber by defendant, who is assignee of the first purchaser.