

as though it were land and quite apart from any provisions in the will, as the will has not in any way dealt with it. The widow can elect under the Devolution of Estates Act to take a third of this fund.

If I am wrong, and this is personalty, then the widow on the intestacy takes a third.

If regarded from the standpoint of election, the testator by his will has said to his widow: "I will give you \$1,000 if you bar your dower on the sale by my executors of this land, and the proceeds are then (subject to the legacies and charge for maintenance) to be divided between you and my sons as the law directs." And to this the widow has assented, and I can find nothing indicating an intention on the testator's part to exclude her from participating in this distribution.

The instrument of election was drawn so as to release the right the widow had to share. It was conceded that it could not stand as a bar to the widow's right (if she had any such right) to share in the estate. To remove it from the way and so enable the question to be considered upon the merits, the action of *McEwen v. Gray* was instituted and in it judgment may go vacating that instrument so far as it purports to deal with the right of the widow to elect under sec. 4 of the Devolution of Estates Act, or in so far as it in any way affects her rights to the fund in question, but allowing it to stand as an election to take under the will and as a bar of dower.

The costs of all parties and of the Official Guardian, both of the motion and action, should be paid out of the estate. Executors' as between solicitor and client.

DIVISIONAL COURT.

MARCH 25TH, 1911.

CLARKSON v. ANTIPITSKY.

*Contract—Agreement for Remuneration—Conflict of Evidence
—Question of Fact—Function of Appellate Court.*

Appeal by the plaintiff from the County Court of York to recover \$300, being balance alleged to be owing from the defendants to the plaintiff.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, J.J.

A. McGregor, for the plaintiff.

A. F. Lobb, for the defendants.