

Distributions, take the personal estate in case of an intestacy; and that they ordinarily take per capita: *Tiffin v. Longman* (1852), 15 Beav. 275; *Eagles v. Le Breton* (1873), L.R. 15 Eq. 148; *Fielden v. Ashworth* (1875), L.R. 20 Eq. 410; *Re Cawthrope* (1914), 6 O.W.N. 716.

The costs of the application are to be dealt with when a substantial question raised by the motion, but not yet argued, shall be disposed of.

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RIMAND V. LINES—CLUTE, J.—MAY 25.

*Contract—Condition not Expressed in Written Agreement—Oral Evidence of Condition—Inoperative Agreement—Principal and Agent—Sales of Land Made by Agent not Assented to by Principal—Commission.*]—Action to recover commission or damages under an agreement of the 28th April, 1914, between the plaintiff and defendant, whereby the defendant, the owner of a block of land, agreed to subdivide the same, appointed the plaintiff the exclusive agent for the sale of the lots, and agreed to pay him a commission of 2 per cent. upon all sales that he might make of the said lots. The agreement did not state at what price the lots were to be sold. The action was tried without a jury at Toronto. The learned Judge finds that the writing evidencing the agreement was prepared by the plaintiff's solicitor, and that the agreement was subject to the condition that it was not to go into effect unless a certain prior sale agreement, which the defendant had assumed to cancel, was out of the way. It turned out that it was not out of the way. That condition should have been, but was not, embodied in the writing; and the defendant ought not to be bound by the terms of the agreement in disregard of the understanding upon which it was entered into; if the condition were disregarded, the agreement would operate as a fraud upon the defendant. The learned Judge also finds that no sales were in fact ever made by the plaintiff to which the defendant assented. The price not having been stated in the agreement, the defendant had a right to fix it; and he never did assent to the terms upon which the sales which the plaintiff said he had made were made. Action dismissed without costs. J. M. Laing, for the plaintiff. J. W. Bain, K.C., for the defendant.