

THE  
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DIVISIONAL COURT.

OCTOBER 26TH, 1912.

BURNEY v. MOORE.

4 O. W. N. 173.

*Way — Private — Vendor and Purchaser — Conveyance of Landlocked Parcel — Agreement to Convey Right of Way when Survey Made — Who Shall Make Survey — Tender of Conveyance — Waiver.*

Action for specific performance or damages for breach of an agreement to convey a right of way. By an undisputed agreement under seal between the parties the right of way was to be granted "when and as soon as the same shall be surveyed." Defendant claimed that plaintiffs should make the survey and offered in the pleadings to execute a conveyance if one was tendered him, but the evidence shewed that he had verbally stated to plaintiffs that he would not make the grant and that he had sold the land comprised in the right of way without making any reservation of the same.

LEASK, Co.C.J., *held*, that it was essential to plaintiffs' case to prove a tender of a conveyance, and if a survey was necessary it should be made by them. Action dismissed with costs.

DIVISIONAL COURT *held*, that as the evidence shewed that if a tender of a conveyance had been made it would have been refused, it had been waived by defendant and plaintiffs need not prove same.

*McDougall v. Hall*, 13 O. R. 166, followed.

That it was the vendor's duty to have a survey made on general principles of law, and his refusal to make one was a further waiver of tender.

*Clark v. Ruge*, 2 Roll. Abr. 60, p. 17, referred to.

Appeal allowed and specific performance decreed. Costs of action and appeal to plaintiffs.

An appeal by the plaintiffs from a judgment of His Honour Judge Leask, of Nipissing District Court.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

R. McKay, K.C., for the plaintiffs, appellants.

G. F. Shepley, K.C., for the defendant, respondent.