

that he did not believe the evidence given on the part of defendant, and that he did believe that of plaintiff and his witness. The question is one entirely of fact, which depended upon the degree of credit to be attached to the conflicting statements of the witnesses. . . . My brother Britton, however, points out what appears to have been an error of the learned Judge. . . . This should be corrected. In other respects the appeal must be dismissed, and the appellant should pay the costs.

BRITTON, J., delivered a written opinion in which he agreed in dismissing the appeal, but pointed out that the plaintiff had been allowed for two weeks' wages at \$6 a week in excess of what his actual claim was, and that the judgment should be reduced by \$12.

FEBRUARY 28TH, 1908.

DIVISIONAL COURT.

# WHITESELL v. REECE.

*Tenant for Life—Waste—Cutting Timber—Remaindermen—Injunction—Payments by Tenant for Life on Mortgage Given to Secure Annuity—Subrogation.*

Appeal by defendants from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 516) in favour of plaintiffs for a perpetual injunction, \$400 damages, and costs, in an action by the persons entitled under the will of G. Scealey, deceased, to an estate in remainder in certain lands in the towship of Bayham, against the life tenant and the purchaser from her, to restrain waste by cutting timber, etc. The testator died on 13th May, 1894, seised in fee of the land, subject to a mortgage made by him on 2nd December, 1886, to trustees for his wife to secure to her an annuity for her life of \$200. At the time of the testator's death he was living apart from his wife, and she was about 75 years of age. She was still living at the time of this appeal. Since the testator's death the defendant Reece had paid the annuity to the widow. On 14th March, 1902, defendant Reece sold to defendant Payne, for \$140, certain timber on the land, to be taken off in two years, and Payne cut down and removed a quantity of timber. He alleged that he purchased in good faith, believing his co-defendant had a right to sell. The defendant Reece set up that having paid eight instalments of the annuity, she was entitled to be subrogated to the rights of the mortgagee in