

evidence of other persons of admissions or statements by defendant that plaintiff had an interest in Merritt, or that he would do what was right with him in respect of it.

The limit was sold by the license holders about 12th December, 1902.

The case was left to the jury generally without written questions. They found for plaintiff "that there was a verbal agreement." The learned Judge, holding that there had been a part performance of the agreement sufficient to take it out of the statute, directed judgment for plaintiff for \$2,392.85, being one-half of the sum received by defendant as his share of the proceeds of the limit after deducting what he had paid for his interest therein.

W. M. Douglas, K.C., for appellant, contended: 1st, that the subject of the agreement was an interest in land within the meaning of the statute, and that, the agreement not being evidenced by writing, plaintiff could not recover; 2nd, that there had been no such part performance as to take the case out of the statute; and 3rd, that, even if these objections failed, the verdict was so manifestly against evidence and the weight of evidence that there ought to be a new trial.

A. B. Aylesworth, K.C., and J. H. Clary, Sudbury, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A. (after setting out the evidence):—It is unnecessary to examine or attempt to reconcile the numerous and not altogether consistent decisions bearing upon the question under what circumstances an ordinary contract for the sale of growing timber or trees or other things usually treated as part of the realty, to be cut or pulled down and taken away, will be regarded as a contract for the sale of an interest in land, or for the sale of goods and chattels. See, e.g., *Marshall v. Green*, 1 C. P. D. 35, which was considered and followed in *St. Catharines Milling Co. v. The Queen*, 2 Ex. C. R. 202, 229, and *Bulmer v. The Queen*, 3 Ex. C. R. 184, 217, 218, affirmed 23 S. C. R. 488, 495. See also *Lavery v. Purcell*, 39 Ch. D. 508; *Summers v. Cook*, 28 Gr. 179. The subject of the contract in the present case, namely, an interest in a timber limit, differs widely from all of those dealt with in the cases referred to, and appears to me to be clearly a contract for an interest in land within the statute, conferring as it does upon the purchaser something more than a mere interest in and right to cut and remove the trees