

an allowance of \$300 was made to the purchaser were now stated to have been found. Evidence should be taken on this; and, if the fact is as stated, the \$300 allowed the purchaser for these doors should be restored to the estate.

(4) No error in principle by the learned Surrogate Judge in allowing the executor's commission was disclosed, nor did the amount appear excessive. The appeal as to this item should be dismissed: *Re Smith* (1916), 38 O.L.R. 67.

When the case is again before the Surrogate Court, the appellant should be at liberty, should he be so advised, to reopen the whole of the accounts of the estate.

Success being divided, there should be no costs of the appeal.

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FALCONBRIDGE, C.J.K.B.

OCTOBER 31ST, 1919.

\*KERRIGAN v. HARRISON.

*Covenant—Conveyance of Land—Grant of Right of Way over Road—Covenant to Keep Road in Repair—Excuse for Nonperformance—Impossibility of Performance—Act of God—Erosion by Waters of Lake—Covenant Construed as Indemnifying Grantee against Impossibility of Repairing—Mandatory Injunction—Damages.*

Action for a mandatory injunction to compel the defendant to repair and maintain a way or road for the use of the plaintiff, in accordance with a covenant of the defendant, and for damages.

The action was tried without a jury at London.

G. S. Gibbons and J. C. Elliott, for the plaintiff.

J. M. McEvoy, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that before the 30th November, 1911, the defendant was the owner of two lots in the village of Port Stanley, marked upon a registered plan. By deed of that date he conveyed the lots to one Graham; and Graham, by deed of the 18th February, 1913, conveyed the whole of one of the lots and part of the other to the plaintiff. There was a covenant or proviso in the deed to Graham that he, his heirs and assigns, should have a right of way to his lands over a certain road shewn upon the plan, and the defendant agreed to maintain the road and the bridges thereon in as good condition as they were on the day of the date of the deed.

The plaintiff alleged that the defendant had allowed the road to become impassable and the bridges to be removed so that it