

from six years before the tests of the writ, "but in ascertaining such damage no allowance shall be made for any damage for flooding the plaintiffs' land occasioned by the defendants or others in exercising the right of driving logs down Crow lake or Crow river under R.S.O. 1897 ch. 142, sec. 1;" (6) that the defendants pay said damages; (7) reserving the question of the amount of damages to be ascertained by Mr. Justice Teetzel or a Referee to be appointed; (8) reserving leave to apply for an injunction; (9) further directions and costs reserved until after damages ascertained.

An appeal was taken to this Divisional Court, 2 O.W.N. 887, and we directed the McGrath case to be opened up and retried. In the other three cases we struck out of the judgment, in the third clause, all the words, "but this Court is unable," etc.; to the end of the clause. In the written reasons for judgment it was said (2 O.W.N. at p. 888): "The Referee will determine the extent of the easement, upon the evidence already given, and such further evidence, if any, as any party may adduce upon the reference." But neither party saw fit to have this direction inserted in the formal judgment.

In the McGrath case, we directed the costs of the first trial, of the appeal, and of the new trial, to be in the discretion of the Judge or Referee before whom such new trial should be had.

The four cases came on again before Mr. Justice Teetzel, and also the fifth case, *McMillan v. Pearce Co.* In the *McMillan* case the learned Judge found a cause of action proven; and, having assessed the damages at \$80, he directed judgment to be entered for the plaintiff for \$80 and High Court costs. In the McGrath case (2 O.W.N. 1496), he found damages (\$110) in respect of lot 8 and directed judgment to be entered for \$110 and High Court costs, including the costs of the appeal, less the sum by which the costs had been increased by reason of the claim for lots 9 and 10. The learned Judge found damages to the amount of \$150 in respect of part of lot 9 and \$225 in respect of lot 10 and the rest of lot 9; but does not consider that the plaintiff is entitled to these sums.

In the three first-named cases, an assessment of damages was had, and the Judge found \$600, \$250, and \$65—and directed judgment for these sums, with costs on the High Court scale.

The defendants now appeal. A difficulty arose at the outset of the argument as to the propriety of the appeal being brought before a Divisional Court, and it was agreed by all parties that the findings, etc., of Mr. Justice Teetzel should be