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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. APRIL 17TH, 1916.

BRADISH v. CITY OF LONDON.

Highway—Nonrepair—Injury to Traveller—Notice to City Corporation—Contributory Negligence—Evidence—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 9 O.W.N. 296.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

T. G. Meredith, K.C., for the appellants.

W. R. Meredith, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. APRIL 19TH, 1916.

*SMITH v. DARLING.

Limitation of Actions — Mortgage—Action for Redemption—Infant—Disability — Limitations Act, R.S.O. 1914 ch. 75, sec. 40—Application of—Action for Recovery of Land — Costs.

Appeal by the defendant Darling from the judgment of LENNOX, J., 9 O.W.N. 385.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.A.

J. D. Falconbridge and J. A. Jackson, for the appellant.

A. B. Cunningham, for the plaintiff, respondent.

J. L. Whiting, K.C., for the defendants the Toners, respondents.

MEREDITH, C.J.O., read the judgment of the Court. He said, after stating the facts, that the appellant set up the Limi-

*This case and all others so marked to be reported in the Ontario Law Reports.

tations Act as a bar to the action; and it was conceded that, unless the plaintiff's right to redeem was saved by what is now sec. 40 of the Limitations Act, R.S.O. 1914 ch. 75, it was barred; but, if that section applied to an action for redemption, the plaintiff was entitled to redeem.

An arrangement having been made as to the Kingston property, the Court dealt only with the Storrington property.

The question as to the application of the disability sections to an action for redemption is not free from difficulty—and the difficulty is increased by the conflict of judicial opinion as to it.

Reference to 3 & 4 Wm. IV. ch. 27, secs. 2, 16, 17, 28 (Imp.); Sugden on Real Property, 2nd ed., p. 118; Fisher on Mortgages, 1st ed., p. 95, para. 142; 6th ed., p. 724, para. 1412; Kinsman v. Rouse (1881), 17 Ch.D. 104; Forster v. Patterson (1881), 17 Ch. D. 132; 37 & 38 Vict. ch. 57; Banning on Limitation of Actions, 2nd ed., pp. 187, 188; 3rd ed., p. 174; Coote on Mortgages, 8th ed., pp. 774, 775; Dart on Vendors and Purchasers, 7th ed., p. 438 (note (*b*)); Williams's Real Property, 21st ed., p. 563; Darby & Bosanquet on Limitations, 2nd ed., pp. 469, 470; Halsbury's Laws of England, vol. 19, p. 150, para. 302; 4 Wm. IV. ch. 1, secs. 16-45 (U.C.); C.S.U.C. 1859 ch. 88, secs. 25, 45; 38 Vict. ch. 16 (O).; Caldwell v. Hall (1860-2), 6 U.C.L.J. 141, 7 U.C.L.J. 42, 8 U.C.L.J. 93; R.S.O. 1877 ch. 108; Faulds v. Harper (1882-6), 2 O.R. 405, 9 A.R. 537, 11 S.C.R. 639; Farquharson v. Imperial Oil Co. (1899), 30 S.C.R. 188; R.S.O. 1887 ch. 120, sec. 5; R.S.O. 1887 ch. 111; R.S.O. 1897 ch. 133; 10 Edw. VII. ch. 34 (O.); R.S.O. 1914 ch. 75, secs. 6, 26, 40; Bell & Dunn on Mortgages, pp. 382, 383; Leith's Blackstone, 2nd ed., p. 444.

"Upon the whole," concluded the Chief Justice, "though necessarily not without some doubt, owing to the conflict of judicial and other opinion, my conclusion is, if the question is *res integra*, that the disability sections do not apply to actions to redeem. I am, however, of opinion that we ought, if indeed we are not bound, to follow the decision of the Court of Appeal in Faulds v. Harper. It was a decision on the very question we are now called upon to determine. The judgment of the Supreme Court of Canada, though it reversed the judgment of the Court of Appeal, proceeded on an entirely different ground from that upon which the case was decided in the Court below, and the expressions of opinion of Strong and Henry, JJ., as to the application of the disability clauses, were only obiter."

Appeal allowed and action dismissed as to the Storrington lands; each party to bear his own costs of the action and appeal as far as these lands are concerned.

FIRST DIVISIONAL COURT. APRIL 19th, 1916.

*McLEAN v. WILSON.

Title to Land—Strip between Road Allowance and Lake—Evidence—Survey—Plan—Surveyor's Report—Field-notes—Possession—Trespasser—Limitations Act—Part of Lot Covered by Building—Easement—Way to Building—Prescriptive Right—Description of Land Held by Possession—Amendment of Judgment.

Appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Lambton, in favour of the plaintiff, in an action brought in that Court to recover possession of land.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

D. L. McCarthy, K.C., for the appellant.

W. N. Tilley, K.C., for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the small piece of land, bordering on Lake Huron, which the plaintiff sought to recover, was alleged by him to form part of lot 43 in the 9th concession of the township of Sarnia, of which lot he was admittedly the owner. If this piece of land proved part of lot 43, the plaintiff's title was made out.

The defendant contended that the instructions for the original survey of the township, made in 1829, the report of the surveyor, the plan which he returned to the Surveyor-General, and the field-notes of the survey, shewed that the strip of land between the road allowance and the lake was not included in the 9th concession; but that was not the proper conclusion; it was plain that the instructions indicated that the lots in the 9th concession were to extend to the lake. They were to be "lots bordering on the lake-shore," and they were so called in the report of the surveyor; the plan shewed the lots as bounded by the lake; if the defendant's argument were to prevail, the strip of land between the road allowance and the water's edge would not have formed any part of the township, but would have been unsurveyed land. It was manifest also that the Surveyor-General read the report and the plan as the Chief Justice reads them.

The plaintiff had made out his paper title to the locus.

The defendant had failed to shew a possession of any part of the land of which possession was claimed, except that part of

it which was occupied by the original shack or hut which he built, sufficient to extinguish the title of the plaintiff. Such use as he made of the strip of land between the road allowance and the water's edge was as a mere trespasser; it was necessary for him to shew pedal possession. The strip was not enclosed. His possession was not actual, continuous, and visible, and indeed was not a possession at all; his acts were but a series of successive trespasses, with long periods of time between them.

Piper v. Stevenson (1903), 28 O.L.R. 379; Nattress v. Goodchild (1914), 6 O.W.N. 156, 482, and Cowley v. Simpson (1914), 31 O.L.R. 200, distinguished.

The County Court Judge rightly decided against the contention that the defendant had established a right by prescription to an easement in the nature of a right to pass and repass to and from the shack to the lake and over the strip of land lying between the road allowance and the water's edge, in order to reach the side road. The testimony of the defendant shewed that there was no one way by which he came and went, but that he did so at one time by one route and at other times by other routes. A similar user is not sufficient to establish dedication.

Regina v. Plunkett (1862), 21 U.C.R. 536, and Regina v. Ouellette (1865), 15 U.C.C.P. 260, applied.

The judgment, as entered, not defining the part of the lot as to which the defendant succeeded (that upon which his shack is built), there should, if the defendant wished, be a reference to ascertain and fix its boundaries; if the parties should agree as to the proper description of it, the judgment might be amended by inserting in it the description.

Subject to this variation, the judgment should be affirmed, and the appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 19TH, 1916.

*BRANT v. CANADIAN PACIFIC R.W. CO.

Railway—Damage to Neighbouring Land from Closing of Street in City—Order of Board of Railway Commissioners—Jurisdiction—Municipal By-law—Railway Act, R.S.C. 1906 *ch.* 37, *secs.* 237, 238, 238A, 239A — *Remedy for Injurious Affection of Property—Compensation—Arbitration—Costs.*

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 9 O.W.N. 432.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Angus MacMurchy, K.C., and W. N. Tilley, K.C., for the appellants.

G. H. Watson, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the respondent was the owner of land on the west side of Albany avenue, in the city of Toronto, and sued to recover damages for the alleged wrongful interference by the appellants with the grade of the street; for closing up that part of it lying to the north of the respondent's land; and for injury to his house, caused, as he alleged, by the additional vibration occasioned by the running of the trains on tracks which had been elevated; or, in the alternative, for a mandatory order requiring the appellants forthwith to give the necessary notices and to take proceedings under the Railway Act to provide compensation to the respondent, and for payment to him for the injury and loss which he had sustained.

The acts of which the respondent complained were done in the course of elevating the tracks of the railway between Davenport road and Summerhill avenue, and for the purpose of carrying out a plan which had been adopted for getting rid of certain of the grade crossings in that part of the city.

The appellants justified these acts as having been lawfully done, under the authority of the Railway Act (Canada) and of an order made by the Board of Railway Commissioners of Canada; and they contended that, if the respondent's property had been injuriously affected by what had been done, he must seek compensation under the Act.

The Chief Justice referred to and reviewed at some length the decision of the Privy Council in Corporation of Parkdale v. West (1887), 12 App. Cas. 602; and then referred to changes in the legislation since that decision—in 1888, by 51 Vict. ch. 29; in 1903, by 3 Edw. VII. ch. 58; in 1906, by R.S.C. 1906 ch. 37; and in 1909, by 8 & 9 Edw. VII. ch. 32. By the last-named Act, secs. 237 and 238 of R.S.C. 1906 ch. 37 were repealed and new sections bearing the same numbers substituted, and new sections numbered 238A and 239A were added; these provisions are those which affect the question for decision.

Section 238, the Chief Justice said, plainly deals with proceedings in invitum of the railway company, and was passed to facilitate the elimination or diminishing of grade crossings; and it was in furtherance of this object that the Board of Railway Commissioners was empowered to act upon its own motion, as it is provid-

ed in sec. 238 it may. That section confers upon the Board authority to order that part of a highway be closed, or at least to require the proper municipal authority to close it.

Corporation of Parkdale v. West does not apply: it was by reason, and by reason only, of the provisions of the Railway Act which were applied having been made applicable by sec. 4 of 46 Vict. ch. 24 that the conclusion of the Judicial Committee was reached.

The order of the Board does not require that the railway "be carried across or along a highway," nor does it require the "railway to be diverted;" it in effect blots out the highway between the points mentioned in the city by-law closing part of Albany avenue, and vests that part in the railway company.

The acts of which the respondent complained were lawfully done in the execution of the order of the Board, unless the contention of the respondent that the Board had no jurisdiction ought to prevail. That contention, the Chief Justice said, was not, in his opinion, well-founded. The Board, in making the order, was acting under sec. 238, and upon its own motion.

Upon the appellants undertaking to proceed without delay to determine the compensation to be paid to the respondent in respect of the injurious affection of his property by the closing up of part of the highway and for any injury he may have sustained by the elevation of the tracks, so far as that is a matter for which, under the Railway Act, he is entitled to be compensated, the appeal should be allowed and the action be dismissed, and the parties should be left to bear their own costs of the action and appeal

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FIRST DIVISIONAL COURT. APRIL 19TH, 1916.

*RE GEFRASSO.

Infant—Custody—Illegitimate Child—Rights of Mother—Interest of Infant—Foster-parents—Discretion of Judge in Chambers—Appeal—Infants Act, R.S.O. 1914 ch. 153, sec. 2.

Appeal by Millicent Ratcliffe from the order of SUTHERLAND, J., ante 65.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

T. C. Robinette, K.C., for the appellant.

W. A. Henderson, for William and Jennie Warwood, the respondents.

MEREDITH, C.J.O., read the judgment of the Court. After setting out the facts, he said that the proper conclusion upon the evidence, in his opinion, was that the respondents had properly cared for the child, and that they would do so in the future if she were allowed to remain with them, and that the interests of the child would be better subserved if she remained a member of the respondents' family than if she was entrusted to the care and custody of her mother, the appellant. The Chief Justice doubted whether "a rooming house" was a desirable place in which to bring up a young female child, and at best there was no certainty that the home which the mother proposed to provide for the child would always be available to her. The question was whether these and other considerations affecting the welfare of the child outweighed the claims of the appellant.

The desire of the mother of an illegitimate child as to its custody is primarily to be considered and must be given effect to, unless it would be prejudicial to the child's interests if it were delivered into the custody of the mother: Barnardo v. McHugh, [1891] A.C. 388.

The remarks of Fitzgibbon, L.J., in In re O'Hara, [1900] 2 I.R. 232, 240, 241, appear to be directly applicable to the facts of this case: "The Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the fetish of parental authority by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head or provide it with the necessaries of life." The case is a fortiori where the child is illegitimate.

The Court could not say that the discretion exercised by Sutherland, J., in deciding against the appellant, was wrongly exercised, or that it proceeded upon a misapprehension of the facts or a mistaken view of the law; and it followed that his order must be affirmed.

Terms as to bringing up the child in the Roman Catholic faith and permitting the mother access at stated periods may be spoken to, if not arranged between the parties.

It may be that under the Infants Act, R.S.O. 1914 ch. 153, sec. 2, the right of the mother is not as ample as it was held to be in the cases referred to.

Appeal dismissed without costs.

FIRST DIVISIONAL COURT. APRIL 19TH, 1916.

*ST. DENIS v. EASTERN ONTARIO LIVE STOCK AND POULTRY ASSOCIATION.

Negligence—Explosion of Boiler in Exhibition Building—Death of Contractor Working in Building—Action by Widow under Fatal Accidents Act—Settlement of Claim in Former Action—Absence of Concluded Bargain—Settlement not Approved by Court on Behalf of Infant Children of Deceased—Findings of Jury—Negligence of Superintendent of Building—Negligence of Engineer—Supplemental Finding by Appellate Court—Evidence.

Appeal by the defendants from the judgment of SUTHERLAND, J., at the trial, upon the findings of a jury, in favour of the plaintiff. The action was brought under the Fatal Accidents Act, by the widow of Napoleon St. Denis, who met his death by reason, as she alleged, of the negligence of the appellants.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Peter White, K.C., for the appellants.

R. V. Sinclair, K.C., for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that St. Denis was killed owing to the explosion of a boiler which was in use for heating a building in which the appellants were holding an exhibition; and it was admitted that the appellants were liable, if the explosion was due to their negligence or that of any person entrusted with the superintendence of the boiler and its operations, unless the respondent was bound by an agreement made, in an action brought against the Corporation of the City of Ottawa by the respondent, for the settlement of the respondent's claim against the city corporation for $3,000—the city corporation being charged with negligence to which the explosion was alleged to have been due.

The learned Chief Justice was of opinion that there was at no time a concluded bargain, binding on both parties, "that the claim should be settled for $3,000." Besides that, no settlement could properly be made without the sanction of the Court, because the rights of the seven infant children of the deceased were involved. The appellants failed as to the alleged settlement.

The deceased was not a servant or employee of the appellants; he was a partner of one Hilliard with whom the appellants had entered into a contract for the killing and dressing of cattle; Hilliard was in no sense the servant of the appellants; and St. Denis met his death while engaged in carrying out this contract.

The first finding of the jury was, that the explosion which resulted in the death of the plaintiff's husband was the result of negligence and not of pure accident; the third finding was, that the negligence which caused the explosion was the negligence of the appellants; the fourth finding was, that that negligence consisted in the fact that the appellants continued to operate the boiler, knowing that the safety-valve was not working properly; and, in answer to the 8th question—whether the appellants employed a competent superintendent—"Yes. However, we believe that Mr. Davitt (the superintendent) made an error of judgment in allowing the engineer to continue to operate the boiler after the second steam-gauge had been applied for a test and there was still shewn a serious discrepancy between the safety-valve and the steam-gauge."

The jury's answers, taken together, amounted to a finding of negligence on the part of Davitt; and there was evidence to warrant that finding. There was no other reasonable explanation of the mishap than that it was occasioned by the negligence charged, and found by the jury: McArthur v. Dominion Cartridge Co., [1905] A.C. 72. If the finding of negligence did not include a finding that the engineer was negligent, the Court ought to supplement the findings of the jury by making that finding; it was warranted by the evidence, and was the necessary corollary of the finding as to Davitt.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 19TH, 1916.

CROUCH v. WILFORD.

Assignments and Preferences—Chattel Mortgage—Insolvency of Mortgagor—Knowledge of Mortgagee—Fraudulent Preference—Antecedent Promise—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 *ch.* 135, *sec.* 16—*Sale of Goods by Mortgagee—Following Proceeds—Assignments and Preferences Act, R.S.O.* 1914 *ch.* 134, *sec.* 13—*Amount for which Mortgagee Answerable to Creditors—Reference—Election—Judgment—Costs.*

Appeal by the defendant Lear from the judgment of COATSWORTH, Jun. Co. C.J., in favour of the plaintiff, in an action brought in the County Court of the County of York, to recover $800 and to set aside a transfer of property by the defendant Wilford to the defendant Lear as a fraud upon creditors. The trial Judge found that the transfer was null and void as against the plaintiff and all other creditors of the defendant Wilford; and, the property having been sold, gave judgment against the defendant Lear for $800 and costs.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. E. Newman, for the appellant.

A. C. Heighington, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who, after stating the facts, among which it appeared that a chattel mortgage was made to the appellant by one Margaret Nethery on the stock in trade and fixtures of a business carried on by the defendant Wilford, and that the appellant sold them, said that the defendant Wilford was insolvent, to the knowledge of the appellant, when the chattel mortgage was given; and that the proper conclusion upon the evidence was that, if the chattel mortgage was not made for the purpose of defeating, delaying, and hindering the creditors of Wilford, it was at all events a fraudulent preference and void as against them. Even if the promise to give a chattel mortgage was proved, it would not avail to support the chattel mortgage in question: sec. 16 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135.

The stock in trade and fixtures having been disposed of by the appellant, the creditors of Wilford were entitled to recover from him the proceeds of the sale: Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 13; and that was the remedy which the respondent sought.

The respondent, however, was not, in the opinion of the Chief Justice, entitled to recover more than $165, which was the sum received by the appellant from one Denne, to whom he sold. But the respondent should have an opportunity of proving that the appellant was answerable for more than the money which he received from Denne. If the respondent so elects, he may have a reference for that purpose; and in that case there should be substituted for the judgment in the Court below a judgment declaring the appellant's chattel mortgage to be void as against the respondent and the other creditors of Wilford; requiring the appellant to pay to the Sheriff of York $165 and such other sum (if any) as the appellant may on the reference be found liable for; reserving further directions and subsequent costs until after report; requiring the appellant to pay the costs of the action up to judgment; and directing that there be no costs of the appeal to either party. If the respondent does not, within ten days, elect to take the reference, the judgment below should be varied by reducing the amount to $165, and, with that variation, the judgment should be affirmed, and each party should bear his own costs of the appeal.

FIRST DIVISIONAL COURT. APRIL 19TH, 1916.

*ADAMS v. GLEN FALLS INSURANCE CO.

Insurance—Fire Insurance—Proofs of Loss—Sufficiency—Absence of Objection—Refusal to Pay Claim for Loss—Proof of Value of Goods Insured—Proof of Damage—Extent of Damage—False Statements in Statutory Declaration—Evidence—Onus—Statutory Conditions 19 *and* 20, *R.S.O.* 1914 *ch.* 183, *sec.* 194—*Stock-taking List—Excessive Claim for Damage by Smoke—Inference of Fraud not Warranted—Findings of Fact of Trial Judge—Appeal.*

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 9 O.W.N. 446.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Kilmer, K.C., for the appellant.

Leighton McCarthy, K.C., for the defendants, respondents.

MEREDITH, C.J.O., read the judgment of the Court. After stating the facts, he said that the plaintiff claimed for loss and damage to his stock in trade, caused entirely by smoke, $3,333.90; for loss and damage to the furniture, caused in the same way, $150; and for loss and damage to the building, $250. These claims were disputed by the respondents; and they also set up as defences to the action the failure of the appellant to furnish to them proper proofs of his loss; and that the appellant, in an account of his loss which he did furnish, made false and fraudulent statements with reference to his claim, by which, by virtue of the 20th statutory condition, his claim was vitiated.

The proofs of loss furnished by the appellant were in the form of a statutory declaration accompanied by a detailed statement, sent by the appellant's solicitor to the respondents' solicitors, in a letter in which the writer said, "If there is anything further you require, you might let me know." No answer was made to this nquiry, and no complaint was made as to the sufficiency of the proofs. It was, therefore, not open to the respondents to set up insufficiency, if indeed it was open to them to object to the proofs when they had definitely rejected and refused to pay the appellant's claim or any part of it: Morrow v. Lancashire Insurance Co. (1898-9), 29 O.R. 377, 26 A.R. 173.

The finding of the trial Judge that the appellant had not proved that the stock in the store at the time of the fire was of the value of $14,000, was not only not supported by the evidence, but was directly opposed to it.

Upon the evidence, also, it was clear that the stock was damaged by smoke; $2,000 would not be an unreasonable sum at which to fix the damage; and the appellant was entitled to recover that sum, to be apportioned among the respondents according to the amounts of their respective policies—unless the claim of the appellant was vitiated by reason of fraud or false statements in his declaration as to the matters mentioned in statutory condition 19.

The onus of proving the fraud or false statement alleged to have been made was on the respondents; and there must be clear and satisfactory proof.

It was argued for the respondents that what purported to be a statement of a stock-taking on the 5th February, 1915, was a document fabricated after the fire, and that there had been no stock-taking at that time. The fire was on the 11th February, 1915.

According to the provisions of statutory condition 20, the fraud or false statement must be in a statutory declaration in relation to the particulars mentioned in condition 19. In the declarations furnished by the appellant there was no allegation that there had been a stock-taking on the 5th February, and that the accompanying statement shewed the result of it. It was, therefore, unimportant, so far as the question of the application of condition 20 was concerned, whether or not there was in fact any stock-taking: Ross v. Commercial Union Assurance Co. of London (1867), 27 U.C.R. 552. But, in any case, it was satisfactorily shewn that stock was taken on the 4th and 5th February, and that the stock-list produced at the trial was the result of it.

The estimate made by the appellant of the damage that had been done to the stock by smoke was excessive, but not so excessive as to justify the conclusion that it was dishonestly and fraudulently made: Rice v. Provincial Insurance Co. (1858), 7 U.C.C.P. 548; Park v. Phœnix Insurance Co. (1859), 19 U.C.R.110; Parsons v. Citizens Insurance Co. (1878), 43 U.C.R. 261.

The defence founded on the 20th statutory condition was not made out.

In respect of the damage to the household furniture, the appellant should have judgment for $150 against the two insuring respondent companies in the proper proportions; and in respect of damage to the building the appellant should have judgment against the Glen Falls company for $13.20.

The appeal should be allowed with costs, the judgment of the trial Judge reversed, and judgment entered for the appellant in accordance with the opinion as to his rights above expressed, with costs throughout.

FIRST DIVISIONAL COURT. APRIL 19th, 1916.

*LOWERY AND GORING v. BOOTH.

Water—Rights of Lumbermen Floating Logs in River—Injury to Dam—"Unnecessary Damage"—Rivers and Streams Act, R.S.O. 1914 ch. 130, sec. 4—Negligence—Damages—Reference —Costs.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 8 O.W.N. 529, 34 O.L.R. 204.

The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

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

W. N. Tilley, K.C., and Wentworth Greene, for the defendant, respondent.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

MEREDITH, C.J.O., read a judgment in which he said that if, as might reasonably be found on the evidence, the appellants' coffer-dam was lawfully constructed and maintained under the authority of the Dominion Parliament, for the purpose of improving navigation, either in the Montreal river or below that river, by the creation of a storage-dam to conserve the head-waters, the respondent was bound to exercise his rights under the Rivers and Streams Act, so as not, at all events unnecessarily, to destroy or injure the coffer-dam.

That the coffer-dam was there, the foreman knew or ought to have known, and yet no precautions were taken by him to prevent injury being done to it. The logs might have been brought down without the formation of side-jams, though at certain risks. The respondent was bound to take those risks if he knew or ought to have known that there would be danger of the coffer-dam being destroyed or seriously injured if the driving were done in the manner in which it was done; and the damage that was done was, therefore, an unnecessary damage within the meaning of sec. 4 of the Rivers and Streams Act.

The rights conferred by the Rivers and Streams Act were subdordinate to the right to maintain the coffer-dam; and sec. 4 of that act could not cut down or impair the paramount right to maintain the coffer-dam.

The appeal should be allowed, and judgment should be entered for the plaintiffs, for the recovery of the damages sustained by them, owing to the destruction by the respondent's logs of the coffer-dam, with costs. If the parties were unable to agree as to

the amount of the damages, there must be a reference to ascertain them, and in that event the costs of the reference and subsequent costs should be reserved to be dealt with on further directions.

MAGEE, J.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A., agreed in the result, for reasons briefly stated in writing.

GARROW and MACLAREN, JJ.A., dissented, for reasons stated in writing by GARROW, J.A.

Appeal allowed; GARROW and MACLAREN, JJ.A., *dissenting.*

HIGH COURT DIVISION.

SUTHERLAND J., IN CHAMBERS. APRIL 17TH, 1916.

HARRIS v. ALTSHULLER.

Mortgage—Action by Third Mortgagee for Payment, Foreclosure, and Possession—Sum Admitted to be Due—Dispute as to Remainder of Claim—Motion for Summary Judgment—Judgment for Part Admitted, with Stay of Execution—Tender before Action—Payment into Court—Practice.

Appeal by the plaintiff from an order of the Master in Chambers refusing part of what the plaintiff asked upon a motion for summary judgment.

The action was brought by the holder of a third mortgage on property in the possession of the defendants. The writ of summons was endorsed with a claim for $1,000 principal money, interest thereon, and moneys said to have been paid by the plaintiff for interest and costs in respect of the first mortgage, and with claims for foreclosure and possession.

The defendants appeared and filed affidavits setting up defences. They admitted that they owed the plaintiff part of the money claimed, but said that the plaintiff, having agreed to make a further advance of $402.38 in cash upon the mortgage, fraudulently refused to do so. The defendants were cross-examined on their affidavits, and the plaintiff moved for judgment.

By the Master's order, the plaintiff was allowed to enter judgment for the amount admitted to be due, but execution on that judgment was stayed until after the remainder of the plaintiff's claim should be disposed of, and the defendants were given liberty to defend.

L. M. Singer, for the plaintiff, contended that the Master erred in refusing to give judgment for foreclosure, with a reference, and for possession, and also in staying execution.

J. Singer, for the defendants, contra.

SUTHERLAND, J., after setting out the facts in a written judgment, said that the Master was right in determining that the issues raised should be sent for trial, and not referred to the Master: Munro v. Orr (1895), 17 P.R. 53; Spears v. Fleming (1900), 19 P.R. 127; Euclid Avenue Trust Co. v. Hohs (1907), 10 O.W.R. 474.

The defendants, however, in their affidavits set up a tender before action of the sums admitted to be owing to the plaintiff. No money was brought into Court.

Having regard to this aspect of the case, to the fact that the plaintiff's mortgage was a third mortgage, and that the defendants were in possession, the order of the Master should be varied by directing the defendants to pay into Court, within four days, the sum admitted to be due, and, if not so paid, that the stay of execution be removed.

Costs of the appeal to be costs in the cause.

HODGINS, J.A. APRIL 17TH, 1916.

CRANSTON v. TOWN OF OAKVILLE.

Highway—Nonrepair — Injury to Traveller Thrown from Cutter —Snow-road — Evidence of Dangerous Condition—Notice to Council of Municipality—Dangerous Vehicle — Negligence—Liability of Municipality—Damages.

Action for damages for personal injury sustained by the plaintiff by being thrown from a sleigh, upon Reynold street, in the town of Oakville, in the 18th February, 1915, at about 6.30 p.m.

The action was tried without a jury at Toronto.

J. S. Fullerton, K.C., for the plaintiff.

I. F. Hellmuth, K.C., for the defendants.

HODGINS, J.A., read a judgment in which he set out the facts at length. He said that the issue between the parties was, whether the roadway, opposite Dr. Dorland's house, where

the accident happened, was or was not out of repair. It was a winter-road, with an icy ridge between the tracks of the sleigh-runners. The plaintiff sat in the sleigh, a "Gladstone cutter," facing backwards, and was thrown out by a sudden jerk. The cause of the jerk was a depression or pitch-hole in the snow-road.

After summarising the evidence as to the condition of the road, the learned Judge said that it was sufficient for the plaintiff's case if the evidence established such a want of repair as to render travel unsafe, even though others may pass over the spot without an accident.

The law as to snow-roads is unchanged since 1869, when A. Wilson, J., in Caswell v. St. Mary's and Proof Line Junction Road Co., 28 U.C.R. 247, at p. 254, said that it was a question of fact altogether for the jury to say whether the place alleged to have been out of order was dangerous, and, if so, from what cause, and, if from a natural cause or process, whether the persons liable to repair the road could reasonably and conveniently, as regarded expenditure and labour, have made it safe for use. That rule was accepted as correct by the Court of Appeal in Hogg v. Township of Brooke (1904), 7 O.L.R. 273, 285; followed by the same Court in Wallace v. Ottawa and Gloucester Road Co. (1905), 6 O.W.R. 652.

It was said that a "Gladstone cutter" was more dangerous than the ordinary vehicle used upon these roads; but the learned Judge was not able to say that anything unreasonable was asked of the defendants in requiring thenm to keep the road in repair sufficient to enable a Gladstone cutter to travel in safety.

The members of the defendants' council had sufficient notice in this case, one of them (Hillmer) being told by McClary, his 'bus driver, after the storm of the 2nd February, 1915, that Reynold street was a bad road, and to keep off it.

Featherstone, the mayor, admitted that the rate at which the plaintiff was travelling (found to be 7 or 8 miles an hour) was reasonable, and that the roads should be such that a man in the winter driving along them after dark ought to be able to do so without danger.

The defendants were liable for negligence in not keeping this portion of the road in proper and sufficient repair.

Judgment for the plaintiff for $1,500 damages, with costs.

BOYD, C. APRIL 18TH, 1916.

CARTWRIGHT v. PRATT.

Contract—Claim for Damages for Failure to Deliver Company-shares—Consideration — Failure to Prove Agreement—Absence of Writing — Evidence — Finding of Referee—Appeal.

Appeal by the defendant from the report of an Official Referee upon a reference, as to the disallowance of the defendant's counterclaim, being a claim for damages by reason of the plaintiff failing to deliver to the defendant 10,000 shares of Coleman Development Company stock, as consideration for the defendant procuring a loan of $15,000 for the plaintiff. The amount of damages claimed was $15,000, which the Referee disallowed for failure of proof by the defendant.

The plaintiff moved for judgment on the report.

The appeal and motion were heard in the Weekly Court at Toronto.

M. H. Ludwig, K.C., for the defendant.

G. H. Sedgewick, for the plaintiff.

THE CHANCELLOR reviewed the evidence in a written opinion. The action was begun, he said, in July, 1911, and the plaintiff in his claim shewed that he and the defendant had been engaged in various joint mining adventures, and substantially all the amounts alleged to be due in respect of these adventures, viz., $3,149.45, with interest from the 17th August, 1908, and the further sum of $5,000 with interest from the 4th January, 1909, had been allowed by the Referee. The first two of these joint undertakings were entered into in 1907, and the last in December, 1908. The transaction wherein the defendant was to procure a loan for the plaintiff was in November, 1907, and the loan was procured in December of that year. The liability from the plaintiff to the defendant for procuring the loan then arose, and after that date and down to the middle of 1909 various considerable sums of money were paid by the defendant to the plaintiff without reference to moneys being then overdue from the plaintiff to the defendant. Upon the meagre oral evidence on the counterclaim—the parties having put none of their dealings into writing—this circumstance was not without significance.

To substantiate so large and extravagant a demand, after the lapse of several years, and in the absence of all writing directly bearing on the point, would call for more cogent evidence than was given here. The onus was on the appellant to

displace the Referee's conclusion. The Chancellor would have arrived at the same conclusion had he been the primary judge, and it was his duty now to dismiss the appeal with costs.

Judgment for the plaintiff on the report, dismissing the counterclaim with costs, and on the plaintiff's claim for payment by the defendant of the various sums reported due, with interest and costs of action.

BOYD, C., IN CHAMBERS. APRIL 20TH, 1916.

*RE TORONTO ROWING CLUB.

Company—Winding-up—Transfer of Company's Land to another Company—Misfeasance of Directors—Order for Production for Inspection of Documents in Possession of Transferee-company—Powers of Master on Reference—Winding-up Act, R.S.C. 1906 *ch.* 144, *secs.* 108, 117, 119—*Rule* 350.

Appeal by the Security Realty Company from an order of the Master in Chambers requiring that company to make discovery of documents upon a reference for the winding-up of the Toronto Rowing Club, under the Dominion Winding-up Act, R.S.C. 1906 ch. 144.

J. F. Boland, for the appellant company.
Harcourt Ferguson, for the liquidator.

THE CHANCELLOR, in a written opinion, said that the proceedings under a winding-up order are to be carried on as nearly as may be in the same manner as an ordinary action or proceeding within the jurisdiction of the Court: sec. 108; sec. 117 provides for the examination of any person whom the Court deems capable of giving information concerning the dealings, estate, or effects of the company; and any such person may be required to produce before the Court any paper, book, deed, writing, or other document in his custody or power relating to the company: sec. 119.

An order had already been made in the winding-up, under sec. 123, to proceed against the directors (past and present) for misfeasance. Upon the examination of one of the directors, it appeared that a "deal" took place by the officers of the insolvent company whereby the real estate of the company (the club above named) was transferred in January, 1914, to the Security Realty Company, formed, as it appeared, to take over that property, and that that company sold and made a large profit out of the land in February, 1914, It was in evidence that the same individuals were, in whole or in part, directors of both companies. This

indicated that an investigation, in the interest of the creditors of the insolvent company, was required. The Master's order, calling for the production and inspection of all books, papers, etc., in the power, possession, custody, or control of the Security Realty Company, was appealed against on the ground that the Master had no jurisdiction so to order; it was said that the order was made in pursuance of Rule 350, a new Rule, which provides that, when a document is in possession of a person not party to an action, and the production of it might be compelled at the trial, the Court may, at the instance of any party, direct the production and inspection thereof.

The pith of the objection is, that the winding-up proceeding is not an "action."

The discovery appeared to be material to the liquidator's case, and his application for the order was made bona fide.

Section 108 of the Act practically incorporates Rule 350, and the matter is carried further by secs. 117 and 119. "Person," by the Interpretation Act, R.S.C. 1906 ch. 1, sec. 34 (20), includes any body corporate and politic, unless the context otherwise requires. This does not narrow the meaning.

Reference to Re Contract Corporation, Hakin's Case (1871), 25 L.T.R. 552.

There was jurisdiction to make the order, and the appeal should be dismissed with costs.

BOYD, C. APRIL 20TH, 1916.

Re TANNER

Will—Construction—Bequest to Daughters—Power to Receive Interest and Dispose of Principal by Will—Absolute Right to Moneys Bequeathed—Residuary Clause—Exclusion of Children of two Sons from Specific Bequest—Effect as to Residue.

Application by the executors and trustees under the will of William Tanner, deceased, for an order determining certain questions of construction in respect of the distribution of the estate.

The motion was heard in the Weekly Court at Toronto.

L. C. Raymond, for the applicants.

D. C. Ross, for the three daughters of the testator.

J. M. Ferguson, for the children of William and George Tanner.

K. W. Wright, for the Inspector of Prisons and Public Charities.

F. W. Harcourt, K.C., for the infants.

THE CHANCELLOR read a judgment disposing of the questions raised:—

(1) The bequests of $6,000, $6,000 and $4,000 to the daughters

of the testator, Emma, Annie, and Mary, respectively, "that they might draw and receive the interest and with full power to dispose of the said principal by will," vested in each of the daughters an absolute interest in the said sums, and the trustees were justified in paying the corpus forthwith to each of the daughters.

(2) The next question submitted was, whether the children of William Tanner and George Tanner, sons of the testator, were entitled to share in the residue disposed of in the 9th clause of the will. In the 8th clause, the testator gave $1,000 to each grandchild, except the children of his sons William and George; and, in a subsequent part of the same clause, said: "It was the intention at first to ask for the payment of the note of $6,000 now owing by my sons William and George and to bequeath to their children the sum of $500 each, but upon further consideration I have decided in lieu of such bequest to not exact from my sons William and George payment of the said $6,000 note, but give the same to them to be cancelled, and as the assistance I have already rendered them has enabled them to make ample provision for their children without further assistance to them from me I am now cancelling the said note and releasing them from the payment thereof in lieu of the bequest to their children." By clause 9, the testator gave all the residue of his estate to all his children, share and share alike, the children of a deceased child to receive the share of that child.

The testator died in February, 1906, and letters probate of his will were issued on the 18th April, 1906. His son George died in March, 1905; his son William, in May, 1905. In July, 1905, the representatives of William and George paid the $6,000 to the testator; but he made no change in the will—it was executed in 1904.

The Chancellor said that under the 9th clause the children of William and George would share, and he saw no reason to read the earlier excluding clause into this final clause, particularly in view of the payment made to the testator of the $6,000 which he intended to cancel.

There was an additional clause in the will to this effect: "Having already made provision for my sons William and George during my lifetime, I have not included them in my will, and have cancelled the indebtedness of $6,000 to enable them to provide for their children in lieu of the provision I intended making for them." This did not displace the express provision of the residuary clause. The children of William and George should share with the others in the residue.

Costs out of the estate.

CLUTE, J. APRIL 20TH, 1916.

Re SOLICITOR.

Solicitor—Retention of Money of Client—Order for Payment within Limited Time—Penalty on Default—Striking of Name from Roll—Costs.

Motion by Alice Emmeline Morris for an order for the payment by the solicitor to her of $2,144, and interest from the time he received that sum for her, as her solicitor, from the sale of company shares, and, in default of payment, for an order striking his name from the roll of solicitors.

It appeared that the solicitor had, with the money realised from the sale of the shares, bought bonds of a brick company, but had, in writing, promised the applicant to pay her the $2,144 at any time after the 1st September, 1914; that, after that date, she had asked for the money, but the solicitor had neglected to pay her.

The motion was heard in the Weekly Court at Toronto.

Harcourt Ferguson, for the applicant.

M. Wilkins, for the solicitor.

CLUTE, J., in a written opinion dealing with the facts, finds that the solicitor was acting as the solicitor of the applicant before and at the time her shares were disposed of; that the shares sold for $2,144; and that the bonds were absolutely worthless, to the knowledge of the solicitor.

The solicitor asserted that the applicant owed him $155 paid out to her and $50 for costs—$205 in all.

Reference to United Mining and Finance Corporation Limited v. Becher, [1910] 2 K.B. 296, [1911] 1 K.B. 840.

The applicant was entitled to an order directing the solicitor to pay over the amount claimed, and, in default, that his name should be stricken from the roll; payment or a satisfactory settlement of the claim to be made within one month. The order to strike the name off the roll is not to become effective until default has been made in payment of the claim and the matter has again been mentioned in Court.

The solicitor to pay the costs of the application.

LENNOX v. RUSSELL MOTOR CAR CO.—FALCONBRIDGE, C.J.K.B. —APRIL 17.

Architect—Preparation of Plans—Action for Fees—Evidence—Finding of Fact of Trial Judge.]—Action by an architect for a balance of his fees for preparing plans for a factory-building. The action was against the company and Thomas A. Russell,

vice-president and general manager of the company. The trial was at Toronto, without a jury. The learned Chief Justice, in a written judgment, said that the plaintiff and the defendant Russell had an entirely different recollection of what took place nearly five years ago in reference to the preparation of plans for the proposed building. The plaintiff undoubtedly prepared plans and specifications. When the tenders were opened, it was found that the building would cost about $70,000; and the defendant Russell said that the plaintiff had been informed and was well aware that only $30,000 was at the disposal of the company for this building. The plaintiff, on the contrary, said that he was never informed of that until Russell decided to go on with the erection of an office-building instead of a factory. The learned Chief Justice found it quite impossible to realise or credit that the plaintiff, who was an architect of great experience, could have imagined that such a building as was contemplated could be put up for $30,000. The plaintiff should have judgment for $1,400—two per cent. on $70,000—less $91.04 overpaid on his claim for services in connection with the office-building. Judgment for the plaintiff against the defendant company for $1,308.96 with costs. As against the defendant Thomas A. Russell, action dismissed without costs. H. E. Rose, K.C., for the plaintiff. E.B. Ryckman, K.C., for the defendants.

OUELLETTE v. SINASAC—FALCONBRIDGE, C.J.K.B.—APRIL 20.

Malicious Prosecution—Evidence—Failure to Prove Malice and Want of Reasonable and Probable Cause—Dismissal of Action—Potential Damages—Costs.]—An action for malicious prosecution, tried without a jury (by consent), at Sandwich. The learned Chief Justice read a brief judgment in which he said that the plaintiff had failed to prove malice and want of reasonable and probable cause. The defendant made inquiries at the house of the plaintiff and received information as to the shocks of corn which did not seem satisfactory, and he afforded the plaintiff the opportunity of giving an explanation, which again did not commend itself to the defendant's mind as being convincing The defendant, therefore, took reasonable care to inform himself of the facts, and he honestly, though perhaps erroneously, believed in such a state of facts as would, if true, found at least a prima facie case against the plaintiff. The action should be dismissed. If judgment had passed for the plaintiff, heavy damages would not have been awarded. The arrest and imprisonment were of the mildest and most nominal character. In all the circumstances, there should be no order as to costs. A. B. Drake, for the plaintiff. T. G. McHugh, for the defendant.