

## PARRY SOUND LUMBERING CO. V. FERRIS ET AL.

as the injury to the fish, the obstruction by the dam to the use of boats going to McKellar village, the flooding of Ferris' stable and the cellar of the house, and the overflowing of the public highway, seem far to outweigh any possible benefit that can be conceived.

The statute of Virginia goes even further, for, by sect. 5, "If on one such inquest, or on any other evidence, it shall appear to the Court that the mansion house of any proprietor, or the office, curtilage or garden thereto immediately belonging, or orchards will be overflowed, or the health of the neighbours be annoyed, they shall not give leave to erect the said dam."

Mr. Ferris evidently would be perfectly safe if he lived in Virginia. Now if I ask myself the question, whether the allowance of this application will conduce to the public good, and is proper and just under all the circumstances of the case? I cannot, when I look at all these circumstances, with a good conscience, answer in the affirmative. *The good* to be derived from it would, it seems to me, result more to the private benefit of this company than to that of the public in the neighbourhood of Parry Sound. And much more to them than to the public at Lorimer Lake.

It was not shown that the mill could not be worked without this additional water power, or that the ordinary supply of water ever failed. The most that was said was, that last summer (one of the driest we have had for many years) the mill had to stop for a while owing to the lack of water, and to some difficulty with the Guelph Lumber Company. I cannot see how a temporary failure of water, even every year, would be any inconvenience, still less an injury to this company, inasmuch as they use steam in addition to their water power—being already provided with the necessary works and machinery for the purpose of using steam. It is not as though they had to go to the expense of now doing so. It may be unfortunate for the company that they have already erected the dam, at some considerable expense no doubt; in doing so, however, they exceeded their powers. The only right given them by the Act before this application was to enter upon the lands required, to examine and survey them afterwards, if their application was granted they must have paid in the assessed damages before they would be entitled to a conveyance of the land, or to exercise

any of the powers mentioned in the first section of the Act.

I have not thought it necessary to say anything as to the objection raised, that Still Creek was a navigable river, as my judgment proceeds upon other grounds. No doubt, in the technical sense of the word, it is not a navigable stream, as it is not affected by the ebb or flow of the tide. But it might be said to be a boatable one. The common law has preserved the right to the public, as a highway, such rivers above the flow of tide water as are naturally of sufficient depth for valuable floatage, giving them an easement therein for the purposes of transport and commercial intercourse. The Thames, the Severn and the Wye are instances of this. In the State of Maine, where the English common law prevails, it seems that if a stream is naturally of sufficient size to float boats or mill logs, the public have a right to its free use, for these two purposes, unencumbered with dams, etc. (*Wadsworth v. Smith*, 11 Maine 278).

Taking the view I do, it is unnecessary to make any reference to the subject of compensation. I find, however, a case in our Courts where the decision of the Court was, that when land is overflowed by the erection of a mill, the owner may recover full compensation for all the injury he has sustained thereby, whether it be more or less direct, whether it effect his domain in the land by taking away its use, or impair the value of that domain by rendering the land unfit for a place of residence, or whether the injury—reaching beyond its immediate mischief—extends also to the personal property of the petitioners.

This application will therefore be refused, with costs to the defendants Ferris and Edward Bell, to be paid by the plaintiffs, the Parry Sound Lumber Company.