THE CASE OF McLAREN V. CALDWELL.

OTTAWA, Nov. 28.—When the judges took their seats in the Supreme Court this morning the Chief Justice, Sir William Ritchie, announced that they would deliver judgemnt in the case of McLaren, appellant (plaintiff), against Caldwell, respondent (defendant), before hearing arguments on the cases remaining on the docket.

LEGAL HISTORY OF THE CASE.

Vice-Chancellor Proudfoot had granted an injunction to restrain the defendant from interfering with or using the improvements placed by the plaintiff in certain streams of which he claimed to be seized in fee simple, and the user of which, the defendant contended, was a common right under the common and statute law of Ontario. The Court of Appeal of the Province by a majority reversed this decision, Chief Justice Spragge and Justices Patterson and Morrison concurring in over-ruling the court below, and Mr. Justice Burton dissenting from their view. The present appeal was from the judgment of the Ontario Court of Appeal, and was argued at a former term.

THE CHIEF JUSTICE'S RULING.

The CHIEF JUSTICE said the plaintiff contended that the stream where it passed through his property was by nature non navigable and non floatable at all seasons of the year, but that he had by artificial means placed upon his own property certain improvements, which enabled him to convey logs and other timber down the stream. The main question at issue was, Had the appellant the legal right to prevent the respondent, as he sought to do, from driving his logs through these improvements on the streams which were the appellant's own property; or were those particular streams merely a part of the public highway, and therefore open to the respondent in common with the appellant and the public generally? It could not be disputed that if the portions of the streams in which the improvements were made were incapable of floating lumber, and if the fee simple of the streams was in the plaintiff, the public had no right at common law, and the plaintiff had the sole right to deal with the bed and soil of the stream, and to place such improvements thereon as he might choose. While it seemed to be admitted that the public had no right to make improvements on the plaintiff's property, it was claimed that in Ontario, where streams of the character mentioned were rendered capable of being navigated by such improvements made by the owner of the soil whereby lumber could be floated, the public had an absolute common right to use such improvements, and to deal with the streams as if they had been naturally floatable—that is, floatable without the aid of artificial improvements, and this right, it was also claimed was conferred on the public by virtue of the Act 12 Vic., cap. 87, sec. 5, which was repealed by the Consolidated Statutes of Canada in 1859, but practically re-enacted by cap. 48, Consolidated Statutes of Upper Canada, secs. 15 and 16. There could, he apprehended, be no doubt that statutes which encroached on the rights of the subject, whether as regarded person or property, should receive a strict construction, and if a reasonable doubt remained which could not be satisfactorily solved, the subject was entitled to the benefit of the doubt. In other words, he should not be injured in person or property unless the intentions of the Legislature to interfere with the one or take away the other was clearly and unequivocally indicated. If the appellant's contentions were correct, they were met at the outset with the incongruity of the Legislature enacting that it should be lawful to float saw logs, &c., down streams on which, from the nature of the streams themselves, it was impossible that saw logs, &c., could be floated down. In other words, it seemed most unreasonable to suppose that the Legislature intended to legislate that it should be lawful to do what, in the very nature of things, could not be done. Was it not more reasonable to assume that the Legislature was dealing with a subject capable of being used in the manner in which it was declared that it should be lawful to use the same, and that its language had reference to all streams on or through which saw logs or other timber could be floated, either at all times or during the spring, summer, or autumn freshets? In his opinion the object of the Legislature was, in the interest of the lumber business, not to interfere with or take away private rights, but to settle by statutory declaration any doubts which might exist as to streams incapable of being navigated by boats, &c., but capable of floating saw logs and lumber at certain seasons of the year. Having established this right, the Act went on to prevent the obstruction of such streams, subject, nevertheless, to the restrictions imposed in respect to erections for milling purposes on such streams. It was not, however, intended to interfere with private property and private rights in streams which were not by nature floatable at any season of the year. If the Legislature contemplated what was now contended, or intended the enactment to apply to streams non-floatable at all seasons, as there was no pretence for saying that the Legislature had conferred any right on the parties to enter upon private property and make the non-floated floatable, and as they could not be made practically floatable by the operation of law, what was the precise legal right conferred on the public by the statute? Was it not obvious that the only effect of the enactment could be in such case to confer upon the public the right to use private property and the improvements thereon without making any compensation therefor? Was it then possible to infer any such intention from this section? Had it been present to the mind of the Legislature it should have been, and, he thought, would have been, clearly and unequivocally expressed. It was not possible to attribute to the Legislature an intention unreasonable and unjust, unless the language was so unambiguous as to admit no doubt of the construction. He could not appreciate the force of the parallel drawn by Mr. Justice Patterson in regard to public highways, which appeared to him entirely to beg the question. Dealing with the contention for the right to use the improvements of a proprietor by which he had made the stream floatable, the Chief Justice said the proprietor of a non-floatable stream who made it floatable for his own use did no more than if he made a canal through his property. He did not interfere with his neighbour; he took nothing from the public, who could neither use the stream as it was nor improve it, except by the permission of the proprietor, and to whom, having no right or property therein, the improvements of the proprietor did no wrong. It had been urged that to allow an individual to shut up a stream 100 miles long because he might own small portions of the stream not floatable because of its nature, would be most unreasonable. But it seemed to him to be forgotten that it was not the individual who shut up the stream; it was closed by natural impediments which prevented such portions being used for floatable purposes, and as it was admitted that the public had no right to enter upon such portions, and make improvements whereby the stream might in those parts be made navigable or floatable, by reason of its being private property, the stream was as effectually shut up by the refusal to permit an entry and improvements to be made as if the proprietor had not made the improvements, and had prohibited the use thereof by the public. If the use of the non-floatable portions was as necessary for carrying on lumbering operations as had been urged, the obvious means to secure the right to use the privileged improvements would seem to be to obtain, by payment of an adequate consideration, the proprietor's permission, or if the streams were unimproved, to secure from the proprietor the privilege of making such necessary improvements; or, failing the ability to accomplish this, if the development of the public domain, the exigencies of the public, or the business of the country was of such paramount importance in comparison with individual loss or inconvenience as to require that private rights should give way to the public interest, the remedy should be sought at the hands of the Legislature, through the instrumentality of expropriation, with suitable and full compensation under and by virtue of the right of eminent domain. There was nothing to justify the conclusion that the Legislature intended in this provision to exercise its right of eminent domain, and expropriate the property of owners of streams not by nature navigable or floatable, or any property or improvements the owner might make or place thereon. His Lordship cited the case of Horrock v. Worship (Best & Smith's reports), and he pointed out that he was strengthened in the conclusion to which he had arrived by the weight of judicial opinion in Ontario as expressed in the Boyle case by Chief Justice Draper, Chief Justice Richards, Justice A. Wilson and J. Wilson; in Whelan v. McLachlin, and McLellan v. Baker, by Chief Justice Hagarty and Justices Gwynne and Galt; and in this case by Vice-Chancellor Proudfoot and Mr. Justice Burton, while Chief Justice Spragge and Justices Patterson and Morrison had overruled the previous decisions on the point. There were thus three Chief Justices and five Justices in support of the conclusion at which he had arrived, and one Chief Justice and two Justices taking a different view. In 1877, in the Revised Statutes, the Legislature, after all the decisions to which he had referred in previous cases had been given, re-enacted chapter 18 of the Consolidated Statutes of Upper Canada, passed in 1859, in almost the same words, as follows—All persons may during the spring, summer, and autumn freshets float saw logs and other timber and rafts and crafts down all streams; and no person shall by felling trees or placing any obstruction in or across any such stream, prevent the passage thereof. In case there is a convenient apron, slide, gate, lock, or opening in any such dam or other structure made for the passage of saw logs and other timbers, rafts, and crafts authorized to be floated down such stream as aforesaid, no person using any such stream in the manner and for the purpose aforesaid shall alter, injure, or destroy any such dam or other useful erection in or upon the bed or across the stream, or do any unnecessary damage thereto or on the banks thereof." His Lordship continued that considering then that up to the time of the passage of this Act all the decisions of all the judges, with no dissenting voice, from 1863 to 1876 placed upon this enactment, the construction now contended for by the plaintiff, if such construction was so clearly contrary to the intention of the Legislature, so opposed to the development of the Crown domain, so antagonistic to the interests of the public, and so disastrous to the lumber business of the country as had been so strongly urged before this court, could it be supposed that the Legislature, in revising the statutes after such a series of decisions, and only one year after the latest decision, would not have corrected the judiciary either by a declaration or by new legislation, and have indicated in unmistakable language that private improvements of non-floatable streams should be subject to public use, and more particularly so if such user was to be without compensation? As they had not done so, did not this case come with great force within the canon of construction that where a clause of any Act of Parliament which had received a judicial interpretation, on account of competent jurisdiction, was re-enacted in the same terms, the Legislature was to be deemed to have adopted that interpretation? In this case he thought that there was unusual cause for treating a re-enactment of this nature as a legislative approval of the judicial interpretation, and for holding that such interpretation should not be shaken, when it was considered that the Legislature, from such judicial proceedings, must have known that the property was purchased and held and an investment made based on the claim that by such judicial decisions private rights and property had been established and secured. As was said by Lord Ellenborough a long time ago, it was no new thing for a court to hold itself precluded in matters respecting real property by former decisions, upon questions in respect of which if it were integral, they would probably have come to a different conclusion, and if an adherence to such a determination was likely to be attended by inconvenience it was a matter to be remedied by the Legislature, which was able to prevent mischief in future and to obviate all inconvenient consequences which were likely to result from it as to purchases already made. For all these reasons he was of the opinion that the contention of the plaintiff should be sustained, and that the decision of the Court of Appeal of Ontario was not correct, and the judgement of Vice-Chancellor Proudfoot should be affirmed. His Lordship further held that the Vice-Chancellor was right in rejecting evidence to prove that all streams in Upper Canada were non-floatably at the time of the passing of the various Acts. He could find nothing to justify him in saying that the Vice-Chancellor arrived at a wrong conclusion from the evidence, and declared in reference to the contention that the Attorney-General should have been made a party to the suit that if this was a private property the Attorney-General had no more to no with the question than any other member of the community, and there was no more reason why he should be made a party than in any other controversy between private individuals as to the rights of private property.

Mr. Justice Strong said it would be hopeless to attempt from the evidence to impugn the finding that the stream in question was not floatable in the state of nature. The appellant's title to the lands, including the beds, had not been seriously disputed, and had been established by the production of his title deeds. The question was therefore purely one of law, whether under common law or under the Revised Statues of Ontario, chapter 115, sections 1 and 2, the respondent had the right of passage which he claimed for his logs and timber through the artificial waterways constructed by the plaintiff on the streams in question. As to the right under common law, he reiterated the decision of Chief Justice Macaulay in the Queen v. Myers, 3 U. C. C. P., 305; Mr. Angell on "The Law of Highways," and Chancellor Kent in his commentory, but declared that in a case like the present, where the owner of the bed and banks of a private stream, which in the whole or part of its course was insufficient to afford a passage even for logs or timber, had by artificial means made it navigable, it did not, for that reason, become liable to a servitude of passage for the benefit of the public, as in the case of a stream naturally adapted to such a use. The principle upon which the common law had made streams originally navigable liable to such use was that a burthen was imposed for the public benefit when the property was originally vested in their own and passed to other owners, while if this were applied to streams which were made navigable by artificial means the result would be to appropriate property to public use without compensation, and this would be an encroachment on private rights which the laws not only never sanctioned, but sought in every way to avoid, in the case of positive written laws, by adopting strict rules of construction. He cited several American cases in support of his view as to the right under chapter 115 of the Revised Statutes. His Lordship was of opinion that all streams did not embrace artificially constructed private streams such as those in question. To consider otherwise would be in direct violation of the sound and well-recognized canon of construction which had been acted upon, from Barrington's case down to the Western Counties Railway Company against the Windsor and Annapolis Railway Company, namely, that statutes were to be so constructed as to avoid any infringement of private rights unless by express words or necessary implication such construction was unavoidable. To comply with the first condition, streams in whole or in part artificially constructed would have to be expressly mentioned, and they would not necessarily be implied unless there were no other streams to which the Act could apply. He cited the case of Horrock v. Wiship, which he said fully warranted the court in adopting a construction so restrictive as to prevent the statute operating in degradation of private rights of property. He could not hold that the Legislature intended to authorize a gross violation of the rights of private property without giving compensation to its owners, and he was therefore of the opinion that the appeal must be allowed and the order of the Court of Appeal be reversed, thus restoring the original decree of the Court of Chancery, with costs to the appellant in all the courts.

Mr. Justice Fournier, Mr. Justice Henry, and Mr. Justice Taschereau concurred.

Mr. Justice GWYNNE said it appeared to him impossible to arrive at any other conclusion than that which the learned Vice-Chancellor had come to. Without the improvements made by