

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

The channel is very deep. The settlers here all use it for the same purpose with the same sized boats. The dam prevents us using it now. Submerging 200 to 300 acres of land around the lake is destroying the settlement, and the settlers are leaving. The water will submerge the public road and prevent travel. We would have a school section but the settlers are being driven away. Six settlers have been driven away since the dam was built (names given) who would have been in our section. I have brought affidavits from other settlers objecting to this flooding." (I refuse to allow these affidavits to be read). On cross-examination the witness said:—"Before the dam was built the receding water left the ground wet, which dried at once. I don't consider this a public improvement. The company use steam as well as water."

Edward Bell's evidence on the same point is as follows:—"I agree with what Mr. Ferris says that Still Creek is navigable in mid channel. I have used it for going to McKellar mill, where there is a village with stores. There is a portage at Patterson's Falls, (on the way to McKellar village). People have taken logs past McKellar to Seguin River. Flooding the land round the lake is likely to make it unhealthy. Last year, during the flooding, my wife complained of sickness, arising from the stench of the lake. She had not been sick before. She was sick about two months. It began in August. We attributed the illness to the flooding, and I do so still. If the dam is kept there it renders my place unfit for a residence. It raises the water so high that I cannot cross it by a small bridge. I have crossed this bridge for four years without objection. The creek is not in my land. It would give me a mile or a mile and a quarter more to get to the high road. I could not live there, the water being stagnant. I have no other desirable place to build on, it is all bush. There is another small lake touching on the other side of my land. It will not be for the public good to leave this dam. Since it was erected five or six settlers have gone away (names given). I knew them all. I don't know of any one having gone away before that. Those that remain cannot now support a school section. We could have done so before those went away. I believe the cross-way of the public road will be put under water." On cross-examination the witness said:—"I can't say why

those people actually left. There are five other settlers round the lake besides the six that have gone, and us two."

In rebuttal, Mr. Beatty was recalled and gave some explanation as to why some of the settlers went away. This is all the evidence given on the question as to this dam being for the public good.

On the argument neither counsel referred me to any cases or text books bearing on this subject, stating what I find, so far as my researches go, to be a fact, that there are no cases on the point to be found in our own reports. I am therefore driven to examine into the law and the cases to be found in American books, for statutes somewhat similar to the one we are now considering have been in force for a long time in several of the neighbouring States. As this case is, so far as I am aware, the first under this Act that has been brought to an actual trial upon evidence, and as it may be useful, on whatever way it eventually terminates, as a precedent in similar application, I feel bound to trace the foundation and history of such legislation as has produced the Act in question.

The legislature have thought fit to exercise the right of "eminent domain" in such matters as railways, which are, undoubtedly, for the public benefit; and have enacted that any lands may be taken which are required for such a purpose, without any possible objection or demur on the part of the owner; the only question to be settled by the Courts, if the owner and company cannot agree, being that of compensation for the lands required and taken.

Under the "Act respecting water privileges," however, the case is different. Here the legislature only says that the right of taking another man's property *may be* exercised provided the judge is of opinion that the allowance of the application to exercise such right "will conduce to the public good, and is proper and just under all the circumstances of the case." I am, therefore, somewhat in the position of a member of a legislature which has been called upon to pass an Act empowering the company to carry out their purpose. As such I will consider the question, and state my reasons for the conclusion I may come to. Upon the right of eminent domain, or the right which the Government retains over the estates of individuals to appropriate them to public use, Vattel says:—"To this