

into them, or by the felling of trees across them. (Con. Stat. U. C., cap. 47.)

The Statute 12 Vic., cap. 87, was passed in May, 1849, to amend 9 Geo. IV., cap. 4, and enacted that every apron or slide, required to be constructed, should have sufficient depth of water to admit of the passage over such apron or slide of such saw-logs, lumber and timber as are usually floated down the stream. This act makes further provisions for carrying out the objects of it, which are now to be found, together with other enactments on the subject of mills and mill-dams, in chapter 48 of the Consolidated Statutes of Upper Canada.

The Consolidated Statutes of Canada, chapter 48, section 3, enacts that the owner or occupier of a mill-dam on any stream down which lumber is usually brought, shall construct and maintain an apron thereto, not less than 18 feet wide by an inclined plane of 24 feet 8 inches to a perpendicular of 6 feet, and so on in proportion.

Section 4, of the same statute, provides for the construction of aprons or slides sufficient for the passage of timber, but that the mill-owner may place slash-boards or waste-gates to prevent any unnecessary waste of water, and may keep the same closed when no person is ready and requires to pass any timber or saw logs over the apron or slide, and until the same is in the main channel of the stream (sec. 5), but these sections do not apply to small streams unless required for the purposes of rafting or floating down lumber and saw-logs (sec. 6).

Section 7 provides for the recovery of a fine of two dollars a day against any owner or occupier of a mill-dam who neglects to make and keep in repair the necessary apron or slide.

Section 8 refers to mill-dams on streams in the county of Huron. Sections 9, 10, 11 and 12, to those on the river Moira, and section 13 to those on the river Otonabee.

In case any apron be destroyed by flood or otherwise, no penalty shall attach if it is repaired as soon as the state of the stream safely permits (sec. 14.)

All persons may float saw-logs and other timber down all streams in Upper Canada during the spring, summer and autumn freshets, and no person shall, by felling trees or otherwise, prevent the passage thereof (sec. 15.)

Section 16 enacts that in case there be a convenient apron, slide, gate, lock or opening in any such dam or other structure made for the passage of saw logs, authorised to be floated down any stream, no person using any such stream shall alter, injure or destroy any such dam or other useful erection, in or upon the bed of, or across the stream, or do any unnecessary damage thereto, or on the banks thereof.

The most important question that has come up in the courts under these sections, has been in what cases and to

what extent parties desirous of floating timber down a stream, can take the law into their own hands when they find the free passage of the stream unlawfully obstructed by mill-dams, not possessing the necessary means provided by the statute for facilitating the passing of the timber.

In *Shipman v Clothier et al.*, 8 U. C. Q. B. 592, the court thought that there was "no such right in any case in which the stream did not appear on the pleadings to be a navigable river. and, as such, a common and public highway. * * * The fifth clause of 12 Vic., cap. 87, (sec. 16 of the Consolidated Act,) seems to give an implied authority to remove the obstruction, by only prohibiting the destroying or injuring any dam, provided there shall be a convenient apron, &c., made for the passage of timber. Hence it is argued, that when there is no such apron, &c., the dam may be destroyed. If it were not for the fifth section, I should certainly think that parties must content themselves with having the party fined for the obstruction as the act points out; and I have doubts whether the negative provision in the fifth clause extends further than to protect parties against the consequence of involuntary injuries occasioned to dams, by floating down the timber when there is not adequate facility afforded."

This case is not to be taken as decisive on the point, as the defendant's plea, setting up this defence, was held bad on another ground. The view taken of the law, moreover, appears to be at variance with a subsequent and more elaborate judgment of the Court of Common Pleas in *Little v. Ince et al.*, 3 U. C. C. P. 528, in which case the pleas did not go so far as to place the justification upon the stream being a public highway by water; but rested it specially upon the rights and privileges which the defendants were entitled to by virtue of the statute.

Chief Justice Macaulay, in giving judgment, said, "It might perhaps have been put upon the higher ground of a public or common right, owing to some expressions used in the pleas; but it was not so treated in the argument, nor did the pleader so intend to treat it in framing the pleas." And then going on to the question we are discussing, and after a careful examination of the authorities, he says, "without attributing to the defendants a right at common law, either original or acquired, to the free use of the stream for the purposes mentioned, it is evident that the statute (12 Vic., cap. 87, sec. 5,) conferred the right in terms so distinct, that I think it must be looked upon as equivalent to a declaration of such right, upon the principles of the common law. And since it is obvious that the obstruction stated in the pleas was calculated to inflict an immediate injury upon the owners of the saw-logs, and which the slow remedy by action might prove a very inadequate remedy, the urgency of the case would justify sum-