McLAREN vs. CALDWELL.

JUDGMENT BY THE COURT OF APPEAL—THE DECISION OF V. C. PROUDFOOT OVER-RULED.

C. J. SPRAGGE delivered judgment in this case on Friday in the following terms:—

The plaintiff describes himself in his bill as a lumber merchant, lumber dealer, saw miller, and lumberman, and states that the defendant carries on the same branches of business. The bill enumerates some twelve parcels of land, of which it is stated that the plaintiff is the owner, and it states also that he is owner of large tracts of timber. The bill goes on to allege that the streams flowing through these parcels of land were not navigable streams, "nor floatable for logs and timber" while in the Crown, nor until after the improvements set forth in the bill were made on the said streams by the plaintiff, and that in their natural and unimproved state they would not, even during freshets, permit of saw logs or timber being floated down the same, but were useless for the purpose, and in the 10th paragraph there states his rights:—"The plaintiff is entitled, both as riparian proprietor and owner, in fee simple, of the bed of the said streams where they pass and flow through the *said lots, respectively, to the absolute, exclusive*, and uninterrupted uses of the said streams for all purposes not provided by law, and amongst other purposes to the absolute and exclusive right to the user of the same for the purpose of floating or driving saw logs and timber down the same." He then goes on to say that in *various parts of the said streams, which run and* flow through lands therein described, the plaintiff and those through whom he claims have expended a large amount of money in making certain specific and very valuable improvements, which he sets out in a number of the following paragraphs of the bill.

The complaint is in substance, that the defendants having got out several thousand saw logs, threaten, and intend to avail themselves of the improvements set out in the bill, and that in floating and running the timber and logs down the stream they are interfering with and obstructing the plaintiff in running and floating down his lumber and saw logs, and he takes this ground, that the defendants in so doing are wrongfully and forcibly, and without right, or colour of right, making use of the improvements made by the plaintiff, and those under whom he claims, and of which plaintiff is entitled to the exclusive and uninterrupted user.

Evidence was given at great length before V. C. Proudfoot. That learned judge considered that he ought to follow the case of Boale v. Dickson, and that he understood that case to determine that if any improvements are necessary to render the streams floatable, the statute does not apply; that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. Upon the evidence he came to the conclusion that without the artificial means of which evidence was given neither of the streams upon which improvements had been made by the plaintiff could be considered floatable, even in freshets or high water.

That was the issue upon which the evidence in the cause was given, and that the proper issue of the construction placed upon the statute in Boale v. Dickson was the proper construction.

Upon the appeal to this court it is contended that the construction placed upon the statute in Boale v. Dickson was not correct. It becomes our duty, therefore, to consider and determine that question.

It is obvious from a perusal of the Acts (which are considered in c. 48 of the C.S.U.C.) that it was the policy of the Legislature to encourage the lumber trade of the province; and to preserve the fish in the streams. The Act of 1828-9, Geo. IV., c. 24, recites: "*Whereas*, it is expedient and found necessary to afford facility to the inhabitants of this province engaged in the lumber trade in carrying their rafts to market, as well as for the ascent of fish in various streams now obstructed by mill dams." Then follow two sub-sections, which are embodied in section 3 of the Consolidated Act.

The same policy is evidenced by 12 Vic., c. 87, the first section of which supplies what may be taken to have been an omission of the Act of 1828, viz., that aprons or slides to mill-dams should be so constructed as to afford sufficient depth of water for the passage of saw logs, lumber and timber—a provision embodied in sec. 4 of the Consolidated Act.

Then in sec. 5 of the same Act we find enacted what is embodied in secs. 15 and 16 of the Consolidated Act. The first clause of sec. 5 is in the same terms as sec. 15, beginning thus:—"And be it enacted that it shall be lawful for all persons to float saw logs" (and so to the end of sec. 15) "and other timber rafts and craft down all streams in Upper Canada during the spring, summer, and autumn freshets; and no person shall, by felling trees or placing any other obstruction in or across any such stream, prevent the passage thereof."

In Boale v. Dickson this opinion is expressed, "that the right so given extends only to such streams as in their natural state will, without improvements, during freshets permit saw logs, timber, etc., to be floated down them, to streams of a different class to those mentioned in the third section "Down which lumber is usually brought."

No such qualification of the right given by section 15 is to be found in the Act nor in any other previous Acts thereby consolidated. There is nothing in the context of any of these Acts showing or tending to show that such qualification was intended; and we know from what we find in the evidence taken in this cause, that confining the right given by section 15 to such streams as are described in the passage I have quoted *from Boale v. Dickson would go far to* defeat the avowed policy of the Legislature. Evidence was offered that in some of the streams in the province, at the date of passing of these Acts, saw logs, timbers, &c., could be floated down in their natural state without improvements, even during freshets. The evidence was stopped by the learned Vice-Chancellor upon the objection of the plaintiff's counsel after some evidence in that direction had been given. But from the evidence that was given in the cause it is apparent that if section 15 is to be read with the qualification given to it by Boale v. Dickson, a very large number of the streams in the province would be excluded from its *operation.*

I agree with what is said in Boale v. Dickson "that assuming the plaintiffs to be the owners of the bed of the river, and considering this Act to be a diminution of private rights, no greater right can arise to the defendant under it than a right to float timber, &c., down during freshets; it confers no right to in any way either improve or deepen the natural channel." I do not understand by this that a person to whom such right to float timber down is given, &c., may not remove fallen timber and such like obstacles to navigation as are referred to in Crell v The G. T. R. Co. But taking what is said in the passage I have just quoted from Boale v. Dickson to be correct, it may well be conceded without affecting the constitution of the Act. It may be thought that the Legislature had over much regard for the interests of the lumbermen, and too little regard for the interests of riparian proprietors. Our province is to construe the Act and not to fail to give due effect to it under an idea that its provisions press over hardly upon one class of persons for the benefit of another class.

I do not feel pressed by the consideration that no right is conferred upon lumberers "to alter improve, or deepen the natural channel." It does not prove that it was not intended to confer upon them the privilege of availing themselves, in the floating of their logs and lumber, of improvements found by them to have been already made in the natural channels of the streams.

The statute makes no provision for compensation to those at whose expense improvements have been made. We may conceive that it would have been more just that provision should have been made for compensation. The Legislature, however, may have felt difficulty in the way of adjusting a scale of compensation, or may possibly have taken some view as this:—The different lumbermen make improvements on their respective properties, each for his own sake. By giving to all a common right over the property of all, we may make an approximation of doing justice to all. Some may be gainers by doing this more than others; but it is the only way of accomplishing that which is, with us, a paramount object, the fostering of the lumber trade. That this was a paramount object is *evidenced by the recitals to the earlier Acts that* I have quoted.

Apart from all these considerations, we have the plain unequivocal language of the Act. To adopt the construction put upon it in Boale v. Dickson, we must read "all streams" as meaning "some streams" and we look in vain in the Act for any class of streams defined as they are defined in Boale v. Dickson. If what is supposed in that case to have been included had been really intended, section 15 should have run thus, "All persons may float saw logs and other timber during the spring, summer, and autumn freshets, down," not all streams—"but such streams as in their natural state will without im*provements permit saw logs, timber, &c, to be* floated down them." It is too much to say that such an alteration of the Act is not construction, but legislation?

Reference is made in B. & D. "to streams of a different class to those mentioned in the third section," "down which lumber is usually brought." The streams mentioned in the third section are those down which lumber is usually brought, and on which a mill dam may be legally erected. That cannot be a stream down which in its natural state, without improvements, timber, lumber, etc., could be floated, because on such a stream a mill dam could not be legally erected. The words "all streams" could not be applied only to that class of streams. There is another class denominated "small streams," which certainly did not form the class, though they might be comprehended in the class to which the words "all streams" applied.

I am unable to concur in the construction put upon sec. 15 of the Act in Boale v. Dickson. There being no context, nor indeed anything whatever in any of these Acts on this subject, to control the ordinary grammatical meaning of the words used, we must read them in their ordinary grammatical sense; and should, therefore, construe sec. 15 as giving the privilege to all persons to float saw-logs and other timber down all streams in U. C. during the spring, summer, and autumn freshets.

It follows that, in my judgment, the issue tried before the learned Vice-Chancellor was not an issue that arises under the statute; but that the defendants had to have the right conferred upon them by sec. 15 of the Act, to float, during the freshets named in that section, their timber, *rafts, and crafts down the streams* down which they were causing them to be floated when their rights were called in question by the plaintiff's bill.

We, of course, do not question the propriety of the course taken by the learned Vice-Chancellor in accepting the interpretation put upon the Act in Boale v. Dickson. But being unable, after a careful consideration of the various Acts passed upon this subject, to concur in that interpretation my conclusion is that the plaintiff's bill must be dismissed.

For reasons which the Chief Justice gave at length, each party is left to pay their own costs.

DIFFERENCE OF OPINION.

In the foregoing decision delivered by the Chief Justice of Appeal, Patterson, J., and Morrison, J., concurred, but Burton, J., held different views. We publish his judgment below.

CHIEF JUSTICE BURTON'S OPINION.

In this case I have the misfortune to differ with my learned brothers, and if this had been a court of last resort, whilst not concurring, I should not have thought it proper to express my dissent, but under the circumstances I think it is but fair to the litigants and respectful to my colleagues briefly to express the grounds on which I feel compelled to come to a different conclusion. The expiration of the general common law principles applicable to inland waters would seem to be well stated in the case of Waldsworth v. Small (2 Fairfield, 280), and to be consistent with the doctrine in the tract *de jure maris* sometimes, but it is said erroneously, attributed it to Lord Hall, viz. that those streams which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right, and the private property of the owner of the soil is to be improved in subserviency to the enjoyment of this public right; whilst, on the contrary, such little streams are not as floatable, that is, cannot in their natural state be used for the carriage of boats, rafts, or other property, are wholly and absolutely private, not subject to the servitude of the public interest, nor to be regarded as public highways by water, because they are not susceptible of use as a common passage for the public. Numerous decisions are to be found at a very early date in the United States to the effect that although the adaptation of the stream to such public use may not be continuous at all seasons, yet the public right attaches and may be exercised whenever opportunities occur. In the case of Thunder Bay River Company v. Speedily, 31 Mich., 343, Mr. Justice Cooley thus refers to the subject:—"Nor is it essential to the easement that the capacity of the stream in its natural state and its ordinary volume of water should be continuous, or, in other words, that its ordinary state at all seasons of the year should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water and navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is a subject to the public easement—referring to Morgan v. King, 35 N.Y., 459, 18 Barbour 284, and 30 Barbour 9."

It would seem that this very reasonable view of the common law doctrine in reference to those streams had at a very early day been recognised by our own Legislature.

Thus we find in the first act passed in Upper Canada in reference to mill-dams, 9th Geo. IV., c. 4, that it was passed in the interest of persons engaged in the lumber trade, to afford facilities for the conveyance of their rafts and lumber to market, and that the owners of mill-dams, erected on the proprietor's own lands, across any stream down which lumber was usually brought, were compelled to make provision for its passage by the construction of *sufficient aprons, and in several other Acts* before we come to the 12th Vic. provision is made for floating down square timber and other manufactured lumber prepared for market.

The latter Act, though passed also evidently in the interests of lumbermen, made provision also for the protection of the mill owner so long as he complied with the conditions prescribed, otherwise the lumberman was at liberty to abate the dam as a nuisance if it interfered with his use of the stream.

In the same Act, however, we find the Legislature using language not only confirmatory of the view that the public had the right to use such streams as I have referred to, but declar*ing that all persons may during the spring, sum*mer, and autumn freshets float sawlogs and other lumber, rafts, &c., down all streams, a provision which in my opinion was intended to be simply declaratory of the Common Law right of everyone to use every stream that was capable, in its natural state, and its ordinary volumes, of transporting in a condition fit for market the products of the forests or other property, with an express statutory declaration superadded that it was not essential to the public easement that the capacity of the streams as those defined should be continuous, but that it should be exercizeable even though it could only be so exercised in times of freshet.

This was then the state of the law in several of the neighbouring States where lumbering operations were carried on to a very large extent, but it was not the universal rule there, the courts in some places holding that a stream which is not capable of being used at any time for the passage of boats or the floating of rafts and logs, except when swelled by rains or the melting of snow, is not in any legal sense a navigable stream, but is private property and not subject to the servitude of the public easement.

And this being the state of the authorities, it is not unreasonable to assume that a Legislature dealing with a similar state of things intended to place the question beyond dispute, and to declare that even though the stream