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*Feb. 27, 28.
*June 9.

JAMES K. WARD (DEFENDANT).....APPELLANT;

AND

THE TOWNSHIP OF GRENVILLE (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Vis major—Driving timber—Servitude—Watercourses—Floatable rivers—Statutory duty—53 V. c. 37 (Que.)—Riparian rights.

The Rouge River, in the Province of Quebec, is floatable but not navigable, and is used by lumbermen for bringing down sawlogs to booms in which the logs are collected at the mouth of the river and distributed among the owners. The plaintiff constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive and took no precautions to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The River Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back by the jam and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally,

Held, affirming the judgment appealed from, the Chief Justice and Sedgewick J. dissenting, that, irrespectively of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused.

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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Held, further, that the right of lumbermen to float timber down rivers and streams is not a paramount right but an easement which must be enjoyed with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Terrebonne, by which the appellant and several other defendants were jointly and severally adjudged and condemned to pay to the plaintiff $4,250 for damages with interest and costs.

The case is stated in the judgments now reported.

Atwater K.C. and *Campbell K.C.* for the appellant. This is not a suit for a penalty under the statute, and consequently, the presence or absence of men to guard the bridge is immaterial, except in so far as it can be shewn that their presence would have been a useful precaution. With regard to the charge that no efforts were made to remove the jam, the appellant claims that he had brought down his logs as far as they could be brought and to the place at which the boom company generally received them; that they were there stopped by an accumulation of other logs which extended down to the boom; that the boom company used all reasonable measures to avoid the jam, and that, even if they did not, he was powerless to interfere with them. The appellant also claims that the municipal bridge was itself an obstruction in the river.

The statute, 53 Vict. ch 37 (Que.) is tacked on as a rider to Art. 2972 R. S. Q., and is in the same category and under the same title as the regulations relating to factories. This court has held in *Tooke* v. *Bergeron* (1), and *The Montreal Rolling Mills Co.* v. *Corcoran* (2), that such provisons are intended to operate only as

(1) 27 Can. S. C. R. 567. (2) 26 Can. S. C. R. 595.

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police regulations and the statutory duties thereby imposed do not affect any civil responsibility as between parties who may be affected thereby.

The article in question is totally inapplicable to the present case. The statute refers to precautions being taken by the owner of timber driven or floated down streams and not to cases, such as the present, where damage has been caused by a jam of the logs below a bridge and by the sudden rising of the waters of the river causing the timber to back up. On the facts of this case it would be impossible to secure a conviction or penalty under the statute. The evidence shows that the jam commenced at the boom and continued right up the river past the different bridges so that the logs were not in course of descent but were resting against the boom.

It cannot be assumed that the right of lumbermen to use the river for floating timber is subsidiary to the rights of the boom company to obstruct the river by its boom, or of the railway company and the municipality to obstruct the river by the piers or abutments of their respective bridges. This use of the river as a highway for logs is the paramount use of the log-owners. The public are entitled to all the advantages which a river in its natural state can afford for public purposes, and there is no difference in that respect whether the river is or is not navigable or floatable. See *McBean* v. *Carlisle* (1), and *Boissonnault* v. *Oliva* (2). Rivers which are floatable, although only so for loose logs, must be free and open and unobstructed for the public. There was no obligation on the lumbermen, because of the presence either of the bridges or the boom, to stop the logs by means of a supplementary boom or other arrangement further up the river; nor was there any right or

(1) 19 L. C. Jur. 276. (2) Stewart K. B. 564.

obligation on the lumbermen to pass the logs through the boom company's boom, and the loss of the bridge is imputable either to *force majeure* or to the negligence of some person or company other than the lumbermen

The appellant's right to use the river for floating logs has not been affected either by the statute or by the boom company's charter, and the municipal bridge is at the risk of the municipality if and so far as it interferes with the floatability of the river, and if the risk to the bridge was increased by the accumulation of logs and by the obstruction caused by the extension of its abutments into the river, that is a risk which was assumed by the municipality in so constructing its bridge. If there was negligence in not removing the logs it was negligence of the boom company in whose control the logs were and not of the appellant who had no further power to move them and, indeed, they could not have been physically moved except by commencing from below and working up and by easing the mass through the boom company's booms.

The jam which caused the backing up of the logs was due to the construction of the booms at the mouth of the river by the boom company which, in erecting such booms, acted within express statutory authority and no act whatever of negligence is proved on the part of the appellant which would render him liable for the damages.

Lafleur K.C. and *DeLaronde* for the respondent. If the jam of logs resting against the piers of the railway bridge had been broken at the commencement of its formation, or *en temps opportun* the accident involving the destruction of the municipal bridge would have been avoided. A very obvious precaution on the part of the defendants, and one prescribed by law, had been neglected, that of retaining a sufficient number

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of men at or near the bridge to guard against possible accident, 53 Vict. ch. 37 (Que.). At a critical moment the defendants' men were discharged and the bridge abandoned to its fate without any effort, even at that late date, and notwithstanding the eminent peril in which the bridge was left. All the defendants were engaged in floating their logs and timber in common down the river towards the boom; they were cognizant of the fact that a much larger quantity than usual of logs and timber was being taken down, still, no warning or intimation of that fact was given to the men in charge of the boom to enable them to provide and prepare for such an emergency. No effort commensurate with the impending danger to the municipal bridge; no effort of any kind was attempted at any time by the defendants to lessen or mitigate the gravity of the situation, wholly engendered by their culpable negligence in not providing a sufficient and competent force of men to cope with such a probable contingency as that which involved the loss and brought about the collapse of the bridge.

What aggravated the condition of things at this time, and materially contributed to the perplexity of the situation was that this jam, having been allowed to increase for weeks without being broken up, soon formed a dam across the river with the natural result that the water was lowered at the foot of the jam where the logs grounded, and rose to an abnormal height at its head, till it was level with the municipal bridge, although this bridge was built ten feet above high water. There was nothing abnormal in the condition of the Rouge River during this drive or descent of the timber. The river had risen a couple of feet as the result of rains, but the rise of twelve feet or more, at and some distance above the municipal bridge was wholly caused by the jam.

There were other means, easy and feasible, to which the defendants could have resorted to prevent the accident such as by stretching safety booms across the river higher up than the bridge, and by having a force of men to precede the drive ready to cope with and break any jam which might form. All precautions were neglected.

The right to construct a boom at the mouth of the Rouge River, conferred upon the Rouge Boom Company, and the existence of such a boom did not exonerate the defendants from the obligation of conducting their business with a due regard to the rights of others, and to conform to the duties imposed upon them by law, and the necessities and conditions of their business. The broad principle determining the question of responsibility reposes on Arts. 1053 and 1054 C. C. We also refer to 20 Laurent, *nn.* 402 *et seq.* and 639; 1 Sourdat, *nn.* 13, 14. *King* v. *Ouellet* (1), and Angell on Watercourses, sec. 556.

The CHIEF JUSTICE and His Lordship Mr. Justice SEDGEWICK dissented from the judgment of the majority of the court dismissing the appeal.

The judgment of the majority of the court was delivered by:

GIROUARD J.—By the action, the Township of Grenville, situated in the County of Argenteuil, in the Province of Quebec, is endeavouring to recover jointly and severally from the appellant and a number of other lumbermen the sum of $4,262, as damages for the destruction, on the 26th June, 1898, through their fault, imprudence and negligence, of an iron bridge erected by the respondent across a floatable river *à bûches perdues*, known as the Rouge River.

(1) 14 R. L. 331.

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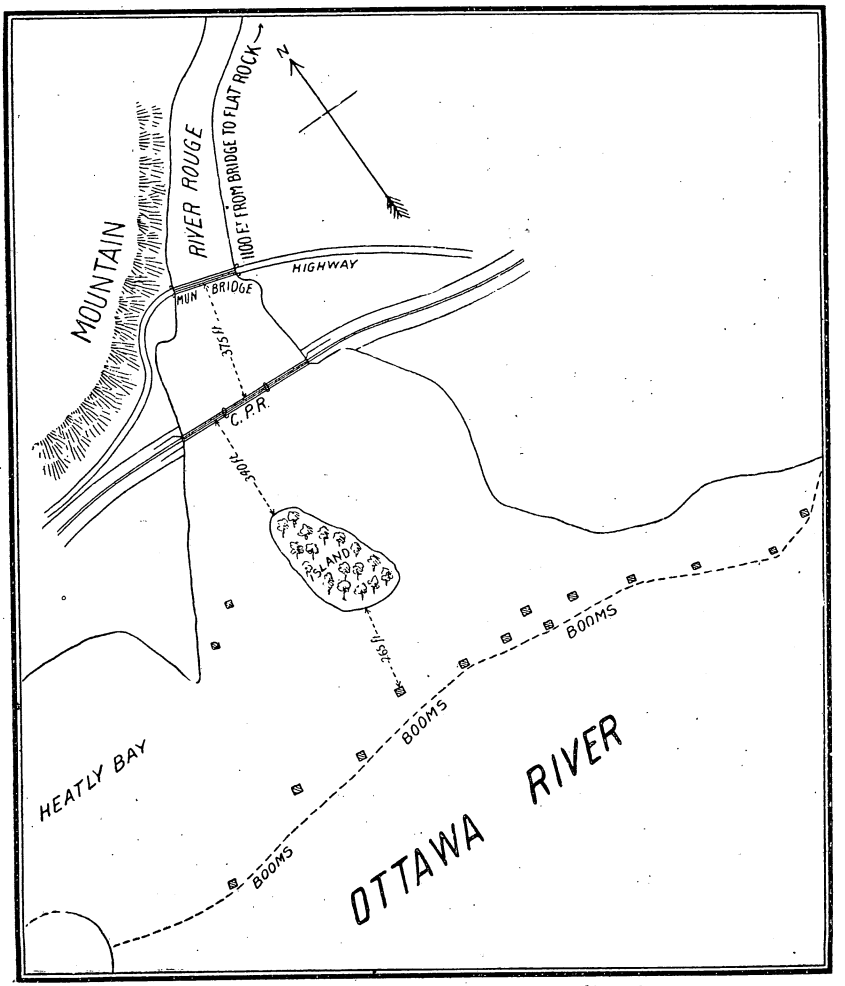
The following plan filed in the case in an enlarged form, shows exactly the situation of the premises:



The booms shown on the plan, as being situated at the mouth of the Rouge River, are the property of a

corporation known as The Rouge Boom Company, incorporated by the Parliament of Canada in 1874, by 37 Vict. ch. 111, which declares them also subject to the provisions of the Consolidated Statues of Canada, 1859, ch. 68, in so far as they are not inconsistent. This chapter 68 was left out of the consolidation of the Revised Statutes of Canada, 1886, as being perhaps out of the jurisdiction of the Parliament of Canada. (Vol. 2, schedule A. p. 2). It is to be found in the Revised Statutes of Ontario, 1887, ch. 160 and 1897, ch. 194, and also in the Revised Statutes of Quebec, 1888, art. 4,985 and following. The parties have agreed however that both the booms and the municipal bridge were lawfully erected under competent authority, and therefore no question arises as to the constitutionality of the Act of incorporation of the Boom Company or the illegality of the construction of these works.

The trial court (Taschereau J.) found that there was negligence on the part of the lumbermen and they were condemned to pay jointly and severally the sum of $4,250, with interest and costs. The judgment rests upon the following *considérant :*

Considérant que les défenses ne mettent pas en question les droits de la demanderesse à la propriété du pont à raison duquel la litige est engagé, et qu'il ressort de la preuve que la demanderesse est en possession du dit pont à titre de propriétaire depuis plusieurs années, que l'enquête fait voir que les travées et le tablier métallique du dit pont ont été soulevés, enlevés et emportés, le 26 juin 1898, par la masse des bois et billots qui, en descendant par la Rivière Rouge, avait précédemment formé un amoncellement ou encombrement et une digue (*jam*) ayant sa base aux piliers du pont du Pacifique (à 375 pieds en aval du pont de la demanderesse) et s'étendant en amont jusqu'à un endroit connu sous le nom de "Flat-Rock", a une distance d'environ 1100 pieds du pont de la demanderesse, laquelle digue, étant subitement brisée et remuée par suite d'une crue soudaine de la rivière causée par des pluies récentes, entraine le dit pont de la demanderesse par le choc irrésistible de sa descente ; qu'il

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appert aussi de l'enquête que la demanderesse a déboursé la somme de $4,250, pour la reconstruction du dit pont et la réparation de ses culées et autres accessoires ; qu'il est prouvé que chacun des défendeurs avait des bois et billots dans la masse composant la dite digue, laquelle s'était augmentée graduellement par la descente continuelle de bois et billots jusqu'au moment de l'accident ; qu'il est aussi prouvé que les défendeurs connaissaient l'imminence du péril, mais qu'ils n'avaient pas placé au dit pont un nombre suffisant d'hommes, ni pris d'autres précautions nécessitées pour empêcher les dommages, ainsi qu'il leur était prescrit par l'acte provincial, 53 Vic., ch. 37, qui punit d'une pénalité et rend responsable des dommages tout propriétaire de billots et bois marchands qui en opère ou fait opérer la descente sur une rivière flottable de cette province sans telles précautions ; que l'accident n'est pas du à la force majeure, mais à la négligence des défendeurs qui n'ont pas empêché la formation de cette digue, ni pris les mesures propres à la briser en temps utile, alors qu'une crue soudaine mais ordinaire des eaux de la Rivière Rouge, due à des pluies récentes, pourrait d'un moment à l'autre, comme la chose est arrivée, emporter cette digue en brisant tout sur sont passage.

This judgment was confirmed by the Court of Appeal purely and simply. No notes of the judges were transmitted to us.

The present appeal involves two questions, one of fact and one of law.

As to the facts alleged to establish the fault or negligence of the defendants, the two courts below have found unanimously against the defendants, and we have declared on several occasions that in cases of this kind we would not interfere, unless the finding was clearly wrong. There is not only some evidence in support of it, but the weight of the proof is decidedly in favour of the plaintiff.

The undertaking of driving logs and timber on a floatable river is too well known in this country to require much explanation. During the winter, the logs and timber, cut by owners of timber in the adjoining forests, are marked and put loose in the creeks, lakes and rivers emptying into the main river which will finally take them to destination, in this

instance, the Rouge River, discharging into the navigable Ottawa River, near the bridge of the respondents. As soon as the ice begins to move, large gangs of men are employed by the lumbermen to float out the lumber, keeping the logs off rocks, *battures*, islands or banks, and aiding in every way to float them with the current, loose, *à bûches perdues*, the drivers following them till they reach the booms at the mouth of the main floatable river.

In the spring of 1898, the water being rather unusually low in the Rouge River, the drive was commenced only about the middle of May, but had been so easy and successful that about the beginning of June the boom was practically jammed with logs piled up in every direction and position, the gap at the foot of it being altogether insufficient to permit their sacking or rafting by the lumbermen in the Ottawa River as quickly as they came down. The logs continuing to descend in great quantity, the jam went up into the Rouge River, soon reached the Canadian Pacific Railway bridge and even as far as Flat Rock, eleven hundred feet further up than the municipal bridge.

The trial judge found that the jam commenced at the Canadian Pacific Railway bridge, and there is some evidence in support of his view. But whether it was formed first in the boom or at the Canadian Pacific Railway bridge, there is no doubt that for more than two weeks before the accident, the jam looked more like a dam, to use the expression of one of the witnesses, and that nothing was done to prevent a flood, although there was ample evidence that there were reasonable precautions which might have been taken to prevent the jam forming if the appellants had exercised reasonable diligence. The inevitable consequence of the state of the river was the rise

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of the water, which was considerably increased by a sudden heavy freshet, not infrequent in that region even during the summer season, and finally the carrying away, on Sunday, the 26th of June, 1898, of the municipal bridge by the logs and timber of the defendants. The lumbermen and the boom company, although well aware of the imminent danger of the situation, had only some ten or twelve men working at the gap engaged in giving and receiving the logs which were put in sacks or rafts as they were intended for close or distant destination; but at no time was any man placed at or near the bridge, or any precaution taken to avoid its destruction, not only at the time of its occurrence, when they could perhaps have accomplished little, if anything, but for two or three weeks previously, when the jam commenced and could have been prevented, and even broken up after it was formed.

The different gangs of drivers had been discharged when their respective logs had reached the jam, whether at the booms, the Canadian Pacific Railway bridge, the municipal bridge or the Flat Rock, which, judging from the plan, lies at a distance of 2480 feet or more than thirteen arpents from the booms, and certainly about 1500 feet above the mouth of the Rouge River.

These facts, as I appreciate them, constitute three distinct acts of negligence on the part of the defendants, each of them being sufficient to render them liable jointly and severally for the destruction of the bridge;—1st. the abandonment of the drive at the Flat Rock, at all events before the logs had reached the booms;—2ndly. The total absence of men to protect the bridge at all times; and—3rdly. The total want of any precaution or effort to prevent or break

up the jam in the Rouge River above and below the municipal bridge.

To be brief upon these findings of fact, let me quote Mr. Reuben Weldon, a lumberman and one of the defendants. Referring to a visit he made to the bridge on Monday, the 20th June, he says:—

A. I was going up to the drive and I went there before going to the drive; I heard the thing was in danger and I went to see how it was.

Q. Did the jam extend far?

A. To the Flat Rock.

Q. How far up?

A. Perhaps four acres or more, but I could not swear to the exact distance.

Q. When you were at the bridge did you notice anyone working on the jam?

A. No.

Q. Was there any person stationed at the bridge itself?

A. Not when I saw it * * *

Q. You saw no effort on their part to break up the jam?

A. I saw no men working at the jam to my knowledge when I was there.

* * * * * * *

Q. Did you at any time before the accident to this bridge complain to Mr. Dean that there were not sufficient gaps in the boom?

A. Yes, I did * * *

Q. You think if they had two gaps and the necessary number of men, you think they could have avoided this accident?

A. Yes.

Q. That is your opinion?

A. Yes.

Q. You heard the evidence of Mr. Dauphinais that they had five men on the gap and five men on the jam; do you consider under the circumstances five men on the jam were sufficient?

A. No.

Q. To have broken up the jam, it would have taken how many men?

A. Thirty men at the very least, I would say.

Q. Do you consider that if sufficient precaution had been taken in the way of having more gaps and more men that this accident could have been avoided or prevented?

A. It could have been avoided altogether * * *

Q. Have you any idea how long this jam was in forming?

A. It was quite a time in forming.

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Q. Would it not have been an easy matter at first to have broken up this jam when it commenced to form?

A. I do not see why it could not.

* * * * * * *

Q. In the case of a jam formed here and which resulted in the carrying away of the bridge, do you not consider it would have been wiser to have attempted to break it up from the first?

A. Yes, that is when it should have been broken.

The lumbermen contend that they cannot be held responsible for any act of negligence of the boom company and they refer to the testimony of Mr. Dean, its manager and secretary:

Q. Whereabouts did the boom company begin to take charge of the logs when they came down the river?

A. The custom was that the logs were driven down right into the booms, and then the drivers were disbanded, and the company assumed any logs that were left further back, that is, the lumbermen would drive their logs into the jam.

Q. Until they touched the logs?

A. Yes, until they touched the logs, and the boom company took charge of them after that.

* * * * * * * * *

Q. Whose duty was it to prevent a jam as far as possible and break it up?

A. Well, if there was space—if there was open water between the booms and this jam, while the drivers are on, they are supposed to bring them into the boom, but in the event of the booms being full when the drive came down, the Boom Company then assumed that charge.

Thus, according to Mr. Dean, if there be a jam in the boom, the drivers cannot take the logs into it—an eventually easily understood—but if there be none, or if there be open water between the boom and the jam, they are expected to bring them in.

It is proved beyond doubt that at the time of the formation of the jam at the Canadian Pacific Railway bridge, and for some days after, there was open water space in the Heatly Bay, west of the booms, although Mr. Dean swears that as early as the 17th of June, every available place above the boom was full of logs.

Mr. Reeves, (and his testimony is corroborated by Weldon, Brown and the foreman of the boom company, Dauphinais), says:

Q. Well now, was it true that a portion of the river on the west side was open between the boom and the jam?

A. Part of this bay was empty—not very much of it.

Q. Part of the west bay?

A. Yes.

Thus, according to Mr. Dean's testimony the drivers were expected to break up the jam at the Canadian Pacific Railway bridge and above, till that open space was filled. They did not even attempt to do so.

Mr Dean finally considers the drive as accomplished only when the logs and timber have reached the booms. The exception he mentions, as being established by custom, even supports the general rule. The boom company, he says, undertakes to break up the complete jam, probably because they consider themselves in default, or look upon the formation of a jam as almost a natural event, not necessarily involving danger to property. Even in that case, it seems doubtful that they can legally be charged with default, unless certain steps have been taken by the lumbermen in accordance with the provisions contained in section 76 of ch. 68 of the Consolidated Statutes of Canada, 1859. But whether in default or not, responsible or not, the lumbermen are not relieved from their liability, if the jam be not broken by the boom company, and cause damage. They remain at all times directly and primarily liable to the riparian proprietors, save their recourse in warranty, if any, against the boom company.

It may indeed be questionable whether, under its charter, the boom company can act as suggested by Mr. Dean and operate in the Rouge River, some eight or nine arpents above its mouth. By 37 Vict. c. 111, the Rouge Boom Company is incorporated

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for the purpose of holding, maintaining and working booms *at the mouth* of the said River Rouge. (Sec. 7).

The company shall have the right to acquire all booms, lands, plant and dependencies, *at the mouth of the said River Rouge*, and all property and rights whatsoever appertaining thereto. (Sec. 8.)

Therefore, as a general rule, and under ordinary circumstances, the company cannot act, work or take care of logs outside of the mouth of the Rouge River, for instance, at and above the municipal bridge they cannot finish the job of the drivers, and when they do so, it can only be on behalf of the lumbermen to whom they may possibly be liable in damages for any default or neglect in the booms.

The Parliament of Canada could not permit the boom company to operate on the Rouge River, which in no sense is navigable, but only floatable, *à bûches perdues*, and is the property of the riparian proprietors, and as such exclusively subject (outside of the regulations of the fisheries) to the Legislature of the Province of Quebec. (Arts. 400 and 503, C. C. and the authorities collected in a foot-note to *King* v. *Ouellet* (1)).

We are now brought to face the proposition of law set up by the appellant, that "the use of the river as a highway for logs is the paramount use," and that the municipal bridge, although lawfully erected, was an obstruction of the river. I cannot assent to this proposition of law. It is contrary to the well settled jurisprudence not only of the Province of Quebec, but throughout the whole Dominion and the continent of America. Art. 503 C. C., and the decisons collected under that article by Mr. De Bellefeuille; *King* v. *Ouellet* (1); *Dunning* v. *Girouard* (2); *Drake* v. *Sault Ste. Marie Pulp and Paper Co.* (3); Am. & Eng. Encyc. of Law (2 ed.) *vo.* "Boom Companies", p. 711; and *vbis.*

(1) 14 R. L. 331.
(2) 9 R. L. 177.
(3) 25 Ont. App. R. 251.

"Floods", pp. 692-694, and "Logs and Lumber", p. 529.

The lumbermen are not the owners of floatable rivers and no law can be cited which secures them the exclusive use of these streams for the passage of their logs. They enjoy merely a right of servitude for that purpose. The riparian proprietors have also rights in and over floatable rivers, especially those *à bûches perdues*. They have a right to the use of the water running in the stream for themselves and their cattle and also to cross it in canoes, scows or on bridges, of which they cannot unnecessarily be deprived. Lumbermen, when exercising their rights of servitude for the floatage of their logs and timber, either in a public or a private river, must respect these rights, and if in the course of the drive they commit any *délit* or *quasi-délit* within the meaning of articles 1053 and 1054 of the Civil Code, they, like all other persons, must take the consequences and pay the damages caused by their fault or that of persons under their control, or by the logs and timber under their care.

It is no argument to say that under such a rule the floating of loose logs will become so onerous as to be almost impracticable, for, as it is stated, every bridge on the river, constructed according to the requirements of the law, will require protection from the drivers. That might involve some inconvenience and expense, but the lumbermen, with the large gangs of men on hand, are more able to look after their own property than the farmers. The evidence shows that this hardship is more imaginary than real. Seldom indeed a jam commences at any of the bridges; it is generally first formed in the booms, and as the municipal bridges along the whole length of the river are not exposed to the danger of booms, the risk of damaging them

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during the course of the descent of the logs is very small.

At all events, this is only an argument *ab inconvenientibus*, which cannot be taken into consideration when the law is clear. It is especially so in the Province of Quebec where the subject matter is regulated by a special statute in force since 1857—likely unknown elsewhere—which leaves no room for discussion or doubt. It lays down the rule that the owner of logs and timber floating on a private river, like the Rouge, is responsible for the damage caused by that passage, whether he is in fault or not, provided, of course, the riparian proprietors are not in fault. It was quite recently (1902) applied by the Superior Court in Sherbrooke, (Archibald J.,) confirmed in review by Tait A.C.J., Loranger and Fortin JJ. in *McKelvie* v. *Miller*. That statute is 20 Vict. ch. 40, s. 2, which was incorporated in the Consolidated Statutes for Lower Canada of 1860, chap. 26, s. 2, which is in the following words:

> 2. It shall be lawful, nevertheless, to make use of any navigable or floatable river or water-course, and the banks thereof, for the conveyance of all kinds of lumber, and for the passage of all boats, ferries and canoes, subject to the charge of repairing, as soon as possible, all damages resulting from the exercise of such right, and all fences, drains or ditches so damaged.

In 1888, when the Quebec Revised Statutes were under consideration, the provincial legislature felt, no doubt, that they had no power to deal with navigation, which, under the British North America Act, 1867, is a subject matter assigned to the Parliament of Canada. Hence the change in the wording of the clause in the Revised Statutes, by which the words "navigable or floatable" were struck out. As the clause stands, it will undoubtedly apply to a private floatable river like the Rouge, but not to a navigable

river and possibly a public floatable river. The clause 5551 of the Quebec Revised Statutes of 1888, now in force, reads as follows :—

> It shall be lawful, nevertheless, to make use of any river or watercourse, ditch, drain or stream, in which one or more persons are interested, and the banks thereof, for the conveyance of all kinds of lumber, and for the passage of all boats, ferries and canoes, subject to the charge of repairing as soon as possible, all damages resulting from the exercise of such right, and all fences, drains or ditches damaged.

We do not rest our decision upon this local statute, which has not even been invoked, and much less discussed at the bar before us. We base it upon articles 1053 and 1054 of the Civil Code, which after all, express the law in force in every civilized country. The plaintiffs have proved fault or negligence on the part of the defendants in the drive of their logs. For this reason, and without expressing any view as to the effect of the provincial statute, 53 Vict., ch. 37, upon their civil responsibility, we think the appeal should be dismissed, with costs.

DAVIES J.—The learned trial judge, before whom this cause was heard, found (*inter alia*) 1. That the logs which carried away the plaintiffs' bridge were those of defendants inextricably mixed and they were being floated down river by the defendants and had not reached the boom at the mouth of the river when the plaintiffs' bridge was carried away. 2. That the jam of logs having as its base the piers of the C.P.R. bridge 375 feet lower down the river than plaintiffs' bridge, extended up the river past plaintiffs' bridge to Flat Rock, a distance of about 1,100 feet. 3. That the accident was not due to *vis major* but to the negligence of the defendants who did nothing whatever to prevent the formation of the jam nor took any proper steps to break it up while there was still time to do so successfully.

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These findings of fact were approved of by the court of appeal for Quebec and it appears to me the evidence fully justifies them. From this evidence it appears that the jam of logs was about three weeks in forming and that after its formation there was an open space of water between the Canadian Pacific Railway bridge (the base of the jam) and the boom, capable of holding about 20,000 logs. The questions raised in the appeal and in the courts below did not involve disputes as to the right of the defendants to use the river for the purpose of floating their logs down to the boom, but were confined simply to the manner in which they exercised those rights. On the plaintiffs' part it was contended that in the exercise of their right to float their logs down the stream the defendants were bound to use proper and reasonable diligence and care to prevent jams which would injure either the property of the riparian owners, or the property in bridges or similar works built by statutory authority across the stream for the public necessity or convenience, and that the neglect to use such diligence and care made them liable for any damages caused to such property as a consequence of such neglect.

The true rule would seem to me to be that the right to float logs down such a river or stream as the one in question, being in the nature of a public easement, the rights of the log-owners and the riparian proprietors are concurrent and must be enjoyed reasonably without unnecessary interference one with the other, and without negligence. The same rule must be applicable in the cases of the owners of legally constructed bridges crossing the river for the public convenience. The degree of care, skill and diligence required on the part of the log owner must necessarily depend upon the circum-

stances of each case. Facts which might constitute proper skill and diligence in the early stages of the settlement of the country might easily assume the proportion of negligence when the country had become settled and the rivers had been crossed by numerous bridges. If the natural conformation of the river and lands through which it runs shows that there are narrow gorges or places where logs would be likely to jam, it is, in my opinion, both law and common sense that a greater degree of care, skill and diligence is required of the owner of the logs at such special places than along the ordinary and broader reaches of the river. And so, irrespectively altogether of any duty created by statute, it seems to me that at such places as that where the Canadian Pacific Railway bridge crossed the river on piers several of which were built in the river, a very much greater degree of care, skill and diligence would be required of the defendant log owners when floating their logs down the river, to prevent a jam, then in the open or ordinary reaches of the river. The Quebec statute of 1890, 53 Vict. ch. 37, amends the Revised Statutes by adding after sub-section 3 of section 12, chapter 1, of title seven, the following section:—

> Every owner of logs or other merchantable timber who drives or has the same driven down the floatable rivers of this province shall station a sufficient number of men at every bridge built at least three feet above high water mark under which the said timber must pass or shall take other precautions necessary to prevent any damage which might be caused.
>
> In default of such precautions being taken the owner of the timber, the driving or floating down of which has damaged or carried away such bridge is (in addition to whatever recourse there may be against him) liable to a penalty of from ten to fifty dollars and costs or an imprisonment of one month in default of payment thereof.

It was strenuously contended for the defendants that this statute did not create a new civil remedy or make

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that a wrong for which damages could be recovered civilly unless such right existed *aliunde*. It is unnecessary for me in the view I take of the law as applicable to the facts of this case to express any opinion as to the effect of this statute upon the respective rights and liabilities of the several parties to this suit.

Apart altogether from the statute, I am of opinion that the defendants while exercising their right of floating their logs down the river had a corresponding duty to take all reasonable and proper care and precaution necessary to prevent the logs injuring the property of the riparian owners or other property, such as the plaintiffs' bridge, legally crossing the river. That bridge was admittedly built by statutory authority 10 feet above high water mark. I think the evidence establishes clearly that the defendants could have, with a proper force of men, prevented the formation of the jam at the Canadian Pacific Railway bridge, at any rate at the time it was being formed. I think if they could have done so, they were bound to employ such a force and to have continued its employment so long as it might be proved to be necessary either to prevent the formation of a jam or to break it up at once when formed. But I do not think the degree of care, skill and precaution required of the log owners by the law stopped or would have been satisfied by stationing a force of men at the bridge. If such a precaution was shewn to be insufficient to prevent a dangerous jam forming and any other reasonable steps could be taken by the log owners to prevent the jam forming and reduce and minimize its danger even when formed, I think they were bound to take them.

The jam of logs, as the evidence shewed, remained formed for about three weeks, being daily increased in size by the addition of logs floating down the

river. It is obvious that the construction of a safety boom or booms above the plaintiffs' bridge, as suggested in the evidence, would have at any time prevented further additions to the jam of logs even if it had been formed at the Canadian Pacific Railway bridge in the first instance in spite of any efforts on defendants' part to prevent its formation. But the defendants remained passive and inactive for nearly three weeks while the jam was forming and daily growing larger and more dangerous by the addition of more and more logs. They practically acted throughout as if they had no duties or responsibilities, with the result that the pent back waters of the river eventually burst over the jam and carried away the plaintiffs' bridge.

The defendants evidently assumed, as in fact they contended at the argument, that their right to float logs down the river was a paramount right to which other rights must yield. I fully agree with my brother Girouard that they have no such paramount right. They repudiated the duty of exercising care, skill and diligence or of being responsible for their absence to the owners of the bridge, claiming exemption from liability for damages caused by the floating down of their logs beyond the statutory penalty. I take an altogether different view alike of their rights and their responsibilities. I think their right to float logs down the river is a *concurrent* right which they can enjoy reasonably with those of the riparian owners and the municipalities which have by statutory authority constructed bridges in the public interest across the river, and not a paramount right, and must be exercised with due regard to the rights of these others. In the case now before us, as there was a total disregard of these duties and responsibilities subject to which, in my opinion, the log owners have the right to float

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down their logs and as the necessary connection between the plaintiffs' loss and the defendants' negligence has been properly found. I think the appeal should be dismissed with costs.

Davies J.

MILLS J.—I concur in the judgment of my brother Girouard.

Appeal dismissed with costs.

Solicitors for the appellant: *Campbell, Meredith, Allan & Hague.*

Solicitor for the respondent: *R. P. de Laronde.*