PETER McLAREN.....APPELLANT;

AND

BOYD CALDWELL AND WILLIAM CALDWELL.....RESPONDENTS.

1882

*Mar.3,4,5,6.

*Nov. 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

R. S. O. ch. 115, *sec.* 1, *construction of—Non-floatable streams—Private property.*

By the decree of the Court of Chancery for *Ontario* the respondents were restrained from driving logs through, or otherwise interfer-

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Henry, Taschereau and Gwynne, JJ.

1882

McLAREN v. CALDWELL.

ing with, a certain stream, where it passed through the lands of the appellant and which portion of said stream was artificially improved by him so as to float saw logs, but was found by the learned judge at the trial not to have been navigable or float able for saw logs or other timber, rafts, and crafts when in a state of nature. The Court of Appeal reversed this decree, on the ground that C. S. U. C. ch. 48, sec. 15, re-enacted by R. S. O. ch. 115, sec 1, made all streams, whether naturally or artificially floatable, public waterways.

Held,—(Reversing the judgment of the Court of Appeal and restoring the decree of the Court of Chancery,) that the learned Vice-Chancellor who tried the case, having determined that upon the evidence adduced before him, the stream at the *locus in quo*, when in a state of nature, was not floatable without the aid of artifical improvements, and such finding being supported by the evidence in the case, the appellant had at common law the exclusive right to use his property as he pleased, and to prevent respondents from using as a highway the stream in question where it flowed through appellant's private property.

Held,—Also (approving of *Boale* v. *Dickson*) (1), that the C. S. U. C. ch. 48, sec. 15, re-enacted by R. S. O. ch. 115, sec. 1, which enacts that it shall be lawful for all persons to float saw logs and other timber, rafts, and crafts down all streams in *Upper Canada*, during the spring, summer and autumn freshets, etc., extends only to such streams as would, in their natural state, without improvements, during freshets, permit saw logs, timber, etc., to be floated down them, and that the portions of the stream in question, where it passes through the appellant's land, were not within the said statute (2).

APPEAL from a judgment of the Court of Appeal for the Province of *Ontario*, whereby a decree of the Court of Chancery in favor of the plaintiff, the respondent herein, was reversed (3).

The facts, pleadings and points relied on, cases cited, and statutes referred to by counsel, appear sufficiently in the report of the case in the court below (4), and in the judgments hereinafter given.

(1) 13 U. C. C. P. 337.

(2) The Privy Council granted leave to appeal, and the case has been argued before the Judicial Committee and stands for judgment.

(3) 5 Ont. App. Rep. 363.

(4) 5 Ont. App. Rep. 363.

1882

McLAREN v. CALDWELL.

Mr. *Hector Cameron*, Q. C., Mr. *Dalton McCarthy*, Q. C., and Mr. *Creelman*, for appellant, and Mr. *James Bethune*, Q. C., and *L. R. Church*, Q. C., for respondents.

RITCHIE, C. J.:—

The bill in this case was filed in the Court of Chancery on the 4th May, 1880, on behalf of the appellant, *Peter McLaren*, against the respondents, *B. Caldwell & Son*, to restrain them passing or floating timber and saw logs through portions of the main branch of the *Mississippi* river and its northern tributaries, *Louse* creek and *Buckshot* creek, where these streams passed and flowed through the lands of the appellant and over the dams, slides, and improvements owned or constructed by the appellant along these streams.

Vice-Chancellor *Proudfoot*, on the 4th of May, granted an *ex parte* injunction to the plaintiff (appellant), and on the 21st day of May, 1880, continued the injunction until the hearing of the cause.

From this decision the defendants appealed to the Court of Appeal, and on the 2nd of June, 1880, by a judgment of that court, the injunction granted was dissolved. The defendants thereupon answered the plaintiff's bill in the usual course on the 11th of August, 1880. Replication was filed on the 3rd of September, 1880.

The cause came on for examination of witnesses and hearing before Vice-Chancellor *Proudfoot*, at *Brockville*, on the 27th of October, 1880, and afterwards at *Perth*, on the 8th of December, 1880, and was continned until the 16th of December, on which day the Vice-Chancellor pronounced a decree in favour of the appellant.

From this decree the defendants appealed to the Court of Appeal for *Ontario*, and their appeal was allowed.

From this decision the plaintiff now appeals to this court.

1882

McLAREN v. CALDWELL.

Ritchie, C.J.

At the time the bill was filed the respondents were proceeding to drive their logs, in all some 18,000 logs, through all the appellants improvements on *Louse* creek and *Buckshot* creek, and on the *Mississippi*, all of which flow through the lots of land of which the appellant was, and still is, the owner in fee simple.

The plaintiff contends that the stream in question where it passes through his property is non-navigable, and non-floatable at all seasons of the year,—that he has, by artificial means placed on his own property, enabled lumber to float over his property through the course of said stream, and the main question at issue between the parties is this:—Has the appellant the legal right to prevent (as he seeks by his bill to do) the respondents driving their logs through his lands, and in doing so to utilize the improvements owned by him, on and along the streams in question? or, are those streams part of the public highway, and, therefore, open to the free use of the respondents in common with the appellant and the public generally?

It cannot be disputed, I think, that if those portions of the streams in which plaintiff's improvements were made, are incapable of being navigated or floated at any time of the year, and the fee simple of the beds of such streams is in plaintiff, the public at common law have no right whatever to enter on such private property, and plaintiff, having the absolute title to the same, has the sole right to deal with the bed and soil of the stream, and to place such improvements, constructions and erections thereon as he may choose. While it seems to be admitted that the public have no right to enter on such property and make improvements thereon, it is claimed that in *Ontario*, when streams of the character mentioned are rendered capable of being navigated through the instrumentality of such improvements made by the owner of the soil, whereby lumber

can at freshet times be floated through private property, the public have an absolute common law right to use such improvements and to deal with the stream, as if the same had been naturally floatable, that is, without the aid of artificial improvements; and this right it is also claimed, is conferred on the public by virtue of the statutory enactments of the Province of *Ontario*.

The Act 12 *Vic.*, cap. 87, is intituled, "An Act to amend an Act passed in the Parliament of *Upper Canada* in the ninth year of the reign of his late Majesty King *George* the Fourth, intituled 'An Act to provide for the construction of aprons to mill dams over certain streams in this Province, and to make further provision in respect thereof.'"

Section 5 of this Act is in the following words:

And be it enacted that it shall be lawful for all persons to float saw logs and other timber rafts and craft down all streams in *Upper Canada* during the spring, summer and autumn freshets; and that no person shall, by felling trees, or placing any other obstruction in, or across such stream, prevent the passage thereof; provided always that no person using such stream, in manner and for the purposes aforesaid, shall alter, injure or destroy any dam or other useful erection in, or upon the bed, of or across any such stream, or do any unnecessary damage thereto or on the banks of such stream; provided there shall be a convenient apron, slides, gate, lock or opening in any such dam or other structure made for the passage of all saw logs and other timber rafts and crafts authorized to be floated down such streams as aforesaid.

The Act 12 *Vic.* c. 87, remained in force until 1859, when it was repealed by Consolidated Statutes of *Upper Canada*, at page 462.

It was, however, substantially re-enacted during the same year as chapter 48 of the Consolidated Statutes of *Upper Canada*, of which Act the above section 5 is made to comprise sections 15 and 16. This Act is intituled 'An Act respecting mills and mill dams." Section 15 of chapter 48 is as follows:—

All persons may float saw logs and other timber, rafts and craft

1882

McLAREN v. CALDWELL.

Ritchie, C.J.

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.

There can be no doubt that statutes which encroach on the rights of the subject, whether as regards persons or property, should receive a strict construction, and if a reasonable doubt remains, which cannot be satisfactorily solved, the subject is entitled to the benefit of the doubt, in other words he shall not be injured or affected in his person or property, unless the intention of the Legislature to interfere with the one or take away the other is clearly and unequivocally indicated.

At the very outset, if defendants' contention can be maintained, we are met with the singular incongruity of the Legislature enacting that "it shall be lawful for all persons to float saw logs and other timber rafts and crafts down," or "that all persons may float saw logs and other timber rafts and crafts down" streams that from the nature of the streams themselves it is impossible saw logs, &c., could be floated down; in other words it seems most unreasonable to suppose that the Legislature intended to legislate that it should be lawful to do what in the nature of things could not be done. Is it not much more reasonable to assume that the Legislature was dealing with a subject-matter capable of being used in the manner in which it is declared it shall be lawful to use it, and that in this view the language of the Legislature had reference to all streams on or through which saw logs and other timber, &c., could either during the spring, summer or autumn freshets be floated?

The object of the Legislature was, in my opinion, in the interest of the timber business, not to interfere with or take away any private right, but to settle by statutory declaration any doubt that might exist as to

streams incapable of being navigated by boats, but capable of floating property, such as saw logs and timber, only at certain seasons of the year, viz.: during spring, summer, or autumn freshets; thereby classing such streams as public highways, by adopting a test of navigability judicially recognized and acted on in the Province of *New Brunswick*, as far back as 1842, and in some, though not in all, of the American States, as applicable to the circumstances and necessities of this country, and which circumstances do not exist in *England*, where no such test prevails, thus affirming and settling a new and debatable point, viz.: the right of the public to float timber, &c., down streams floatable only in freshet times, and the Legislature having thus established the right proceeded to prevent the obstruction of the same; but, nevertheless, subject always to the restrictions imposed in respect to erections for milling purposes on such streams, and the action of the Legislature was not intended to interfere with private property and private rights in streams not by nature floatable at any season of the year.

If the Legislature contemplated what is now contended for, and intended the enactment to apply to streams not-floatable at all seasons, as there is no pretence for saying that the Legislature has conferred any right on the public to enter on private property on any such non-floatable streams, and make it floatable, and as a non-floatable stream cannot be made practically floatable by operation of law, what was the specific legal right conferred on the public by the statute? Is it not obvious that the only effect of the enactment could be to confer on the public the right to use private property and the improvements made thereon by the proprietors thereof without making any compensation therefor? From this section is it possible to infer any such intention? Had any such intention been present

1882

McLAREN v. CALDWELL.

Ritchie, C.J.

to the mind of the Legislature it should have been, and I think it would have been, clearly and unequivocally expressed. To attribute to the Legislature an intention so unreasonable and unjust is not justifiable unless the language is so direct and unambiguous as to admit of no doubt or other construction.

I am at a loss to appreciate the force of the illustration given by Mr. Justice *Patterson* of the statutory highways of *Ontario*, as being at all analogous to the case of non-floatable streams. It seems entirely to beg the question No doubt, if the Legislature had, in so many words, declared all streams, whether or not navigable or floatable, common or public highways, then doubtless the improvements or the removal of obstructions on such common or public highways, could in no way interfere with their common and public character. But this leaves us just where we were, and in no way that I can see solves the question we have to determine, viz.: whether or not the Legislature has so declared streams not floatable, public highways. It may so happen, and no doubt has happened, that in grants of land, allowances for roads therein dedicated as highways, on actual survey, and on the laying out of the roads, have proved, from the natural character of the ground, impassable as highways. But it is clear that any such case must be exceptional and accidental.

It cannot, I think, be supposed that the Legislature would, knowingly, dedicate by law, over private property, common and public highways, which could never be used as such by reason of the land being by nature totally unfit for and impassable as a highway. On the same principal, it seems to me as equally unreasonable to suppose that the Legislature intended simply to declare it lawful for all persons to float sawlogs down streams in freshet times, through which, at

such times, no logs could by any possibility be floated. I am likewise quite at a loss to understand how such a mere declaration, impossible to be acted on, could encourage the lumber trade or afford any facilities to parties engaged in the lumber trade in conveying their rafts to market.

Then as to the right to use the improvements of a proprietor by which he has made the stream floatable. The proprietor of a non-floatable stream who makes it floatable for his own use, does no more than if he made a canal through his property. He does not interfere with his neighbor; he takes nothing from the public, who can neither use the stream as it is, nor improve it, except by the permission of the proprietor, and as to whom, having no right or property therein, the improvement of the proprietor does no wrong, and who are placed in no worse position by the owner's refusal to permit them to be used than they were in if no such improvement had been made.

It has been urged that to allow an individual to shut up a stream a hundred miles long because he may own small portions of the stream not floatable in a state of nature would be most unreasonable. But it seems to be forgotten that it is not the individual who shuts up the stream, it is closed by natural impediments which prevent such portions being used for floatable purposes, and as it is admitted the public have no right to enter on such portions and erect improvements whereby the stream in those parts may be made navigable or floatable by reason of the same being private property, the stream is as effectually shut up by a refusal to permit an entry and improvements to be made as if the proprietor himself made the improvements and prohibited the use thereof by the public. If the use of the non-floatable portions of a stream is as necessary for the carrying on of lumbering operations as has been urged,

1882

McLAREN v. CALDWELL.

Ritchie, C.J.

the obvious means of securing a right to use private improvements would be to obtain by payment of an adequate consideration the proprietor's permission, or, if the streams are 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, is of such paramount importance in comparison with individual loss or inconvenience as to require that private rights should give way to the public necessity, the remedy must 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 is, in my opinion, nothing whatever to justify the conclusion that the legislature intended under this provision to exercise its right of eminent domain, and expropriate the property of the owners of streams not by nature navigable or floatable, or any property or improvements the owner might place or make thereon.

But, in my opinion, as I have suggested, the Legislature merely intended that all streams through which lumber could pass, whether all the year round, or only during the freshet times, should, for the purposes of the lumber trade, be common and public highways, but did not intend thereby to enact that streams through which lumber could not pass, even in times of freshets, should be common and public highways, still less that sluiceways and improvements on private property, through which, in its natural state, lumber could not be passed, should become subject to public uses any more than a canal or railroad dug or constructed on private property round a natural obstruction.

The case of *Harod* v. *Worship* (1), is somewhat

(1) 1 B. & S. 381.

analogous. At any rate principles are therein enunciated very applicable to the present:

The Great Yarmouth Haven Act, 1835, sec. 76, subject to a penalty any person who shall place on any space of ground immediately adjoining to the Haven and within ten feet from high water mark, any goods, materials or articles, so as to obstruct the free and commodious passage through or over the same, or who shall break down or remove any quay head or river bank next adjoining such Haven for the purpose of forming a dock, without making and maintaining a foot bridge over the same. By the Great Yarmouth Haven Improvement Act, 1849, sec. 18, the commissioners of the Act shall twice in the year inspect the public right or rights of way, in and along both shores of the Haven, and shall take all necessary proceedings to abate or remove every encroachment made on such right or rights of way. Upon appeal against a conviction under the former enactment, a case for the opinion of this court stated that the appellant who occupied a boat building yard, which sloped down to the Haven, placed three boats on the part of the yard immediately adjoining the Haven, and within the space of ten feet from high water mark, so as to obstruct the free and commodious passage over the same. There was no public right of passage there. Held, by *Cockburn*, C. J., and *Crompton* and *Blackburn*, JJ., that a right of way was not given by sec. 76 of the Great Yarmouth Haven Act, 1835, and that the section only applied where a right of way existed, and therefore that the appellant was not properly convicted. *Wightman*, J., *dissentiente*, on the ground that the section was intended to secure a passage free from obstruction along the side of the Haven.

Cockburn, C.J.:—

I adhere to the opinion which we intimated when the case was before us in last Michaelmas Term, namely that s. 76 of Stat. 5-6 *W. IV.* c. xlix does not create any right of passage where none existed at the time of the passing of the Act. The offence of which the appellant has been convicted is that of placing materials within ten feet of the haven of *Great Yarmouth*, so as to obstruct the free and commodious passage through and over the same. In fact there was not at the time of the passing of the Act, any right of passage for the public over it: therefore, unless the Act created the right, the appellant could not be convicted of an obstruction of it within s. 76.

It is argued that the effect of s. 76 is to give a right of passage over the space in question for using the haven; and that s. 18, of Stat. 12-13 *Vic.* c. xlviii, by which the Commissioners of the Act are authorized and required to inspect the public rights of way, in and along the

1882

McLAREN v. CALDWELL.

Ritchie, C.J.

shores of the *Haven*, and are required to take proceedings to abate or remove encroachments on such rights, confirms that construction. But it is a canon of construction of acts of parliament, that the rights of individuals are not interfered with unless there is an express enactment to that effect, and compensation is given to them, and it would militate against the canon and seriously interfere with private rights, if we held that the enactment in s. 76, carried into it, by implication, a right by the public to pass over the space in question. I think the legislature meant that both s. 76 of Stat. 5-6 *W. IV.* c. xlix and s. 18 of Stat. 12-13 *Vic.* c. xlviii should be applied to those places where a public right of way already existed, and not where previously there was no right of way. The effect of not so limiting the application of those enactments would be, that whereas there are many private grounds along the shore of the *Haven*, a right could be given by implication to the public to interfere with and remove private walls and pass over private property; which could not be intended, without compensation. Therefore I am of opinion that s. 76 of Stat. 5-6 *W. IV*, ch. xlix, must be limited to the cases in which a right of passage has been enjoyed by the public.

Wightman, J. :—

The section says nothing about obstructing a right of way; but it prohibits, under the penalty of £5 any person placing any goods, materials, or articles whatsoever upon the ground immediately adjoining the *Haven*, "so as to obstruct the free and commodious passage "through or over the same." Whoever may have a right to go over the adjoining land, and for whatever purpose and however that right may arise, is to have a free passage by the terms of the section, which provides that a clear space of ten feet is to be left. The words are very strong, and it is, I think, very difficult to get over them. I admit that there may be a difficulty as to their conferring upon the public a right of way over the land, and I do not know to what extent such a right may be given, or whether it is given at all; nor do I know that there was any reason for the enactment, except that for the general purposes of the *Haven*, it was considered expedient to keep a space clear at the side of it; but the obstruction is prohibited in express terms.

Crompton, J. :—

The other construction is an interference with private rights without any compensation to individual owners; and we ought to see clearly that such was the inteution of the legislature before we adopt that construction. I cannot see that the statute gives a public right of passage of ten feet width all around the *Haven*.

1882

McLAREN v. CALDWELL.

Ritchie, C.J.

Blackburn, J.:—

It is important that there should be rights of passage along the sides of this ancient *Haven*, and it is very likely that there should be, though not on every part. Taking s. 76 by itself, the first part of it must be construed by the respondent, either as declaring that there is, and shall be a free and commodious passage all round the *Haven*, that is, giving the right and imposing a penalty for obstructing it, according to which construction the section takes away a private right without giving compensation, or, if it does not give a free and commodious passage, it must be construed, as enacting that the space is to be kept open though no person could use it, and though there was no right of way at the time of the passing of the Act. So also as to the second part of the section, which subjects to a penalty any person who forms a dock on the side of the *Haven* without making and maintaining a footway bridge over it, we cannot suppose that the legislature would order a safe foot bridge to be made and maintained unless foot passengers had a right to go there: and if they had it not, the respondents must contend that the legislature gave it. But I agree with the Lord Chief Justice and my brothey *Crompton* that we should not construe that section so as to interfere with private rights. The words of that section, if literally read, bear the construction put upon them by my brother *Wightman*, but that would subject a person to a penalty for doing an act upon his own land. I think we must construe the section as imposing a penalty for doing an act of obstruction at those places where a public right exists.

I am very much strengthened in the conclusion at which I have arrived by the weight of judicial authority in *Ontario*.

The question appears to have been raised and determined as far back as 1863 in the case of *Boale* v. *Dickson* (1), and by that case the slides in question appear to have been put up and used as private property on a non-floatable stream for twenty years. This case affirmed the proposition that the legislation in question "extends only to such streams as in their natural state will without improvements during freshets permit saw logs, timber, &c., to be floated down them." The judgment in this case was prepared by *Draper*, C. J. and

(1) 13 U. C. C. P. 337.

1882

McLAREN v. CALDWELL.

Ritchie, C.J.

adopted as the judgment of the court by Chief Justice *Richards* and *A Wilson* and *J. Wilson* JJ.. This case was acted on in 1865, by the unanimous judgment of the Common Pleas, in *Whelan* v. *McLachlan* (1), and was again affirmed in *McLaren* v. *Bucke* (2), by *Hagarty*, C. J., *Gwynne* and *Galt*, JJ.

In the present case we have V. C. *Proudfoot*, while considering himself bound by the decision in *Boale* v. *Dickson*, acting on it, but expressing no doubt as to its soundness, and the decision of *Spragge*, C.J. and *Patterson* and *Morrison*, JJ., overruling these decisions, and *Burton*, J., again affirming them, so that I find there are in fact three Chief Justices and five Justices in support of the conclusion I have arrived at. One Chief Justice and two justices taking a different view.

Then again, I think the conclusion I have come to is much strengthened by the circumstance that by the Revised Statutes of *Ontario*, the Legislature in 1877, after all these decisions, re-enacted chapter 48, of the Consolidated Statutes of *Upper Canada*, passed in 1849, in almost precisely similar words. Considering then, that up to this period all the judicial decisions of all the Judges, with no dissenting voice, from 1863 to 1876, place on 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 interest of the public, and so destructive to the lumber business of the country, as has been so strenously urged before us, can it be supposed that the legislature in revising the statutes in 1877, after a series of decisions and only one year after the latest decision, would not have corrected the judiciary, either by a declaratory act, or by new legislation, and have enacted in unmistakable language that private rights on non-

(1) 16 U. C. C. P. 102. (2) 26 U. C. C. P. 539.

floatable streams should be subject to private user, and more particularly so, if such user was to be without compensation. Not having done so, does not this case come with great force within the canon of construction that where a clause in an Act of Parliament, which has received a judicial interpretation, in a court of competent jurisdiction, is re-enacted in the same terms, the legislature is to be deemed to have adopted that interpretation? In this case, I think there is unusual force in treating the re-enactment of this section as a legislative approval of the judicial interpretation it has received; and for holding that such interpretation should not be shaken, when it is considered that the legislature, from such judicial proceedings, must have known that property was being purchased and held and investments made, based on the claim that by such judicial decisions private rights to property had been established and secured. As was said by Lord *Ellenborough* in *Doe d. Ottley* v. *Manning* (1), a long time ago:

> It is no new thing for the court to hold itself concluded in matters respecting real property by former decisions upon questions in respect of which, if it were *res integra* they would probably have come to very different conclusions, and if the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the legislature which is able to prevent the mischief in future, and to obviate all inconvenient consequences which are likely to result from it as to purchases already made.

At the trial defendant claimed the right to show, with a view to the correct construction of the statute, that all the streams in *Upper Canada*, now *Ontario*, at the time of the passing of these various acts, were non-floatable without artificial improvements and aids of some kind.

This evidence was rejected, and he now claims that if the judgment of the Court of Appeal is reversed, there should be a new trial with a view to the recep-

(9) 9 East 71.

1882

McLAREN v. CALDWELL.

Ritchie, C.J.

tion of evidence of this character, and also on the ground that the Attorney General should be a party to the suit.

With respect to the objection that the learned Vice-Chancellor was not justified in the conclusion he arrived at on the question whether the streams in question were, when in their natural state, navigable or floatable for saw logs, during the spring, summer and autumn freshets, the appellant contends that it should be answered in the negative, and the respondent contends that it should have been answered in the affirmative.

The learned Vice-Chancellor, after hearing the evidence of forty-six witnesses called by the appellant and fifty-six called by the respondents, came to the conclusion, which is stated at page 97 of the case, in the following words:

> After carefully weighing all the evidence that has been given here and at *Brockville*, it seems impossible to escape the conviction, at least I cannot, that without these artificial means (referring to the appellant's improvements) neither the *Mississippi*, nor *Louse*, nor *Buckshot* creek, can be considered floatable, even in freshets or high water.

Neither of the judges of the Court of Appeal appear to have questioned the finding of the learned judge on this point, and I can find nothing to justify me in saying that the learned Vice-Chancellor arrived at a wrong conclusion, still less to justify me, sitting in this last Court of Appeal, in saying that he was so manifestly wrong that his verdict should be set aside and a new trial had.

It is rather inconsistent in defendant claiming a new trial on the ground that he was not permitted to show that all the streams in *Ontario* were not floatable, when he in the same breath avers and asks us to say the Judge was wrong, under the evidence, that the stream in question was naturally non-floatable, when he alleges the evidence showed it floatable, and as such a public

highway, and to grant a new trial on these contradictory grounds.

Is it not obvious that, to make the construction of the statute dependent on the weight of evidence as to the floatable or non-floatable character during freshet times of all the rivers in *Ontario*, would necessarily involve the investigation and determination of the character of each and every stream in the province, and which, if judged by the evidence offered in respect to that in question in this case, and which involved the examination of 102 witnesses whose testimony covers some 819 folio pages with some twenty or thirty maps or plans, clearly show that the trial of such a side issue would be interminable and impracticable; but I know of no principle of law by which a party seeking to protect his rights of property can be called on or could be expected to be prepared with evidence to try out such interminable side issues with the sole view of influencing the judgment of the court in the construction of the language of an Act of Parliament.

As to the Attorney-General being made a party, if this is private property and not a public highway, the Attorney-General has no more to do with the question than any other member of the community, and there is no more reason why he should be made a party than in any other controversy between private individuals in relation to the rights of private property; to make the Attorney-General a party would be to admit just what plaintiff denies.

No judgment in this case can prevent the Attorney-General from protecting the public rights and interests in public highways, wherever he can show they have been infringed.

For these reasons I have come to the conclusion that the appeal should be allowed, and the decree of V. C,

1882

McLAREN v. CALDWELL.

Proudfoot be restored with costs in this court and in the court below.

STRONG, J. :

The finding of the learned judge before whom this case was tried, that those parts of the river *Mississippi* and of *Louse* and *Buckshot* creeks, at which the appellant has constructed his improvements, were not originally and in their natural state capable of being used, even in times of freshets, for the transportation of sawlogs or timber, was not on the argument of this appeal demonstrated to be erroneous, and a careful perusal of the evidence has led me to the conclusion that an attempt to impugn that finding would have been hopeless, even if we could have entirely disregarded the rule so often laid down in this court, that the finding of the judge before whom the witnesses were examined is, in the case of contradictory evidence, entitled to the strongest possible presumption in its favor. We must, therefore, assume the facts to be as they are stated in the first declaration with which the decree under appeal is prefaced, namely :—

That those portions of the three streams referred to in the plaintiff's bill of complaint, where they pass through the lands of the plaintiff, when in a state of nature were not navigable or floatable for saw-logs and other timber rafts and crafts down the same.

The appellant's title to the lands upon which he has made the improvements in question, including the beds of the respective streams, was not seriously disputed and has been established by the production of his title deeds. The question for this court to determine is, therefore, purely one of law ; namely, whether, either at common law, or under the provisions of the revised statutes of *Ontario*, chapter 115, sections 1 and 2, the respondent has the right of passage which he claims for his saw-logs and timber through the artifi-

cial waterways constructed by the appellant upon the streams in question. It will be convenient in the first place to consider if the respondent has at common law and irrespective of the statute any such right as he thus claims.

There can be no doubt that the law in respect of the right of the public to use as highways all streams of sufficient capacity to afford the means of transportation for boats, rafts, logs or timber, was correctly stated by *Macaulay*, C.J., in his very learned judgment in *Reg.* v. *Meyers* (1). In that case, after examining with great care many English and American and some *New Brunswick* authorities, and after having given full consideration to a doctrine which seemed to be countenanced by some of the English decisions, that in a fresh water river, above the ebb and flow of the tide, which is technically called a non-navigable river, a public right of navigation can only exist by prescription arising from long continued usage, the learned Chief Justice thus states his conclusion:

> To make it depend upon usage implies that however navigable in fact, a public easement does not arise *primâ facie*, but is to be acquired by enjoyment, and, if so, the question must become one of time and user combined in a sufficient degree to create and confirm the right. But this is not what I understand to be laid down in *Hale de jure Maris*, and approved in subsequent authorities, wherefore I prefer the conclusion that in the application of the common law to *Upper Canada* in substitution for the old law of *Canada* it should depend upon the fact of natural capacity and not the fact of usage.

This case of *The Queen* v. *Meyers*, decided nearly thirty years ago (in February, 1853), has never since been judicially controverted or questioned, and might, therefore, considering the high authority of the court which decided it and the length of time it has stood unchallenged, be well considered as by itself a rule of

(1) 3 U. C. C. P. 305.

1882

McLAREN v. CALDWELL.

Strong, J.

the common law applicable to *Upper Canada* upon this question, even if its doctrine had not, as I shall presently show that it has, the support of numerous reported cases decided in the American Courts and the approbation of text writers of the highest authority. Mr. *Angell* in his treatise on Highways (1) states the result of the American decisions, as follows :

> In the *United States* it is held that the right of public servitude in a stream depends not upon its navigability, in the common law sense of the term, but upon its capacity for the purposes of trade, business and commerce. Any stream capable of being used in the transportation of any kind of property to market, whether in boats, rafts or single pieces, is a public stream and subject to the public use. The ebb and flow is not the only test, nor is the public easement always founded upon usage or custom ; the test is, whether there is in the stream capacity for use for the purpose of transportation valuable to the public ; and in this view it is not necessary that the stream should have capacity for floatage at all seasons of the year, nor that it should be available for use against the current as well as with it ; if in its natural state and with its ordinary volume of water, either constantly or at regular recurring seasons it has such capacity that it is valuable to the public, it is sufficient.

For these propositions the learned author cites numerous cases, decided principally in the courts of *Maine*, *Michigan* and *New York*, which fully sustain his text. *Morgan* v. *King* (2) ; *Moore* v. *Sanborne* (3) ; *Brown* v. *Chadbourne* (4) ; *McManus* v. *Carmichael* (5) ; *Treat* v. *Lord* (6) ; *Lorman* v. *Benson* (7) ; *Rhodes* v. *Otis* (8) ; *Stuart* v. *Clark* (9) ; *Dalrymple* v. *Mead* (10). To these authorities may be added that of Chancellor *Kent*, who states in his commentaries that when a river is navigable for boats or rafts the public have an easement therein, or a right of passage as over a public highway, and this, although the bed of the river is the

(1) Pp. 44-45.
(2) 18 Bar. 277.
(3) 2 Mich. 519.
(4) 31 Me. 9.
(5) 3 Clarke 1.
(6) 42 Maine 552.
(7) 8 Mich. 18.
(8) 33 Ala. 578.
(9) 2 Swan 9.
(10) 1 Grant 197.

private property of the riparian holders. It has scarcely been disputed in the present case that this is the correct view of the law, as it was held to have been in *Reg.* v. *Meyers*, and I refer to the authorities already mentioned rather as bearing upon the construction of the statute upon which the judgment of the court below was altogether founded, than as directly decisive of the present appeal. The right to the use by the public of all possible means of navigation in the transportation of produce and supplies is indeed so essential to the settlement of a new country that such streams may well be likened to ways of necessity, and the doctrine of the common law in recognizing them as highways rested on an analogy to the public right of passing over the private property of adjoining owners to avoid the dangerous or impassable portion of a public road.

In a case like the present, however, where the owner of the bed and the banks of a private stream, which, in the part of its course, is insufficient to afford a passage even for the floating of logs or timber in single pieces, has, by artificial means, made it navigable, such improved portion does not for that reason, and because it immediately adjoins parts of the stream which, being naturally susceptible of navigation, the public are entitled to use without compensation, become liable to a servitude for the benefit of the public as in the case of a stream naturally adapted to such a use. This is at once apparent if we consider for a moment the principle upon which the common law has made streams, originally navigable in their natural state, liable to this quasi-easement, which, as I understand it, is that this burden is imposed for the public benefit, whilst the property is vested in the Crown and passes to all subsequent private owners subject to it, whilst in the case of a stream made navigable by artificial construction, the imposition of such a public right of

1882

McLAREN v. CALDWELL.

Strong, J.

user would be to appropriate private property to public uses without compensation; an encroachment on proprietary rights, which the law not only never sanctions, but seeks in every way to avoid, in the case of positive written laws, by adopting strict and exceptional rules of construction. In *Wadsworth* v. *Smith* (1) the Supreme Court of *Maine* propounds the law on the point now under discussion as follows:

If, therefore, *Ten Mile Brook* was naturally of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose unincumbered with dams, sluices or tolls; and no man can thus lawfully incumber it without the public permission. But such little streams or rivers as are not 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. If the *Ten Mile Brook* be naturally a stream of this description, then, although *Wadsworth* and his grantor have at their own expense made it floatable by artificial means, it did not thereby become public. *Smith* had no common law right to improve it. It was private property—and when private interests are involved, they shall not be infringed without a satisfaction being made to the parties injured—and it does infringe private interests to suffer the public, without compensation, to pass over private property not being a common highway, inasmuch as it affects the inheritance of the owner.

See also *Dwinel* v. *Barnard* (2).

Having ascertained the state of the common law at the time of the passing of the statute, upon the proper construction of which the decision of this appeal must depend, I next proceed to consider the effect of the enactment in question. It is comprised in the two first sections of the R. S. O. ch. 115, which are as follows:—

Sec. 1. So far as the legislature of *Ontario* has authority to enact, all persons may, during the spring, summer and autumn freshets, float saw logs and other timber, rafts and crafts down all streams; and no person shall, by felling trees or placing any other obstruction in or across any such stream prevent the passage thereof. Sec. 2. In case

(1) 2 Fairfield 278. (2) 28 Maine 554.

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 timber, rafts, and crafts authorized to be floated down such stream as aforesaid, no person using any such stream in manner and for the purposes aforesaid 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.

For reasons which I will state very concisely, I am of opinion that the words "all streams" in the first section did not, as the court below have decided they did, embrace artificially constructed private streams, such as the three streams in question in this case are at the points at which the applicant has by the expenditure of his own money made them navigable.

First, then, to give the words "all streams" the construction and application contended for would be to determine this appeal in direct violation of the sound and well recognized canon of construction which has prevailed for centuries, and been constantly approved and acted on by courts administering English law. The rule of construction in question is well stated by Lord *Blackburn* in the late case of *Metropolitan Asylum District* v. *Hill* (1), in the House of Lords, as follows:

> It is clear that the burthen lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words or necessary implication such an intention appears.

Then, in order to comply with the rule or canon just referred to, it is incumbent on us to avoid the forbidden construction if it is possible to do so. Do we, then, find in the statute anything which compels us to read the words "all streams" as comprising streams in whole or in part artificially constructed?

This cannot be pretended, since nothing short of the express mention of such artificial streams would be a sufficient compliance with the first alternative of the

(1) 6 App. Cases 208.

1882

McLAREN v. CALDWELL.

Strong, J.

rule. And, equally, it cannot be said that there is a necessity for such a construction arising from implication, since nothing short of the fact that there existed no streams other than those artificially constructed to which the Act could apply would warrant such a violent presumption as the rules requires. It is clear, therefore, to my mind, that no other streams were intended than those which the law had already burdened with an easement in favor of the public, and with the use of which, therefore, the legislature might fairly be presumed to deal without compelling compensation to the owner. And I am of opinion that if any authority for this application of the rule referred to is required, the case of *Harrod* v. *Worship* (1) furnishes us with one. In that case an act of parliament having imposed a penalty on any person who placed articles on "any quay within ten feet of the quay head, or on any space of ground immediately adjoining the haven within ten feet from high water mark, so as to obstruct the free passage over it," it was held to apply only to ground on which there was already a public right of way, but not to private property not subject to any such right. Notwithstanding the comprehensive nature of the general terms used, it was not to be inferred that the legislature contemplated such an interference with the rights of property as would have resulted from construing the words as creating a right of way (2). The case just quoted appears to be even stronger than the present and fully warrants us in adopting a construction so restricted as to save the statute from operating in derogation of private rights of property.

Further, it would appear to me, that the true rule of the common law as to the public use of floatable streams being that which the decision in *Reg.* v. *Meyers* had decided it to be, as already stated, we must read

(1) 1 B. & S. 381.

(2) Maxwell on Stats. 258.

the first part of the first section as merely enunciative of the common law, and as introductory to the second section by which an important qualification and abridgment of the public rights was authorized by the erection of mill dams, which would but for the statute have constituted public nuisances, and then we are to consider the second part of the first section prohibiting the felling of trees or placing obstructions as introduced *ex abundanti cautelâ* to prevent any undue extension of the permission to erect dams into a recognition of a right to erect other obstructions. To put it in a familiar form, we may consider the legislature as saying: "True it is "that by law all persons may float rafts and timber "down streams of sufficient natural capacity for that "purpose, and no person can lawfully place any obstruc- "tions in such streams, but it is hereby enacted that "hereafter such streams may be obstructed by mill dams, "provided sufficient aprons or slides are made in the "dams. But no other obstruction is authorized." I have no doubt that that was the sole object and intention of the Act, to restrict somewhat the rights of lumberers in the interest of mill owners; and in putting that construction upon it I feel confident that we in no way violate its spirit, but adopt a much more just and rational construction than if we held that, by the mere use of general words and comprehensive language, the legislature intended to authorize a gross violation of the rights of private property without in any way providing for compensation to its owners.

This is in effect the view of the statute which prevailed in *Boale* v. *Dickson* (1), which, I may say, was the decision of judges of such very high authority that even if I differed from the conclusion arrived at in that case, instead of entirely agreeing with it as I do, I should be extremely unwilling to overturn the rule of property

(1) 13 U. C. C. P. 337.

1882

McLAREN v. CALDWELL.

Strong, J.

law established by it after it has now stood unimpeached for twenty years, and after large sums of money have been expended in reliance upon its authority. Upon this point I refer to the observations of Lord Justice *Thesiger* in the case of *Pugh* v. *The Golden Valley Railway Co.* (1).

I am of opinion that the appeal must be allowed, and the order of the Court of Appeal reversed, thus restoring the decree of the Court of Chancery, with costs to the appellant in all the courts.

HENRY, J.:—

I take exactly the same view of this case as my learned brethren, and did not therefore consider it necessary to prepare a written judgment in this case. The law annexes to private property rights and privileges by which the owner of such private property can do with it what he pleases, provided he is not guilty either of a public or a private nuisance. That is one of the tests by which the rights of property, and of the owners of property, such as the appellant's, may be ascertained, and it is applicable to this case. The appellant in it is the legal owner of the streams and banks on which he undertook to construct dams and make certain improvements, and the only question is whether he had the right to the use of them exclusively. Under such circumstances, all we need inquire is, whether by the common law or by statute, his rights can be interfered with. Now I quite concur with the opinion just expressed by my colleagues as to what the common law is, and I am also of opinion that the legislature, when legislating in reference to streams and rivers in *Upper Canada*, only intended to make further provisions, that is to go a little beyond what might be considered the common law rights of the public, and provided for an easement whereby the public were authorized to use such

(1) 15 Ch. D. 334.

1882

McLAREN v. CALDWELL.

Henry, J.

streams and rivers for the purpose of floating timber in times of freshet during the spring and fall. It might have been a question otherwise whether outside parties would have been entitled to use such streams and rivers, it being only practicable to use them during such periods, and during such freshets at such seasons the streams were naturally capable of being so used. As the case on the evidence comes before us with the finding of the learned judge before whom the issues were first tried, I have sought in vain for evidence to bring me to the conclusion that the streams upon which the improvements were made by appellant, were such streams as to come under the operation of the statutes. The question seems to me to resolve itself into these enquiries.

The only means of interfering with private property is by expropriation for public purposes or subjects. One private individual cannot say to another who has the sole right of user of his property:—"You have that property and I will force you to give me the use of it." He cannot compel the owner of such property to do so, even for a consideration offered to be given I know of no law that would give any such right. If, as it must be admitted, the appellant in this case cut a canal through his property, the law gives him the exclusive use of it, then, I do not see how the respondents can have any right to use the improvement made by appellant on these streams any more than he would have to use the canal. Taking this view of the case, I think the appeal should be allowed, and the decree of Vice-Chancellor *Proudfoot* restored.

TASCHEREAU, J.:—

I have arrived at the same conclusion, more especially for the reasons given by Mr. Justice *Gwynne*, whose notes I have had occasion to read.

1882

McLAREN v. CALDWELL.

GWYNNE, J. :—

I find it impossible to arrive at any other conclusion upon the evidence in this case, than that arrived at by the learned Vice-Chancellor before whom the case was tried, namely, that in their natural state, and without the artificial means employed, and improvements made by the appellant, and those through whom he derives title, in the streams referred to at the places referred to, none of those streams were capable of being used for floating down logs and timber, even in times of freshets or high water, although the *Mississippi*, one of those streams below the places where the improvements upon it have been made, does come within the character of a stream navigable in fact.

That the appellant is seized in fee simple of the lands on either side adjoining the streams at the several places where the improvements have been made, is either admitted or sufficiently established in evidence. An objection taken to the evidence of his title to the lot adjoining the stream, at the place where the improvement called the "*Buck Stewart*" dam is erected, if there be anything in it affecting the absolute perfection of the appellant's title, cannot be entertained in this suit, for that the appellant was in possession of that land, *quâ* owner in fee at the time of the committal by the respondents of the wrong complained of, is not disputed, and such possession is sufficient title against the respondents who are wrong doers, unless they can establish their main contention, which is—that although the appellant may be seized in fee of the lands adjoining the several streams, at the places where the improvements have been made, still the beds of those streams are vested in the Crown for the public use, and that, in virtue of such seisin in the Crown, the respondents were entitled to float their logs and timber on the

streams at the places so alone made capable of floating logs and timber by the improvements referred to, without any interference whatever offered by the appellant; and this right is asserted upon the basis: Firstly, that as is contended, the beds of all streams, large or small, in the Province of *Ontario*, are vested in the Crown under the provisions of the French law, as prevailing in the Province of *Quebec*, which, as was alleged, is different from the law of *England* in this respect, and are subject to the same public rights of user as like streams in the Province of *Quebec*; and secondly, that at common law, or at any rate, by force and effect of the *Upper Canada* statute, 12 *Vic.*, c. 87, all persons have the right to use the streams in question at the places in question, for floating their logs and timber, without any molestation or interference upon the part of the appellant, notwithstanding that the streams were, at the places referred to, made capable of floating logs and timber solely by the improvements made and maintained by the appellant. Whether there is any difference between the laws of the Province of *Quebec*, and that of the Province of *Ontario*, in relation to streams of the character of those in question here, it is unnecessary to enquire; for that the Crown could, in *Upper Canada*, ever since the Act of 1791, constituting that Province, now *Ontario*, grant the beds of streams, such as those in question, and that a grant by the Crown, of land abutting on such streams, on either side, to one person, or to different persons, does, *primâ facie* in the former case, pass the whole bed of the stream, passing through the land granted, and, in the latter case, does pass to each grantee the bed of the stream *ad medium filum aquæ* opposite the land granted, never has been doubted in the courts of *Upper Canada*; and that there is, or ever has been any difference between the law of *Upper Canada* and the law of

1882

McLAREN v. CALDWELL.

Gwynne, J.

England, upon this point, is a contention which cannot be for a moment entertained.

In *Kains* v. *Turville* (1) the late Chief Justice *Draper* says:

> The law is too well settled to require any extended reference to authorities to establish the rule, that in streams and rivers which are not navigable, a description of land which extends "to the water's edge" or "to the bank," carries the grant or conveyance of the thread of the stream, and that the description continuing along "the water's edge" or "along the bank," will extend along the middle or thread of the stream, unless, indeed, there be some words forming part of the description or introduced by way of exception, which clearly excludes whatever may lie between the water's edge or the bank, and the *medium filum aquæ*.

I will only refer to two authorities, one English, the other American In *Wright* v. *Howard* (2), *Leach*, V.C., says:

> *Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream.

In *Tyler* v. *Wilkinson* (3) *Story*, J., says:

> *Primâ facie*, every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream.

Such has ever been held to be the law of *Upper Canada*, nor is there a dictum or suggestion of any judge to the contrary.

Now, as I have already said, it has been admitted or established in evidence, that the appellant, in right of title derived from the Crown, is proprietor of the lands abutting either sides of the streams in question at the places in question. Moreover, the descriptions contained in the Crown patents, granting the lands in question, have been produced, from which it appears that there is not contained in any of them any reservation of the beds of the streams or anything in qualifi-

(1) 32 U. C. Q. B. 17. (2) 1 S. & S. 190.
(3) 4 Mason 400.

cation of the grant of such beds, which the grant of the lands abutting upon the streams carries with it. In determining this case, therefore, we must proceed upon the basis that the appellant is seized in fee of the beds of the streams in question, at the places where the several improvements for rendering the streams capable of floating logs and timber have been made.

That very learned judge, the late Chief Justice Sir *James Macaulay*, thirty years ago, in the *Queen* v. *Meyers* (1), after a careful review of the English authorities and those of the *United States*, and of *Rowe* v. *Titus* (2), and *Esson* v. *McMaster* (3), decided in the courts of the Province of *New Brunswick*, arrived at the conclusion, that in the application of the common law to *Upper Canada*, in substitution for the old law of *Canada*, when inland streams are proved to be in fact, and in their natural state, navigable, they are, *primâ facie*, public highways, by water, and that the public easement depends upon the fact of natural capacity, and not upon the fact of usage.

It is [he says] the adaptation, [by which he means the natural adaptation,] of a stream to the purposes of navigation, and not the being adapted in use, that renders it a navigable river; and usage [he says] after all is but evidence to prove the fact of capacity in relation to the thing as affording the easement claimed therein.

And he concludes that since the Act of 1791, whereever an inland stream in *Upper Canada* is capable in its natural state of general and common use, as a highway by water, it is *jure naturæ* subject to such easement, being enjoyed by the public, and that when streams are capable in certain parts to be used as public highways, though not in others, by reason of interruptions from rocks, shoals, and other natural obstructions, causing what are called portages, such streams, although being incapable of being used

(1) 3 U. C. C. P. 305. (2) 1 Allen N. B. 329.
(3) 1 Kerr N. B. 501.

1882

McLAREN v. CALDWELL.

Gwynne, J.

continuously, are, in the portions capable of being used in a state of nature, highways, although they are not in the parts where, by reason of the impediments, they are incapable of being so used. According to the judgment of that learned judge, the public right to use inland streams in *Upper Canada* as highways depended upon the natural capacity of the stream to be used as such, and was confined to those portions of the streams which in their natural state were capable of being so used.

Now this judgment was pronounced four years after the passing of the Act of the Legislature of *Upper Canada* (1), and with a full knowledge therefore of the provisions of that Act, and from the whole judgment it is apparent that at that time, so recently after the passing of the Act, when the object of passing it would be fresh and present to the mind of the learned judge, it never entered into his head, that its objects or effect was to make private streams, which were not, in their natural state, capable of floating logs or timber, if made so by private enterprise, and a large expenditure of private capital upon private property, to become subject to an easement in the public, through and over the works and property of the person whose enterprise and capital had so enlarged the capacity of the streams, or that any person so improving the capacity of a stream, within the limits of his own property, as to give to the stream a capacity to float logs and timber, which by nature it had not, should be adjudged to be dedicating the works and improvements so made to the public use. Referring to the provincial statutes relating to the subject, he says:

> Some of those Acts are adapted to waters strictly private, and speak of dams legally made, which they could not be in obstruction of public highways by water; and others are intended expressly

(1) 12 Vic. ch. 87.

to authorize dams in streams manifestly regarded as public navigation, but in which the public interests are protected, if not promoted, by requiring the construction of locks, to be freely used, exempt from tolls.

Gwynne, J.

The Court of Common Pleas at *Toronto*, in three cases, namely, *Boale* v. *Dickson* (1), *Whelan* v. *McLachlan* (2), and *McLaren* v. *Buck* (3), has held that the 5th section of 12th *Vic.*, ch. 87, the section relied upon by the respondents here, refers only to such streams as in their natural state would, without improvements, during freshets and high water, permit saw logs and timber to be floated down them, and not to streams which, not having such natural capacity, have been given such capacity by the expenditure of capital by private persons upon their own property. This view appears to me to accord with the opinion of Sir *James Macaulay*, to be gathered from his judgment in the *Queen* v. *Meyers*, above referred to, and hitherto no doubt has ever, in the judgment or argument of any reported case, been cast upon the soundness of the above judgment bearing expressly upon the point; however, in the case now before us, the Court of Appeal for *Ontario* (Mr. Justice *Burton* dissenting) has held that the above decisions are erroneous, and in effect that the respondents, or any other person, have perfect right, without any permission, molestation or interruption from the appellant, to use the improvements made by him in the streams passing through his property, by which improvements alone the streams were given a capacity to enable them to float logs and timber. Apart from the imputation of arbitrary interference by the legislature with the rights of private property, without compensation, and the disregard of the established canon for the construction of statutes, which are claimed to have the effect of

(1) 13 U. C. C. P. 349. (2) 16 U. C. C. P. 110.
(3) 26 U. C. C. P. 549.

1882

McLAREN v. CALDWELL.

Gwynne, J.

extinguishing private rights in the assumed interests of the public, which such a construction involves, a careful examination of that statute and of other statutes of the Legislature of *Upper Canada*, bearing upon the subject, leads, I think, to the clear conclusion that the judgment of the Court of Appeal for *Ontario* cannot be upheld.

The 9th *George IV.*, ch. 4, which, as appears from its preamble, was passed, not only to give facilities to lumberers, but for the protection also of fish in certain streams, enacted that after the 1st May, 1829, every owner of any mill dam, which is, or might be legally erected, or where lumber is usually brought down the stream, on which said mill dam is erected, or where salmon or pickerel abound therein, should erect a good and sufficient apron or slide, in such dam of certain dimensions, specified in the Act in proportion to the width of the stream. The expression in this Act "where lumber is usually brought down the stream," plainly, to my mind, indicates the intention of the legislature to have been, in so far as the interests of persons floating logs, etc., down the streams was concerned, to limit the application of the Act to such streams as lumber was usually, that is in a state of nature, floated down, the object of the Act being to prevent the obstruction of streams having sufficient capacity to float lumber, and not to provide means to enable lumber to be floated down streams, not having by nature such capacity. The Act 2 *Vic.*, ch. 16, which was to prevent the felling trees into certain rivers mentioned therein as dangerous to mill dams and bridges, and impeding the navigation of the named streams, has no application to the present case; neither has 7 *Vic.*, ch. 36, which was passed to prevent obstructions in rivers and rivulets in *Upper Canada*, occasioned by persons throwing slabs, bark, waste stuff, or other

1882

McLAREN v. CALDWELL.

Gwynne, J.

refuse of saw mills, stumps, and waste timber, or leached ashes into the rivers or rivulets of *Upper Canada*; neither has 10th and 11th *Vic.*, ch. 20, which was passed to explain and continue 7th *Vic.*, ch. 36, for by 14th and 15th *Vic.*, ch. 123, which was passed to explain the two latter Acts, it was expressly enacted that neither 7th *Vic.*, ch. 36, nor 10th and 11th *Vic.*, ch. 20, did, nor did any part of these Acts, extend to any river or rivulet wherein salmon or pickerel or black bass or perch do not abound, so that these Acts were plainly passed for the protection of those fish.

The 12th *Vic.*, ch. 87, is the Act upon which the judgment of the Court of Appeal in this case is rested. That Act, which was passed for the purpose of amending 9th *Geo. IV.*, ch. 4, in its preamble, recites that "it is necessary to declare that aprons to mill dams, which are now required by law to be built and maintained by the owners and occupiers thereof, in *Upper Canada*, should be so constructed as to allow a sufficient draught of water to pass over such aprons as shall be adequate in the ordinary flow of the stream, to permit logs and other timber to pass over the same without obstructions," and it enacted that from and after a day named it should be the duty of each and every owner or occupier of any mill dam, at which an apron or slide is by the said Act (9th *George IV.*) required to be constructed, to have altered and, if not already built, to have constructed, such apron or slide, so as to afford depth of water sufficient to admit of the passage over such apron or slide, of such saw logs, lumber and timber as are usually floated down such streams, and in the 5th sec. it was enacted, that it should be lawful for all persons to float saw logs and other timber, rafts and craft down all streams in *Upper Canada*, during the spring, summer and autumn freshets, and that no person should by felling trees, or placing any other obstruction in or across

1882

McLAREN v. CALDWELL.

Gwynne, J.

such streams, prevent the passage thereof. Now this Act, by its preamble and first enacting clause, is expressly limited in its application to mill dams at which an apron or slide is by 9th *George IV.*, c. 4, required to be constructed. This language involves a legislative recognition of the fact that there might be erected mill dams over streams, where no apron or slide was required to be constructed by 9th *George IV.*, ch. 4, and a reference to the Act shows that in point of fact, it did not require an apron or slide to be constructed in any mill dam erected across a stream where salmon or pickerel did not abound, unless the stream was one whereon lumber was usually, that is, as it appears to me, in a state of nature, brought down; for lumber could not be usually floated down a stream, which in a state of nature was incapable of floating the lumber, so as to be brought down. The Act 12th *Vic.* ch. 87, recites its object to be to provide that aprons required to be constructed by 9th *George IV.*, ch. 4, should be so constructed as to be adequate in the ordinary flow of the streams to permit saw logs and timber to pass without obstruction, plainly indicating, as it appears to me, the intention of the legislature to have been, to provide that streams, by nature capable of floating down logs and lumber, should not be prevented from doing so even by mill dams. The enacting clause therefore provides, that the apron or slide shall be so constructed, as to afford depth of water sufficient to admit of the passage of such logs, lumber or timber, as are usually floated down such streams, wherein such dams are erected, still referring to the streams as are referred to in the preamble, namely: streams down which, but for the obstruction caused by the mill dam, the timber usually was, and so could be, floated down. The 5th section appears to me to have been added lest the term "usually floated down," should be construed to have a limited

application, namely; to such streams only as during the whole year were used, or were capable of being used, for floating logs, etc., and the object of the section was, inasmuch as there had not been in *Upper Canada* any practical decision as to what were the rights of the public, in streams capable of floating timber in periods of freshets, by the common law, as applied to the condition of *Upper Canada*, to declare by legislative enactment, that in all streams, during periods of freshets, the public should have the right (which, however, could be exercised only if the condition of the streams by nature would admit of it), of floating down logs and timber and that no person should by any obstruction interfere with the exercise of such right, and which but for such obstruction could have been exercised:—a right which four years afterwards, the Court of Common Pleas, in *The Queen* v. *Myers*, for the first time in the *Upper Canada* courts, declared that the common law, as applied to the peculiar condition of *Upper Canada*, was sufficiently elastic to secure, as a right existing *jure naturæ* and not depending on the fact of user and acquirable only by prescription.

It is impossible to conceive that the legislature contemplated, by this language, to declare that, and, in my judgment, the language used is not capable of the construction that, it should be lawful for all persons during the period of freshets, to float logs, rafts, etc., etc., down streams which had not capacity sufficient to enable logs, rafts, etc., to be floated down them, even during freshets; or to prohibit persons from erecting dams, within the limits of their own property, over streams not having by nature such capacity, even during freshets, unless subject to the consequence that in the event of any such dam having the effect of making the stream, which by nature was incapable of floating logs, to become capable of being used for that purpose,

1882

McLAREN v. CALDWELL.

Gwynne, J.

as it passes through the property of the person erecting the dam over the stream, of the bed of which he was seized in fee; the stream so made passable through private property should *eo instanti* of the artificial capacity being given to it, become subject to the burthen of being a highway, open to the public, without the consent, molestation, or interference of the person whose enterprise and capital expended upon his own property created the artificial capacity of the stream, and without any compensation whatever to the owner of the property, who had constructed upon his own property the work which gave to the stream such artificial capacity. Such a construction cannot, in my opinion, be given to the Act, without an utter disregard of the plainest principles of justice, and of every principle ordinarily applied to the construction of statutes. But that the legislature in point of fact never did contemplate anything so unjust is apparent from the 16th *Vic.* ch. 191, and 18th *Vic.* ch. 84, by which the former Act was amended, and extended to *Lower Canada*. By these Acts it is enacted that any number of persons, not less than five, may form themselves into a company, for the purpose of acquiring or constructing and maintaining any dam, slides, piers, or other works necessary to facilitate the transmission of timber down any river or stream, or for the purpose of blasting rocks or dredging and removing shoals or other impediments, or otherwise improving the navigation of such streams for the said purpose, provided always that no such company should construct any such works, or interfere with any private property or of the Crown without first having obtained the consent of the owner, or of the Crown, except as in the Act is provided, as to the amount to be paid by the company to such owner for the privilege to construct such works by arbitration, in case of difference. And it was further provided that when any

company formed under the Act, should require any slide, pier or other work, intended to facilitate the passage of timber down any water, already constructed by any party other than a company formed under the Act, it should be lawful for the owner of such works (or if constructed on the property of the Crown, for the person at whose cost the same shall have been constructed), to claim compensation for the value of such works, either in money or in stock of such company at the option of the said owner, or the person at whose cost the same shall have been constructed, the value of such compensation in case of difference, to be also determined by arbitration. Then the companies were authorized to collect tolls, from all parties using the works.

We here find the legislature with scrupulous regard for private rights providing that no man shall be interfered with, in the full enjoyment of his property, without his consent, or without full compensation being made to him.

Now if, as is here provided, no company formed under the Act, could acquire or interfere with the works constructed by this appellant without his consent, or without paying him full compensation, and if, as is also here provided, the companies could prevent all persons from using the works so acquired, unless upon the payment of tolls, it is impossible to hold, that by force of 12th *Vic.*, ch. 87, all persons were entitled to use as public property works erected upon private property without the consent of, and in fact against the will of, the person who had constructed the works upon his own property. I am of opinion, therefore, that the plain natural and reasonable construction of the 5th sec. of 12th *Vic.*, ch. 87, is that its object and effect is simply to prevent any person, even the owner in fee, of the bed of a stream, by any obstruction erected by him across the stream, to interfere with the free passage down the stream of such

1882

McLAREN v. CALDWELL.

Gwynne, J.

logs and timber as, but for such obstruction, could be floated down the stream, although such floating down could only be effected or take place during the period of freshets; the judgment of the Court of Common Pleas, therefore, in the three cases above quoted, puts the correct construction upon the Act, and the judgment of the Court of Appeal in *Ontario*, in this case, must be reversed, the appeal in this case be allowed, and the judgment of the Court of Chancery restored with costs to the appellant in this court and in the courts below.

In the view which I have taken of the Act, it is plain that the learned Vice-Chancellor acted quite right in refusing to receive any further evidence of the nature of that tendered by the respondents, his refusal to receive which has been objected to.

Appeal allowed with costs (1).

Solicitors for appellants: *McCarthy, Hoskin, Plumb & Creelman.*

Solicitors for respondent: *Bethune, Moss, Falconbridge & Hoyles.*