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*June 2, 5.
*Oct. 24.

COCKBURN & SONS (PLAINTIFFS) .....APPELLANTS

AND

THE IMPERIAL LUMBER COMPANY, LIMITED (DEFENDANT)..... } RESPONDENT.

AN APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Rivers and streams—Floatable waters—Construction of statute—"The Saw-logs Driving Act"—R. S. O. (1887) *ch.* 121—*Arbitration—Action upon award—River improvements—Detention of logs—Damages.*

When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them the owner is entitled to an arbitration under the Saw-logs Driving Act to determine the amount of his damages for such detention and is not restricted to the remedy provided by sec. 3 of that Act, namely, removing the obstruction. Judgment of the Court of Appeal (26 Ont. App. R. 19) reversed.

APPEAL from a judgment of the Court of Appeal for Ontario (1) reversing the judgment of the High Court of Justice, (Rose J.) and dismissing the plaintiffs' action in so far as it was based upon the award in question in the suit.

The action was brought to recover $1,376 damages and costs awarded to them in an arbitration under the provisions of "The Saw-logs Driving Act," R. S. O. (1887) ch. 121, occasioned by alleged wrongful and unnecessary detention of their saw-logs on the drive in Deer Creek, District of Nipissing, during the season of spring freshets in 1896. The circumstances of the case and questions at issue on the appeal are stated in the judgments now reported.

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

(2) 26 Ont. App. R. 19.

Gamble and *Dunn* for the appellants. This was a public stream and respondents could not interfere with the right appellants' had to float their logs down it. See *Caldwell* v. *McLaren* (1); *Davis* v. *Winslow* (2); *Bearce* v. *Dudley* (3).

The new remedy given by sec. 3 does not take away any existing previously, but is only additional. Hardcastle on Statutes (2 ed.) pp. 324 *et seq.*

As to the meaning of "detention" see *Crandell* v. *Mooney* (4).

Aylesworth Q C. for the respondent.

THE CHIEF JUSTICE.—I concur in the reasons given by Mr. Justice King in his written opinion which I have read.

TASCHEREAU J.—I concur in the reasons of my brothers Gwynne and King.

GWYNNE J.—By chapter 121 R. S. O. 1887 intituled "An Act respecting the Driving of Saw-logs and other Timber on Lakes, Rivers, Creeks and Streams," it is enacted in sec. 3, that

any person putting or causing to be put into any water in the province, logs for the purpose of floating the same in, upon or down such water, shall make adequate provision and put on a sufficient force of men to break, and shall make all reasonable endeavours to break, jams of such logs and clear the same from the banks and shores of such water with reasonable dispatch and run and drive the same so as not to unnecessarily delay or hinder the removal, floating, running or driving of other logs or unnecessarily obstruct the floating or navigation of such water.

Then sec. 4 enacts that

in case of the neglect of any person to comply with the provisions of the preceding section it shall be lawful for any other person or persons

(1) 9 App. Cas. 392.
(2) 51 Me. 264.
(3) 88 Me. 410.
(4) 23 U. C. C. P. 212.

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desiring to float, run or drive logs in, upon or down such water, and whose logs would be thereby obstructed, to cause such jams to be broken and such logs to be cleared from the banks and shores of such water and to be floated, run and driven in, upon and down such water.

Then secs. 5, 6, 7, 8, 9, 10, 11 and 12 provide for cases of logs of several different owners becoming intermixed so as not to be capable of being conveniently separated, and enact that the several owners shall respectively put on a fair proportion of men to break the jams, and that if any should fail to do so the other or others may supply such deficiency and take and retain possession of logs of the one in default to meet the cost of the supplying of such deficiency and provide how the logs so taken possession of may be dealt with. Then sec. 13 enacts that:

If it be determined by arbitration as hereinafter provided for, that any person *acting under the assumed authority of this Act* has without just cause taken possession of or detained, or caused to be taken possession of or detained, logs of another person or has after offer of security which the arbitrators may think should have been accepted, detained such logs, or has through want of reasonable care left logs of another person on the banks or shores or has taken logs of another person beyond the place of their original destination, contrary to the provisions of sections 5, 8 or 11, then such first mentioned person shall pay to such last mentioned person such damages as the arbitrators may determine.

Then sec. 16 enacts that:

All claims, disputes and differences arising under this Act shall be determined by arbitration as hereinafter provided and not by action.

Then sec 17 provides for the appointment of arbitrators, by enacting that

the person claiming that another person has not complied with the provisions of this Act, or, claiming payment of any charges or expenses under this Act, or claiming a lien on any logs, *or* claiming damages under sec. 13, shall give to such other person notice in writing stating the substance of the claims made and appointing an arbitrator and calling upon the other person to appoint an arbitrator within ten days after the service of the notice, &c., &c.

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Then sec. 19 enacts that:

The parties may agree that the arbitration shall be by one arbitrator * * or may apply to the judge (of the County Court) or stipendiary magistrate to appoint one.

Then sec. 20 enacts that:

The person on whom a claim is made and notice of arbitration served may at any time before the arbitration is entered upon, or with leave of the arbitrators during the arbitration, give the claimant notice in writing by way of counter-claim, stating the substance of any claim arising under this Act, which such person may have against the claimant, and such counter-claim, unless barred under sec. 27, shall be determined in the arbitration, and an award made with respect thereto.

The limitation of claims prescribed by this sec. 27 is that all claims shall be made by a notice in writing under sec. 17, and within one year after the same have arisen, or otherwise they shall be barred.

Then sec. 25 enacts that the award of the arbitrators or of a sole arbitrator, as the case may be, shall be final and binding upon the parties.

In the spring of 1896 the appellants and respondents respectively had logs being driven down a river in the District of Nipissing, in the Province of Ontario, called Deer Creek, in the following order, namely, the respondents had one drive in front and another in the rear of the drive of the appellants. The logs of the appellants' drive became so intermixed with the logs in the front drive of the respondents that the parties, both assuming to act under the above statute, took measures which resulted in a fracas between the respective parties and their men, and in the detention, as the appellants contend, of a large portion of their logs so that they could not descend the river during the spring freshet, but had to remain therein until the autumn freshet. Upon the 27th June, 1896, the appellants caused a notice to be served upon the respondents in the form required by the statute, to the effect that the appellants claimed from the respondents the

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sum of five thousand and eleven dollars, being the amount of loss sustained by the appellants in consequence of the detention by the respondents of logs of the appellants in Deer Creek during the months of April and May then last past, and they notified the respondents that they had appointed one John Bourke as their arbitrator, and called upon the respondents to appoint an arbitrator on their behalf within ten days after the service of the said notice upon them. The respondents, in compliance with this notice which was served upon them, caused to be served upon the appellants a notice dated the 3rd of July, 1896, to the effect that they had appointed one Alexander Hamilton as their arbitrator to act with John Bourke as the appellants' arbitrator in respect of the appellants' claim; and further, that the respondents counter-claimed from the appellants the sum of four hundred and seventy-four dollars and fifty-three cents, being for a fair proportion of the charges and expenses of breaking the jams and clearing, floating, running, driving, separating, booming and keeping possession of their logs which delayed and hindered the floating of the company's logs down Deer Creek during the driving season of 1896, and which were intermixed therewith. And the appellants were by the said notice required to take notice

that such logs are now lying at the mouth of Deer Creek between the Veuve River and dam no. 1 upon Deer Creek, and that the company claims to take and keep possession of so much of such logs as may be reasonably necessary to satisfy the amount of such proportion of charges, and if satisfactory security be given for the amount of such proportion of charges and expenses possession of the logs will be given up; and further that the company claims from you the sum of ten thousand dollars being the amount of damages and loss sustained by the company in consequence of the detention by you of its logs in Deer Creek during the driving season of 1896, and the further sum of twelve hundred and fifty-one dollars, twenty-five cents loss the company has sustained by reason of your having taken possession of the

company's logs and having carried them past their place of destination and retained possession thereof.

Afterwards the parties agreed together to substitute John Alphonse Valin, Esquire, Judge of the District Court of the District of Nipissing, as sole arbitrator in the place and stead of the said arbitrators, and they signed and set their respective seals to an agreement to that effect, dated the 24th of July, 1896. On the opening of the arbitration before Judge Valin on the 8th August following a note was taken down and recorded by the said judge in the arbitration proceedings that the agreement and intent of the parties was that Judge Valin was agreed upon and accepted by both parties as sole arbitrator under sec 19 of the said ch. 121 R. S. O., 1887. This was apparently done to avoid any misconception as to the intent of the parties which might possibly arise upon construction of the terms of the sealed instrument of the 24th July. Judge Valin accordingly proceeded with the arbitration and no objection appears to have been made before him by or on behalf of either of the parties that any of the evidence offered by the other related to a claim such as that now pleaded by the defendants or to any matter not included within the scope of a reference under the statute, and Judge Valin accordingly made his award in the premises and thereby did award, adjudge and finally determine as follows:

1. That the said Imperial Lumber Company is not entitled to compensation for loss (if any) suffered by said company through its logs being taken past their place of destination by reason of the act or neglect of the said Cockburn & Sons.

2. That the said Imperial Lumber Company and the said Cockburn & Sons are not entitled to any charge or expense or compensation for work done by either party on the other's logs.

3. That the said Cockburn & Sons have sustained damages by reason of the detention of their logs on Deer Creek during the driving season of 1896 by the acts and neglect of the said Imperial Lumber Com-

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pany to the extent of $1,376, and that the said Imperial Lumber Company is therefore indebted to the said Cockburn & Sons in the sum of $1,376 which said sum I hereby direct the said Imperial Lumber Company to pay to the said Cockburn & Sons at their office at Sturgeon Falls, in the District of Nipissing, on or before the first day October, 1896.

4. That the said Imperial Lumber Company shall pay to the said Cockburn & Sons, at their said office at Sturgeon Falls, on or before the first day of October, 1896, their costs of and incidental to the submission to arbitration and of the arbitration or reference and of this my award.

The above amount not having been paid this action is brought upon the award to recover the amounts thereby awarded, and the only defence to the action which is at all material to be noticed upon this appeal is contained in the following paragraph in the defendants' statement of defence:

15. The defendant company denies that the said Joseph Alphonse Valin made any such award of and concerning the said matters as is alleged in the statement of claim, and the defendant company further charges that in the sum of $1,376 mentioned in the said alleged award the said Joseph Valin has included a substantial amount in respect of the delay claimed by the plaintiffs to have been occasioned to them in getting their logs down the said stream by reason of logs of the defendant company being ahead of the plaintiffs' logs in the said stream, and thereby keeping back or hindering the running and driving of the plaintiffs' logs down the said creek, and the defendant company charges that no such claim could arise or be made the subject of arbitration under the said Saw-logs Driving Act, and that no such claim was in fact included in the matters intended to be referred to the said Joseph Alphonse Valin.

At the trial it was expressly admitted by the defendants' counsel that this was the sole matter in difference between the parties. Now the whole burthen of establishing the truth of this defence rested upon the defendants, and the sole evidence adduced by them in support of their allegation was that of the arbitrator whom the defendants called and the whole of whose evidence upon the subject appears to have been as

follows. He was asked by the defendants' counsel whether evidence had been given by the plaintiffs in the arbitration before him

that the Lumber Company by having their logs ahead of the plaintiffs in the stream were delaying them. Is that it?

To which he answered:

No, not in that way, the statements made by the witnesses were to this effect, that Doctor Warren (the manager of the defendant company) was not able with his jackladder to take in the logs fast enough to clear the channel and to delay Cockburn's logs as long as possible, that is one of them.

The learned counsel put this further question:

Perhaps (he said) we can get at the matter in this way, if you can tell me (without telling me any of your reasons) how the award was made up?

To this he answered as follows:

The amount of the award was made up by twenty-two days of delay at 40 men a day on the average, that was accepted by counsel on both sides, that there would be an average of 40 men for every day, at $1.45 per day.

The above is substantially the whole of the evidence upon which the defendants rested for proof of their contention, and that evidence appears to fall far short of establishing the truth of their defence, namely, that part of the damages awarded was for damage occasioned to the plaintiffs by the mere circumstance that the defendants had a drive of logs ahead of the logs of the plaintiffs whose logs were thereby necessarily delayed in floating down the stream without any default of the defendants. The evidence of the arbitrator, on the contrary, appears to me to establish that the plaintiffs made no claim upon any such ground as that now contended for by the defendants, but that the delay complained of by the plaintiffs was occasioned by the acts, default and neglect of the defendants in the manner in which they assumed to exercise the rights which they claimed to be vested in them by the statute, after

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the occurrence of the jams which would seem to have been constantly taking place, and that it was for such damages so occasioned which the arbitrator called damages for general detention as distinguished from damages occasioned by a special detention of some logs under a false claim by the defendants of a right of lien under the statute. We have not before us the evidence of all the circumstances attending the occurrence of the several jams and of the several acts of the parties in attempting to extricate the logs from them, nor of the duration of the jams and of the efforts of the parties to extricate the logs as the arbitrator had, but there was shown at the trial, and presumably by the defendants themselves, extracts from the evidence given at the arbitration by the manager of the defendant company from which it is apparent that the intermixing of the logs of the respective parties in their course down the river, and the efforts of both parties to extricate them, took place constantly during a long period of time until on the 30th or 31st May the difficulties which had arisen and the conflicts and collisions between the parties and their servants in respect thereof culminated in this, that according to the evidence of the manager of the Imperial Lumber Company, he assumed a right to prevent all the plaintiffs' logs which were then above a dam in the river from entering a sluice gate therein, whereby logs descended the dam by putting a large boom across the head of the sluice gate and locking it there, and prevented the plaintiffs' men from removing the boom and so actually detained all of the logs of the plaintiffs above the dam for some days, and gave the plaintiffs notice that the defendants claimed the right to retain in their custody all of the logs of the plaintiffs so detained above the dam for a lien thereon under the statute; and we see further by the defendants' notice

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of the 3rd of July, 1896, that they then claimed to have in their custody certain of the plaintiffs' logs which had floated down the dam, and which were then said to be in the river between its mouth into Veuve River and the dam which they claimed to hold for a lien thereon under the statute. The learned trial judge found as a fact upon the material before him that the general detention and detention under alleged lien (of which the arbitrator in his evidence had spoken), were both during the months of April and May, and that what was done on the 1st of June was but a continuation of the assertion of the right of lien which the defendants had made, and that the arbitrator had acted clearly within the scope of a reference as provided for by the statute, and accordingly he rendered judgment for the plaintiffs for the amount of the award, with interest and costs. The Court of Appeal for Ontario reversed this judgment and dismissed the action upon the award with costs, from which judgment the plaintiffs have appealed to this court.

Now it is to be observed that in the defendants' statement of defence, paragraph 15, and in all the courts below and in this court, the whole ground of defence to the action on the award relied on by the defendants was an allegation that the arbitrator in his award had allowed to the plaintiffs damages for delay in getting their logs down the stream, which delay was occasioned by the mere fact of defendants' logs being ahead of those of the plaintiffs, which latter were thus necessarily delayed. In my opinion the defendants have wholly failed to establish this their contention.

Although we have not before us all the evidence which the arbitrator had before him, we have enough, I think, to show that all the claims, disputes and dif-

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ferences which appear to have been numerous between the parties while their logs were floating down the stream, and the claims made by the plaintiffs before the arbitrator, were in respect of damages suffered by the plaintiffs by reason of the manner in which the defendants assumed to act in their assertion of the authority of the statute, all of which claims, disputes and differences were claims, disputes and differences under the statute within the meaning of section 16, and so were recoverable by arbitration and an award under the statute. The arbitrator, in his evidence in the action, said that the plaintiffs had presented no claim before him for damages by delay occasioned by the cause as pleaded by the defendants, and as throughout the action was contended by them. The fact that the defendants never during the progress of the arbitration nor until an award was made against them claimed that any such or any claim outside of the scope of an arbitration under the statute was presented before the arbitrator by the plaintiffs, seems to afford confirmation of this evidence of the arbitrator if any confirmation was necessary, and the general detention spoken of by the arbitrator is susceptible of an intelligible meaning by reference to the numerous detentions claimed to have arisen during the progress of the logs down the stream from the manner in which the defendants assumed to act in assertion of authority under the statute, without attributing it to mere delay from the clause pleaded by the defendants and relied upon by them. I can see nothing in the evidence to support a contention that the arbitrator allowed, or that the plaintiffs claimed before him, damages for any delay so occasioned, and the defendants having failed to establish the only defence offered by them to the validity of the award the appeal must be allowed with costs and the judgment of the plaintiffs for the

full amount of the award and interest and costs, be restored.

KING J.—The action was brought by the present appellants to recover a sum of $1,376 awarded in an arbitration under the provisions of the "Saw-logs Driving Act" (R. S. O. [1887], c. 121.) The appeal is from a judgment of the Court of Appeal reversing a judgment of Rose J. who had maintained the action. The substantial question arises upon the construction of the Act, the material clauses of which are the following:

Sec. 3. Any person putting or causing to be put into any water in this province logs for the purpose of floating the same in, upon or down such water, shall make adequate provisions and put on a sufficient force of men to break, and shall make all reasonable endavours to break, jams of such logs, and clear the same from the banks and shores of such waters with reasonable despatch, and run and drive the same so as not to unnecessarily delay or hinder the removal, floating, running or driving of other logs, or unnecessarily obstruct the floating or navigation of such water.

Sec. 4. In case of the neglect of any person to comply with the provisions of the preceding section, it shall be lawful for any other person or persons desiring to float, run or drive logs in, upon or down such water, and whose logs would be thereby obstructed, to cause such jams to be broken, and such logs to be cleared from the banks and shores of such water and to be floated, run and driven in, upon and down such water.

Sec. 5. The person or persons causing such jams to be broken, or such logs to be cleared, floated, run or driven pursuant to the last preceding section shall do the same with reasonable economy and despatch, and shall take reasonable care not to leave logs on the bank or shores, and shall have a lien upon the logs in the jam, or so cleared, floated, run or driven for the reasonable charges and expenses of breaking the jams, and the clearing, floating, running, driving, booming and keeping possession of such logs and may take and keep possession of such logs or so much thereof as may be reasonably necessary to satisfy the amount of such charges and expenses pending the decision by arbitration as hereinafter provided for. The person taking possession of logs under this section shall use all reasonable care not to take such logs beyond the place of their original desti-

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nation, if known, but may securely boom and keep possession of the same at or above such place. The owner or person controlling such logs, if known, shall be forthwith notified of their whereabouts and, if satisfactory security be given for the amount of such charges and expenses, possession of the logs shall be given up.

Then follow analogous provisions for the driving in common of logs which have become so intermixed that they cannot be conveniently separated, and for the separation of intermixed logs which are capable of being so separated. (secs. 6-11.)

Section 13 provides for the case where persons assuming to exercise the authority given by the Act, act irregularly or in excess of such authority. It provides that:

If it be determined by arbitration, as hereinafter provided for, that any person acting under the assumed authority of this Act has, without just cause, taken possession of, or detained, or caused to be taken possession of or detained, logs of another person, or has, after offer of security which the arbitrators may think should have been accepted, detained such logs, or has, through want of reasonable care, left logs of another person on the banks or shores, or has taken logs of another person beyond the place of their original destination contrary to the provisions of sections 5, 8 or 11, then such first mentioned person shall pay to such last mentioned person such damages as the arbitrators may determine.

Sec. 16 declares that:

All claims, disputes and differences arising under this Act shall be determined by arbitration as hereinafter provided, and not by action.

And then sec. 17 provides that:

The person claiming that another person has not complied with the provisions of this Act, or claiming payment of any charges or expenses under this Act, or claiming a lien upon any logs, or claiming damages under section 13, shall give to such other person notice in writing stating the substance of the claims made and appointing an arbitrator and calling upon such other person to appoint an arbitrator within ten days after the service of the notice.

Provision is then made for appointment of a second arbitrator in case the person notified does not appoint,

and also, (in either event), for the appointment of a third arbitrator.

Sec. 19 provides that the parties may agree that a single arbitrator may determine the matter. And sec. 20 provides for a counterclaim by the person on whom the original claim was made.

The plaintiffs and defendants were the owners of timber limits on a stream called Deer Creek, in the District of Nipissing, and in the spring of 1896 were engaged in driving saw-logs down it. Disputes arose between them in carrying on their respective driving operations, and notices of claim and counterclaim were given under the arbitration provisions of the Act. The plaintiffs claimed $5,011.25 as being the amount of loss sustained in consequence of the detention by defendants of the logs in Deer Creek during the months of April and May, and notified defendants of the arbitrator appointed by them, and requested them to appoint an arbitrator. The defendants thereupon notified plaintiff that they had appointed a certain person to act as arbitrator in respect of the claim served by plaintiff, and gave notice of counterclaim under the three heads of proportion of expenses for driving intermixed logs—damages for detention of defendants' logs by plaintiffs and damages sustained for carrying defendants' logs past their place of destination.

A third arbitrator was appointed, but subsequently the parties agreed that Mr. Valin, the judge of the District Court of Nipissing, should be the sole arbitrator.

The arbitrator, after hearing the parties, adjudged that

the said Cockburn has sustained damages by reason of the detention of their logs in Deer Creek during the driving season of 1896 by the act and neglect of the Imperial Lumber Company to the extent of $1,376,

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and awarded that this sum be paid by defendants to the plaintiffs in respect thereof.

The arbitrator was examined at the trial and stated that, of the $1,376, the sum of $1,276 was for the unreasonable detention of plaintiff's logs, and the balance for their illegal detention under a claim of lien.

The question in the case arises upon the inclusion of the former sum. It is held by the Court of Appeal that the only consequence of a non-compliance with the provisions of sec. 3 of the Act is that the person injuriously affected may resort to the remedies given to him by the 4th and 5th sections and break the jam or obstruction at the ultimate expense of the neglecting or offending party.

Section 3, already cited, imposes upon persons using streams for the purpose of floating logs a positive obligation (apart from any concurrence or mutual act of others using the water) to take reasonable steps to prevent an accumulation of his logs from unnecessarily delaying or hindering other persons in like use of the water. Unless an intention to the contrary appears it would *primâ facie* follow that a legal right existed in one whose logs had been unnecessarily delayed or hindered to complain of breach of such obligation. It is said that the contrary intention appears in the provision of the next section (5), whereby "in case of the neglect of any person to comply with the provisions of the preceding section" it shall be lawful for such other person to break the jam himself, and charge the wrongdoer with the cost. But by section 17 (as we shall presently see) the like phraseology is employed to describe a ground of complaint giving a right to an arbitration under the Act:

> The person claiming that another person *had not complied with the provisions of this Act* * * * shall give to such other person notice

in writing stating the substance of the claims made and appointing an arbitrator, &c.

Sec. 16 declares that all claims, disputes, and differences arising under the Act shall be determined by arbitration, and not by action.

A claim that a person has not complied with the provisions of the Act is a claim, dispute or difference arising under the Act within the meaning of sec. 16, because by sec. 17 this is explicitly and in terms made a ground for instituting arbitration proceedings.

Four classes of claims are specified in sec. 17, as furnishing ground for instituting proceedings in arbitration. (1) That of a person claiming that another person has not complied with the provisions of the Act; (2) That of a person claiming payment of any charges or expenses under the Act; (3) That of a person claiming a lien upon any logs; (4) That of a person claiming damages under sec. 13.

Of these, the second and third are in support and enforcement of the rights deprived from the exercise of the special remedial provisions of secs. 4, 5, 7, 8, 10, 11. The fourth is the relief of the person against whom the special remedial provisions have been used, and is directed against the abuse of an assumed authority under the Act, or its irregular exercise.

The second, third and fourth mentioned claims substantially cover all matters arising out of the exercise of the special powers, and the first mentioned claim, viz.: "That another person has not complied with the provisions of the Act" is fairly to be held to refer to a non-compliance separate from the special remedial provisions. The most sensible and simplest construction is that they relate, at least, to non-compliance with the direct and positive obligation which is imposed, or declared, by section 3.

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The Court of Appeal was of opinion that from the fact that the right to recover damages is mentioned in sec. 13, and not mentioned in terms in sec. 3, it may reasonably be inferred that the intention of the Legislature was that the penalty for default should be solely the breaking of the jam at the cost of the person whose logs formed it.

But it does not seem reasonable thus to infer that what would obviously, under some circumstances likely to happen, be no adequate remedy, or no remedy at all, is to be assumed as intended by the Legislature to be the only remedy. The judgment appealed from gives no satisfactory meaning to the first clause of sec. 17.

As to the form of the notice, the substance being within the scope of the Act, it is sufficient if the parties have not been misled by any defect of form. This is not alleged, and that they have not been misled is manifest from what took place before the arbitrator where both parties were represented by counsel. Both parties in their notices used the word detention as applicable, amongst other things, to a state of holding back or necessary delay occasioned by obstruction.

In the views here expressed the judgment of the Court of Appeal should be reversed and the original judgment of Mr. Justice Rose restored.

GIROUARD J. also concurred in the opinions of GWYNNE and KING JJ.

Appeal allowed with costs.

Solicitors for the appellants: *Dunn & Boultbee.*

Solicitors for the respondent: *Barwick, Aylesworth & Wright.*