

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Caldwell and another v. McLaren from the
Supreme Court of Canada, delivered 7th April
1884.*

Present :

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

In this case the now Respondent, as Plaintiff, filed in the Court of Chancery, Ontario, on the 4th May 1880, a bill of complaint, and Appellants, as Defendants, filed an answer on the 11th August 1880. Issues of fact were raised, and evidence was heard at great length before Vice-Chancellor Proudfoot, who, on the 16th December 1880, pronounced this judgement:—

“1. This Court doth declare 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, described in the said bill, when in a state of nature were not navigable or floatable for saw logs and other timber rafts and crafts down the same, and doth order and decree the same accordingly.

“2. And this Court doth further declare that the Plaintiff is entitled to the user of those portions of the said streams where they pass and flow through the lands of the Plaintiff in the said bill of complaint described, and to the improvements thereon, freed from the interruption, molestation, or interference of the Defendants or either of them, or their or either of their servants, workmen, or agents, and doth further declare that the Defendants have no right to the user of such parts of the said streams for the purpose of driving timber and saw logs, and doth order and decree the same accordingly.

“3. And this Court doth further order and decree that a writ of injunction be awarded to the Plaintiff, perpetually restraining the Defendants, their servants, workmen, and agents, from interfering with the Plaintiff's user of the said streams where they pass through the lands of the Plaintiff, described in the said bill, and of the improvements erected on the said streams, and restraining the Defendants from using such parts of the said streams and the said improvements for the purpose of driving their timber and saw logs.”

This decree was brought by appeal before the Court of Appeal of Ontario, and, on the 8th July 1881,—

“It was ordered and adjudged by the said Court that the said appeal should be, and the same was allowed without costs; and that the bill of complaint of the said Peter McLaren, in the Court below, be, and the same is hereby dismissed without costs, except in so far as the costs of the Appellants (the Defendants in the Court below) have been increased by reason of the motion for an interlocutory injunction, and except their costs of appeal to this Court from the order granting such interlocutory injunction, and as to such excess and costs of appeal, the same are to be paid by the Respondent to the Appellants forthwith, after taxation thereof.”

This order was brought by appeal before the Supreme Court of Canada, and on the 28th November 1882 it was ordered by that Court—

“That the said appeal should be and the same was allowed, that the said order of the Court of Appeal for Ontario should be and the same was reversed, and that the decree of the Court of Chancery of Ontario, dated the sixteenth day of December 1880, should be and the same was affirmed.

“And this Court did further order and adjudge that the said Respondents should pay to the said Appellant the costs incurred by the said Appellant, as well in the said Court of Appeal for Ontario as in this Court.”

It is from this last order that the present appeal is brought.

There are some things not now in controversy, which it is better to state before examining the allegations in the bill and answer.

The waters which drain from a considerable tract in Upper Canada collect so as to form a river called the Mississippi, which flows down to and into the river Ottawa. There is no contro-

versy as to the Mississippi below a point in the township of Dalhousie called High Falls.

The lie of the country above that point is shown by a map (Exhibit G) prepared by the Plaintiff below (now Respondent), and adopted and used on the argument here by the Appellants (Defendants below).

The waters which flow over High Falls have their origin in a district of considerable dimensions, now divided into several townships. The upper part of this district does not appear to be very steep, though on some of the creeks in it there appear to be rapids. The creeks, at places widening into lakes, finally converge into Cross Lake, in the township of Palmerston. Thence the waters flow in what must be a considerable body of water down a steep and rocky country; and this continues to be the character of the country for some miles. The body of water flowing down this passes over a succession of rapids and waterfalls. The waterfall which is lowest down is High Falls; below that there is no controversy that the Mississippi is floatable.

All this country was till within the last forty or fifty years in a state of nature, and belonged to the Crown. It was covered with timber, and the waters flowed as the force of gravity directed them.

And now it is convenient to examine the allegations in the bill and answer.

The bill of complaint of the Plaintiff was filed on the 4th May 1880 in the Court of Chancery, Ontario. It states that the Plaintiff is a timber dealer having his principal saw mill at Carleton Place, a village on the Mississippi, a considerable distance down below High Falls. The Defendants also are timber dealers, having their principal saw mill also at Carleton Place.

Both the Plaintiff and the Defendant have

taken from the Crown growing timber on the lands which form the upper townships, the waters from which flow over High Falls.

The bill states that the Plaintiff is owner in fee simple of several lots of land. He derives his title from grants by the Crown, some to himself and some to persons from whom he claims by mesne conveyances.

The dates of those grants are all given in the bill; the earliest grant in point of date is one of the 3rd of August 1853 to one Skead, of lands at High falls, and the latest in date is one of 18th September 1879, to the Plaintiff himself, of lands on one of the creeks above Cross Lake. It is not unimportant to remark that all the grants under which the Plaintiff claims are subsequent in date to the Act of 1849.

The bill then contains these statements :—

“ 8. The Plaintiff is also the owner of large tracts of timber land in the aforesaid townships and along the banks and in the vicinity of the said streams, and he has for many years past been using, and is now using, and expects for many years to come, and until the timber on the said land so owned by the Plaintiff has become exhausted, to continue to use the said streams for the purpose of driving or floating down his timber and logs to his mill at Carleton Place aforesaid.

“ 9. The said streams were not navigable streams nor floatable for logs and timber during the time the said lands were vested in the Crown, nor until after the time when the improvements herein-after referred to were made on the said streams, and when they were in their natural and unimproved state the said streams would not, even during the freshets, permit of saw logs or timber being floated down the same, but on the contrary, were quite useless for that purpose.

“ 10. The Plaintiff is entitled, both as riparian proprietor and as owner in fee simple of the bed of the said streams, where they pass and flow through the said lots, respectively, to the absolute, exclusive, and uninterrupted user of the said streams for all purposes not forbidden by law, and amongst other purposes to the absolute and exclusive right to the user of the same for the purpose of floating or driving saw logs and timber down the same.

“ 11. The Plaintiff has for many years been engaged in the business of lumbering in the said county of Lanark, and at other places throughout this province, and more particularly in the timber region along the banks and in the vicinity of the

said streams ; and in order to get to his mill at Carleton Place aforesaid, and to market the timber and saw logs cut in that region, the Plaintiff and various other persons and firms, the whole of whose rights and interests therein and thereto have been acquired by purchase by the Plaintiff, have expended a large amount of money, to wit, not less than one hundred and fifty thousand dollars, not only where the said streams run and flow through the lots above described, but at various other parts thereof, over a length of about fifteen miles on the said 'Buckshot Creek,' and a length of about fifty miles on the said 'Louse Creek,' and main branch of the 'Mississippi,' in improving the said streams, by deepening the same by clearing out therefrom stumps, trees, and *débris* of all kinds, by erecting dams, slides, and other erections and improvements wherever necessary on the said streams, and occasioned by the existence of rapids, falls, and shallows in the course thereof; and by reason of such expenditure the said streams have become navigable for saw logs and timber which, with the aid of such dams, slides, and other erections, may now be floated down the said streams during the time of freshets, which occur chiefly in the spring of the year.

" 12. On the various parts of the said streams which run and flow through the said lands herein-before described, the Plaintiff and those through whom he claims the said lands, have expended a large amount of money in making certain specific and very valuable improvements, that is to say :"—

(The description of the improvement at High Falls may serve as a sample) :—

" On the said parcel of land, being the front half of lot number fourteen in the first concession of the township of Sherbrooke North, the Plaintiff, and those through whom he claims the said parcel of land, at a place called 'High Falls,' a portion of the said Mississippi River, which runs through the said lot, having erected a dam across the said Mississippi, where there is a fall of about seventy feet from an island in the centre of the said stream to the south shore thereof, and also a dam between the said island and the north shore thereof, and the said Plaintiff, or those through whom he claims, that is to say, the said Skead and Gilmour, or one of them, has formed an artificial stream, consisting of a cutting through rock and earth, and a slide connecting the lake or pond above the said High Falls, on an extension of the said Mississippi River, with the lake or pond below the said falls, which said cutting also passes through the afore-mentioned lot in the township of Dalhousie, the effect of the building of the said dams at the entrance of the 'High Falls' being to raise the level of the waters in the said pond or lake above the same, and to form a stream in the said cutting or artificial stream as aforesaid made through the said lot fourteen and the said lot in Dalhousie, and thus rendering the same capable of floating saw logs and timber down the same.

" 31. The Defendants being engaged in their business as hereinbefore alleged, have recently got out of the woods in the said township of Abinger a large quantity of saw logs, to wit, about nine thousand saw logs, the whole of which is now lying in or being driven by the Defendants down the said Buckshot Creek, and they commenced to enter the said improvements on Buckshot Creek on the twenty-seventh day of April one thousand eight hundred and eighty, and they have taken them over the improvements herein-before particularly referred to, and made as aforesaid on lot one in the third concession of Abinger aforesaid, and they are now driving them down the said Buckshot Creek with the intention of taking, and they threaten and intend to take, them over the other herein-before described improvements made as aforesaid on the said Buckshot Creek, and down through the main branch of the said Mississippi, and will do so unless restrained by the order and injunction of this Honourable Court.

" 32. The Defendants are also taking a quantity of saw logs, about ten thousand in number, down the said Louse Creek, and through the said lands belonging to the Plaintiff in the township of Denbigh, and thence down the said stream, and to do this the Defendants threaten and intend to avail themselves, and unless restrained by this Honourable Court they will avail themselves, of the said improvements made by the Plaintiff and those under whom he claims, and, in so floating and running the said timber and saw logs down the three said streams, the Defendants are interfering with and obstructing the Plaintiff and his employés in floating and running down the Plaintiff's timber and saw logs, to the great damage and injury of the Plaintiff, and to the damage and injury of the said improvements.

" 33. The Defendants, in so floating and running their timber and saw logs down the said streams, are wrongfully and forcibly, and without right or colour of right, making use of the improvements made by the Plaintiff and those under whom he claims, and to which, for the reason aforesaid, the Plaintiff is entitled to the exclusive and uninterrupted user. . . .

" 37. The Plaintiff further shows that the Defendants have made use of the said streams and the improvements thereon without any authority or license from the Plaintiff, and well knowing, as the facts are, that the Plaintiff was the owner of such improvements, and that owing to the said improvements, all of which have been made by the said Plaintiff or those through whom he claims, the said streams had become useful for the purpose of floating down saw logs and timber, and that before the said improvements were made, and when the streams were in a state of nature, they would not permit of timber and saw logs being floated down the same even during freshets, yet the Defendants have never paid to the Plaintiff any compensation for the user of the said streams and improvements, and the Plaintiff submits that the Defendants are liable to pay him compensation therefor, and that this Honourable Court

should direct an account to be taken of the amount of compensation which the Defendants should pay, and that the Defendants should be ordered to pay the same to Plaintiffs when so ascertained."

The following are the more material parts of Defendants' answer:—

"We are the owners of certain timber limits situated in the townships of Abinger and Denbigh, in the county of Ad-dington, for the purchase of which we paid a very large sum of money.

"The said limits were originally the property of the Crown, and were sold by the Crown Lands Department to one Skead, and we claim title thereto through the said purchaser from the Department.

"Our object in purchasing the said limits was to obtain a supply of timber and saw logs for our mills at Carleton Place, and we would not have purchased and paid the price we did for them for any other purpose or object.

"Timber and saw logs, cut and manufactured upon the said limits, can only be brought to our saw mill by means of the Mississippi River, and Buckshot and Louse Creeks, mentioned in the Plaintiff's bill, form the only outlets by which the said timber and saw logs from our said limits can be carried to the said Mississippi River.

"We deny the allegations contained in the 9th and 10th paragraphs of the said bill, and, on the contrary, we say that we are informed and believe, and charge the fact to be, that the said Mississippi River and Buckshot and Louse Creeks are all streams which are navigable or floatable for timber and saw logs within the meaning of the statutes in that behalf, and we claim the benefit of the said statutes.

"We deny that the alleged improvements upon the said streams, claimed by the Plaintiff, confer upon him the rights he claims against us by his said bill, but we have nevertheless been always ready and willing, and before the commencement of the suit we offered the Plaintiff, to pay him any proper sum for the use of any of said improvements, or any loss or damage that he might fairly claim to be put to by reason of the passage of our said timber and logs over the said improvements, and we offered to submit the question of the amount we should pay to arbitration, but the Plaintiff would not accede to any of our offers."

Strong, J., begins his judgment by saying:—

"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 saw logs 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 favour. 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.”

To this their Lordships agree. The Respondent cannot now contend that timber could be practically floated down those portions of the streams whilst in a state of nature, though not so well or so profitably as after the improvements were made; but the Vice-Chancellor cannot be understood to find that it was impossible to float any timber at all, over High Falls, for instance. In an affidavit used by the Plaintiff for the purpose of obtaining an interim injunction, Mr. T. Skead says :—

“I purchased High Falls in the thirtieth paragraph of the bill referred to from the Plaintiff's father, and built the dam and slides there; and about the year of our Lord eighteen hundred and forty nine I took John Allan Snow, a surveyor, with me and surveyed the whole line of the river from High Falls to Cross Lake, and he and I then drew a plan of the improvements which we thought necessary to make the river navigable and floatable for timber and saw logs, which said improvements were substantially carried out by Messrs. Gilmour & Co., who purchased from me the lands and limits bordering on this portion of the said Mississippi.

“Before the improvements at High Falls, a Mr. Playfair, during the highest freshets, used to run a few hundred logs over the falls, but they were so injured and damaged in their transit thereover, that he told me he would have to give it up. I had not made the slide herein-before referred to.”

The finding of the Vice-Chancellor must be

understood as meaning only that in a commercial sense it could not be done ; the timber being so difficult to guide over the falls and so liable to be injured that no one could profitably do it, and consequently no one would do it. And it must be taken, as admitted, that at many places above High Falls and for considerable distances, timber could be floated along the streams. Obviously this must have been the case wherever the streams expanded into lakes.

So understanding the finding, the question, which though raised as to many places may most conveniently be dealt with as if it related to one only, seems to be this.

The waters have formed a stream or river, which for many miles is capable of floating logs and timber, at least during the freshets, down towards a market, but at a part of it where the soil on both sides of the stream belongs to the Plaintiff, there is a natural obstacle such as a rapid and waterfall which renders it impracticable in any commercial sense to float timber down the stream at that part.

The Plaintiff, or those through whom he claims, have made improvements, consisting substantially of dams above the waterfall to keep the waters back so as to make the rapid deeper and slower, and made slides over the top of the dam and down to below the falls, so that timber can by means of those slides be carried safely over the waterfall. The Defendant proposes to bring his timber from the part of the stream above the obstacle by means of these improvements. He does not claim to do this by any common law right, but by virtue of certain statutes of Upper Canada. And it cannot be disputed that the Legislature had full power to confer such a right ; whether they have done so or not must depend on the construction of the statutes.

The Defendant has always been ready and willing to pay for the use of the improvements; this is obviously fair and just, but it is not pretended that the statutes provide in terms that if he uses such improvements he shall pay for them. Had either of them done so, the intention of the Legislature to authorize him to pass over the obstacle by means of the improvements would have been quite clear. The absence of any such provision is strongly relied on as showing that the Legislature did not so intend.

The Plaintiff relies on his common law right, as owner of the soil, to prevent any one from using his soil in any way which he does not choose to allow, unless by statute that right is abridged, as it may be.

There has been a considerable diversity of opinion amongst the Judges in the Courts below. Their Lordships have perused their opinions with much advantage, and have with great care considered the reasons of those from whom they differ. In the result they come to the conclusion that the judgement of the Court of Appeal for Ontario is right and should be restored.

They think that there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is, *primâ facie* at least, owner of the soil which forms the bed of the stream, and as owner of this land covered by water, has all the rights of a landowner. But this is subject to all rights of the owners above him to have the water flow away from their land, and to all rights of the owners below him to have the flow come down to them as it was wont. It is also subject to any rights which the public have over it.

One of the practically most important rights of the owner of a portion of the soil of the river is the right to use the water for a mill, and in order to so, or indeed for any other lawful

purpose, to erect a dam on it. The public may have rights to navigate the stream, and whenever such a right exists the right of the millowner and the right of the public come into conflict. They may co-exist, but when they do one or other must be modified.

The rights of the public to navigate a stream may be created either by prescription or by dedication by the owner of the soil within time of legal memory. And in an old settled country like England it could seldom be material to inquire further than as to those modes of creating such a right. But when the law of England was taken out to a new unsettled country, where prescription could not exist, and dedication could rarely exist till after the country was to some extent settled, it became important to inquire whether the principles of the common law did not give such a right independent of any user, wherever the stream was, in its nature, capable of being navigated. No question arises in the present case as to this right of navigation; and, at all events, up to a period later than 1849, it was a question of great doubt what the law of Upper Canada was on this subject. The right now claimed to use streams, not navigable for general purposes, to float down timber, was one which in England, if it existed at all, from the nature of the country, could not be important: it never came in question in any case of which we are aware. It was one which, in a new wild country overgrown with timber, might be very important, and it must have been a question of doubt what was the right.

The owner of the land covered with water over which a stream flows has the unquestioned right to erect a mill on it, if he does not thereby infringe on any right of the proprietors above or below him, or on the public rights. The doubts as to what was the extent of the public right over

such streams cast a doubt on the extent to which it was lawful to erect mill dams.

It is obvious that it was very desirable that, for the purposes of encouraging the development of the country, these doubts should, as soon as possible, be solved. And as the Legislature of Upper Canada had full power to enact what should be the law in that country, the real question is what did they enact?

The statutes of Upper Canada have been consolidated and afterwards revised; but the Acts under which this is done are merely consolidation and revision Acts, and do not alter the effect of those statutes which bear on this question. The first statute which it is necessary to notice is the Act of 25th March 1828.

After a preamble that it is found expedient and necessary to afford facility to the inhabitants of the province engaged in the timber trade in conveying their rafts to market (as well as to the ascent of fish) in various streams now obstructed by mill dams, it enacts that every occupier of "any mill dam which *is* or *may be* legally erected," where timber "is usually brought down the stream on which such dam is erected," shall, under a penalty, "construct and erect a good and sufficient apron to his dam. The 2nd section describes the kind of apron:—"Such apron shall not be less than eighteen feet wide, by an inclined plane of twenty-four feet eight inches to a perpendicular of six feet, and so in proportion to the height, where the width of the stream will admit of it, where such stream or dam is less than fifteen feet wide, the whole dam shall be aproned in like manner with the same inclined plane."

Without encumbering the case by considering any question relating to the fish the intention of the Legislature seems obvious. They contemplated that there might be mill dams

then or thereafter legally erected on streams down which lumber was usually brought. And without inquiring what were the conditions necessary to make such an erection legal, the Legislature, for the purpose of affording facility to those engaged in the lumber trade in conveying their rafts to market, impose a duty on the millowner to add to his mill an apron so as to let the rafts pass over it. This did, to some extent, impose on the owner of the dam, by supposition legally erected, the burthen without any compensation of building an apron; but it is clear that the Legislature did intend for the good of trade to impose that burthen on them. Probably it was not supposed to be very heavy. The Act, however, is in terms confined to those streams down which lumber was "usually" brought.

Several statutes were referred to on the arguments, which their Lordships think do not much affect the question.

Then comes the Act of 30th May 1849.

The preamble is, "Whereas 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" (obviously referring to the Act of 1828 already cited) "should be so constructed as to allow a sufficient draft of water to pass over such aprons as shall be adequate in the ordinary flow of the stream to permit saw logs and other timber to pass over the same without obstruction." This clearly indicates an intention to throw upon those who have dams "legally erected" upon streams a further burthen. The first section with the object contemplated by the preamble cast upon them without any compensation the duty to erect and maintain waste gates, brackets, and slush boards, so as to keep the depth sufficient to allow the passage of "such

“ saw logs, lumber, and timber as are usually floated down such streams,” with a proviso that “ no person shall be required to build aprons or slides on small streams unless required for the purposes of floating down lumber.”

The fifth section of this Act goes beyond the object mentioned in the preamble; it is, however, perfectly settled that though the preamble aids in the construction of an Act, effect is to be given to the intention of the Legislature if it sufficiently appears though it goes beyond the object of the preamble.

It is upon the construction of this fifth section that their Lordships think this case depends. In the Consolidated Statutes for Upper Canada, cap. 48, it is divided into two sections, Sects. 15 and 16, and the meaning is made rather clearer by transposing the position of the two provisos at the end of the section which are made into Sect. 16, but there is no alteration in the substance.

The fifth section is in the following terms:—

“ 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 stream as aforesaid.”

This enactment, it is to be observed, became law in 1849, and has not been altered since. In 1863, the case of *Boale v. Dickson* was decided in the Court of Common Pleas of Upper Canada. The question there was as to a claim for the use and occupation of a slide on the Indian River. The Court of Common Pleas thought that if the

slide was on a stream within the meaning of the enactment their Lordships are now considering, the Plaintiff must fail; whether, if the statute applies, this consequence would follow their Lordships need not stop to inquire. So thinking the Court of Common Pleas put a construction on the Act.

The Vice-Chancellor, in the present case, after the evidence was heard, said, addressing the Defendant's Counsel :—

“I think, Mr. Bethune, that you stated that if I considered myself bound by the authority of *Boale v. Dickson*, there was little use in arguing the case. It seems to me that I am bound by that case in this respect, that I ought to be bound by and respect the ruling of a Court of co-ordinate jurisdiction, though not in the same sense as I would be bound to follow a judgment of the Court of Appeal. If the interpretation placed upon it in *Boale v. Dickson* be the construction this statute is to bear in regard to improvements upon rivers and their floatability, I understand that case to determine that if any improvements are necessary to render streams floatable, the statute does not apply, that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. It therefore comes to be a question of evidence as to whether the streams mentioned here can be considered floatable without artificial aids.”

The Judges of the Court of Appeal for Ontario all agreed that Vice-Chancellor Proudfoot had correctly apprehended the construction put upon the statute by the Court in *Boale v. Dickson*, and that he could not properly disregard the decision of a Court of co-ordinate jurisdiction, but all four thought that construction wrong; Burton, J., though dissenting from his brothers, expressly saying :—

“I quite agree with them in their view of the doctrine laid down in *Boale v. Dickson*, and think there is nothing to warrant the qualified construction placed upon Sect. 15 of the 12th Vict., c. 87, by the learned Judge who delivered the judgment in that case; but I am unable to bring myself to the conclusion that the mere permission or the recognition of the right to float all streams during freshets, make the entire streams “*publici juris*,” although, in point of fact, many portions of it may be quite impassable, even in times of freshets, for the smallest description of timber or other article of merchandise.

The Judges in the Supreme Court thought that the construction put upon the statute in *Boale v. Dickson* was right, and the Chief Justice, Sir W. Ritchie, thought that, even if wrong, it ought to be maintained on the ground taken by Lord Ellenborough in *Doe and Otley v. Manning*, 9 East 71, that in questions of conveyancing it was important to adhere to decided cases even if convinced they were originally wrong. This doctrine has often been recognized. The maxim "*Communis error facit jus*" is peculiarly applicable to conveyancing questions. But this is not a question of conveyancing, and their Lordships do not think that there is any ground for saying that *Boale v. Dickson*, if wrong, should be followed.

And their Lordships agree with the Judges in the Court of Appeal for Ontario in thinking that there is nothing to justify any Court in construing the words "all streams" as meaning such streams only as are at all places floatable. They do not think that every little rill, not capable of floating even a bullrush, is a stream within the meaning of the Act. But when once it is shown that there is a sufficient body of water above and below the spot where the natural impediment exists, though that natural impediment renders the stream at that spot practically unfloatable, it does not make it cease to be a part of the stream in the ordinary sense of the words.

It has been argued that though this might have been the natural meaning of the words, if the enactment had been "that it should be lawful to float saw timber rafts and craft down all streams in Upper Canada at all seasons," that the Legislature here confined the enactment to making it lawful "during the spring, summer, and autumn freshets." And that, it is argued, shows an intention to cut down the large words "all streams." Their Lordships do not assent

to this argument. Probably the Legislature confined the enactment to the seasons during which lumberers ordinarily ply their trade, thinking it better to leave the rights of all parties at all other seasons untouched. Whatever was their motive it seems clear, on the construction of the enactment, that if a lumberer claims a right at any other period than during the freshets to float timber along a portion of a stream, he must rest his claim on something else than this enactment. It is not, however, an objection to his right under this enactment to float during freshets, that he may on the same part of the stream be entitled, on other grounds, to float at all times.

Their Lordships do not think that the limitation of the right in the stream to one period of the year prevents that from being a part of the stream which would otherwise, in the ordinary use of language, be a part of the stream, even if the existence of an impediment there makes it not practically available for the purposes of the lumberer even in freshets. The Respondent's construction of the enactment seems to them to require the introduction by implication of some such words as these, "except on such parts of the streams as are, owing to the presence of an impediment such as a waterfall, not practically available for the purposes of floating timber, until some improvements are made."

There does not seem to their Lordships to be any sufficient reason for implying this or any similar qualification.

It is quite true that it is not to be presumed that the Legislature interfere with any man's private property without compensation. But if the whole stream is floatable during the freshets it cannot be doubted that the Legislature did mean, with the object of affording facility to lumberers to carry their timber to market, to

say that they should have the right to float down the stream at these seasons without obstruction by the owners of the bed of the river without paying them anything. If, as seems to be the opinion of Burton, J., the principles of the common law could be worked out so as to give this right, at any rate the Legislature in 1849 did not know this, or mean to declare it. Without declaring what the law then was, they enacted that "from this time, 1849, forward the law shall be as we now enact."

It is, however, quite true that no power is given by the statute to make practically floatable spots which are not so in their natural state, and that the Legislature, who must be taken to know that such streams as this Upper Mississippi were likely to exist in the unimproved parts of the country, must have contemplated that, before the right they gave became practically useful, something must be done which would be a trespass if done without the authority of the owner of the soil.

There does not seem to be any great difficulty in holding that, if all that was done was to remove some existing obstruction, as by blowing up a rock which impeded the passage, and thus putting the bed of the stream into the state in which it would have been if the rock had never existed, a right to float timber down that spot might be exercised, even though the blowing up the rock could not be justified against the owner of it. There is more difficulty in dealing with the case of a dam maintained by or with the assent of the owner of the soil for the purpose of making the part of the stream practically floatable, which was not so in its natural state. There is certainly no obligation on the person who makes and maintains such a dam to continue to maintain it; if he ceases to do so it becomes useless, and can only, if at all, be made

useful by forming a joint stock company for the purpose of doing so; and, if the Court of Common Pleas in *Boale v. Dickson* were right in thinking that, if the statute applies, a promise to pay slidage for the use and occupation of such works, in consideration that the Plaintiff would allow the Defendant to use them, could not be enforced, the Legislature have improvidently reduced the inducement to make the stream at such a part practically floatable. But, though this may be so, the question remains whether the words of the Legislature do not express an intention that, when the part of the stream could be used, it should be lawful for all persons to use it.

It does not seem to their Lordships that the private right which the owner of this spot claims to monopolize all passage there is one which the Legislature were likely to regard with favour, and in the earlier legislation they had, without scruple, cast on the owners of dams "legally erected" the obligation, at their own expense, to make such dams passable for lumber; if the law was (contrary to what is laid down in *Boale v. Dickson*), that reasonable compensation should be payable for the use and occupation of works maintained for the purpose of rendering the portion of the stream practically useful for floating purposes, there would be no hardship at all; if the Legislature had inserted a provision that such should be the law, there could have been no doubt of their intention. They have not inserted such a provision; but, though that makes the case somewhat difficult, their Lordships do not think it enough to justify what seems to them a somewhat violent departure from the plain meaning of the words.

Their Lordships will therefore humbly advise Her Majesty that the judgement of the Supreme

Court should be reversed, and that of the Court of Appeal restored. They do not think there is any reason for departing from the general rule that the costs of the appeal should be borne by the unsuccessful party, the Respondents.
