

McLaren v Caldwell, (1881) 6 OAR 456

(CA)

Spragge, CJO —

[1] The plaintiff describes himself in his bill as a lumber merchant, timber dealer, sawmiller, and lumberman, and states that the defendant carries on the same branches of business. The bill enumerates some twelve parcels of land, of which it is stated that the plaintiff is owner; and it states that he is owner also of large tracts of timber. The bill goes on to allege that the streams flowing through his parcels of land were not navigable streams, “nor floatable for logs and timber,” while in the crown, nor until after the improvements set forth in the bill were made on the said streams by the plaintiff; and that in their natural and unimproved state they would not, even during freshets, permit of saw-logs or timber being floated down the same, but were useless for the purpose. And in the 10th paragraph the plaintiff thus states his rights: “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.” He then goes on to say that on various parts of the said streams which run and flow through lands therein described, the plaintiff and those through whom he claims have expended a large amount of money in making certain specific and very valuable improvements, which he sets out in a number of the subsequent paragraphs of the bill.

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

[3] Evidence was given at great length before Proudfoot, V. C. That learned Judge considered that he ought to follow the case of *Boale v. Dickson*, 13 C. P. 337, and stated that he understood that case to determine that if any improvements are necessary to render streams floatable, the statute G. S. II. C. ch. 48, does not apply—that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. Upon the evidence, he came to the conclusion that without the artificial means of which evidence was given, neither of the streams

upon which improvements had been made by the plaintiff could be considered floatable, even in freshets or high water.

[4] That was the issue upon which the evidence in the cause was given, and that was the proper issue if the construction placed upon the statute in *Boale v. Dickson* was the proper construction.

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

[6] It is obvious, from a perusal of the Acts, (which are consolidated in ch. 48 of the C. S. U. C.,) that it was the policy of the legislature to encourage the lumber trade of the province, and to preserve the fish in the streams. The Act of 1828, 9 Geo. IV. ch. 4, recites : “Whereas it is expedient and found necessary to afford facility to the inhabitants of this province engaged in the lumber trade in conveying their rafts to market, as well as for the ascent of fish, in various streams now obstructed by mill-dams.” Then follow two sections, which are embodied in section 3 of the Consolidated Act.

[7] The same policy is evidenced by 12 Vic. ch. 87, the 1st section of which supplies what may be taken to have been an omission in the Act of 1828, viz., that aprons or slides to mill-dams should be so constructed as to afford sufficient depth of water for the passage of saw-logs, lumber, and timber, a provision embodied in section 4 of the Consolidated Act.

[8] Then, in section 5 of the same Act, we find enacted what is embodied in sections 15 and 16 of the Consolidated Act. The first clause of section 5 is in the same terms as section 15, beginning thus,—“And be it enacted that it shall be lawful for all persons to float saw-logs,” (and so to the end of section 15) “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 any such stream, prevent the passage thereof.”

[9] In *Boale v. Dickson* the opinion is expressed, “that this right so given 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; to streams of a different class to those mentioned in the 3rd section, ‘down which lumber is usually brought.’ ”

[10] No such qualification of the right given by section 15 is to be found in the Act, nor in any of the previous Acts thereby consolidated. There is nothing in the context of any of these Acts shewing or tending to shew that such qualification was intended; and we know, from what we find in the evidence taken in this cause, that confining the right given by section 15 to such streams as are described in the passage I have quoted from *Boale, v. Dickson*, would go far to defeat the avowed policy of the Legislature. Evidence was offered that in none of the streams in the province, in their natural state, at the date of the passing of these

Acts, could saw-logs, timber, &c, be floated down without improvements, even during freshets. The evidence was stopped by the learned Vice-Chancellor upon the objection of the plaintiff's counsel after some evidence in that direction had been given. But from the evidence that was given in the cause, it is apparent that if section 15 is to be read with the qualification given to it by *Boale v. Dickson*, a very large number of the streams of the province would be excluded from its operation.

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