

McLaren v Caldwell, [1882] 8 SCR 435

Ritchie, CJ —

[1] 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.

[2] 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.

[3] 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.

[4] 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 continued until the 16th of December, on which day the Vice-Chancellor pronounced a decree in favour of the appellant.

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

[6] From this decision the plaintiff now appeals to this court.

[7] 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.

[8] 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?

[9] 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.

[10] The Act 12 Vic., cap. 87, is entitled, "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, entitled '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.'"

[11] 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.

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 c. 87, remained in force until 1859, when it was repealed by Consolidated Statutes of Upper Canada, at page 462.

[13] 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 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.

[14] 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.

[15] 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?

[16] 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.

[17] 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 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.

[18] 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.

[19] 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.

[20] 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 neighbour; 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.

[21] 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, 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.

[22] 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.

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