1960
*Nov. 28, 29, 30
Dec. 1

1961
May 15

THE UPPER OTTAWA IMPROVEMENT COMPANY, CANADIAN INTERNATIONAL PAPER COMPANY, CONSOLIDATED PAPER CORPORATION LTD., THE E. B. EDDY COMPANY and GILLIES BROS. & CO. LTD. (*Plaintiffs*) APPELLANTS;

AND

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Water and watercourses—Log-driving—Construction of dams by riparian owner—Velocity of natural current altered—Necessity to tow logs—Rights of log-owners.

The plaintiff company was engaged in driving logs and timber down the Ottawa river, which, in the area concerned, forms the dividing line between the Provinces of Ontario and Quebec. The defendant commission, a body corporate engaged in the production and distribution of electrical energy in Ontario, was enabled under an interprovincial agreement to utilize the water power of the river by the erection of dams at certain sites. Under the agreement the defendant acquired rights to the relevant portions of the river-bed and adjacent lands. Paragraph 44 of the agreement reserved the lawful rights of timber owners or others to drive their logs down the river.

As a result of the closing of the dams the flow of the river was so altered that the plaintiff was obliged to tow the logs which formerly floated freely in the current. The plaintiff's action for damages was dismissed at trial and this judgment was affirmed by the Court of Appeal. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Locke, Fauteux, Abbott and Judson JJ.: It was a common law right of a riparian owner in Upper Canada and in Ontario since 1792 to dam the waters of a stream or river flowing through or past his lands for the purpose of using the water power, subject to the condition that he should not interfere with the rights of other proprietors, either above or below him. *Wright v. Howard* (1823), 1 Sim. & St. 190; *Mason v. Hill* (1832), 3 B. & Ad. 304; *Embrey v. Owen* (1851), 6 Exch. 353; *Miner v. Gilmour* (1859), 12 Moo. P.C.C. 131; *Chasemore v. Richards* (1859), 7 H.L. Cas. 349, referred to.

The right of lumbermen to float or drive their logs past dams lawfully erected in the province was one given by statute, c. 4 of 1828. This Act and subsequent statutes which gave and now give that right recognized the common law right of the riparian owner. *McLaren v. Caldwell* (1881), 6 O.A.R. 456, referred to.

The plaintiff's contention that the meaning to be attributed to the words "driving" in s. 26(4) of *The Lakes and Rivers Improvement Act* and "to drive" in para. 44 of the agreement is the floating or transmission

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

of logs and timber with the aid of the natural current was rejected. The legislature and the parties to the agreement intended nothing more than the perpetuation of the log-owners' former rights of passage.

There was nothing inconsistent with the exercise of riparian owner rights to their fullest extent by the defendant with the exercise by the plaintiff of the easement or right of passage for its timber to which it was entitled under *The Lakes and Rivers Improvement Act. Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Ward v. Town of Grenville* (1902), 32 S.C.R. 510; *Quyon Milling Co. v. E. B. Eddy Co.*, [1926] S.C.R. 194, applied.

The plaintiff's further contention that the right to drive its logs free in the current was made clear by para. 44 of the agreement was also rejected. The agreement clearly reserved to timber owners or others only such rights to drive their logs and timber down the Ottawa River as then existed. It did not purport to add to or implement such rights.

The issue as to whether the plaintiff's rights under the laws of Quebec differed from those in Ontario was not properly before this Court as this was an appeal from the Court of Appeal and the issue, not having been pleaded, was not considered by that Court.

Per Cartwright, Martland and Ritchie JJ.: The right of lumbermen in Ontario to use such rivers as the Ottawa for the transportation of their logs was recognized at common law as a part of the right of navigation on such rivers. Provincial legislation dealing with the rights of lumbermen driving logs and the rights of riparian owners to construct dams defined the manner in which the common law rights of each were to be exercised concurrently. In re *Provincial Fisheries* (1884), 9 App. Cas. 392; *North Shore Railway Co. v. Pion* (1889), 14 App. Cas. 612, referred to.

The rights of loggers were in no way greater than those of other members of the public. As they possessed no right of property in the water they had no rights as regards its flow, and so long as their right to pass their logs down the river was maintained in the manner provided by statute they had no cause of action against a riparian owner exercising his right to dam the river. *Ward v. The Township of Grenville* (1902), 32 S.C.R. 510; *Caldwell v. McLaren* (1884), 9 App. Cas. 392; *Orr Ewing v. Colquhoun* (1887), 2 App. Cas. 839, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Gale J. Appeal dismissed.

J. D. Arnup, Q.C., André Forget, Q.C., A. McN. Austin and *G. LeDain,* for the plaintiffs, appellants.

C. F. H. Carson, Q.C., John L. O'Brien, Q.C., L. R. McDonald, Q.C., Allan Findlay, Q.C., and *E. E. Saunders,* for the defendant, respondent.

The judgment of Kerwin C.J. and of Taschereau, Locke, Fauteux, Abbott and Judson JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which dismissed an appeal of the present appellants, the plaintiffs in the action, from the judgment of Gale J. at the trial dismissing the action.

[1] [1959] O.R. 473, 19 D.L.R. (2d) 111.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Locke J.

The Upper Ottawa Improvement Company was incorporated in the year 1859 and is engaged in the business of driving logs and timber down the Ottawa River from the head of Lake Temiskaming to the cities of Ottawa and Hull for such parties, including the other appellants, as may turn their logs and timber over to it for that purpose. The other appellants are the principal shareholders of that company and the services rendered by it are carried on at rates which approximate the cost of such services and, accordingly, any increase in such cost must in the main be borne by them. It will be convenient to refer to the Improvement Company hereinafter as the appellant.

The Ottawa River flows from Lake Temiskaming to the River St. Lawrence and forms the dividing line between the provinces of Ontario and Quebec in the area with which this case is concerned. The respondent commission is a body corporate engaged in the production and distribution of electrical energy in Ontario and its general operations are carried on pursuant to *The Power Commission Act,* R.S.O. 1950, c. 281, and predecessor statutes.

By an agreement dated January 2, 1943, made between His Majesty the King in the right of the Province of Ontario, His Majesty the King in the right of the Province of Quebec, the respondent and the Quebec Streams Commission, Quebec leased to the respondent certain tracts of land upon the Quebec side of the Ottawa River and the portions of the bed of the Ottawa River necessary to enable the respondent to utilize the water power of the river at La Cave, Des Joachims and Chenaux, with the right to enter upon, possess, occupy, use and enjoy such additional lands owned by the province as were necessary to enable the head water level of the dams to be raised to specified levels. The lands on the Quebec side of the river required for the purposes of the dams to be constructed and the approaches thereto were leased to the respondent for a term of 999 years. On its part the Province of Ontario granted rights in Ontario similar in their nature, to the Quebec Commission

for the purpose of the construction of two other power sites on the Ottawa River. Paragraph 44 of the agreement provided that:

> The granting of these presents shall not take away the lawful rights of timber owners or others to drive their logs or timber down the Ottawa River, not only within but also beyond the limits of the lands comprised in these presents.

The execution of this agreement, in so far as it referred to lands in Quebec, was authorized by c. 33 of the statutes of 1942 of that province and, by paragraph 6 of that statute, it was provided that:

> It shall be a condition of the leases contemplated under sections 1 and 2 that no third party claiming to have been injured by reason of any development contemplated by the said leases shall have any remedy by way of injunction or other process but by way of damages only.

In Ontario, by *The Ottawa River Water Powers Act, 1943,* being c. 21 of the statutes of that year, the agreement referred to, which had been executed, was ratified and confirmed and the respondent commission authorized to do all acts and things necessary to carry out its terms. The commission was further authorized by s. 3 to exercise in its own name, on behalf of His Majesty the King in the right of the Province of Ontario without the authority of the Lieutenant-Governor in Council, for the purposes of the said agreement all powers conferred upon it by *The Power Commission Act* and the provisions of *The Public Works Act* incorporated in *The Power Commission Act* by s. 21. The nature of the rights acquired by the respondent are described in an agreed statement of facts as follows:

> The Defendant at all material times was the owner, lessee, or licensee with a licence to develop waterpower, of all lands on which the dams at Des Joachims, Chenaux and Cave & Fourneaux were constructed and of all lands forming the bed of the said river above each of the said dams as far as the upstream limit of the pool formed by raising the water at each of the said dams and of all lands adjacent to the said river which were flooded as a result of closing the said dams, with certain exceptions which are not relevant to this action.

Section 11 of the statute read:

> No person claiming that he has been or may be injured by reason of any development contemplated by the said agreement shall have any remedy by way of injunction or other process but by way of damages only.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Locke J.

Part of that portion of the Ottawa River with which we are concerned was navigable and, accordingly, approval of the contemplated works under the *Navigable Waters Protection Act,* R.S.C. 1927, c. 140, was required and obtained. The works were also approved in the manner required by *The Lakes and Rivers Improvement Act,* R.S.O. 1950, c. 195 and predecessor statutes.

The dams at Chenaux and Des Joachims were closed in 1950 and the dam at La Cave in 1952. That at Des Joachims is approximately 130 ft. high, at La Cave approximately 100 ft. and at Chenaux 35 to 40 ft. The effect of the closing of the dams at La Cave and Des Joachims was to create large bodies of water above each dam in which there was virtually no current, where previously the logs had run freely in the river. The dam at Chenaux materially reduced the current in the river upstream for a distance of approximately 6 miles, though the logs still run freely at a reduced rate of speed. As a result, the appellant is obliged to tow its logs for almost the entire length of the ninety mile stretch of the river in question. Each of the dams is equipped with an apron or slide through which timber being brought downstream may be passed, and these have been approved as required by *The Lakes and Rivers Improvement Act* above mentioned.

It is the contention of the appellant that its costs of operation have been greatly increased by the necessity of towing logs which formerly floated freely in the current and that additional expenditures are required to enable it to carry on its operations: that, in common with all other persons who float or drive logs down the Ottawa River, it is entitled to the benefit of the natural current of the river and that the action of the respondent in depriving it of that right is actionable.

While the title to the bed of the river to midstream and the river's northerly banks between Lake Temiskaming and the city of Ottawa is in the Province of Quebec in the portion of the river flowing through that province, the pleadings treated the matter as if the laws of Ontario were alone to be considered in determining the issues and the case was argued either on that footing or on the assumption that there was no difference between the rights of the parties under the laws of Quebec and of Ontario at the trial and

in the Court of Appeal. When the appeal was brought before this Court, however, the appellant applied for leave to amend the statement of claim by pleading certain present and former provisions of the laws of the Province of Quebec and, while this application was refused, the appellant was given permission to file a supplementary factum dealing with the asserted rights of the appellant under the laws of Quebec and we have had the advantage of hearing argument in support of and against this contention.

It is convenient to deal with the matter by considering in the first instance the rights of the respective parties, both at common law and under the existing statutes in the Province of Ontario.

The right of a riparian owner to dam the waters of a stream or river flowing through or past his lands for the purpose of operating a mill has been since 1792, in my opinion, a common law right in Upper Canada and in the Province of Ontario. That right was subject to certain restrictions at common law and has been made subject to certain statutory restrictions to be hereinafter referred to.

In the Province of Ontario the laws of England, as they stood on the 15th of October 1792, except to the extent that they have been altered or modified by statute, are to be resorted to (R.S.O. 1950, c. 293).

From very early times the right of the riparian owner to utilize the current of such waters for the operation of a mill was recognized in England (see *Cox v. Matthews*[1], *Hebblethwaite v. Palmes*[2], Blackstone Commentaries, 1766, vol. 2, p. 14, Holdsworth History of English Law, vol. 7, p. 338).

In *Wright v. Howard*[3], Sir John Leach, V.C. said in part (p. 203):

> The right to the use of water rests on clear and settled principles. *Prima facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above.

[1] (1673), 1 Vent. 239. [2] (1685), 3 Mod. Rep. 48.
[3] (1823), 1 Sim. & St. 190.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Locke J.

This statement of the law was approved by Tenterden C.J. in *Mason v. Hill*[1].

In *Embrey v. Owen*[2], the head note reads in part:

> The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorized use of this common benefit that any action will lie.

Parke B., delivering the judgment of the Exchequer Chamber, quoted with approval what had been said in *Wright v. Howard* and *Mason v. Hill,* and said in part (p. 369):

> The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris,* not in the sense that it is a *bonum vacans,* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.
>
> This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; . . . but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

Baron Parke quoted with approval a statement of the law in Kent's Commentaries, where the learned author said that all that the law required of the party from or over whose lands the stream passes is that he should use the water in a reasonable manner and so as not to destroy or materially diminish or affect the application of the water by the proprietors above or below the stream and, accordingly, he must not shut the gates of his dams and detain the water unreasonably or let it off in unusual quantities, to the annoyance of his neighbour.

In *Miner v. Gilmour*[3], where the action concerned the respective rights of riparian owners on the Granby River in Quebec, Lord Kingsdown referred to the fact that it was the French law prevailing in Lower Canada which governed

[1] (1832), 3 B. & Ad. 304 at 311. [2] (1851), 6 Exch. 353.
[3] (1859), 12 Moo. P.C.C. 131, 14 E.R. 861.

the matter but said that it did not appear that, for the purposes of that case, any material distinction existed between the French and the English law. The judgment reads in part (p. 156):

> By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

In *Chasemore v. Richards*[1], the House of Lords approved the decisions in *Mason v. Hill, Wright v. Howard* and *Embrey v. Owen*. Lord Wensleydale said in part (p. 382):

> The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae,* belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour.
>
> The elaborate judgment of Lord Denman in the case of *Mason v. Hill* (5 Barn. and Ad. 1), in 1833, reviewed most prior judgments and authorities of importance up to that date, and fully established that proposition. But former authorities, and of a very early date when carefully considered, really left no room for doubt on this subject.

While in some of the earlier cases it is suggested that the right to utilize the flow of the stream or to construct a dam in the bed of the stream depended to some extent upon the ownership of the bed of the stream, in *Lyon v. Fishmongers' Co.*[2], Lord Cairns, referring with approval to what had been said by Lord Wensleydale in *Chasemore v. Richards,* said that the right to the use of the stream did not depend upon the ownership of the soil, but was a right of the riparian owner.

[1] (1859), 7 H.L. Cas. 349, 11 E.R. 140 [2] (1876), 1 App. Cas. 662.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Locke J.

The decisions after the year 1792, in my opinion, simply declare what was the common law of England prior to that date.

The statutes which were passed by the Province of Upper Canada, by the Province of Canada, and thereafter by the Province of Ontario, which have dealt with the respective rights of riparian owners of all constructed dams on the streams or rivers in the province and of lumbermen driving logs upon such waters, do not in terms, except to a very limited extent, declare the right of the riparian owner but, in certain respects, restrict the manner of its exercise.

The first of these Acts which requires examination is c. 4 of the statutes of 1828 passed by the Legislature of Upper Canada. The preamble recited that, whereas it was expedient and found necessary to afford facility to those 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 for the accommodation of those residing at a distance from the mouths thereof, from and after May 1, 1829, every owner or occupier of any mill-dam which is or may be legally erected or where lumber is usually brought down the stream on which such mill-dam is erected and where salmon or pickerel abound therein in this province, who shall neglect to construct or erect a good and sufficient apron to the dam shall be guilty of an offence. The dimensions of the apron to be constructed were prescribed.

This was followed by an Act of the Province of Canada, c. 87 of the statutes of 1849, which amended the statute of 1828. It was recited that it was necessary to declare that aprons to mill-dams which are now required by law to be built and maintained by the owners and occupiers thereof in Upper Canada should be so constructed as to allow a sufficient draught of water to pass over such aprons as shall be adequate for the ordinary flow of the streams to permit saw-logs and other lumber to pass over the same without obstruction. After imposing the duty on the owner or occupier of the mill-dam to maintain such an apron or slide, s. 1 read:

> Provided always, that every such owner or occupier of any such Dam may construct a Waste Gate or put up Brackets and Slash Boards in, upon and across any such Apron for the purpose of preventing any unnecessary waste of water therefrom, and to keep the same closed at all times when

no person or persons shall be ready and require to pass or float any Craft, Lumber or Saw Logs over any such Apron or Slide, but not until such Craft, Raft, Lumber or Saw Logs shall have gained the main Channel of the Stream.

This section not merely recognized, but authorized the damming of the waters except in the circumstances described.

Section 5 read:

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 Stream as aforesaid.

By c. 48 of the statutes of 1859 [consolidated] entitled *An Act Respecting Mills and Mill-Dams* which dealt, *inter alia,* with tolls payable to the owners of mills operated by water power, the owner or occupier of a mill-dam "legally erected on any stream down which stream lumber is usually brought" was required to maintain an apron of the nature described, and the provision for the construction of a waste-gate upon or across the apron for preventing any unnecessary waste of water therefrom and permission to keep the same closed when no person was ready to float any lumber or saw-logs over such apron or slide, contained in the Act of 1849 was repeated. By s. 15 the right declared by s. 5 of the Act of 1849 was given in an abbreviated form. Section 16 imposed upon those persons using such apron or slide, for the purpose of passing saw-logs and other timber, the duty to refrain from causing injury to such works.

After Confederation the same subject-matter was dealt with in 1877 in Ontario by R.S.O. c. 113, being *An Act Respecting Mills and Mill-Dams,* and by R.S.O. c. 115, *An Act Respecting Rivers and Streams.* The first of these statutes substantially repeated the provisions of the Act of 1859 as to the requirements of the apron or slide upon such dams, and permitting the closing of the waste-gate when no person was ready to float lumber or saw-logs over the dam.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Locke J.

The second statute provided that, so far as the Legislature of Ontario had authority to so enact, all persons may during the Spring, Summer and Autumn freshets float saw-logs and other timber down all streams and contained provisions imposing liability for any injury occasioned to such structure by timber floated down them. By s. 6 it was provided that the Act should not extend to the Ottawa or St. Lawrence Rivers.

By *An Act for protecting the Public interest in Rivers, Streams and Creeks,* being c. 17 of the statutes of 1884, the right to float and transmit saw-logs and other timber is restated and in s. 12 reference is made to "persons driving saw-logs other timber . . . down any such river, creek or stream."

The first of the statutes passed thereafter that requires consideration is R.S.O. 1914, c. 130 entitled *The Rivers and Streams Act.* This by s. 3 again declared the right of all persons to float and "transmit" timber, rafts and crafts down a river during the Spring, Summer and Autumn freshets, subject to the provisions of the Act. Section 17 authorized the Lieutenant-Governor in Council to make regulations as to the description and dimensions of aprons and slides on dams, and such other regulations as to the mode of constructing them and the provisions to be made for the passage of timber, rafts and crafts as might be deemed necessary. Section 18 required all dams theretofore or thereafter erected upon any river down which timber is usually floated to be provided with a slide or apron, and s. 19 declared that, unless otherwise provided by the regulations, such apron shall be of the nature described. Section 21 substantially repeated the provisions of the Act of 1859 permitting the owner or occupier of a dam to keep the waste-gate closed when it was unnecessary to permit the passage of timber. Section 27 declared that where a dam or other structure for the development of a water power has been or should thereafter be constructed the Lieutenant-Governor in Council may make such regulations as he may deem expedient respecting the use of the river or the waters of it.

The last mentioned statute was amended by c. 15 of the statutes of 1915 which declared that the Lieutenant-Governor in Council might by proclamation declare that any river, stream or creek to which *The Rivers and Streams*

Act applied, should be subject to the Act and under the jurisdiction and control of the Minister of Lands, Forests and Mines. Section 4 provided that no person shall erect a dam, weir or other structure or work upon any river brought under the Act, except with the permission of the Minister and subject to such terms and conditions as he may see fit to impose:

for the efficient and proper user of such river as between the persons having a right to use the river or any works or other improvements thereon for lumbering, power or other purposes.

The statute in force at the time the construction of the works in question in this action was undertaken was *The Lakes and Rivers Improvement Act,* R.S.O. 1937, c. 45. That statute appeared as R.S.O. 1950, c. 195.

Section 9 of c. 195 provided in more detail for the obtaining of the approval of the Lieutenant-Governor in Council to the construction of a dam in any lake or river and s. 10 specified that such approval should be obtained for any improvements to any existing dam. Section 17 provided that where a dam or other structure for the development of a water power on any river down which any timber is floated has been heretofore or shall hereafter be constructed, the Minister may make such order as he deems expedient respecting the use of the river or the waters thereof by, *inter alia,* persons using the river for the purpose of floating timber. Sections 20 and 21 require the maintenance of slides or aprons in dams theretofore or thereafter constructed and require that they shall afford sufficient depth of water to admit the passage of such timber as is usually floated down the lake or river on which the dam is constructed. Section 26(1) declared the public right of all persons to float timber down all lakes and rivers. Subsection (4) provides that persons "driving" timber down a lake or river have the right to go along the banks to assist in "floating" it.

While there have been various other statutes enacted since 1828 dealing with the manner in which logs may be floated or driven upon rivers and streams in Ontario, I find nothing in their provisions which affects the matter to be considered.

It appears to me to be implicit in the terms of the statute of 1828 that the common law right of riparian owners to dam streams or rivers flowing through or past their lands for the purpose of utilizing the water power was recognized

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Locke J.

and the subsequent legislation to which I have referred up to the year 1915 merely regulated the manner in which that right was to be exercised for the protection of those persons desiring to obtain passage for their timber. From that date up to the present time that right can be exercised only with the permission and upon terms to be prescribed by the Minister of Lands, Forests and Mines and, in the present case, that permission was given. The right to close such dams when it was unnecessary to open them to allow passage of timber was in terms recognized by s. 1 of the statute of 1849 and by s. 1 of the statutes of 1859 and 1877. The erection of any dam in a river or stream of sufficient height to obstruct its flow must, of necessity, lessen the strength of the current, and so the log-drives of lumbermen upon such streams in Ontario during the last century must have been to a greater or lesser extent impeded by dams erected for the operation of lumber, grist or other mills from the time such operations were carried on in Upper Canada and Ontario. While we have been referred to many authorities in which there has been conflict between lumbermen and riparian owners who have exercised their right to dam streams or rivers in the province, in none of them has the question been raised as to the loss sustained by such drives being delayed. That is, no doubt, due to the fact, as disclosed by the evidence, that the first large installation of dams for the purpose of generating electrical energy in Ontario was at or about the commencement of the present century. These works, of necessity, affect the flow of rivers in which they are constructed for very much greater distances than was the case of the dams erected for the purposes I have mentioned.

If the common law right of the riparian owners to utilize the force of the river for the purpose of generating energy has been taken away, it must be the case that this has been done either impliedly by the rights given to lumbermen by the statutes to which I have referred or, as it is contended, by the terms of the agreement of January 2, 1943, or by the statutes authorizing and confirming the making of that agreement. There is no evidence in the case as to the existence of a custom permitting lumbermen to float or drive their logs past dams lawfully erected upon streams or rivers in Upper Canada prior to the year 1828. The statute passed

that year recognized the necessity of permitting this to be done and imposed an obligation on the owners of mill-dams legally erected to provide a good and sufficient apron to the dam to permit such passage. I agree with the opinion of Patterson J.A. in *McLaren v. Caldwell*[1], that the right is one that has been given by statute and the statutes which gave and now give that right are those in which the common law right of the riparian owner is recognized.

The statute of 1828 recites that it is expedient to afford facility to lumbermen in conveying their rafts to market to provide means whereby they may pass dams upon the stream. The statute of 1849 speaks of allowing a sufficient draught of water to pass over the aprons to permit saw-logs and other lumber to pass over the same and requires that the aprons afford a depth of water sufficient to admit the passage of such logs as are usually floated down such streams, and the section which declares for the first time in express terms the right of the log-owners reads that it shall be lawful for them to float the logs down all streams in Upper Canada. The same language is employed in s. 15 of the Act of 1859 and in s. 1 of c. 115 of the statutes of 1877.

The word "driving" first appeared in the statute of 1884, s. 12 of which read:

> All persons driving saw-logs or other timber, rafts or crafts, down any such river, creek or stream shall have the right to go along the banks of any such river, creek or stream, and to assist the passage of the timber over the same by all means usual amongst lumbermen, doing no unnecessary damage to the banks of the said river, creek or stream.

In subsection 4 of s. 26 of the Act of 1950 which deals with the same subject-matter the language is:

> all persons driving timber down a lake or river shall have the right to go along the banks of the lake or river for the purpose of assisting, and to assist the floating of the timber by all means usual with lumbermen doing no unnecessary damage to the banks of the river.

As I have pointed out, para. 44 of the agreement uses the expression

> the lawful rights of timber owners or others to drive their logs or timber down the Ottawa River.

It is contended by the appellant that the meaning to be attributed to the words "driving" in the statute and "to

[1] (1881), 6 O.A.R. 456 at 476.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Locke J.

drive" in para. 44 of the agreement is the floating or transmission of logs and timber with the aid of the natural current. Evidence was given without objection by both parties as to the meaning the expression "drive" or "driving" bore in the timber trade along the Ottawa River. To some of the witnesses the expression "to drive" meant allowing the logs to flow freely down the current without "pushing them or forcing them down". To others, the word "drive" meant, as a noun, a body of logs in the process of being floated, and "to drive" the floating of logs or permitting them to run free with the current. I do not think this evidence is of any assistance in interpreting these expressions. While the language of the 1884 section refers to driving timber down a river or stream, the 1950 section includes driving timber down a lake where, admittedly, there is either no or no appreciable current. The contention was carefully considered by the learned trial judge and led him to the conclusion that the parties to the agreement and the legislature intended nothing more than the perpetuation of the log-owners' former rights of passage. With this I agree.

In *Orr Ewing v. Colquhoun*[1] Lord Blackburn said in part (p. 854):

> Now the public who have acquired by user a right of way on land, or a right of navigation on an inland water, have no right of property. They have a right to pass as fully and freely, and as safely as they have been wont to do, but unless there is a present interference with that right, or it can be shewn that what is now done will necessarily produce effects which will interfere with that right, there is no *injuria*, and I think that if there be no *injuria*, the foundation of the right to have the thing removed, fails.

In *Ward v. Town of Grenville*[2], which dealt with the rights of lumbermen to float timber down the River Rouge in the Province of Quebec, Girouard J., delivering the judgment of the majority of the court, said that lumbermen merely enjoy a right of servitude to transmit their logs along a floatable river. Davies J. at p. 528 said:

> The true rule would seem to me to be that the right to float logs down such a river or stream as the one in question, being in the nature of a public easement, the rights of the log-owners and the riparian proprietors are concurrent and must be enjoyed reasonably without unnecessary interference one with the other, and without negligence.

[1] (1877), 2 App. Cas. 839. [2] (1902), 32 S.C.R. 510.

In *Quyon Milling Co. v. E. B. Eddy Co.*[1], Rinfret J. (as he then was), delivering the judgment of the court, said in part (p. 196):

> The right of lumbermen or others floating or "driving" timber is not a paramount right but an easement, which must be exercised with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of the rivers, streams and watercourses.

As pointed out by Baron Parke in *Embrey v. Owen* and by Lord Kingsdown in *Miner v. Gilmour,* the right of a riparian owner to utilize the flow of the stream at common law was subject to the condition that he should not interfere with the rights of other proprietors, either above or below him. No such question arises in the present action. There is nothing inconsistent with the exercise of these rights to their fullest extent by the respondent with the exercise by the appellant of the easement or right of passage for its timber to which he is entitled under *The Lakes and Rivers Improvement Act.* We are asked to say in the present matter that these ancient rights of the riparian owner, so long embedded in the common law, have been taken away by inference, a conclusion which I find impossible to reach. Had the legislature intended that these rights should be restricted to any greater extent than has been done by the statute it would, no doubt, have said so in clear terms.

It is contended for the appellant that its right to drive its logs free in the current is made clear by para. 44 of the agreement of January 2, 1943. Apart from the fact that the appellant is not a party to that agreement, its terms clearly reserve to timber owners or others only such rights to drive their logs and timber down the Ottawa River as then existed. It does not purport to add to or implement such rights. Since there is, in my opinion, no basis for the right asserted under the legislation to which I have referred, para. 44 cannot affect the matter.

This action was commenced on March 31, 1954. By an amendment to the statement of claim made on March 5, 1957, a claim for damages was asserted with respect to what was said to be the practice at the dam at Des Joachims of decreasing on week-ends the amount of water flowing

[1] [1926] S.C.R. 194, 1 D.L.R. 1142.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Locke J.

through the dam, with a consequent decrease in the quantity of water below it which occasioned loss of time and additional expense. Gale J. declined to deal with this claim for the reason that the damage complained of was said to have been caused after the issue of the writ, a conclusion with which I agree.

There remains for consideration the argument which has been addressed to us, based upon the laws of the Province of Quebec. If it had been intended by the plaintiff to assert that its rights under the laws of Quebec differed from those in Ontario, this should have been pleaded and the laws of Quebec proven at the trial (*Canadian National Steamships Co. Ltd. v. Watson*[1]). As this was not done, the matter was not considered either by Gale J. or by the Court of Appeal and when, as I have pointed out, an application for leave to amend the statement of claim was made before this Court, it was refused. In these circumstances, the issue is not properly before us since this is an appeal from the Court of Appeal and no such case was made before it. While it is true that in a proper case this Court requires no evidence of the laws in force of any of the provinces or territories of Canada (*Logan v. Lee*[2], *Canadian Pacific Railway Company v. Parent*[3]) such a case arises only when a law foreign to that of the *lex fori* has been pleaded.

It was said by the Judicial Committee in *Miner v. Gilmour*[4] and in *North Shore Railway v. Pion*[5], which concerned rights of riparian proprietors in Quebec, that there was no material distinction between the law of Quebec or Lower Canada and the law of England with respect to such rights and the case was conducted until it reached this Court on the assumption that this was the case. In the absence of evidence to the contrary, the learned trial judge, had the issue been raised, would have been required to assume that there was no difference and, in my opinion, the matter must be treated in this Court on that basis.

I would dismiss this appeal with costs, including the costs of the motion of May 30, 1960.

[1] [1939] S.C.R. 11, 1 D.L.R. 273.
[2] (1908), 39 S.C.R. 311.
[3] [1917] A.C. 195 at 201.
[4] (1859), 12 Moo. P.C.C. 131, 14 E.R. 861.
[5] (1889), 14 App. Cas. 612, 59 L.J.P.C. 25.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—The circumstances giving rise to this appeal are fully outlined in the reasons for judgment delivered by Mr. Justice Locke with whose disposition of this appeal I am in full agreement.

It does, however, appear to me that the right of lumbermen in the Province of Ontario to use such rivers as the Ottawa for the transportation of their logs is a right which was recognized at common law as a part of the public right of navigation on such rivers, and that the statutes passed by the Province of Upper Canada, the Province of Canada and thereafter by the Province of Ontario dealing with the rights of lumbermen driving logs and the rights of riparian owners to construct dams did not have the effect of restricting the rights of riparian owners or of creating any new rights in the lumbermen but rather served to define the manner in which the common law rights of each were to be exercised concurrently.

In the case of *Caldwell v. McLaren*[1], the defendant did not claim that his right to use the stream in question for transporting lumber was a common law right, but rested his case entirely on the statutes of Upper Canada then in force. In the course of his decision Lord Blackburn said at p. 405:

> 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 is 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.

He goes on to say:

> 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?

[1] (1884), 9 App. Cas. 392.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Ritchie J.

That the same considerations did not and do not apply to the Ottawa River can be seen from the decision of Strong C.J. in *In Re Provincial Fisheries*[1], where he says in relation *inter alia* to the Ottawa River:

> It appears from several cases decided in the courts of the province of Ontario that such lakes and rivers are to be considered navigable waters and that the rule of the English law as to navigable tidal waters applies to them. I refer particularly to the cases of *Parker v. Elliott,* 1 U.C.C.P. 470; *The Queen v. Meyers,* 3 U.C.C.P. 305; *The Queen v. Albert Sharp,* 5 Ont. P.R. 140; *Gage v. Bates,* 23 U.C.C.P. 116; *Dixson v. Snetsinger,* 23 U.C.C.P. 235.
>
> It is true that the right of fishing was not in question in any of these cases, the point in controversy in each of them having been the right of the riparian owner claiming under a grant from the Crown to the property in the bed of the river or lake opposite their land frontage. *It follows, however, from the reasoning of the courts that such navigable waters were to be likened in all respects to rivers which, according to the common law, came within the definition of navigable rivers.* (The italics are mine.)

As I read it, the passage from the judgment of Lord Kingsdown in *Miner v .Gilmour*[2], (a Quebec case) to which Mr. Justice Locke refers is definitive of the general law applicable to non-navigable rivers under which a riparian proprietor had the right to use the water flowing past his land for any purpose whatever, provided that he did not thereby interfere with the rights of other proprietors either above or below him. When the same passage is quoted by Lord Selborne in *North Shore Railway Company v. Pion*[3], (which was also an appeal from the Province of Quebec) it is immediately followed by this paragraph:

> The question, whether this general law was, in England, applicable to navigable and tidal rivers arose, and (*with the qualification only that the public right of navigation must not be obstructed or interfered with*) was decided in the affirmative by the House of Lords, in *Lyon v. Fishmongers' Company,* (1876), 1 App. Cas. 662 at p. 683. That decision was arrived at not upon English authorities only, but on grounds of reason and principle which (if sound, as their Lordships think them) must be applicable to every country in which the same general law of riparian rights prevail, unless excluded by some positive rule or binding authority of the lex loci. (The italics are mine.)

The public right of navigation in the tidal rivers of England is described in Halsbury's Laws of England, 2nd ed., vol. 33, at p. 566, in the following terms:

> The right of navigation in tidal waters is a right of way thereover for all the public for all purposes of navigation, trade, and intercourse. *It is a right given by the common law,* and is paramount to any right that the

[1] (1895), 26 S.C.R. 444.
[2] (1859), 12 Moo. P.C.C. 131 at 156, 14 E.R. 861.
[3] (1889), 14 App. Cas. 612, 59 L.J.P.C. 25.

Crown or a subject may have in tidal waters, except when such rights are created or allowed by Act of Parliament. Consequently every grant by the Crown in relation to tidal waters must be construed as subject to the public rights of navigation. It is not a right of property; it is merely a right to pass and repass, and to remain for a reasonable time. (The italics are mine.)

The fact that this right was long ago recognized as extending to the rivers of England which are *de facto* navigable can be seen from a tract entitled "De Jure Maris" which was published in 1787 and is attributed to Lord Hale. In this tract, under the heading "Concerning public stream", the following paragraph is to be found:

> There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *primâ facie publici juris,* common highways for man or goods or both from one inland town to another.

That the right of navigation extends to the movement of logs down the navigable rivers of Canada has been recognized in a great number of Canadian cases, including *The Queen v. Meyers, supra,* at p. 341, *Rowe v. Titus*[1], *Esson v. M'Master*[2], *Keewatin Power Company v. Town of Kenora*[3], per Anglin J., *Ward v. The Township of Grenville*[4], and *The Queen v. Robertson*[5].

The fundamental issue raised by this appeal, as I see it, is whether the log-owners' common law "right of passage" on such rivers as the Ottawa includes a right to the benefit of the flow of the waters thereof which has not been extinguished by statute and therefore constitutes one of "the lawful rights of timber owners and others to drive their logs or timber down the Ottawa River . . . ." which are expressly reserved by the terms of para. 44 of the agreement of January 2, 1943, between The King in the right of the Provinces of Ontario and Quebec, the respondent and the Quebec Streams Commission.

[1] (1849), 6 N.B.R. 326 at 333.
[2] (1842), 3 N.B.R. 501 at 507.
[3] (1907), 13 O.L.R. 237 at 243.
[4] (1902), 32 S.C.R. 510.
[5] (1882), 6 S.C.R. 52.

1961

THE UPPER OTTAWA IMPROVEMENT CO. *et al.* *v.* THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO

Ritchie J.

It is clear that the rights of log-owners are not paramount to the rights of riparian proprietors and other users of the river, and this is specificially noted by Girouard J. in *Ward v. The Township of Grenville, supra,* at p. 524, where he said:

> We are now brought to face the proposition of law set up by the appellant, that "the use of the river as a highway for logs is the paramount use", and that the municipal bridge, although lawfully erected, was an obstruction to the river. I cannot assent to this proposition of law. It is contrary to the well settled jurisprudence not only of the Province of Quebec, but throughout the whole Dominion and the continent of America.

In the same case, Davies J. (as he then was) said of the rights of loggers at p. 531:

> I think their right to float logs down the river is a *concurrent* right which they can enjoy reasonably with those of the riparian owners and the municipalities which have by statutory authority constructed bridges in the public interest across the river, and not a paramount right, and must be exercised with due regard to the rights of these others.

In *Caldwell v. McLaren, supra,* at p. 404, Lord Blackburn put the matter thus:

> 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 do 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 mill-owner and the right of the public come into conflict. They may co-exist, but when they do one or the other must be modified.

The respective rights of riparian owners and those using the waters of the river for purposes of navigation are carefully distinguished in the case of *Orr Ewing v. Colquhoun*[1], where Lord Hatherley said at p. 846:

> Now it appears to me that there are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way, and with that right of way you must not interfere in any manner by any course you take.

In the same case at p. 871 Lord Gordon made the following statement with which I respectfully agree:

> But, in my opinion, the interests of the public in such a case as your Lordships are considering are very different from those of conterminous proprietors. The rights of the public are of a limited nature. They possess no right of property in the water itself. They have a right to the use of it only for the purpose of navigation. They have no rights as regards the flow of the water, or the withdrawing of water, if the right of navigation is not affected. If that right is not interfered with, they are not, in my opinion, entitled to complain of operations by proprietors for the beneficial use and occupation of their properties.

[1] (1877), 2 App. Cas. 839.

In my view the rights of loggers are in no way greater than those of other members of the public. As they possess no right of property in the water they have no rights as regards its flow, and so long as their right to pass their logs down the river is maintained in the manner provided by statute they have no cause of action against a riparian owner exercising his right to dam the river.

I agree with Mr. Justice Locke and the learned trial judge that the use of the words "driving" and "to drive" as they occur in certain sections of the relevant statutes and in para. 44 of the agreement in no way affects or enlarges the common law rights of loggers and in my view the parties to the agreement and the legislature intended nothing more than the perpetuation of the log-owners' common law right of passage, subject to such modifications as are necessary to enable this right to coexist and be exercised concurrently with the right of the riparian owner to dam the river. The formula adopted by the legislature was to impose the requirement that riparian owners should construct and maintain slides or aprons for the passage of logs in the dams erected by them, and under this legislation the log-owners' right of passage is limited to the use of such slides or aprons.

I would dismiss this appeal with costs, including the costs of the motion of May 30, 1960.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

Solicitors for the defendant, respondent: Tilley, Carson, McCrimmon & Wedd, Toronto.