**HOOKER v. CUMMINGS.**
**SUPREME COURT OF JUDICATURE OF NEW YORK**
***20 Johns. 90***
**May, 1822, Decided**

**OPINION**

SPENCER, Ch. J., delivered the opinion of the court:

The case of *Nevins v. Keeler, 6 Johns. 64*, is decisive that the second and third pleas are informal. They profess to answer the whole declaration. The defendant should have justified as to one *locus in quo,* and pleaded not guilty to all but one close. He had no right to narrow the plaintiff's declaration in the manner attempted; and the plaintiff could not take issue on the allegation that the several closes were one and the same, and that the fisheries were one and the same. But the real question in the cause is, whether the defendant has set forth, in the third plea, sufficient matter to bar the plaintiff's right of action. He alleges that the *locus in quo* is part and parcel of Salmon River, and that the part thereof in which, &c., is, and always has been, a public and common navigable river, in which the waters of Lake Ontario have flowed and reflowed, and that every citizen of the State has the right of fishing therein; and therefore, &c., justifying the fishing complained of by the plaintiff.

We cannot consider this plea as setting up that the waters of Salmon River are not fresh water: or that the flowing of the waters of Lake Ontario into it, and the reflowing thereof, are the flux and reflux of the tides, or anything else than occasional and rare instances of a swell in the lake, and a setting up of the waters into the river, and the subsiding of such swells; nor can we understand the allegation that it is a public and common navigable river, in any other sense, than that it is used with boats and small craft. I will not say that we can judicially notice the real state of the facts, but they are indisputably so; and as the plaintiff must have judgment on this demurrer, for the formal defects of the pleas, it would probably be desirable to both parties, that the court should pronounce an opinion on the facts as they are, and as they would prove to be on a trial. I shall, then, assume that Salmon River is a fresh water river, that there is no regular flux and efflux of the tide in it, that it is navigable only for boats and small craft, and that it has all been granted by the State to private individuals. In the case of *The People v. Platt, 17 Johns. 195*, we were not called upon to decide the precise question, because the River Saranac was not navigable for boats of any description, although salmon ascended into it, beyond the obstruction occasioned by Platt's dam; but we recognized the principles of the common law to be, that, in the case of a private river, that is, where it is a fresh water river, in which the tide does not ebb and flow, and is not, therefore, an arm of the sea, he who owns the soil has, *prima facie,* the right of fishing; and if the soil on both sides be owned by an individual, he has the sole and exclusive right; but if there be different proprietors on each side, they own, on their respective sides, *ad filum mediam aquae.* We considered, in the case referred to, that it was not inconsistent with this right, that the river was liable and subject to the public servitude, for the passage of boats; the private rights of the owners of the adjacent soil were no otherwise affected, than by the river's being subject to public use. The same doctrine was advanced by Kent, J., in *Palmer* v. *Malligan,* 3 Cai. 319, without any dissent by the other judges. The case of *Adams v. Pease, 2 Conn. 481*, has been published since the decision of the case of *The People* v. *Platt,* and there is an entire coincidence of opinion. All the judges there held that the owners of land adjoining the Connecticut River, above the flowing and ebbing of the tide, have an exclusive right of fishing opposite to their land, to the middle of the river; and the public have an easement in the river, as a

highway, for passing and repassing with every kind of water craft. The decision of that case was placed on the same adjudged cases as were relied upon in the case of *The People* v. *Platt.*

The defendant's counsel supposes that the common law of England, which he seems to admit, if applied to this case, would be decisive against his client, is inapplicable here, as our navigable rivers are formed on a much larger scale than those in England; and that where the judges of their courts, or their elementary writers, have said that the right of fishing was a common and a public right in navigable rivers, in which the tide ebbs and flows, they have adopted the ebbing and flowing of the tide as evidence of the navigability only of the river; and that, therefore, where the fact of the navigability is proved, and does exist, in any given case, the river is, and must be, public. This I conceive to be a mistaken idea. The common law of England considers a river, in which the tide ebbs and flows, an arm of the sea, and as navigable, and devoted to the public use, for all purposes, as well for navigation as for fishing. It also considers other rivers, in which the tide does not ebb and flow, as navigable, but not so far belonging to the public as to devest the owners of the adjacent banks of their exclusive rights to the fisheries therein. The case of *Carson v. Blazer, 2 Binn. 475*, has been much relied on to sustain the doctrine contended for by the defendant's counsel. In that case only two of the judges gave opinions as to the common law right of the proprietor of the bank or margin of the Susquehanna to the exclusive enjoyment of the fishery opposite to his shore; and it will be seen that they admit the common law of England to be in favor of the right claimed; but they supposed that the people of Pa. had not adopted that part of the English common law, as it was not deemed proper in that country. They placed great stress, too, on several Acts of the Assembly, declaring that river to be a highway, and regulating the fisheries, which they held to be incompatible with the common law right. They rejected, as inapplicable to them, the common law principle that the flux and reflux of the tide ascertained the character of the river. Now, I do not feel myself authorized to reject the principles of the English common law, by saying they are not suited to our condition, when I can find no trace of any judicial decision to that effect, nor any legislative declaration or provision leading to such a conclusion. Indeed, I concur in the opinion expressed by the late and present Chief Justice of Connecticut, in the case cited, that a more perfect system of regulations on this subject could not be devised; it secures common rights, as far as the public interest requires, and furnishes a proper line of demarkation between them and private rights, that is, by considering rivers navigable as far as the sea flows and reflows, and the right of fishing as common to all; and rivers not, in that sense, navigable above the flow and reflow of the sea, in which the adjoining proprietors have the exclusive right; and I concur in the doctrine that all rivers, in fact, navigable, whether above the flow of the tide, or whether in its whole extent unaffected by the tides, in reference to the use of them, as public, and subservient to public accommodation, and liable to governmental regulation. I agree, also, with Ch. J. Hosmer in the position that the doctrine of the common law promotes the grand ends of civil society by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner. Lord Mansfield's opinion, in *Carter* v. *Murcott,* 4 Burr 2162, has been misconceived; the defendant's counsel supposed it to be favorable to the pretensions set up by the defendant, but it is directly otherwise. He says: "In navigable rivers, the proprietors of the land on each side have it not; the fishery is common; it is, *prima facie,* in the King, and is public." The case under consideration was that of a navigable river, which was an arm of the sea; and his Lordship spoke of navigable rivers in the common law sense of the term, or of such as were arms of the sea.

The defendant's counsel laid some stress on the Acts of the Legislature (2 R. L. 544), and the Act (sess. 37, ch. 214) Regulating Fishing, and the Taking of Salmon, in Salmon River. These Acts

prove nothing; for the Legislature have, confessedly, the right of regulating the taking of fishing in private rivers; and do, every year, pass laws for that purpose, as to rivers not navigable in any sense, and which are, unquestionably, private property.

There must be judgment for the plaintiff, with leave to the defendant to plead *de novo,* on payment of costs.

*Judgment accordingly.*