

1905

*May 11.

*May 29.

SAMUEL ROULEAU (PLAINTIFF).....APPELLANT ;

AND

TREFFLÉ POULIOT AND OTHERS }
(DEFENDANTS).....} RESPONDENTS.ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL
SIDE, PROVINCE OF QUEBEC.*Construction of statute—Toll-bridge—Franchise—Exclusive Limits—Measurement of distance—Encroachment—58 Geo. III., c. 20, (L.C.)*

The Act, 58 Geo. III. ch. 20 (L.C.) authorized the erection of a toll-bridge across the River Etchemin, in the Parish of Ste. Claire, "opposite the road leading to Ste. Therèse, or as near thereto as may be, in the County of Dorchester," and by section 6, it was provided that no other bridge should be erected or any ferry used "for hire across the said River Etchemin, within half a league above the said bridge and below the said bridge."

Held, Nesbitt and Idington, JJ. dissenting, that the statute should be construed as intending that the privileged limit defined should be measured up-stream and down-stream from the site of the bridge as constructed.

Per Nesbitt and Idington JJ.—That there was not any expression in the statute showing a contrary intention and, consequently, that the distance should be measured from a straight line on the horizontal plane ; but,

Per Idington J.—In this case, as the location of the bridge was to be "opposite the road leading to Ste. Therèse," and there was no proof that the new bridge complained of was within half a league of that road, the plaintiff's action should not be maintained.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, by which the plaintiff's action was dismissed with costs.

The appellant is the assignee of the rights of the original owners of the bridge franchise under the

*PRESENT ;—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

statute, 58 Geo. III., chap. 20, and brought the action against the respondents praying for a declaration that the construction of a new bridge, across the Etchemin River, alleged to be within the limits prohibited by the statute, and opened by them to the free use of the public, was an infringement of the privileges secured to him under the statute, for an order prohibiting further use of the new bridge and for its demolition at the expense of the defendants and for damages. Upon the trial, the Superior Court dismissed the plaintiff's action on the ground that the new bridge was not within the prohibited limits according to the distance measured along the highway. On appeal by the plaintiff, the Court of King's Bench affirmed the judgment dismissing the action, but on the ground that the new bridge was not within the limits reserved according to the distance measured along the course of the river. The principal contention of the plaintiff on the present appeal was that, under the proper construction of the statute, the distance should be measured in a straight horizontal line, and that according to such measurement the new bridge encroached upon the limits specially reserved by his franchise.

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Belleau K.C. for the appellant.

L. P. Pelletier K.C. for the respondents.

THE CHIEF JUSTICE.—L'appelant, demandeur en cour de première instance, est l'ayant cause des concessionnaires d'un pont de péage autorisé sur la rivière Etchemin par le ch. 20 du statut 58 Geo. III. Il se plaint par son action de ce que les intimés ont construit un pont libre sur la dite rivière dans les limites du privilège concédé à ses auteurs par le dit statut, et en demande la démolition avec \$1,000 de dommages. La clause 6 du statut qui régit le litige se lit comme suit :

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VI. Et qu'il soit de plus statué par l'autorité susdite qu'aussitôt que le dit pont sera passable et ouvert pour l'usage du public, dès lors aucune personne quelconque ne pourra ériger ou faire ériger aucun pont ou ponts, pratiquer ou faire pratiquer aucune voie de passage pour le transport d'aucunes personnes, bestiaux ou voitures quelconques pour gages à travers la dite rivière Etchemin à une demie lieue au-dessus du dit pont et au-dessous du dit pont ; et si quelque personne ou personnes construisent un pont ou des ponts de péage sur la dite rivière Etchemin dans les dites limites, elle paiera ou elles paieront aux dits Jean Thomas Taschereau, George Pyke, Pierre Edouard Desbarats, et François Roy, leurs héritiers, exécuteurs, curateurs et ayants cause, trois fois la valeur des péages imposés par le présent acte pour les personnes, bestiaux et voitures qui passeront sur tel pont ou ponts et si quelque personne ou personnes passent en aucun temps que ce soit, ou transportent pour gage ou gain aucune personne ou personnes, bestiaux, voiture ou voitures à travers la dite rivière Etchemin dans les limites susdites, tel contrevenant ou contrevenants encourront et payeront pour chaque personne, voiture ou animal ainsi traversé une somme n'excédant pas quarante chelins courant pourvu que rien de contenu dans cet acte ne sera censé s'étendre à priver le public de passer la dite rivière Etchemin dans les limites susdites à gué ou en canot sans lucre ou gages.

Le pont des intimes est à 53 arpents de celui de l'appelant en suivant le cours de la rivière, à 42 arpents et quelques perches par les chemins actuels et à moins de 42 arpents en tirant une ligne droite à vol d'oiseau, en sorte que l'appelant ne peut réussir que si cette dernière méthode de mesurer la distance entre les deux ponts est celle qui doit prévaloir. La cour supérieure a débouté son action sur le motif que c'est la distance mesurée par le chemin qui régit. La cour d'appel a confirmé le dispositif de la cour supérieure sur le motif que c'est la distance en suivant le cours de la rivière qui doit prévaloir. J'adopte le motif du jugement de la cour d'appel. Le statut ne me laisse pas le moindre doute sur la question. C'est la rivière qui seule doit être prise en considération quand il s'agit d'un tel privilège sur une rivière. Une demie-lieue au-dessus et au-dessous du dit pont veut dire la même chose qu'une demie-lieue en amont et une demie-lieue en aval du dit pont.

Je débouterais l'appel avec dépens.

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GIROUARD J.—I concur in the judgment dismissing the appeal for the reasons stated by His Lordship the Chief Justice.

DAVIES J.—I also concur for the reasons stated by His Lordship the Chief Justice.

NESBITT J. (dissenting).—The question in this case is: What is the proper construction to be placed upon a statute 58 Geo. III., ch. 20, sec. 6, forbidding the erection of a bridge or use of a ferry within half a league above or below a bridge by the statute authorized. The trial judge held the half league was to be measured by the roads then in use, the Court of King's Bench, that the measurement was to be made by following the middle course of the stream.

I find the cases well summarized in the 9th volume of the Am. & Eng. Enc. of Law, page 614 as follows:

Distance is to be measured in a straight line in a horizontal plane unless there is a clear indication that another mode of measurement is to be adopted.

I have read the various cases referred to and those referred to in the judgment of the court below and adopt the summation I have quoted. Nothing can be added to the historical treatment of the authorities by Lord Blackburn delivering the judgment of the Exchequer Chamber in 1872 in *Moufflet v. Cole* (1), and I fail to find any such expression of clear intent on the part of the legislature in this case as to justify a different construction from the one which the court in the case I have referred to lays down as the proper one. I am sensible of the argument that the law was differently declared in 1817, the year before the legislation was enacted, but I cannot overlook the consid-

(1) L. R. 8 Ex. 32.

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eration that the law has been authoritatively stated in case after case in England to be different from that laid down by Lord Ellenborough in 1817. Any other construction would in my view leave such room for uncertainty as to be a trap for litigation. I cannot adopt the suggestion of my brother Idington that the court can question the location of the bridge constructed under the statute and used for so many years, and as I have said the true construction of the language used is that a circle of half a mile radius is to be drawn around the bridge and the erection of any other bridge within that radius is prohibited.

I would allow the appeal.

IDINGTON J.—The cases cited seem to show that the distance from any given point or thing must, unless there is something in the contract or statute inconsistent with such holding, be measured in a straight line. I see nothing in the statute 58 George III., ch. 20, sec 6, inconsistent with the application of that rule to the expression,

within half a league above the said bridge and below the said bridge.

The plain ordinary meaning of the words accords with running in a straight line better than any other.

There were as far as shown no roads alongside the river when this enactment was passed. Nor is it shewn that the river itself was a navigable stream. That, if shewn, might have made some difference.

On the plan produced as an exhibit the river between the two bridges in question is very crooked and for aught we are told it may be from the Byrne bridge up stream absolutely straight. Measurement by the river may mean one thing up the stream and quite another thing down. When we think of the causes and reasons for imposing prohibition here against the

construction of another bridge on either side of this toll bridge we see the absurd results that might flow from such interpretation.

The bridge was to be opposite the Saint Thérèse road or as near thereto as possible.

No doubt this was to serve the people using that road, and there is just as little doubt that when new bridges would be needed they would be likely intended to serve the people coming by other roads to cross the river. And what roads? Roads that would serve by running in a general way back from the river to the neighbouring country. It obviously was the intention of the legislature to serve by this bridge a district or territory contributory to it, so to speak, on each side of the river.

It was as obviously intended in a general way to prohibit, as a reward to the builders, any new bridge within a half league of the Ste. Thérèse road or as near thereto as it was possible to build a bridge.

It is clear that this bridge was not put opposite or at that road. Why is not explained. If it had been shown by evidence that by reason of the conformation of the land it was impracticable to put it nearer thereto than it is, then placing the bridge where it is would be within the statute. Without such evidence or explanation the bridge is not where this statutory franchise authorized it to be. It rested on the appellant to show this, and failing to do so I think he must fail; for rights such as he claims are to be construed most favourably to the public whose rights are restricted by such legislation.

The length of time the appellant and his predecessors in title have enjoyed the franchise may enable him to claim the property in the bridge but cannot entitle him to the right of prohibition against rival bridges that the statute gave the original grantees of

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the franchise, and to measure it from the place where this bridge erroneously placed is found to be. No matter what the interpretation of long ago may have been by somebody the real meaning of the statute is what must govern. The case of *Madison v. Emmerson* (1) exemplifies this. And the Ste. Therèse road was declared on the argument here to be more than half a league from the new bridge now in question measured in a straight line and that was not denied.

As the cases of *Reg. v. The Inhabitants of Saffron Walden* (2); *Jewell v. Stead* (3); *Mouflet v. Cole* (4), in Exchequer Chambers; *Duignan v. Walker* (5); *Stokes v. Grissell* (6); *Lake v. Butler* (7), followed by *Jewell v. Stead* (3) which is, being as to a toll-gate on to a turnpike road, peculiarly applicable here.

Lord Campbell said in this last case that unless there is some clear indication in the Act that a different mode of measurement is pointed at, he thought we ought to abide by one general rule of construction.

In another case he illustrates the need for this by showing how in case of a tidal river the distance measured by that would vary as in this, no doubt, between low water in summer and high at spring freshet time.

I am glad to arrive at what I think manifest justice in the case by an adherence to the strict law which must always govern us here.

I think the appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Belleau, Belleau & Belleau.*

Solicitors for the respondents: *Drouin, Pelletier & Baillargeon.*

(1) 34 Can. S. C. R. 533.

(2) 9 Q. B. 76.

(3) 25 L. J. Q. B. 294.

(4) L. R. 8 Ex. 32.

(5) 28 L. J. N. S. Ch. 867.

(6) 23 L. J. C. P. 141.

(7) 5 E. & B. 92.