

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Bell v.  
the Corporation of Quebec, from the Court of  
Queen's Bench for the Province of Quebec,  
Canada, delivered on the 22nd November 1879.*

---

Present :

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

This is an appeal from the judgment of the Court of Queen's Bench for the Province of Quebec, which affirmed the judgment of the Superior Court of the Province, dismissing the Appellant's action.

The action was brought for damages, and to obtain the demolition of a bridge, constructed by the Corporation of Quebec, across the Little River St. Charles, a tributary of the St. Lawrence, on the ground that the bridge obstructed the navigation of the river, and thereby caused damage to the Appellant, as the owner of riparian land.

The bridge was built to carry an aqueduct, and formed a part of the works constructed by the Corporation to carry water to Quebec for the use of the inhabitants.

The Corporation was authorized to construct works for this purpose by an Act of the Legislature of Canada, 29 Vict., c. 57 (which was passed before the British North American Act, 1867, No. 10). These powers are found in Sect. 36 of the Act.

The place where the bridge complained of has been built is about two miles above Quebec, and

a short distance only below another bridge crossing the St. Charles, called Scott's Bridge, constructed by the Government more than fifty years ago.

The Appellant's land lies on the south bank of the river between these two bridges, and is used for agricultural purposes. He and his brother, as partners, own land about half a mile above Scott's Bridge, where they carry on the business of potters, and have a pottery and clay pipe manufactory. The Appellant originally based his claim on the ownership of these works, as well as of the land below Scott's Bridge, but his claim in respect of the former was not insisted on at their Lordship's bar, and the right to maintain the action was rested solely on his ownership of the land below Scott's Bridge.

The Court of Queen's Bench appears to have doubted whether the statute above referred to, though it authorized the construction of waterworks, which might be brought across the St. Charles, would, if the action were otherwise maintainable, afford a sufficient defence to it, so far as it claimed damages. Mr. Justice Tessier was of opinion that it would be an answer to the claim for the demolition of the bridge.

The questions on which the decision below turned, and which were those principally argued upon the appeal, are, (1) whether and in what degree the river is navigable at the place where the bridge has been built; (2) whether the Appellant has sustained special damage from its construction; and (3) whether, without proof of such damage, the action is maintainable.

The river is tidal for some distance above Scott's Bridge, and is navigable for small boats and flats, and for rafts up to and beyond this bridge, but that it is navigable, in a practical and commercial sense, for larger craft, such as barges (*bateaux*), above the place where the

bridge has been built, is controverted, and a great conflict is found in the evidence given at the hearing on this point.

The general character of the river at this place may be thus described,—numerous shoals exist in it, its bed is studded with rocks or boulders, which are a source of danger to any craft which may ground upon it, very high tides happen twice in the year, caused by the melting of the snow in spring, and by the rains in autumn, and it is only at the times of these extraordinary tides that barges can at all ascend the river, and then not without difficulty and danger of grounding. The proof of the actual employment of barges in this part of the river is very much what might be expected from this description. Throughout the period of twenty-seven years to which the evidence extends, a rare and intermittent use only has been shown. Although numerous witnesses were called on the part of the Plaintiff, the instances spoken of were very few, with intervals of many years between them. In most of the cases the barges were said to have been brought up to the Corporation Road, which is just above the new bridge. Of those so brought up, about eight or ten were said to have conveyed clay and stores for Messrs. Bell, which were carted from the Corporation Road to their potteries above Scott's Bridge. For some years before the building of the bridge no barges appear to have gone above the place where it stands, and it was contended for the Defendants that the inference from these facts was that the employment of barges on this part of the river was neither useful nor profitable, and had practically been abandoned. It was attempted to account for the want of use of this part of the river by the fact of a strike of the bargemen, but this appears to be an insufficient explanation of it. On the part of the Defendants, numerous witnesses of good position and of great

local experience, including the harbour master of Quebec, owners of barges, shipbuilders, and others, who lived on the banks of the river, or had business there, deposed that the river at and above the spot in question was not navigable for barges on account of the difficulties and dangers of the passage, and that in point of fact these vessels were not on this account employed to navigate it. Barge owners gave evidence that they would not allow their barges to make the passage, and declared that they could not be safely or profitably employed in that part of the river.

There was evidence to the effect that the bridge offered no obstruction to the passage of small boats, flats, and rafts, and the obstruction complained of principally was that barges with masts (which most of the Quebec barges carried) could not pass under it without striking or lowering their masts.

The Judge of the Superior Court based his judgment dismissing the suit upon the following *considérants* :—

“Que le Demandeur n’a pas prouvé que les constructions faites par la Défenderesse sur la Rivière St. Charles, en vertu des pouvoirs à elle conféré par la loi, aient causé aucune dommage ou préjudice au dit Demandeur, ou soient de nature à lui en causer à l’avenir.

“Que les seuls dommages que le dit Demandeur ait cherché à prouver sont des dommages futurs, incertains, et inappréciables.

“Que les dites constructions faites par la Défenderesse ne troublent en aucune manière le Demandeur dans sa jouissance et possession des immeubles décrits en la déclaration en cette cause.”

Upon appeal to the Court of Queen’s Bench, Chief Justice Dorion, after discussing the evidence and some French authorities on the subject,

declared that all the circumstances led him to adopt the opinion of the witnesses who considered that the river was not navigable at the place where the bridge is built; but he was further of opinion, supposing the river to be navigable, that the Plaintiff had given no sufficient proof of actual or special injury from the construction of the bridge, which entitled him to maintain his action for its demolition or for damages.

Mr. Justice Tessier thought that the evidence of the most competent of the witnesses proved that this part of the river was not navigable in the true sense of the word, that it was "flottable" for small boats and rafts only, and that it was as much so since the construction of the bridge as before. He also agreed with the Chief Justice that, if the river was to be deemed navigable, the Plaintiff had not proved that he had sustained damage. Mr. J. Ramsay dissented from his colleagues on both points, but stated that the Plaintiff's actual damage appeared to him to be very small.

The decision in this case is to be governed by the French law, as it prevails in the Province of Quebec.

In the authorities referred to by the Judges below, and those cited at their Lordships' bar, the subject of navigable rivers is discussed principally with a view to determine the question whether a particular river is or is not to be considered the domain of the Crown. The definitions attempted to be given are often vague, and sometimes contradictory.

In Dalloz (Rep. Tit. Voirie par eau) it is stated, No. 52:—

"Il ne suffit pas pour qu'une rivière soit réputée navigable qu'elle soit en quelques points de son cours susceptible de porter bateaux; il faut qu'il puisse s'y établir une navigation régulière, que l'on puisse y naviguer librement, y cir-

culer en bateaux, trains, et radeaux, au moins pendant une partie de l'année."

At the end of the paragraph, he says,—

"En d'autres termes, la seule possibilité de naviguer sur un cours d'eau n'emporte pas pour le public le droit de naviguer, il faut possibilité et permanence dans une certaine mesure."

In No. 53, the same writer says,—

"D'un autre côté, il n'est pas nécessaire pour qu'une rivière soit considérée comme navigable, qu'il y ait sur cette rivière une navigation effective et continue, il suffit que la navigation y soit possible. Il a été décidé en ce sens qu'une rivière anciennement navigable ne cesse pas d'être comprise parmi les dépendances du domaine par cela seul que la navigation ou le flottage y aurait été interrompu depuis un temps plus ou moins long (Cons. d'Et 22 Fev. 1850, aff. Dartique V. No. 338, V. aussi Cons. d'Et 5 Août 1829, aff. Mirandol, V. Eaux, No. 150)."

It is difficult to reconcile these two paragraphs.

The following is a passage from a *Traité des Cours d'Eaux*, by Daviel, 1 Vol., No. 36, p. 34 :—

"Mais un cours d'eau n'est réputé navigable parceque, d'un bord à l'autre, il existe un bac de passage, ou parceque quelques riverains, par pur agrément ou même pour l'exploitation de leurs fonds, se serviraient de bateaux. Il faut que d'amont en aval, il y ait navigation proprement dite, ou flottage en trains, et qu'en un mot, le cours d'eau fasse l'office de chemin et de voie de transport."

Dalloz adopts this view (Rep. Tit. Eaux, No. 39), he says:—"Il ne suffit même pas qu'une rivière porte des batelets ou bacs pour le passage des personnes ou voitures, il faut qu'elle puisse être parcourue dans un espace assez considerable pour fair l'office de chemin, et servir de moyen de transport."

These general definitions of Daviel and Dalloz

show that the question to be decided is, as from its nature it must be, one of fact in the particular case, namely, whether and how far the river can be practically employed for purposes of traffic. The French authorities evidently point to the possibility at least of the use of the river for transport in some practical and profitable way, as being the test of navigability.

Their Lordships, assisted in their appreciation of the evidence by the findings of the learned Judges below, are disposed to think the result of it to be, that the river is navigable for boats, flats, and rafts, and that it is possible, at the exceptionally high tides referred to, to float barges as high as Scott's Bridge, but that the difficulties and risks which from natural causes attend the navigation of craft of this description are so great that the river in its present state does not admit of their use in a practical and profitable manner.

Turning to the question of damage, and supposing the river to be navigable in the degree just indicated, their Lordships are not disposed to dissent from the conclusion of the two Courts below, that the Plaintiff has not sustained damage by the construction of the bridge.

It is not disputed that small boats, flats, and rafts can be navigated as before, unobstructed by the bridge. The interruption complained of is that masted barges cannot pass it without lowering their masts.

It has been already said that the Plaintiff's land is used as a farm, and there is no evidence that its occupiers ever employed barges for the purposes of the farm. No produce has been carried from it, and no manure or other things brought to it by such vessels. It does not even appear that in the few instances in which Messrs. Bell are shown to have brought up clay for their potteries it was landed upon this farm. The barges were on one or two occasions brought into a little

creek, part of which adjoins the farm, but the clay appears to have been discharged at the Corporation Road, which is outside it.

It is evident, that the Plaintiff did not prove that he had sustained damage from actual interruption of traffic. This was scarcely denied, but it was contended that his farm was depreciated in value by reason of the bridge. Upon this question there was a great conflict of testimony. The witnesses for the Plaintiff formed their opinion in great measure on speculations of future changes in the use and employment of the property, and of artificial improvements which might be made in the river. This latter speculation cannot legitimately be imported into the consideration of the question. With regard to the Plaintiff's witnesses generally, the Courts below obviously distrusted their evidence, and refused assent to their opinions. These witnesses failed to satisfy them that this farm, which has apparently no landing place, and whose owners had never used the river as a means of transport for conveying anything to or from it, was, having regard to the state of navigability of the river above described, really depreciated in value by the fact that masted barges would have to lower their masts to pass under the bridge.

Their Lordships understand the learned Judge of the Superior Court, who heard the witnesses, to base his judgment on the ground that no appreciable damage had been or would be caused to the Plaintiff's property by the construction of the bridge, and that judgment the Court of Queen's Bench has affirmed without altering the "considérants" on which it is founded. This tribunal usually accepts the concurrent findings of two Courts upon questions of fact, and their Lordships cannot say that sufficient reasons appear in the present case to warrant a departure from their rule.



The main contention, however, of the Appellant's Counsel has been that, the river being, however imperfectly, navigable, the Appellant has a private right, belonging to him as riparian proprietor, to the free use and navigation of the river, independently of his right as one of the public, and that the construction of the bridge is an infringement of that right, which entitles him to maintain an action without proof of actual, and still less of special and peculiar, damage. A case from Lower Canada, presenting this question, and not unlike in its circumstances to the present, came before this Committee some years ago. (*Brown v. Gogy*, 2 Moore P. C., N. S., 341.) In that case the Plaintiff, the owner of land and a mill abutting upon the navigable River Beaufort, brought an action against the riparian owner on the opposite bank for erecting a wharf, which it was alleged obstructed the flow of the water to the Plaintiff's mill, and also the navigation of the river. The Plaintiff claimed damages and the demolition of the wharf. A great deal of conflicting evidence was given at the trial upon the question of the alleged obstruction. The judgment of the Superior Court contained the following considérants which bear on the question of law now under discussion:—

“ Considering that the River Beaufort is alleged  
“ and proved to be a navigable river, and that  
“ any obstruction of the same would be a public  
“ nuisance; and considering that no action by  
“ an individual lies for a public nuisance, unless  
“ the party bringing such action has received  
“ special and particular damage therefrom.” The judgment goes on to state that the Court further considered that the Plaintiff had failed to prove any special or particular damage, and the suit was dismissed. No doubt the Court also found in that case that the Plaintiff had not proved that the wharf obstructed or diverted the natural

course of the river, but the considérants above set out indicate the view of the Court that if an obstruction had been proved the action would require proof of special damage for its support. The Court of Queen's Bench affirmed this judgment, and upon the appeal to Her Majesty this Committee declined to interfere with the concurrent findings of the two Courts in Canada on the question of fact that the Plaintiff had failed to prove that the work would be injurious to him. Lord Kingsdown, however, in giving the judgment, discusses the law of Canada on the subject. He says:—"The law of Lower  
 " Canada, as we collect it from the authorities,  
 " seems to stand thus. An officer suing on  
 " behalf of the public has a right, at his own  
 " instance or on the application of any person  
 " interested, to call for the demolition of any  
 " work erected without license on the public  
 " domain, and he is no more required to prove  
 " that the erection has occasioned actual damage  
 " to the public than a private person who com-  
 " plains of a wrongful invasion of his property  
 " is obliged to prove that it has occasioned actual  
 " damage to him; but, although such an officer  
 " may, if he think proper, take proceedings to  
 " abate the nuisance, he is not obliged, nor is it  
 " in all cases his duty, to interfere. A case  
 " of this kind is put by Proudhon (*Traité du*  
 " *Domain Public*, tom. 3, p. 192, No. 820) in the  
 " passage cited by Mr. Justice Aylwin. He says:  
 " 'It may be that in the case of a dyke erected  
 " ' in the bed of a navigable river, the dyke may  
 " ' be no injury to the actual state of the navi-  
 " ' gation, as being built in an arm of the river  
 " ' where navigation is not practised, and which,  
 " ' nevertheless, does not on that account cease  
 " ' to be a part of the public domain.' "

The judgment proceeds:--

"If the public officer refuse to interfere, an

individual who suffers injury is not prejudiced, he has still his "action privée," by which he may recover damages for injury already sustained, and the abatement of the cause of such injury for the future. The public and private action are said to be not only independent of each other, but essentially distinct in their object. The fact that the place where the work is erected is public property is of course very important in both cases, in regard to the right of the Defendant to do what he has done, but it does not, according to the law, as we can collect it from the authorities, supersede the necessity of the Plaintiff in a private action proving that he has sustained injury by the work special to himself, and beyond that which is common to the public at large, and this, as we have already stated, the Plaintiff in this case has failed to do."

In these passages the distinction between the "action privée," founded on a right of property which lies, if the right be invaded, without proof of damage, and the same action which arises only when the party is able to prove damage "special to himself," is plainly assumed to exist in the law of Canada, and to apply to cases analogous to that now under appeal. In the cited case, no doubt, the alleged obstruction was negatived, but the judgment is material for the view it presents of the law on the point now under discussion.

There appears to be a clear distinction in French law between rights of immediate access from a man's property to a highway, and the power to complain of a mere obstruction in it. In a case recently before this board (*Mayor of Montreal v. Drummond*, L. R., 1 Appeal Cases, 384), the Plaintiff was the owner of houses in a public street in the city of Montreal, one end of which had been entirely stopped by the Corporation. It was contended for the Plaintiff in that case that the right of passage through the street was

a private right belonging to him as owner of these houses, and that the closing one end of the street was an interference with his property, and constituted "une expropriation" in respect of which he was entitled to previous compensation, and that this being unpaid, the act of the Corporation was wrongful. It appears from the authorities cited in that case that the French law recognizes "droits d'accès ou de sortie" as rights belonging to a house in a street, though the authorities differed as to whether a violation of these rights was to be regarded, for the purpose of indemnity as "une expropriation," or as constituting only "dommage." It is evident that this right of access is different from the right of passage which the owner has in common with the public throughout the street; and the distinction is thus adverted to in their Lordships judgment, p. 406:—

"The right of access to a house is, of course, essential to its enjoyment, and if by reason of alterations in the street the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt, that by the law of France he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences." It is also said,—“The Counsel for the Plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view, but the weight of authority appears to be the other way.” After referring to some of these authorities, the judgment proceeds:—“It certainly then appears that in France the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an interference with the servitude, nor (standing alone) such direct and immediate

“ damage as will give a title to indemnity ; and  
“ if this be so, there seems no reason or autho-  
“ rity for declaring the law to be otherwise in  
“ Canada.”

These principles appear to be applicable to the position of riparian proprietors upon a navigable river. There may be “ droit d'accès “ et de sortie ” belonging to riparian land, which, if interfered with, would at once give the proprietor a right of action, but this right appears to be confined to what it is expressed to be, “ accès,” or the power of getting from the waterway to and upon the land (and the converse) in a free and uninterrupted manner. Their Lordships think that this right has not, in fact, been violated in this case ; and that, supposing the bridge to cause some obstruction to the navigation, the Courts below are right in holding that the Plaintiff is not entitled to maintain the action in respect of it, without proof of actual and special damage.

The learned Counsel for the Appellant, in support of their contention on this point, did not at all refer to French or Canadian authorities, but referred only to English and American decisions. These, though they may illustrate the subject, cannot be treated as governing authorities upon the law of the Province.

The principal cases cited were, *Beckett v. Midland Ry. Co.*, L. R., 3 C. P., 82 ; *Metropolitan Board of Works v. McCarthy*, L. R., 7 E. & I. Appeals, 243 ; and *Lyon v. Fishmongers' Company*, L. R., 1 Appeal Cases, 662.

In the case in the Common Pleas the Railway Company had made an embankment in a public road in front of the Plaintiff's house, by which the width of the road was considerably diminished, and the immediate access to his house interfered with. It was found as a fact that the house was thereby permanently injured in value. The Court held that the special damage sustained

by the Plaintiff beyond that of the rest of the public gave him a right of action, and consequently a right to compensation. The Court, however, evidently thought that it was necessary for the Plaintiff to prove special damage, so that this case, even in English law, is beside the point now under discussion.

In the *Metropolitan Board of Works v. McCarthy*, the facts were that the Plaintiff was possessed of land, on which he carried on trade, situate very near a draw dock in the Thames. This dock which was much used by the Plaintiff for the purpose of his business, was wholly stopped up and destroyed by an embankment constructed by the Board, and the value of the land was thereby undoubtedly diminished. The House of Lords affirmed the judgments of the Court of Common Pleas and Exchequer Chamber given in favour of the Plaintiff. The Plaintiff was not strictly a riparian proprietor, and the decision again turned on the ground that the Plaintiff had sustained actual damage beyond that of the rest of the public. In this case the proximity of the Plaintiff's property to the dock was regarded; and no doubt the proximity of property to the highway must usually be a material element in the consideration of the question whether actual damage has in fact been caused to it by the obstruction.

In the *Caledonian Railway Company v. Ogilvy*, 2 Scotch Appeals, 229, the House of Lords decided that the mere proximity of the claimant's house to the highway and to the obstruction did not create a particular damage which would give him a right of action. There the highway, which was the road by which the Plaintiff's house was approached, was obstructed by the railway being made to cross it on a level within a few yards of his lodge and entrance gate. This level crossing, though it undoubtedly created an obstruction very close to the entrance gate, which rendered the use of the road by those occupying the house

constantly liable to interruption and delay, did not affect the immediate access to it, and it was held that the claimant had not proved that he had sustained particular damage beyond that of the rest of the public, and his claim was dismissed.

The case most relied on by the Appellant's Counsel was *Lyon v. The Fishmongers' Company* in the House of Lords. There the Plaintiff was owner of a wharf on the Thames. One of its sides abutted on a tidal inlet which allowed of barges being brought up to and loaded and unloaded from and upon that side of the wharf. Under a license from the Conservators of the Thames, the Defendants made an embankment fronting the river which entirely filled up the mouth of the inlet, and consequently prevented all access from it to the Plaintiff's wharf. The Act of Parliament which empowered the Conservators to grant the license contained a saving of the rights of owners of lands on the banks of the river. The question to be decided was, whether the right of access from the inlet to the wharf was a private right which fell within this saving, and the House, overruling the decision of the Lords Justices, held that it was. The learned Counsel sought to press the authority of this case beyond the point which arose for adjudication, and treated it as an authority for the proposition that every riparian proprietor, as such, has, beyond his right as one of the public, a right to the use of the river in a free and uninterrupted manner, so that any obstruction placed in it would be an invasion of a private right, for which an action would lie, without proof of special or even of actual damage. It would obviously be very difficult to assign the limits of such a right, if it were established, especially in large rivers. Upon consideration of the opinions of the learned Lords, it does not seem to this Committee that

their decision can be pressed to this extent. The distinction between the right of access from the river to a riparian frontage and the right of navigation when upon it is more than once adverted to, particularly by the Lord Chancellor, who referred, certainly not with disapproval, to the judgment of Lord Hatherley, when Vice Chancellor, in the case of the Attorney General *v.* the Conservators of the Thames 1 H. and M. 1, where that distinction is pointedly taken and acted upon. Whether an obstruction amounts to an interference with the access to the frontage would be a question of fact to be determined by the circumstances of each particular case. When this access is not interrupted, and the waterway of the river is open to the riparian land, the question will arise for decision whether the right of action of the riparian proprietor for a distant obstruction in the river can be based on higher or other ground than would be that of any one of the public using the river and sustaining special damage; though his being such proprietor would obviously be an important element in the question whether such damage had in fact been sustained.

The House of Lords undoubtedly decided that the right of access to the waterway from riparian land is a private right which the owner of such land enjoys *quâ* owner. Such a right is analogous to the "droits d'accès et de sortie" recognized by the French law. If, as it was contended, the English law attributes larger rights than these to riparian proprietors on navigable rivers, it would seem to go further in this direction than the law of Canada, according to which the case now under appeal has to be determined.

Their Lordships, considering that the bridge in question does not in fact interfere with the access to the Plaintiff's land, and therefore, that by the law of Canada it was necessary for the Plaintiff to prove actual and special damage



arising from it, and not disagreeing with the concurrent judgments of the Courts below that no such damage has been established, are of opinion that those judgments ought to be affirmed, and they will humbly advise Her Majesty accordingly.

The Appellant must pay the costs of this appeal.

