JAMES ANDERSON AND JONATHAN A. PORTE, (DEFENDANTS)..... } APPELLANTS;

AND

JOHN JELLET, (PLAINTIFF).....RESPONDENT.

1882
*Dec. 5.
1883
*May. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ferry, disturbance of—License to ferry, construction of.

The Crown granted a license to the town of *Belleville*, giving the right to ferry "between the town of *Belleville* to *Ameliasburg*."

Held,—A sufficient grant of a right of ferriage to and from the two places named.

Under the authority of this license the town of *Belleville* executed a lease to the plaintiff granting the franchise "to ferry to and from the town of *Belleville* to *Ameliasburg*," a township having a water frontage of about ten or twelve miles, directly opposite to *Belleville*, such lease providing for only one landing place on each side, and a ferry was established within the limits of the town of *Belleville* on the one side, to a point across the Bay of *Quinte*, in the township of *Ameliasburg*, within an extension of the east and west limits of *Belleville*. The defendants established another ferry across another part of the Bay of *Quinte*, between the Township of *Ameliasburg* and a place in the Township of *Sidney*, which adjoins the City of *Belleville*, the termini being on the one side two miles from the western limits of *Belleville*, and on the *Ameliasburg* shore, about two miles west from the landing place of the plaintiff's ferry.

Held (reversing the judgment appealed from), that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the said ferry, and that the defendants' ferry was no infringement of the plaintiff's rights.

APPEAL from a judgment of the Court of Appeal for *Ontario*, affirming a decree of the Court of Chancery

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*PRESENT.—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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of that Province (1), declaring that the appellants had infringed the right of ferry of the respondent, and enjoining the appellants from continuing their ferry and from running any ferry boat between the townships of *Ameliasburg* and *Sidney*. The facts are fully stated in the report of the case in 27 Grant 411, and in the judgments hereinafter given.

Mr. *Bethune*, Q. C., for appellants.

Mr. *C. Robinson*, Q. C., for respondent.

The following cases were referred to on the argument: *Fripp* v. *Frank* (2); *Fraser* v. *Drynan* (3); *Hopkins* v. *Great N. Rwy. Co.* (4); *Pim* v. *Curell* (5); *Huzzey* v. *Field* (6); *Newton* v. *Cubitt* (7); *Smith* v. *Ratté* (8).

RITCHIE, C.J.:

I do not think there was any infringment of the rights of the plaintiff by the defendant's ferry running from the township of *Sidney*, in the county of *Hastings*, to *Ameliasburg*, across the bay of *Quinte*, at the points indicated on the plan exhibit P. in this case.

The letters patent, dated the 26th April, 1858, on a petition by the municipality "to grant a license to said municipality of one ferry from *Belleville* to *Ameliasburg*," did "grant full license and authority unto the municipality of the town of *Belleville* to establish a ferry between the town of *Belleville* to *Ameliasburg* aforesaid," and under this authority the municipality of *Belleville* did establish a ferry.

The regular starting place of the ferry thus established on the *Belleville* side was from the town of *Belleville* at the foot of the street, where a ferry dock was built for the purpose, across the bay to the "ferry point," at

(1) 7 Ont. App. Rep. 341.
(2) 4 T. R. 666.
(3) 4 Allen 74.
(4) 2 Q. B. Div. 231.
(5) 6 M. & W. 234.
(6) 2 Cr. M. & R. 432.
(7) 12 C. B. N. S. 60.
(8) 13 Grant 696 & 15 Grant 473.

the *Picton* road, on which the town built a dock on the *Ameliasburg* side, immediately opposite the town of *Belleville* and within a prolongation of the west and east city limits of the said town. The terminus of the defendants' ferry on the *Ameliasburg* side, in the township of *Ameliasburg*, was over two miles from the western city limits of *Belleville*, across the bay of *Quinte* to a point in the township of *Sidney*, three miles from the said dock or starting place of plaintiff's ferry on the *Belleville* side, and it is two miles from defendants' ferry dock in *Sidney* to the town line.

I think the letters patent clearly contemplated the establishment of a ferry between the town of *Belleville* and *Ameliasburg*, not merely a right, as contended, to ferry from *Belleville* to *Ameliasburg* and not from *Ameliasburg* to *Belleville*, or, in other words, a right to ferry one way only. I do not think, as contended, that the grant was void for uncertainty in not describing the limits of the ferry. I think the fair construction of the letters patent is to limit the right to establish a ferry within the limits of the town of *Belleville*, on the one side, to a point across the Bay of *Quinte*, within an extension of the east and west limits of *Belleville*, on the other side, and if there is any doubt on this point, the establishment and user of the ferry within these limits for so many years fixes the termini of the said ferry.

This is not a ferry between *Belleville* and *Ameliasburg;* its termini are at a greater distance than the statutes fix as interfering distances. There is evidence that this ferry is a public convenience, and the petition of the ratepayers, the resolution of the municipal council and the order in Council clearly show beyond all dispute the necessity and expediency of the ferry.

It would be most unreasonable and inconsistent to that part of the country if *Belleville*, under these letters

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patent, could claim the right to control and run or not, as might happen to suit *Belleville*, ferry boats all along the Bay of *Quinte*

I think there has been no infringement of plaintiff's rights, and therefore the appeal should be allowed with costs.

STRONG, J. :

This is an appeal from a decision of the Court of Appeal, which affirmed a decree of the Court of Chancery restraining the defendant from maintaining and using a ferry across the bay of *Quinte*, between the township of *Ameliasburg* and the township of *Sidney*, and also directing an account of moneys received by the defendants in respect of the ferry in question during the year 1879, and ordering payment of the amount found due to the plaintiff.

The bill states the plaintiff's title to a ferry between the city of *Belleville* and the township of *Ameliasburg*, and alleges that the defendants have interfered with his rights by running a ferry boat between *Ameliasburg* and a place in the township of *Sidney*, which adjoins the city of *Belleville*, about two miles from the *Belleville* terminus of the plaintiff's ferry, and with having, for hire and reward, carried persons from *Ameliasburg* whose immediate destination was *Belleville*, and with having carried persons to *Ameliasburg* from *Belleville*, all of whom would, but for the defendants' ferry, have used and travelled by the plaintiff's ferry ; and the bill further states that thereby the defendants intended to and did divert the traffic from the plaintiff's ferry to his detriment and loss, that the only object of the defendants in establishing their ferry was to draw off passengers from the plaintiff's ferry, and that there is no occasion or reason for the defendants' ferry.

The defendants do not admit the allegations of the bill, and consequently, under the practice of the Court of Chancery as established by its general orders, the plaintiff is bound to prove both his title to the ferry he claims and the disturbance of his right by the defendants.

The plaintiff's title consists, first, of a license from the Crown, under the Great Seal, dated the 26th of April, 1858, whereby the Crown granted "full license and authority unto the municipality of the town of *Belleville* to establish a ferry between the town of *Belleville* to *Ameliasburg* aforesaid, with power to sublet the same," subject to the terms and conditions of the license. This license contains no definition of the limits of the ferry, except in so far as such limits may be considered to be prescribed by the operative words of the license just stated, namely, a ferry between the town of *Belleville* and the township of *Ameliasburg*. On the 17th June, 1867, the corporation of the town of *Belleville* by deed, after reciting; amongst other things, that by the letters patent a lease of the ferry "from the town of *Belleville* to the township of *Ameliasburg*" had been granted, proceeded "to demise and lease to *Abraham L. Bogart*, for fifteen years, the said ferry and the right to ferry to and from the town of *Belleville* aforesaid to the township of *Ameliasburg* aforesaid, as fully and to the same extent as the party of the first part might or could claim under the said lease or letters patent from the Crown." Subsequently, in the spring of 1874, *Bogart* assigned this lease, with the assent of the town of *Belleville*, to the plaintiff. The fact of the defendants having maintained a ferry and carried passengers for hire between the township of *Ameliasburg* and the opposite township of *Sidney*, situated on the same side of the Bay of *Quinte* as *Belleville*, is not disputed. The only color of title to such a ferry as that which the

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defendants have established is an order of the Lieutenant Governor of *Ontario* in Council, dated the 30th September, 1879, whereby it was ordered that a license under the great seal should issue to the township of *Ameliasburg* for a ferry between that township and the township of *Sidney*. No license was ever issued under this Order-in-Council, nor has the township of *Ameliasburg* ever executed any lease or license to the defendants, or authorized them to establish a ferry under the powers conferred upon them. The landing place of the defendants' ferry on the *Belleville* side is proved to have been upwards of 1½ miles west of the westerly limit of *Belleville*.

The first question which arises is whether the license of the 20th April, 1858, authorised the town of *Belleville* to establish a ferry both ways, that is, a ferry from *Ameliasburg* to *Belleville* as well as one from *Belleville* to *Ameliasburg*. The ferry is differently described in the license itself, as well as in the lease subsequently made under it. In the recital of the letters patent it is stated that the petition was for a license for a ferry from "*Belleville* to *Ameliasburg*," but in the operative or granting part of the same instrument it is differently described, the words of this part of the grant being:

> Now, therefore, know ye that we do by these presents grant full license and authority unto the municipality of the town of *Belleville* to establish a ferry between the town of *Belleville* to *Ameliasburg* aforesaid.

I think there can be no doubt, but that the construction put upon this grant by the court below was the correct one, and that what was granted was a ferry both ways. We cannot construe the words of the letters patent literally—so construed, they would be insensible; we must either reject the word "to" and substitute the conjunction "and" for it, or we must reject "between" and substitute "from." It seems to me that

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the argument in favor of the former construction, as stated in the judgment of Mr. Justice *Patterson*, is conclusive. The ferry was being established for the use and benefit of the public, and we must therefore so interpret the grant as best to sustain that object—not so as to confer a mere monopoly for the profit of the individual licensee. The statute under which the license was granted clearly shows that it was intended to provide for the establishment of steam ferries running both ways, and not for ferries one way only. The lease by the town of *Belleville*, which is also very inaccurate in the language in which it describes the ferry, must likewise be taken as demising a right co-extensive with that conferred by the license. The operative words in the granting part of the lease are "the said ferry and the right of ferry to and from the town of *Belleville* aforesaid to the township of *Ameliasburg* aforesaid as fully and to the same extent as the party of the first part might or could claim under the said lease or letters patent from the crown." If we take out the words "to the township of *Ameliasburg* as aforesaid," and read the lease as of a ferry "to and from *Belleville*" as fully and to the same extent as confirmed by the letters patent upon the town, there can be no doubt about what was meant, and I cannot consider this description, which we should get by so reading the instrument, narrowed by the insertion of the words, "to the township of *Ameliasburg*;" rather the words "to and from *Belleville*" call upon us to interpolate the words "and from" before the "township of *Ameliasburg*;" and so reading it, we get a complete, sensible and accurate description of what was no doubt intended to be granted—a ferry co-extensive with that which the letters patent had granted to the town, viz., one to and fro between *Ameliasburg* and *Belleville*.

It seems clear that the provision originally contained

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in 8 *Vic.*, ch. 50, now embodied in Rev. Stats. *Ont.*, ch. 112, sec. 3, providing that no exclusive privilege of a right of ferry should extend for any greater distance than one mile and a half of the point at which the ferry is usually kept, does not apply to steam ferries licensed under 20 *Vic.*, ch. 7. The Commissioners, in revising the statutes, have adopted this construction, for sec. 3 of chapter 112 expressly makes the exception of ferries granted to municipalities under the subsequent provisions of the Act (ch. 112), which are a re-enactment of the provisions of 20 *Vic.*, ch. 7.

Section 5 of ch. 112, which is an exact reproduction of the similar provision in 20 *Vic.* ch 7, under which this license now in question was granted, is in these words:

> Such license shall confer a right on the municipality or municipalities to establish a ferry from shore to shore on such stream or other water and within such limit and extent as may appear advisable to the Lieutenant-Governor in Council and be expressed in such license.

Referring to the letters patent we do not find any description or definition of the limits of the ferry beyond those contained in the operative words of the grant which, as before stated, and according to the proper construction, describe it as "a ferry between the town of *Belleville* and *Ameliasburg*." The exclusive limits of the ferry must be taken, therefore, to be the town of *Belleville*, on one side of the bay, and the township of *Ameliasburg*, on the other. These at first, no doubt, seem to be very extensive limits, but when we consider that the grant is subject to an absolute power of revocation by the Crown, any objection on this head ceases to appear of importance.

Therefore, taking the limits of the ferry to be the limits of the town of *Belleville* on one side, and those of the township of *Ameliasburg* on the other, we have to

determine whether the defendants, by the maintenance of a ferry from a point in the township of *Ameliasburg* to a point in the township of *Sidney* west of the limits of the town of *Belleville*, have been guilty of any disturbance of the plaintiff's ferry. And I am clearly of opinion that this question must be answered in the negative. Although the 8 *Vic.*, ch. 50, has no direct application to the license granted to the town of *Belleville*, yet it may be called in aid to assist in the interpretation to be given to the words "such limit and extent" used in the 20 *Vic*, ch. 7, in the section already extracted from the Revised Statutes. Referring, then, to the provision of the 8 *Vic.*, ch. 50, which fixes the limits of a ferry at one mile and a half on each side of the point at which it is usually kept, we find very distinctly what is meant by "limits," and by the words "limit and extent," and for what purpose such limits are defined ; for the words of the earlier statute are that—

> When the limits to which the exclusive privilege of any ferry extends are not already defined, such exclusive privilege shall not be granted for any greater distance than one mile and a half on each side of the point at which the ferry is usually kept.

The limits, therefore, being used in the first statute for the purpose of defining the exclusive right of ferry, we are at liberty to conclude, construing the two statutes as *in pari materiâ*, that the limit and extent required in licenses to be issued under the later Act, were also to be the limits of the exclusive privilege. Then, what is meant by the term " exclusive privilege ?" It must mean that, within the limits defined, no person shall, without being guilty of unlawful interference, maintain a ferry, but that without the limits there shall be no exclusive privilege, and consequently that no amount of practical interference shall be taken to be unlawful or actionable as constituting a disturbance of the franchise of the licensee. This must necessarily mean within

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the same limits on both sides of the river or stream, for otherwise the very object and purpose of fixing the limits of a ferry, which is to prevent the uncertainty which arises in the case of ancient ferries in *England*, and in respect of other ferries without defined limits, would be defeated. That this is the object of defining the limits of the ferry is, if it is not sufficiently obvious without any demonstration, very clearly shown by a note in *Kent's* Commentaries (1), where it is said:

> It has been usual in the grant of a franchise to exclude in express terms all interference within specified distances. This practice has become highly expedient, considering the doctrine referred to in a subsequent part of this note. By a general Act in *Illinois* a ferry or toll bridge privilege created by statute excludes all other establishments within three miles of the same. * * * * This is an affirmance of the common law rule, and it is the wisest course, for it prevents all uncertainty and dispute as to what are reasonable distances in the given case, and what would amount to an unlawful interference.

On the whole, therefore, it appears very clear that it was intended by the statute that the limits and extent to be defined should be those within which it should be deemed a disturbance of the licensee's franchise to interfere by the establishment of another ferry, and that as regards anything done without those limits, the licensee should have no right to complain. The defendants have not therefore by running a ferry boat between the townships of *Ameliasburg* and *Sydney* been guilty of any interference with the plaintiff's rights. As regards the provision included now in the 10th sec. of the Revised Statutes, ch. 112, I am of opinion that it has no application to the case of a person who "lessens the tolls and profits" of a licensee of the Crown, by ferrying without the limits of the licensed ferry. The section can only be applicable to the case of a disturbance, by ferrying within the limits of the licensed

(1) 3 Vol. p. 459.

ferry, or by some unlawful act other than ferrying without the limits. The language of this section in terms only applies to persons who unlawfully ferry, or who unlawfully do any other act or thing whereby the licensee's profits are lessened. The unlawful ferrying referred to must mean a ferrying within the exclusive limits of the licensed ferry, or otherwise there would be no use in defining the limits of the exclusive privilege, as the statute has so carefully done; for a contrary construction would at once let in all the uncertainty which it was the very object to prevent in requiring a definition of the limits; and the "other unlawful act or thing" means some "act or thing" distinct from ferrying, such as forcibly obstructing the landing from the ferry and other unlawful acts which may be suggested, entirely distinct from maintaining a ferry without the limits.

It is true that the maintenance of a ferry and the taking of tolls for ferrying without the license of the Crown, is at common law illegal, as unduly infringing the prerogative of the Crown, but it is an illegality for which, so long as there is no unlawful interference with the private rights of other ferrying proprietors, there is no remedy but such as the Crown may think fit to resort to, to restrain or abate it.

In my judgment the decree of the Court of Chancery must be reversed and the bill dismissed with costs, and the appellant must have his costs in this Court and in the Court of Appeal.

FOURNIER, J.:—

I agree with Chief Justice *Haggarty* in the court below that the defendants' ferry is no infringement of plaintiff's right, and therefore I am of opinion that this appeal should be allowed.

HENRY and TASCHEREAU, JJ., concurred.

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GWYNNE, J.:—

I am of opinion that the plaintiff, by selecting the ferry point on the *Ameliasburg* side, as his landing place, has adopted the termini of his ferry, and that there has been by the defendants in this case no infringement of plaintiff's rights.

Appeal allowed with costs.

Solicitors for appellants: *Delaney & Ostrom.*

Solicitors for respondent: *Blake, Kerr, Lash & Cassels.*