

1893
*May 13.
*June 24.

THE CORPORATION OF THE
VILLAGE OF NEW HAMBURG }
(PLAINTIFFS) }

APPELLANTS ;

AND

THE CORPORATION OF THE
COUNTY OF WATERLOO (DE- }
FENDANTS)..... }

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Ontario Municipal Act—Bridges—Width of stream—R. S. O. [1887]
c. 184, ss. 532, 534.*

By the Ontario Municipal Act R. S. O. [1887] c. 184, s. 532, the council of any county has “exclusive jurisdiction over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county and connecting any main highway leading through the county,” and by s. 534 the county council is obliged to erect and maintain bridges on rivers and streams of said width. On rivers or streams one hundred feet or less in width the bridges are under the jurisdiction of the respective villages through which they flow.

Held, reversing the decision of the Court of Appeal, that the width of a river at the level attained after heavy rains and freshets each year should be taken into consideration in determining the liability under the act ; the width at ordinary high-water mark is not the test of such liability.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the defendants the County of Waterloo.

This action is brought under the provisions of 53 Vic. ch. 50, sect. 40 (O.), now section 535 (a) of the Consolidated Municipal Act, 1892 (55 Vic. ch. 42), for the purpose of determining whether the duty and liability

*PRESENT :—Sir Henry Strong C. J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 20 Ont. App. R. 1.

(2) 22 O. R. 193.

to build and maintain a certain bridge, called the Huron Street bridge, across the River Nith, which passes through the village of New Hamburg, an incorporated village in the county of Waterloo, rests upon the appellant corporation or the respondent corporation.

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Section 531 of ch. 184, R. S. O., deals with the general duty of municipalities to keep in repair the roads, streets, bridges and highways.

Section 532 provides as follows :—

532. The county council shall have exclusive jurisdiction over all roads and bridges lying within any township, town or village in the county, and which the council by by-law assumes, with the assent of such township, town or village municipality, as a county road or bridge, until the by-law has been repealed by the council, and over all bridges across streams, or ponds, or lakes, separating two townships in the county, and over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county, and connecting any main highway leading through the county, and over all bridges over rivers, or ponds, or lakes forming or crossing boundary lines between two municipalities.

Section 534 provides as follows :—

534. When a county council assumes by by-law any road or bridge within a township as a county road or bridge the council shall, with as little delay as reasonably may be, and at the expense of the county, cause the road to be planked, gravelled or macadamized, or the bridge to be built in a good and substantial manner ; and further, the county council shall cause to be built and maintained in like manner all bridges on any river or stream over one hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any main public highway leading through the county.

The only question to be decided on the appeal was :

1893 Is the River Nith a river or stream over one hundred
 feet in width within the meaning of these provisions?
 THE The evidence showed that the river has well defined
 VILLAGE OF NEW banks higher on one side than on the other and that
 HAMBURG after an ordinary freshet or heavy rain the water rises
 v. nearly to the height of the lower bank, which is over-
 THE flowed by a heavy freshet. When the water is within
 COUNTY OF one foot of the lower bank it is about 112 feet in width,
 WATERLOO. but in dry weather, when the water is low, it is less
 than 100 feet.

Mr. Justice Ferguson, who tried the action, held that the proper mode of ascertaining the width of the river under the section was to measure from a point a little below the brow of the lower bank across the stream in a straight line to the bank opposite which would make the river in this case more than 100 feet in width. The Divisional Court reversed this decision, holding that the width at the ordinary high-water mark was the true width for the purpose. The Court of Appeal sustained the judgment of the Divisional Court by being equally divided in opinion.

Meredith Q.C. for the appellants was stopped by the court.

King Q.C. for the respondent referred to *Phear* on Rights of Water (1); *McCullough v. Wainright* (2); *Gilman v. Philadelphia* (3).

The judgment of the court was delivered by

GWYNNE J.—The only question raised upon this appeal is whether or not a bridge over the River Nith in the village of New Hamburg, connecting the parts of a main public highway on either side of the river leading through the county of Waterloo, is a bridge within secs. 532 and 534 of ch. 184, R. S. O., that is say, whether or not it is a bridge crossing a river or stream over one hundred feet in width. That the bridge

(1) P. 31.

(2) 14 Penn. 171.

(3) 3 Wall. 713.

which crosses the river is considerably more than 100 feet in length is not disputed, but it is contended that the river itself is not one hundred feet in width. The evidence shows the river to be one having well defined banks, that upon one side being much higher than that on the other. It is also shown that in ordinary freshets and even after an ordinarily heavy rain the waters of the river rise as high as the lower bank, while in heavy freshets they overflow that bank; when, however, the waters in the river rise as high as within one foot of the top of the lower bank and so are flowing within its well defined banks the river is over 112 feet in width, but in dry weather and when the waters are low it is not as much as 100 feet in width. Now a bridge across such a river is, in my opinion, clearly within the sections in question, that is to say, is a bridge which crosses a river over 100 feet in width and is under the exclusive jurisdiction of the county council whose duty it is to maintain the bridge. After heavy rain and during freshets, which are ordinary occurrences in this country, the waters of the streams and rivers are accustomed to be much swollen and raised to a great height, and a bridge therefore which is designed to be the means of connecting the parts of a main highway leading through a county which are separated by a river must necessarily be so constructed as to be above the waters of the rivers in such periods, and the width of the rivers at such periods must therefore, in my opinion, be taken into consideration in every case in which a question arises like that which has arisen in the present case under the sections of the act under consideration. The appeal must, in my opinion, be allowed with costs and the judgment of Mr. Justice Ferguson restored.

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Appeal allowed with costs.

Solicitors for appellants: *Meredith, Clarke, Bowes & Hilton.*

Solicitor for respondents: *John King.*