

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Hamilton and Milton Road Company v. the Corporation of the Town of Dundas, from the Court of Chancery for the Province of Ontario, Canada; delivered 22nd February, 1873.

Present :

SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from an Order of the Court of Error and Appeal of Ontario in Canada, dated the 7th day of September, 1870, varying a Decree of the Court of Chancery for the Province of Ontario, dated the 26th of January, 1870, and made on the hearing of a Cause wherein the Respondents were Plaintiffs, and the Appellants, with others, were Defendants.

The principal question to be determined is, whether the terms imposed upon the Plaintiffs by the Vice-Chancellor, as the conditions of relief by injunction, ought to be affirmed or to be varied, in the manner directed by the Decree of the Appellate Court. The effect of that decree was to relieve the Plaintiffs from the following conditions imposed by the Vice-Chancellor.

1. That the Plaintiffs should, at their own expense, erect in connection with the new road of the Hamilton and Milton Road Company, a new, sufficient, and commodious bridge, which should not interfere with the navigation of the Desjardins Canal, and which should have proper approaches

thereto in connection with the said road of the Hamilton and Milton Road Company.

2. That the Plaintiffs should pay the costs of removing the bridge erected by the said Hamilton and Milton Road Company, and any further compensation, if such there were, which should justly be made to the Road Company for their past expense on their new road and bridge, having regard to the comparative advantages of the road formerly used and the road since built by the said the Hamilton and Milton Road Company, and having regard also to the circumstance of the high bridge having been lately repaired by the Plaintiffs, and its usefulness having thereby increased.

3. That proper provision should be made for opening and closing the new bridge, in case the Plaintiffs should build a draw or swing bridge, and for the repair thereof at the Plaintiffs' expense.

4. That it should be referred to Francis Shanly, Civil Engineer, to inquire and report, as to the provision that would be proper to be made *for opening and closing the new bridge* in case the Plaintiffs should build a draw or swing bridge, *and for the repair thereof* as aforesaid, *the security* for such provisions to be settled by the said Master of this Court.

It may be taken that the Canal Company was, in pursuance of the 5th section 16 Vict., c. 54, of the Canadian Legislature, bound to keep in repair the bridge over the new cut at the Burlington Heights; that the bridge was allowed to become greatly out of repair, and even dangerous; that the Canal Company were, in consequence, indicted for a public nuisance; that they were sentenced to a fine of 8,000 dols.; that execution was issued against them for the purpose of levying the fine, and that that execution was stayed by injunction.

It was stated by the Chancellor that there were some points upon which he believed all the Members of the Court of Appeal were agreed. It was agreed, he said, that there was no forfeiture of the franchise of the Canal Company, by reason of their omission to repair the bridge, and on the other hand that the duty created by the statute to keep and maintain, as well as to erect a safe and commodious bridge over and across the cut referred to in the Act, was a continuing obligation; and further, that that obligation had not been observed by the Canal Company.

Their Lordships concur in those views, and they have no doubt that the Road Company and the public were put to considerable inconvenience in consequence of the non-repair of the bridge, and the obstacles presented in the way of their obtaining redress.

It may be admitted that the Plaintiffs, as equitable mortgagees of the Canal, are not entitled to an injunction upon more favourable terms than the Canal Company would have been, but, with every respect for the opinions of the Chancellor and Vice-Chancellor, their Lordships fail to see any sufficient grounds upon which the issuing of an injunction could be fairly and equitably made subject to the conditions which were disallowed by the majority of the Judges in the Court of Error and Appeal.

The new cut through the Burlington Heights was substituted for a portion of the Canal in the navigability of which the public had an undoubted interest. The Canal Company and the Plaintiffs had a right, even if they had not a duty imposed upon them, to prevent the construction of any unlawful work which would obstruct the navigation of the Canal, or diminish the amount to be collected thereon for tolls. By the 7th Geo. IV, cap. 18, by which the Desjardins Canal Company were incorporated, it was recited that public benefits were expected to be derived from connecting Burlington Bay with Lake Ontario, and that, in order that those benefits might be more generally extended to the surrounding country, it was of manifest importance to form a Canal sufficient for the passage of sloops and other vessels of burden from the said bay to the village of Cootes Paradise through the intervening marsh and other lands. By the 22nd and subsequent sections of the Act, provisions were made for the compulsory purchase of the lands necessary for the Canal. By the 28th section the said Canal Company were required to construct and maintain sufficient and commodious bridges for the passage of carriages wherever they should cut into or through any highway in order to conduct their Canal by or through the same, and were authorized to convert certain then existing ordinary bridges into draw-bridges, keeping such draw-bridges in that situation that His Majesty's subjects and others might pass thereon with their horses, cattle, and carriages, at all times,

except when actually required to be opened for the passage of boats, vessels, or other craft navigating the said canal. By Section 18 the Company were empowered from time to time to regulate and establish the rates of toll payable by persons navigating the said Canal, and were bound annually, if required, to exhibit an account to either branch of the Legislature of the tolls so regulated, of the amount received, and of the sums expended in keeping the Canal in repair. It was also provided by Section 19 that whenever the tolls should in the annual receipts exceed in amount a sum sufficient to defray the expenses of maintaining and repairing the said Canal, and to afford an annual income to the said Company of 20 per cent. profit upon the capital actually expended in the construction of the said Canal from the time of the commencement of its navigation for such vessels as aforesaid, the surplus revenue of the said tolls should be charged against the said Company as so much by them received in the nature of a sinking fund, by means whereof to purchase from the said Company the entire estate and property of the said Canal for the use of the public in such manner as the Legislature of the said Province might provide. Power was also given to the Legislature at any time to purchase the said Canal upon the terms thereby provided. And by Section 34 it was enacted that the Act should continue in force for fifty years, at which time the said Canal, with the waters and navigation thereof, should vest in His Majesty for the use of the said Province, unless otherwise provided for by an Act of the Legislature.

The cut through the Burlington Heights, over which the bridge whereof the non-repair complained of was constructed, was about 125 feet deep, and it intersected an ancient common public highway. The making of the cut rendered it necessary to construct a bridge across it, in order to restore the said highway by connecting the two portions thereof where it had been intersected. At first a suspension bridge was constructed by the Great Western Railway Company about 110 feet above the water of the cut, but that bridge having been blown down, a wooden bridge was constructed across the said cut in the same place.

That bridge, and the road which passed over it, were about 110 feet above the water of the cut—

sufficient to enable schooners and other masted vessels to pass under them without obstruction.

The bridge which the Appellants were about to erect, and which they did erect pending the suit for the injunction, was about 50 feet only above the water-way of the cut, and not sufficiently high to allow schooners and other masted vessels to pass under it; it did not connect the points of the ancient highway where it had been intersected by the cut, and was altogether out of the line of that road. It merely connected one part of a new road made by the Appellants on the north side of the cut with another part of that road on the south side of the cut long after the cut was completed. Their Lordships cannot consider the construction of the new road and bridge as a mere deviation from the line of the old highway, rendered necessary by the non-repair of the bridge, or as an abatement of the nuisance caused by the non-repair of the old bridge. The new bridge was, in fact, itself a nuisance, inasmuch as it obstructed the navigation of the canal. The Chief Justice of Appeal put the point very clearly in his Judgment. He said:—

“The right of abating, as the Road Company claim to exercise it, goes very far beyond the right given by law to a party to abate a nuisance which is injurious to him. The right which the Road Company had was to have a particular highway, as I understand the only highway which the cut through the Burlington Heights intersected, restored by a bridge. That right was infringed by allowing the bridge to become unsafe and out of repair, and this was the only nuisance of which the Canal Company were guilty, and consequently the only nuisance which the Road Company were injured by. The argument of the Road Company leads to this: That, to abate this nuisance, they may construct a new road for a public highway, which, as it did not exist when the cut was made, could not have been intersected by it, and in respect of which, therefore, the Canal Company had committed no nuisance; and that in the line of such new highway they may construct a bridge, of such a character that it will prevent a class of vessels which have ordinarily navigated this canal from doing so in future. It amounts in effect to this—that to abate a nuisance of omission in one place where it injures them, they may erect a nuisance in another place where it injures the party guilty of the first nuisance.”

His Lordship might have added “and where it injures the public who were not guilty of the nuisance intended to be abated.”

Again he says:—

“I presume it will not be seriously contended that a fixed bridge which would prevent masted vessels, sloops, schooners, &c.,

from navigating this canal, would not be indictable as a nuisance. The language of Park J., in delivering the opinion of the Judges before the House of Lords in *Mayor, &c., of Lyme Regis v. Henley* (1 Bing, N. C. at p. 238), removes any doubt as to this canal being a matter of general and public concern."

It has not been found as a fact, nor is there sufficient evidence to lead their Lordships to the conclusion that it was necessary in consequence of the non-repair of the bridge, to make the new road crossing the cut at a lower level than the old one, and thus to involve the necessity of incurring a very large expenditure in erecting at that point a bridge of such a height as to enable sloops and other masted vessels to pass under it, or else of making a draw-bridge, which would render it necessary to incur continual expense in providing for the opening and closing of it.

The new road was made under an agreement between the Corporation of the City of Hamilton of the first part and the Appellants of the second part, according to which the new road was to be extended into the City of Hamilton, beyond the limits of the old highway, and was not confined to what was actually necessary to provide a passage over the cut. The following is one of the clauses of the agreement :—

"And conceiving that the Canal Company, by their neglect to maintain a sufficient bridge across the said Canal, have forfeited the right to obstruct the highway, and that parties restoring the highway for public travel by a sufficient bridge will be entitled to maintain a fixed or stationary bridge across the said Canal, and the negotiations between the said parties of the second part and the said Canal Company for a fixed bridge, are pending but have not yet been concluded, they the said parties of the second part promise the said parties of the first part to make and maintain the said intended bridge as a fixed or stationary bridge, unless and until prevented by legal process or proceedings; and in case of being so prevented, then they will cause, compel, or procure to be kept and maintained, a good and sufficient swing bridge in place of a fixed bridge across the said Canal, and the same to be opened and closed as occasion shall require, in all time to come, without damage to the City of Hamilton or to the parties using the said intended highway. And the said parties of the first part further promise and agree to and with the parties of the second part that they will immediately pass a bye-law permitting and consenting to the extension of the said toll roads of the parties of the second part into the City of Hamilton to the easterly limit of the said ordinance lands; and also a bye-law whereby the line of the highway leading down the heights where it intersects the railway leading from Hamilton to Toronto, shall be so changed and altered as to cross the said railway at grade,

and the present opening for the said highway under the said railway be filled up and made an embankment."

In paragraph 18 of their answer the Appellants say :—

"That in order to preserve their property they came to an arrangement with the Corporation of the City of Hamilton, in the early part of the month of June last whereby the said Road Company agreed, amongst other things, to extend their toll roads into the City of Hamilton across the said Canal to a considerable distance south of the said Canal to a point known as the southerly or south-easterly limits of the ordnance lands, and to erect and maintain a fixed bridge across the said Canal, at their own cost ; in consideration whereof, and as an inducement thereto, the said Corporation of the City of Hamilton agreed to lend to these Defendants the said Road Company, at nominal interest, five thousand dollars."

After the filing of the Bill, viz., on the 29th September, 1869, the Plaintiffs (now Repondents), moved for an injunction according to the prayer of their Bill, and on the 1st of October the injunction was refused, the Appellants undertaking to remove their bridge as soon as a secure and commodious bridge should be constructed across the canal to the satisfaction of the Court or of an engineer appointed by the Court to examine and report thereon, and as soon as the Court should direct the removal, and on such terms as to the Appellants' expenditure in the matter of their bridge as the Court should think reasonable.

With the the consent of both parties, Mr. Shanly, a civil engineer, was appointed by the Court to make the said examination and report. Nothing was then said as to the Plaintiffs being required to pay any part of the expenses of constructing the new road.

Between July and November the Plaintiffs (now Respondents) expended from 6 to 7,000 dols. on the repairs of the old bridge. It was proved by Mr. Griffin, the Secretary to the Appellants, that those repairs were commenced about the 19th of July. Mr. Shanly, in his evidence, stated that the repairs which he considered necessary were being carried out with reasonable expedition, and before the Vice-Chancellor delivered judgment Mr. Shanly reported that the Respondents had practically carried out his instructions, and that he considered the old bridge, with proper attention, to be good for two years.

But for the agreement which the Appellants had

entered into with the City of Hamilton, there was no actual necessity for proceeding with the new road and bridge: yet those works were being carried on, and the expenses thereof incurred, whilst the repairs of the old bridge were being executed, the Appellants evidently being under an erroneous impression that, in consequence of the non-repair of the bridge, the Respondents' right to maintain the new cut had been forfeited, and that the Appellants were entitled to make a new road, and to erect and maintain a fixed bridge across the Canal in connection with such road, even though their bridge might obstruct the navigation. It was proved by the evidence of the Mayor of Dundas and other witnesses that very little, if any, interruption of the traffic over the old bridge was caused by the non-repair thereof. Upon that point the Vice-Chancellor, in his judgment, said: "The evidence is contradictory as to whether there has been any loss from that cause. By many persons the bridge had never ceased to be used as before; loaded teams continued to go over it in large numbers without accident before the Plaintiffs repaired it, and many persons appear all along to have considered the bridge perfectly secure. But the bridge was not, in fact, secure, and some persons were in consequence, deterred from making as much use of it, and the Defendants' road as previously. The diminution of travel last year was not wholly owing to that cause."

It was further proved by the Mayor of Dundas and other witnesses, that the stopping of the Canal would have a very injurious effect upon that town; that schooners carrying coal and other things arrived there every year and carried away lumber, wood, and other articles; that Dundas depended entirely on its factories; and that if the navigation should be stopped, the traffic would go by the road between Hamilton and Dundas, or by the Great Western Railway.

If at the time when the Defendants commenced their new road the old bridge had been in as good a state as it was when Mr. Shanly made his Report, it could scarcely be contended that it would have been equitable to require the Plaintiffs, who were merely equitable mortgagees of the Canal, to erect a new bridge in connection with the new road, upon the ground that the old bridge might probably not be

secure for more than two years; and if it would not have been equitable in that case, could the construction by the Defendants of the new road out of the line of the old road, under a contract with the City of Hamilton, alter the liability of the Plaintiffs in that respect, or throw upon them the burthen of paying any portion of the expenses of making it, or of giving security to keep either the old or new bridge in repair for all time?

With respect to the new road in connection with which the new bridge is required to be made, several of the witnesses proved that it would not be practicable; and that, as compared with the high bridge and road, the new one would always be inferior, because there would be one hill to ascend and another to descend; whereas the approaches to the old bridge were on a level with it. Another witness, Christopher Cave, said, "I have seen the new road; it is not in a fit place for the road to go. I don't think the new road can be used." Another witness, John Evans, deposed—

"I have seen the new road which the Hamilton and Milton Road Company is constructing. I think it a dangerous road. It could not be used for the same purpose as the high bridge. The removal of the high bridge would be a serious loss to the county. The iron bridge of the Road Company is too narrow for two teams to pass. I measured it to-day. The road is in part along the bank, and in places where the road is between the water and the railway there is not space for two teams to pass. A mast or piece of timber 60 feet long could not pass at the point where the new road crosses under the railway, the curve is so short. A piece of timber 50 feet long could not turn there. Equal loads could not be taken over the new road in its present state as over the old road. The new road will also be liable to be blocked up with the snow. And in spring the road will be dangerous from the water on it freezing. There is also danger from the proximity of the railway. I would not trust to drive some horses over the new road. It would not be safe."

Mr. Shanly stated that the road along the bay would be safe or otherwise according to the way in which it should be finished. He said—

"Unless there be some protection I think it would be unsafe, because it is very near the railway on the one side and the bay on the other."

Mr. Griffin, the Secretary to the Road Company, said—

"If the high bridge were properly renewed and repaired when required, I am not prepared to say whether or not the Hamilton

and Milton Road Company would be willing to abandon their new road and bridge, even if they could do so under their agreement with the City of Hamilton; this has never been considered by us. Our reason for building a fixed instead of a swing bridge was that it would cost more to build and to attend it when erected. Another reason is that the Great Western is willing to give us 15,000 dols. if we can establish a fixed one; but we are under no obligations with the Great Western to build a permanent bridge. Another reason is that the trains would not be compelled to stop at the bridge, and thus the noise of the whistles would be avoided, and this annoyance to persons travelling with horses would also be avoided.

It must be borne in mind that the more the Respondents are compelled to pay in connection with the new road, such as it is described by the witnesses to be, the less they will be able to provide for the maintenance and repair of the old bridge or for the re-construction thereof.

Mr. Shanly stated that an iron bridge at the height of the present high bridge could be built for 22,000 dols., that a wooden bridge would be about 6,000 dols. less. The decree of the Vice-Chancellor requires a new, sufficient, and commodious bridge in connection with the new road which shall not interfere with the navigation of the Canal. If built to the height of the old bridge, it would probably cost as much as a new bridge on the site of the old one. The decree, it must be admitted, contemplates a draw or swing bridge as within the terms of the condition, but their Lordships are of opinion that the Respondents have no right to erect either a drawbridge or a fixed bridge across the Canal without the consent of the Canal Company; and that even if the Canal Company would consent to the erection of a drawbridge across their Canal, which they are not bound to do, it would be open to the objections pointed out by Mr. Griffin. Their Lordships have not been referred to any statute which would authorize the erection of a drawbridge in connection with the new road. It is clear that both the passage over the Canal and the navigation on it would be rendered less convenient to the public by a drawbridge than by the old bridge, over which passengers crossing and vessels navigating the Canal can pass at their free will without any obstruction or waiting for the opening or closing of a drawbridge. At all events a drawbridge could not be validly substituted for the high fixed bridge. The permission

granted to the Canal Company by the 7 Geo. IV, cap. 18, sect. 28, to convert certain ordinary bridges into drawbridges was limited to those particular bridges, and did not extend to bridges over the new cut.

Their Lordships do not consider that it was equitable to require the Respondents to pay any part of the expense of the new road or bridge, or to erect a bridge in connection with the new road and to find security for keeping it in repair. If security for keeping any bridge in repair would have been reasonable, it was the bridge in connection with the old road. But even as regards that bridge, their Lordships do not think it would have been equitable to require such security from the Respondents.

One of the Respondents' grounds of Appeal to the Court of Error and Appeal, was—

“Because the road and bridge newly attempted to be constructed by the said Road Company were not and may never be accepted by the public in lieu of or in substitution for the ancient travelled highway aforesaid, and should Appellants (the now Respondents) therefore pay and perform the conditions of the said decree, the liability of the Canal Company to maintain the said bridge over the excavation aforesaid would still continue.”

Their Lordships are of opinion that this objection to the Vice-Chancellor's Decree was well founded. Nothing appears upon the evidence, or upon the record to show that the public could be deprived of their ancient highway by the construction of the new road. Therefore if the Respondents were to comply with the conditions imposed by the Vice-Chancellor, the Canal Company will not be relieved from the obligation of repairing the old bridge.

Their Lordships concur with the remark of the Chief Justice of Appeal, that “for all that is shewn—the Statutory obligation of the Canal Company to maintain the high bridge continues, and there is no obligation in law on the Canal Company to assist the Road Company in any other way than by affording and maintaining a sufficient bridge on the old site.”

With respect to the costs of removing the bridge, their Lordships are of opinion that it was a public nuisance, and that the Appellants were guilty of an unlawful act in erecting it, and that the Plaintiffs

the Respondents cannot justly or equitably be called upon to pay such costs.

As regards the delay in applying for the injunction, which was urged against the Respondents in the argument, their Lordships do not think that there was any undue delay. The application was to restrain the Appellants from erecting and maintaining the bridge. The mere construction of the new road was no intimation of the Appellants' intention to obstruct the navigation; the bridge which they intended to erect, and which they subsequently erected, was not purchased until the 2nd of September, 1869 (par. 22 of the Answer), and the Bill was filed on the 14th of that month.

Upon the whole, their Lordships are of opinion that the decision of the Court of Error and Appeal was correct, and they will therefore humbly recommend Her Majesty to affirm the Decree of that Court, and to dismiss this Appeal with costs.