

JOHN BUCHANAN MAGEE AND }
WILLIAM CLARENCE MAGEE... } SUPPLIANTS;

1897
Mar. 29.

AND

HER MAJESTY THE QUEEN.....RESPONDENT;

AND

THE CITY OF ST. JOHN (THIRD }
PARTY) } DEFENDANT.

Public work—Injurious affection where no property taken—Deprivation of access—Compensation.

An interference with the right of navigation in a harbour, which the owner of a wharf suffers in common with the public, is not sufficient to sustain a claim for compensation for the injurious affection of the property on which the wharf is situated resulting from the construction of a public work.

2. But where the interference affects a private right of access which the owner has to and from the water of the harbour, or with the use of such water for the lading and unlading of vessels at his wharf, the claimant is entitled to compensation.

PETITION OF RIGHT for damages arising from the construction of a public work.

The facts of the case are stated in the reasons for judgment.

The case came on for hearing before the Judge of the Exchequer Court at St. John, N.B., on the 21st, 22nd and 23rd days of January, 1897.

W. Pugsley, Q.C., for the suppliants, cited *Chamberlain v. The West End of London and Crystal Palace Ry. Co.* (1); *Metropolitan Board of Works v. McCarthy* (2); *The Queen v. Barry* (3); *Caledonia Ry. Co. v. Walker's Trustees* (4); *re Wadham and the N. E. Ry.*

(1) 2 B. & S. 605.

(2) L. R. 7 H. L. 273.

(3) 2 Ex. C. R. 333.

(4) 7 App. Cas. 259.

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*Co.* (1); *Herring v. Metropolitan Board of Works* (2);  
*Parkdale v. West* (3).

*W. W. Allen* followed, citing *Pion v. North Shore Ry. Co.* (4).

*C. N. Skinner*, Q.C. (with whom was *H. A. McKeown*)  
 for the respondent and third party, cited 3 L. & P. S.  
 N. B., p. 999.

*Mr. Pugsley* replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 29th, 1897) delivered judgment.

The petition is brought by the suppliants to recover a sum of five thousand dollars for damages which they allege that they have sustained by reason of the depreciation in value of certain lands and premises of which they are lessees, situated in the City of St. John and the Province of New Brunswick. This property adjoins that which came in question in the case of *Robinson v. The Queen* (5), to which for convenience I shall refer as the Robinson property, and like the latter, was injuriously affected by the construction within the City of St. John of an extension of the Intercolonial Railway. There was a wharf on the property and buildings which at the time when this extension was made were in possession of the suppliants under a lease from one Stephen Blizzard, for five years from the 28th of March, 1892, with a right to purchase the property for eight thousand five hundred dollars. The suppliant John Buchanan Magee, and a brother since deceased, had first gone into possession of the property in 1886, under a similar lease, from the same lessor, and had fitted the property up

(1) 14 Q. B. D. 747.

(2) 19 C. B. N. S. 510.

(3) 12 A. C. 602.

(4) 14 A. C. 612.

(5) 4 Ex. C. R. 439; 25 S. C.  
 R. 692.

for carrying on their business as coal dealers, and had made improvements and additions to the property to the value of three thousand dollars. The option of purchasing the property was not exercised during the term limited in the first lease, but before the expiration thereof the second lease to which I have referred was entered into. According to the evidence, the value of the property as a whole immediately before the construction of the extension of the Intercolonial Railway across that portion of the river or harbour of St. John on which the property fronted, was eleven thousand five hundred dollars. The lessor's interest therein was represented by the sum of eight thousand five hundred dollars, at which he had agreed to sell to the suppliants, and the lessees' by the sum of three thousand dollars, the cost of the additions and improvements that had been made. The effect of the construction of the extension has been to depreciate the value of the property as a whole. The suppliant John Buchanan Magee estimates that depreciation as equal to one-half the value of the property before the public work was constructed. Mr. Joseph A. Likely, a witness called by the suppliants, places the depreciation at twenty-five per centum of the former value of the property, and I adopt his view. It seems to me to be a fair and reasonable estimate of the damages, and according to it the suppliants, if entitled to succeed, are entitled to judgment for two thousand eight hundred and seventy-five dollars.

Are the suppliants so entitled? The Robinson property is forty-five feet wide, and the present case differs from the Robinson case in this principally that it is fifty-five feet further removed from the extension or trestlework which interferes with its free use as a wharf property.

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In the first place there is in this case, as there was in the Robinson case, an interference with the right of navigation. Every vessel that comes to, or goes from, the suppliants' wharf has to pass through the draw that has been constructed in the extension or trestle on which the railway has been built, and cannot as formerly, when the tide permits, pass freely and directly to and from its berth at the wharf. That, however, so far as it is a mere question of navigation, is an interference with a right common to the public, which, if there was nothing more, would not sustain the suppliants' claim. They and other owners of wharfs within the trestlework may, and probably do, suffer in a greater degree than others of the public from the interference with this right, but the interference is in each case of the same kind or character. But there is, I think, in this case more than that. There is, it seems to me, some interference with the right of access to and from this property which the owner had, and with the use thereof for the lading and unlading of vessels. The property, like many other wharf properties at St. John, can only, it is true, be advantageously used by occupying at and for reasonable times the water in front of adjoining wharfs or properties. That is a matter, however, that is left to the direction of the harbour master, under the harbour regulations of the port. Before the construction of the public work referred to, the suppliants, by arrangement with the owner of the Robinson property and the concurrence of the harbour master, or without such arrangement by the direction of the harbour master, could place a vessel at their own wharf that would not only overlap the Robinson wharf, but extend westerly into water now occupied by the railway trestlework. That is not now possible, and a smaller class of vessels has to be used, and the value

of the suppliants' property has for that reason more particularly been lessened.

The distinction between the public right and the private right incident to the ownership of a wharf on a river or harbour is clearly stated in *Lyon v. The Fishmongers Company* (1). In that case Lord Chancellor Cairns said: (P. 671.)

“ Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *quod* owner or occupier of any lands on the bank, nor is it a right which *per se* he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction.”

In the case now under consideration there has been, in my opinion, an interference with a right incident to the ownership of the property of which the suppliants were in possession under the conditions mentioned, and they are, I think, entitled to the judgment of the court.

There will be judgment for the suppliants for two thousand eight hundred and seventy-five dollars and costs.

It is conceded that the Crown is, under its agreement with the City of St. John, entitled to be indem-

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(1) 1 App. Cas. 662.

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nified by the city against any amount for which the Crown is liable to the suppliants.

There will, therefore, be judgment against the City of St. John in favour of the Crown for the sum mentioned and costs, and also for any costs to which the Crown has been put in this action as between itself and the city.

Judgment accordingly.

Solicitor for suppliants: *W. W. Allen.*

Solicitor for respondent: *H. C. McKeown.*

Solicitor for third party: *C. N. Skinner.*
