IN THE MATTER of the Petition of Right of

HAVELOCK McCOLL HART.....SUPPLIANT; 1910

Sept. 16.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Railways—Siding—Undertaking in mitigation of damages in prior Suit—Right of suppliant to maintain action.

In certain expropriation proceedings between the Crown and the suppliant's predecessor in title, the Crown, in mitigation of damages to lands not taken, filed an undertaking to lay down and maintain a railway track or siding in front of, or adjoining, said lands and to permit the then owner, "his heirs, executors, administrators, assigns (and the owner or owners for the time being of the said land and premises or any part thereof and each of them) " to use the same for the purposes of any lawful business to be carried on or done on the said lands or premises." By order of Court the suppliant's predecessor in title was declared to be entitled to the execution of such undertaking. The undertaking was given in 1907, and at that time the lands in question were not being used for any particular purpose. The Crown in execution of its undertaking subsequently laid down a siding in front of or adjoining the said lands. There was, however, a retaining wall between the siding and such lands, and the Crown informed the solicitor of the suppliant on the 5th October, 1909, that "at any time you may desire, we are prepared to open a way through this retaining wall so as to give access to the siding in order that you may conduct your business in the manner contemplated in the order of the Court;" but, although the suppliant presented his claim for damages on the basis that the Crown had not given him a siding suitable for carrying on a corn-meal milling business, at the time of the institution of the present proceedings nothing had been done to utilize the property for any particular business.

Held, that upon the facts the Crown had fully complied with the terms of the undertaking mentioned, and that the suppliant had not made out a claim for damages.

Quaere, Whether the suppliant had any right to take proceedings to compel the execution of the undertaking by the Crown until the property was occupied for the purposes of some particular business?

2. Whether the suppliant would have any right to enforce a claim for damages in view of the fact that he had no assignment of any such claim from his predecessor in title?

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Argument of Counsel.

PETITION OF RIGHT seeking damages for the alleged non-performance of an undertaking by the Crown to furnish a railway siding.

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

June 7th and 8th, 1910.

The case was tried at Halifax. N.S.

W.B.A. Ritchie, K.C. and *E. P. Allison*, for the suppliant, contended that the benefit of the undertaking ran with the land, and that the suppliant, as devisee of the original owner, had a right to bring action for the breach of the undertaking. (*Tulk* v. *Moxhay*, (1); *Cooke* v. *Chilcott*, (2); *Heywood* v. *Brunswick Soc.* (3); *London & S. W. Ry. Co.* v. *Gomm*, (4); *Austerberry* v. *Oldham*, (5); *Spencer's Case*, (6). Secondly as to the construction of the undertaking, all the surrounding circumstances at the time it was given have to be looked at, when the terms of the document are, as here, ambiguous. (*Phipson on Evidence*, (7); *Gandy* v. *Gandy*, (8); *Bank of New Zealand* v. *Simpson*, (9); *Waterpark* v. *Fennell*, (10); *McDonald* v. *Longbottom*, (11); *Attrill* v. *Platt*, (12); *Dominion Iron & S. Co.* v. *Dominion Coal Co.* (13); *Inglis* v. *Buttery*, (14); *Krell* v. *Henry*, (15).

A track on a high level is not a track "in front of or adjoining" suppliant's land. Thirdly, it is open to the suppliant to contend that as a commercial mill is a business especially suited to the premises, to refuse to give him a siding suitable for carrying on such business is a breach of the terms of the undertaking. The evidence

(1) 2 Phil. 774.
(2) L. R. 3 Ch. D. 694.
(3) L. R. 8 Q. B. D. 403.
(4) L. R. 20 Ch. D. 562.
(5) L. R. 29 Ch. D. 750.
(6) 1 Sm. L. C., 10 ed., pp-72-89.
(7) 3rd ed. p. 538.
(8) L. R. 30 Ch. D. 67.
(9) [1900] A. C. 182.
(10) 7 H. L. C. 661.
(11) 1 E. & E. 983.
(12) 10 S. C. R. 467.
(13) 43 N. S. R. 132.
(14) L. R. 3 A. C. 552
(15) [1903] 2 K.B. 749.

shows that the property with a siding at low level would have a special value for a corn-meal business and would be worth $10,000, while with the siding at high level it would have no special value for such business.

R. T. MacIlreith, *K.C.*, and *C. D. Tremaine*, for the respondent, contended that the undertaking in question was a personal or collateral agreement or covenant with the suppliant's predecessor in title, could only be taken advantage of by him personally, and did not run with the land. (*Doughty* v. *Bowman* (1); *Lydford* v. *North Pacific Coast Ry. Co.* (2); *Norcross* v. *James*, (3) *Bronson* v. *Coffin*, (4). Where there is no privity of estate between the parties, where they do not stand in such a relation as lessor and lessee, the covenant is purely collateral and does not run with the land. (*Webb* v. *Russell* (5); *Mygatt* v. *Coe* (6); *Hurd* v. *Curtis* (7) Assuming that there was a breach of the undertaking in the life-time of the suppliant's predecessor, the right of action on a personal covenant broken in the life-time of the covenantee passes to the personal representatives and does not run with the land. (*Ricketts* v. *Weaver* (8); *Raymond* v. *Fitch* (9). It is submitted that the covenant was not assignable, and further that even if it was assignable, as it was not a covenant running with the land, it ought to have been assigned. (*Child* v. *Douglas*, (10); *Keats* v. *Lyon*, (11).

As to the undertaking, it is clear and unambiguous when read in connection with the plan. It was an undertaking to lay a siding in front of the land which would be reasonably convenient for the carrying on of business thereon. There was no promise to lay a track at any particular level.

(1) 11 Q. B. 448.
(2) 92 Cal. 93.
(3) 140 Mass. 188.
(4) 108 Mass. 180.
3 T. R. 403.
(6) 142 N. Y. 86.
(7) 36 Mass. 459.
(8) 12 M. & W. 718.
(9) 2 C. M. & R. 598.
(10) 2 Jur. N.S. 950.
(11) L. R. 4 Ch. 218.

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What the present case amounts to is simply this: The suppliant in an action for damages for breach of an undertaking, and with no prayer therefor in the pleadings, asks the court to reform the undertaking. It is submitted that this cannot be done.

CASSELS, J. now, (September 16, 1910) delivered judgment.

This is a petition of right exhibited on behalf of the suppliant claiming the sum of $10,000 as damages alleged to have been occasioned to him by reason of the alleged failure on the part of the Crown to perform a contract entered into between His Majesty the King and one Levi Hart, now deceased, the father of the suppliant.

The claim of the suppliant is thus stated:—

"That in a certain section in this Honourable Court under *The Expropriation Act* (52 Victoria, chap. 13, of the Acts of the Parliament of Canada) in which His Majesty the King, on the information of the Attorney-General for the Dominion of Canada was Plaintiff and the said late Levi Hart, deceased, was Defendant, His Majesty the King for the purpose of reducing the amount of compensation for the lands and premises of the said late Levi Hart, deceased, expropriated by His Majesty the King therein, and the damages arising therefrom, undertook and agreed by the Honourable Allen Bristol Aylesworth, his Attorney-General for the Dominion of Canada, to lay and maintain a railway track connected with the Intercolonial Railway Service of Canada, shown and marked as 'A A' on plan annexed to plaintiff's exhibit 3 filed therein, in front of or adjoining the said lot or parcel of land described in said paragraph one hereof, and to permit the said late Levi Hart, deceased, his heirs, executors, administrators and assigns (and the owner or owners for the time being of the said land and premises or any part thereof and each of them) to use the said

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track so to be constructed and maintained for the purpose of any lawful business to be carried on or done on the said lands and premises, which said undertaking or agreement was incorporated in the final order or decree granted and issued in the said action on the 22nd day of April, A.D., 1907, and which said final order and decree is in the words and figures following .—

" In the Exchequer Court of Canada, Monday, the 22nd day of April, A.D., 1907.

PRESENT :—

The Honourable MR. JUSTICE BURBIDGE.

" BETWEEN :—

THE KING on the information of the Attorney-General for the Dominion of Canada,

PLAINTIFF;

AND

LEVI HART,

DEFENDANT.

1. This action coming on for trial at the city of Halifax, Nova Scotia, on the 19th, 21st, 22nd and 26th days of January, A.D., 1907, before this court in the presence of counsel for the plaintiff and the defendant, upon hearing read the pleadings herein and upon hearing the evidence adduced and what was alleged by counsel aforesaid, and His Majesty the King having undertaken by the Honourable Allen Bristol Aylesworth, His Attorney-General for the Dominion of Canada, to lay and maintain a railway track connected with the Intercolonial Railway Service of Canada, shown and marked 'AA' on the plan annexed to plaintiff's exhibit 3 filed herein, in front of or adjoining all and singular that certain lot, piece or parcel of land situate lying and being in the city and county of Halifax and Province of Nova Scotia. and more particularly described as follows," &c.

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The judgment then describes the lands now owned by the Suppliant, and proceeds:—

"and to permit the said defendant, his heirs, executors, administrators and assigns (and the owner or owners for the time being of the said lands and premises or of any part thereof and each of them) to use the said track so to be constructed and maintained for the purpose of any lawful business to be carried on or done on the said lands and premises, this court was pleased to direct that this action should stand over for judgment and the same coming on this day for judgment."

Clause 4 of the judgment is as follows:—

"4. And this Court doth further order and adjudge that the said defendant is entitled to the fulfilment and execution by His Majesty the King of the undertaking in the first paragraph hereof mentioned."

The suppliant then claims as follows:—

"That under and by virtue of the terms, conditions and provisions of the said final order or decree and of the said undertaking or agreement made and entered into by His Majesty the King as aforesaid and incorporated in the said final order or decree and referred to and set forth in paragraph four hereof it was and became the duty of the said Minister of Railways and Canals, and of the said David Pottinger, as General Manager of the said Intercolonial Railway as aforesaid, and subsequently of the said Michal J. Butler, David Pottinger, Ephraim Tiffen and Frank P. Brady, as the Board of Management of the said Railway as aforesaid, and of the other officers or servants of His Majesty the King, as represented by the Government of the Dominion of Canada, in charge of the said railway, including the said railway yard and terminals at Halifax aforesaid, to lay and maintain a railway track connected with the Interclonial Railway Service of Canada, and to permit the persons entitled thereto,

including your suppliant, to use the same in accordance with the terms, conditions and provisions of the hereinabove mentioned final order or decree and of the said undertaking or agreement incorporated therein, but, notwithstanding the said duty so cast upon them as aforesaid under and by virtue of the terms, conditions and provisions of the said hereinabove mentioned final order or decree, and of the said undertaking or agreement incorporated therein and entered into as aforesaid, and in direct breach thereof, although a reasonable time for so doing has elapsed, and although requested so to do by your suppliant, the said Minister of Railways and Canals, and the said David Pottinger, as General Manager of the said Intercolonial Railway as aforesaid, and the said Michael J. Butler, David Pottinger, Ephraim Tiffen and Frank P. Brady. as the Board of Management of the said railway as aforesaid, and the other officers or servants of His Majesty the King, as represented by the Government of Canada, in charge of the said railway, including the said railway yard and terminals at Halifax aforesaid, have wholly failed, neglected and refused to lay and maintain a railway track connected with the Intercolonial Railway Service of Canada shown and marked as 'AA' on the plan annexed to the plaintiff's exhibit 3 filed in the said action between His Majesty the King on the information of the Attorney-General for the Dominion of Canada, as plaintiff, and the said Levi Hart, deceased, as defendant, and referred to and set forth in said paragraph four hereof, in front of or adjoining the said lot or parcel of land described in said paragraph one hereof, or any other track or tracks or at all as required by the terms, conditions and provisions of the said hereinbefore mentioned final order or decree and of the said undertaking or agreement incorporated therein."

The suppliant further claims:—

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"That your suppliant has suffered loss and damage in the sum of $10,000 and has suffered the aforesaid loss and damage through and in consequence of the failure, neglect and refusal and breach of contract of and by the said Minister of Railways and Canals and the said David Pottinger, as general manager of the said Intercolonial Railway as aforesaid and the said Michael J. Butler, David Pottinger, Epharim Tiffen and Frank P. Brady, as the Board of Management of the said railway as aforesaid, and the other officers or servants of His Majesty as represented by the Government of Canada, in charge of the said railway, including the said railway yard and terminals at Halifax aforesaid, to lay and maintain a railway track connected with the Intercolonial Railway Service of Canada shown and marked as 'AA' on the plan annexed to Plaintiff's Exhibit 3 in the said action between His Majesty the King on the information of the Attorney-General for the Dominion of Canada, as plaintiff, and the said late Levi Hart, deceased, as defendant, in front of and adjoining the said lot or parcel of land described in said paragraph one hereof in accordance with and as required by the terms, conditions and provisions of the said hereinabove mentioned undertaking or agreement made and entered into by His Majesty as aforesaid."

"Wherefore your suppliant therefore humbly prays that he be permitted to bring suit in the Exchequer Court of Canada for the recovery from Your Majesty of the sum of $10,000 for the causes above mentioned, and that he be awarded the said sum of $10,000 and costs by the judgment to be rendered herein by the Exchequer Court."

Voluminous evidence was adduced at the trial as to the best method of utilizing the premises in question owned by the suppliant.

It is beyond question that a siding has been constructed located on the line "AA," as shown by the plan

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referred to in the judgment, and such siding is in front of or adjoining the premises of the suppliant.

There is a retaining wall between this siding and the premises of the suppliant, and it is contended that this wall being higher than the rail of the siding would prevent access to it. Prior to the filing of the petition of right and as far back as the 5th October, 1909, the solicitor of the suppliant had been notified by Mr. Butler in charge of the railway, as follows :—

"At any time that you may desire we are prepared to open a way through this retaining wall so as to give access to the siding in order that you may conduct your business in the manner contemplated in the order of the court."

On the 31st December, 1908, the suppliant had written to the chief engineer of the Intercolonial Railway as follows :—

"HALIFAX, N.S., Dec. 31, '08.

"Mr. W. B. Mackenzie,
Chief Engineer I. C. R.,
Moncton, N.B.

Dear Sir,—When the property on Water street was taken by expropriation an award affixed by the Exchequer Court in April, 1907, included an undertaking for the construction and operation of a siding along the front of the remaining property. This siding it was expected would be completed during 1907. Since the award in April, 1907, we have had no use of the remaining property awaiting the use of the siding. Will you please advise whether or not the siding is in condition to use and give us permission to open your fence for access to the siding.

Yours truly,
Executor Est. LEVI HART,
(Sgd.) H. McC. Hart."

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At this time the suppliant made no complaint that the siding as well as other tracks should be lowered about eight feet so as to bring the siding to a level with bed rock of the land in question.

The purpose for which the land was expropriated in the former action against Levi Hart was the extension of the yard accommodation of the Intercolonial Railway at Halifax. The expropriation of those lands and of parts of streets would have the effect of cutting off the lands owned by the suppliant from access to Water Street, and the purpose of the undertaking was to guarantee to the occupiers of the lands in question a siding or track for unloading and loading, and so give an inlet and outlet for material and goods and also for products manufactured in any buildings that might be erected on the premises.

The views of certain witnesses as to values of property sometimes vary much according to the circumstances of the particular case in which they happen to be giving testimony.

In this action the suppliant, Havelock McC. Hart, asks for the modest sum of $10,000 for damages by reason of not being furnished with a siding, he still retaining the lands in question.

In the former action, tried by the late Mr. Justice Burbidge in 1907, the present suppliant not then being the owner of the property in question valued these lands without a siding at a sum under $1,000. He stated, referring to the property in question:—

"We paid $7,000, because we wanted sufficient ground room for the plant. If we paid too much for it that is our fault. But if I were buying this hole to day even with a railway siding I would consider $2,500 all I would want to pay for it if I could use it. As it is to-day we could not use it under our plan."

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A perusal of the evidence of the suppliant given in the former action and set out in the transcript of his evidence in this case satisfies me that his present contention that a ladder track instead of a blind siding would be of greater value, is an afterthought. I think from the evidence adduced before me the blind siding is the better, and this has been furnished.

The claim put forward is a grossly exorbitant one. The property is as it was in 1907. No purchaser has been found for it. No excavation has been done on the property. The question as to what the property would be used for with the rock bottom in the floor on the lower part as a cellar, and the floor level with the siding furnished, is one dependent on the nature of the business to be carried on. To utilize the bed rock as the floor would require a large amount of excavation and the lower part would be damp and cut off to a great extent from light and air unless not merely the siding in question was lowered about eight feet, but the other tracks as well to the east between the retaining walls.

The plan referred to in the judgment in the former action (Exhibit No. 2 in this action) gives no levels of the various tracks. It does show to the north and between the various tracks and the property in question a retaining wall, for what purpose if the tracks were not to be elevated? It never could have been in the contemplation of the parties that the whole arrangement of the tracks in the yards of the railway—the levels of the various tracks—the numbers of the tracks—should be settled forever in the former action. All that the parties had in mind was that siding accommodation should be furnished and the location of the siding settled. The railway had and has almost as much interest as the owners in furnishing facilities for the handling of the freight. The judgment in the former action does not contemplate any particular kind of business to be carried on in any

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buildings to be erected. On the contrary it provides as follows :—

"And to permit the said defendant, his heirs, executors, administrators and assigns (and the owner or owners for the time being of the said lands and premises or of any part thereof and each of them) to use the said track so to be constructed and maintained for the purpose of any lawful business to be carried on or done on the said lands and premises."

The present siding is constructed so as to be on a level with North street, thus obviating any grade, and the evidence is overwhelming, and in my opinion correct, in favour of such a siding in lieu of one with a heavy grade.

The evidence on the part of the suppliant is given mainly with the object of proving that for a particular business the bed rock could be used as a floor and a lower siding than the one furnished be more advantageous.

Henry Flowers, the managing director of Levi Hart & Son, expressly limits his evidence to the use of the property for a corn mill business. He is asked as follows :—

"THE COURT :—Now, you must have a cellar underneath this building? A. No.

THE COURT :—You would have no cellar at all?—A. No.

Q. For any kind of business? A. Not for this business I am talking about.

Q. Take it for any other business, would you load from your cellar or from your first floor? A. You would load from the first floor.

Q. If you have your cellar seven feet in height, and you excavate it at the rear, the first floor would be almost on the level of the track? A. It would be then.

Q. Is not that the way buildings are constructed? A. Yes, but in our business there would not be any use for a cellar.

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Q. But for some other business? A. But I am giving evidence on this business, that a cellar would not be of any use.

Q. There are other business purposes for which a cellar would be used? A. But I can't see what it would be used for there.

THE COURT: For most business purposes you would build your cellar— you would want to heat your building with a furnace, and you would want to store your coal and all sorts of things—and your cellar would be on a level with the siding now? A. I don't know. I am only giving evidence as far as my own business is concerned. I will not talk about anything else."

James A. Calder, also in the cornmeal business, admits that for a large number of industries a basement would be required in which case the first floor is the one from which the loading would take place. For these industries a siding sunk to the level of the bed rock would be inappropriate besides having the disadvantage of a heavy grade.

Arthur E. Curren, also in the flour and cornmeal business, admits that if the property was used for an industry requiring a cellar the raised siding as at present would be better. This witness also points out that even for a cornmeal business if only the siding in question were lowered and the other tracks not lowered there would be no advantage. He also shews what is apparent, that even for a cornmeal business there is no disadvantage in having the corn mill built up as far as the siding is concerned.

The undertaking was not given with the view to a siding for a cornmeal business. On the contrary the provision is as quoted before :—

"And to permit the said defendant, his heirs, executors, administrators and assigns (and the owner or owners for the time being of the said lands and premises or of

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any part thereof and each of them) to use the said track so to be constructed and maintained for the purpose of any lawful business to be carried on or done on the said lands and premises."

It must also be borne in mind that in 1907 no tracks had been laid nor had the excavation been made.

I think the meaning of this undertaking is quite clear and unambiguous. Some common sense must be brought into play in considering the case. Everyone knows how a railway business is conducted, and the purpose which a siding is intended to serve. I think the railway has fully complied with their undertaking, and that no reasonable ground of complaint exists.

Since the trial very able and exhaustive written arguments have been furnished as to whether a right of action exists. I do not find it necessary to deal with these difficult and interesting questions, as on the facts I am of opinion that the suppliant fails.

I have grave doubts as to the right to compel the laying of a siding until the property is occupied. Furthermore, according to the evidence of the suppliant, the retaining wall between the siding and the property was erected in 1907, necessitating a raised siding, and it may be the breach, if any there were, took place at that time, and the present suppliant suing for damages for a complete breach the right to such damages may not have passed to him.

His title to the property was acquired in September, 1908. He has no assignment of the claim for damages. However, I do not decide these questions either for or against the suppliant.

The petition is dismissed with costs.

Judgment accordingly.

Solicitor for suppliant: *E. P. Allison.*

Solicitor for respondent: *R. T. MacIlreith.*