

1891  
 Sept. 21.  
 HENRY A. ARCHIBALD.....SUPPLIANT;  
 AND  
 HER MAJESTY THE QUEEN.....RESPONDENT.

*Contract—Construction—Implied promise—Breach thereof.*

The suppliant had a contract to carry Her Majesty's mails along a certain route. In the construction of a Government railway the crown obstructed a highway used by the suppliant in the carriage of such mails, and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed by both parties, the suppliant sought to maintain an action by petition of right for breach thereof on the ground that there was an implied undertaking on the part of the crown in making such contract that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been.

*Held*, that such an undertaking could not be read into the contract by implication.

**DEMURRER** to a petition of right for damages for an alleged breach of contract for the carriage of Her Majesty's mails between North Sydney and Port Hastings, in the Province of Nova Scotia.

By his petition the suppliant alleged as follows:—

“1. That on the first day of June, 1885, your petitioner entered into a contract under seal with Her Majesty, represented in that behalf by the Postmaster-General for Canada, to convey for the sum of \$2507.52, per annum, Her Majesty's mails from North Sydney to Port Hastings aforesaid three times per week each way, serving on each and every trip or journey all the post offices then established, or which might be established, on the route during the continuance of the said contract; and it was stipulated in and by the said contract

that the route to be pursued in the conveyance of the said mails was the highway *via* Jacksonville, Leitch's Creek, Boisdale, Barrachois, Boisdale Chapel, Beaver Cove, Shunacadie, Christmas Island, Grand Narrows, South Grand Narrows, McKinnon's Harbor, Broom, Orangedale, Munro's Bridge, River Dennis, Big Brook and Askellton; that the computed distance between North Sydney and Port Hastings aforesaid was eighty-seven miles, and that the said mails were to be conveyed by horse and vehicle.

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- " 2. It was further provided by the said contract that the rate of travelling should be at an average speed of six miles per hour including stoppages, and that the whole distance from North Sydney to Port Hastings aforesaid, going and coming, should be travelled in fifteen hours.
- " 3. By the said contract it was further covenanted that any default or failure on the part of your petitioner in performing the stipulations in the said contract provided and herein set out should subject your petitioner to a forfeiture of \$50 for each such default or failure, and your petitioner was required to enter into a bond by himself and two sureties in the sum of \$5,000, conditioned that your petitioner should well, faithfully and truly perform, fulfil and keep all and every of the articles, conditions, provisions and stipulations in the said contract expressed and contained on his part to be done, performed, fulfilled and kept.
- " 4. The said contract was expressed to remain and continue in force for a period of three years six months and twenty-two days, but on the 13th day of February, 1887, the said contract was varied by the contractor, your petitioner undertaking to convey the said mails six days per week, each way

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between North Sydney and Port Hastings aforesaid, receiving therefor at the rate of \$5,000.04 per annum, and it was on the said date agreed to be continued in force beyond the time limited thereby, subject to the said variances, and your petitioner to be bound to all its terms, stipulations and conditions, until such time as your petitioner should receive notice of the termination thereof.

“5. That in the years 1888, 1889 and 1890, Her Majesty, by Her agents, servants and workmen, for the purposes and in the construction of a line of railway, the property of the Government of Canada, from Point Tupper, in the Island of Cape Breton, to North Sydney aforesaid, entered upon the highway over which your petitioner was required by the said contract to convey the said mails and in many places took possession thereof and for long distances expropriated the same, and laid rails and ties thereon, and in at least fifteen other places placed rails and ties across the said highway, and at an elevation, and in other places, diverted water-courses so that the said highway was torn away and destroyed; and in divers other ways and by divers other acts and in divers other places in the construction of the said line of railway blocked up and destroyed the said highway, and your petitioner was compelled to leave the said highway at many points in the carriage of the said mails, and to adopt other more difficult, lengthy and dangerous routes, and was compelled to provide additional teams and conveyances to carry the said mails, and lost horses and carriages and was otherwise greatly damaged by reason of the said acts of Her Majesty, Her agents, servants and workmen, and by reason

- of the breach on Her part of the said contract in expropriating and destroying the said highway.
- “6. Your petitioner by petition dated on or about the 30th day of April, 1890, addressed the Honourable the Postmaster-General of Canada on the subject of the grievances herein complained of, and by his said petition claimed compensation for the loss and damages hereinbefore referred to, but was refused relief.
- “Your suppliant, therefore, humbly prays that his claim for relief in the premises may be referred to this Honourable Court, and that it may be determined that he is entitled to \$9,000 as damages.”
- The respondent demurred to this petition as follows :
- “The Honourable Sir John Thompson, Her Majesty’s Attorney-General for Canada, on behalf of Her Majesty the Queen, demurs to the whole of the suppliant’s petition, and says that the same is bad in law on the following grounds :
- “1. Because the suppliant’s petition does not show any cause of action against Her Majesty the Queen, and does not disclose any facts which can give rise to any liability on the part of Her Majesty the Queen.
  - “2. Because no facts are set out in the suppliant’s petition upon which Her Majesty the Queen can be made liable on a petition of right.
  - “3. Because the suppliant’s claim is not in respect of any matter which may be the subject of a suit or action against Her Majesty the Queen.
  - “4. Because the suppliant’s petition does not disclose that any lands or goods of the suppliant have come into the possession of Her Majesty the Queen, and does not disclose any breach of contract on the part of Her Majesty the Queen, or any right or cause of action arising out of a contract.

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- “ 5. Because the suppliant’s petition is not brought against Her Majesty the Queen for breach of contract, but seeks to make Her Majesty the Queen liable *ex delicto* for the acts of Her agents, servants and workmen.
- “ 6. Because the suppliant’s petition does not show that the acts complained of in the 5th paragraph thereof were done unlawfully, and the lawful acts of Her Majesty the Queen by Her agents, servants and workmen upon the public highway cannot render Her Majesty the Queen liable in damages to the suppliant.
- “ 7. Because the fact that a person having a contract with Her Majesty the Queen to carry mails over a certain highway is damnified by reason of the said highway being obstructed, torn away, blocked up, or destroyed by Her Majesty the Queen by her agents, servants and workmen for the purposes and in the construction of a line of railway, does not give rise to any cause of action or right by such contractor against Her Majesty the Queen, and does not constitute any ground for a petition of right against Her Majesty the Queen; and does not render Her Majesty the Queen liable on a petition of right or otherwise to indemnify such contractor for such damage, or to pay the amount of such damage or any part thereof.
- “ 8. Because Her Majesty the Queen cannot be made liable on a petition of right for the torts or acts *delicto* of Her agents, servants or workmen.
- “ 9. Because Her Majesty the Queen is not liable for the torts or acts *delicto* of Her agents, servants or workmen.
- “ 10. Because no negligence can be imputed to Her Majesty the Queen, and Her Majesty the Queen is

not answerable by petition of right or otherwise for the negligence of Her servants or agents.

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“ 11. Because there was no liability on the part of Her Majesty the Queen to maintain the said highway in a suitable or convenient manner for the use of the suppliant in the carrying out of his said contract, or in the same or a like condition in which the same was when the said contract was made, or to keep the same in a suitable or convenient condition for travel.

“ 12. Because all the acts and things set forth in the suppliant's petition are immaterial and irrelevant, and do not set forth or show or allege any violation or breach by Her Majesty the Queen, Her ministers, officers, agents or servants, of any contract of the suppliant, or any cause of action or right by the suppliant against Her Majesty the Queen.

“ 13. Because the suppliant's petition does not disclose any breach of contract on the part of Her Majesty the Queen.”

August 20th, 1891.

*Ritchie*, in support of demurrer, cites *Leake on Contracts* (1), *Planché v. Colburn* (2).

*Sedgewick, contra* :

It was within the contemplation of both parties in making the contract that the mails were to be carried along the highway in question, and there must be read into the written contract a stipulation or undertaking on the part of the crown that nothing would be done on behalf of Her Majesty to make it harder for the suppliant to carry out his contract. The suppliant took the risk of the highway being diverted by the ordinary authorities, but he did not contemplate the expropriation of the road by the promisee. Such a

(1) 2nd ed. 708.

(2) 8 Bing. 14.

1891 state of facts would give rise to an action for breach of  
 ARCHIBALD contract between subject and subject.

v. Cites *Ford v. Beech* (1); *The Queen v. McLean* (2);  
 THE *Isbester v. The Queen* (3).  
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**Reasons  
 for  
 Judgment.**

BURBIDGE, J. now (September 21st, 1891) delivered judgment.

It is not contended by the suppliant that he is entitled to compensation under the Expropriation Acts for damages occasioned by the obstruction of the highway by the Minister of Railways and Canals in the construction of the Cape Breton Railway, but he contends that there was implied in the contract set out in the petition of right an undertaking on the part of Her Majesty that the Minister would not exercise the statutory powers vested in him for the construction of the said railway in such a manner as to make it more difficult for the suppliant to carry out his contract, and that in this respect there has been a breach of the contract as set out in the petition. For this contention no authority was cited, and I know of none.

There must, I think, be judgment for the respondent upon demurrer, and with costs.

*Demurrer allowed with costs.*

Solicitors for Suppliant: *Ross, Sedgewick & Mackay.*

Solicitor for Respondent: *W. F. Parker.*

(1) 11 Q.B. at p. 866.

(2) 8 Can. S.C.R. 210.

(3) 7 Can. S.C.R. 696.