IN THE MATTER of the Petition of Right of

1908
March 25.

JEAN BAPTISTE BOULAY AND ADELARD LUCIER.................. } SUPPLIANTS;

AND

HIS MAJESTY THE KING...............RESPONDENT.

Contract—Breach—Supply of hay for war purposes—Inspection—R. S. C. 1906, c. 85—Applicability where provisions for inspection are made in the contract—Negligence—Crown officers—Liability.

During the progress of the South African war, the Minister of Agriculture for the Dominion of Canada entered into certain contracts with the suppliants for the supply of pressed hay for the use of the British forces engaged in the war. Express provision was made in the contracts for the inspection of the hay at the Canadian port of shipment for South Africa. Some of the hay was rejected by the Government Inspector at such port as being defective in quality under the contracts. The rejected hay was sold by the Crown for the benefit of the suppliants at a lower price than that payable under the contracts. In an action for damages for breach of contract it was contended by the suppliants that the provisions of the *Inspection Act* (R.S. 1886, c. 19; R. S. 1906, c. 85) were not complied with by the Government inspectors, and their inspection was therefore improperly made.

Held, that the statute in question did not apply and that as the manner in which the inspection was made satisfied the requirements of the contracts, there was no breach.

Semble, that even if the conduct of the inspectors was illegal or negligent, the Crown would not be bound thereby.

PETITION OF RIGHT for damages for an alleged breach of contract of sale.

By their petition the suppliants alleged, *inter alia*, that during the year 1901 the Government of Canada, through the Honourable Sidney A. Fisher, Minister of Agriculture, requested the suppliants to procure plant and equipment for compressing hay and to purchase large quantities of hay and to hold the same on hand in order to be prepared to fill the orders to be given by the Government

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of Canada for shipment to South Africa. They further alleged that such plant and equipment were procured by them at great expense, and that subsequently thereto they entered into several written contracts with the Department of Agriculture for the supply of pressed hay for the purpose aforesaid. By one of the clauses of the said contracts it was provided that "a number of bales in each car was to be weighed at St. John by an Inspector for the Department, the weight of the car load to be determined on this basis, and any short-weight that may be found to be charged against the shipper," and the suppliants alleged that purporting to act under this clause the inspectors of the said Department improperly reported a shortage in weight in the hay supplied by the suppliants of some 331,084 pounds which was wrongfully charged against the suppliants. The suppliants further charged that the inspectors of the Department improperly rejected hay by reason of alleged defect in quality, and that the Department refused to accept the same. By reason of these alleged facts the suppliants claimed damages, amounting to a sum of $20,766.97, for breach of contract by the Crown.

By its statement in defence the Crown denied the alleged breach of contract and consequent liability therefor, setting up that the suppliants had not purchased plant and equipment for compressing hay at the request of the Minister of Agriculture; that what the inspectors did was done in pursuance of the memorandums of agreement between the Department of Agriculture and the suppliants; that the deductions for shrinkage and short deliveries were properly made as was also the rejection of certain quantities for defect in quality; and that if the suppliants suffered any loss it was by reason of their own conduct in the selection and shipment of the hay during the period in controversy.

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Argument of Counsel.

On the argument the suppliants contended that there had been no proper inspection of the hay, as the provisions of the Dominion Inspection Act (1) had not been complied with.

March 24th, 1908.

The case was heard at Montreal.

C. S. Gogo and *J. A. MacInness*, for the suppliants;

M. G. Larochelle, for the respondent.

Mr. *Gogo*, for the suppliants, contended that there was no proper inspection of the hay upon which the Crown might rest its right to reject the alleged defective portion of it in respect of quality. The requirements of the Dominion Inspection Act, R. S. c. 85, s. 32, were not complied with, and the Government inspectors were themselves responsible for the shrinkage and deterioration of the hay because they did not make their inspection promptly or see that the hay was properly stored in the meanwhile, *Bull* v. *Robison* (2). There is no evidence to show that the hay was of such poor quality as not to answer the requirements in that behalf; and in no event was the Crown justified in re-selling.

[By the Court: Is not the inspection of the hay provided for in the contracts?]

There was no proper inspection, because the provisions of the Act regulating such inspections were not complied with.

Secondly, there was no proper rejection of the hay. The intention to reject was not communicated to the suppliants. The goods shipped f.o b., threw all risks on the purchaser, and the Crown did nothing to assert its right to reject. It assumed the possession of the hay, and did not put itself in a position to reject, much less re-sell the hay. The moment the hay came into the Crown's possession it was necessary for proper inspection

(1) R. S. c. 85. (2) 10 Ex. 342.

and rejection to be made. The Crown re-sold without notifying the suppliants. (Cites *Benjamin on Sales* (1).

Thirdly, there was acquiescence on the part of the Crown's servants upon which an estoppel arises. They accepted possession of the hay, and exercised the right of re-sale instead of asserting their right to rescind the contract *pro tanto*. Fourthly, there is no shrinkage to be accounted for by the suppliants because there was no proper ascertainment of the fact of short weight as provided for by the Inspection Act.

Mr. *MacInnes*, followed for the suppliant, citing sec.31 of the Dominion Inspection Act, R. S. c. 85.

The respondent's counsel was not called upon.

CASSELS, J. now (March 25th, 1908) delivered judgment.

I do not think I will call upon the defence for any argument in this matter; I had thought of reserving the case for judgment, but, this is a case which seems to me to depend to a very great extent upon the facts, and, taking everything into consideration, I think it would be better for me to give judgment immediately.

While considering the case, it is well to look at the statement of claim, and to ascertain, in the first instance, what the suppliants are suing for.

The allegation in the 10th paragraph of the petition of right is, that upon the arrival of the hay at St. John, the same was not inspected and weighed properly by the Department, and that said inspection and weighing were delayed from time to time, and no adequate provision was made by the Government of the Dominion of Canada for the care and protection of the hay so delivered between the time of its arrival, and the time of its being inspected and weighed as aforesaid.

As a result of this the suppliants ask for some twenty thousand odd dollars damages.

(1) 15th ed. p. 752,

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At the opening of the case, the claims were all abandoned with the exception of two items, one for the sum of $554.50 claimed in the twenty third paragraph of the petition of right. This is what the suppliants urged as representing the amount of their loss on the hay rejected by the Department as set out in paragraph twelve. This is the paragraph referring to the disposition of the hay by the Department.

The only other item persisted in is the one referred to in the twenty fourth paragraph of the statement of claim, that is in connection with shortage in weight, which refers back to the fifteenth clause.

Now, it is necessary that I should discuss some of the aspects of the case as proved. It is quite clear, to my mind, that this contract was entered into on behalf of the Imperial Government, with the object and purpose that the hay should be received at St. John for transmission to South Africa.

I mention this in connection with the point that has been placed forcibly before the Court by Mr. Gogo in his argument in connection with the obligation to accept the rejected hay. I will deal with this later on.

As I have stated, the contract was entered into for the Imperial Government. It is quite true that the Dominion Government are the ostensible contractors, and it is quite true that they are the parties liable to these suppliants, if any liability exists. Nevertheless, the contract was undoubtedly entered into for the Imperial Government.

The contract itself, according to my judgment is not governed by the Inspection Act (1) at all. The fifth paragraph of the contract (assuming all the contracts to be the same in that respect, as I believe they are) provides that the hay shall be subject to inspection and acceptance by the Department, alongside the steamship at St. John, N.B.

(1) (R. S. 1886 c. 19; R. S. 1906, c. 85)

The seventh clause of the same contract provides that a number of bales in each car shall be weighed at St. John by an inspector for the Department.

As I view it, the clause of the Revised Statutes has no application whatever to this particular contract. I think the statute relates to inspections, under the terms of the Act, made for the general protection of the public of Canada. The statute itself provides means for fixing the standards, and inspectors are appointed. They have to pass an examination in order that they may be capable of seeing that the goods passed, or purporting to be passed under the authority of the Dominion Inspection Act, are up to those particular standards.

Under this particular contract, the standard is fixed by the contract itself. It is of no concern to the public that this hay might be inspected. This was not hay which was being inspected for the purpose of being put on the market with the hall-mark of inspection under the Revised Statutes of Canada. This hay was to be shipped to South Africa.

It is provided in the first clause of the contract that this hay was to be good timothy, specially selected and with not more than twenty per cent. of clover. The contract is complete in itself.

The suppliants come forward with evidence of as loose a character as could possibly be presented in support of their claim; and, but for the production of information and evidence by the Crown, it would have been almost impossible to arrive at a conclusion as to what they were claiming. The Crown has brought forward certain statements which show the amount of hay rejected, and the reason given for the rejection.

In the first place I may say, there is not the slightest impeachment of the inspectors appointed by the Government. We have the evidence of Mr. Macfarlane, Mr. Robertson, Mr. Moore and others, to the effect that

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these inspectors were all gentlemen in the employ of the Department of Agriculture. They are all gentlemen of high standing, and there has not been any suggestion of anything wrong on their part. If any suggestion at all has been made, it is more a suggestion of error in law, or in the legal way in which the inspection was done, than any personal imputation. There has not been any personal imputation of any kind cast upon these gentlemen, either by counsel for the suppliants, nor in the evidence itself.

As a result of this, I must assume that they intended to accept the hay, if it was up to the standard. There was no object whatever in their rejecting hay which was up to the standard, when they were trying as a matter of fact to get it. That being so, I think that the action taken by these gentlemen is final, so far as the evidence before me is concerned.

More than that, there was a great deal of evidence offered to the effect that the rejected hay was not up to the standard. If we consider the evidence of Mr. Robertson (of course nobody can speak as to every particle of hay that was in each of these bales) but speaking in a general way Mr. Robertson stated that he had seen the rejected hay, and that the hay was properly rejected, because it was not up to the standard called for by the specifications.

Mr. Macfarlane, who was examined as a witness here, gave evidence to the same effect; as also did Mr. Bell. There is no evidence whatever, and no proof has been made showing that the hay was other than what those Inspectors stated it to be. Apparently the only proof is that the hay was placed upon cars at the points of shipment, and, as far as the suppliants know, it was in good order.

No one has come forward to give evidence as to whom the hay was purchased from; no one who sold the hay has

given evidence to show that the statements made by Professor Robertson, Mr. Macfarlane, Mr. Bell and Mr. Moore were unfounded. We have not a tittle of evidence as against their statements.

All the evidence amounts to is practically this, that the suppliants no doubt honestly intended to supply hay in accordance with the contract, and they took it for granted that the parties from whom they bought the hay were supplying them with hay of quality and weight which would fulfil the requirements of the contract.

The salient feature of the case is that there was a rejection of some of this hay in St. John, and the hay that was rejected was not up to the standard called for by the contract.

The learned counsel for the suppliants, Mr. Gogo has said everything that could be said in favor of the contention of the suppliants.

As to the question of the standard, I have given my views with regard to the statute.

With regard to the expression f. o. b. on the cars, it seems to me that this practically means that the cost of the freight or transportation would be upon the Government. While the hay was put f. o. b. on the cars, nevertheless the Government could reject it at St. John alongside the steamship.

Now, with regard to the excess quantities, raised by Mr. Gogo, I do not think there is a great deal in that.

Mr. Gogo also cited certain cases in support of his contention in regard to the expression f. o. b. For instance, take the case of *Chapman* v. *Morton* (1). That case amounts to nothing more than this, having regard to all the facts and circumstances of the case, the Court came to the conclusion that the vendee had accepted. That is all that case amounts to.

(1) 11 M. & W. 534.

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In this matter it is a difficult thing to argue, or to contend that the department, by its officers, ever intended to accept this rejected hay. One fact alone goes a long way towards the demonstration of that point. The hay was acquired, or purchased, for the purpose of being shipped to South Africa. Now, if they had any contemplation, or intention of accepting the hay, it would not have been sold in St. John after it was rejected. That is obvious, it is also obvious from the evidence, that what the Department, or Departmental officers, did under the terms of this contract (whether they were right, or whether they were wrong) was to reject that hay, and to decline to receive it under the terms of the contract. This is quite apparent from every circumstance connected with the case. It is also quite apparent from the fact that when the hay was sold for $6.80 per ton, that this amount was refunded to the suppliants.

Now, there is a good deal of force in the contention raised by Mr. Gogo, that the Government, or the Government officers, had no right to sell the rejected hay. The hay, having been rejected, never became the property of the Government. However, the place was filled with this hay, and it had to be got rid of, and the officers of the Crown, as a matter of fact, did sell the rejected hay, and did remit the proceeds to the suppliants.

There is no allegation in the petition of right of any loss or damage by that sale. There is no evidence made before me to show that the hay did not realize the highest price that could be got. The action, or claim, is against the Crown, and if the Crown is liable for what might be a wrongful act of the officers of the Department, there is no evidence before me of any loss whatever. It is purely a question of the loss sustained by the suppliants by reason of their property having been sold in the manner in which it was sold. I should doubt very much if the Crown would be liable in any event, for the

acts of their officers in selling the suppliant's hay. I think it is open to very great question whether such liability exists, but suppose it did exist, what of it? It is only a question of damage, and there is no evidence at all that the hay was not sold upon the best terms that could be got. There is no evidence at all that the hay did not bring the best price on the market, and no evidence whatever of damage of any kind, and no allegation in the petition to any such effect.

I think, therefore, that the case of the suppliants absolutely fails, and the petition is dismissed, with costs.

Judgment accordingly.

Solicitor for the suppliant: *J. A. MacInnes.*

Solicitor for the respondent: *M. G. Larochelle.*