IN THE MATTER of the Petition of Right of

JOHN B. McLELLAN..... SUPPLIANT; 1905

AND Jany. 12.

HIS MAJESTY THE KING.....RESPONDENT.

Contract for sale of railway ties—Delivery—Inspection—Payment—Purchase by Crown from vendee in default—Title.

In January, 1894, the suppliant agreed with M., acting for the B. & N. S. C. Company, to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where suppliant placed them until they were paid for. During the season of 1894, the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, and inspected; those accepted being marked with a dot of paint and the letters "B. & S.", and thereafter paid for by the company. In 1895 the suppliant made a second agreement with M. to get out another lot of ties for the company upon the same terms and conditions. Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them; and in May or June, 1897, the Intercolonial Railway authorities removed all the ties.

Held, that the B. & N. S. C. Company had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown.

PETITION OF RIGHT for the recovery of the possession of goods in the hands of the Crown, or their value.

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

1905

McLELLAN v. THE KING.

Argument of Counsel.

April 30th, 1904.

The hearing was commenced at Port Hawkesbury, N. S., and adjourned to Halifax.

May 6th, 1904.

Hearing resumed at Halifax. It was agreed between counsel that their respective arguments would be submitted to the court in writing.

D. McLennan and *J. A. Chisholm*, for the suppliant.

The suppliant is entitled to the return of the ties by the Crown or to the recovery of their value in money. *Tobin* v. *The Queen* (1); *Feather* v. *The Queen* (2); *Clode on Petition of Right* (3); *Audette's Practice* (4); *Merchants Bank of Canada* v. *The Queen* (5).

There was no contractual relation between the suppliant and the Crown. The agreement for supplying the ties was made between the suppliant and an agent of the Boston & Nova Scotia Coal Company.

Payment to the suppliant was necessary before the property in the ties passed to the company. The ties are in the hands of the Crown in derogation of the suppliant's right to take possession. A petition of right will be sustained under such circumstances (6); *Tempest* v. *Fitzgerald* (7); *Bloxam* v. *Sanders* (8); *Anson on Contracts* (9); *Grice* v. *Richardson* (10).

There was no delivery to the company. The ties were placed on the property of a third party. *Christie* v. *Burnett* (11); *Smith* v. *Hobson* (12); *Smith* v. *Hamilton* (13); *Whitwell* v. *Vincent* (14); *Tyler* v. *Freeman* (15); *Whitney* v. *Eaton* (16); *Farlow* v. *Ellis* (17); *Adams* v.

(1) 16 C. B. N. S. at pp. 357, 358.
(2) 6 B. & S. at p. 295.
(3) Pp. 87, 89.
(4) P. 74.
(5) 1 Ex. C. R. 1.
(6) 24 Am. & Eng. Ency. of Law, 1095.
(7) 3 B. & Ald. 680.
(8) 4 B. & C. 941.
(9) 10th ed. p. 316.
(10) 3 App. Cas. 319.
(11) 10 Ont. R. 609.
(12) 16 U. C. Q. B. 368.
(13) 29 U. C. Q. B. 394.
(14) 4 Pick. 449.
(15) 3 Cush. 261.
(16) 15 Gray 225.
(17) 15 Gray 229.

O'Connor (1); *Armour* v. *Pecker* (2); *Saloman* v. *Hathaway* (3); *Michigan Central Railroad Co.* v. *Phillips* (4); *Wabash Elevator Co.* v. *First National Bank* (5); *Leonard* v. *Davis* (6); *Turner* v. *Moore* (7); *Bush* v. *Bender* (8); *Benjamin on Sales* (9).

H. Mellish, K.C., for the respondent:

The sale of the ties to the company was complete. Everything to pass the property under the contract was done, viz., the fixing of the price, delivery and acceptance. The English rule is that the title passes when the contract is made and the goods appropriated to the contract, even if there be no delivery. *Sweeting* v. *Turner* (10).

The goods were out of the suppliant's possession before the respondent took them.

There is no evidence of any agreement between the suppliant and the company that the former should retain either the property in, or possession of, the ties until payment.

The company had *primâ facie* title in the goods and the suppliant is estopped from making any claim against the innocent purchaser. The suppliant must show his title by a written agreement accompanied by affidavit and duly registered under the *Bills of Sale Act* (11), otherwise an agreement as to a lien for the price is void as against a subsequent purchaser.

In reply, counsel for the suppliant urged that there was no delivery of the ties in a sense of a transfer of possession or of title. *Sweeting* v. *Turner* (*supra*), does not apply.

(1) 100 Mass. 515.
(2) 123 Mass. 143.
(3) 126 Mass. 482.
(4) 60 Ill. 190.
(5) 23 Ohio 311.
(6) 66 U. S. 476.
(7) 58 Vt. 455.
(8) 113 Pa. 94
(9) Sec. 320, 343.
(10) L. R. 7 Q. B. 310.
(11) R. S. N. S. 5th Ser. cap. 92, sec. 3.

1905

McLELLAN v. THE KING.

Reasons for Judgment.

The suppliant's evidence shows that he was to retain possession until payment.

The Nova Scotia *Bills of Sales Act* does not apply to the facts of this case. Moreover, there is no estoppel pleaded, or any plea with respect to compliance with the *Bills of Sale Act*, and these must be specially pleaded.

THE JUDGE OF THE EXCHEQUER COURT now (January 12th, 1905), delivered judgment.

The petition is brought to recover from the respondent 5,732 railway ties or sleepers that came into the possession of the Crown under circumstances to which reference will be made, or to recover the value of such railway ties. According to his evidence, the suppliant, in January, 1894, agreed with John McKeen, of Mabou, acting for the Boston and Nova Scotia Coal Company, to make and get out a quantity of railway ties for that company. The number of the ties to be made was not stated; the suppliant was to get out as many as he could; the ties were to be placed along the line of the Intercolonial Railway, in Cape Breton, and were to be paid for as soon as they were inspected and before they were removed from the place where they were placed by the suppliant. During the season of 1894 the suppliant got out a number of ties and placed them on the line of the railway where they were inspected, and those that were accepted were marked with a dot or spot of paint and with the letters "B. & S," that were used by the company. These ties were paid for by the company and are not in question here. In the spring of 1895, the suppliant made a second agreement with John McKeen, acting for the said company, to get out another lot of ties upon the same terms and conditions as those mentioned in respect of the first lot. They were to be paid for as soon as they

1905

McLELLAN v. THE KING.

Reasons for Judgment.

were placed on the line of railway and inspected, and with reference to the possesion of the ties, or control over them, the understanding, according to the suppliant, was that he was to get his money before the ties were removed from the place where he put them. During the season the suppliant got out 5,732 ties (those now in question), and placed them along the line of the railway at the places where the former lots were piled. The two lots were, however, piled separately and were not mixed with each other. The second lot of ties were inspected for the company, and those that passed inspection were marked with a dot or spot of paint as in the case of the first lot, but the letters "B. & S." were not put on them. In both cases the ties that were rejected were marked with a cross. The suppliant demanded payment from the company for the second lot of ties, but was never paid for them. Both lots remained upon the line of the railway until the autumn of 1896 when the suppliant was informed that they had been inspected by the Government inspector. He wrote at once to Mr. McKeen, but beyond that he did not do anything except speak to the track-master of the railway at that place, who told him the vouchers had been sent in. As a matter of fact the Boston and Nova Scotia Coal Company had in November, 1896, sold to the Crown for the use of the Intercolonial Railway all the ties mentioned, as well those that were made in 1895 as those that were gotten out in 1894, and had on the fourth and ninth of that month been paid in full therefor by the Intercolonial Railway authorities. The receipt for the money paid to the company on the 9th of November is signed by Mr. J. Fraser, the president, and A. C. Ross, the secretary-treasurer, of The Boston and Nova Scotia Coal Company, and that of the 4th of November by A. C. Ross, the secretary-treasurer. On the 2nd

1905

McLELLAN v. THE KING.

Reasons for Judgment.

of January, 1897, Mr. McKeen, in reply to a letter from the suppliant of the 29th of December, 1896, stated that he had nothing to do with the sale of the ties to the Government, which sale had been made by Ross and Fraser; and that he had not heard "what payments were made nor what ties were taken"; but that he would write to Ross and let the suppliant know. On the 6th of January, 1897, the suppliant wrote the following letter to the Minister of Railways and Canals:—

"KINGSVILLE, C.B., Jan. 6th, 1897.

"Hon. Mr. Blair,

"Minister of Railways and Canals,

"Ottawa

"SIR,—I have made 5,762 ties for the Boston & N. "Scotia Coal Co. in 1895, delivered them on the "I.C.R. between McIntyre's Lake station and River "Dennis station, and never received one cent for "them, and I am now informed the I.C.R. has taken "them over from the B. & N. S. Coal Co. I hope you "will please keep my money, or if paid to the com- "pany, that you will help me to get my money. I "am a poor man and cannot afford to lose this amount. "I am enclosing you a bill for the amount. Trusting "to hear from you soon,

"I am, sir,

"Your obedient servant,

"(Sgd.) J. B. McLELLAN."

"KINGSVILLE, C.B., 189 .

"The Department of Railways and Canals

"In a/c, with J. B. McLellan.

"Jan. 6th, 1897.

"To 5,672 15c.....$862.30.

"KINGSVILLE, INVERNESS CO.,

"Jan, 6th, 1897."

The company is said to have been insolvent, and nothing, so far as appears, came of this letter. In March following the suppliant wrote again to Mr. McKeen, with whom, as has been stated, the verbal contract for getting out the ties had been made. The following is Mr. McKeen's answer:

"MABOU, March 11, 1897.

"J. B. McLellan, Esq.

"DEAR SIR,—I have your letter of the 4th inst. I "have been laid up unable to reply to it the last few "days.

"I was sure you had come to an understanding "with Ross about those ties, as I have heard nothing "from Ross since I wrote him asking him to commu- "nicate with you in the matter. It appears to me "that your position is a good one if the Government "take the ties. You would have both the Govern- "ment and Ross & Fraser responsible for them.

"I think your best plan is to let the Government "take the ties. You would be perfectly safe in get- "ting your pay from either the Government or from "Ross & Fraser.

"If Ross sold the ties Fraser must be equally re- "sponsible with him, and he is a good man to collect "from.

"I speak thus of Fraser because he was president of "the company and must have had a hand in the "transaction.

"I wish you would let me know what Ross says in "the matter.

"Yours truly,

"(Sgd.) JOHN MCKEEN."

In May or June, 1897, the Intercolonial Railway authorities removed all the ties. The suppliant says that when he heard that was being done he told the section foreman in charge of the loading not to load

1905

McLELLAN v. THE KING.

Reasons for Judgment.

any ties marked with red paint only, as these were his; but as to that the latter says that the suppliant was not at any time present while he was loading the ties, but that he was not there during all the time the loading was going on.

The first question to be answered in this case is whether or not the suppliant's account of what the agreement between him and John McKeen was ought to be accepted. Mr. McKeen is dead, and we have only the suppliant's testimony as to what the bargain was. That suggests, of course, that the testimony should be received with caution. The difficulty on that point is not, however, as great as it otherwise might be, as Mr. McKeen's letter of March 11th, 1897, which has been given in full, is, it seems to me, more consistent with the view that the ties at the time belonged to the suppliant than with any other view of the case. One ought, I think, to be careful not to make too much of Mr. McKeen's letter. On the one hand, he was, as was well known, a good business man, of more than average intelligence, if one may with propriety refer to that—a man who knew very well that the suppliant would have no legal claim against the Crown for the ties if at the time of the sale they belonged to the company and not to the suppliant. On the other hand, he desired, no doubt, to see the suppliant paid for the ties, and in any case he was disposed, I think, to give the suppliant all the encouragement that the circumstances of the case admitted of. The suppliant's letter to the Minister of Railways and Canals, of January 6th, 1897, which also has been given in full, presents perhaps greater difficulties. It is true that he encloses therewith an account for the ties made out in his own name against the Railway Department, but in his letter he states that he made the ties for the company and

1905

McLELLAN v. THE KING.

Reasons for Judgment.

delivered them on the Intercolonial Railway. That he now explains by saying that what he meant by the expression "delivered" was that he had placed the ties where he had agreed to place them. It will have been observed that the ties had been bought for the Intercolonial Railway and the price had been paid some two months before this letter was written, so that, if there should be any question as to that, no one was in any way misled or prejudiced by the terms in which the letter was expressed.

With regard to the ties being placed or piled along the line of the Intercolonial Railway, on its property, it is argued for the respondent that, when the suppliant did that, he parted with the possession of the ties, and that they were thereafter in the possession of the railway for the company, to which they were in that way delivered. I should be inclined to agree with that view if there had been any delivery of the ties to the Intercolonial Railway to be carried or any delivery in any proper sense of the term. But the act of piling ties along the line of the Intercolonial Railway, such as happened in this case, without any direction to the railway authorities, or any agreement or arrangement with them, did not, it seems to me, constitute a delivery of such ties to the railway, any more than the placing or piling of ties upon a highway would constitute a delivery thereof to the Crown or the authority in whom the highway might be vested. There is nothing in that incident, it seems to me, which makes either for or against the suppliant's contention that the right of property in the ties and the right to the possession thereof remained in him.

It is also contended for the respondent that such an agreement as that which the suppliant states was made, namely, that the ties were to be paid for on

1904

McLELLAN v. THE KING.

Reasons for Judgment.

inspection and were not to be removed until paid for, that is, that they did not become the property of the company or at least that the company was not entitled to take possession of them until they were paid for, could not be supported except by compliance with the provisions of *The Bills of Sales Act* then in force in Nova Scotia (1). The provision relied upon is contained in the third section of the statute, and has reference, so far as is material to this case, to agreements for the sale of goods or chattels accompanied by an immediate delivery and followed by an actual and continued change of possession, whereby it is agreed that a lien thereon for the price or value thereof or any portion thereof shall remain in the bargainer. But in this case, if the suppliant's testimony is to be accepted, there was neither delivery of the ties to the company nor any change of possession, and it is only in that view of the case that the petition can be sustained.

The conclusion to which I have come is that the Boston and Nova Scotia Coal Company had not at the time, when they professed to sell the ties in question to the Intercolonial Railway, any right to sell them and that the Crown did not thereby acquire a good title to the ties. In that view of the case the suppliant is entitled to have the possession of the ties r etored to him ,and, that not being now possible, he is entitled to recover their value. He claims that they were worth twenty cents a piece when the Intercolonial Railway authorities took possession of them, but in the account that he sent to the Minister of Railways and Canals he put the value at fifteen cents for each tie, and I take that to have been a fair price.

The number of ties for which the suppliant makes his claim in the petition is, as has been seen, 5,732.

(1) R.S.N.S., 5th Series, ch. 92, s. 3.

For the value of that number at the rate of fifteen cents per tie, amounting in all to $859.80, there will be judgment for the suppliant, with costs.

Judgment accordingly.

Reasons for Judgment.

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

Solicitor for the respondent: *H. Mellish.*