1910
January 3.

# IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA,

PLAINTIFF;

AND

THE DOMINION OF CANADA GUARANTEE AND ACCIDENT INSURANCE COMPANY,

DEFENDANT.

*Manitoba Grain Act* (1900)—*Licensed Warehouses—Bonds by the same—Construction and Interpretation of—Extent of guarantee—Responsibility thereunder—When it terminates.*

The Dominion Government, through its Commissioner, having decided to give "X" a license to carry on the business of Public Country Warehouseman, for one year, beginning the 1st of September, 1906, pursuant to the provisions of the *Manitoba Grain Act* (1900), took from the defendant a surety bond to guarantee the faithful performance of "X" of all his duties under this Act. The bond was for one year, the duration of the license, and was, inter alia, to guarantee that "X" would "keep, store and deliver" the grain entrusted to him. At the termination of the above mentioned license a new license was granted for similar time, and a new bond from another company taken, on the same terms as the first mentioned.

There were no defaults or breaches of the law by "X" during the currency of the first license, but after 1st September, 1907, he made away with and failed to "deliver" certain grain, which he had received and stored, during the previous year. The proviso in the bond stated "that if the surety shall at any time give 3 calendar months notice . . . of its intention to put an end to the suretyship . . . . then this bond and all accruing responsibility on its part . . . . shall from and after the last day of such 3 calendar months . . . . cease and terminate in so far as concerns any acts or deeds of the Principal subsequent to such determination. . . ."

*Held,* that the license was a yearly license, and the security required by statute was for the faithful performance of the duties by the holder thereof, during such year only; and, this being so, notwithstanding that the breach herein was in reference to wheat received during the currency of the bond, the breach itself occurring

after such time, that it was not covered by the bond, and that the defendant could not be held responsible ,as surety, for the results of such breach.

Information filed by His Majesty's Attorney-General for the Dominion of Canada to recover from the defendants a certain sum alleged to be due by them as sureties under the *Manitoba Grain Act* of 1900, for the Wheat City Flour Mill Company.

The plaintiff, after alleging that the Company has given a bond in pursuance of the *Manitoba Grain Act,* 1900, and after reciting certain paragraphs therefrom which are given in the reasons for judgment of the Honourable Judge, printed below, and alleging that the Wheat City Flour Mill Company had received certain quantities of grain as licensee, alleged that all the wheat above referred to was delivered by the parties mentioned therein respectively to the Wheat City Flour Mill Company, Limited, in their elevator at Brandon, on the line of the railway of the Canadian Pacific, or, in the case of the track purchase by the Wheat City Flour Mills Co. Ltd., from the said Thomas Williams, the said two cars of wheat were delivered at Balcarres in the Province of Saskatchewan and that the Wheat City Flour Mills Co. Ltd. neglected and refused to "deliver" to said parties or any of them, the wheat referred to in the Information or to pay the value of the same or any portion thereof.

In the statement of defence the defendants denied the principal allegation of the Information and in paragraph 8 state:

"8. In the further alternative the defendant says "that between the 1st day of September, 1906, and "the 31st day of August, 1907, both days inclusive,

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Argument of Counsel.

"the Wheat City Flour Mills Company, Limited, "made no default, but did faithfully perform its "duties as a public warehouseman and did fully and "unreservedly comply with all laws in relation "thereto and when the alleged default, if any, oc- "curred (which the defendant denies), was carrying "on business under another and later license than "that referred to in paragraph 3 of the Information "issued under the Provisions of the said the *Mani- "toba Grain Act*, in respect of which later license a "bond to His Majesty the King as required by the "said Act and approved by the Commissioner had "been filed with the said Commissioner and the al- "leged default occurred, if at all, under such later "license and the defendant says it is not answerable "therefor."

The case was tried before the Honourable Mr. Justice Sir Walter Cassels at the City of Winnipeg, on the 3rd day of November, 1909.

*A. B. Hudson,* K.C. and *Mr. Marlatt,* for the Crown.

*Mr. H. A. Robson,* K.C. and *Mr. D. A. Stackpoole,* for defendant.

*Mr. Hudson,* argued, inter alia, that the operative part of the bond was in general terms. It did not limit it to any particular time; it was the duty of the principal to deliver the grain even after the expiration of the license year. That this bond was really a bond to secure the performance of obligations entered into during the continuance of the license year. *Wickens v. McMicken*[1], and 32 Encyc. of Law and Procedure, page 82 cited.

[1] (1888), 15 O. R. 408.

The illustration given there was where a bond to secure rent expires on a certain day the Surety on the bond is liable for rent earned on that day although not payable until afterwards.

*Mr. Robson,* in argument, cited sections 52 and 53 of the *Manitoba Grain Act,* 1900, and added that these articles constituted the contract that was authorized under this Act, between the warehouseman and the farmer, and that it was fair to argue that the obligation assumed by the Guaranty Company, or whoever the Surety may be, under this statute, was for the carrying out of that obligation and that the conditions which were assumed in the nature of the transaction by the producer, the bailor, must be complied with before the Surety could be liable. He must come within the Act and show that the obligation imposed upon the Surety by the Act had arisen in his favor. Then section 53 states the form of the receipt; that has been given for the purpose of showing what that contract is. Section 54 goes on (reads)

* * * * * *

The Company was not liable for the principal's common law liabilities, only liable under the obligations under the statute.

As the bond itself recites and as the declaration alleged the Company is being sued as guarantors under this Act.

He further claimed that the Company was in the same position as a surety for a servant and that it was the defaults that occur within the period for which their bond was given that they must account for, not the wheat that is received but the defaults that occur. Which was really taking just another view, or the same view, of section 54 just mentioned and applying it to another view of the case.

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They took another bond, immediately, to answer for the defaults of the next year. It was a matter of defaults. Under the statute a fair reading of it is, that it is the defaults that occur.

*Mr. Stackpoole*: The *Manitoba Grain Act* provides that at the end of each license year and before the warehouse commissioner issues a fresh license there shall be a return sent in by the elevator or warehouseman showing what is the amount of grain in store, that is, showing the obligations of the warehouseman to various parties who have stored grain and it is at the discretion of the Grain Commissioner then to fix the amount of security which will be required for the coming year for each elevator operated, up to the amount of $15,000 for each elevator. Now in the case of these particular bonds, in the case of the first bond at least and that is the principal one, there were four elevator licenses granted. That enabled the warehouse commissioner to take security up to the amount of $60,000 in bonds had he thought fit to do so but evidently, having the evidence before him of the amount of grain stored in the warehouse and the liabilities that might be incurred, he thought $18,000 was amply sufficient to cover it. Section 49 of the Act further provides that the bond to be taken by the warehouse commissioner shall be a condition for the faithful performance of his duties as a public warehouseman. Now the faithful performance of the duties is the delivery of the grain. There is no doubt about that and if he accepted fresh sureties for the performance of the duties of the warehouseman during that year I submit that we were relieved, there was somebody taken in our place, who assumed whatever obligations we might have had. That is,

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we take the stand that if we were liable at all after the completion of the license year (but we do not of course admit that) but even supposing your lordship should find that, we say that there have been other sureties taken for the faithful performance of the duties of the warehouseman and those sureties must be liable.

*Mr. Hudson,* in reply, stated that it was open to question whether the second bond would cover grain stored during the currency of the first license year. It says "Will keep, store and deliver grain". It might mean grain during that license year. It is fairly open to that construction. He cited *Canada West Farmers Mutual and Stock Insurance Co. v. Merritt*[1].

The parties made certain admissions and the facts necessary are stated in the reasons for judgment of the Honourable Mr. Justice Cassels, printed below.

Reasons for Judgment.

CASSELS, J. (January 3rd, 1910) delivered judgment.

The information was filed claiming against the defendants the payment of the sum of $57,500.00. The defendants by virtue of certain bonds became guarantors for the faithful performance of the duties of certain Licensed Warehouse Companies track buyers of grain and Public Country Warehousemen, licensed under the provisions of the *Manitoba Grain Act* to carry on the business of warehousemen, etc. The form of each bond is practically the same, and it will be unnecessary to refer to more than one.

The trial took place before me at Winnipeg on the 3rd November, 1909, *Mr. A. B. Hudson* and *Mr. Mar-*

[1] (1861), 20 U. C. Q. B. 444.

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Reasons for Judgment.

*latt* appeared for the Crown. *Mr. Robson,* K.C. and *Mr. Stackpoole* appeared for the defendants.

Both counsel for the plaintiff and the defendants made all reasonable admissions, and there is but little or no dispute as to the facts. Certain technical objections were raised by counsel for the defendants to the right of the plaintiff to recover, if otherwise entitled to recover under the terms of the bonds. I do not consider it necessary in the view I take of the case to consider these objections.

The principals for whose faithful performance of their duties the defendants became guarantors obtained a license to carry on the business of Public Country Warehousemen pursuant to the provisions of the *Manitoba Grain Act,* 1900.

Quoting from one of the bonds (the others are in the same terms):

"Whereas the Principal has applied for four ele-"vator licenses under the hand and seal of Charles "C. Castle, Warehouse Commissioner for the In-"spection Division of Manitoba in Canada by which "when issued the Principal will be authorized and "empowered to carry on the business of Public "Country Warehousemen at such place or places as "are set forth in the schedule written on the back "of this sheet which is made part of this bond, from "the first day of September, 1906, to the 31st day of "August, 1907, both days inclusive.

"And this bond is given in pursuance of the *Mani-"toba Grain Act,* 1900."

The bond proceeds as follows:

"Now the condition of this obligation is such that "if upon the granting of such license the Principal "shall duly keep books and accounts, insure grain,

"issue and deliver receipts and tickets, keep, store "and deliver grain, render all accounts, inventories, "statements and returns prescribed by law, pay all "penalties which the Principal is or may become "liable to pay under the provisions of the said Act, "and of such other Act or Acts as may hereafter "be in this behalf enacted by the Parliament of "Canada, and shall well, truly, faithfully and un-"reservedly comply with all the enactments and re-"quirements of the said Act, or of any Act or Acts "as aforesaid, and of any Order in Council, depart-"mental or other regulation made by competent "authority according to their true intent and mean-"ing as well with regard to such books, accounts, "insurance, delivery or receipts and tickets and the "keeping, storing, delivering of grain, the render-"ing of accounts, inventories, statements, returns "and payment of penalties as to all other matters "and things whatsoever referred to or required of "the Principal by the said Act or Acts and Orders in "Council and regulations whatsoever, then this obli-"gation shall be void and of no effect, but otherwise "shall be and remain in full force and virtue.

"Provided always that if the Surety shall at any "time give three calendar months' notice in writing "to the Principal and to the Warehouse Commis-"sioner for the Inspection Division of Manitoba "aforesaid for the time being of its intention to put "an end to the Suretyship hereby entered into, then "this bond and all accruing responsibility on its "part, and of its funds and property shall from and "after the last day of such three calendar months "aforesaid, cease and terminate in so far as con-"cerns any acts or deeds of the Principal subsequent

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"to such determination, remaining liable, however, "hereon, for all or any deeds, acts or defaults done "or committed by the Principal in his said business "of Public Country Warehouseman as aforesaid "from the date of this bond up to such determina-"tion."

On the expiration of the license a new license was granted pursuant to the terms of the statute licensing the warehousemen to carry on the business from the 1st day of September, 1907, to the 31st day of August, 1908, and a new bond was taken to secure the faithful performance of the duties of the warehousemen, the Surety, however, not being the present defendants, but the London Guarantee and Accident Company.

During the currency of the first license and between the 1st September, 1906, and the 31st August, 1907, certain grain was delivered to the licensed warehousemen by farmers referred to in the evidence. There was no breach by the Principal during the currency of this first license. Grain which had been received prior to 31st August, 1907, was subsequently and after the granting of the second license to carry on business from the 1st September, 1907, to 31st August, 1908, made away with by the warehousemen.

The point under consideration is whether the defendants under the terms of the bond hereinbefore recited are liable in respect of breaches occurring subsequent to 31st August, 1907.

It appears that the Surety in the second bond, the London Guarantee and Accident Company, have paid in full the amount of their liability and a *pro rata* proportion has been retained to meet the claims

in question. This fact does not appear to me to influence the question.

The Crown contends that the liability of the defendants continued in respect of all grain received by the warehousemen during the currency of the bond, notwithstanding there was no breach or default prior to the 1st September, 1907.

The defendants on the other hand contend that their liability ended on the 31st August, 1907, that their suretyship ended on this date and that they are not liable for subsequent defaults.

Since the argument of counsel at Winnipeg I have been furnished by counsel for both the plaintiff and defendants with authorities bearing on either view of the case. There is not much assistance to be derived in arriving at a conclusion from these authorities. The question depends in my view on the construction of the bond of suretyship, having regard to the surrounding circumstances, I will consider the authorities later.

Certain provisions of the *Manitoba Grain Act* have to be considered.

Section 7 provides as follows:—

"(a) to require all track buyers, and owners and "operators of elevators, warehouses and mills, and "all grain commission merchants to take out annual "licenses;

"(b) to fix the amount of bonds to be given by the "different owners and operators of elevators, mills "and flat warehouses, and by grain commission mer- "chants and track buyers;

"(c) to require the persons so licensed to keep "books in forms approved of by the Commissioner "or by the Governor in Council."

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"COUNTRY ELEVATORS, FLAT WAREHOUSES AND LOADING PLATFORMS."

"45. All elevators and warehouses in which grain "is received, stored, shipped or handled, and which "are situated on the right of way of any railroad, "or on any siding or spur track connected therewith, "depot grounds, or any lands acquired or reserved "by any railroad company to be used in connection "with its line of railway, at any station or siding "other than at terminal points, are declared to be "public elevators or warehouses, and shall be under "the supervision and subject to the inspection of "the Commissioner, and shall, for the purpose of the "following sections of this Act, be known and desig-"nated as public country elevators or country ware-"houses. 63-64 Vic. c. 39, sec. 29.

"47. Unless the owner or lessee thereof shall have "first procured a license therefor from the Commis-"sioner it shall be unlawful to receive, ship, store or "handle any grain in any elevator or warehouse.

"2. A license shall be issued only upon written "application under oath or statutory declaration, "specifying:—

"(a) the location of the elevator or warehouse;

"(b) the name of the person owning and operating "the elevator or warehouse; and

"(c) the names of all the members of the firm, or "the names of all the officers of the corporation, "owning and operating the elevator or warehouse.

"3. The license shall expire on the thirty-first "day of August in each year, but while in force shall "confer upon the licensee full authority to operate "the warehouse or elevator in accordance with law "and the rules and regulations made under this Act.

"4. Every person receiving a license shall be held "to have agreed to the provisions of this Act and to "have agreed to comply therewith.

"5. The annual fee for such license shall be two "dollars, and all moneys received as such fees shall "be paid into the Manitoba Grain Inspection Fund. "63-64 Vic. c. 39, s. 30.

"49 The person receiving a license as herein pro- "vided, shall file with the Commissioner a bond to "His Majesty, with good and sufficient sureties, to "be approved by the Commissioner, in a penal sum "in the discretion of the Commissioner, of not less "than five thousand nor more than fifteen thousand "dollars, in the case of an elevator, and of not less "than five hundred nor more than five thousand dol- "lars, in the case of a flat warehouse, conditioned "for the faithful performance of his duties as a pub- "lic warehouseman and his full and unreserved com- "pliance with all laws in relation thereto; Provided "that when any person procures a license for more "than one elevator or flat warehouse, security may "be given by one or more bonds, in such amount or "amounts as the Commissioner may require, subject "to the approval of the Minister. 63-64 Vic. c. 39, "s. 31.

"51. The person operating any such country ele- "vator or country warehouse shall,—

"(a) receive the first six standard grades of wheat "established and described in Part II. of the In- "spection and Sale Act;

"(b) upon the request of any person delivering "grain for storage or shipment, receive such grain, "without discrimination as to persons, during rea- "sonable and proper business hours;

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"(c) insure the grain so received against loss by "fire while in his elevator or warehouse; and

"(d) keep a true and correct account in writing, "in proper books, of all grain received, stored, and "shipped at such elevator or warehouse, stating, "except as hereinafter provided, the weight, grade, "and dockage for dirt or other cause, of each lot of "grain received in store, for sale, storage or ship- "ment. 63-64 Vic. c. 39, s. 34; 3 Edw. VII., c. 33, s. 8.

"(e) at the time of delivery of any grain at his "elevator or warehouse issue, in the form prescribed "by the schedule to this Act, to the person delivering "the grain either a cash purchase ticket, warehouse "storage receipt, or storage receipt for special "binned grain, dated the day the grain was received, "for each individual load, lot or parcel of grain de- "livered at such elevator or warehouse. 7-8 Edw. "VII., 1908, c. 45, s. 22.

"53. .....

"2. Such receipt shall also state upon its face "that the grain mentioned therein has been received "into store, and that upon the return of such receipt, "and upon payment or tender of payment of all law- "ful charges for receiving, storing, insuring, de- "livering or otherwise handling such grain, which "may accrue up to the time of the return of the re- "ceipt, the grain is deliverable to the person on "whose account it has been taken into store, or to "his order, either from the elevator or warehouse "where it was received for storage, or if either "party so desires, in quantities not less than car- "load lots, on track at any terminal elevator in the "inspection district of Manitoba, on the line of rail- "way upon which the receiving elevator or ware- "house is situate, or any line connecting therewith,

"so soon as the transportation company delivers "the same at such terminal, and the certificate of "grade and weight is returned. 63-64 Vic. c. 39, s. 34.

"70. When ordered by the Commissioner, any "person operating a public country elevator or "warehouse under this Act shall, immediately after "the end of each month in which the elevator or "warehouse shall have been operated, furnish in "writing to the Commissioner a return statement showing:

"(a) The amount of grain on hand in the elevator "at the commencement of such month, and the total "amount of warehouse receipts at that time out-"standing in respect of the said grain;

"(b) The total amount of warehouse receipts "issued during such month, the total amount of "warehouse receipts surrendered by the holders "thereof during such month, and the total amount of "warehouse receipts outstanding at the close of such "month;

"(c) The amount of grain received and stored in "the elevator or warehouse during such month."

Then follow other provisions for the purpose of ensuring complete returns.

Section 27 provides as follows:—

"Upon the return of any terminal warehouse re-"ceipt by the holder thereof, properly endorsed, and "the tender of all proper charges upon grain repre-"sented thereby, such grain shall be immediately de-"liverable to the holder of such receipt, and shall "be delivered within twenty-four hours after de-"mand has been made, and cars or vessels therefor "have been furnished for that purpose, and shall not "be subject to any further charges for storage:

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"Provided that if it should happen that, in conse-
"quence of the cars or vessels not being furnished
"till after the expiration of twenty-four hours as
"aforesaid, a new storage term shall be entered
"upon, then the charge for storage shall neverthe-
"less be made, but only on a *pro rata* basis in respect
"of the time which shall have elapsed after the ex-
"piration of the twenty-four hours as aforesaid,
"and the time when the cars or vessels actually
"arrive. 63-64 Vic. c. 39, s. 22."

It seems to me that the license is merely a yearly license. The security required by the statute is merely for the faithful performance of the duties of the warehouseman during that year. On the renewal of the license the Commissioner arranges for new security. He can be guided in arriving at the amount to be fixed as such security by requiring the warehouseman to furnish particulars in the section quoted. Moreover, according to my view, the last clause of the bond sheds considerable light upon the construction to be placed on the bond. I repeat the clause:—

"Provided always that if the Surety shall at any
"time give three calendar months' notice in writing
"to the Principal and to the Warehouse Commis-
"sioner for the Inspection Division of Manitoba
"aforesaid for the time being of its intention to put
"an end to the Suretyship hereby entered into, then
"this bond, and all accruing responsibility on its
"part, and of its funds and property shall from and
"after the last day of such three calendar months
"aforesaid, cease and terminate in so far as con-
"cerns any acts or deeds of the Principal subsequent
"to such determination, remaining liable, however,

"hereon for all or any deeds, acts or defaults done "or committed by the Principal in his said business "of Public Country Warehouseman as aforesaid "from the date of this bond up to such determin- "ation."

It is a provision enabling the Surety during the currency of the bond to terminate their liability on giving three months' notice. The liability does not relieve "for any deeds, acts or defaults done or com- "mitted by the Principal in his said business of "Public Country Warehouseman as aforesaid from "the date of this bond up to such determination."

This provision is evidently one enabling the Surety to get rid of his liability prior to the expiration of the bond with the condition attached that it does not free them from liability previously incurred.

If the Surety fails to take advantage of this provision enabling him to curtail his liability during the currency of the bond, he remains liable until the expiration of the bond, namely, a year from 1st September, 1906; but I do not think the liability is carried on for an indefinite period.

The license is granted 1st September, 1906, for a year, and the guaranty executed the same date. Assume on October 1st the Surety gave three months' notice of their intention to terminate their liability. Their liability would cease on 1st January, except for defaults prior to that date. Suppose during November farmers had deposited grain and no default on the part of the warehouseman until February. The Surety would not be liable. Any liability would be that of the new Surety. It seems to me on the expiration of the license the same result follows. The new Surety, not the defendants, is liable.

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Reasons for Judgment.

The case of the *Canada West Farmers Mutual and Stock Insurance Co. v. Merritt*[1] does not assist the plaintiff; but if anything is adverse to his claim.

The cases cited by counsel of *Kitson v. Julian*[2]; *Hassell v. Long*[3]; *Peppin v. Cooper*[4]; *Lord Arlington v. Merricke*[5]; and *Bamford v. Iles*[6] are all referred to in the judgment of the late Mr. Justice Street in *Wickens v. McMeekin*[7], which is in favour of the contention of the defendants.

*Leadley and others v. Evans*[8] also favours the defendants' contention.

The case of *Niagara District Fruit Growers Stock Co. v. Stewart et al*[9] may also be referred to.

For the reasons given above I am of opinion that defendants are not liable, and the information is dismissed with costs.

*Judgment accordingly.*

Solicitors for plaintiff: *Hudson, Howell, Ormond & Marlatt.*

Solicitors for defendant: *Sharpe, Stackpoole & Elliott.*

[1] 20 U. C. Q. B. 444.
[2] (1885), 24 L. J. Q. B. 202, 4 El. & Bl. 854.
[3] (1814), 2 M. & S. 363.
[4] (1819), 2 B. & Ald. 431.
[5] 2 Wm. Saunders 813.
[6] (1849), 3 Exch. 380.
[7] 15 O. R. 408.
[8] (1824), 2 Bing. 32.
[9] (1896), 26 Can. S. C. R. 629.