1921
May 12.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA..... PLAINTIFF;

AND

THE GLOBE INDEMNITY COMPANY OF CANADA, AND E. T. HINCHLIFFE..... DEFENDANTS.

AND

W. H. BARBER, P. WARMKE, WILLIAM GWILLIM, D. MACPHEAT, G. W. DRAKE, AND THOMAS HASLETT..... THIRD PARTIES.

Canada Grain Act—Conversion—Collateral Bonds—Third Party notice.

In compliance with the provisions of the Canada Grain Act, H. filed with the Board of Grain Commissioners a bond of the defendant company to obtain a license to operate a country elevator for the crop year of 1915-16. Various persons stored their grain in his elevator, to whom he issued receipts therefor pursuant to the Act. Subsequently without instructions from the owners and without obtaining the return of the storage certificates he disposed of the grain, keeping part of the proceeds thereof.

Held: On the facts that H. had failed to comply with the provisions of the Act and that the defendant Company was liable to plaintiff under its bond.

2. That, the fact of the owners on discovering their grain gone, making a demand for payment thereof from H. could not be construed into a waiver of the old or the making of a new contract between them and H. so as to relieve him of his statutory duties, or to exonerate the company from liability under their bond.

3. That where there is conversion as aforesaid, the damages should be measured by the actual loss, depending upon the price prevailing at that time.

4. At the time it gave its said bond, the company required H. to furnish collateral bonds securing them; and the third-parties herein gave these bonds.

Held: That, as the Company's right to indemnity as against the third-parties was an independent right not depending upon the bonds themselves, but upon other and separate agreements than those forming the basis of the information herein, and that the third-parties were admittedly liable upon the showing of vouchers or other evidence of payment by the Company under the bonds,—the rule of third-party notice, the object of which is to give them an opportunity of contesting plaintiff's right and that he may be bound by the judgment obtained by the plaintiff, was not applicable and therefore this court had no jurisdiction to decide this issue as between subject and subject, which is entirely foreign to the main issue.

INFORMATION exhibited by the Attorney-General for Canada seeking to recover against the Indemnity Company for the bonds furnished in connection with the operating of country elevator and of track buyers operations.

Trial was begun at Regina on the 28th September, 1918, before the Honourable Mr. Justice Audette and was later, on the 3rd February, 1921, resumed and concluded before the same judge.

E. L. Taylor, K.C. and *T. Sweatmen, K.C.*, for the Crown.

Coyne, K.C., for the Globe Indemnity Co.

L. A. Sellers for Thomas Ashton, Third Party.

J. A. Frame, K.C., for the other third-parties.

No one appearing for defendant Hinchliffe.

The facts are stated in the reasons for judgment.

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AUDETTE J. now (May 12th, 1921) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover against each of the said defendants, the sum of $6,600, being the full amount of a country elevator bond, together with the further sum of $6,000, or such portion thereof as may be considered just,—being the amount of a track-buyer's bond,—both bonds being given, under the provisions of the Canada Grain Act, 2 Geo. V, ch. 27 (1912).

The defendant Hinchliffe, although duly served with notice of trial, after having filed a statement of defence, did not appear at trial,—the other defendant, the Globe Indemnity Company of Canada and the third-parties, being, however, duly represented by counsel.

The following admissions, subscribed to by all parties hereto, excepting the defendant Hinchliffe, were duly filed at the opening, and read as follows, viz.:

"Admissions:—For the purposes of this case it is agreed between His Majesty and the defendants:

"1. That on the 28th and 29th June, 1916, the Board of Grain Commissioners held sessions at Strassburg, in the Province of Saskatchewan, pursuant to the statute, for the purpose of fully investigating all matters in connection with the alleged default of the said Hinchliffe in operating the said country elevator and also as to his alleged default as a track buyer, subject to the question of relevancy.

"2. The Board wrote to the defendant company giving the date of the hearing and requesting that the Company have a representative present. The defendant company was represented by counsel at said investigation who cross-examined persons called before the Board subject to the question of relevancy.

"3. The said elevator was closed by the 1st of January, 1916, all grain having been shipped out.

"4. Early in January, 1916, the Board received complaints that Hinchliffe was not complying with the Act and asking for an investigation. A representative of the Board interviewed him in Regina. This is admitted subject to the question of relevancy.

"5. The first declarations of claim, making claims against Hinchliffe to the Grain Commission were made on the 22nd of February, 1916, and twelve of them were taken before the end of the month of February. This is admitted subject to the question of relevancy.

"6. The prices of grain during the period from September 1st, 1915, to August 31st, 1916, are correctly set out for the various days in the closing prices shown in Report of the Winnipeg Grain Exchange for the year 1916, pages 70 to 81 inclusive, which are made part of these admissions, except grain commandeered; and the value of the grain of the said claimants at the above prices is subject to deductions for freight 11.4 c. per bushel on wheat and 6½ c. per bushel on oats, storage 1¾c. per bushel and 1-30c. per bushel per day after the first fifteen days, and 1c. per bushel commission on sale, together with dockage and also to interest on advances made in respect of the grain of the various claimants.

"7. The grain prices for the contract grades for the various days in the years succeeding 1916 are correctly shown in the Winnipeg Grain Exchange Reports, which prices as well as the orders of the Wheat Board are admitted. It is also admitted that the highest price for No. 2 Feed Oats on the Winnipeg Grain Exchange since September 1st, 1915, was $1.36½ on

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June 15th and June 16th, 1920. It is also admitted that all grain from said elevator went to the Regina Grain Company and was sold by them, with the exception of the 1976 bushels 40 pounds of wheat and oats mentioned in paragraph 1 of the particulars.

"8. During the grain year 1915-16, it is the price of No. 1 Northern Wheat which is shown by the Winnipeg Grain Exchange prices above. During the same period it is the price of No. 2 C.W. Oats which is shown by the Winnipeg Grain Exchange prices above.

"9. The claim in paragraph 8 of the Particulars is withdrawn.

"10. The amount of the claim in paragraph 10 of the Particulars is fixed at $110. This claim is the only one under the Track Bond.

"11. The only cars commandeered by the Government on November 28th, 1915, are Nos. 209390, 146660, 208878, 102930, all No. 1 Northern."

(This admission is signed by counsel on behalf of plaintiff, defendant company and third-parties).

The defendant, the Globe Indemnity Company of Canada, by counsel, at the opening of the trial admitted liability to the extent of $110 under the $6,000 bond above referred to, in respect of the track buyer's license, and the Crown's counsel declared himself satisfied, limiting his claim to that amount in respect to the track-buyer bond.

That leaves me to deal with the bond of $6,600 in respect of the Country Elevator license.

Counsel for the Crown, upon application, was also allowed to amend his particulars of claim to the effect that the price or prices or value at which the various classes of grain should be estimated in this action for the purpose of fixing damages should be the highest

market price (according to the reports of the Winnipeg Grain Exchange) prevailing between the date of storing the grain in each case and the date of the trial. This question will be hereinafter referred to.

The statement of defence by the Globe Indemnity Company of Canada was also amended, upon leave granted at trial, by striking out thereof the whole of paragraphs 7 and 8 and sub-paragraphs (b), (c), (d), (e), and (f) of par. 9.

The defendant Hinchliffe, as averred by the pleading, in compliance with the Canada Grain Act, filed with the Board of Grain Commissioners the bond in question for $6,600 to obtain a country elevator license for operating the crop year of 1915-1916.

Evidence was adduced on behalf of the Crown in respect of some of the claims set out in the particulars and those set out in the statement of defence by the Globe Indemnity Company of Canada, namely: The claim of George Dueringer, William Schwandt, Frank Staffen, William Hinchliffe, John Flavelle, Edward Shepherd, Albert Revoy, Fentwick & Rowe, Aaron Kerr, George F. Sculpholm, one Fenwick for Mrs. Moeller, and George Staffen.

The defence offered no *viva voce* evidence at trial.

The details of the several transactions of these claimants with the country elevator operated by defendant Hinchliffe are set forth both in the particulars and in the evidence; but in the view I take of the case I find it unnecessary to undertake any minute analysis of the same, because I have come to the conclusion that the defendant Hinchliffe has made default in the operation of his country elevator and that he has transgressed the law or rules for operating such an elevator as laid down in the statute.

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Having received from the farmer their grain for storage in the elevator, Hinchliffe, pursuant to sec. 157 of the Grain Act, and at the time of delivery of such grain, issued, in the form prescribed by the Act, to the person delivering the grain, warehouse storage receipts and under secs. 159 and 166, he became liable to account for the same.

The claim made herein, under the bond, is for the wheat so stored by the farmer and which Hinchliffe disposed of without instructions from them, with the result that when the farmers came to ship their wheat or grain, they found the elevator empty and closed, and Hinchliffe gone. The farmers thereby suffered heavy losses for which it is sought here to compensate them out of the proceeds of the bond.

Hinchliffe had no right, of his own volition and without an order, to dispose of and sell the grain stored in his country elevator, except under the special circumstances mentioned in the statute, which are not in issue herein. Hinchliffe having given storage certificates, the grain could not leave the elevator without the return of these certificates, as required by the statute; and he was moreover under contract with the farmer to keep his grain in the elevator.

It is true Hinchliffe made advances in money to several of the farmers storing grain in his elevator, but that did not change the nature of the statutory contract he was working under. He was quite free, at common law, to make these advances, but he had no legal lien upon the stored grain, especially as against a third party holding the storage certificates. He took his chance, and he had the advantage of having in his hands grain representing more than the amount advanced and that was all.

Moreover, the conversion, with regard to all these claims, of the farmers' grain cannot now be sought to be construed into a new contract as between the farmers and Hinchliffe from the manner and the language used when the farmer, seeing his grain gone, asked for his money, and the demand for money or payment, under the circumstances, cannot be made referable to a new contract as between the warehouseman and the farmer, with the object or view of avoiding the statutory duties cast upon the elevator man.

It is not, indeed, what the swindled farmers said or had to say when they realized their grain had gone, that is now under consideration in the present controversy—but the consideration is what the farmers have a right to exact from Hinchliffe under the circumstances which form the gravamen of the case. Hinchliffe having violated his statutory duties and converted the grain to his own use, is estopped from setting up afterward, thereby invoking his own turpitude, what the farmers said when they found their grain gone and endeavour to construe it into a new contract which would release him of any liability. It is not in the mouth of Hinchliffe to say—as was said at bar—the farmers ratified the sale I made of their grain by asking for their money, the proceeds of the sale of such grain. He who seeks equity must come into court with clean hands.

When some of the farmers realized their loss and went to Hinchliffe and asked for their money, the elevator being closed and the wheat gone, they were trying to make the best of a bad job, if I may use that expression. And, indeed, whatever they did say to get the proceeds of their disappeared grain cannot now be sought to be made referable to a new class of contract which would let out Hinchliffe from his statutory duties.

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The farmers were shamefully swindled. They dealt in the regular manner, as provided by the statute, with the person operating the elevator, who proved himself false and the damages flowing from his violating the statute and his being obviously derelict in his conduct would appear to be only partially guaranteed by the bond of the Globe Indemnity Company of Canada, and I find the company are liable under their bond and must pay.

The farmers are not parties to the bond, but they have a claim for damages and compensation against the defendant Hinchliffe, whose action in respect of the administration of his country elevator is bonded and guaranteed. The compensation for damages in a case of conversion should be complete and the converter must not be allowed to take or make any profit out of his wrongful act. The damages should be measured by the actual loss and the claimants would have sold their grain during that season and they would have been paid the price prevailing at that time.

The damages therefore should be ascertained upon the basis of the price of the wheat, oats or grain prevailing between Christmas, 1915, and the 1st February, 1916, and making the usual and proper deduction or allowance for freight, transportation, storage, warehouse charge, etc. The elevator as admitted, was closed by the 1st January, 1916. But in no case should a farmer receive a higher price at which he testified he was holding for sale.

The plaintiff having omitted to ask for interest by the information, moved at trial to amend accordingly and the pronouncement upon that application had been reserved to the merits. Interest should be allowed in a matter like the present one, and moreover, in view of the long delay since the institution

of the action, the greater part of which resulting from an adjournment which was granted at the request of the Globe Indemnity Company, I think the plaintiff is undoubtedly entitled thereto. I have no hesitation in allowing the amendment and direct that interest should run upon the amount of damages duly ascertained from the 1st March, 1916. The whole in full accord with the basic consideration that the farmer should be compensated by the converter to the full amount of his loss.

The costs of the adjournment above referred to having been reserved, I hereby adjudge the plaintiff is entitled to recover the same against the said The Globe Indemnity Company of Canada in any event.

Dealing now with the amount of damages or the amount which should be paid to the respective claimants mentioned herein, I will accept the suggestion at trial and I will direct counsel to adjust the same upon the basis above mentioned. Failing, however, counsel to be able to arrive at a satisfactory adjustment, leave is hereby given to apply for further direction in respect of the same.

The claimants will be entitled to the value of their lost grain, at the prices prevailing between Christmas, 1915, and the 1st February, 1916, with interest thereon from the 1st March, 1916, they being entitled to full compensation in a case of conversion. All due deduction to be duly made respecting advances, costs of transportation, storage, etc., etc., all such charges being familiar to counsel herein, as clearly appeared at bar.

There will be judgment as follows, on the main issue, viz.:

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1°. The plaintiff is ordered and adjudged to recover against the said defendants, in respect of the operation under the track-buyer bond for $6,000, the sum of $110, as admitted and agreed upon at bar.

2°. The plaintiff is further ordered and adjudged to recover against the defendants all such damages and compensation as may be arrived under adjustment by counsel aforesaid, allowing for each of the said farmers his claim under the prices prevailing between Christmas, 1915, and the 1st February, 1916, with interest thereon, from the 1st March, 1916, the whole, however, only up to the total amount of the bond of $6,600 if the added sums representing the damage amount to that, and less if the deficiency amounts to less. If the several amounts of the individual loss of the farmers, ascertained in the manner above set forth, and if the condemnation becomes to be for $6,600—the total amount of the bond—against the Globe Indemnity Company, interest upon that sum should only run against that company from the date of demand upon them which may be taken to be the date of the investigation by the Board of Grain Commissioners, which is to be found in the information as the 28th June, 1916.

3°. The plaintiff is further ordered and adjudged to recover against the said defendants the costs of this action, together with and including the costs of the adjournment, in any event, and which stood under reserve up to date.

4°. Failing the parties to adjust the claim, as mentioned above, leave is hereby reserved to apply for further direction.

THIRD PARTIES ISSUE.

One of the defendants, the Globe Indemnity Company of Canada, having claimed to be entitled to indemnity over against the third parties above mentioned, obtained leave to serve third-party notice upon them and after the pleadings had been respectively filed and delivered, the matter came up for hearing at the same time as the hearing upon the issue as between the plaintiff and the defendants.

I have heard both issues at Regina, on the 3rd February, 1921, and following days, and allowed counsel for the defendant company on account of his having taken ill at trial to offer his argument in writing by the 14th February, 1921. A further extension was also allowed; but as the written argument is not at this late date forthcoming, about three months after the argument, I now proceed to render judgment.

The Globe Indemnity Company gave the two bonds above mentioned and required the defendant Hinchliffe to procure collateral in the nature of exhibits A. 12 and A. 26. The third-parties who signed these documents contend, among other things, that they signed the same upon misrepresentation on the part of Hinchliffe, who told them it was a recommendation touching his capacity to run an elevator, under the provisions of the Grain Act; to some of them he even said it was a bond or security, but that they would never be asked to pay out any money. In one case there was no seal affixed upon the document and in the other the seals appeared to have been affixed after the parties had signed.

However, in the view I take of the case it becomes unnecessary for me to decide whether or not the third-parties, not being blind or illiterate, were or

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were not so grossly negligent in signing these documents without reading them or ascertaining their purport, that the plea of misrepresentation can let them out or whether the plea is *non est factum*. *Howatson* v. *Webb* (1).

It is furthermore unnecessary for me to decide whether or not the case comes under sec. 4 of the Statute of Frauds and whether in such cases seals are required upon this class of documents. Brown, on Statute of Frauds (2).

Indeed, after going over the whole case and giving this matter careful consideration, I have come to the conclusion that this is not a proper third-party issue, and further that I have no jurisdiction to entertain the claim.

This is not a claim to indemnify the defendant company over against the plaintiff's claim in the action resting on the bonds recited in the information; but the defendant company claims under an independent right, not depending upon the bond themselves, but upon other and separate deeds or agreements entirely distinct and separate from the bonds in question. The transaction between the plaintiff and the defendants in respect of the two bonds in question is complete and distinct and cannot be linked with the other collateral bond or security to be used as a right to third-party notice. Where the defendant's right against a third-party is an independent right, not depending on the defendant's own liability in the action, the rule of third-party notice is not applicable. *Wynne* v. *Tempest* (3); *Greville* v. *Hayes* (4).

(1) 4 British Rg. Cases 642.
(2) pp. 440, 441 et seq., & 582.
(3) [1897] 1 Ch. D. 110.
(4) [1894] Ir. R. 2 Q.B. & Ex. 20, at 23.

The object of the third-party notice is to bring in a third-party in the suit to give him an opportunity of contesting the plaintiff's right and furthermore that he may be bound by the judgment obtained by the plaintiff. In the present case, there would be no object in and nothing gained by bringing in the third-parties in question, because by the very terms of their bonds or collateral securities (exhibits 12 and 26), they are bound by the judgment upon the original bond, by the terms of these collateral bonds the third-parties are liable to the company for all loss, damage and costs, etc., admitting before hand, that the vouchers or other evidence of payment made by the company, etc., shall be conclusive evidence as against them of the fact and extent of their liability to the company whether such payments were made to discharge a penalty under the bond, or were incurred in the investigation of a claim therein or in adjusting a loss or claim *and whether voluntarily made or paid after suit and judgment against the company.*

The matter is very clear, this is not a case of third-party notice, it necessarily follows that I have no jurisdiction to decide this issue as between subject and subject.

I am moreover bound by the decision of this Court upon a closely analogous case *In re the Queen* v. *Finlayson et al* (1).

Therefore the claim made by the Globe Indemnity Company of Canada as against the third-parties is hereby dismissed with costs. The third-parties are dismissed from this action, which, of course, will not deprive the defendant company of such right of indemnity as may exist.

(1) 5 Ex. C.R. 387.

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The very able written argument of counsel for the defendant company was delayed in its transmission to me for reasons which I need not state. I had arrived at my conclusion in the case, as above stated, before I had an opportunity of perusing it; but I have since done so. However, after duly considering it, I see no reason to change the conclusion of my judgment in any way.

Judgment accordingly.

Solicitor for Crown: *E. L. Taylor.*

Solicitors for Globe Indemnity Company: *Coyne, Hamilton & Martin.*

Solicitors for Hinchliffe: *Thornburn, Forrester & Forrester.*

Solicitor for Third-Parties: *G. A. Colquhoon.*