

1926
January 12

A. E. KENDALL ET AL. SUPPLIANTS;
AND
HIS MAJESTY THE KING. RESPONDENT

Crown—Petition of Right—Negligence of servant—Fraud

Suppliants desiring to obtain 600 tons of hay from Indian Lands, made out a joint statement of their respective holdings of horses, cattle, etc., and the amount of hay required by each, duly sworn to, which document contained the following: "We, the undersigned hereby appoint the bearer, Jack Ryggs, to act in our behalf." R. proceeded to G. with this document, where he saw the Indian Agent, but was unable to get definite assurance that hay would be available. When there he met one McL., bent on the same errand for others, and, as McL. was remaining on, R. then and there endorsed on the document aforesaid the following: "I have instructed Mr. McLarnon with my power to act for the above," which document he left with the Indian Agent. He then returned home and reported to his associates. Some time later being advised by McL. that he had returned to Medicine Hat, R. and some of his associates there called on McL., who claimed to have arranged for hay for the suppliants, and stated that the price would be \$1.50 per ton. Suppliants shortly after gave McL. a draft for \$900 payable to the order of the Indian Agent, to be handed to him for the hay. Under the regulations a deposit of 50 cents per ton was to accompany the application for hay, and the price charged for the hay in the year in question by the Department of Indian Affairs was \$1 per ton. Arriving at G., McL. saw the Indian Agent, handed him the draft, and represented that the amount of the draft exceeded the amount required to be deposited, and that the suppliants had been put to much expense, and suggested that a portion of the proceeds of the draft be handed back to him. Thereupon the agent cashed this draft, deposited \$400 to the credit of the Indian Department, and handed back \$500 to McL. as requested. This amount McL. never returned to suppliants. Hence this action to recover from the Crown the sum of \$500 on the ground that the Indian Agent acted improperly in so returning the money to McL. who, they allege, was authorized only to hand over the draft, but had no authority to receive the refund. As a matter of fact no permits were ever allotted to the suppliants, and no hay ever became available to them.

Held, that even if the facts disclosed negligent conduct on the part of the agent, a petition of right would not lie against the Crown to recover damages therefor; and that the \$500 in question not being and never having been in the possession of the Crown, in fact or in law, the petition of right herein should be dismissed.

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2. That where one or two innocent parties must suffer from the fraud of a third, the loss should be borne by him who has enabled such third party to commit the fraud, and that, as it was the conduct of the suppliants which mislead the Crown's agent as to McL's powers and which made possible the train of events leading to their loss, their action must fail.

PETITION OF RIGHT to recover from the Crown the sum of \$500 alleged to have been improperly paid out by an employee of the Crown.

Calgary, September 28, A.D. 1925.

Action now tried before the Honourable Mr. Justice Maclean.

C. S. Blanchard for suppliants.

W. J. A. Mustard, K.C., for respondent.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 12th day of January, 1926, delivered judgment.

This is a petition of right in which the suppliants ask for the recovery of the sum of \$500 from the respondent. The cause was partially heard by Mr. Justice Audette at Calgary, in October, 1923, and concluded before me at Calgary, by agreement between the parties, almost two years later. While the amount involved is not very substantial, still an important point of law is involved in the issue, and I confess a great deal of difficulty in reaching a conclusion. In the event of an appeal it is perhaps desirable that I should set forth the facts as fully and clearly as is possible.

The suppliants, residents of Winnifred, Alberta, in August, 1918, applied in the circumstances I shall later set forth, to a representative of the Department of Indian Affairs, for permits to cut 600 tons of hay from Indian Reserve Lands, in northern Alberta. It would appear that in this year, there was a general shortage of hay for animals in southern Alberta, and the Department of Indian Affairs and the Dominion Lands Branch of the Department of the Interior, in order to assist the farmers in that situation,

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were jointly associated in the reception and granting of permits to cut and remove hay from Indian Reserve Lands, upon terms, to bona fide farmers, and proportioned upon their holdings of animal stock. The price payable for hay cut upon Indian Reserve Lands, under the permits so granted that year, was \$1 per ton, and the payment of 50 cents per ton was required to accompany the application. The authorization for the sale of such standing hay was provided by section 48, ss. 1, of the Indian Act, chap. 81, R.S.C., 1906.

In the year in question, Mr. J. W. Martin, of the Dominion Lands Office at Edmonton, it appears, was required to approve of applications for permits to cut hay on Indian Reserve Lands, and such applications if approved by him, were usually transmitted to Mr. W. B. Crombie, an Inspector of Indian Agencies, who was sent into northern Alberta this year, to deal with applications to cut hay on Indian Reserve Lands, and to issue permits if the same were possible. Mr. Harold Laird was, in 1918, the acting Indian Agent for the Lesser Slave Lake Agency, and was located at Grouard, Alberta. He was absent from Grouard from some time in May till late in September on other official business, except that he once returned early in August, how long he remained is not quite clear. While at Grouard, it would seem he was free to receive applications for hay permits, but in any event, he or his office was the proper recipient of any moneys paid on account of the applications for permits to cut hay, on Indian Reserves.

The suppliants, prior to making their formal application for hay permits as by regulation required, had prepared a statement in writing, setting forth their respective holdings of horses and cattle, and that writing contained the following paragraph:

We the undersigned hereby appoint the bearer Jack Ryggs to act in our behalf.

Jack Ryggs was one of the parties to this written statement under the name of John Ryggs, and is one of the suppliants. The statement was signed and sworn to by the parties thereto, on the 24th day of July, 1918.

Ryggs left Winnifred during the month of August with a view to ascertaining, if any so called hay permits would likely be available to him and his associates, in northern

Alberta. He first called at the office of the Dominion Lands Agency at Edmonton, and by Mr. Martin of that office, he was directed to the Indian Agent at Grouard. There he met Mr. Laird, the Indian Agent, to whom I have already referred, and who evidently had returned to Grouard, and there Ryggs informally applied for the hay permits required by him and his associates. At Mr. Laird's office Ryggs met a Mr. McLarnon, and according to Ryggs, they travelled together on the train from Edmonton to Grouard. McLarnon was on the same mission, namely, to obtain hay permits for himself and his associates, belonging to Medicine Hat. Mr. Laird informed Ryggs that he was then unable to definitely state if hay from Indian Reserves would be available to applicants, as it had yet to be ascertained and determined, what amount of hay the Indians would require, their needs having first to be supplied, and so Mr. Ryggs was obliged to return home without being informed as to the probable reception of his application. Before returning home, he states he left with Mr. Laird the sworn statement to which I have referred, and which contained the authority to him to act for his associates, and he then and there endorsed thereon authority for McLarnon to act in his stead. This was in the following words:—

I have instructed Mr. McLarnon with my power to act for above.

This Ryggs signed. McLarnon intended then remaining at Grouard awaiting official decision upon his own application, and he volunteered to advise Ryggs as to the probable reception of the latter's application. Laird admits that he saw the document appointing Ryggs the agent of his associates, but that it had not been left with him, and that he knew nothing about the presumed delegation of authority from Ryggs to McLarnon, and that his only information about it was that contained in a letter he received from Mr. Martin, and to which I shall later refer. I am inclined to think that Laird is incorrect, in stating that the document itself had not been delivered to him. Ryggs states distinctly that the document was taken possession of by Mr. Laird, and placed in a box from which receptacle Laird later took it, and delivered it to Ryggs, to endorse thereon the authority to McLarnon, and he says he did this at the suggestion of Laird, and to whom he handed back the

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document. This positive evidence of Ryggs I accept as correct. When Laird gave evidence before me, some seven years had since elapsed, and I think he had forgotten all the incidents of that occasion. His duty apparently was to receive applications, and moneys paid for hay permits, the permits being granted only by Crombie with the approval of Martin. The document was soon passed over to Crombie, and Laird probably never saw it again.

Ryggs on his return to Winnifred, reported to his associates that Mr. McLarnon was shortly to advise him, whether or not their application would likely be granted, and whether any hay would be available to them. Subsequently some two weeks later, Ryggs received word from McLarnon that he was returning to Medicine Hat, where he was apparently located, and Ryggs and some of his associates went there to see McLaren. When they returned they reported to their associates who had not gone to Medicine Hat, that McLarnon had informed them, according to the evidence of Ryggs, that the suppliants had been allotted hay at Sucker Creek Reserve, and that the price would be \$1.50 per ton. There is also evidence to the effect that Mr. McLarnon stated that he had arranged for a considerable tonnage for himself and his associates, from which the suppliants might obtain their requirements, but at the price of \$1.50 per ton. Altogether the evidence as to what occurred at this interview is not clear. I have no doubt that McLarnon was then meditating upon his scheme to defraud the suppliants, if he could. He had obviously lied to them on that occasion, and doubtless he would ambiguously express himself in order to confound those whom he was clearly and deliberately deceiving.

I think Ryggs and his associates thought, that the hay was to come in the usual way, through the Indian Agency at Grouard, and that the increased price was to go to the office of the Indian Agent at Grouard. Ryggs, however, had been informed by Laird when he first saw him at Ground, that the price of the hay under the permits, if granted, would be \$1 per ton, and this should have put Ryggs and his associates upon their inquiry. The suppliants, in truth, were unconcerned as to the increase in the price of the hay, or how it was obtained. Their necessities

were such that they would have paid almost any price for hay, could they but get it, as one witness expressed it. There is no evidence to convince me of the suggestion that the suppliants, or any of them, believed that McLarnon had it in his mind, or within his power to corruptly influence the Indian Agent or any other official of the department, so as thereby to secure preferential treatment in the allotment of hay permits, or that they thought that any part of the stated excess purchase price was to go to the Indian Agent of any other official, for his or their personal use. McLarnon's whole conduct at the Medicine Hat meeting, possibly suggested to some of them the suspicion that he was able in some way, to secure a more favourable consideration of their applications than they themselves might obtain, and believing they were to obtain the required hay, they were not inclined to be at all inquisitive about any of the details of the matter, such as the increased price or to whom it was to go. The fact that they later remitted \$900 by draft payable to the order of the Indian Agent at Grouard, dispels the theory that they were to obtain their permits or the hay, other than through the regular channel.

The petitioners then arranged to borrow \$900 from a bank, with which they purchased a draft dated August 7, and in that amount, payable to the "Indian Agent, Grouard, Alberta," and which draft was turned over to McLarnon for delivery to the Indian Agent, in payment of 600 tons of hay which they believed they were to receive under their applications, and they say that all McLarnon was asked to do, was to deliver the draft to the Indian Agent. McLarnon represented himself to be then proceeding north again, for the purpose of cutting hay for himself and his associates.

When McLarnon started for Grouard, on this the second occasion, and with the draft of \$900 given to him by the suppliants he called at Edmonton where he saw Mr. Martin the inspector of Dominion Lands, to whom he delivered a statutory declaration made by himself and dated the 8th day of August, to the effect that Ryggs who had authority in writing to act for the suppliants had assigned the same to him, so that he could act in his stead. A part of this declaration is as follows:—

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I, Joseph F. McLarnon, of the city of Medicine Hat, province of Alberta, do solemnly declare that Mr. Ryggs had power of attorney for people in the Winnifred District, and he assigned this power of attorney to me so that I could act in their behalf. These powers of attorney were given by me to Mr. Crombie.

The written authority to Ryggs, and the delegation of the same to Mr. McLarnon, according to this declaration, came into the possession of Mr. Crombie through McLarnon, the former as I have already stated, being the officer specially detailed to administer the applications for hay permits in northern Alberta that year. There is no reliable or clear evidence to indicate that the so called power of attorney came into the hands of Crombie through McLarnon. Crombie would no doubt obtain it at the office of the Indian Agent at Grouard, where Ryggs said he left it. Having made up his mind to defraud the suppliants if he was able to do so, I have no doubt McLarnon would not hesitate to make a false declaration in this regard. However, it matters little whether this portion of McLarnon's declaration be true or false, for it is of little importance how the so called power of attorney reached Crombie.

On August 9, Mr. Martin wrote Mr. Laird a letter, after his interview with McLarnon on the previous day, and as this letter was much referred to at the trial, I had better set it out in full. It is as follows:—

Office of
 INSPECTOR OF DOMINION LANDS AGENCIES

Edmonton, August 9, 1918.

Sir,—I am enclosing herewith a declaration made by Mr. J. F. McLarnon in which he states that a Mr. Ryggs had power of attorney for certain people in the Winnifred District to secure hay for them and that Mr. Ryggs assigned this power of attorney to him so that he might transact this business. The parties interested in this hay have made declarations which will be found attached. The hay desired is from Sucker Creek Indian Reserve and the quantity is apportioned by Mr. Crombie for Ryggs and his associates is 600 tons.

A second declaration made by this gentleman in which he states that Messrs. Edwards and Myers had authority from people in the Seven Persons District to secure hay for them and also that this power of attorney was assigned to him by this gentleman so that he could act for these settlers. Declarations from the settlers interested will be found attached and Mr. McLarnon informs me that he handed this power of attorney to Mr. Crombie. The quantity of hay involved is 500 tons apportioned to them on the Sucker Creek Indian Reserve by Mr. Crombie.

You will find attached a draft in your favour in the Dominion Bank, Medicine Hat, No. 4312 for \$600, this is \$50 in excess of the 50 per cent to be paid at the time the application is made.

It is presumed that Mr. Crombie handed over to you the powers of attorney above mentioned, if what Mr. McLarnon states is correct.

Respectfully,

J. W. MARTIN,
Inspector.

Harold Laird, Esq.,
Indian Agent,
Grouard, Alberta.

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It is only the first and last paragraphs of this letter that refer to the applications of the Winnifred syndicate. It should perhaps here be stated that the suppliants, individually made applications for hay permits in the form of solemn declarations, being a printed form furnished by the Department of Indian Affairs or the Dominion Lands Branch, setting forth *inter alia*, the number of tons of hay required by each declarant. These declarations are dated at Winnifred August 6, 1918, and were later approved by Martin. Copies of these declarations were enclosed to Laird by Martin in his letter of August 9, also the declaration of McLarnon respecting the assignment of the power of attorney from Ryggs. Martin, in the third paragraph of his letter assumed, it would appear, that the Medicine Hat draft of \$600 had some relation to the application of the Winnifred Syndicate. If I am correct in this, he was clearly in error.

McLarnon then proceeded to Grouard, reaching there the same morning as the letter from Martin to Laird, and he then delivered over the Laird the Winnifred draft for \$900. McLarnon at the same time represented to Mr. Laird that the people for whom he was presuming to act, Ryggs and his associates, had been under great expense, and requested that, as the amount of the draft was greater than the amount of the deposit necessary to accompany the applications for the permits to cut 600 tons of hay, which would be \$300, a portion of the amount of the draft should be returned to him. Laird acquiesced in the request.

There being no bank at Grouard, it was the practice of the officers of the Department of Indian Affairs at that point to deposit moneys received by them with the Hudson Bay Company, for the account of the department, and I understand they were officially authorized and directed to do so. Laird then deposited or discounted the draft with the Hudson Bay Company. Out of the proceeds of the

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draft he procured \$500 in cash which he paid to McLarnon, and left the balance of \$400 with the Hudson Bay Company, to the credit of the account of the Indian Department, and which amount was later refunded to the suppliants. I assume that what must actually have occurred, and which might easily have been shewn, was that the Hudson Bay Company credited the department with \$900 and debited it with \$500, which in effect means that \$400 was the net amount received by the Hudson Bay Company for the credit of the department, and McLarnon kept the money so paid him, and never returned the amount to the suppliants. A receipt, dated the 13th day of August, from the Hudson Bay Company for \$1,600, was tendered in evidence to shew that the proceeds of the \$900 draft constituted part of this amount, and was at one time to the credit there of the department. This receipt affords no such proof, and I do not attach any importance to it. Further, the draft which had been forwarded to the Bank of Montreal at Edmonton for collection was received by that bank on the 12th instant, a day prior to the date of the receipt. No proceedings either civil or criminal were brought against McLarnon by the suppliants although for a time they knew of his whereabouts.

Relying on the statement of McLarnon as to the allotment of hay to the suppliants, or his ability to secure the permits for them, and make all arrangements therefore, some of the suppliants, including Ryggs, later went north to cut and remove the hay, taking with them the necessary equipment for that purpose, and on September 2nd they arrived at Grouard. There they learned that no hay would be available to them in that region. Mr. Laird, the Indian Agent at Grouard, was absent on official business elsewhere, but they saw a Mr. Cunningham, a homestead inspector, who was temporarily acting in the place of Mr. Laird. Mr. Cunningham gave them a written memorandum dated September 2, being something in the nature of a certificate, to the effect that \$900 had been deposited with the Indian Agent, Mr. Laird, by the suppliants, and Mr. Laird being away at the time, the money could not then be returned to the suppliants during Laird's absence, but would be available as soon as he returned. This document

was intended to operate as a recommendation for credit to the suppliants, in their efforts to purchase hay or other feed from other parties elsewhere. I do not think any importance attaches to this letter whatever, and neither do I think it relevant.

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Mr. Laird stated at the trial that he acted on the letter of Mr. Martin, the declaration of McLarnon, and the formal applications for hay permits made by the suppliants, recommended by Crombie and approved of by Martin, copies of which were enclosed to him in the letter from Martin.

In cases where lands, goods or money of the subject are in possession of the Crown, or where the claim arises out of a contract entered into by or on behalf of the Crown, a petition of right will lie. In the case under consideration, there is not, I think, to be found the elements which would constitute a contract, and upon consideration that is my conclusion. In fact, this point was not I think urged on behalf of the suppliants. The suppliants' claim for relief, therefore, I think depends upon whether or not there is in the possession of the Crown and belonging to the suppliants, the amount claimed, \$500, and it is upon this ground that the suppliants rely. If such money is not in the possession of the Crown, then the claim for relief must be denied. If the money in question is not in the possession of the Crown, but was negligently paid to McLarnon, the suppliants must also fail because it is a well established principle of law, that a petition of right will not lie to recover compensation for a wrongful or negligent act done by a servant of the Crown, in the supposed performance of his duty, and by this authority I am bound.

Is the money in question in the possession of the Crown? I do not think this can fairly be answered affirmatively. Concurrently with depositing the draft to the credit of the Department of Indian Affairs at the office of the Hudson Bay Company, or perhaps speaking more accurately, concurrently upon discounting the draft, Laird paid over to McLarnon \$500 out of the proceeds of the same. As a matter of bookkeeping, the amount of the draft was probably credited to the account of the respondent, and debited with the sum of \$500, and in fact the net amount credited to

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the respondent at the moment was but \$400. The result of the disposition of the draft in this manner is not I think different from that which would have occurred had cash been entrusted to McLarnon, and he had handed the same to Laird, and then subsequently requested and obtained a refund of \$500. I cannot concur in the contention urged upon me by the suppliants' counsel, that the amount deposited was \$900 and that this amount is still in possession of the Crown, less the amount of \$400 already refunded to the suppliants. While not entirely free from doubt, I have reached the conclusion that in respect of the \$500 in question it is not in the possession of the Crown, in fact or in law.

It is not necessary to rest my judgment entirely upon the points I have just mentioned. Outside the question as to whether or not there was negligence on the part of Laird, and whether or not the respondent actually received the \$900, the suppliants I think would fail. There is the well recognized proposition of law, that where one party is guilty of such a degree of negligence, as to enable another party to commit a fraud, the former must bear the loss rather than an innocent third party, acting of course in good faith. Where one of two innocent parties must suffer from the fraud of a third, the loss should be borne by him who has enabled the third party to commit the fraud. The suppliants by their conduct I think, either made McLarnon their agent, or validated the delegation of agency made by Ryggs, which of course by itself was void. In fact, so far did the suppliants rely on McLarnon that they permitted themselves to be assured that they would obtain hay when there was to be no hay for them, that the hay would cost \$1.50 per ton, which would not have been the fact had the hay been available to them, and of this they had some evidence. They must have placed reliance on McLarnon's ability in some way or other, to procure the hay for them when others might fail, and would not I think hesitate to make him their agent. Ryggs admitted that he was not hopeful of procuring hay as the result of his first visit to Grouard, and he and his associates were greatly concerned about the matter. And it is to be remembered that Ryggs was not again going to Grouard on behalf of his associates,

to make any arrangements regarding the permits and prior to their going there to actually engage in the cutting and removing the hay. It need occasion no wonder then that they were willing to clothe McLarnon with all the authority intended for Ryggs, and to empower him to consummate all the arrangements for the hay permits, and to do anything incident thereto if needs be, and I think it was so intended. The formal and approved applications only went forward to Grouard from Edmonton after McLarnon's arrival at the latter place, and no doubt his presence there was responsible for this. While there is no evidence upon the point, yet I suspect that McLarnon carried the formal applications or declarations of the suppliants, dated August 6, to Edmonton with him. In the circumstances, Laird's act in refunding the \$500 and retaining the amount required to accompany their several applications for 600 tons of hay, and a little more, was hardly an act of negligence, or in excess of his duty. Altogether it was the conduct of the suppliants themselves, that created the belief in the mind of Laird, that McLarnon was authorized to do anything that Ryggs was empowered to do on their behalf, or on their account, and it is this conduct which creates an equity against themselves, in favour of the innocent party even if agency in fact has not been actually established. The excess in the required amount of the draft was not chargeable to Laird, but rather to the suppliants themselves, and being an obvious error, it was but natural that a prompt refund should be made by the receiving party, if a demand were made by one acting under a colour of agency or authority, and who was entrusted to deliver the same, and to make all other necessary efforts to secure the hay permits. Laird was not bound to accept more than \$600 in any event. If there be blame on both sides, the loss occasioned must I think fairly be borne by the suppliants, as they themselves made possible the train of events, leading to their loss.

I have no hesitancy in finding Mr. Laird's actions throughout to have been in good faith, and that there is nothing on which to found the suggestion made, that Laird was in collusion with McLarnon.

For the above reasons, and on the facts as I have reviewed them, I reach the conclusion that the suppliants

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have failed to establish the relief sought by the petition of right, or any part of it, and that the petition must therefore be dismissed. There will be an order that no costs be allowed to either party.

Judgment accordingly.