

IN THE MATTER of the Petition of Right of

EUGENE MICHAUD.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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 Oct. 3.

Contract—Railway ties — Inspection — Inspector exceeding authority in respect of acceptance—Subsequent rejection of ties improperly accepted —Right to recover price.

The suppliant, in reply to an advertisement calling for tenders for ties for the use of the Intercolonial Railway, offered to supply ties to the Crown for such purpose. The Crown expressed its willingness to purchase his ties provided they answered the requirements of the specifications mentioned in the advertisement for tenders. D., an inspector appointed by the Government, in excess of his authority and contrary to his instructions, undertook on behalf of the Crown to accept ties not up to the said specifications. On this becoming known to the Crown, D.'s inspection was stopped, and other persons were appointed to re-inspect the ties, who rejected a portion of those which D. had undertaken to accept. The suppliant claimed the price of the ties so rejected.

Held, confirming the report of the Registrar, as referee, that the Crown was not liable for the price of the ties which D., as inspector, wrongfully and in excess of his authority, had undertaken to accept.

THIS was a case arising upon a claim against the Crown for the value of certain railway ties alleged to have been sold to the Crown for the purposes of the Intercolonial railway.

The facts of the case appear in the report of the Registrar, to whom the case was referred for enquiry and report.

August 31st. 1910.

The REGISTRAR, L. A. AUDETTE, filed the following report:—

“The suppliant brought his petition of right to recover the sum of \$1,142.48, being the balance, as he alleges, of

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an amount due under a contract entered into between the Crown and himself to supply the former with a quantity of ties not exceeding 100,000, at the price of 36 cents each for No. 1 and 24 cents each for No. 2, and admittedly in accordance with the specification filed herein as respondent's exhibit "A". The action, the suppliant states in his evidence, is taken for the balance due under Dubé's inspection."

"After the suppliant's tender had been accepted, as shown by the correspondence produced herein, he delivered ties at certain places to be inspected in compliance with the terms of the Intercolonial Railway specifications."

"The suppliant first objected to the ties being inspected by an English speaking person, and to Mr. Hilliard, the official inspector, suggesting some one else to do the work."

"George Gallant, a section foreman, speaking both French and English and who had already inspected ties, was duly appointed. Again the suppliant objected to this person on the ground that he would take too long to inspect such a large quantity as the one in question, and Gallant's services were dispensed with."

"William Fournier was the next appointee. Again the suppliant objected to him. Fournier, however, began to inspect, but the suppliant says he was too particular, was taking too much time, and found fault with him because he was measuring the ties. Indeed a person who is not in the habit of inspecting ties will obviously take longer than a person who is in the habit of doing so daily. The official inspector should have made the first inspection notwithstanding such protest."

"When the suppliant objected to Fournier he suggested X. Dubé, a section foreman at St. Moïse. In compliance again with his request Dubé was appointed, and proceeded with the inspection, after having been called

to Moncton and given special instructions to inspect according to the specifications of the Intercolonial Railway. He tells us candidly he received instructions to comply with the specifications, but that certainly he did not follow them. He says he did not inspect according to the specifications, but according to his conscience, a matter rather difficult to reconcile. He admits having accepted about 150 ties less than 4 inches, 500 to 600 that were not 5 by 6, and 200 to 300 that were crooked. Dubé says he neither speaks nor understands English, and therefore could not understand the specifications which are in the English language; but that he had, however, understood what concerned the quality of wood."

"Wm. Patterson contradicts Dubé on that point; and says Dubé understood English and that he gave him instructions in that language. Exhibit "B" is a letter written in the English language and signed by Dubé, and Patterson says it is under the usual signature."

"It having been brought to the notice of the authorities of the Intercolonial Railway that Dubé was taking a quantity of ties which should not be accepted, he was at once stopped, and Mr. Hilliard, the official inspector, and Mr. Patterson, the roadmaster, were both instructed to re-inspect the suppliant's ties, already inspected by Dubé, which they did. Mr. Burpee, the engineer of maintenance, went over the ground and took notes of the re-inspection, and he considered it a fair inspection giving the suppliant the benefit of every doubt, and he says the inspection was not more severe than usual as made on the I. C. R., but if anything it was more lenient. Mr. Patterson tells us Dubé had accepted ties that were too short, too thick, rotten, crooked, worm-eaten and too thin. Mr. Hilliard says that Dubé took ties that were not up to the specification and that were no good. This witness says he was more lenient on this re-inspection than usual, and even if he had originally made the

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inspection quite a number of the ties accepted on the re-inspection would not have been accepted, and the roadmaster even found fault with him for accepting ties he should not have accepted. It having been hinted and suggested, without any precision however, by some witnesses, that in the course of the re-inspection, all the suppliant's ties had not been inspected. Mr. Hilliard states he inspected all the ties Dubé had already inspected, and that Dubé and the section foreman showed him the ties. Then as to the ties which had been used between the two inspections, due credit was given for them ; there cannot be any doubt as to that. Take for instance, the ties mentioned by witness Laferte, at Lac au Saumon, they must necessarily be the ones mentioned by Hilliard, at page 133 of his evidence."

"Then, at the trial, it has transpired that some of the rejected ties on the re-inspection had been seen at different stations or places, but there is no evidence that the ties re-inspected by Mr. Hilliard were marked by him. However, it was the suppliant's fault if the ties went astray after the re-inspection for neglecting to comply with the specification, which says that "if any such" [not accepted] "ties are on the premises of the railway they must be removed immediately after the inspection, as the railway department will not be responsible for them." The suppliant admits he did not remove the rejected ties, and come what may with these ties, after their rejection, the Crown is not liable therefor."

"The review of all these facts brings us to the only serious question of law involved in this case. The suppliant contends that the Crown is bound by Dubé's inspection, and that he should recover accordingly. It clearly appears from the above that Dubé did not comply with his instructions, that he acted without authority when he did not inspect according to the specification, and that therefore the Crown cannot be bound by his inspec-

tion, under the well known legal doctrine that the Crown is not bound by the laches of its officers. This principle of law is too well known to be discussed here at any length. (*Burroughs v. The Queen* (1). The rule of law that the Crown is not liable for the laches or negligence of its officers also obtains in the Province of Quebec, except when altered by statute. *Black v. The Queen* (2). See *Audette's Exchequer Court Practice* (3). Then the case of *Boyd v. Smith* (4) is authority for the doctrine that for acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him by law, an officer of the Crown is personally responsible to anyone who sustains damages thereby. Even under the Civil Code P. Q. Arts. 1727 *et seq.* between subject and subject the principal is only responsible towards third parties for the acts of his mandatary done in the execution and within the powers of the mandate."

"This case is a true illustration of the principle that too much leniency will inevitably create trouble. Had the inspection of the suppliant's ties been made in the usual business way, disregarding the likes and dislikes of the suppliant in the selection of an inspector—carried in this case to an extreme point amounting to abuse—this case would not have come before the Court.

For the reasons above mentioned the action should be dismissed with costs."

The suppliant appealed from the report of the Registrar.

September 30th, 1910.

The appeal from the report of the Registrar was now argued before the Judge of the Exchequer Court.

L. St. Laurent for the suppliant;

F. H. Chrysler, K.C., for the respondent.

(1) 2 Ex. C. R. 293; 20 S.C.R. 420.

(2) 29 S. C. R. 693.

(3) 2nd Ed. pp. 124, 159, 199.

(4) 4 Ex. C. R. 116.

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 of Counsel.

Mr. *St. Laurent* argued that the Crown had become bound to pay for all the ties that Dubé, the inspector, had selected and marked with the government marks. This was a taking of possession of the ties by the government, and the inspectors subsequently appointed by the government had no right to reject them. The suppliant had no right to remove them when they bore the government marks, and so they were left where they were. Then he contended some of the ties inspected by Dubé had not been reinspected and not paid for.

Mr. *Chrysler* contended that the Registrar was justified in finding that Dubé had exceeded his authority in undertaking to accept ties not up to standard, and the Crown could not be held liable for them. He further contended there was no evidence to show that the reinspection did not cover all Dubé had inspected. This new theory is a mere afterthought.

Mr. *St. Laurent*, in reply, pressed the court to find that the Crown was responsible for all the ties which Dubé had marked, and from which of her inspectors had not removed his marks.

CASSELS, J., now (October 3rd, 1910), delivered judgment.

Since the argument of the appeal I have read over the evidence and the report of the Referee and the exhibits.

I think the Referee arrived at a correct conclusion from the evidence adduced before him.

Mr. *St. Laurent* while placing forcibly before me his objections on behalf of the suppliant to the finding of the Referee, frankly conceded the view-point from which the case should be considered.

He was quite right in my opinion. The real position of the parties is as follows. Michaud had a certain number of ties which he desired to sell to the Intercolonial Railway. The Department was desirous of acquiring the ties

if up to the requirements of the railway. Changes of the inspectors took place at the request of Michaud. The railway was not bound to take any ties. There was no contract requiring them to purchase if up to a certain standard. An offer is made that a certain number of ties were ready for them if they chose to take them at a certain price. The railway wanted the ties. They, after certain persons had been objected to, sent Dubé, approved by Michaud, to inspect the ties. He completely ignored his instructions, and purported to accept on behalf of the Government ties not authorized by the scope of his employment. The Government were not bound. A new selection was made, and ties purchased. It is clear from the evidence that considerable latitude was exercised on the part of the employees of the railway in accepting ties that might otherwise have been rejected, the officers being influenced by the fact that Dubé had accepted ties not up to the requirements of the specifications. I think Michaud has been fairly dealt with. Mr. St. Laurent who presented his case with fairness, and at the same time with a considerable amount of ingenuity, claimed that at all events as to the three piles of ties, counting in all about 145 ties, the suppliant should recover. This contention is based on the argument that when Hilliard inspected [as counsel used the phrase] three piles passed by Dubé had not been inspected, and that these ties had been subsequently used by the railway.

In the first place, the evidence is too loose to warrant any finding in favour of Michaud in respect of such a claim. Then, moreover, there is no appeal on this point. The rules of Court require the grounds of appeal to be given. I find no ground of appeal supporting this contention; it is an afterthought. The appeal is based on the contention that Dubé's selection was final. The Referee has arrived at a right conclusion. The appeal should be dismissed with costs, and the action dismissed with costs.

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The suppliant should be paid the costs occasioned by the adjournment on the 27th day of September, which I fix at \$10, to be set off *pro tanto* against the costs payable by him.

Judgment accordingly.

Solicitors for the suppliant : *Choquette, Galipeault & Cie.*

Solicitors for the respondent ; *Lapointe & Stein.*
