

IN THE EXCHEQUER COURT OF CANADA

1919

December 31.

BETWEEN

HIS MAJESTY THE KING,

PLAINTIFF;

AND.

GEORGE ROY,

DEFENDANT.

—AND—

IN THE MATTER OF THE PETITION OF RIGHT OF

GEORGE ROY,

SUPPLIANT;

AND.

HIS MAJESTY THE KING,

RESPONDENT.

Interpretation of contract—"Approximate" meaning of—"Garbage"; meaning of—Right to read into a contract; Ambiguity in language—Estoppel.

Among the terms and conditions of a contract made by the Crown with R. for the sale and removal of "garbage, swill and kitchen refuse" from Camp Hughes there was the following clause: "There will be approximately 20,000 men in camp". There were 2,467,057 men in camp during the time it was in operation, viz., an average of over 15,814 daily. The contractor undertook to remove garbage, etc., "during the period of the camp" at a price of so much per thousand men. The number for a time fell below 20,000, due to men being sent unto farms and overseas. There was no guarantee as to the time camp would be kept open or as to quantity or quality of garbage.

Held, that the words "approximately 20,000 men" were merely words of estimate or expectation and contained no warranty as to the exact number of men; and there being moreover no guarantee as to duration of camp, or as to the quantity of garbage, no action would lie against the Crown for breach of contract by reason of

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the number of men in camp being less than 20,000 daily during part of the time and for consequent loss of profits.

2. That as the contract was in writing and the language clear, the word "daily" could not be read into the language of the contract by any forced construction, so as to enlarge the obligation of the Crown, and the words "approximately 20,000 men" could not be read "approximately 20,000 men daily."

3. The words "garbage, swill and kitchen refuse", as used in the contract, covered all table waste, and all that comes as kitchen refuse including material of various kind and description coming from or being in daily use in the preparation and use of food, in either camp or kitchen.

4. Where the claimant complains that sales of fats, etc., were made by private soldiers and non-commissioned officers in violation of the provisions of his contract, so that the Crown did not obtain the money arising from such sales, and where it further appeared that he himself had made purchases of the same irregular character, it was held that he was estopped by his conduct from setting up a claim for loss of profits arising from such sales by third parties.

Where, however, moneys found their way into the hands of the Crown from the sales of such fats at Camp, notwithstanding the claimant's conduct, as above mentioned, the amount being small, the prospective profits on such sales to third parties were allowed to be set off against the claim of the Crown.

THE information herein was filed by His Majesty's Attorney-General for the Dominion of Canada to recover from the defendant, Roy, the sum of \$1,737.59 the price of garbage, etc., removed and taken away by him from Camp Hughes, in Manitoba.

The defendant obtained permission to file and filed a Petition of Right against the Crown alleging a breach of contract by the Crown and making a counterclaim for the sum of \$18,712.38, alleging that the Crown had undertaken to have, at least, 20,000 men in the camp, and as the number for a time had fallen below this figure, he had suffered damages and loss of profits by not receiving the amount of garbage which he should; and

20. That he had furnished, at the request of men

in camp, certain extra cans beyond the number fixed by the contract and should be paid therefor;

30. That he had not received all the garbage and refuse from the kitchen, inasmuch as some men in camp had sold, on the side, in violation of his alleged exclusive privilege to get the same.

The two cases were tried together at the City of Winnipeg on the 29th and 30th days of September, 1919.

Mr. A. E. Johnston, for plaintiff-respondent.

Mr. R. A. C. Manning, for defendant-suppliant.

The facts are fully stated in the reasons for judgment filed by the Honourable Mr. Justice Audette, printed below.

AUDETTE, J. (this 31st December, 1919), delivered judgment.

This is a rather peculiar controversy, both in respect to the subject-matter, which has to deal with garbage, swill, kitchen refuse and uncooked meat, fat, bacon rind, and also with respect to the abnormal claims made for consequential damages arising out of an alleged breach of contract in the nature of loss of profit.

These two cases have been tried together, at the request of all counsel at bar, for the obvious reason that they both result from the same contract, and it would appear that, but for the fact that the suppliant was of opinion he could not counterclaim as against the Crown without a *fiat*, his plea to the case instituted by information would have contained what his pleadings in both cases did actually contain.

In the course of the war just ended, which has shaken the world to its foundation, the Crown de-

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cided to establish a military camp at "Camp Hughes", in Manitoba, which lasted from the 1st June to the 3rd November, 1916.

Sometime before the opening of the camp, the military authorities decided to provide for the sale and the removal from the camp, of the "garbage, swill and kitchen refuse," together with the "uncooked meat, fat and bacon rind", and they accordingly called for tenders for the same.

The present contract was accordingly constituted and entered into in the following manner. The suppliant Roy, among others, tendered on the 5th May, 1916, for this contract on the departmental form reading as follows, viz:

"This tender should be mailed by registered letter in time to be received at the District Office, Bulman Block, Winnipeg, on May 10th, by or before 12 o'clock noon on the 10th day of May, 1916. It should be addressed to the *Assistant Director of Supplies and Transport, Military District No. 10, Winnipeg, Man., and the envelope should be marked 'Tender for the Removal of Swill, Garbage, etc., at Camp Hughes.'*

"Tender for the removal of Swill, Garbage, etc. (To be made in duplicate).

"Winnipeg, the 5th day of May, 1916.

"To the Assistant Director of Supplies and Transport, Winnipeg, Man.

"Sir,

.. "..... the undersigned (hereinafter called the contractor) hereby offer to remove garbage and swill from Camp Hughes during the period of the camp, beginning on or

“about the first of June, subject to the terms and
“conditions hereinafter set forth, at the following
“prices to be paid by me to the Department of
“Militia and Defence:

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“Garbage, Swill and Kitchen Refuse, at one
“hundred dollars per 1,000 men.

“Uncooked meat, fat, bacon rind, etc., one and
“one half cents per pound.

“This offer is made on the understanding that
“it is to stand good for the period of thirty days,
“commencing on the day of mailing it to your ad-
“dress; and that your acceptance of the offer
“and the official notification of the said accept-
“ance, duly mailed to the contractor, shall bind
“the contractor to the due performance of all the
“said terms and conditions.

“Terms and conditions of the contract.

“1. Garbage cans will be provided by the con-
“tractor, of a standard size and pattern eighteen
“inches by eighteen inches, as required (ap-
“proximately 6 per thousand men).

“2. All garbage will be removed in tank wag-
“gons, to be provided by the contractor, the tank
“waggon and garbage cans will be kept cleaned,
“and tank waggon will be provided with a hose
“for dumping. All tank waggon and garbage
“cans must be kept securely covered.

“3. Tender for the removal of garbage and
“swill must be made at a quotation per thousand
“men. There will be approximately 20,000 men
“in camp, and the Department reserves the right
“to increase this number to 35,000 men.

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“4. This contract shall not be sub-let or transferred without the written permission of the Camp Commandant.

“5. The Department may terminate this contract at any time by giving one month’s notice to the contractor to that effect or immediately, at any time, should the contractor become insolvent. In the event of repeated irregularities by, and complaints against the contractor, the Department may impose a penalty, not exceeding one hundred dollars (\$100.00) or may terminate the contract immediately.

“6. The Department reserves the right to reject any or all of the tenders received. No security deposit is required with this tender; but, and when, any contract is made, the contractor must furnish as security for the due performance of the contract a certified cheque for two hundred dollars (\$200.00).

“(Signature of Contractor) George Roy.

“(Address) Elie, Man.”

On the 18th May, 1916, the District Officer Commanding Military District, No. 10, sent to Roy a telegram in the words following:

“Authority granted to contract with you for disposal of garbage and swill, kitchen refuse, etc., Camp Hughes, provided you will pay highest price quoted, namely, one hundred ten dollars per season per thousand men for garbage, swill and kitchen refuse, and two and half cents pound for uncooked meat, etc.

“D. O. C. 10.”

And on the 19th May, 1916, the Assistant Director of Supplies and Transport, sent to Roy a telegram reading as follows, viz:

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“Reference your tender remove garbage, swill
“and kitchen refuse, Camp Hughes, stop. Con-
“tract will be awarded you provided you pay one
- “hundred and ten dollars per season per thous-
“and men for garbage, etc., and two and one half
“cents per pound for uncooked meat. Stop. Wire
“reply urgent.

“A. D. of S. & T., M. P. 10.”

Then on the same day, namely on the 19th May, 1916, Roy replied to this last telegram by sending the following telegram to the Assistant Director of Supplies and Transport, viz:

“Contract accepted under terms and conditions
“named in your wires of eighteenth and nine-
“teenth instant.

“George Roy.”

The acknowledgment of the two first telegrams and the confirmation of the last one were further made by Roy by his covering letter of the 23rd, which reads as follows:

“Elie, Man.,
“May 23rd, 1916.

“Col. H. N. Ruttan, D.O.C., M.D. 10.

“Winnipeg, Man.

“Dear Sir:—

“I beg to acknowledge receipt of the following
“telegrams, namely:—

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“Winnipeg, Man., May 18th, 1916.

“George Roy,

“Elie, Man.

“Authority granted to contract with you for
 “disposal of garbage and swill, kitchen refuse,
 “etc., Camp Hughes, provided you will pay high-
 “est price quoted, namely one hundred ten dol-
 “lars per season per thousand men for garbage,
 “swill and kitchen refuse, and two and half cents
 “pound for uncooked meat, etc.

“D. O. C. 10.”

“Winnipeg, Man., May 19th, 1916.

“George Roy,

“Elie.

“Reference your tender remove garbage, swill
 “and kitchen refuse, Camp Hughes. Stop. Con-
 “tract will be awarded you provided you pay one
 “hundred and ten dollars per season per thous-
 “and men for garbage, etc., and two and one half
 “cents per pound for uncooked meat. Stop. Wire
 “reply urgent.

“A. D. of S. & T. M. D. 10.

“I also beg to confirm telegram sent by me to
 “the A. D. of S. & T. M. D. 10, Winnipeg, on May
 “19th last as follows:

“Elie, Man., May 19th, 1916.

“A. D. of S. & T. M. D. 10.

“Winnipeg.

“Contract accepted under terms and conditions
 “named in your wires of eighteenth and nine-
 “teenth instant.

“George Roy.

“You might kindly let me have copies of specifications as I have none in my possession.

“Yours truly,

“George Roy.”

Having said so much it will be seen that the contract entered into is separable into two parts. One part deals with the “garbage, swill and kitchen refuse”, and the other part with the “uncooked meat, fat and bacon rind.” Each part will be dealt with separately.

Dealing first with the question of “garbage, swill and kitchen refuse”, we find that the Crown, by its Information, seeks to recover, in the manner therein set forth, the amount due on the basis of \$110 per 1,000 men, from the suppliant who has purchased, removed and taken the garbage, etc., in question from the said camp.

It is well to note the Information is quite silent with respect to the “uncooked meat, fat and bacon rind”, and makes no claim therefor.

The parties having admitted, as shewn by Exhibit No. 7, and by the admission filed of record, that there were altogether in camp 2,467,059 men during June, July, August, September, October and November, 1916, the Crown then reduced its claim from \$1,825.00 to \$1,739.59.

This number of men of 2,467,059, spread over the 156 days, represented by the period of the above mentioned months, will give a daily average for that period of 15,814.48, which calculated on the basis of \$110 for 1,000 men gives the said sum of \$1,739.59, for which judgment is asked against defendant Roy.

Roy, in answer to this claim by the Crown, both by his defence in the case wherein the Crown is

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plaintiff and by his petition of right, sets up, as resulting from an alleged breach of the contract by the Crown, a counterclaim, as amended, for \$18,712.38.

As a *first count*, he contends that as the number of men were, during August, September and October reduced below 20,000, the Crown is guilty of breach of the contract for which he should recover damages in the nature of loss of profits. Had the number of men been maintained at 20,000, he contends he would have had more garbage enabling him to feed more hogs and thereby make more profits.

By clause 3 of the tender it is, among other things, said that "tender for the removal of garbage and "swill must be made at a quotation per thousand "men. There will be approximately 20,000 men in "camp". The contention is that these words, "There will be approximately 20,000 men in camp" call for, at all times, a force of 20,000 in camp.

The contract does not say there will be approximately 20,000 in camp *daily*. The word "daily" is not there, and cannot be read into the language of the contract by any forced construction so as to enlarge the obligation of the Crown. Moreover, what is the meaning, under the circumstances, of these words, "approximately 20,000 men in camp"? From reference to dictionaries and from the meaning attached to the word in common parlance, "approximately" primarily means "nearly", "closely", but "not exactly"—nearly approaching this number, but not reaching it. Approximate truth is not the truth. Then the charges are called for by the contract at \$110 per 1,000 men and not per 20,000.

It would appear that under the circumstances these words "approximately 20,000 men" are merely words of estimate or expectation and in no sense contain a warranty that there would be no less than 20,000 men, and in support of that view I would refer to the following cases bearing the justification of accepting that view, viz: *Gwillim v. Daniell*¹; *McConnell v. Murphy*²; *F. W. Berk & Co., Ltd. v. International Explosives Co.*³; *In re An Arbitration between Harrison and Micks, Lambert & Co.*⁴; *Tancred, Arrol & Co. v. The Steel Company of Scotland*⁵; *Tebbits Brothers v. Smith*⁶; *Brawley v. U. S.*⁷

Moreover, the number of men was thus reduced in the camp during the time in question to allow them to be sent upon the farms to work and help gathering the crops, and during time of war would not that step be approved as part of a policy for the purpose of securing public safety and the defence of the realm? *Lipton Ltd. v. Ford.*⁸

Moreover men were also continuously sent overseas from the camp, and while the camp lasted the length of time above mentioned, there was no guaranty as to how long it would last. It might have been broken up at any time and all the men sent to the front. Roy would have had no recourse.

Then there was no guaranty as to the quantity of garbage, etc., which might greatly vary—outside of being affected by the number of men—according to

¹ (1835), 2 Cr. M. & R. 61.

² (1873), 5 L. R. P. C. 203.

³ (1901), 7 Com. Cas. 20.

⁴ [1917] 1 K. B. 755.

⁵ (1890), 15 App. Cas. 125.

⁶ (1917), 33 T. L. R. 508.

⁷ (1877), 96 U. S. Rep. Sup. Ct. 168.

⁸ [1917] 2 K. B. 647.

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the diligence, care and economy exercised in the military kitchens.

Another complaint is that Roy supplied, at the request of some officers in camp, more cans than were called for by the contract. The obvious answer to this is that the question is to be determined by the terms of the contract, that is to say, "approximately 6 per 1,000 men". If some men in the camp asked for more cans than the contract called for, the Crown cannot be bound by their unauthorized acts. No claim can lie under the aspect of excess expenditure on capital account by Roy for trading in hogs. The contractor was not bound to supply more than the contract demanded, and if he did so it was entirely his own concern.

We now come to the much involved question of the meaning of the words "*garbage, swill and kitchen refuse*". Indeed Roy contends that besides getting a smaller quantity of such material from less than 20,000 men, which deprived him of feeding more hogs from which he would have derived profits, that the garbage, swill and kitchen refuse were of bad quality in that they were not free from rubbish, paper, bottles, glass, rags, boxes, sand and soap water, and that as a result 147 hogs died from feeding upon the same, that some hogs were choked with rags and others died from eating pieces of glass. He said he inspected most of them, but he had no veterinary to determine whether or not some of them or all might have died from other natural causes or diseases, as it is quite usual to lose a certain number of hogs through illness of some kind, especially on quantities reckoning on one or two thousand. Moreover the question of profit and loss is subjected to a

great many *alea*, and such damages as claimed are too remote.

However, the question to be determined is whether or not the garbage, swill, and kitchen refuse delivered at the camp were such as might, or should be, expected under the circumstances. A deal of evidence has been adduced upon the subject, and a deal of surmise and conjecture offered in respect of the same, together with the definition of such words to be found in dictionaries.

From the *New English Dictionary*, by Murray & Bradley and the *French Dictionary of Littré*, it would appear that the etymology of the word "garbage" is obscure, but may be traced to an old French word, used in Picardy, of "guerbe", "garbe", etc., which afterwards found its place under the word "garbage" in the English language. It is also suggested that its early origin may be traced to the latin word "garba",—a cock of hay, a fagot of wood, or any other bundle in the shape of a "gerbe". Littré opines it might be traced to the latin word *carpere*, to cut, to throw away.

The *Century Dictionary* defines "garbage": "Originally entrails of fowls, . . . offal, . . . refuse, " . . . animal and vegetable matter from a kitchen "—Any worthless offensive matter."

New English Dictionary: "Refuse, that which is "cast aside as worthless; rubbish or worthless matter of any kind, the rejected or rubbish part of "anything. Refuse in general, filth, etc."

I find that these words "garbage, swill and kitchen refuse", as used in the contract would cover all the table waste and all that comes as kitchen refuse, including as we all know, material of various

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kind and description coming from or being in daily use in the preparation and use of food, either in a camp or in any kitchen. It cannot be expected that the material covered by these three words would call for clean matter, free and disengaged from all that is in daily use in a kitchen and that has to be got rid of, such as wrapping paper, cans, rags, bottles, etc.

There is clearly no undertaking on the part of the Crown to supply "garbage, swill and kitchen refuse" fit for feeding pigs, and no such obligation can be made a term of the contract enforceable against the Crown in the present case. If Roy wanted to use the material for that purpose, or for any other purpose, it was for him to serve it and use it to the best purpose he saw fit, and the Crown had nothing to do with that part, which was entirely in Roy's discretion. *Wilson v. Dunville*.¹

I have come to the conclusion, in the action instituted by the Crown, by way of information, that there should be judgment, against Roy for the sum of \$1,739.59, subject to the reduction hereinafter mentioned.

Uncooked meat, fat and bacon rind.

Coming now to the second branch of the case, dealing with the question of "uncooked meat, fat and bacon rind", I find from the evidence that Roy received delivery of a certain quantity of such material and paid therefore the sum of \$80.00. However, he claims he was entitled to a deal more and that some of such material was sold in camp, in violation of his contract which gave him, he claims,

¹ (1879), 4 L. R. Ir. 249.

exclusive right to purchase the same. Such sales made in camp he contends were made by the men and sold to the highest bidder, the proceeds thereof in most cases not finding their way into the hands of the Crown. It is further in evidence that Roy, or some of his agents and employees, did resort to this means of buying such material in that manner, in direct violation of the contract. By this mischievous dealing he directly deprived the Crown, a party to his contract, of the benefit of such sales and he is therefore estopped from benefiting by his wrongful act.

Whoever seeks equity must do equity. Roy, or those acting for him, knew of the impropriety of such dealings. It was known to them it was wrong, and it was so admitted in the evidence. By so buying on the side, so to speak, it was to Roy's knowledge that he was transgressing the rules of fair dealing, the common rules of right and wrong, contrary to the terms of the contract whereby he was under the obligation to pay to the Crown for such material, and he is now estopped from setting up anything which is the result of such dealings. No man can take advantage of his own wrong. *Nullus commodum capere potest de injuria sua propria.*

Besides receiving \$80.00 for uncooked meat, etc., from Roy, and there is evidence Roy did not make any other payments in that respect to the Crown, it has been established that the sum of \$49.19 has found its way into the hands of the Crown as proceeds from sales; but the evidence does not disclose or show by whom such payments were made, the moneys were turned in to the military superintend-

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ing clerk, whose duty it was to receive all money for the Crown.

These sales, the proceeds of which amounted to \$49.19, were made in apparent violation of the contract and the Crown received the benefit thereof and it would be but fair and equitable, in adjusting the accounts between the contracting parties, that Roy should be credited with the profits he would have derived from that quantity sold to outsiders and from which the crown benefited. It is questionable whether Roy should be entitled to the same in view of what has been said in respect of his conduct when buying in camp from the men such material, however, the matter is a small one and perhaps strict law ought not to be invoked against him:

Taking into consideration the number of pounds these \$49.19 represent, the contract price, the market price at the time, the shrinkage in manufacturing and the labour, I roughly estimate that Roy would have realized on these three sales about the net sum of \$15.96, for which he should be given credit as against the said sum of \$1,739.59, reducing that amount to \$1,723.63.

Coming to the question of costs and bearing in mind that these two cases have been tried together, for the reasons above mentioned, on arriving at my conclusion on the question of costs, I will treat the two cases as one and will allow the Crown its costs on the action instituted by Information with the result that no costs will be allowed either party in the action instituted by Petition of Right. Furthermore, as the Crown has not been successful in all the details of the cases, I will, considering that view, exercise the judicial discretion provided by

Rule 290, and in lieu of full taxed costs I will fix and lump the same at the total of \$200.

Therefore, disposing of the two cases, there will be judgment ordering and adjudging that the Crown recover from the said George Roy, defendant in one case and suppliant in the other, the sum of \$1,723.63, with the costs as fixed at the sum of \$200. In the result the action No. 3213 is maintained with costs, and the other action by Petition of Right, No. 3253, subject to what has already been said, is dismissed each party paying his own costs.

Solicitor for the Crown: *A. E. Johnston.*

Solicitor for Geo. Roy: *Robert A. C. Manning.*

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