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Jan. 17.

ALEXANDER S. WOODBURN.. .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Petition of right—Contract—Statutory requirements—Informality—Ratification by Crown.

A contract entered into by an officer of the Crown empowered by statute to make the contract in a prescribed way, although defective in not conforming to such statutory requirements, may be ratified by the Crown.

PETITION OF RIGHT seeking damages against the Crown for breach of a contract for departmental binding.

The contract relied on by the suppliant was impugned by the Crown for not conforming to the requirements of 32 & 33 Vict. c. 7, sec. 6, viz:—

"The printing, binding, and other like work to be "done under the superintendence of the Queen's "Printer, shall, except as hereinafter mentioned, be "done and furnished under contracts to be entered "into under the authority of the Governor in Council, "in such form and for such time as he shall appoint, "after such public notice or advertisement for tenders "as he may deem advisable, and the lowest tenders "received from parties of whose skill, resources, and "of the sufficiency of whose sureties for the due per-"formance of the contract the Governor in Council "shall be satisfied, shall be accepted."

The contract is set out in the reasons for judgment.

April 16th, 1896.

At the hearing of the case this day, the Judge of the Exchequer Court directed a reference for the purpose

of enquiry and report as to the damages sustained by the suppliant, reserving the questions of law.

June 11th, 1897.

The Referee now reported in favour of the suppliant for the amount of $38,829.03 as representing in the Referee's opinion the amount of the damages sustained.

September 14th, 1897.

The matter now came before the court upon two motions, one by the Crown by way of appeal from the Referee's report, the other by the suppliant to confirm the report. The motions were consolidated as to the hearing.

R. V. Sinclair for the suppliant:

With Reference to the correspondence between Woodburn and the Secretary of State's Department, the fair view is that Woodburn takes the position that he is ready to do the work, but he wants the proper price for it under his contract.

Then your Lordship will have to construe the schedule to see if "The Revised Statutes" come within the meaning of the term "Statutes," as there used.

The referee was inclined to think upon the argument that it was a "future arrangement," within the meaning of the order in council, that they entered into in giving "The Revised Statutes" to some one else The letter of the Queen's Printer of 30th October, 1886, which we claim to contain the evidence of our contract, says: "Pending future arrangements, the binding will be sent to you."

Then we claim that the Referee should not have deducted the men's wages from the profit. We say they had been paid already in doing the work we actually got. We had staff enough to do all the work that came to us and all that was taken away from us. The Government was bound to send us all the work

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it had to do. If Woodburn had not kept the men on hand he would have been subject to a penalty under his contract.

[PER CURIAM.—You say that this work would have been all profit except the material?] Yes.

The evidence shows that the work was taken away from day to day during the whole period. Some weeks there was much to do, some little, some weeks a good deal more than others. So at times they were slack. Our contention is that if they had been given this extra work they could have done it during the slack times when wages were accruing to them which were then paid. Two days of the week they were slack as a general rule, and then rushed on the last two days.

[PER CURIAM.—Is that prudent? You could not say you kept men there to do work you were not getting. There is no contract that would compel you to do six days work in four.]

We had only enough men to answer the requirements of the contract. He cites *Waters* v. *Towers* (1).

W. D. Hogg, Q.C., for the Crown:

The whole theory of the suppliant's case in estimating his damages proceeded upon the view that the proper amount of wages applicable to each individual item which other persons than contractor had received, should be so applied. That, I submit, is the proper basis, and it having been so limited it ought not to be extended now. The schedules filed by the suppliant show the contract rates and the profits which would have accrued to the contractor had he done this particular work, deducting first the proper expenses—wages among the rest. Now the suppliant wishes to be paid back these wages on the theory that he would have paid out no wages at all to do this extra work.

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[PER CURIAM.—They did not present their case that way first?]

No, and very naturally, because the way we pursued was the way all these references have been conducted. The test is what would it cost to produce this particular work? Not a calculation of how it could have been done for nothing by men in their slack time.

[PER CURIAM.—That doesn't take away the force of the argument that he would have had more profit if he had had this extra work to do.]

It must be admitted that the evidence establishes that the work done outside was of a more profitable character.

As to "The Revised Statutes," there was a contract prior to 9th November, but on that date it was absolutely put an end to and there was nothing beyond "negotiations" between the parties after that date with reference to "The Revised Statutes." The contractor refused to do them, and never did them.

The suppliant is only entitled to damages for five years. That is not questioned by the Crown, but my argument is that on 1st December, 1884, the contract was at an end, and never revived afterwards. This is established by the order in council of 30th October, 1886.

The fact is that after 1st December, 1884, there was no sort of dealings between the parties which would give the suppliant a right to damages for a breach of contract. This is distinguishable from the case of an executed contract for work done and goods sold and accepted. There is no authority to show that the Crown can be made liable for the breach of an executory contract. The facts show that the only contractual relations between Mr. Woodburn and the Government were those subsisting in the odd jobs that were sent him from time to time to do and which he

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has been paid for. There was no contract in respect of a breach of which he could recover damages.

[PER CURIAM.—You distinguish between a contract for work and labour done, and a contract to give labour?]

Yes, and I say the principle of the one cannot be applied to the other in extending the liability of the Crown. Before the suppliant could recover for a breach of an executory contract he must have a good and valid contract made according to the requirements of the statute. A valid formal contract is the foundation of his case, and without it he is out of court after December, 1884.

Mr. Sinclair in reply cited the Queen's Printer's Act of 1869.

[PER CURIAM.—You must go further and show that the Secretary of State had power to make a contract of his own motion to give labour for breach of which the Crown would be liable.]

The statute is only directory and a contract may be valid even while its form does not satisfy sec. 6 of the Queen's Printer's Act of 1869. The statute does not say that by failure to comply with its provisions a contract will be penalized or rendered null. It is merely directory. Then there was a ratification by the Crown. The parties went on under this letter from the Secretary of State, and Mr. Woodburn was led to believe that he had the right to do all this work. The Queen's Printer's office was attached to the Secretary of State's Department at that time, and he acted for the Secretary of State. Unless your Lordship construes this section as *imperative*, the contract was validly made.

Then the order in council is a ratification of the contract.

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Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (January 17th, 1898.) delivered judgment.

This matter comes before the court on motions by way of appeal against the findings of the learned Referee, and for judgment.

In the first place the respondent contends that the Referee was wrong in allowing damages for breaches of contract occurring between the first day of December, 1884, and the ninth day of November, 1886. It is conceded that during this period there was a contract between the Crown and the suppliant; but it is contended that it was to do such work of the kind mentioned in the contract of the 22nd of November, 1879, that had expired, as the Crown might send the suppliant to do, and not all the work of that kind that was required to be done. That question is, I think, to be determined by reference to the terms of the letter of the Queen's Printer to the suppliant of the 9th of December, 1884, as it was acted upon by the parties, and the contract, whatever it was, that arose therefrom and from the acts of the parties, was ratified by the Government. By that letter the suppliant was informed by the Secretary of State "that pending future arrange-" ments the binding work of the Government would "be sent to him for execution under the same rates " and conditions as under the contract which had just "expired." Construing that contract as like contracts have been construed in other cases in this court, and in the Supreme Court, one of such conditions was that the contractor was entitled to have sent to him all the work of the class mentioned in the contract that the Government required to be done. There was, it is admitted, a breach of that condition, and for such breach the suppliant is, I think, entitled to damages. I agree with the learned Referee that such damages should be allowed.

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Another objection the respondent takes to the Referee's report is that he was wrong in allowing damages to the suppliant for not being allowed to do the work of perforating sheets of Inland Revenue labels. The question, which is not free from difficulty, arises upon the construction to be put upon the words "Perforating, any size per 100 cuts," ".01," occurring in schedule A to the contract to which reference has been made. The schedule is headed "Departmental Binding, etc.," and under the words "Blank Books, etc.," is included a description in general terms of the work to be done, with the prices therefor. The larger portion of this work has to do with the binding of books of some kind, but some of it has no connection therewith, other than this, that it is work that is commonly done by book-binders. Among other things included in this list of things to be done is "Perforating, etc.," and the question is whether these words should be limited to such perforating as might be required to be done in respect of books sent to the contractor to be bound, or should be held to include other perforating, such as the perforating of sheets of labels used by the Department of Inland Revenue. It is not now contended for the suppliant that such perforating would include the perforating of postage stamps and revenue stamps, work that could not, without some inconvenience and risk, be done by any other person than the contractor for the engraving of such stamps, but only such perforating as not being within any other contract, the Queen's Printer was accustomed to send to the suppliant to be done under the contract in question here. To the latter contention the Referee gave effect, and it seems to me that the construction he has put upon the words mentioned is under all the circumstances of the case fair and reasonable.

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The first objection that the suppliant takes to the report is that he has not been allowed damages for not being given the binding of "The Revised Statutes of Canada."

The suppliant's right to have sent to him for execution all the work mentioned in the contract of November 22nd, 1879, came to an end on a day not later than the 9th of November, 1886. The proclamation bringing "The Revised Statutes of Canada" into force was not published until the twenty-fourth day of January, 1887, and they did not come into force until the first day of March following. It seems clear that the binding of these statutes was not work that the Government required to have done during the pendency of the suppliant's contract.

There is but one other matter of controversy to which it is necessary to refer. The damages that have been allowed have, as I understand the matter, been assessed by finding the profits that would have accrued to the suppliant had he been called upon to do all the work mentioned in his contract. In ascertaining such profits the actual cost of the labour necessary to do the work has been deducted. To that course the suppliant now objects. He says he could have done all the additional work without any extra outlay for labour. That is something which one does not readily understand, if the suppliant's business was carried on with prudence, and one naturally asks: How could that happen? and the suppliant answers in effect, "I had six men to do four men's work." But why do you keep six men to do four men's work? one replies; and the suppliant answers that he was bound to keep a staff large enough to do all the work that the Government required him to do under the contract. I do not agree that he could so increase the damages for which the Crown would be liable. He

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knew well enough that he was not getting the work to do, in respect of which the claim now under consideration is made, and he had no right to keep men idle waiting for work to come to him that he knew well enough would never come to him. It is also suggested that the work came to him in such a way that his men would do it in four days of the week, leaving them with little to do on the other two days. Well, all one need say as to that is that it was not a prudent way to carry on his affairs. He was under no obligation to do six days' work in four days, and if he saw fit to manage his business in that way, he must now bear any loss thereby incurred. It is very clear of course that it is usual that the percentage of profits would be greater on a large amount of work than on a small amount of work, and in such a case as this the proportion of work attributable to any given piece of work should be calculated with reference to the whole work that the suppliant was entitled to do. But there is no complaint on that score put in that way, but a bald demand that the total expense for labour referable to the doing of the work in respect of which damages are now asked and given should be eliminated and the damages increased by that amount. To that proposition, put in that way, I cannot agree. I do not believe it to be possible that the additional work in this case could have been done without any extra cost for labour if the work sent to the suppliant and executed by him had been done in a prudent and careful business manner.

The motions by way of appeal will be dismissed with costs, the report of the Refereee affirmed, and the judgment entered in accordance therewith, with costs.

Judgment accordingly.

Solicitor for the suppliant: *R. V. Sinclair.*

Solicitor for the respondent: *D. O'Connor.*