

DAVID H. HENDERSON AND NOR- }
 MAN B. T. HENDERSON..... } PLAINTIFFS ;

1897
 Sept. 10,

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Crown—Executory contract—Liability—Goods sold and delivered—Acceptance—R. S. C. c. 37, s. 23—Interest.

Notwithstanding the provisions of the 23rd section of the Railways and Canals Act, R. S. C. c. 37, where goods have been purchased on behalf of the Crown by its responsible officers or agents without a formal contract therefor, and such goods have been delivered and accepted by them, and the Crown has paid for part of them, a ratification of the informal contract so entered into will be implied on the part of the Crown, and, under such circumstances, the plaintiffs are entitled to recover so much of the value of the said goods as remains unpaid.

Held also, following *St. Louis v. The Queen*, 26 Can. S. C. R. 649, that interest was payable by the Crown on the balance due to the plaintiffs in respect of such contract from the date of the filing of the reference of the claim in the Exchequer Court.

THIS was a reference of a claim for goods sold and delivered, made under the provisions of sec. 23 of *The Exchequer Court Act*.

The following are the provisions of the statute governing the formal requirements of contracts entered into for the purposes of the Department of Railways and Canals :

23. "No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon Her Majesty, unless it is signed by the Minister, or unless it is signed by the deputy of the Minister and countersigned by the Secretary of the department, or unless it is signed by some person specially authorized by the Minister, in writing for that purpose : Provided always, that

1897
 HENDERSON
 v.
 THE
 QUEEN.

Statement
 of Facts.

“ such authority from the Minister, to any person professing to act for him, shall not be called in question except by the Minister, or by some person acting for him or for Her Majesty.”

The following are the material allegations in the statement of claim :—

1. The claimants have been for many years and still are lumber merchants carrying on business in the City of Montreal, under the name and style of “ Henderson Bros.”

2. That on, to wit : the 9th day of December, 1892, Her Majesty the Queen, acting by and through her proper officers in that behalf, entered into a written contract with the claimants, whereby the claimants agreed to supply and furnish the timber and lumber required for the building and construction of a certain public work of the Dominion of Canada, to wit : the new Wellington Bridge over the Lachine Canal, at Montreal

3. That the said contract contained a description of the several kinds and dimensions of the timber and lumber required to be supplied and furnished by the claimants, for the said bridge, and the prices which the claimants were to be paid therefor, and which were set out as follows :—[Here follows a statement of particulars].

4. That subsequent to the date of the said contract, Her Majesty, acting by and through the officers aforesaid, commenced the construction of the Grand Trunk Railway Bridge over the said Lachine Canal, at Montreal.

5. That during the construction of the said bridges, the claimants received requisitions from the said officers from time to time for the supply and delivery of timber and lumber, and in compliance with the said requisitions, they supplied and delivered to Her

Majesty's said officers, during the month of December, 1892, and the months of January, February, March and April of the year 1893, a large quantity of timber and lumber of various kinds and dimensions, to wit: 3,613,600 feet, board measure.

6. That the claimants from time to time, during the construction of the said bridges, rendered accounts to Her Majesty's said officers, of the timber and lumber so supplied and delivered as aforesaid, which accounts were received, approved and duly certified by the said officers for payment by Her Majesty.

7. That the total amount of the accounts, for the timber and lumber so delivered as aforesaid, was the sum of \$67,474.43, on account of which Her Majesty paid and the claimants received the sum of \$43,862.06, leaving a balance due and payable to the claimants of \$23,612.37, for which balance and interest thereon Her Majesty is indebted to the claimants.

8. The claimants have requested payment of the said balance, and interest thereon from the 9th day of May, 1893, the date of the last payment on account of the said lumber; but Her Majesty, acting through the Department of Railways and Canals, being the department having charge of the said accounts, has declined and refused to pay the said balance or any part thereof.

CLAIM.

1. The claimants therefore pray for judgment against Her Majesty, for the sum of \$23,612.37, and interest thereon from the 9th day of May, 1893.
2. That the claimants may be paid their costs of this action.
3. That the claimants may receive such further or other relief, as the nature of their claim may entitle them to.

1897
 HENDERSON
 v.
 THE
 QUEEN.
 Statement
 of Facts.

1897
 HENDERSON
 v.
 THE
 QUEEN.
 Statement
 of Facts.

The following are the material allegations of the statement in defence :

The Honourable Sir Oliver Mowat, Her Majesty's Attorney-General for the Dominion of Canada, on behalf of Her Majesty, says that :

1. Her Majesty did not order any of the timber or lumber the price of which is claimed herein.

2. The claimants did not, nor did either of them, deliver to Her Majesty, or any of Her Majesty's officers the timber and lumber the price of which is claimed herein, or any part thereof.

3. Her Majesty did not on the 9th day of December, 1892, nor at any time, acting by or through Her proper officers in that behalf or otherwise, enter into any written or other contract with the claimants whereby the claimants agreed to supply the timber and lumber required for the building and construction of the new Wellington bridge over the Lachine Canal, at Montreal.

4. It was agreed between Her Majesty and the claimants that the claimants should furnish in connection with the said bridge at certain specified prices the following quantities of timber of the kinds and dimensions hereinafter mentioned, namely :—[Here follows a statement of the goods supplied.]

5. Her Majesty's officers did not, nor did any of them, make any requisitions on the claimants for the supply and delivery of timber or lumber as alleged, nor at all, nor did the claimants receive any such requisitions.

As to the alleged requisitions for the supply of timber and lumber, Her Majesty did not authorize the engineer in charge of the work, nor the superintendent thereof, nor any other officer of Her Majesty, to contract for or order or give requisitions for timber or lumber, except as and when authorized by the Minister of Railways and Canals acting on behalf of Her Majesty, and the alleged requisitions if any were given, which Her

Majesty does not admit but denies, were not in fact authorized by the said Minister of Railways and Canals. HENDERSON

6. The claimants did not, nor did either of them, supply or deliver any timber or lumber to Her Majesty's officers, or any of them, during the month of December, 1892, or the months of January, February, March or April, 1893. THE QUEEN.

Statement
of Facts.

7. The accounts rendered by the claimants for the timber and lumber alleged to have been supplied and delivered were not, nor was any of them, approved or certified for payment by Her Majesty's officers, or by any of them.

8. The officers who approved and certified said accounts had no authority from Her Majesty to approve or certify the same.

9. Her Majesty's officers who approved and certified the said accounts did so without any enquiry or information as to whether the timber and lumber charged for in the said accounts had been supplied and delivered by the claimants to or ordered by Her Majesty or any of Her Majesty's officers, or whether the prices charged therefor were reasonable or proper, and the said approval and certificates were so negligently and improvidently given by the said officers as to be of no value, of all which the claimants were and are well aware

In the alternative, if it should appear on the evidence that Her Majesty's officers did in fact duly certify and approve of some of the accounts, which Her Majesty does not admit but denies, then Her Majesty avers that the accounts so certified and approved amounted to the sum of \$43,862.06; and that the said accounts were duly paid by Her Majesty and the said sum was received by the claimants in satisfaction and discharge of the claimants, said accounts so certified and approved, and Her Majesty avers that, except as

1897
 HENDERSON
 v.
 THE
 QUEEN.
 Statement
 of Facts.

to the said accounts so satisfied and discharged, no accounts rendered by the claimants were delivered to Her Majesty, or were any of the said accounts approved or certified for payment by Her Majesty's officers, or by any of them.

10. The total amount of the accounts for the timber alleged to have been delivered was not \$67,474.43 but \$60,017.71.

11. The balance, if any, due and payable by Her Majesty to the claimants is not \$23,612.37.

12. Before action was brought Her Majesty satisfied and discharged claimant's claim herein by payment.

13. Her Majesty did not agree, nor is Her Majesty otherwise liable, to pay interest upon the balance sought to be recovered herein.

COUNTER-CLAIM.

By a lease under seal from Her Majesty to the claimants, dated 4th of November, 1885, of a certain storage lot located between St. Gabriel Basins number two and three, in St. Ann's ward, in the City of Montreal, forming part of the lands of the Lachine Canal, lying on the north-west side thereof to the west of St. Gabriel Basin, number two, containing an area of 33,560 feet, more or less, for and during the pleasure of Her Majesty to be signified to the lessee by the Minister of Railways and Canals of Canada for the time being, the claimants covenanted to yield and pay, invariably in advance on the first day of November in each year and every year during which the said claimants should continue and remain in possession of the said lands, to Her Majesty through the Honourable the Receiver-General of the Dominion for the time being, a yearly rent or sum of \$300, and the claimants have since the date of the said lease been and continued and remained in possession of the said lands, but four of the

said annual payments of rent are now in arrear and unpaid, and the sum of \$1,200 is now due by the claimants to Her Majesty for four year's rent reserved under the said lease, together with interest thereon.

1897

HENDERSON

v.
THE
QUEEN.Argument
of Counsel.

Her Majesty counter-claims the sum of \$1,326, according to the following particulars: [Here follows statement of particulars of the counter-claims amounting to \$1,326.]

September 8th, 9th and 10th, 1897.

The case was heard at Montreal.

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

The evidence discloses that this was a case where the plaintiffs observed *uberrima fides* in their performance of the contract. Further than this, every facility has been afforded the Crown to sift the honesty of the plaintiffs all through the transaction. Books and papers have been freely placed at the disposal of the Crown, and the evidence so far from showing bad faith on the part of the plaintiffs shows that the Crown did not employ the care and attention necessary, and that extravagance prevailed all through on its behalf. It is also to be noticed that Mr. Parent, the engineer in charge, was not called by the Crown.

The Government used all the lumber ordered; the fact that some of the materials were taken away from the works by thieves, does not affect the plaintiffs' claim. We have proved by all available methods the delivery of our materials, and that evidence remains uncontradicted. The work was rushed. Kennedy, the superintendent, actually took the direction of the work, although Parent was the superior officer on the works, and he ordered the lumber and timber necessary, and directed Lavery and Huot to get any such materials they required. The plaintiffs, who were anxious to do business, supplied the materials

1897
 HENDERSON
 v.
 THE
 QUEEN.

Argument
 of Counsel.

ordered. That was sufficient to create a contractual obligation. The officer in charge ordered the wood and it was supplied. No Minister of the Crown, or any subordinate officer declined to accept the same. Such objection should have been taken before to-day. The Government was doing the work, and not Messrs. Henderson. Not only the Minister but the Government confirmed this state of things. The agency of Mr. Kennedy was confirmed by the fact that the accounts for over \$43,000 were approved by the Deputy, affirming and recognizing all that was done. Every act that Kennedy had done up to that time was approved both by Mr. Schreiber and the Government. Kennedy had authority to purchase the lumber and timber and such authority was confirmed by the Deputy and the Minister for an amount over \$43,000. Mr. McLeod and Mr. Lavery say there was great extravagance and Mr. Schreiber stopped everything, stopped paying; and what we now ask is to be paid. On the April account the same course of conduct took place. The plaintiffs were justified in acting as formerly in view of doing what had been done in the past. They were acting in the same manner as formerly, when they were duly paid, and they had no reason to believe that that course would be changed. They were acting honestly and continued doing so. If some of the officers of the Crown were doing things they should not have done it was not the plaintiff's business. The plaintiffs kept their accounts as they had done before, and they had no reason to expect any change or to be refused payment. *The Commissioners of Sewerage and Water Supply of the City of St. John v. The Queen* (1); *Hall v. The Queen* (2).

(1) 2 Ex. C. R. 78; 19 Can. S. C. R. (2) Ex. C. R. 373.
 125 and "Audette's Practice," p. 103.

The new materials were ordered during the progress of the work, and it would be absurd to say that every time a piece of timber outside the contract would be required that tenders would have to be issued. (*Hall v. The Queen, supra*). The timber was ordered and it went into the whole work, that is to say on the two bridges.

1897
 HENDERSON
 v.
 THE
 QUEEN.
 Argument
 of Counsel.

When a course of conduct has been established by a principal and an agent from week to week and from month to month for five months, and the act of the agent has been confirmed by the principal, it is proper to say that a contractual obligation resulted therefrom. I know of no law that would put the Crown in a different position from that of a subject in this respect. The goods have been sold and delivered and received by the Government, and if not all used in connection with the works it was kept for other purposes, as the evidence shows. The amount of the account is \$60,208.18, deducting \$478.80 therefrom for timber returned.

I ask for interest on the amount from the date of the demand, 22nd June, 1894, citing *St. Louis v. The Queen* (1).

Chrysler Q.C. for the defendant: The claim was only filed six months after the reference, and interest should not run before that date. (Cites R. S. C. ch. 37, sec. 11.) The course of conduct appearing during April was not ratified. In April the accounts were not communicated to the Crown, and when they were they were not affirmed or ratified. The officers had perhaps authority to purchase all the timber required for the works, but they had no authority for ordering any lumber over and above what was required and which was left over when the works were finished.

(1) 25 Can. S. C. R. 649.

1897
 HENDERSON
 v.
 THE
 QUEEN.
 Argument
 of Counsel.

Then as to the delivery we have the signed accounts. The McKinley signature is worth nothing and the ticket-book is not what should be referred to, as it does not tally with the receipts given. The plaintiffs cannot change the accounts supplied and rendered. The error was not identified, it was not made clear whether it had occurred in April or December, January, February or March. The accounts for the months of December, January, February and March are now finally closed.

Mr. Hogg replied.

At the conclusion of the argument, judgment was pronounced by the JUDGE OF THE EXCHEQUER COURT.

[For the purpose of an appeal to the Supreme Court, the following note of his reasons was handed to the Registrar by the learned Judge:]

I have been asked some weeks after the delivery of judgment in this case to give a statement of the reasons upon which the judgment proceeded, no note of such reasons having been made or taken down at the time the judgment was delivered. I cannot undertake at so great a distance of time to give with exactness the reasons as they were then briefly stated, but I can give, in a general way, the grounds upon which I disposed of the case. These were that the plaintiffs had shown to my satisfaction that the lumber and materials, the price of which they sought to recover, had been sold and delivered to the Crown; that such lumber and materials had been ordered and accepted by its officers and agents, and as the works that were being constructed could not be proceeded with without such lumber and materials, and no other provision had been made for procuring them, and part of them so ordered and accepted had been paid for by the Crown, it must be taken to have ratified what in this respect its officers and agents had done. It was

objected that the plaintiffs could not recover because of the 23rd section of "The Railways and Canals Act" (1) which provides that: "No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon Her Majesty, unless it is signed by the Minister, or unless it is signed by the deputy of the Minister, and countersigned by the secretary of the department, or unless it is signed by some person specially authorized by the Minister, in writing, for that purpose." This provision I did not think to be applicable to the case then under consideration, following the views expressed by Sir William B. Richards, C. J. in the case of *Wood v. The Queen* (2), and the views I had before expressed in the same direction in the cases of *Hall v. Queen* (3), and *Quebec Skating Club v. The Queen* (4). Having stated briefly the grounds upon which the judgment proceeded, I then directed it to be entered, with a reference to the registrar to settle the amount, the object of which was to make sure that the proper amount was duly ascertained. Interest was allowed upon the authority of the case of *St. Louis v. The Queen* (5), and not because I had myself formed any decided view that the plaintiffs were entitled to it. Apart from that case I should not be at all sure that the Crown is bound by the practice prevailing in Quebec to allow interest from the service of the writ.

[The judgment was directed to be entered in the terms following:]

There will be judgment for the plaintiffs with costs of the claim, and judgment for the Crown on the counter-claim for the sum of \$988.34, with interest

1897
 HENDERSON
 v.
 THE
 QUEEN.
 Reasons
 for
 Judgment.

(1) R. S. C. c. 37.

(3) 3 Ex. C. R. 373.

(2) 7 Can. S. C. R. 634.

(4) Ibid. 387.

(5) 25 Can. S. C. R. 649.

1897
 HENDERSON
 v.
 THE
 QUEEN.
 Reasons
 for
 Judgment.

thereon from the 1st day of February, 1897, date of the filing of the counter-claim, and costs of the counter-claim. There will be a reference to the Registrar of the court to ascertain the actual amount due plaintiffs, starting with the April accounts at \$16,155 65, to which shall be added the cost of any lumber and timber sold and delivered by the plaintiffs to the defendant, and which may have been omitted in the statement of accounts rendered for the months of December, 1892, January, February, March and April, 1893, which lumber and timber are to be charged, 1st, at contract rates, if coming within the contract; 2ndly, if not coming within the contract rates, then at the rates paid for similar material during December, 1892, January, February, March and April, 1893; and, 3rdly, if not coming within the contract rates, or rates established by such previous rate, then at a *quantum meruit* rate or fair rate as established by witnesses. There shall also be deducted from the amount coming to the plaintiffs the sum of \$478.80, or such other sum as may be found to be the actual amount due, for the timber returned.

The plaintiffs will have interest on the amount found due them from the 1st October, 1896.

Judgment accordingly.

Solicitor for the plaintiffs: *W. D. Hogg.*

Solicitor for the defendant: *F. H. Chrysler.*
