IN THE MATTER OF THE PETITION OF RIGHT OF

ALPHONSE POIRIER.... .... SUPPLIANT;

1911
Feb. 9

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Supply of hay for the use of Imperial Government in South African War—Hay not up to requirements of contract—Sale of rejected hay by Crown Officers—Conversion—Damages—Counterclaim—Excess of Stowage space—Evidence—Laches in asserting claim.

Suppliant had a contract with the Minister of Agriculture for the supply of hay for use by the Imperial authorities in the South African War. A certain quantity was rejected by the officers of the Department of Agriculture as not up to the requirements of the contract. Some of the rejected hay was returned to the suppliant, but a portion of it was stored subject to his order. The suppliant not having removed the hay, and the storage space occupied by it being required, the hay was sold by the officers of the department at a price less than its alleged value. The price realized by such sale was paid to the suppliant, but he claimed damages for the difference between such price and the alleged value of the hay, charging that his loss was sustained by reason of the tortious act of the Crown's employees, amounting to a conversion of the hay.

Held, that the claim was not one in respect of which the Crown was liable under the provisions of sec. 19 of *The Exchequer Court Act*. *Boulay* v. *The King* (43 S.C.R. 61) referred to; *Windsor & Annapolis Co.* v. *The Queen* (L.R. 11 A.C. 607) referred to and distinguished.

2. It was provided in the contract that the hay should be compressed to stow in not more than 70 cubic feet per ton, and that hay occupying more than that space might be accepted at the option of the Department, "but only at a reduction of $1.50 per ton from the contract price for every ten feet, or any part thereof, stowage space required per ton in excess of the standard specified." There was no provision for payment of excess of space used by any particular bale. In support of its counterclaim for an amount alleged to represent the aggregate deductions by reason of excess of space used, the Crown offered evidence which showed that not more than five bales out of twenty-two tons had been tested and found to exceed the standard. It was also shewn that the Crown had not sought to enforce any claim for deduction for a period of five years.

Held, that as the evidence supporting it was insufficient, the counterclaim ought to be dismissed.

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PETITION OF RIGHT for damages arising out of an alleged breach of contract by the Crown.

The facts are stated in the reasons for judgment.

The case was heard at Montreal on the 1st, 2nd, and 3rd days of March 1910, and at Ottawa on the 13th day of January, 1911.

A. Lemieux, K.C. for the suppliant contended that the Crown was liable for the value of the hay under sec. 19 of *The Exchequer Court Act*, because the hay had gone into possession of the Crown; and there was also liability for the acceptance of goods supplied under contract. The fact of the officers or employees of the government selling the hay was tantamount to an act of dominion (*dominium*); it was exercising the the right of ownership, and was evidence of an acceptance of the hay on behalf of the Crown. The suppliant was thus prevented from taking back his goods, and the acceptance nullifies the antecedent rejection. If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them.

Per *Bovill, C. J.* in *Heilbutt* v. *Hickson* (1). See also *Grimoldby* v. *Wells* (2); *Couston* v. *Chapman* (3); *Williston on Sales* (4).

If it is contended that this is a tortious breach of contract, then I submit that even in such a case the Crown is liable. *Windsor & Annapolis Ry. Co.* v. *The Queen* (5). It is settled law that a petition of right will lie for any breach of contract by the Crown. *Thomas* v. *The Queen* (6); *Feather* v. *The Queen* (7).

(1) L. R. 7 C. P. at pp. 438, *et seq.*
(2) L. R. 10 C. P. 391.
(3) L. R. 2 Sc. Ap. 250.
(4) P. 867.
(5) L. R. R. 11 A. C. 607.
(6) L. R. 10 Q. B. 31.
(7) 6 B. & S, 257.

It is immaterial whether the breach is occasioned by acts or omissions of the Crown officials.

Upon the point of acceptance of the hay by the fact of resale, the suppliant relies on the further authorities of *Boulay* v. *The King* (1); *Benjamin on Sales* (2); *Perkins* v. *Bell* (3); *Parker* v. *Wallis* (4); *Parker* v. *Palmer* (5); *Campbell on Sales* (6).

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The law of the Province of Quebec should govern. The liability of the Crown is in the nature of quasi-contract (Cities Art. 1043 C.C.P.Q.)

As to the question of the Crown's liability under sec. 19 of *The Exchequer Court Act*, Clode (7) affirms the liability of the Crown for property wrongfully taken and detained.

As to the counterclaim, it is a mere after-thought and should not be taken seriously. In any event there is no satisfactory evidence to support it.

R. C. Smith, K.C., for the respondent.

Counsel for the suppliant takes two positions which are diametrically opposed to each other and incompatible. He contends that the act of resale was at one and the same time an acceptance under the contract and a breach of the contract. If there was an acceptance it must stand as a fulfilment of the contractual obligation; it could not be a breach of it.

Let us look first at the object of the contract to see if there was a breach of the contract here by the Crown. In order that there should be a breach it must be perfectly manifest, or rather one of two things must be manifest, that the Crown has neglected to do something which it was bound to do under the contract, or that it has done something which under

(1) 12 Ex. C. R. 198.
(2) 5th ed. p. 752.
(3) [1893] 1 Q. B. 193.
(4) 5 E. & B. 21.
(5) 4 B. & Ald. 387.
(6) 2nd ed. pp. 341, 514.
(7) Petition of Right, p. 66.

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the contract it was bound not to do. Those are the only two possible breaches of the contract. The Crown might be guilty by its officials of one hundred and fifty wrongful acts in respect of this property; but in order to constitute a breach of contract there must be a breach of some provision of the contract. Now it is abundantly clear that this property had relation to the contract only up to a certain time. It had a relation to the contract when it was destined by the vendor, and, insofar as he could appropriate it to the contract, it had relation to the contract. But the provisions of the contract are absolutely explicit and clear, that the acceptance was left to the person representing the Crown, he could either accept or reject. So far as the vendee is concerned we are met with this position that the hay had some relation to the contract only so long as it was appropriated to the contract by the vendee. But what was the fact? When the hay comes to the ship's side it is rejected—properly rejected as not fulfilling the requirements of the contract. It won't make it any stronger to repeat it a hundred times, the proper rejection of the hay is admitted throughout the case. It is common ground. The suppliant in his petition of right accepts it as having been properly rejected. The moment that is admitted it is no longer contract hay. It is then in the same position as if it had been destined for the East Indies. It is not the hay under contract that has been rejected, and it has no possible relation to the contract at all. The Crown under the contract has no obligation resting on it at all with respect to that hay. There cannot be any breach of contract. Let us suppose for a moment that it had been thrown into the ocean. Supposing the officers of the Crown, Mr. McFarlane and Lieutenant

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Bell, instead of selling it said, that hay has no right to be on this wharf, and they shoved it into the water? Would it be argued there, or could it be argued, or could an argument be stated either that it was a breach of contract or that it was an acceptance? I submit not. It would have been purely a tort. If it were in the Province of Quebec it would have been a *delit*, which is equivalent to a tort. The character of that act, as to whether it was a tort, would be determined by the law of the place where that act took place.

As to the question whether the conversion of Poirier's property by the resale of it, could possibly constitute an acceptance, the whole of the petition of right negatives such an idea. But I would just say in that connection in all of these cases of acquiescence or acceptance, what is it all founded upon? It is founded upon consent only. In the case of acquiescence and in the case of acceptance by active conduct, it is simply an act from which consent may be reasonably inferred.

That is what they all resolve themselves into. Counsel for the suppliant argued that the *Windsor & Annapolis* case disturbed in some way *Tobin* v. *The Queen* (1), on which all of those cases were founded. The *Tobin* case was the leading case on the subject. It is the leading case to-day, and it simply decides that while the Crown is liable in contract it is not in tort. It distinguishes between contracts and torts, and the *Windsor & Annapolis* case (2) does not extend or modify the principle (See per Lord Watson in *Windsor & Annapolis* case.)

In the civil law there is a distinction between actions of pure tort and those based on wrongs arising out of

(1) 10 L. T. N. S. 762. (2) L. R. 11 A. C. p. 614.

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contract. In Sourdat's work on *Responsabilité* (1) there is a chapter devoted to *delit civil*—and there we find, you can have a tort arising out of a contract, or you can have an action purely tortious. That distinction is well marked in the civil law. But I do not recall that a straight action of tort can be brought against the Crown.

Supposing there was a contract to deliver certain goods and the contractor does not deliver them, but deals with them in an improper manner. You could sue him for breach of contract for failing to deliver or for tort in the manner he dealt with them. Those questions would not elucidate what is before your lordship at all—because here there is no tort in connection with the contract, unless an obligation rested upon the Crown under the contract to deal with that property after its rejection. If there were any resulting trust, or if the Crown was the bailee of the hay after rejection under the contract there might be some ground for an argument; but there was nothing of the sort. The Crown assumed no responsibility concerning it, and any manner the subordinate officials of the Crown dealt with it would not be binding on the Crown.

With regard to the counterclaim. In determining how much evidence ought to be required to give certitude to the particular facts, we have to look at the particular circumstances of the case; and if what was done was proved to be done in pursuance of a regularly established system—and it is proved that that system was faithfully adhered to, no better evidence can be made to establish the fact. In the case of *Vasey* v. *The Montreal Gas Co.*, (2) which was discussed before our courts, and in the Privy Council,

(1) Vol. 2, pp. 452-453.

(2) 4 Q. R. S. C. p. 388.

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a certain record was kept of the strength of ammoniacal liquor from day to day. There were three or four deliveries of ammoniacal liquor from day to day for three or four years. To say that anybody could speak from memory as to those particular deliveries would be absolutely impossible. The weight in the *Vasey* case was given to the fact that what was done was in pursuance of a regular system.

The facts here are that we have the positive evidence of the man who made the measurements. We have his recollection with regard to the shipment of the bales, and so on, which is very, very strong. We rely upon the evidence given to support the counter-claim.

CASSELS, J. now, (February 9th, 1911) delivered judgment.

This is a claim by Alphonse Poirier in respect of hay delivered at St. John, N. B., under contracts entered into by the Minister of Agriculture for Canada for and on behalf of the Imperial Government. The contracts are similar to those dealt with in the case of *Boulay* v. *The King* (1).

One material difference between the claim put forward in the *Boulay* case and the case in question is, that in the present case the petitioner admits that the hay, the subject-matter of the present action, was rightly rejected. His claims are of a twofold character. A part of his claim is for the payment of 33,680 pounds of hay which he alleges the Department received, and for which it is said the Crown is indebted to him in the sum of $235.76. The second part of his claim is in respect of 267,750 pounds of hay sold by employees of the Government. The petition claims

(1) 12 Ex. C. R. p. 198; 43 S. C. R. p. 61.

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that this sale was illegal, and asks for damages for the illegal conversion of his hay. His claim on this account amounts to the sum of $1,095.99.

After setting out in his petition the contracts, the petitioner alleges as follows:

(Par. 3) "Que, par une des conditions des dits "contrats, le dit Département ne devenait propriétaire "que du foin, expédié par votre requérant, qu'il n'avait "pas rejeté avant son chargement sur des bateaux à "vapeur, St-Jean, Nouveau-Brunswick, appert aux "dits contrats, lesquels, pour plus amples imforma- "tions, sont produits au soutien des présentes comme "Exhibits numéros 1, 2, 3, 4, 5 et 6;"

(Par. 6.) "Que sur la quantité de foin ainsi livré "par votre requérant durant les années de 1901 et de "1902, le dit Département a rejeté, en petites quan- "tités, pour chacune des dites deux années 144,878 "livres et 243,743 respectivement, en tout 388,621 "livres qui ont continué à être la propriété de votre "requérant, appert aux états fournis par le dit Dépar- "tement et qui seront produits au soutien des pré- "sentes comme Exhibits numéros 31, 15 et 14—et à "certaines lettres en date des 27 août 1902 et 10 dé- "cembre 1902 par lesquelles il est clairement admis "que 370,350 (au lieu de 388,621) livres de foin ont "été rejetées, en petits lots, par le dit Département "durant les années 1901 et 1902; appert également à "ces lettres qui seront produites comme Exhibits "numéros 11 et 21."

(Par. 7.) "Que votre requérant admet avoir reçu "du dit Département 102,000 livres du foin ainsi "rejeté durant les dites deux années;"

(Par. 8.) "Que la balance du foin ainsi rejeté, "savoir 286,621 livres valant $14.00 la tonne, le dit "Département, par ses officiers et préposés, se l'est

"approprié, s'en est emparé et l'a vendu, parait-il, "pour la somme de $910.35 que votre requérant admet "avoir reçu sans préjudice toutefois à ses droits;"

(Par. 9.) "Que le dit Département, par ses officiers "et préposés, n'avait pas le droit en vertu d'aucune "convention, ou de la loi, de s'emparer et de vendre "le foin de votre requérant ainsi rejeté par lui, et il "n'y a jamais été autorisé par votre requérant;"

(Par. 11.) "Qu'en agissant ainsi le dit Départe- "ment, par ses officiers et préposés a manqué à ses "obligations et a par là fait perdre à votre requérant "la somme de $1,095.99, puisque de fait ce dernier "aurait vendu cette balance du foin, savoir $286,621 "à raison de $14. la tonne, soit $2,006.34 sur lesquelles "il (votre requérant) n'a reçu, comme susdit, que "$910.35, lui causant une perte sèche de $1,095.99.

(Par. 12.) "Que cette perte de $1,095.99 résulte "de l'inexécution des obligations du dit Département "ainsi que de la faute et de la négligence de ses officiers "et préposés, dont l'intimé est responsable."

The petitioner then sets out in the subsequent paragraphs his claims in respect of 345 bales of hay weighing 33,680 pounds, and demands the sum of $235.76 on this account. The Crown denies the right of the petitioner to receive this sum of money, and it sets out in the alternative, as follows:

"23. In the alternative he says that in the final "settlement of the accounts of the suppliant with "the Department of Agriculture, his account was on "the 12th of August, 1902, credited with 43,633 pounds "of hay which at $14 a ton, amounted to $303.43, "which was above the value of the said car load in "the petition of right alleged to have been sent as "aforesaid."

The case came on for trial in Montreal on the first day of March, 1910, there being an agreement between

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the counsel for the suppliant and the counsel for the Crown, that only the evidence in support of the suppliant's case should be then adduced, the further trial of the case to enable the Crown to put in their evidence to take place in Ottawa at some time to be agreed upon.

The case was concluded on the 13th day of January last at Ottawa. During the progress of the trial it became apparent that the contention of the Crown set out in the 23rd paragraph of the defence quoted was not well-founded. The explanation given in the earlier stages of the trial in regard to the 43,633 pounds of hay was, that prior to the 12th day of August, 1902 when the final account was rendered and final payment made, the plaintiff had made a claim in respect of the 333,680 pounds referred to in paragraph 13 of the petition. According to the evidence of Mr. Moore, the Department found that they had received the amount of 43,633 pounds of hay, which had not been paid for—whose hay this was they did not know—but as Mr. Poirier was making the claim they gave him the benefit of the credit. During the progress of the trial it was clearly proved that the hay in question, namely, the 43,633 pounds, was the hay of the suppliant and that the suppliant was entitled as of right to the payment therefor; and upon the true facts coming to light this claim for an offset of $305.43 was abandoned.

It was also clearly proved and admitted by a letter among the exhibits written on behalf of the Crown, that the contention of the petitioner in regard to the claim for 33,680 pounds was well founded. The mistake arose from the fact that the hay had been loaded upon a car of the Canadian Pacific Railway Company, No. 2542. This car in transit had been destroyed, and the hay was transhipped to car No. 19084, and was received

by the Department at St. John. By the admission of the respondent the suppliant is entitled to receive from the Crown the value of this hay amounting to $235.76, and the claimed offset in respect of the 43,633 pounds is abandoned.

The further claim made on behalf of the suppliant is as follows: It is admitted by both parties that the total quantity of hay rejected by the officers at St. John amounted to 370,350 pounds of hay. Of this amount 102,600 pounds was delivered to the suppliant or his nominees. The claim made is in respect of the balance 267,750 pounds. Immense quantities of hay were being purchased for shipment to South Africa. The suppliant did not see fit until late in December of 1901 to send anyone to St. John or to write to anyone to take care of his rejected hay. His hay together with rejected hay belonging to other shippers was placed in the sheds on the wharf. Congestion took place and the officers of the railway required the hay to be removed. Thereupon sales were from time to time made of this blended hay. The average price received for the hay comprising a portion of the petitioner's rejected hay and the hay of other shippers, came to $6.80 per ton. This sum, amounting to $910.35, the suppliant was credited with and he admits having received it. His complaint, however, is that his hay was sold by the officials in St. John without any authority from him. The price of $6.80 was below the value of the hay; and he claims as damage, valuing his hay at $14. per ton, for the difference between $6.80 per ton and $14. which he claims his hay should have realized. It has to be borne in mind that while the suppliant received the $6.80 per ton in cash, he practically received the sum of $9.80 per ton. The freight on the hay from the point of shipment to St. John was $3 per ton; this

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amount was payable by Mr. Poirier in respect of the hay carried for him. The Department in addition to crediting him with cash for $6.80 released him from the freight of $3. Mr. Poirier in this way receiving payment in fact at the rate of $9.80 per ton. In the view I take of this branch of the case, I do not propose to enter into the question as to what amount Mr. Poirier should have received for his hay. It may eventually turn out that the $9.80 a ton was ample. In this particular case upon the facts stated, and as the case was presented both by the petition and during the conduct of the case, I do not think there is any liability no behalf of the Crown.

The act complained of both in the petition and during the progress of the trial by the suppliant was that it was a tortious act by employees in the service of the Crown. The claim put forward is one of wrongful conversion, and I do not see that the Crown can be held responsible for the torts of its employees. The case of the *Windsor & Annapolis Railway Company* v. *The Queen*, (1) cited by Mr. Lemieux, is a case of a different character. All that was there decided is that the Crown may be liable in damages for breach of a contract. In the case before me the hay was the property of the suppliant. There was no contractual relation whatever in regard to the hay. Clode on Petition of Right (2) deals with the question. He also refers to the American case of *Langford* v. *The United States*, (3). The question is also discussed in some of the reasons for judgment in the case of *Boulay* v. *The King*, (4).

I think, therefore, that in respect of the petition, the suppliant is entitled to be paid the sum of $235.76 hereinbefore mentioned; and that that portion of the peti-

(1) L. R. 11 A. C. 607.
(2) p. 136 *et seq.*
(3) 101 U. S. R. 341.
(4) 43 S. C. R. 61.

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tion which claims damages for the wrongful conversion of the hay must be dismissed.

I proceed now to deal with the counterclaim filed on behalf of the Crown.

The Attorney-General on behalf of the Respondent in his counterclaim alleges as follows:

"1. By contracts respectively dated the 19th Sep-"tember, 1901, the 15th November, 1901, the 20th "December, 1901, and the 26th December, 1901, the "Commissioner of Agriculture agreed with the sup-"pliant for the purchase from the latter of certain quan-"tities of hay therein particularly mentioned and de-"scribed and upon the terms and conditions therein "contained."

"2. It was one of the terms and conditions mentioned "in the preceding paragraph that the hay was to be "compressed to stow in not more than 70 cubic feet per "ton, that hay occupying more than 70 cubic feet per "ton might be accepted at the option of the Depart-"ment, but only at a reduction of $1.50 per ton from "the contract price for every ten feet or any part "thereof stowage space required per ton, in excess of "the standard specified."

"3. All of the hay shipped by the suppliant between "the 4th November, 1901, and the 31st of January, "1902, exceeded the limit of stowage specified in the "said Clause 3."

"4. The suppliant is indebted to His Majesty the "King in the sum of $3,525.72, the amount of the reduc-'tions from the contract price provided by the contract 'and incurred in respect of the hay mentioned in the "preceding paragraph."

Clause 3 of the contract reads as follows:

"The hay to be compressed to stow in not more than "seventy (70) cubic feet per ton; hay occupying more

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"than seventy cubic feet per ton may be accepted at "the option of the Department, but only at a reduction "of $1.50 per ton from the contract price for every ten "feet, or any part thereof, stowage space required, per "ton, in excess of the standard herein specified."

While the language of the contract has to be construed as it is written, it is well to understand the object of this clause. Moore in his evidence puts it in this way:—"Clause 3 of the agreement referred to the compression of the hay, the compression of the hay was a very important point, because we chartered our steamers at so much per cubic foot for cargo space under deck."

[THE COURT:—Who paid that freight?]

A. We did.

Q. Are the Dominion Government out of anything?

A. We paid for stowage.

Q. Somebody lost. Did the British Government?

A. If we exceeded our limit of the amount offered them our Department would have to pay. We stated we could deliver 15,000 a month at Cape Town at a certain price, and to get that down there we had to get a certain amount of space in the ship. We had to compete with the United States and the Argentine and Australia for getting this business for Canada." Again he says:—

"We were anxious to get as much hay in the ships as possible. The more hay we got into a ship it reduced the freight."

Further on he states:—

"It cost us roughly $1.50 for every ten cubic feet in stowage; and that is the way we arrived at that figure in the contract. If a ton of hay occupied more than 70 cubic feet, which was a reasonable stowage limit with those steam presses,—if it occupied ten

feet more than that amount the shippers would receive $1.50 less. It is an important matter to the shipper. This hay was put through the steam compressors. It was hard compression and hard on the press. If a shipper could compress to 80 feet, and he could supply the hay under our contract calling for 70 cubic feet compression, and have it accepted, when it occupied 80 or 90 cubic feet per ton, it would be a decided advantage to him, because he could run his press without any danger of breakage and have no large bills for repairs, and have no loss of time on the part of his staff and in that way it would cost him less money."

This witness produced the stowage book. He states that the measurements were made by Lieutenant Bell who was the Inspector of Weights and Measures. A copy of the book is filed, marked respondent's exhibit "K."

On the 27th August, 1902, a final settlement was made,—marked "Suppliant's exhibit No. 17." It appears that at the date of this settlement Mr. Poirier, the suppliant, had been overpaid the sum of $393.54. The Department had received $910.35 the proceeds of the hay sold in St. John. The way in which the settlement was carried out was dividing $910.35 into two cheques—one for $393.54 and one for $516.81. The cheque for $393.54 was endorsed over by Mr. Poirier, and thus the amount of his over-payment was repaid. At the time of this balancing in August, 1902, no claim was made on the part of the Department for the alleged repayment of the $1.50 referred to in the counter-claim. Mr. Moore explained it as follows:—

"Q. THE COURT:—Have you looked at the settlements of Mr. Poirier?

A. Yes. There was no deduction made with Poirier.

[THE COURT:—Why was that?]

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A. They wanted to be as generous with the shippers as they could be. We remitted the freight also on the culled hay we sold—I don't know why."

From August, 1902, until about 1907 no claim was ever put forward on the part of the Government for repayment of the amount now claimed in the counter-claim, viz., $1.50 per ton. Had the claim been made in August of 1902, Poirier would no doubt have been in a better position to meet the case than five years later. There is not what can be called strictly a settlement of accounts in 1902; and if there had been the effect of the action taken by the suppliant Poirier would be to open up the settlement. And the counter-claim being filed on behalf of the Crown I would probably have been compelled to allow their claim had sufficient proof been adduced in support of it. Having regard to the circumstances detailed, I think it incumbent upon the Crown to give strict proof in support of their contention. In this I think they have failed. The contracts of September 19th, 1901, November 15th, 1901, December 20th, 1901, and December 26th, 1901, are all similar in language so far as clause 3 is concerned. In the contracts of the 22nd January, 1902, and the 22nd February, 1902, instead of clause 3 containing the words "more than seventy (70) cubic feet per ton," it is "more than seventy-five cubic feet per ton." In other respects they are the same. The Department have placed a construction upon this clause 3 which certainly presses hardly on the vendor. The obvious meaning of clause 3 is that $1.50 per ton should be deducted from the contract price for every ten feet "stowage space required per ton in excess of the standard herein specified." This no doubt was framed for the purpose of meeting the case put by Mr. Moore in his evidence quoted, namely, that for every loss of

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ten feet of cubic space, there was a monetary loss of $1.50. The Department, however, seem to take the view of the contract which would enable them to deduct $1.50 per ton for every ton compressed in such a way as to require more than seventy cubic feet per ton, even if the excess was merely one cubic foot. The result of their method of construing the contract would be that if a ton of hay was so compressed that it occupied 71 cubic feet instead of 70, Mr. Poirier would only receive $12.50 per ton, instead of his contract price of $14 per ton. The contract in clause 3 is open to doubt as to its true meaning by the interposition of the words "or any part thereof" after the words "for every ten feet." I should hesitate before accepting the construction placed upon it by the Department of Agriculture. I think, however, there is no proper proof of the non-compliance with this particular provision of the contract. The book produced by the Department is relied upon under the *Canada Evidence Act* as proof. These books are compiled from the slips prepared by Lieutenant Bell. Lieut. Bell was appointed for the purpose of seeing that the various contracts were lived up to. He states in his evidence that all the hay passed through his hands. He is asked:—

"Q. Did you immediately report the measurements of all the bales of hay that you measured there in St. John?

A. I did. That is to say, after each day's work the actual figures were returned to Ottawa on a slip which was provided for the purpose. The slip bore the number of each car, the number of the bales tested in the car, and the number of bales that were eventually shipped from the car.

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Q. The record in Ottawa was the record of your daily reports?

A. Yes, actually."

His evidence goes no further than the record produced from the book. I find nothing in the contract which permitted Lieutenant Bell to test a certain number of bales and to conclude that because this particular number of bales occupied proportionately more space than that provided by the contract, therefore it was to be assumed as against the suppliant Mr. Poirier, that the balance of the bales making up the ton of hay measured the same as those bales tested. The contract provides for an excess per ton. In my opinion if the Department had intended, or were entitled, to charge this sum of $1.50 per ton, they should have had a proper measurement, not jumping at it in the manner in which Lieutenant Bell performed his work.

Referring to the statement, exhibit "K" (a copy of the book), take for illustration Number 1—Car No. 18198; shipping date November 4th; net weight of hay accepted 43,629 pounds; number of bales tested, five; measurement per cubic feet, seventy three; reduction per ton $1.50; and reduction per carload $32.72. A bale of hay is said to contain 100 pounds, a ton of hay 2,000 pounds. The 43,629 pounds being the weight of the hay accepted, amounts to almost 22 tons. Lieutenant Bell tested out of these 22 tons five bales, or if it were averaged by the ton about 25 pounds of hay per ton. It would probably have turned out, or at all events it might have turned out, if he had made a proper examination, that while a considerable number of the bales might have been in excess of the 70 cubic feet, others might have been under, so that when the whole thing was computed, Mr. Poirier might

have been found to have complied with his contract. In my opinion this method of arriving at the amount due is not sufficient to prove the claim put forward.

The contract calls for a reduction of $1.50 per ton from the contract price. There is no provision for payment for excess of space occupied by any particular bale. If after the lapse of time and what has taken place, assuming the contention of the Department as to the meaning of clause 3 to be in their favour, I think they would have to prove the truth of their allegations by evidence stronger than that adduced before me. I think the Crown have failed to support their counterclaim, and the counterclaim should be dismissed.

That portion of the counterclaim referred to in paragraph 5, as follows:—"In the final settlement of the accounts of the suppliant with the Department of Agriculture, the account of the former was on the 12th August, 1902, credited with 43,633 pounds of hay at $14 a ton, amounting to $305.43, being in respect of a carload of hay referred to in paragraph 13 of the petition of right, and alleged to have been delivered by the suppliant, but which the Attorney-General claims was never received by the respondent," has been dealt with in the judgment on the main case, and was abandoned.

The result of the whole case is that the suppliant Poirier succeeds as to the sum of $235.76. He also succeeds in respect to the claim put forward by the Crown in respect to the 43,633 pounds of hay referred to in the 23rd clause of the defence. He fails in regard to the damages claimed for the wrongful conversion of his hay amounting to a sum over $1,000. The defence fails entirely as to their counterclaim. To adjust the different items that would be allowed for

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costs to and against the suppliant, and to or against the respondent, will be difficult. I think if the suppliant is allowed $250 for his costs it will be about the correct amount. Judgment will therefore be entered for the suppliant for the sum of two hundred and thirty five dollars and seventy-six cents, and for two hundred and fifty dollars costs. The counterclaim is dismissed, no further costs to or against the respondent.

Judgment accordingly.

Solicitors for suppliant: *Beauregard & Delage.*

Solicitor for the respondent: *E. L. Newcombe.*