1922
January 27.

IN THE MATTER OF THE PETITION OF RIGHT OF R. G. LONG COMPANY, LIMITED..SUPPLIANT;

AND

HIS MAJESTY THE KING......DEFENDANT.

Contract—Obligation of Crown as bailee—Reasonable care—Tort—Contractual relationship.

By a contract under seal, entered into between the suppliant and the Crown, suppliant agreed to deliver a certain number of gauntlets for the use of the R.C.M. Police, equal in every respect to the sample submitted by them. These were delivered, and upon examination, a large proportion thereof were rejected as not up to sample.

The rejected gauntlets were marked with an ordinary lead pencil mark, easily removed, and shipped back to suppliant, who returned them to Ottawa because so marked. This mark was removed by the employees of the Crown and in some instances the surface of the leather was injured in the process.

Held: That the Crown in the right of the Dominion of Canada may be liable as a bailee, and that after the rejection of the gauntlets herein it became an involuntary bailee, liable only for want of reasonable care. That its employee having chosen to erase the marks in question it became liable for whatever damage arose by reason of the way in which the erasing was done. *Brabant & Co. v. The King.* (1895) A.C. 632 applied.

2. That in this case the damage arose out of something done by an officer and servant of the Crown under a contract, and that the Crown is liable to make good any damage arising out of its contractual relations with the subject.

PETITION OF RIGHT on behalf of suppliant herein seeking to recover from the Crown the sum of $1,858.41 with interest, as compensation for the damage done to the gauntlets delivered by them to the Crown and rejected by the Crown.

November 10th and 11th, 1921.

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Case was now tried before the President at Ottawa.

Harold Fisher and *L. P. Sherwood*, for the suppliant.

E. F. Newcombe and *H. H. Ellis*, for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this (27th January, 1922) delivered judgment.

This is a Petition of Right on behalf of R. G. Long Company, Limited, a corporation having its head office in the City of Toronto. It is necessary to refer to some of the allegations set out in this petition. It alleges that by a contract under seal, dated the 19th July, 1920, entered into between the suppliant and His Majesty represented therein by the Honourable the President of the Privy Council of Canada, the suppliant agreed to deliver free of all charges at the Royal Canadian Mounted Police Store House at Ottawa, one thousand pairs of brown leather gauntlets equal in every respect to an accepted sample submitted by the suppliant, and His Majesty agreed to pay to the suppliant $3.50 for every pair of gauntlets accepted in accordance with the conditions in the said contract contained.

The 4th allegation is: "That His Majesty, by his servants, returned to your suppliant, 529 pairs of the gauntlets so delivered, but the said gauntlets were found by your suppliant to have, whilst in possession of His Majesty, been so defaced by markings of blue crayon or some similar substance as to be rendered valueless and unsaleable."

"5th That your suppliant therefore refused to accept the said gauntlets and returned the same to His Majesty."

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"6th That subsequently, His Majesty's servants in undertaking to remove the said markings so injured the substance and destroyed the colour of the said gauntlets that they remain of no substantial commercial value."

And the suppliant claimed the sum of $1,858.41 with interest.

In this petition the right of the Crown to reject the number of gauntlets in question does not seem to have been disputed. The ground of complaint is that the gauntlets so rejected had been so defaced and injured while in the possession of the Crown as to entitle the suppliant to damages. The damages being claimed as at the value of the contract price for these five hundred odd pairs of gauntlets.

The case came on before me for trial at Ottawa, on the 10th November, 1921. It was proved before me beyond reasonable doubt that the rejected gauntlets were not up to the sample, and were not in accordance with the terms of the contract. It was shown, however, that instead of these gauntlets being marked with a blue crayon or some similar substance so as to be rendered valueless and unsaleable, the mark was made with an ordinary lead pencil which could be easily removed, as shown by the witness Hackett, when one of the marks was removed within the space of a minute or so in my presence. The rejected gauntlets were shipped back to the petitioner at this time. Had the petitioner acted as they should have acted, they could easily have removed these pencil marks which would have left the gauntlets in the same state as when they were shipped to Ottawa. Instead of that, however, they returned them to Ottawa, and according to the evidence of the witnesses for the Crown the pencil marks were erased and the gauntlets returned.

At the trial three or four samples of gauntlets which were claimed to have been injured were produced to me, showing that in the process of removing the marks some slight injury had been done to the surface of the leather of which the gauntlets were made. I was not satisfied to determine the case on these samples, and directed that all the gauntlets that were rejected should be sent to Ottawa, and the gauntlets examined in my presence. Two large boxes of gauntlets were opened on the 13th January, 1922, and an examination was made on that day, and on the following day, January 14th. It appeared that in box Number 1, three hundred and thirty-one pairs of gauntlets were examined. Of these three hundred and thirty-one pairs of gauntlets, I found that two hundred and twenty-six pairs showed no appreciable indications of damage or injury. One hundred and five pairs were selected by the Counsel for the petitioner for further examination. I think it is quite clear that while with a minute scrutiny some of these one hundred and five pairs had the appearance of having been injured in the process of removing the pencil mark, it would have been an easy matter to have restored the gauntlets to their original condition when first received by the Mounted Police.

In the other box, one hundred and eighty-three pairs of the gauntlets were examined, and one hundred and sixteen pairs were placed aside for further examination.

It was conceded before me that the Crown can be held liable as bailee, and I think this concession is in accordance with the law. This was so determined in the case of Brabant & Co., *v* The King (1).

(1) (1895) A.C. 632.

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It was contended by Mr. Newcombe on behalf of the Crown that if any injury was done to the gauntlets, it was in the nature of a tort, and the Crown would not be liable for tort committed by its officers or servants. My opinion is, while in the ordinary case between subject and subject an action might have been brought in tort, nevertheless in this case the obligation of the Crown rests upon a contract, and the Crown is liable to make good any damage arising out of its contractual relations with the subject.

After the examination which I have referred to on the 13th and 14th January, I desired to have Hackett recalled with the view of enabling me to arrive at the quantum of damage. I am of the opinion that the damage was trifling. But, I wished to be assisted in arriving at the measure of damage. I therefore suggested that Mr. Hackett should be recalled, and that he should go over these gauntlets which had been put aside for further examination, and I appointed the Monday following for this purpose. I thought, as I stated, that the alleged defacement could be remove at very slight expense, but on Monday I was notified by counsel for the petitioner that they declined to appear or to agree upon any examination by Hackett or by any other person, and they claimed the right to have the matter left as it was left at the trial with the subsequent examinations to which I have referred. On this state of facts any further investigation ceased, as I could not take upon myself to have Hackett or any other person assist me in the matter of arriving at the amount of damages that should be allowed.

In my opinion, after a fairly exhaustive examination of the authorities, I think the Crown after the rejection of the gauntlets became what the sixth edition of

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Benjamin on Sales relying on the case of Okell *v* Smith, (1) describes as an involuntary bailee and they were only liable for want of reasonable care. Benjamin on Sales, 6th ed. p. 889 may be looked at.

The Crown having chosen to erase these marks and there being some slight damage, I think they are liable (1) but the damage is trifling. I think that if the petitioner is allowed the sum of fifty dollars that it will be more than ample to have covered any damage to these rejected gauntlets.

I therefore allow the petitioner the sum of fifty dollars, and under the circumstances of the case I think there should be no costs to either party.

Judgment Accordingly.

(1) (1815) I, Starkie, 107; Benjamin on Sales 6th ed. p. 870.