

EMMANUEL ST. LOUIS.....SUPPLIANT ;

1894

AND

Sept. 24.

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of right—Evidence—Omnia præsumuntur contra spoliatorem.

In an action to recover from the Crown a balance of moneys alleged to be due for labour and materials supplied in respect of certain public works, a question arose as to the correctness of a number of pay-lists or accounts rendered by the suppliant to the Crown. Before the completion of the works a Commission had been appointed to inquire into the manner in which they had been carried on. It was likely that the correctness of such pay-lists or accounts would come in question before such Commission. In view of the opening of the Commission the suppliant burnt his time-books and all the original papers and materials from which his accounts had been compiled as well as his own books of account, by which also the correctness of the accounts rendered by him might have been ascertained.

Held, that the fair presumption from the destruction of such time-books and books of account was that if they had been accessible they would have shown that the accounts rendered by the suppliant were not true accounts.

PETITION OF RIGHT for the recovery of moneys alleged to be due upon certain contracts to supply labour and materials for a public work.

The facts of the case are stated in the reasons for judgment.

June 15th, 16th, 19th, 20th and 21st, 1894.

The case came on for trial at Ottawa.

Geoffrion, Q.C., and *Emard*, in opening for the suppliant, reviewed at length the evidence in support of the suppliant's case.

Osler, Q.C., for the defence, contended that the petition of right must be dismissed because it was impossible for the suppliant to recover when he had des-

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troyed the only evidence upon which the court could properly arrive at the *bona fides* of the claim. His destruction of the documentary evidence leaves the case to be treated upon a *quantum meruit*, leaves the question at large. The suppliant's fraud wholly avoids the contract. The court cannot find in favour of the suppliant because it is unable to state that the labour he claims for has been supplied. *Omnia præsumuntur contra spoliatorem*.

He cites: *Taylor on Evidence* (1); *Lawson on Presumptive Evidence* (2); *Hanson v. Eustace* (3); *Hunter v. Lauder* (4); *The Attorney-General v. Dean of Windsor*; (5); *Harris v. Rosenberg* (6); *Bott v. Wood* (7); *Askew v. Odenheimer* (8); *Thompson v. Thompson* (9); *Johannes v. Bennett* (10).

Hogg, Q.C., followed, and dealt with the facts in evidence which made against the suppliant's right to recover.

Geoffrion, Q.C., replied.

Subsequently, by consent, counsel for the suppliant filed a memorandum citing the following authorities in answer to those cited by *Ostler*, Q.C.: *Pothier on Obligations* (11); *Best on Presumptions* (12); *Best on Evidence* (13); *Barker v. Ray* (14); *Evans's Pothier* (15); *Dalloz Rep. vo. "Exceptions"* (16); *Cartier v. Troy Lumber Co.* (17); *Drosten v. Mueller* (18); *Wharton on Evidence* (19); *Bott v. Wood* (7).

- (1) Vol. 1 p. 137.
- (2) Pp. 138, 152.
- (3) 2 How. 653.
- (4) 8 C.L.J.N.S. 17.
- (5) 24 Beav. 679.
- (6) 43 Conn. 227.
- (7) 56 Miss. 140.
- (8) 1 Bald. 390.
- (9) 9 Ind. 323.
- (10) 5 Allen 169.

- (11) *Evans's Tr.* p. 839; C.N. Arts. 1349 to 1353; C.C.L.C. Arts. 1238 to 1242.
- (12) Par. 148.
- (13) (Am. Ed.) par. 414.
- (14) 2 Russ. 72.
- (15) Vol. 2, p. 169, 339.
- (16) No. 515.
- (17) 138 Ill. 539.
- (18) 103 Mo. 633.

(19) Sec. 1264.

BURBIDGE, J. now (September 24th, 1894) delivered judgment.

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The suppliant brings his petition to recover a balance of \$63,642.29 alleged to be due to him on certain contracts made between him and the Crown, whereby he undertook to supply labour and stone for certain public works executed under the direction of the Minister of Railways and Canals, at the City of Montreal, and known as the Wellington Street Bridge, and the Grand Trunk Railway Bridge over the Lachine Canal, and Lock No. 1 of the said Canal. The total amount of the suppliant's claim is \$284,192.50, upon which he has been paid the sum of \$220,550.21. By the statement in defence the Attorney-General for Her Majesty alleges, among other things, that the pay-lists presented by the suppliant for payment were improperly and fraudulently prepared, inasmuch as many of them contain the names of large numbers of workmen who were not employed or engaged upon the work of constructing the said bridges, and who were never in fact supplied by the suppliant to Her Majesty for the purposes mentioned in the said contract; and he submits that by reason of the fraud, misrepresentations and illegal and improper dealing of the suppliant with such pay-lists an account should be taken of all matters between the suppliant and Her Majesty arising out of such contracts, and he charges that in case such an account is taken it will appear that the suppliant has already been largely overpaid for all the wages of workmen furnished by him under such contracts; and he claims that the amounts so overpaid should be repaid by the suppliant to Her Majesty.

The works to which reference has been made were commenced in January, 1893, and completed in June of that year. It was imperative that they should be executed with the least possible delay so that there

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should be no interruption of business when navigation opened in the spring. From January to the 13th of May, Mr. Etienne Parent was engineer in charge of the works and Mr. Edward Kennedy was superintendent. In May, Parent and Kennedy were suspended, and the works completed under the direction of Mr. Ernest Marceau, as superintending engineer, and Mr. John Conway as superintendent. While Parent and Kennedy were in charge of the works Patrick Coughlan was time-keeper, for the Government, of the labourers and workmen employed on the Wellington Street Bridge, other than the stone-cutters and stone-masons. For the latter, and for all the labour employed on the Grand Trunk Railway Bridge, and on Lock No. 1 of the Lachine Canal, it happened that there was no time-keeper for the Government. The time of the stone-cutters and stone-masons on the Wellington Street Bridge, and of all the labourers and workmen employed on the other works, was kept by, or under the direction of, Jacques Villeneuve, who was a brother-in-law of the suppliant and a clerk employed in the office of the Collector of the Lachine Canal. When navigation closed in the autumn, Villeneuve, we are told, was not required to attend at the Collector's office, but to hold himself ready to answer any call for service the Collector might make upon him. Under these circumstances he felt himself free, it appears, to engage himself to the suppliant as chief time-keeper for the latter. That Villeneuve was at the same time in pay of the contractor and of the Crown was not, I think, known to any of his superior officers, with the exception, perhaps, of Kennedy, the superintendent. It is possible that the latter was aware of the fact, but as to that I do not venture any opinion. It would be difficult to say, and it is not, I think, important to inquire, how far Villeneuve's presence on the works in the capacity

of time-keeper contributed to the circumstance that, with the exception I have mentioned, no provision was made for keeping, on the part of the Government, a record of the time the men supplied by the suppliant were actually employed on the several works. The material fact is that Villeneuve was time-keeper for the suppliant and not for the Crown. It was said by Mr. Geoffrion, and on the evidence before the court I agree, that it was no fault of the suppliant that the officers of the Government neglected to appoint time-keepers. At the same time it affords him no excuse if he took advantage of the opportunity thus afforded him to render false accounts to the Government.

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During the progress of the work, Coughlan made up lists showing the time of the labourers and workmen on the Wellington Street Bridge, other than the stone-cutters and stone-masons, and delivered the lists to Joseph Alfred Michaud, the suppliant's chief clerk and book-keeper. The time-books, lists and memoranda kept by Villeneuve and his assistants were also handed in to Michaud. From these materials a number of clerks, under the direction of Michaud, compiled pay-lists, of each of which several copies were made. Such lists when completed were submitted to and certified by Parent, Kennedy and Coughlan, and after May 13th, by Marceau and Conway, and by James Davin or Michael Doheny as time-keeper for the Government. The lists were then forwarded to the Minister of Railways and Canals, and on them the payments mentioned were made, and upon them, in the first instance, the suppliant now rests his claim to be paid the balance referred to.

With reference to the certificates, it appears that Mr. Parent had no knowledge as to whether the lists were correct or not, and he certified to their correctness because they had first been signed by Kennedy

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and Coughlan, whose duty it was, he thought, to know. Kennedy was not called by either party. He was said to be ill, and it does not appear on whom he relied, but it is clear that personally he had no means of knowing that the lists constituted true and just accounts against the Government. Coughlan had personal knowledge of the time of the men who worked on the Wellington Street Bridge, other than the stone-cutters and stone-masons, and so far his certificates are entitled to consideration. For the rest he signed the lists because Kennedy told him to do so, and of their correctness or incorrectness he knew nothing.

There is no controversy as to the stone. It was measured for the Government by Michael Doheny, and his measurements and certificates are not called in question. Neither is there any question as to the correctness of the lists certified to by Marceau, Conway and Davin or Doheny. Of the total claim of \$284,192.50, some \$80,394.57 is supported by certificates of Government officers upon which reliance may properly be placed. For the balance of \$203,797.93 such certificates have been given negligently and improvidently, to say the least, and are utterly valueless.

Anticipating, no doubt, the weakness of a case resting upon such certificates, the suppliant has sought to support the pay-lists by other evidence. But here he is met by a difficulty of his own making.

Before the several works mentioned were completed the Government decided to appoint a Commission to inquire into the manner in which they had been carried on, and this coming, no doubt, to the knowledge of the suppliant he destroyed all the time-books and other original papers and material in his possession, by which the correctness of the pay-lists in question could be tested or verified. He also destroyed his

books of account, his ledger, his journal, his cash-book, his bank pass-book and his returned cheques. Michaud, his chief clerk and book-keeper, selected the books and papers to be destroyed and left them on the table in the suppliant's office, and the latter took them away and burned them. If we had the time-books and other original materials from which the pay-lists were compiled, it would of course be a simple matter to see whether the lists are correct or not. In like manner if we had his books of account, showing, as they no doubt would show, how much money was from time to time paid by the suppliant to the men for whose labour he makes his claim, we would have the means of verifying such lists. But by the destruction of his books and papers the suppliant has rendered it impossible in either way to ascertain the correctness of the accounts that he has rendered.

In these circumstances he has called, so far as was possible, all the time-keepers and clerks who were engaged in compiling the lists to testify that they had done their work honestly and faithfully. There may be a question, though none was raised, how far, in such a case as this, such evidence is admissible for the purposes for which it was tendered. But whether admissible or not, the evidence was of necessity of a general character, not touching or directly supporting particular items in the accounts, and cannot, I think, be accepted as excluding all chance of fraud, and as being conclusive of the correctness of such accounts. Against them are facts well established, and fair presumptions arising from such facts that with reasonable certainty, at least, lead to an opposite conclusion.

In the first place it is clear that the works referred to have cost a very large sum more than under any circumstances consistent with the absence of fraud, they should have cost. Part of the excessive cost is

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no doubt attributable to the necessity of completing the works in a short time, and part to the difficulties incident to the season during which they were executed. But any fair allowance for such causes falls far short of accounting for the excess of cost that I have mentioned. Works that were estimated to cost some \$170,000, and the cost of which, executed when and as they were, ought not at most to have exceeded \$250,000, have in the end cost nearly \$500,000. So far as this was attributable to the men employed idling away their time the suppliant is not at fault. That clearly was no concern of his. Such evidence, however, as we have on the subject tends to negative idling, though I must confess that I have great hesitation in accepting that conclusion. I fear there was a good deal of the slackness which is too apt to prevail when the eye of the master is absent. But be that as it may, it must, I think, be said that the evidence as a whole points rather to a falsification of the pay-lists as the principal cause of the excessive cost of labour employed on the works.

We know, of course, that the names of the clerks whom Michaud had in the office compiling the lists appear thereon as foremen, or in some capacity other than that in which they were engaged; and that the suppliant in that way made the Government, without its knowledge, pay for their services. That, so far as the amount of money involved is concerned, is comparatively speaking, a small matter. The importance lies in the fact that it shows that the suppliant did not hesitate in that respect to falsify his accounts. Then we have the direct testimony of Michael Doheny, which, if credited, shows beyond doubt, that with respect to the stone-cutters, the suppliant has included in the pay-lists the names of a large number of men who were not employed on the works at or for the time stated in

such lists. Doheny's evidence, it is argued, is open to adverse comment; but there is this to be said for it, that it fits in remarkably well with the facts of the case about which there is no doubt.

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Then, too, there is the destruction by the suppliant of his books and papers. It is suggested that he burnt them because he feared the inquiry before the Commission would reveal some payments that he had made for purposes which he wished to conceal. That however would not account for the destruction of the time-books and memoranda from which the lists in question were compiled. As the books of account and the time-books were destroyed at one and the same time, and so far as appears with the same object in view, the conclusion seems at least reasonable that the suppliant desired to conceal something that would appear as well from the one as the other. Now the question of the correctness of the accounts he had rendered was one that was likely to arise on the inquiry, in view of which such books and papers were burnt, and, if such accounts were not true but false accounts, that fact would no doubt have been ascertained by reference either to his general books of account or to the time-books and other original papers from which the lists or accounts had been compiled. It has not been suggested, and it does not occur to me, that there was anything else common to the two sets of books that the suppliant would think it necessary to conceal. The fair presumption to draw from this wilful destruction of the evidence is, I think, that if such evidence were accessible it would show that the pay-lists which the suppliant has furnished to the Government and upon which he makes his present demand do not constitute true and just accounts of the labour he supplied to the Crown under his contracts. The rule of law that justifies such a presumption is, I think, a most whole-

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some one, especially where the destruction of evidence is accomplished with the deliberation and thoroughness that distinguishes the present case. The petition will be dismissed with costs.

With reference to the claim of the Crown to recover back a portion of the money alleged to have been overpaid to the suppliant, an application has, since the argument, been made to the court on behalf of the Crown to amend the statement of defence and to strike out so much thereof as sets up any counter-claim, but without prejudice to the right of Her Majesty to prosecute an action in respect of such claim. On the motion, counsel for the suppliant appeared and did not oppose the application, and I shall allow it with costs to the suppliant, and without prejudice to the right of Her Majesty to maintain an action to recover any moneys that may have been overpaid to him. The costs to the suppliant will include as well any additional costs of the trial occasioned by the counter-claim, as of the motion to amend, and the same may be set off *pro tanto* against the respondent's costs on the dismissal of the petition.

Judgment accordingly.

Solicitor for suppliant: *J. U. Eward.*

Solicitors for respondent: *O'Connor & Hogg.*