

ROBERT B. HUMPHREY (SUPPLIANT)...APPELLANT;

1892

AND

*Feb. 22, 23.

HER MAJESTY THE QUEEN (DE- }
FENDANT..... } RESPONDENT.

*May 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Contract—Carriage of mails—Authority of P. M. G. to bind the Crown—
R. S. C. c. 35.*

An action will not lie against the Crown for breach of a contract for carrying mails for nine months at the rate of \$10,000 a year, made by parol with the Postmaster-General, and accepted by the contractor by letter, notwithstanding it was partly performed, as, if a permanent contract, being for a larger sum than \$1,000 it could not be made without the authority of an order in council and if temporary it was revocable at the will of the Postmaster-General.

APPEAL from a decision of the Court of Exchequer (1) in favour of the respondent.

The suppliant, as agent of a steamship company, had tendered for the contract to carry the mails between St. John, N.B. and Digby, N.S. His tender was not accepted but the Postmaster-General verbally agreed to allow him to carry the mails until a contract should be made for the service which offer the suppliant accepted by the following letter :—

OTTAWA, Ont., 30th October, 1888.

To the Honourable John Haggart, Postmaster-General :

SIR,—I beg to state that I hereby accept your proposition to carry Her Majesty's mails between St. John and Digby and Annapolis upon usual conditions, and at and upon the same price as has been subsisting between your department and the Nova Scotia Steam-

*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

1892 ship Company, temporarily, that is, for a period of nine
 HUMPHREY months, subject, as usual, to cancellation at an earlier
 v. period if deemed necessary by your department.
 THE
 QUEEN.

I have the honour to be,

Your obedient servant,

(Signed) ROBERT B. HUMPHREY,

On behalf of N.B. and N.S.SS.Co.

The price formerly paid for the service was \$10,000 per annum and the usual cancellation referred to was on giving six months notice, of the intention of the department to terminate the contract.

The suppliant carried the mails under this agreement for some two months when the department notified him that the agreement was at an end, and the mails were thenceforth carried by a government steamer.

The suppliant, by petition of right, claimed damages from the Crown for breach of contract claiming that he had expended considerable money in preparing steamers to carry the mails. The case was tried at St. John, N.B., when judgment was given for the suppliant and a reference ordered to assess the damages.

On application of the Crown the case was reopened and further evidence by the Postmaster-General and his deputy submitted, when the previous decision was reversed and judgment given for the Crown. The suppliant appealed.

Pugsley Q.C., Solicitor General of New Brunswick, for the appellant.

Hogg Q.C. for the respondent.

Sir W. J. RITCHIE C.J.—Assuming a contract was entered into between the Postmaster-General as alleged by the suppliant, had the Postmaster-General power to bind the Crown by such a contract? This de-

pende on the statutory authority conferred on the Postmaster-General by R. S. C. cap. 35, by which the power of the Postmaster-General to make contracts for the carriage of mails is governed and to the provisions of which every contract or arrangement for the carriage of mails to bind the Crown must conform.

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Sections 54, 60 and 62 of the act provide as follows :

MAIL CONTRACTS AND CONTRACTORS.

54. The Postmaster-General, before entering into any contract for carrying the mail involving an annual cost of more than two hundred dollars, shall give at least six weeks previous notice by advertisement in such newspapers as he selects in each case, and by public notices put up in the principal post offices concerned in such contract,—that such contract is intended to be made, and of the day on which tenders for the same will be, by him, received.

2. The contracts, in all cases in which there is more than one tender, shall be awarded to the lowest tenderer who offers sufficient security for the faithful performance of the contract, unless the Postmaster-General is satisfied that it is for the interest of the public not to accept the lowest tender.

60. The Postmaster-General may, with or without previous advertisement, contract with any railway or steamboat company for conveying the mail ; but no contract involving the payment of a larger sum than one thousand dollars shall be entered into without the approval of the Governor in Council.

62. The Postmaster-General may make temporary contracts for such services until a regular letting in the form prescribed can take place.

This contract in this case was, as appears by the suppliant's letter of acceptance, only temporary and, as such, terminable when a regular contract was entered into as provided by sec. 62. If not, being for a larger sum than \$1,000 the Postmaster General had no authority to enter into it without the approval of the Governor in Council.

STRONG J.—At the conclusion of the argument. I was of opinion that the judgment of the Exchequer Court was clearly right, and subsequent consideration has not led me to alter this opinion.

Under R.S.C. cap. 35 sec. 60 the Postmaster-General had no power to enter into such a contract as this,

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Strong J.
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without an order in council, save under the authority conferred by sec. 62, which is expressly confined to a temporary contract until a permanent contract should be effected. The Postmaster-General treated this as a temporary contract under sec. 62 and accordingly put an end to it so soon as he had effected a regular permanent contract. In this he was clearly within the terms of the statute. The contract stated in the suppliant's letter of 30th October, 1888, expressly recognizes it as being a temporary contract and one which might be put an end to at an earlier period than nine months at the election of the Postmaster-General. I can see no ground whatever for doubting that this contract is referrible only to the powers conferred by sec. 62 and that it was consequently terminable at the will of the Crown. The words "subject as usual to cancellation at an earlier period if deemed necessary" indicate as strongly as words can that such was its meaning. Further, I am unable to see any reason for implying from the words just quoted any condition that the cancellation should be in any particular terms or otherwise than absolute at the pleasure of the Postmaster-General.

The appeal wholly fails and must be dismissed.

TASCHEREAU J. concurred.

GWYNNE J.—Whether it was or was not prudent in the appellant to enter into a contract in the terms of his letter of the 30th October, 1888, if the receipt of that letter and the manner in which it was dealt with by the Post Office Department constituted a contract in the terms of the letter, is not the question. In my opinion it was not in the power of the Postmaster-General to enter into such a contract, that is to say for a definite period of nine months and exceeding \$1,000, and further that if the letter is to be construed as containing the terms of the contract which the appellant

did enter into with the Postmaster-General, it was terminable at the pleasure of the department and therefore that this appeal should be dismissed. I am of opinion further that the learned Judge of the Exchequer Court came to a correct conclusion when he held that the Postmaster-General had not entered into a contract with the appellant for the period of nine months or for any definite period. The intention of the department was, there can I think be no doubt, to enter into an arrangement purely *temporary* in accordance with the usual practice of the department as to which practice the evidence offered was admissible and should have been received.

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 Gwynne J.

PATTERSON J.—I do not see how to get over the limitation contained in section 60 of the Postal Service Act (1) which requires the approval of the Governor in Council whenever the contract involves the payment of a larger sum than \$1,000. That limitation of the authority of the Postmaster-General seems to apply to temporary contracts effected under section 62 as well as to what that section calls a regular letting in the form prescribed. We have not, therefore, the duty of construing the contract on which the appellant relies, but I may say for myself that I see no great difficulty in holding that it was a contract for nine months, subject to be cancelled at an earlier period *if necessary*, and I do not think any necessity for its cancellation is shown.

The absence of the order in council makes it necessary to dismiss the appeal.

Appeal dismissed with costs.

Solicitor for appellant: *W. Pugsley.*

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

(1) R.S.C. ch. 35.