

[CIVIL JURISDICTION.]

1890
Aug. 22.

H. MARKS AND COMPANY v. THE ATTORNEY-GENERAL.

Breach of contract—Agency—Provincial Department—Liability of Colonial Government—Petition of Rights Act, 1860—Stamp Ordinance 1883.

The Colonial Government is liable for breach of contract entered into by the Native Commissioner on behalf of native Fijians though not for public service, the Provincial Department being held to have acted in such a case as agent for undisclosed principals.

Mr. Irvine for the plaintiffs.

The Attorney-General (Mr. Udal) in person.

The facts and arguments of the case, which was heard on the 4th, 5th, and 11th August, when the Court reserved its decision, sufficiently appear from the judgment delivered on the 22nd.

H. S. BERKELEY, C.J. This was an action to recover the sum of 11*l.*, the value of an iron safe under the following circumstances:—Some time during the month of June, 1889, Mr. James Cocks, then Assistant Native Commissioner, a principal officer of the Provincial Department of the Government of the Colony, in company with a native Fijian visited the store of the plaintiffs who were at that time the contractors to Government for general supplies to the public service. Mr. Cocks on that occasion informed Mr. Caldwell, the plaintiffs' salesman, to whom he was well known in his official capacity, that he desired to purchase an iron safe for which he said the Provincial Department would pay and asked to be shown one. This was done. The safe was examined by the Fijian and Mr. Cocks, and, after some discussion between Cocks and Caldwell as to price, a

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reduction was made in the marked price from 137. to 117. and a purchase was effected at that figure, and the safe was delivered to the Fijian who had it then and there taken away. A memorandum of the sale was then made and filed by Mr. Caldwell, and about one month later the safe was charged to the Colonial Government as having been supplied to the Provincial Department, the entry in the plaintiffs' books bearing the ear-mark "N.O." (meaning Native Office), a designation by which the Provincial Department is apparently commonly known. A voucher on a "Memorandum of Service" form was later on in the month of August following sent in to Mr. Cocks at the Provincial Department. Mr. Cocks shortly after this retired from the public service, and on the plaintiffs requesting payment for the safe they were informed that the Provincial Department knew nothing of the transaction and that no vouchers for any safe sold to the Department could be found; and the plaintiffs were then informed that the Department could not accept any responsibility in the matter, and they were referred to the Colonial Secretary who repudiated any liability on the part of the Colonial Government, the safe having been delivered without requisition as required in the case of goods supplied for the use of the public service. On the plaintiffs pressing for payment they were informed by Mr. Stewart that the Government would not pay and that the amount must be sued for. It was stated by Mr. Caldwell, that, as far as he remembered, Mr. Cocks at the time of the purchase of the safe promised to send down a requisition for it subsequently, and he gave that as his reason why the safe was not charged to the Provincial Department on the day the sale was effected. In the view

which I take of this case, the delivering of the safe on the verbal order of Mr. Cocks and without requisition beforehand is of no importance, for I think on the plaintiffs' own showing the sale was one to the Provincial Department for the use of certain unknown Fijians and not to that Department for the use of the public service. Had the evidence shown this to have been a sale of goods for the use of the public service the action must have failed; for, under the contract between the plaintiffs and the Colonial Government for the supply of goods, &c., to the public service, such supplies are only to be delivered on requisition; and there is nothing to show any recognised departure on the part of the Government from the conditions of the contract which would have justified the plaintiffs in supplying goods on the verbal orders of public officers. Any goods so supplied would be at the risk of the person supplying. It was stated by Mr. Friend, of the Provincial Department, that the "Native Department acts as the agent of the natives in getting supplies" for them, that "when officers of the Department obtain supplies on behalf of natives they do so without requisition," that requisitions are only used by the officers of the Department when supplies are obtained on public account." And Mr. Stewart, the Assistant Colonial Secretary, said, "in obtaining supplies for provinces and individual natives the Native Department don't requisition because it is not considered a Government matter." It is clear to me on the evidence that this safe was not purchased by Mr. Cocks on public account, but was purchased by him as an officer of the Provincial Department, obtaining supplies for certain unknown natives; and this was at the time known to the plaintiffs. It was suggested at the trial that there was a sale

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direct to the Fijian who accompanied Mr. Cocks, and that the sale was made on Mr. Cock's personal guarantee and apart from his character of officer of the Provincial Department, and the fact that the safe was not charged as supplied to Provincial Department for some two months after the sale was relied on as supporting this contention, and it was proved that on a previous occasion Mr. Caldwell had sold direct to a Fijian on the personal guarantee of a former Native Commissioner. I feel, however, that I must believe Mr. Caldwell when he declares that he did not sell in this way, but that he sold to Mr. Cocks on the understanding that the Provincial Department would pay for the article sold, and the nature of the article sold is inconsistent with the supposition that it was a sale direct to the Fijian. It is however a question of fact, and I believe the witness to be speaking truly.

With respect to the relations between the Provincial Department and the natives of the Colony, and with respect to the view the Colonial Government takes of such relationship *inter se* and as regards the general public, it was stated by Mr. Friend that the Department kept at the Bank of New Zealand an account entitled "Provincial Department Deposit Account" which "consists of moneys belonging to the various native provinces, districts, towns, and individuals of the Colony. That cheques in payment of supplies obtained by the Department on behalf of the natives are drawn against the 'Provincial Department Deposit Account,' and that the Native Commissioner draws against the fund." And Mr. Stewart in his evidence said, "The Provincial Department deposits" do not form part of the public account, they do not appear in the annual statement of accounts, "nor in the statement of Colonial Assets

and Liabilities." In other words, the evidence amounts to this that the Government regard the moneys standing to the credit of the "Provincial Department Deposit Account" as moneys belonging to certain unnamed "native provinces, districts, towns and individuals" as principals, for whom the Provincial Department of the Colonial Government act as the general agent for obtaining supplies, which when obtained are paid for out of such money. It was admitted that the Native Commissioner and all the officers of the Provincial Department, with the exception of the accountant, are paid solely from public funds, the accountant receiving a portion of his salary from the Provincial Fund. I think that this contract for the purchase of the safe must be regarded as one made between Mr. Cocks on behalf of the Provincial Department acting as Native Agent for obtaining supplies and Mr. Caldwell acting on the part of the plaintiffs. The authority of Cocks to act on behalf of the Department is fully established, similar contracts having on previous occasions been made by him and recognised by the Department. I think Mr. Cocks had authority to bind the Department without requisition when the goods were being purchased, as in this case, for native use, and I think, therefore, that the Department, as agent for the natives, is liable to the plaintiffs for the value of the safe. If in this particular instance Mr. Cocks has acted without actual authority and in fraud of the Department, the loss must fall on those who by previous behaviour held out Mr. Cocks to the public as a person having authority to make contracts such as this, and not upon the plaintiffs who acted in good faith with Mr. Cocks, believing him, and reasonably so, to have authority.

The questions then arise, what is meant by the

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expression "the Provincial Department as agent" for the natives?—what is the nature of the responsibility incurred towards the general public by the Department when acting as such agent? I will state my view of the second question first. I think that the responsibility incurred is that of an agent for an undisclosed principal. The various native provinces, districts, towns and individuals referred to by Mr. Friend are, in my opinion, the undisclosed principals of the Provincial Department in its character as agent for obtaining supplies. As in the case of an ordinary agent for an undisclosed principal, the liability is a personal one: *Paice v. Walker*. (1) So in this case the liability is a departmental one. There can be no personal liability attaching to the officers of the Department, as it was suggested there might be. Here the contract is made with the Department,—it is true as the agent for some unknown person or persons,—but still the contract is with the Department. Such a contract is similar to a contract made with agents acting for foreign principals, as in the case of *Paice v. Walker* to which I have just referred, and on the authority of that case the Department here must be held to have contracted personally, as it were, with the plaintiffs. In an old case of *De Gaillon v. L'Aigle* (2), referred to in *Paice v. Walker*, Eyre, C.J., says: "I am not aware that I have ever concurred in any decision in which it has been held, that if a person describing himself as agent for another residing abroad, enters into a contract here, he is not personally liable on the contract."

I think there is an exact analogy between the Provincial Department acting as the agent for the native community, who are by protective legislation much hedged round in trading directly on their own account, and an

(1) L. R. 5 Ex. Cas. 173.

(2) 1 B. & P. 368.

ordinary agent acting for a foreign principal. Now what is meant by "Provincial Department acting as agent for the natives"? That expression seems to me to have only one meaning, namely, when amplified, "The Colonial Government of Fiji in its Provincial Department acting as agent for the native community." The use of the word Department shows this to be the true meaning. Except so understood the expression is meaningless. Provincial Department of what? Why of the Colonial Government, of which there are several other departments. I cannot but regard the Colonial Government as the agent. The Provincial Department is merely the medium through which the Government conducts its agency—that is all. In the conduct of the agency too—the receipts for payments made by the Department run as follows, "received from the Colonial Government of Fiji," and are not stamped. The cheques too drawn against the Provincial Department Deposit Account are not stamped. Now by the Stamp Ordinance 1883 under the heading, "General exemptions from Stamp Duty" is the following:—

Every instrument for effecting the payment or transmission of money, or for acknowledging any such payment, or receipt, by to or on behalf of Her Majesty or the Colonial Government.

The receipts and cheques then, which are given on account of goods supplied to the Department on behalf of natives, are not stamped because they are given and drawn on behalf of the Colonial Government. I think this shows the true position of the Government on this contract; and such position may be further tested by applying the following words of Cleasby, B., in *Paice v. Walker* (1),—"Suppose that the present case were one in which the defendants had in a similar form

(1) L. R. 5 Ex. Cas. at p. 178.

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contracted to buy, and were suing the seller in their own names for non-delivery; would it be possible to hold them not entitled to sue?" I do not think it would be possible. I am of opinion, therefore, that the Colonial Government is responsible on this contract made by Mr. Cocks of the Native Department on account of an undisclosed native principal, that principal being in turn responsible to the Government as agent. It is true that the goods in the present case were supplied to the Government without requisition, but it is fully established on the evidence of Mr. Stewart and Mr. Friend that it is the practice of the Government when contracting as native agent through its Provincial Department for supplies to the natives to dispense with the rule as to requisitions, which the Government enforces when contracting through its several departments for supplies for the general public service of the Colony. That being so, this action is properly brought against the Attorney-General, the claim being of the same nature as claims which may be preferred against the Crown in England under the Petition of Rights Act, 1860, and the plaintiffs are entitled to judgment for the amount claimed by them with costs.

Judgment for plaintiffs with costs.