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Report : Mr. Wright

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IN THE SENATE OF THE UNITED STATES.

FEBRUARY 12, 1875.—Ordered to be printed.

Mr. WRIGHT submitted the following

REPORT:

[To accompany bill H. R. 2170.]

On the 29th day of May, 1867, Timothy D. Crook, of Nebraska City, Nebr., entered into a contract with Capt. J. H. Belcher, assistant quartermaster, United States Army, to deliver at Fort Dodge, Kansas, between the 1st day of August and the 1st day of December, 1867, one thousand two hundred and seventy tons of good merchantable prairie-hay, for which he was to receive the sum of \$10.93 per ton.

One of the conditions of the contract was that, in case Mr. Crook failed to furnish the amount of hay stipulated, the Government should have power to retain such amount of money as should indemnify it for any and all defects and deficiencies in the execution of the contract on the part of Mr. Crook.

It was further stipulated that the Government should pay for the hay on vouchers to be issued on the delivery of each 200 tons, in such funds as the Government might provide for that purpose; but it was provided that the Government should retain 10 per cent. of the contract-price, and might retain all, until the whole amount of the hay was delivered.

It appears from the evidence that Mr. Crook proceeded on or about the 1st day of August to Fort Dodge with a competent force of men, teams, and machines, for the purpose of cutting and delivering the hay. He did deliver, it appears, 800 tons of hay, and asks for relief for his failure to deliver the remaining 470 tons for the following reasons:

At or about the time of his arrival, it is said that the cholera was raging with great violence at Fort Dodge, and that many deaths occurred. Mr. Crook's men were many of them taken sick, and four of them died. This greatly demoralized his working-force, and a number of his men left. It also appears that about the time of the arrival of Mr. Crook's party there were demonstrations of hostility on the part of the Indians. Mr. Crook applied to the officer in command at the fort for an escort or guard of soldiers, which could not be furnished on account of sickness which was prevailing among the soldiers. In consequence the work of cutting and delivering the hay proceeded under constant apprehensions of attack. A portion of the party had to be detached to stand guard, and the men who were running the machines refused to work during the absence of the hauling men and teams, but would assemble and prepare for defense.

On the 6th of September they were attacked by Indians; one man was killed, several mules stolen, and the machines broken.

The committee are of the opinion, from a careful examination of the evidence, that Mr. Crook made every reasonable effort to comply with the terms of the contract, and was only prevented from doing so by obstacles which could not be foreseen, and which were entirely beyond his control.

It appears from the papers submitted to the committee that Mr. Crook received from the quartermaster at Fort Dodge four vouchers for the receipt of 800 tons of hay—200 tons each—each voucher \$2,186. Three of these vouchers were, it appears, paid, less 10 per cent. which was retained under the terms of the contract. The voucher unpaid, to wit, \$2,186, and the 10 per cent. retained on previous vouchers, to wit, \$655.80, in all, \$2,841.80, is the amount Mr. Crook claims is in equity and justice due him from the Government.

It appears from the papers in the case that the Government has an unsatisfied claim against Mr. Crook. By the terms of the contract Mr. Crook was bound to make good any loss to the Government by reason of any failure on his part to comply with the terms of the contract. In consequence of his failure to furnish the required amount of hay, the Government was compelled to purchase during the early summer of the following year 85 tons of hay, at \$35 per ton, amounting to \$2,975. Deduct contract-

price, \$926.50, makes the loss to the Government from Mr. Crook's failure to furnish the stipulated amount of hay, \$2,048.50. Unquestionably it was the duty of the Department to charge Mr. Crook with that sum, and if there was any reason to believe that his failure to fulfill and perform his contract was due to any negligence on his part, or lack of energetic, faithful effort to do his duty, it would be very wrong even for Congress to pass an act to relieve him from the failure to fulfill his contract. But believing Mr. Crook's failure was owing to unavoidable causes, we think it would be too much like the Jew exacting the pound of flesh for the Government to insist on the strict letter of the bargain.

The vouchers issued to Mr. Crook from time to time by the United States quartermaster were signed in blank by Crook and sold in the ordinary course of business to D. I. McCann & Co., of Nebraska City, Nebr. McCann & Co. set up the claim that these vouchers are commercial paper, and as such, as soon as issued, it is obligatory on the Government to pay them. This question was submitted to the Department, and by it fully considered and decided adversely to the claim. We see no reason to question the correctness of this conclusion. McCann & Co. can, therefore, have secured no rights by the transfer of these vouchers by Crook to them than the rights possessed by Crook. As the question as to McCann & Co.'s rights has been pertinaciously insisted on, and has been carefully considered by Assistant Judge-Advocate-General W. M. Dunn, his decision, as approved by the Secretary of War, is appended to this report.

The committee reach this conclusion: That in consequence of the almost insurmountable obstacles in the way of Mr. Crook fulfilling his contract, he should not be held responsible for the loss to the Government caused by reason of his failure; and that, in justice and equity, he should be paid the full contract-price for the hay he delivered. That on that contract he is entitled to receive the sum of \$2,841.60.

This conclusion is in accordance with the opinion of the Quartermaster-General. The committee, therefore, report back the bill, and recommend that it pass.

WAR DEPARTMENT, WASHINGTON CITY, May 5, 1870.

In the matter of the claim of D. J. McCann & Co., for payment of a certain voucher issued by an officer of the Quartermaster's Department to T. D. Crook.

This voucher is for 200 tons of hay, at \$10.93 per ton, amounting to \$2,186, delivered at Fort Dodge, Kansas, September 26, 1867, under contract made between Capt. J. H. Belcher, assistant quartermaster, and T. D. Crook, dated May 22, 1867.

After the voucher was duly certified and approved, the usual receipt attached to such vouchers was signed in blank by Crook, and the voucher was, in the ordinary course of business, sold by Crook to Messrs. D. J. McCann & Co., of Nebraska City, Nebr.

No question is raised as to the delivery of the hay in quantity, as set forth in the voucher, or in quality, as required by the contract.

The Quartermaster's Department has refused payment on the ground that subsequent deliveries which, by the terms of the contract, were to have been made by the contractor, Crook, were not made, and that his default in this respect occasioned greater loss to the Government than the amount of the voucher in question; and it satisfactorily appears that this statement is true. The claimants reply that the default was occasioned by the prevalence of cholera and Indian troubles in that locality at the time the hay should have been cut, &c. To which the Quartermaster's Department replies that it is not for the executive department to excuse the non-fulfillment of contracts, but to enforce them; in which it is again right.

Two provisions of the contract on which the hay specified in the voucher was delivered are of controlling importance in the consideration of this case:

"First. That if default shall be made by the said party of the second part in the time of the delivery of the said hay, or in any of the provisions of this contract, the said party of the first part shall have power to supply any deficiency that may exist by purchasing in open market, or in such manner as he may elect, and the said party of the second part shall be charged with the difference in cost."

Such a default did occur, and it became necessary in consequence thereof for the Government to supply the deficiency by a purchase of 85 tons of hay in open market, which cost the Government \$35 per ton, amounting to \$2,975.

To this it is replied that the contractor was not in default when this voucher was issued, and attention is called to the following provision of the contract:

"The said party of the first part hereby agrees, for and on behalf of the United States of America, to pay, or cause to be paid, to the said party of the second part, the sum of \$10.93 for each and every ton of 2,000 pounds of hay delivered and accepted in accordance with the terms of this contract, as follows, to wit: On the delivery and acceptance of each 200 tons of hay on vouchers issued by the officer of the Quartermaster's Department at Fort Dodge, Kansas, in such funds as may be provided by the Government for that purpose, or as soon as the funds shall be received for that purpose."

It is claimed that under the foregoing stipulation, an installment of 200 tons having been duly delivered, the obligation to pay became absolute. But there is a proviso to the stipulation, which is the second of the two provisions deemed of controlling importance in the consideration of this case, as follows:

“Provided, however, That the said party of the first part shall have the power to retain any or all, and shall retain 10 per cent. of the money to be paid as aforesaid until the completion of this contract according to the terms, intent, and meaning thereof.”

Thus it appears that by an express provision of the contract the Government was not bound to pay a cent to the contractor until the contract, as an entirety, was fulfilled. He could not, therefore, have pretended to have a legal demand on the Government for hay delivered, when the damages to the Government on account of his subsequent defaults amounted to more than the balance due him on his deliveries.

The final position assumed by the attorneys for the claimants, and the one which they press with great earnestness is, that this voucher must be regarded as commercial paper, and they make the following quotation from the decision of the Supreme Court of the United States in the case of the “Floyd acceptances:”

“It must be taken as settled that when the United States became a party to what is called commercial paper, by which is meant that class of paper which is transferable by indorsement or delivery, and between private parties is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation, they are bound in any court to whose jurisdiction they submit by the same principles that govern individuals in their relations to such paper.”

This voucher is not commercial paper. It is not such a paper as between private parties would be transferable by indorsement or delivery, so as to enable the holder to bring a suit in his own name. It is neither a note nor a bill of exchange. It is simply a certificate by a proper public officer that such an amount of supplies has been delivered at such a time and place, on a contract with the Government of such a date.

The blank receipt attached thereto to be signed by the contractor is not a necessary part of the paper, as it would be just as valid against the Government if the receipt were not there. The receipt could be written on the certificate when the amount therein specified should be paid.

Nor is this paper, even in the hands of an innocent holder, exempt from inquiry into the circumstances under which it was issued. If such were the case, the provisions of the contract last quoted would be of no value to the Government, as the contractor might immediately on the receipt of a voucher transfer it, and thus, if the argument of counsel be correct, compel a payment to be made notwithstanding the above important provision.

This voucher, with the blank receipt thereto attached, is such a transfer of the right to receive the amount named in the voucher as enables the holders to claim the amount from the Government, as against the contractor, and to receive it, provided the Government has no sufficient offset against either the contractor or the holder of the voucher. If the Government has such an offset, it has the right to assert it.

Such vouchers as the one on which this claim is based, though not commercial paper, were during the war, and to a considerable extent have since been, articles of commerce.

They were dealt in as public securities, and but few contractors could have fulfilled their contracts had they not been able to raise money by the sale or hypothecation of vouchers received from time to time during the progress of the fulfillment of their contract.

The case under consideration, like many others that have come to my knowledge, is one of great hardship upon the purchaser, but the rule of “*caveat emptor*” applies in this as in other purchases.

It is respectfully recommended that this claim be rejected.

W. M. DUNN,
Assistant Judge-Advocate-General.

Approved.

WM. W. BELKNAP,
Secretary of War.

Claim of Timothy D. Crook, (H. R. 2170.)

The Committee on Claims in the Senate, while concurring in the finding of facts as set out in the foregoing report of the House committee, are unable to concur in the conclusion that the obstacles in the way of the performance of the contract on the part of Mr. Crook are so “insurmountable,” or that the efforts made to comply with the same are of such a character as to relieve him from his liability to respond to the Government for the damages sustained by his non-performance. To

our minds it is only a case where he entered into a contract known to be surrounded with dangers, made his bid, and entered upon the fulfillment of his contract with the knowledge that he would probably meet with obstacles, which he did meet with, and now asks that he shall have as full pay as if he had fully performed. He certainly is not legally entitled to the full contract-price, nor do we think he is equitably so entitled. In our opinion, all he is entitled to is the difference between the amount paid for the 85 tons of hay, (\$35 per ton, which seems to have been reasonable,) less what he would have been entitled to if he had delivered the same, (at \$10.93 per ton,) when deducted from the amount of the outstanding and refused voucher, and the 10 per cent. withheld upon the prior vouchers; and this would make the account stand thus:

Voucher		\$2,186 00
Ten per cent. on the three prior vouchers withheld under the terms of the contract.....		655 80
		<hr/> 2,841 80
Deduct amount paid by the Government for 85 tons hay.....	\$2,975 00	
Less contract-price.....	<u>929 05</u>	
		<hr/> 2,045 95
And we have balance due claimant.....		795 85

For this amount he should be paid; and we recommend that the House bill be so amended, and, as thus amended, that it do pass.