

**H. W. PEABODY & CO. AND SMITH, BELL & CO., PLAINTIFFS
AND APPELLEES, VS. PACIFIC EXPORT AND LUMBER COMPANY,
DEFENDANT AND APPELLANT.**

G. R. No. 3622. August 26, 1907

Ponente: TRACEY, J.

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TRACEY, J.:

The Manila office of H. W. Peabody & Co. made a contract to sell lumber to the Government upon an order of the Insular Purchasing Agent which contained the following clause:

"You will please deliver to this Bureau at ship's side, Manila Bay, the following list of Oregon pine lumber. All lumber to be No.1, rough merchantable, sound and strong, free from rot, shake, and large loose knots; it shall be well manufactured and suitable for good substantial construction purposes. * * * for the 890,000 feet No. 1, rough merchantable, \$24, U. S. currency, per 1,000 feet, board measure."

The Manila house thereupon forwarded the New York office of H. W. Peabody & Co. a detailed order for this lumber, containing the specifications of the various kinds and quantities, but omitting the words above quoted. This order was transmitted by the New York office to the manager of the San Francisco branch of the same house, by whom the specification was furnished the defendant upon which the lumber was sold by it, nothing being said therein as to the special requirements of the Insular Purchasing Agent. It does not appear anywhere in the testimony, either oral or documentary, that these requirements were brought to the knowledge of the defendant or that its officers had any reason to understand that the 890,000 feet of lumber specified were to be "No. 1, rough merchantable."

The lumber was loaded at Portland, but upon its arrival at Manila was found by the Insular Purchasing Agent to fail to comply with his specifications in respect to the 890,000 feet, which was of second quality only, and was valued by three experts appointed by the Government at \$22 per thousand feet, being a reduction of \$2 per thousand feet from the stipulated price. It was accepted and paid for by the Government at this figure.

For the resulting damages, \$1,780, equivalent to P3,560, the trial court gave judgment to the plaintiffs. A careful examination in detail of the various exhibits in this case makes plain that the defendant did not fail to comply with the terms of any agreement that it is shown to have made. On the other hand, it is to be inferred that the Manila house of H. W. Peabody & Co. omitted to forward that part of the specifications in which this lumber was required to be "No. 1, rough merchantable," there being nothing in the evidence indicating that this provision was made known even to the home offices of the same house at New York and San Francisco.

The Manila manager, one George M. Lamb, testified:

"I believed that the Pacific Export and Lumber Company had shipped No. 2 without any intention on their part to give any other lumber than what was ordered, and I understood from the conversation I had with Mr. Brady, what they had formerly shipped to Manila, and which they always supposed was No. 1, was in reality No. 2."

That on other occasions, under similar orders, they had furnished No. 2 quality lumber and nothing better, does not, under the circumstances indicate bad faith on their part, the presumption being that the course followed by the Manila house of H. W. Peabody & Co. had been the same in other instances in which it may not have been detected by the vigilance of the Government officials. Nor did the admission of the defendant's local manager, that there was some defective stock for which allowance might be made, refer to the difference in quality, but only to items in detail, and of the offer of such allowance the plaintiffs did not avail themselves. Smith, Bell & Co. were associated in this traffic with their co-plaintiffs and are consequently proper parties to this action.

As a second defense the defendant pleaded *res adjudicata* founded upon a judgment in favor of its assignees, Cadwallader & Co., against these same plaintiffs, in an action then pending in this court on appeal. The conclusion at which we have arrived on the main issue renders it unnecessary to pass upon this defense. The judgment of the Court of First Instance is hereby reversed, and judgment directed to be entered in favor of the defendant and against the plaintiffs, absolving the defendant, without costs to either party. So ordered.

Arellano, C.J., Torres, Johnson, and Willard, JJ., concur.

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