

INCHAUSTI & CO., PLAINTIFF AND APPELLANT, VS. ELLIS CROMWELL, COLLECTOR OF INTERNAL REVENUE, DEFENDANT AND APPELLEE.

G.R. No. 6584. October 16, 1911

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal by the plaintiff from a judgment of the Court of First Instance of the city of Manila, the Hon. Simplicio del Rosario presiding, dismissing the complaint upon the merits after trial, without costs.

The facts presented to this court are agreed upon by both parties, consisting, in so far as they are material to a decision of the case, in the following:

"III. That the plaintiff firm for many years past has been and now is engaged in the business of buying and selling at wholesale hemp, both for its own account and on commission.

"IV. That, it is customary to sell hemp in bales which are made by compressing the loose fiber by means of presses, covering two sides of the bale with matting, and fastening it by means of strips of rattan; that the operation of baling hemp is designated among merchants by the word 'prensaje.'

"V. That in all sales of hemp by the plaintiff firm, whether for its own account or on commission for others, the price is quoted to the buyer at so much per picul, no mention being made of baling; but with the tacit understanding, unless otherwise expressly agreed, that the hemp will be delivered in bales and that, according to the custom prevailing among hemp merchants and dealers in the Philippine Islands, a charge, the amount of which depends upon the then prevailing rate, is to be made against the buyer under the denomination of 'prensaje' That this charge is made in the same manner in all cases, even when the operation of baling was performed by the plaintiff or by its principal Jong before the contract of sale was made. Two specimens of the ordinary form of account used in these operations are hereunto appended, marked Exhibits A and B, respectively, and made a part hereof.

"VI. That the amount of the charge made against hemp buyers by the plaintiff firm and other sellers of hemp under the denomination of 'prensaje' during the period involved in this litigation was P1.75 per bale; that the average cost of the rattan and matting used on each bale of hemp is fifteen (15) centavos and that the average total cost of baling hemp is one (1) peso per bale.

"VII. That insurance companies in the Philippine Islands, in estimating the insurable value of hemp always add to the quoted price of same the charge made by the seller under the denomination of 'prensaje.'

"VIII. That the average weight of a bale of hemp is two (2) piculs (126.5 kilograms).

"IX. That between the first day of January, 1905, and the 31st day of March, 1910, the plaintiff firm, in accordance with the custom mentioned in paragraph V hereof, collected and received, under the denomination of 'prensaje,' from purchasers of hemp sold by the said firm for its own account, in addition to the price expressly agreed upon for the said hemp, sums aggregating P380,124.35; and between the 1st day of October,

1908, and the 1st day of March, 1910, collected for the account of the owners of hemp sold by the plaintiff firm in Manila on commission, and under the said denomination of 'prensaje' in addition to the price expressly agreed upon for said hemp, sums aggregating P31,080.

"X. That the plaintiff firm in estimating the amount due it as commissions on sales of hemp made by it for its principals has always based the said amount on the total sum collected from the purchasers of the hemp, including the charge made in each case under the denomination of 'prensaje.'

"XI. That the plaintiff has always paid to the defendant or to his predecessor in the office of the Collector of Internal Revenue the tax collectible under the provisions of section 139 of Act No. 1189 upon the selling price expressly agreed upon for all hemp sold by the plaintiff firm both for its own account and on commission, but has not, until compelled to do so as hereinafter stated, paid the said tax upon sums received from the purchaser of such hemp under the denomination of 'prensaje.'

"XII. That on the 29th day of April, 1910, the defendant, acting in his official capacity as Collector of Internal Revenue of the Philippine Islands, made demand in writing upon the plaintiff firm for the payment within the period of five (5) days of the sum of P1,370.68 as a tax of one-third of one per cent on the sums of money mentioned in Paragraph IX hereof, and which the said defendant claimed to be entitled to receive, under the provisions of the said section 139 of Act No. 1189, upon the said sums of money so collected from purchasers of hemp under the denomination of 'prensaje.'

"XIII. That on the 4th day of May, 1910, the plaintiff firm paid to the defendant under protest the said sum of P1,370.69, and on the same date appealed to the defendant as Collector of Internal Revenue, against the ruling by which the plaintiff firm was required to. make said payment, but defendant overruled said protest and adversely decided said appeal, and refused and still refuses to return to plaintiff the said sum of P1,370.68 or any part thereof.

"XIV, Upon the facts above set forth it is contended by the plaintiff that the tax of P1,370.68 assessed by the defendant upon the aggregate sum of said charges made against said purchasers of hemp by the plaintiff during the period in question, under the denomination of 'prensaje' as aforesaid, namely, P411,204.35, is illegal upon the ground that the said charge does not constitute a part of the selling price of the hemp, but is a charge made for the service of baling the hemp, and that the plaintiff firm is therefore entitled to recover of the defendant the said sum of P1,370.68 paid to him under protest, together with all interest thereon at the legal rate since its payment, and the costs of this action.

"Upon the facts above stated it is the contention of the defendant that the said charge made under the denomination of 'prensaje' is in truth and in fact a part of the gross value of the hemp sold and of its actual selling price, and that therefore the tax imposed by section 139 of Act No. 1189 lawfully accrued on said sums, that the collection thereof was lawfully and properly made and that therefore the plaintiff is not entitled to recover back said sum or any part thereof; and that the defendant should have judgment against plaintiff for his costs."

Under these facts we are of the opinion that the judgment of the court below was right. It is one of the stipulations in the statement of facts that it is customary to sell hemp in bales, and that the price quoted in the market for hemp per picul is the price for the hemp baled. The fact is that among large dealers like the plaintiff in this case it is practically impossible to handle hemp without its being baled, and it is admitted by the statement of facts, as well as demonstrated by the documentary proof introduced in the case, that if the plaintiff sold a quantity of hemp it would be the understanding, without words, that such hemp would be delivered in bales, and that the purchase price would include the cost and expense of baling. In other words, it is the fact as stipulated, as well as it would be the fact of necessity, that in all dealings in hemp in the general market the selling price consists of the value of the hemp loose plus the cost and expense of putting it into marketable form. In the sales made by the plaintiff, which are the basis of the controversy here, there were no services performed by him for his vendee. There was

agreement that services should be performed. Indeed, at the time of such sales it was not known by the vendee whether the hemp was then actually baled or not. All that he knew and all that concerned him was that the hemp should be delivered to him baled. He did not ask the plaintiff to perform services for him, nor did the plaintiff agree to do so. The contract was single and consisted solely in the sale and purchase of hemp. The purchaser contracted for nothing else and the vendor agreed to deliver nothing else.

The word "price" signifies the sum stipulated as the equivalent of the thing sold and also every incident taken into consideration for the fixing of the price, put to the debit of the vendee and agreed to by him. It is quite possible that the plaintiff, in this case in connection with the hemp which he sold, had himself already paid the additional expense of baling as a part of the purchase price which he paid and that he himself had received the hemp baled from his vendor. It is quite possible also that such vendor of the plaintiff may have rect&ved the same hemp from his vendor in baled form, that he paid the additional cost of baling as a part of the purchase price which he paid. In such case the plaintiff performed no service whatever for his vendee, nor did, the plaintiff's vendor perform any service for him.

The distinction between a contract of sale and one for work, labor, and materials is tested by the inquiry whether the thing transferred is one not in existence and which never would have existed but for the order of the party desiring to acquire it, or a thing which would have existed and been the subject of sale to some other person, even if the order had not been given. (*Groves vs. Buck*, 3 Maule & S., 178; *Towers vs. Osborne*, 1 Strange, 506; *Benjamin on Sales*, 90.) It is clear that in the case at bar the hemp was in existence in baled form before the agreements of sale were made, or, at least, would have been in existence even if none of the individual sales here in question had been consummated. It would have been baled, nevertheless, for sale to someone else, since, according to the agreed statement of facts, it is customary to sell hemp in bales. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor. It is otherwise when the article is made pursuant to agreement. (*Lamb vs. Crafts*, 12 Met., 353; *Smith vs. N. Y. C. Ry. Co.*, 4 Keyes, 180; *Benjamin on Sales*, 98.) Where labor is employed on the materials of the seller he can not maintain an action for work and labor. (*Atkinson vs. Bell*, 8 Barn. & C, 277; *Lee vs. Griffm*, 30 L. J. N. S. Q. B., 252; *Prescott vs. Locke*, 51 N. H., 94.) If the article ordered by the purchaser is exactly such as the plaintiff makes and keeps on hand for sale to anyone, and no change or modification of it is made at the defendant's request, it is a contract of sale, even though it may be entirely made after, and in consequence of, the defendant's order for it. (*Garbutt vs. Watson*, 5 Barn. & Aid., 613; *Gardner vs. Joy*, 9 Met., 177; *Lamb vs. Crafts*, 12 Met., 353; *Waterman vs. Meigs*, 4 Cush., 497; *Clark vs. Nichols*, 107 Mass., 547; *May vs. Ward*, 134 Mass., 127; *Abbott vs. Gilchrist*, 38 Me., 260; *Crocket vs. Scribner*, 64 Me., 105; *Pitkin vs. Noyes*, 48 N. H., 294; *Prescott vs. Locke*, 51 N. H., 94; *Ellison vs. Brigham*, 38 Vt, 64.) It has been held in Massachusetts that a contract to make is a contract of sale if the article ordered is already substantially in existence at the time of the order and merely requires some alteration, modification, or adaptation to the buyer's wishes or purposes. (*Mixer vs. Howarth*, 21 Pick., 205.) It is also held in that state that a contract for the sale of an article which the vendor in the ordinary course of his business manufactures or procures for the general market, whether the same is on hand at the time or not, is a contract for the sale of goods to which the statute of frauds applies. But if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the statute. (*Goddard vs. Binney*, 115 Mass., 450.)

It is clear to our minds that in the case at bar the baling was performed for the general market and was not something done by plaintiff which was a result of any peculiar wording of the particular contract between him and his vendee. It is undoubted that the plaintiff prepared his hemp for the general market. This would be necessary. One who exposes goods for sale in the market must have them in marketable form. The hemp in question would not have been in that condition if it had not been baled. The baling, therefore, was nothing peculiar to the contract

between the plaintiff and his vendee. It was precisely the same contract that was made by every other seller of hemp, engaged as was the plaintiff, and resulted simply in the transfer of title to goods already prepared for the general market. The method of bookkeeping and form of the account rendered is not controlling as to the nature of the contract made. It is conceded in the case that a separate entry and charge would have been made for the baling even if the plaintiff had not been the one who baled the hemp but, instead, had received it already baled from his vendor. This indicates of necessity that the mere fact of entering a separate item for the baling of the hemp is formal rather than essential and in no sense indicates in this case the real transaction between the parties. It is indisputable that, if the plaintiff had bought the hemp in question already baled, and that that was the hemp the sale of which formed the subject of this controversy, then the plaintiff would have performed no service for his vendee and could not, therefore, lawfully charge for the rendition of such service. It is, nevertheless, admitted that in spite of that fact he would still have made the double entry in his invoice of sale to such vendee. This demonstrates the nature of the transaction and discloses, as we have already said, that the entry of a separate charge for baling does not accurately describe the transaction between the parties.

Section 139 [Act No. 1189] of the Internal Revenue Law provides that:

"There shall be paid by each merchant and manufacturer a tax at the rate of one-third of one per centum on the gross value in money of all goods, wares and merchandise sold, bartered or exchanged in the Philippine Islands, and that this tax shall be assessed on the actual selling price at which every such merchant or manufacturer disposes of his commodities."

The operation of baling undoubtedly augments the value of the goods. We agree that there can be no question that, if the value of the hemp were not augmented to the amount of P1.75 per bale by said operation, the purchaser would not pay that sum. If one buys a bale of hemp at a stipulated price of P20, well knowing that there is an agreement on his part, express or implied, to pay an additional amount of P1.75 for that bale, he considers the bale of hemp worth P21.75. It is agreed, as we have before stated, that hemp is sold in bales. Therefore, baling is performed before the sale. The purchaser of hemp owes to the seller nothing whatever by reason of their contract except the value of the hemp delivered. That value, that sum which the purchaser pays to the vendee, is the true selling price of the hemp, and every item which enters into such price is a part of such selling price. By force of the custom prevailing among hemp dealers in the Philippine Islands, a purchaser of hemp in the market, unless he expressly stipulates that it shall be delivered to him in loose form, obligates himself to purchase and pay for baled hemp. Whether or not such agreement is express or implied, whether it is actual or tacit, it has the same force. After such an agreement has once been made by the purchaser, he has no right to insist thereafter that the seller shall furnish him with unbaled hemp. It is undoubted that the vendees, in the sales referred to in the case at bar, would have had no right, after having made their contracts, to insist on the delivery of loose hemp with the purpose in view themselves to perform the baling and thus save 75 centavos per bale. It is unquestioned that the seller, the plaintiff, would have stood upon his original contract of sale, that is, the obligation to deliver baled hemp, and would have forced his vendees to accept baled hemp, he himself retaining among his own profits those which accrued from the process of baling.

We are of the opinion that the judgment appealed from must be affirmed, without special finding as to costs, and it is so ordered.

Torres, Mapa, Johnson, and Carson, JJ., concur.

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