

IN THE SENATE OF THE UNITED STATES.

DECEMBER 13, 1876.—Ordered to be printed.

Mr. WRIGHT submitted the following

REPORT:

[To accompany bill S. 257.]

The Committee on Claims, to whom was referred bill S. 257, with petition and accompanying papers, having considered the same, submit the following report:

The bill proposes to pay the petitioner \$15,500 for one hundred and twenty-two oxen and two mules captured from him by hostile Indians, without his negligence, and as a result of the failure of the Government to furnish him an escort to his train, as required by the contract between him and the United States. That contract was as follows:

Articles of agreement made and entered into this 5th day of February, A. D. one thousand eight hundred and sixty-seven, between Bvt. Brig. Gen'l W. Meyers, Asst. Q. M. of the United States Army, party of the first part, and Jas. R. Porter, of Plattsmouth, N. T., party of the second part:

This agreement witnesseth that the said Bvt. Brig. Gen'l W. Meyers, Q. M., for and on behalf of the United States of America, and the said James R. Porter, his executors and administrators, have covenanted and agreed, and by these presents do mutually covenant and agree to and with each other as follows, viz:

First, that the said James R. Porter, his heirs, executors, and administrators, shall supply, or cause to be supplied and delivered, to Bvt. Brig. Gen. George B. Dandy, A. Q. M., at Fort Phil. Kearney, D. T., or to his authorized agent, or to his successors in office, the articles and supplies hereinafter specified, and of the quality, quantity, and the prices hereinafter set forth, viz:

Five thousand (5,000) bushels of corn on or before the fifteenth of March next—the corn to be of a good, sound, merchantable quality, put up in stout, well-secured gunnies, and subject to inspection by the post quartermaster at Fort Phil. Kearney, D. T.

For each and every bushel of corn accepted by the quartermaster at Fort Phil. Kearney, under the terms of this contract, James R. Porter is to receive twelve dollars and twenty-three cents.

The Government to furnish escort for Mr. Porter's train while *en route* to Fort Phil. Kearney.

For delays of trains, caused by military authorities in writing, or waiting an escort after application, James R. Porter will be entitled to (\$10) ten dollars per day for each team carrying thirty-five hundred pounds or upwards so delayed.

Second. That the said party of the first part hereby agrees to pay or cause to be paid to said party of the second part, for the articles furnished and received by him or his authorized agent, the price or prices hereinbefore specified therefor to be paid, should the quartermaster be in funds; otherwise, as soon as he may be in funds.

Third. It is hereby expressly provided that no member of Congress shall be admitted to any share or part herein, or any benefit to arise herefrom.

Fourth. It is hereby expressly understood between the parties hereto that the binding obligation of this agreement, as against the party of the first part, depends upon the loyalty of the party of the first part to the Government of the United States.

In witness whereof the parties hereto have hereunto, in quintuplicate, set their hands and seals, this fifth day of February, 1867.

(Signed)
(Signed)

WILLIAM MEYERS, [SEAL.]
Brevet Brigadier-General, Q. M.
JAMES R. PORTER.

[SEAL.] Witnesses: WM. COLBURN.
[SEAL.] F. H. PORTER.

Petitioner brought his action in the Court of Claims, where he was allowed \$13,530 for delays of his trains under that clause of the contract which provided that he should be allowed \$10 per day for each team so delayed. The court refused to make him any allowance for the destruction of his property. That the grounds of their decision upon this point may be the more readily seen, we quote therefrom as follows:

The petitioner claimed to be indemnified for his oxen and a mule captured and destroyed by the Indians; and rested his claim on two grounds:

First, on the statute of 1849, (9 Stat., 415,) providing indemnity for horses and cattle killed or lost in the service of the United States.

The learned counsel for the petitioner admitted that this court had decided, in the like case of Adolph Gütman, that the statute cited was not applicable. And we are of that opinion now, for we think that the statute applies to cases in which the United States have by impressment or contract taken the property specified into their possession and custody, and out of the possession and protection of its owner. And in transportation contracts that is not the case and was not the case here, for the petitioner retained the possession of his teams and was using them to perform his own contract, and they were thus in his service, and not in the service of the United States, who were at the most only the other parties of the contract, in which the transportation was to be done by him.

The other ground of the petitioner's claim was that the loss of his oxen and mule was the direct consequence of the defendants' breach of contract in not furnishing an escort.

To this it was objected on the part of the defendants that the contract assured an indemnity for all delays to which he might be wrongfully subjected, in the price stipulated for such delays, and that being thus secured against loss he was not obliged to start without an escort, and was not required to do so by any officer of the Government, and in doing so he acted at his own election, and therefore at his own risk. And a majority of the court are of this opinion.

In this view Judge Loring did not concur, nor did the chief-justice concur in so much of the opinion as awarded the petitioner compensation for his delays. The chief-justice, in his brief dissenting opinion, uses this language:

2. But there is a much stronger reason against his right to a recovery here. His contract was to deliver the 5,000 bushels of corn at Fort Phil. Kearney on or before the 15th of March, and he did not move his ox-trains from Fort Laramie until the 6th of April, twenty-two days after that on which his contract was to have been fully performed. Starting at that time, he had no right to demand an escort, for the period limited by himself for the fulfillment of his engagement had expired. If he was entitled to an escort then, he would have been equally entitled to it six or twelve months afterward. No principle is more sound or better settled than that he who has failed to fulfill his part of a contract cannot demand performance of the contract by the other party thereto.

And thus it will be seen that the court place their refusal to make this allowance upon the ground of the non-liability of the Government, as well as upon the specific ground stated in the dissenting opinion of the chief-justice.

This ruling we are asked to review and reverse, and, as we understand it, upon the nebulous and shadowy idea that the court was acting as a court of law, and could not take into consideration the equitable rights of the claimant, and that Congress, while it may not be justified in making the allowance upon any rule known to courts of equity, nevertheless should do so upon the theory that it is better that the Government should part with a little of its money rather than an individual should be a great sufferer at the hands of those who are said to be its wards. In this view we are not prepared to concur. Claimant had his contract with the Government, by which it was obligated to furnish him an escort for his train while *en route* to Fort Phil. Kearney. He was entirely protected, as we are bound to suppose, to his entire satisfaction, for any delay, and whether he did or did not give satisfactory notice of his readiness to leave, whether he did, or did not make sufficient demand for

such escort, we need not stop to determine, since, though he may have given ever so sufficient notice and demand, if he moved away without obtaining such security, he did so at his peril. Having so moved and sustained injury, we know of no principle, either equitable or legal, upon which he would be entitled to compensation for the loss following. His duty was to have stood upon his contract, and whether detained one day or one year, the measure of damages was fixed by its terms. And when we add that we can see no good reason why he would not have been entitled to any damages sustained by his inability to fulfill his contract by reason of the failure of the Government to furnish his escort, it would seem that the argument was at an end. For in this view he would be entitled to the \$10 a day for each team delayed, and also at least to the profit he would have made if he had been allowed to fulfill his contract. But when he, in the face of his contract, or in defiance of its terms, pushed his train forward into a country occupied by the hostile tribes, he acted, as we have already said, at his peril, and must take the consequences of his reckless act.

We therefore unite in the opinion that the claim should be disallowed and the bill indefinitely postponed, and we so recommend.

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