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June 29

BETWEEN:

HER MAJESTY THE QUEEN on the Information of the Deputy-Attorney General of Canada ..... PLAINTIFF,

AND

THE STEEL COMPANY OF CANADA, LIMITED ..... RESPONDENT.

Revenue—Sales Tax—Special War Revenue Act, R.S.C. 1927, c. 179, s. 86(1)—The Sale of Goods Act, R.S.M. 1940, c. 185, ss. 18, 19(1), 19(2), 20, 33(1)—Contract made where acceptance of offer communicated—Meaning of term "F.O.B. Hd. of Lakes"—Delivery under 86(1) (a) of Special War Revenue Act means actual physical delivery —Passing of property in unascertained goods by unconditional appropriation of goods to contract.

The defendant sold steel and other metal goods to purchasers in Winnipeg, Port Arthur, Calgary and Edmonton. The purchasers ordered the goods from the defendant's sales office in Winnipeg which sent them to its Montreal plant for filling and then sent post card acknowledgments to the purchasers. The goods were to be carried by Canada Steamship Lines Limited to the head of the lakes as soon as navigation opened and by rail from there to their destination. The invoices for the goods showed that the freight was to be collect but carried a notation "F.O.B. Hd. of Lakes" and showed allowances for freight deducted from the price of the goods. In April, 1944, the defendant delivered the goods to Canada Steamship Lines Limited in packages addressed to or otherwise identified as consigned to the purchasers and Canada Steamship Lines Limited issued bills of lading for them in the names of the purchasers without any reservation to the defendant of the right of disposal. The defendant sent the invoices and bills of lading to the purchasers. On May 5, 1944, while the goods were still in the Ottawa Street shed of Canada Steamship Lines Limited in Montreal they were destroyed by fire. The plaintiff claimed sales tax on the sale price of the goods.

Held: That a contract is made where the acceptance of an offer is communicated.

2. That the contract between the defendant and its purchasers was made in Winnipeg and that the law applicable to it is the law of Manitoba as found in The Sale of Goods Act.

3. That the delivery contemplated by paragraph (*a*) of section 86(1) of the Special War Revenue Act means actual physical delivery and that since there was no such delivery paragraph (*a*) is not applicable.

4. That the contract between the defendant and its respective purchasers was a contract for the sale of unascertained or future goods by description, that goods of that description and in a deliverable state were unconditionally appropriated to the contract within the meaning of Rule 5 of section 20 of The Sale of Goods Act, that the property in the goods thereupon passed to the purchasers and that the case falls within the ambit of the second proviso to section 86(1) of the Special War Revenue Act.

INFORMATION to recover sales tax under the Special War Revenue Act.

The action was tried before the President of the Court at Ottawa.

J. A. Prud'homme Q.C. for plaintiff.

A. Forget Q.C. for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (June 29, 1953) delivered the following judgment:

This is an action to recover consumption or sales tax on the sale price of certain steel and other metal goods manufactured and produced by the defendant and sold by it to certain purchasers.

The information shows that the defendant sold certain goods to The J. H. Ashdown Hardware Company Limited of Winnipeg in Manitoba in March and April of 1944, to Marshall Wells Company Limited of Port Arthur in Ontario, Winnipeg in Manitoba and Calgary in Alberta in April and May of 1944, to North Hardware Company Limited of Edmonton in Alberta in May of 1944 and to Walter Woods Limited of Winnipeg in Manitoba in May of 1944. Particulars of invoice numbers, dates, prices and nature of goods are given in paragraphs 2, 3, 4 and 5 of the information and are not in dispute.

It is contended that the tax is due and payable under section 86(1) of the Special War Revenue Act (now the Excise Tax Act), R.S.C. 1927, chapter 179, as amended in 1936, Statutes of Canada, 1936, chapter 45, section 5, the relevant portions of which read as follows:

> 86. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods,—
>
> (*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.
>
> Provided . . .
>
> Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

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The facts are not in dispute. I shall deal first with the sales to The J. H. Ashdown Hardware Company Limited. These were of nails, staples and barbed wire. The orders for the goods were placed with the defendant's sales office in Winnipeg and transmitted by it to the defendant's Montreal plant for filling. It was the practice of the Winnipeg sales office to send post card acknowledgments to its customers for less than carload quantities and letter acknowledgments in the case of carload lots (Exhibit 2). The details of the sales are set out in the defendant's invoices dated from March 14, 1944, to April 14, 1944. Under the heading Route the invoices carried the following notations, namely, "CSL when navigation opens" or "Canada Steamship Lines Ltd." or "Canada Steamship Lines" or "CSL & Rail" or simply "CSL". All the goods were to be shipped when navigation opened. Under the heading F.O.B. all the invoices except one carried the notation "Hd. of Lakes". The invoices also specified that the goods were sold to "The J. H. Ashdown Hardware Co. Ltd. Winnipeg, Man." and that they were to be shipped to "Winnipeg, Man." All the invoices except one called for the freight to be "collect" but there was also an item in them providing for freight allowances under various captions, namely, "Allce Freight Montreal to Head of Lakes" or simply "Allce Freight". In each case the amount of the allowances was deducted from the price of the goods. The invoices were sent by the defendant's Montreal office to The J. H. Ashdown Hardware Company Limited at Winnipeg. On various dates the defendant caused the goods covered by the invoices to be delivered by a carter to Canada Steamship Lines Limited for shipment to its purchaser. The dates of the receipts by Canada Steamship Lines Limited are set out in Exhibit P 3. The defendant also made out the bills of lading covering the goods in triplicate for signature by Canada Steamship Lines Limited. These were dated at Montreal, April 17th, 1944, or April 18th, 1944. The bills of lading show that the goods covered by them were consigned to "The J. H. Ashdown Hdwe Co. Ltd." with destination "Winnipeg" and route "C.S.L. Port Arthur & C.N.R." or "C.S.L. Fort William & C.P.R." or

destination "Port Arthur" and route "C.S.L." or destination "Fort William" and route "C.S.L.". The bills of lading also showed that the goods covered by them were addressed to or otherwise identified as the goods consigned to the consignee named in the bill of lading. One copy of each bill of lading was retained by Canada Steamship Lines Limited and two copies signed by it were delivered back to the defendant. It kept one of these and sent the other to The J. H. Ashdown Hardware Company Limited at Winnipeg along with the invoices.

The facts are similar with respect to the sales to Marshall Wells Company Limited, North Hardware Company Limited and Walter Woods Limited.

On or about May 5, 1944, all the goods referred to in the information, while still at the Ottawa Street shed of Canada Steamship Lines Limited in Montreal, were destroyed by fire.

On these facts the question arises whether the goods, prior to their destruction, had been delivered by the defendant to the purchasers within the meaning of paragraph (*a*) of section 86(1) of the Special War Revenue Act or whether the property in them had passed to the purchasers within the meaning of the second proviso.

It is an elementary principle that a contract is formed by the acceptance of an offer and that an offer is accepted when the acceptance is made in a manner prescribed or indicated by the offeror: *vide* Anson's Law of Contract, 20th Edition, page 34. And the same author says, at page 39, that the rule that a contract is made *when* the acceptance is communicated involves as a result the further rule that a contract is made *where* the acceptance is communicated and points out that this may be of importance in determining what law governs the validity of the contract or the procedure by which it may be enforced. In the present case it is clear that the offer to buy the goods was made to the defendant at its sales office in Winnipeg. That is where the orders for the goods were placed. While the evidence as to the acceptance of the offer and its communication to the purchasers is not as precise as would be desirable it was the practice of the defendant's sales office at Winnipeg to transmit the orders to the defendant's office in

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Montreal and then send a post card or letter in confirmation of them to the purchasers and there is no reason to assume that this practice was not followed in the present case. I am, therefore, of the view that the contract between the defendant and its purchasers was made in Winnipeg and that the law applicable to it is the law of Manitoba as found in The Sale of Goods Act, R.S.M. 1940, chapter 185.

It was contended for the defendant that it was not liable for any tax under section 86(1) of the Special War Revenue Act either under paragraph (*a*), because there was never any delivery of the goods to the purchasers within the meaning of the paragraph, or under the second proviso, because it was intended by the parties that the property in the goods should not pass to the purchasers until they had been delivered F.O.B. head of the lakes and no such delivery had been made.

Counsel for the defendant submitted that it was an essential term of the contract between the defendant and its purchasers that it should deliver the goods F.O.B. head of the lakes, that this meant that it was obliged to deliver them to the head of the lakes, that is to say, Port Arthur or Fort William and there place them free on board and that since this term of the contract had not been complied with it could not be said that there had been any delivery of the goods to the purchasers within the meaning of paragraph (*a*) and that it was, therefore, not applicable.

On the other hand, counsel for the plaintiff relied upon section 33(1) of The Sale of Goods Act which provides that where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer and contended that when the defendant delivered the goods to Canada Steamship Lines Limited for the purpose of transmission to the purchasers it had delivered the goods to the purchasers within the meaning of paragraph (*a*) of section 86(1) of the Act. Counsel also submitted that the term "F.O.B. Hd. of Lakes" meant only that the goods should be free from freight charges at the head of the lakes or, in other words, that the defendant was to absorb the freight in them up to the head of the lakes.

I am unable to agree with the defendant's construction of the term "F.O.B. Hd. of Lakes". It was clearly intended by the parties that carriage of the goods was to be by water from Montreal to the head of the lakes and by rail from there to their destination and that the defendant should deliver the goods to Canada Steamship Lines Limited at Montreal for carriage by it to the head of the lakes as soon as navigation opened. The point of delivery by the defendant to a carrier for the purpose of transmission to the buyer was, therefore, Montreal, not the head of the lakes. It also seems clear to me that the carriage of the goods by water was to be free from freight charges to the purchasers. The invoices show that the freight was to be "collect" but the defendant gave its purchasers a freight allowance up to the head of the lakes and deducted it from the price of the goods. It is thus clear that it was agreed between the parties that each should pay a share of the freight, that the defendant should absorb it up to the head of the lakes so that the goods should be free of freight when they got there and that the purchasers should pay the rail freight on the goods from the head of the lakes to their final destination.

There was thus a delivery of the goods to a carrier for the purpose of transmission to the buyer within the meaning of section 33(1) of The Sale of Goods Act and, therefore, a *prima facie* delivery of the goods to the buyer. If paragraph (*a*) of section 86(1) stood by itself and was not qualified, as I think it was, by the second proviso I would accept the submission of counsel for the plaintiff that there had been a delivery of the goods to the purchasers within the meaning of paragraph (*a*). But it appears to me from the proviso, which qualifies paragraph (*a*), *vide The King* v. *Dominion Engineering Co. Ltd.* (1), that the delivery contemplated by paragraph (*a*) means actual physical delivery rather than a constructive or "deemed" delivery within the meaning of section 33(1) of The Sale of Goods Act and that since there was no actual physical delivery of the goods to the purchasers paragraph (*a*) of section 86(1) is not applicable.

Thus to make the defendant liable for tax it must appear that the facts bring the case within the ambit of the second

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proviso of section 86(1), that is to say, that the property in the goods had passed to the purchasers prior to their destruction by fire.

It was contended for the plaintiff that if there had been no delivery of the goods to the purchasers within the meaning of paragraph (*a*) the property in them had passed to the purchasers and the second proviso was applicable.

But counsel for the defendant argued that by the term "F.O.B. Hd. of Lakes" the parties had expressed their intention that the property in the goods should not pass until they had been delivered at the head of the lakes and that since there had not been any such delivery the property had not passed and the second proviso was not applicable.

I am unable to agree that the term expresses or implies any such intention.

At the time of the agreement between the defendant and the respective purchasers the goods which were the subject of it were unascertained goods. The agreement was, therefore, an agreement to sell the goods and not a sale of them. Section 18 of The Sale of Goods Act provides that where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. Then section 19(1) states that when there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. The intention of the parties is paramount. This may be expressed or implied and section 19(2) provides that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. Then section 20 lays down certain rules for ascertaining the intention of the parties. It opens with the following statement:

> 20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

And then five rules are given of which the first three read as follows:

> (*a*) Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial

whether the time of payment or the time of delivery, or both, be postponed;

(*b*) Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing is done, and the buyer has notice thereof;

(*c*) Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weight, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done, and the buyer has notice thereof.

These three rules have no bearing on the question in issue for the contracts between the parties were not for the sale of specific goods. And Rule 4 of section 20 need not be referred to. But Rule 5 is important. It reads as follows:

(*e*) Rule 5.—Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller the property in the goods thereupon passes to the buyer. The assent may be express or implied, and may be given either before or after the appropriation is made. Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

In my judgment, the facts of this case bring it squarely within Rule 5. The contract between the defendant and its respective purchasers was a contract for the sale of unascertained or future goods by description. The defendant put goods of that description into a deliverable state by packing them in kegs or otherwise, as indicated by the invoices, and unconditionally appropriated them to the contract by identifying them by marks, tags or otherwise as the goods intended for the respective purchasers, as shown by the bills of lading. It was clearly intended by the purchasers that the defendant should deal with the goods in this way. There was thus an implied assent by them to the appropriation of the goods to the contract. It was also intended by the parties that the defendant should deliver the goods to Canada Steamship Lines Limited for the purpose of transmission to the purchasers and the defendant made such a delivery and did not reserve any right of disposal of the goods.

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Thus all the facts required for the application of Rule 5 are present. Under the circumstances, I have no hesitation in finding that the defendant unconditionally appropriated the goods to the contract with its respective purchasers within the meaning of Rule 5 and that the property in the goods thereupon passed to the purchasers.

It must be noted that Rule 5 applies only if a different intention does not appear. In my opinion, there is no reasonable ground for assuming any different intention. On the contrary, the facts negative a different intention. When the goods were delivered to Canada Steamship Lines Limited it acknowledged receipt of them and issued bills of lading for them in favor of the purchasers which the defendant sent to the purchasers along with the invoices for the goods. These became documents of title to the goods in the names of the respective purchasers and they had sole control over them. There is no substance in the contention that the bills of lading were not intended to be documents of title until the goods were delivered at the head of the lakes. There is nothing in the facts to warrant such a submission. If there had been any such intention the bills of lading would have been taken out in the name of the defendant or some other indication of it other than the term "F.O.B. Hd. of Lakes" would have been given.

For the reasons stated I have come to the conclusion that the property in the goods passed from the defendant to the several purchasers of them, at the latest, at the time of their delivery to Canada Steamship Lines Limited for the purpose of transmission to the purchasers and the case therefore falls within the ambit of the second proviso to section 86(1) of the Special War Revenue Act and the defendant is liable for the tax claimed.

There is no dispute as to the amount of tax if the claim is well founded or as to the amount of the penalties under section 106 of the Act, the former being $1,659.22 and the latter $781.38, making a total of $2,440.60.

There will, therefore, be judgment in favour of the plaintiff as against the defendant for $2,440.60 and costs.

Judgment accordingly.