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THE TOWN OF GODERICH (DEFENDANT) ..... } APPELLANT ; *Mar. 17. *May 6.

AND

F. BARLOW HOLMES (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of goods—Delivery—"At" shed—"Into" shed or grounds adjacent.

A tender by H. to supply coal to the Town of Goderich pursuant to advertisement thereof contained an offer to deliver it "into the coal shed, at pumping station or grounds adjacent thereto where directed by you," (that is by a committee of the council). The tender was accepted and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from the vessel on to the dock, about 80 feet from the shed and separated from it by a road.

Held, reversing the judgment of the Court of Appeal, that the coal was not delivered "at the coal shed" as agreed by the contract signed by the parties which was the binding document.

Held also, that if the contract was to be decided by the terms of the tender the delivery was not in accordance therewith the place of delivery not being "at the pumping station or grounds adjacent thereto."

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the defendant corporation.

The facts are sufficiently stated in the above headnote and in the judgment of the court on this appeal.

Garrow K.C. for the appellant.

Aylesworth K.C. for the respondent.

The judgment of the court was delivered by :

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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TASCHEREAU J.—This is an appeal by the municipal corporation, defendants, from the judgment of the Court of Appeal for Ontario which reversed a judgment of the Divisional Court in their favour, and restored the judgment against them of the Chief Justice of Ontario, before whom the action was tried without a jury. The Chancellor, and Ferguson and Meredith JJ. in the Divisional Court, were of opinion that the respondent's action as to the amount now in dispute, should be dismissed, the balance having been paid and accepted without prejudice to either party. In the Court of Appeal Maclennan J., dissenting, was of opinion that the judgment of the Divisional Court, should be affirmed but the majority of the court, Meredith C.J.,C.P., Osler, Moss and Lister JJ. were of opinion that that judgment should be reversed and the judgment against the corporation given at the trial restored.

The facts that have any bearing upon the controversy between the parties as now submitted are substantially as follows:

In October, 1899, the respondent, a coal dealer, by a letter addressed to the Water and Light Committee, tendered to supply to the appellant corporation the Hocking Valley coal they required at $2.22 per ton "to be delivered *into the coal shed at pumping station, or grounds adjacent thereto* where directed by you." The committee, on the same day, accepted respondent's tender, and afterwards reported to counsel that they had done so, "the coal to be delivered in the coal shed." And a few days after the following contract was signed:

F. B. Holmes, of the first part, and the Town of Goderich, of the second part. The said party of the first part agrees to deliver *at the coal shed* 600 tons of Hocking Valley coal at $2.22 per ton. The party of the second part agrees to pay the party of the first part the above mentioned price on the delivery of the said coal.

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The respondent's action is for the price of 600 tons of coal alleged to have been sold and delivered under the said contract. I am of opinion that he has failed to prove that he ever delivered that coal to the corporation, as he was bound by his contract to do, either "*at the coal shed*" or "into the shed *at the pumping station* or grounds adjacent thereto where directed by the Water or Light Committee." When the coal arrived at the wharf the appellants directed him to place the coal in the shed until filled, and the balance where directed by the engineer, but the respondent expressly refused to do so, contending, as he now does, that by his contract the dumping over of the coal on the dock was a sufficient delivery to the appellants. The appellants refused to accept the coal at that place, notwithstanding which the respondent continued to unload the coal on the dock, agreeing however next day, as evidenced by two witnesses, Kelly and Cantalon, that he would put it subsequently into the shed if allowed to proceed. The learned Chief Justice at the trial was of opinion that the delivery on the dock was, under the circumstances of the case, a delivery *at the coal shed*, according to the terms of the contract. The majority of the Court of Appeal held that by the pleadings, it is not the contract that must govern, but the tender as accepted, that is to say, that by the real contract, the respondent was to deliver "into the coal shed at pumping station, or grounds adjacent thereof, where directed by the committee." It seems to me that, as held at the trial, it is the contract that governs. That is what the respondent himself contended for in his reasons of appeal before the Court of Appeal. Now, has the coal been delivered *at the coal shed*, in the terms of the contract? It clearly has not. It was deposited upon the dock, away from the shed, 50 or 80 feet from it, with a street separating

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the dock from the shed. And the uncontradicted fact that it will cost ten cents a ton to carry it to the shed demonstrates that this cannot constitute a delivery at the coal shed as the parties must have intended it to be, for when the corporation and the respondent agreed to $2.22 per ton, that meant, under the circumstances, delivered at a place where the cost of it when used would be that sum, and not $2.32 as it would be if the respondent's contention prevailed.

The respondent cannot have reasonably assumed that the appellants, when they signed the contract, intended to give him ten cents more per ton than what he had asked and what they had previously agreed upon.

Assuming with the majority of the Court of Appeal that a delivery "into the coal shed at pumping station, or grounds adjacent thereto, as directed by the committee," was what was agreed upon, I do not think the respondent's position more favourable. The place where he dumped the coal is not a ground adjacent to the coal shed *at pumping station*; then he was never directed to deliver it where he deposited it by any one authorised to do so by the corporation. On the contrary, the evidence is all one way, that the appellants and their officers positively refused to accept it there.

I do not allude to the alterations made in the coal shed after the contract was signed. The objections now taken upon that ground by the respondent are after-thoughts. There was no inconvenience resulting from these changes, but rather greater convenience, it would appear; and at the time, no objection to deliver at the shed was made upon that ground, the respondent, or his father for him, simply contending that they had the right to deliver on the dock, and not a foot further, and not in the shed, or at the shed, or on grounds adjacent *to the pumping station*, though the

respondent himself afterwards, as I before remarked, undertook to put the coal in the shed if allowed to proceed to unload, conceding unequivocally that the dumping on the dock was not the delivery he was bound to make according to his contract.

Assuming that the appellants had no right to refuse acceptance as they did, the fact remains that the coal has not been delivered to them; it is to the present day respondent's coal, and his action for goods sold and delivered must in any case fail.

I would allow the appeal with costs and restore the judgment of the Divisional Court.

Appeal allowed with costs.

Solicitors for the appellant: *Garrow & Garrow.*

Solicitor for the respondent: *E. L. Dickinson.*