1957
*June 12
Sept. 30

MAYNARD BOYCE MARSHALL AND HARRY ALVIN VAN ALLEN (*Plaintiffs*) ..... APPELLANTS;

AND

CROWN ASSETS DISPOSAL CORPORATION (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of goods—Special terms and conditions—Withdrawal of goods not yet "delivered"—What constitutes delivery.

The plaintiffs agreed to buy from the defendant certain machines, the contract containing a clause entitling the defendant "to withdraw from the sale any property which has not been delivered to the purchaser". After execution of the contract, payment in full of the purchase-price and delivery to the plaintiffs of an authority to the custodian to release or ship the machines, the plaintiffs sent a carrier to collect them but before the carrier was able to obtain possession the defendant withdrew the goods from sale and returned the cheque given by the plaintiffs. The plaintiffs sued for damages for breach of contract.

Held: The plaintiffs could not succeed. The word "delivered" in the contract imported an actual physical delivery out of the possession of the custodian, and since this had not taken place the defendant was entitled to withdraw the machines; there was no room for construing the contract *contra proferentem*. Nor, in view of the positive terms of the condition, could it be said that the defendant was estopped by the conduct of its employee from asserting that there had not been delivery; there was nothing in the record to show that the employee was authorized by the defendant to waive its right to enforce the condition.

APPEAL by the plaintiffs from a judgment of the Court of Appeal for Ontario (1), affirming a judgment of Barlow J. (2). The facts are fully stated in the reasons for judgment of the Courts below and for purposes of this report may be briefly summarized as follows:

The plaintiffs entered into a contract with the defendant corporation for the purchase of five tractor crawlers which were at that time at the United States Naval Station at Argentia, Newfoundland. These machines were surplus goods which the defendant was authorized to sell on behalf of the Government of the United States.

(1) [1956] O.R. 930, 5 D.L.R. (2d) 572.

(2) [1956] O.W.N. 489, 3 D.L.R. (2d) 156.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Nolan JJ.

The contract of sale, which was executed by both parties on May 17, 1955, was expressly made subject to "general conditions of sale", under no. 1 of which the defendant corporation was entitled "to withdraw from the sale any property which has not been delivered to the Purchaser".

On execution of the contract the plaintiffs obtained from the defendant written authority to the custodian to release or ship the tractors, and they then instructed a carrier in Newfoundland to collect them for the plaintiffs. Before the carrier was able to obtain possession of the machines, they were withdrawn from sale by the defendant pursuant to instructions received from the United States.

The plaintiffs were advised on May 24, 1955, by G. L. Wood, who had negotiated with them on behalf of the defendant, that the sale was "cancelled under clause no. 1, general conditions of sale" and the cheque given by them to the defendant was returned.

The plaintiffs sued for damages for breach of contract but the action was dismissed at trial and on appeal.

G. E. Beament, Q.C., and *R. B. Hutton*, for the plaintiffs, appellants.

D. S. Maxwell, for the defendant, respondent.

At the conclusion of the argument, judgment was delivered orally dismissing the appeal with costs. The reasons of Kerwin C.J. and Locke, Cartwright and Abbott JJ.* were delivered by

THE CHIEF JUSTICE:—At the conclusion of the argument on behalf of the appellants we dismissed this appeal with costs, without calling upon counsel for the respondent. We are of opinion that there is no ambiguity in clause 1 of the "general conditions of sale", reading as follows:

> 1. Crown Assets Disposal Corporation (hereinafter referred to as "The Corporation") reserves the right to withdraw from the sale any property which has not been delivered to the Purchaser without incurring any liability except to refund to the Purchaser any amount paid on account of such property.

We agree with the Court of Appeal that "delivered" means actual delivery out of the possession of the custodian, *i.e.*, the U.S. Naval Station Supply Department, Argentia,

* Nolan J. died before the delivery of the reasons.

1957

MARSHALL AND VAN ALLEN v. CROWN ASSETS DISPOSAL CORPN.

Kerwin C.J.

Newfoundland. There is, therefore, no room for the application of the doctrine *contra proferentem* and none of the decisions relied upon by the appellants in that connection applies.

In view of the positive terms of the condition, the argument that the respondent was estopped by the conduct of its employee Wood from asserting that there had not been delivery cannot be supported. There is nothing in the record to sustain a contention that Wood was authorized in any manner to waive on behalf of the respondent the right to enforce the condition.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Beament, Fyfe & Ault, Ottawa.

Solicitor for the defendant, respondent: D. S. Maxwell, Ottawa.

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*PRESENT: Rand, Kellock, Locke, Cartwright and Nolan JJ.