THE STEEL COMPANY OF CANADA LIMITED *(Defendant)* ..... } APPELLANT;

AND

HER MAJESTY THE QUEEN *(Plaintiff)* . RESPONDENT.

1954
*Oct. 6
1955
*Jan. 25

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Meaning of term "F.O.B. Hd. of Lakes"—Whether delivery of the goods—Whether property passed to purchasers—Special War Revenue Act, R.S.C. 1927, c. 179, s. 86(1)—Sale of Goods Act, R.S.M. 1940, c. 185, ss. 18, 20, 33(1).

The appellant, a Montreal manufacturer, received orders for the purchase of unascertained goods from buyers in Western Canada. The orders

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

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had been placed and accepted at the sales office of the appellant at Winnipeg. In accordance therewith, the goods were delivered to a steamship carrier at Montreal for shipment. The invoices showed that they were to be shipped from Montreal by the carrier to the head of the lakes when navigation opened and by rail from there to their destination. The freight was to be collect, but the invoices were marked "F.O.B. Hd. of Lakes" and showed that the freight from Montreal to the head of the lakes was to be deducted from the sale price. The bills of lading, obtained by the appellant and forwarded to the purchasers, showed that the goods were appropriated to the several contracts. The goods were destroyed by fire while in the carrier's possession in Montreal awaiting shipment.

The Crown's claim for sales tax on the price of the goods was based on s. 86(1)(*a*) of the *Special War Revenue Act*, R.S.C. 1927, c. 179, which provided that sales tax was payable in respect of goods when they were delivered to the purchasers or when property in them passed to the purchasers. The Exchequer Court maintained the Crown's claim.

Held (Abbott J. dissenting), that the appeal should be allowed.

Per Kerwin C.J. and Fauteux J.: The presence in the invoices of the words "F.O.B. Hd. of Lakes" brings the case within the opening part of s. 20 of the *Manitoba Sale of Goods Act*, R.S.M. 1940, c. 185 which applies to the contracts between the appellant and its customers: "Unless a different intention appears . . .". The circumstances do not take it out of the general rule, as stated in the 8th edition of Benjamin on Sale page 691, that the property passes only when the goods are put on board.

Even if it could be said that there had been no physical delivery, the second proviso of s. 86(1) of the *Special War Revenue Act* does not apply, since the property did not pass to the purchasers.

Per Taschereau and Locke JJ.: Liability for the tax would attach only when the goods were delivered in accordance with the contracts or the property in them passed to the purchasers and they became liable to payment of the purchase price. Here there was no delivery and the purchasers had not become liable. The evidence adduced by the Crown proved that the sales were made F.O.B. Port Arthur or Fort William, terms which have an accepted legal meaning: *Wimble* v. *Rosenberg* (1913) 3 K.B. 743, Benjamin on Sale, 8th Ed. p. 691: *Maine Spring Co.* v. *Sutcliffe* (1917) 87 L.J.K.B. 382. In view of the terms of the contracts the matter was not affected by s. 33(1) of the *Manitoba Sale of Goods Act*.

Per Abbott J. (dissenting): The delivery by the appellant to the carrier was a delivery to such carrier as agent of the buyer within the meaning of s. 86(1)(*a*) of the *Special War Revenue Act*. The use of the term "F.O.B.", in this case, merely conditioned one of the constituent elements in the sale price.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), maintaining the Crown's claim for sales tax under the *Special War Revenue Act*, R.S.C. 1927, c. 179.

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H. Hansard, Q.C. for the appellant.

J. A. Prud'Homme, Q.C. for the respondent.

The judgment of Kerwin C.J. and Fauteux J. was delivered by:—

THE CHIEF JUSTICE:—The respondent claims from the appellant, The Steel Company of Canada, Limited, a sales tax on the sale price of certain goods manufactured by the appellant in Montreal and delivered by it to Canada Steamship Lines Limited for shipment to various companies beyond the Head of the Lakes. While in the possession of the Steamship Company in Montreal the goods were destroyed by fire and the appellant contends that no tax became payable under the relevant statutory provision, s. 86(1) of *The Special War Revenue Act,* R.S.C. 1927, c. 179, as amended by c. 45 of the Statutes of 1936:—

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 that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial payment by instalments, the said tax shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall for the purposes of this section, be regarded as sales and deliveries.

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.

The records of the appellant were destroyed in the usual course of business, so that the orders for the goods in question could not be produced at the trial. However, from the examination for discovery of C. E. Taggart, the appellant's Divisional Supervisor of Invoices and Claims, and his letter, which, by consent, is to be treated as part of his examination, it appears that all the goods were ordered by the various purchasers from the office of the appellant at Winnipeg, Manitoba, and there accepted by it. S. 18 and

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the relevant parts of s. 20 of *The Sale of Goods Act*, R.S.M. 1940, c. 185, must therefore be considered:—

18. 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.

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:

(*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.

The contracts for sale were for unascertained goods, such as nails, etc., but all such goods were appropriated to the several contracts by the appellant, since, as appears by an admission filed at the trial, all the goods were identified by marks, tags, or otherwise, as being the goods, wares and merchandise consigned to the consignees named in the bills of lading and they were taken to the premises of the Steamship Company, where the latter's forms of bills of lading, which had been filled in by the appellant, were signed by the Steamship Company. The bills of lading were non-negotiable and were issued in the names of the several purchasers as consignees. The Steamship Company kept one and delivered two to the appellant which retained one and sent the other to the purchaser with the appropriate invoices.

In the invoices in addition to showing the name of the purchaser, there was inserted in typewriting under ROUTE (which was printed), "C.S.L. WHEN NAVIGATION OPENS", or something similar thereto. Under the printed heading F.O.B. was typed "HD. of LAKES" or words to the same effect. Under the printed heading FREIGHT was typed the word "COLLECT". The body of the invoice, after showing the prices charged, credited an allowance for freight, being the freight charged by Canada Steamship

Lines, Limited, from Montreal to the Head of the Lakes, leaving a net amount upon which the 8% sales tax was computed and charged to the purchasers.

I agree with the contention on behalf of the appellant that, while it might have been argued that the goods were unconditionally appropriated to the contracts by the marks, or tags, and by the delivery of them to the carrier, if "F.O.B. HD. OF LAKES" had not appeared in the invoices, the presence of these words brings the case within the opening part of s. 20 of The Manitoba Sales of Goods Act "Unless a different intention appears". The authorities justify the statement in the 8th edition of Benjamin in Sale, p. 691:—

> The meaning of these words (F.O.B.) is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped; delivery is made, and the goods are at the risk, of the buyer, from the time when they are so put on board.

This does not mean that in all F.O.B. cases the property in the goods contracted to be sold passes only when the goods are so put on board, but the circumstances in the present instance do not take it out of the general rule. The duty of the appellant to pay the freight to the Head of the Lakes is one that would usually accompany the obligation to put the goods Free on Board.

Even if it could be said that there had been no physical delivery of the goods, the second proviso in s-s. (1) of s. 86 of *The Special War Revenue Act* does not apply, because the property in the goods did not pass to the purchasers. The appeal should be allowed and the action dismissed with costs throughout.

The judgment of Taschereau and Locke JJ. was delivered by:—

LOCKE J.:—This is an appeal from a judgment delivered in the Exchequer Court (1) by which the claim of the Crown for sales tax and penalties under the provisions of section 86(1) of the *Special War Revenue Act* (R.S.C. 1927, c. 179) as finally amended by section 5 of chapter 45 of the Statutes of 1936, was allowed.

The claim was advanced in respect of the sale of merchandise manufactured by the appellant at or near

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Montreal in March and April 1944 to the J. H. Ashdown Hardware Co. Ltd., described as being of Winnipeg, to Marshall Wells Co. Ltd. of Port Arthur, Winnipeg and Calgary, and Northern Hardware Co. Ltd. of Edmonton. It was alleged in the information that delivery was made to the respective purchasers on or prior to May 5, 1944, in Montreal, by delivering the merchandise to Canada Steamship Lines Ltd. as a public carrier for the account of the purchasers, that bills of lading made to the order of the purchasers were issued by the steamship company and forwarded by the defendant to the purchasers and that the property in the goods and merchandise passed to the purchasers at or prior to their delivery to it at Montreal. Other than the allegations that the purchasers were not licensed manufacturers or wholesalers, within the meaning of Part XIII of the *Special War Revenue Act,* all of these allegations were put in issue by the Statement of Defence. The appellant alleged that the merchandise referred to was destroyed by fire on May 5, 1944, at the warehouse of the Steamship Company. It was further alleged that all of the merchandise had been sold upon terms that physical delivery would be made by the appellant at specified points f.o.b. and that no such delivery had been made at the time the goods were destroyed. By way of reply, the respondent denied that it was a term of the sale that delivery of the merchandise should be made at specified points f.o.b.

It was upon this record that the action went to trial. Contrary to the practice of this Court, the proceedings at the trial do not form part of the case filed and we are accordingly without any record of what took place before the learned President. The matter is of some importance since findings of fact were made in the judgment delivered which are not supported by the material contained in the Case, which consists merely of what appears to be the complete transcript of the examination for discovery of C. E. Taggart, who described himself as Divisional Supervisor "over invoices, claims, etc." of the appellant company, an admission that the goods in question were destroyed by fire at Montreal as aforesaid, that the practice of the Winnipeg sales office of the appellant when orders were received was to acknowledge them, either by a postcard or letter, and that the goods had been marked with identifying marks

when delivered by the appellant to the steamship company and copies of the invoices and bills of lading issued by the steamship company in respect of the goods.

It was, in the state of the pleadings, an essential part of the case for the Crown to show the terms upon which the goods had been sold to these three companies and in determining the law applicable in the interpretation of the respective contracts to show the place where the respective agreements were made. From the meagre evidence available, it appears that the Ashdown Company's main place of business is in Manitoba; the Marshall Wells Company apparently carries on business in Port Arthur, Winnipeg and Calgary and the Northern Hardware Company at Edmonton. Taggart had not taken any part in obtaining any of the orders and was unable to produce any written orders for the goods, if such were given, by any of the companies and there is no evidence as to where the orders of the Marshall Wells and the Northern Hardware companies were given or accepted. As to the Ashdown Company, it appears to have been assumed by him that they were given either orally or in writing to the sales office of the appellant in Winnipeg but, as to this, it is clear that he had no first hand knowledge.

In the judgment of the learned President it is said that the orders for the goods were placed with the defendant's sales office in Winnipeg. As Taggart said that he could not swear that this was so in the case of the orders of the Ashdown Hardware Company and there is no evidence at all on the point in the case of the other two purchasers, I must assume that these facts were admitted by counsel for the appellant at the trial.

The only evidence as to the terms of the contract between the appellant and these purchasers is that afforded by the invoices, copies of which were filed as part of the case of the Crown, and the inferences, if any, which are to be drawn from the manner in which the bills of lading for the various shipments were issued by Canada Steamship Lines Ltd.

In the case of the Ashdown Hardware Company, each of the invoices shows that the goods were to be consigned to it at Winnipeg, the freight to be collected from the consignee, the terms of sale being 2%—30 days and under the designation F.O.B. there appeared the words "Hd. of

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Lakes." In the body of each of the invoices filed there appeared either the words "allce. freight" or the words "allce. freight Montreal to Head of Lakes", and it is common ground that the figures shown under this designation were for the freight charges of the Canada Steamship Company for transporting the goods from Montreal to either Fort William or Port Arthur. In connection with the shipments to the Ashdown Company, six bills of lading were issued by the Steamship Company, each of which acknowledged receipt of the goods consigned to the Ashdown Company in the case of one of the shipments at Port Arthur, one at Fort William and four at Winnipeg. In connection with the last named, the route was shown either "C.S.L. Port Arthur and C.N.R." or "C.S.L. Fort William and C.P.R.". It appears from the evidence of Taggart that these respective bills of lading were prepared in the office of the appellant for the purpose of expedition and signed in the offices of the Steamship Company.

In the case of the sales to Marshall Wells Ltd. one invoice shows the address of that company at Port Arthur and that point was given as the destination of the shipment. As in the case of the shipments to the Ashdown Company, the freight was shown as being collect, the terms being the same and "F.O.B. Hd. of Lakes" appearing in like manner. As against the price of the goods there was shown an allowance for freight, apparently to the Head of the Lakes. The second shipment to that company showed the destination as Calgary and the route Canada Steamship Lines to Fort William and C.P.R. to destination. Part of this shipment was wire and there was endorsed at the foot of the invoice the words "Wire F.O.B. Hd. of Lakes, balance F.O.B. Montreal."

The bills of lading issued in respect of the Marshall Wells shipments showed the destination of part of the goods as Port Arthur, part as Winnipeg and part as Calgary. No invoice was put in evidence as to the Winnipeg shipment.

In the case of the sale to the Northern Hardware Co. Ltd. of Edmonton, the invoice showed the destination as the latter place, the freight to be collect, the terms 2% 30 days and a credit was given on the amount of the total invoice under the heading of "Wire allce. freight Montreal to Hd of Lakes." In the space below the letters F.O.B. in the

invoice, the words "see below" appeared and, at the foot of the invoice, the following appeared "calks F.O.B. Montreal, wire F.O.B. Hd. of Lakes." The bills of lading issued in respect of this shipment showed the destination as Edmonton and the route "C.S.L. to Fort William and C.P.R. to destination."

No question arises as to the portions of the shipments consigned to Marshall Wells Limited and the Northern Hardware Co. Ltd. which were sold F.O.B. Montreal, since the liability to sales tax in respect of these goods was admitted: the only question concerns the liability in respect of the goods sold F.O.B. at the head of the Lakes.

It was shown that the goods required to fulfill the orders were delivered to the Steamship Company's dock in parcels addressed to the consignees and were there awaiting shipment when the fire took place which destroyed them.

Section 86(1) of the *Special War Revenue Act* as amended by c. 45 of the Statutes of 1936, in so far as it affects the present matter, reads 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 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.

The section appeared in the *Special War Revenue Act*, Part XIII, under the heading "Consumption or Sales Tax." As it appeared in c. 179, R.S.C. 1927, clause (*a*) read:—

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him.

The section did not include the second sentence above quoted from the 1936 amendment. It was thus made perfectly clear, if there could have been any doubt on the subject, that delivery of the goods or the passing of the property to the purchaser was a pre-requisite to liability for the tax.

The tax is a sales tax and not a tax upon contracts of sale which are not carried out. Liability does not, in my

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opinion, attach unless and until the goods sold are delivered or the property in them passes to the purchaser and the latter becomes liable to payment of the purchase price.

In the present matter the purchasers did not, in my opinion, become liable to pay the purchase price. The sections of the *Manitoba Sale of Goods Act*, which are referred to in the judgment appealed from as to the time when the property in unascertained goods which are the subject of sale passes, are prefaced by the words "unless a different intention appears." Here a different intention does appear. The intention of the parties is made manifest by the terms of the contract and the Steel Company as vendor could have no claim for the purchase price from any of the purchasers until its part of the bargain was carried out.

As it is pointed out by Hamilton L. J. (afterwards Lord Sumner) in *Wimble* v. *Rosenberg* (1), the mercantile meaning of the words "free on board" has long been settled. It is unnecessary, in my opinion, to refer to the decided cases in which this has been done since the result of them appears to me to be accurately stated in the following passage appearing at page 691 of the 8th Edition of Benjamin on Sale:—

> In many mercantile contracts it is stipulated that the seller shall deliver the goods "f.o.b.," i.e., "free on board". The meaning of these words is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped; delivery is made, and the goods are at the risk, of the buyer, from the time when they are so put on board.
>
> In a contract of sale "ex ship," the seller makes a good delivery if when the vessel has arrived at the port of delivery, and has reached the usual place of delivery therein for the discharge of such goods, he pays the freight, and furnishes the buyer with an effectual direction to the ship to deliver.

In Kennedy's work on Contracts of Sale C.I.F., at page 9 the learned author says in part:—

> The c.i.f. contract is to be distinguished from other forms of contract for the sale of goods sent overseas. Of these the most common are the f.o.b. (free on board), "ex ship" and "arrival" contracts. Under the normal f.o.b. contract the seller has to put the goods on ship at his own expense, whereupon the seller's contractual liability ceases, delivery is complete, and the property and risk in the goods (unless by the special terms of the contract they have already passed) pass to the buyer, who becomes responsible for freight and all subsequent charges.

(1) (1913) 3 K.B. 743 at 759.

In the case of two of the parcels of goods consigned to the Ashdown Company and two of those to Marshall Wells Ltd., the obligation of the Steel Company of Canada, according to the documents, was to deliver them f.o.b. at either Port Arthur or Fort William, which would have required that company at the time of the arrival of the goods at that port to furnish the buyer with an effectual direction to the ship to deliver. In the case of the remaining shipments to these two companies and of the shipment to the Northern Hardware Company, the seller's obligation was to deliver the shipments f.o.b. the designated rail carriers at one or other of these ports. Had any of the shipments been lost while being carried from Montreal to the Head of the Lakes, the loss would have fallen upon the Steel Company.

The claim of the Steel Company against these purchasers, if it had been necessary to resort to action, would have been for goods sold and delivered. The delivery, in order to sustain the cause of action, would have to be at the point designated by the contracts in the absence of any arrangement altering the terms. Any such action by the Steel Company against any of the purchasers would necessarily fail since there was no such delivery, the carrying out of the sale being frustrated by the destruction of the goods at Montreal.

As pointed out by Bailhache, J. in *Maine Spinning Co.* v. *Sutcliffe* (1), a term of a contract for the sale of goods as to the mode of delivery is not entirely for the benefit of either party to the contract, and neither can waive it without the consent of the other; it is a part of the contract which has to be fulfilled by the seller making delivery at that particular place and by the buyer receiving delivery there. In that case, where by the terms of the contract the goods were to be delivered f.o.b. Liverpool, the buyer contended that he was entitled to waive this term and take delivery before they were received at Liverpool, or at Liverpool on rail instead of on board ship. Bailhache, J., holding that one party to such a contract could not waive a term of the contract without the consent of the other, dismissed the action. This decision, which has been repeatedly referred to and the accuracy of which has never been

(1) (1917) 87 L.J.K.B. 382.

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doubted, would be an answer, in my opinion, to any claim by the purchasers in the present matter if they had sought to compel delivery at Montreal, a claim which might be properly asserted by them if the argument which succeeded in this matter at the trial were to be sound. Since a purchaser cannot compel a delivery elsewhere than at the place specified for delivery in an f.o.b. contract, is it to be said that the vendor, on his part, can enforce payment otherwise than after delivery in accordance with its terms?

While the case for the Crown, proven by the documents to which I have referred, showed that the sales were f.o.b. Head of Lakes, we have been asked to infer that, in reality, this was not so and that there was simply an arrangement between the parties whereby the seller absorbed part of the freight charges, the balance to be paid by the purchasers. But this would be mere speculation with nothing to support it. It is not the function of this Court to indulge in speculation as to the nature of the contracts which the parties intended to enter into, but rather to construe the contracts which, it was proved, they in fact made.

As to the argument based on section 33(1) of the *Sale of Goods Act,* it is sufficient to say that its provisions must be applied subject to the express terms of the contracts of sale. To do otherwise would be to fail to give effect to any f.o.b. contract which provided for delivery elsewhere than at the place where the carriage commenced.

I am unable, with respect, to agree with the opinion of the learned trial Judge that the *Sale of Goods Act* of Manitoba, assuming it applies, affected either the question as to whether delivery had been made or the property had passed since those questions depend upon the construction of the contracts put forward by the Crown as those between the seller and the purchasers.

I would allow this appeal, with costs, and dismiss the action.

ABBOTT J. (dissenting):—This is an action by the Crown to recover consumption or sales tax on the price of certain nails and other metal goods manufactured by the appellant and sold to various purchasers in Western Canada.

The facts are fully set forth in the judgment of the President of the Exchequer Court (1) and are not in dispute.

Appellant had received orders from certain hardware firms in Western Canada for nails and other supplies to be manufactured and shipped from its Montreal plant. The orders were accepted, the goods were manufactured, appropriated to the orders in question, packaged, and delivered by appellant to the Canada Steamship Lines at Montreal to be shipped via that line to the head of the Lakes and thence by rail to the various destinations in Western Canada. The goods were destroyed by fire while in the possession of Canada Steamship Lines and before they had left Montreal.

The Steamship Company, at the time of receiving the goods from appellant, issued non-negotiable bills of lading in the name of the purchasers, kept one copy, delivered two others to the appellant, which kept one copy and sent the third with the invoice to the consignees in Western Canada. Details of the sales are set out in invoices dated from March 14, 1944, to April 14, 1945.

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.", the invoices carried the notation "Hd. of Lakes" and in addition two of them carried the notation "Montreal" with respect to a certain class of merchandise included in those two invoices. All the invoices called for the freight to be "collect" but there was also an item in each 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 allowance was deducted from the price of the goods. Sales tax was calculated on the net amount after making such deduction. It must be assumed therefore that such net amount represented the sale price of the goods. In one of the invoices where a portion of the goods covered by that invoice was stated to be sold "F.O.B. Montreal", a freight

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allowance covering freight to Winnipeg was deducted while, in the other, no freight allowance was given with respect to the goods covered by that part of the invoice.

The trial judge found that the contracts between appellant and the customers were made in Winnipeg and that the law applicable to them is the law of Manitoba as found in *The Sale of Goods Act*, R.S.M. 1940, chapter 185. This finding appears to have been accepted by both parties.

The Crown claimed tax under section 86(1) of the *Special War Revenue Act* (now the *Excise Tax Act*, R.S.C. 1927, c. 179, as amended in 1936, Statutes of Canada, 1936, c. 45), the relevant part of which reads 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 that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase, or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial payment by instalments, the said tax shall be payable pro tanto at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall for the purposes of this section, be regarded as sales and deliveries.

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.

The Crown contended that delivery of the goods by the appellant to the Canada Steamship Lines as carrier was delivery of the goods to the purchaser within the meaning of paragraph (*a*) of said section 86(1), or, alternatively, that the property in the goods had passed to the purchaser, and that consequently the second proviso to section 86(1) was applicable.

Appellant contested the claim for tax on the ground that under the terms of the contracts in question, and in particular as a result of the inclusion of the term "F.O.B. Hd. of Lakes" in the invoices, delivery of the goods was to take place at the head of the Lakes; that the goods having been destroyed by fire while in the shed of Canada Steamship Lines at Montreal, there was never any delivery of the

goods to the purchaser, and that it was a condition of the contract that the property in the goods should not pass to the purchaser until they had been delivered at the head of the Lakes.

This interpretation of the term "F.O.B. Hd. of Lakes" was rejected by the trial judge and I think he was right in doing so. The learned judge took the view, however, that in the circumstances of the case, delivery to the carrier, while delivery to the purchaser, was a constructive or "deemed" delivery within the meaning of section 33(1) of the *Manitoba Sale of Goods Act,* which is in identical terms to section 32(1) of the *Sales of Goods Act,* 1893, in England.

On this assumption that the delivery of the goods to Canada Steamship Lines was a constructive or deemed delivery, and relying upon the decision of the Privy Council in *The King* v. *Dominion Engineering Company, Limited* (1), the learned judge held that there was no physical delivery of the goods to the purchaser within the meaning of paragraph (*a*) of section 86(1) of the said *Act.*

He held however, that the property in the goods referred to had passed from the appellant to the several purchasers, at the latest, at the time of delivery of the goods to Canada Steamship Lines, and that the appellant was therefore liable for the tax claimed, under the terms of the second proviso to the said section 86(1).

Since I am of opinion that there was actual physical delivery of the goods in question to the purchaser, it follows that in my view the decision of the Privy Council in *The King* v. *Dominion Engineering Company, Limited* is not applicable.

With respect I do not agree with the view expressed by the trial judge that delivery to a carrier within the terms of section 33(1) of the Manitoba Act constituted a constructive delivery. Under that section there is merely a presumption created, which may be rebutted, that delivery to a carrier is delivery to such carrier as agent of the buyer; See Benjamin on Sale, 8th ed. pp. 737-8.

In the case at bar, therefore, unless this presumption was rebutted, delivery to Canada Steamship Lines was delivery to the buyer. The learned trial judge found that it had not been rebutted and I share his view as to this.

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STEEL CO. OF CANADA LTD. v. THE QUEEN

Abbott J.

Appellant's case really turns upon the construction to be placed upon the term "F.O.B. Hd. of Lakes". As to this I am in agreement with the conclusions reached by the learned trial judge. The term "F.O.B." at specified point does not necessarily imply that delivery is to take place and the property in the goods to pass at such point. See *Winnipeg Fish Company* v. *Whitman Fish Company* (1) and *Stephens Bros.* v. *Burch* (2).

As Hamilton L.J. said in *Wimble, Sons & Co.* v. *Rosenberg & Sons* (3):

> It is well settled that, on an ordinary f.o.b. contract, when "free on board" does not merely condition the constituent elements in the price but expresses the seller's obligations additional to the bare bargain of purchase and sale, the seller does not "in pursuance of the contract of sale" or as seller send forward or start the goods to the buyer at all except in the sense that he puts the goods safely on board, pays the charge of doing so, and, for the buyer's protection but not under a mandate to send, gives up possession of them to the ship only upon the terms of a reasonable and ordinary bill of lading or other contract of carriage. There his contractual liability as seller ceases, and delivery to the buyer is complete as far as he is concerned.

In my view the words "F.O.B. Hd of Lakes" used in the invoices under consideration "merely condition the constituent elements in the price", to borrow the phrase used by Hamilton L.J. which I have just quoted.

If this were not the case, I do not consider that appellant was justified in deducting the allowance for freight before arriving at the sale price upon which sales tax was computed.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *McMichael, Common, Howard, Ker & Cate.*

Solicitor for the respondent: *J. Alex. Prud'homme.*

(1) (1909) 41 Can. S.C.R. 453 at 460.

(2) (1909) 10 W.L.R. 400 at 401.

(3) (1913) 3 K.B. 743 at 757.