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*March 6, 7.
*June 13.

SARNIA BREWING COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY, THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Revenue—Action by Crown to recover excise tax and sales tax under ss. 19B1 (b) and 19BBB(1) of The Special War Revenue Act, 1915 (Dom.), and amendments—Evidence failing to prove manufacture by defendant—Application to receive further evidence (Dom. Statutes, 1928, c. 9, s. 3).*

The judgment of Maclean J., President of the Exchequer Court of Canada, [1928] Ex. C.R. 219, holding the Crown entitled to recover from the defendant certain sums claimed for excise tax and sales tax, under ss. 19B 1 (*b*) and 19BBB (1) of *The Special War Revenue Act, 1915*, and amendments, was reversed, on the ground that the evidence, although showing that defendant had sold the beer in question, failed to show that defendant had manufactured it. The Court refused an application by the Crown to receive further evidence, under s. 3 of c. 9 of the Statutes of 1928 (Dom.), holding that no special ground existed to justify it.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiff was entitled to recover from the

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) [1928] Ex. C.R. 219.

defendant the amounts claimed for excise tax and sales tax in respect of beer alleged to have been manufactured and sold by defendant. The appeal was allowed.

*S. G. Slaght K.C.* for the appellant.

*N. W. Rowell K.C.* and *Gordon Lindsay* for the respondent.

The judgment of the court was delivered by

LAMONT J.—The sole question in this appeal is: Did the Crown in the court below on the evidence establish as against the appellant a statutory liability for the taxes sued for?

The action was brought to recover from the appellant the sum of $15,249.80 sales tax under s. 19BBB (1) of the *Special War Revenue Act, 1915,* and amendments, and $33,076.85 excise or gallonage tax under s. 19B 1 (*b*) of the same Act.

In the statement of claim the Crown alleged that the Brewing Company was, during the periods therein referred to, licensed to carry on the trade or business of a brewer. It also alleged that, on and after the first day of June, 1925, and prior to the first day of May, 1927, the company made sales of beer subject to the tax imposed by s. 19BBB (1), and thereby became liable to pay the tax. Further that the company had, during the same period, manufactured and sold beer subject to the tax imposed by s. 19B 1 (*b*) and became, therefore, liable to pay that tax also. These sections in part read as follows:—

19BBB 1. In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent. on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him.

* * *

Provided that the consumption or sales tax specified in this section shall not be payable on goods exported.

19B 1 (*b*). There shall be imposed, levied and collected upon all goods enumerated in Schedule II to this Part, when such goods are imported into Canada or taken out of warehouse or when any such goods are manufactured or produced in Canada and sold on and after the twenty-fourth day of May, one thousand nine hundred and twenty-two, in addition to

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any duty or tax that may be payable under this Act, or any other statute or law, the rate of excise tax set opposite to each item in said Schedule II.

* * *

Provided that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise.

Schedule II provides that the rate of excise tax on beer shall be twelve and a half cents per gallon.

A perusal of these sections makes it clear that under each of them the tax is imposed in respect of beer manufactured or produced in Canada and sold by the manufacturer or producer. The onus was, therefore, on the Crown to prove that the beer, in respect of which the taxes were claimed, had not only been sold by the company but had also been manufactured by it, unless such manufacture was admitted, or not denied. The statement of defence contains the following:—

(1) The Defendant does not admit that it was licensed to carry on the trade or business of a brewer or as such manufactured or sold beer.

(5) The defendant does not admit that it manufactured or sold beer subject to any tax and denies that it became liable to pay to His Majesty any of the sums referred to in paragraph 5 of the Information.

(6) The defendant expressly denies all the allegations contained in the Information herein and denies that any taxes or moneys are due or owing as alleged therein.

This defence was notice to the Crown that the company was not admitting anything and would require the Crown to establish the liability of the company to pay the tax.

We have carefully examined the evidence submitted on behalf of the Crown (no evidence was given on behalf of the company) but are unable to find anything therein which, in our opinion, establishes, either expressly or inferentially, that the company had manufactured the beer in respect of which the taxes are claimed. The only evidence of manufacture was that given by A. E. Nash, a member of the accounting firm of Clarkson, Gordon, Gilfoyle & Nash, which firm had been retained by the Crown to make an examination of the company's books. Mr. Nash, among other questions, was asked:—

Q. Has your firm made an examination of the accounts of defendants, the Sarnia Brewing Company, with a view of ascertaining the Crown's claim for gallonage and sales tax?—A. They have.

Q. Were you able to ascertain from the books of the Company the number of gallons manufactured and sold by them from the time they commenced business in 1925 up to the 30th of April, 1927, the period covered by the Information?—A. Yes.

* * *

Q. Then did you take off from the books, and prepare from the books, a statement showing the number of gallons produced and sold month by month during that period?—A. Yes, we did.

That statement was put in as Ex. No. 1. On cross-examination, however, Nash admitted that he had not personally examined the books or vouchers of the appellant, nor any of the documents on which Ex. No. 1 was based. Not having examined the company's books or documents, he was not in a position to testify as to what information could be ascertained from them. His evidence, therefore, in so far as it was directed towards establishing that the company had manufactured the beer sold by it, cannot be said to have any probative force.

The only other witness who gave evidence was G. R. Troop, who had personally examined the books, vouchers and documents of the company. Troop testified that he had verified in the company's books the figures that appeared in Ex. No. 1, that those figures were correct and had been taken by him from the books of the brewery. Unfortunately the books themselves were not put in evidence and an examination of Troop's evidence and of Ex. No. 1 fails to disclose any reference whatever in either of them to the manufacture or production of the beer.

The learned President of the Exchequer Court held that the evidence of Troop and Ex. No. 1 established that the beer in question had been manufactured and sold by the company. They did, without doubt, establish that it had been sold, but, as there is no reference in either of them to the manufacture of the beer, we are unable to find that such manufacture was established. The learned President evidently overlooked the defect in the Crown's proof, for in his judgment he says:

> The real question for determination here is, upon whom lies the onus of establishing what, if any, of the goods in question, were sold for export and in fact exported, and therefore coming within the exemptions from taxation.

The company was contending that the onus was on the Crown not only to prove the sale of the beer, but also to prove that it had not been manufactured for export; while the contention of the Crown was that the onus was on the company to bring itself within the provisos of the sections quoted, in part, above. Nothing, however, was said or done at the trial on behalf of the company to mislead the Crown or to relieve it of the obligation of proving every fact neces-

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sary to establish the company's liability to pay the tax. That obligation, as we have said, involved proving that the company had manufactured the beer sold, and we are of opinion that the Crown failed to prove it. The parties were always at arms' length.

On behalf of the Crown we were asked to receive further evidence of manufacture if the court should be of opinion that it had not been sufficiently proved.

Section 3 of chapter 9 of the Statutes of 1928 (Can.) authorizes this Court, in its discretion, on special grounds, and by special leave, to receive further evidence on a question of fact. In this case, however, we are unable to find the existence of any special ground which would justify the receiving of further evidence.

The appeal, in our opinion, should be allowed and the action dismissed. The appellant is entitled to the costs in the court below but, as it raised no question there as to the absence of proof of manufacture, there will be no costs of this appeal.

*Appeal allowed.*

Solicitors for the appellant: *Slaght & Cowan.*

Solicitor for the respondent: *W. Stuart Edwards.*