
BETWEEN:

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA..... PLAINTIFF;

AND

DOMINION ENGINEERING COMPANY LIMITED..... DEFENDANT.

1942
Jan. 8
1943
Feb. 12

Revenue—Sales Tax—Special War Revenue Act, R.S.C. 1927, c. 179, secs. 86, 95 and 106—Liability for sales tax on progress payments not collected—"Falls due" and "becomes payable"—No sales tax payable by manufacturer on amounts overpaid by purchaser.

THE ACTION is for the recovery from defendant of the sum of $10,844.46 for sales tax, and penalties alleged due the plaintiff under the Special War Revenue Act, R.S.C. 1927, c. 179.

Defendant company, incorporated under the laws of the Dominion of Canada, entered into a contract for the sale of a machine and accessories to the Lake Sulphite Pulp Company Limited for the price of $488,335 payable in 9 monthly instalments and one further instalment to be paid after the machine was placed in operation, and in no event later than 6 months from the date of final shipment or offer of shipment of the machine. The property in the machine was not to pass to the purchaser until all payments under the contract had been made. Except for two small parts worth about $1,200 only, the machine was never delivered to the purchaser. Six instalments of the purchase price were paid to defendant and the sales tax on these instalments was paid to the plaintiff by defendant. The defendant did not receive the last four instalments due it from the Lake Sulphite Pulp Company Limited. No

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sales tax on these four instalments was paid by defendant and plaintiff now seeks to recover from it the sales tax on three of these payments.

Held: That the machine never having been delivered except for the parts above mentioned there could be no liability on defendant for sales tax under ss. 1 (*a*) of s. 86 of the Special War Revenue Act.

2. That the phrase "falls due" in the proviso to ss. 1 (*a*) of s. 86 of the Special War Revenue Act refers to the terms of payment as set forth in the contract and the phrase "becomes payable" in the same proviso refers to the time when the progress payments will mature and become exigible in accordance with the progress made in the building of the machine.

3. That the progress payments stipulated in the contract fell due and were exigible in the proportion the work progressed and the sales tax thereon was payable *pro tanto* at the time such payments fell due and became payable and if there were no progress in the work there were no payments due and consequently there was no tax leviable.

4. That no sales tax is due plaintiff on the amount defendant was overpaid by the purchaser of the machine.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant sales tax and penalties alleged due the Crown under the provisions of the Special War Revenue Act, R.S.C. 1927, c. 179, and amendments thereto.

The action was tried before the Honourable Mr. Justice Angers, at Montreal.

Roger Ouimet for plaintiff.

L. A. Forsyth, K.C. and *H. H. Hansard* for defendant.

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

ANGERS J., now (February 12, 1943) delivered the following judgment:

This is an information exhibited by the Attorney General of Canada on behalf of His Majesty the King whereby it appears that the latter claims from the defendant the sum of $10,844.46 for sales tax, penalties as provided for by section 106 of the Special War Revenue Act (R.S.C. 1927, chapter 179) to the date of payment and costs.

[The learned Judge here refers to the pleadings and continues]:

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The contract, in the form of a proposal by the defendant to Lake Sulphite Pulp Company Limited and an acceptance by the latter, the first dated June 5, 1937, and the second, August 3, 1937, was filed as exhibit P1.

The proposal made by the defendant, addressed to Lake Sulphite Pulp Company Limited, Montreal, contains at the outset the following stipulation:

Dominion Engineering Company, Limited (hereinafter called the Company), proposes to furnish apparatus as follows, at the price, on the terms and under the conditions specified herein; it being agreed that wherever the word "apparatus" appears herein, it shall be understood (wherever the context so permits) to comprise any and all of the goods; wares and merchandise which may be made the subject matter of the proposed contract:—

Description of apparatus

One (1) Dominion Pulp Drying Machine with Minton Vacuum Dryer, having a wire width of 168 inches, in accordance with the attached specifications, but not including stock, white water or vacuum pumps, condenser equipment, screens, wires, deckles, felts, ropes or other clothing or any electrical equipment, unless specifically stated to be included.

The contract provides that all plans and specification thereto shall form part thereof. There is no plan attached to the contract but there is a specification, which has no bearing on the question at issue.

The contract then stipulates that all apparatus shall be installed at the expense of the purchaser, unless otherwise agreed. It goes on to say that the services of engineers, millwrights or mechanics furnished by the company to superintend the erection or operation of the apparatus shall be reimbursed to the company by the purchaser monthly, independently of the contract account, at the company's regular rates at the time the work is done. It adds that all labour and material required in connection with these services will be furnished by the purchaser.

Skipping over certain articles which, to my mind, have no materiality herein, I deem it apposite to reproduce verbatim the clause dealing with the payments and the right of property in the apparatus in question; it reads thus:

The property and right of possession in the apparatus and the right to use the same under any and all patents relating to any of the apparatus herein specified shall not pass from the Company until all payments hereunder (including deferred payments and payments of notes and renewals thereof, if any), shall have been fully made in cash, and the apparatus herein specified shall remain the personal property of the

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Company, whatever may be the mode of its attachment to the realty or other property, until fully paid for in cash, and the Purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in the Company. If default is made in any of the payments in the manner and form and at the times herein specified the Company may retain any and all partial payments, which have been made, as liquidated damages and as rental for the use of such apparatus, and the Company shall be entitled to the immediate possession, of said apparatus and shall be free to enter the premises where such apparatus may be located and remove the same as its property, without prejudice for recovery of any further damages which the Company may suffer from any cause. . . .

The next clause in the contract offering some interest in the present case is the one concerning the price; it is worded as follows:

The price of said apparatus is

Item No. 1:

For the machine complete as specified—*Four hundred and seventy-three thousand nine hundred and twenty dollars* ($473,920).

Item No. 2:

For spare parts as listed in page No. 3-A—*Fourteen thousand four hundred and fifteen dollars* ($14,415).

The above prices are f.o.b. the Company's works with freight allowed to Nipigon, Ontario, and including Dominion Government Sales Tax of 8 per cent.

I do not think that it is necessary, nay even advantageous, to quote the list of spare parts referred to in item No. 2.

The following clause which has some importance is the one fixing the terms of payment, which states:

The terms of payment are as follows:—

Nine (9) monthly progress payments of *forty-eight thousand eight hundred dollars* ($48,800) each, commencing July 5th, 1937, and continuing on the fifth of each month thereafter until a total of *four hundred and thirty-nine thousand two hundred dollars* ($439,200) has been paid.

Final payment to be made after the machine is placed in operation but in no event later than six months from the date of final shipment or offer of shipment of the apparatus from the Company's works.

The contract then provides that all payments shall be made in funds at par Montreal and that, in case partial shipments are made, pro rata payments shall be made therefor and it adds:

If the manufacture or shipment of the apparatus herein specified, or any material part thereof, is delayed from any cause for which the Purchaser is directly or indirectly accountable, the date of completion of the apparatus shall be regarded as the date of shipment in determining when payments for said apparatus are to be made, and the Company shall be

entitled to receive reasonable compensation for storing the completed apparatus, which shall be held at Purchaser's risk. The Purchaser shall reimburse the Company for any extra cost or expense incurred in the manufacture, delivery or installation of apparatus due to such delay.

Regarding the shipment the contract stipulates as follows:

> The apparatus specified above will be shipped as follows —
> Final shipment on or before March 5th, 1938.

[The learned Judge here considers the evidence and continues]:

In brief the evidence discloses the following material facts:

Dominion Engineering Company Limited started to work on the pulp drying machine provided for in the contract on June 15, 1937, and the work ceased on February 11, 1938;

Dominion Engineering Company Limited got behind in its work mostly due to the fact that it had undertaken more than it could perform within the time agreed upon;

Lake Sulphite Pulp Company Limited made the monthly progress payments on the machine purchased from Dominion Engineering Company Limited falling due on the 5th of July, August, September, October, November and December, 1937, on the following dates, viz. the first two on August 27, 1937, and the others on September 30, October 7, November 13, 1937, and January 11, 1938;

In view of the delay in the execution of the contract by Dominion Engineering Company Limited, Lake Sulphite Pulp Company Limited decided not to make any further payments after the one made on January 11, 1938, which, under the contract, fell due on December 5, 1937;

When the work was stopped on the building of the machine by Dominion Engineering Company Limited on February 11, 1938, Lake Sulphite Pulp Company Limited had overpaid a sum of $15,300;

Lake Sulphite Pulp Company Limited was in financial difficulties towards the end of December, 1937, and it went into liquidation at a time which has not been plainly specified, but on or about February 22, 1938, a provisional liquidator was said by counsel to have been appointed on February 5;

Dominion Engineering Company Limited paid the sales tax on the progress payments received from Lake Sulphite

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Pulp Company Limited on or about the last day of the month following the receipt thereof, to wit September 30, October 30, November 30 and December 31, 1937, and January 31, 1938;

Dominion Engineering Company Limited did not pay any sales tax on the sum of $15,300 overpaid by Lake Sulphite Pulp Company Limited.

Notwithstanding the fact that the defendant received only $15,300 on the progress payment falling due on January 5, 1938, and did not receive the progress payments falling due on February 5 and March 5, 1938, the plaintiff contends that he is entitled to the sales tax on the full amount thereof.

The plaintiff bases his claim on section 86 of the Special War Revenue Act (R.S.C., 1927, chap. 179, and amendments), the relevant provision whereof reading thus:

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.

As plaintiff claims in addition to the sales tax the penalties provided for by section 106 of the Act, it seems convenient to reproduce here the relevant part of this section:

106 1. Every person liable for taxes under Parts XI, XII and XIII of this Act and every manufacturer or producer licensed under section ninety-five thereof, . . . shall file each month a true return of his taxable sales for the last preceding month in accordance with regulations made by the Minister. . . .

2 If no taxable sales have been made during the last preceding month, a return verified as hereinbefore provided, shall be filed, stating that no such taxable sales have been made.

3. The penalty for failure to file the return required by subsections one and two of this section, within the time required by subsection four hereof, shall be a sum not less than ten dollars and not exceeding one hundred dollars.

4. The said return shall be filed and the tax paid not later than the last day of the first month succeeding that in which the sales were made.

5. In default of payment of the said tax or any portion thereof within the time prescribed by this Act or by regulations established thereunder, there shall be paid in addition to the amount in default, a penalty of two-thirds of one per centum of the amount in default, in respect of each month or fraction thereof, during which such default continues.

Section 95 to which section 106 refers contains, among others, the following provision:

95. 1. Every manufacturer or producer shall take out an annual licence, for the purpose of this Part, and the Minister may prescribe a fee therefor, not exceeding two dollars.

It is agreed that defendant at all times material held a licence.

The Dominion Pulp Drying Machine which forms the object of the contract is either divisible or indivisible. If it is indivisible, the plaintiff has no claim against the defendant since the machine was not delivered, with the exception of the sole-plates worth about $1,200, an infinitesimal proportion of the whole, when one considers that the price of the machine complete is $488,335. The tax indeed is payable by the producer or manufacturer of the goods at the time of the delivery thereof to the purchaser: sec. 86, 1 (*a*). If, on the contrary, the machine must be considered as divisible, the case is governed by the first proviso of section 86, 1 (*a*). In this case the tax is payable *pro tanto* at the time each of the instalments on the purchase price *falls due* and *becomes payable* in accordance with the terms of the contract. Both conditions must exist in order that the tax be exigible.

The sales tax payments which became due in connection with the instalments on the purchase price which matured on July 5, August 5, September 5, October 5, December 5, 1937, were made on the dates hereinabove mentioned.

The instalments falling due under the contract on January 5, February 5 and March 5 were not effected. On February 11 when the work was discontinued, Dominion Engineering Company Limited had received $15,300 in excess of the value of the work it had done and on this sum it did not pay any sales tax to the plaintiff.

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Counsel for plaintiff referred to, but did not insist on, section 87 in order to show the legislators' intentions as regards contracts which may be doubtful of interpretation. I do not think that section 87 has any application in the present case.

It was urged by counsel for plaintiff that the Special War Revenue Act being a taxing statute must be construed as "giving the broadest authority to the Crown to exact taxation as provided therein". The addition of the last words of the phrase "as provided therein" restricts, undoubtedly intentionally, in a very material way, the scope of the proposition; however I believe it is apposite to note that a taxing statute must be construed strictly: *Maxwell on the Interpretation of Statutes,* 8th ed., 250; *Inland Revenue Commissioners* v. *Duke of Westminster* (1); *Partington* v. *Attorney-General* (2); *Tennant* v. *Smith* (3); *Cox* v. *Rabbits* (4); *Oriental Bank Corporation and Wright* (5); *Harris Co. Ltd.* v. *Rural Muncipality of Bjorkdale* (6).

I may add incidentally that taxation is the rule and that exemption constitutes a privilege which must be strictly construed: *Roenisch* v. *Minister of National Revenue* (7); *Toronto General Trusts Corporation* v. *Corporation of City of Ottawa* (8).

Counsel for plaintiff submitted that the tax claimed herein is proportionate to the amounts payable in instalments "under any form of conditional sales agreement, contract of hire-purchase of any form, etc." and that such instalments, under a fiction of the law, become individual sales and deliveries. Counsel thence contended that, under the provisions of section 86, 1 (*a*), the moment instalments fell due, irrespective of the fact that they had not yet been obtained by the defendant, the tax on each of these fictional sales and deliveries had to be paid to the Crown, because the dates on which these instalments became due and exigible, as stipulated in the contract, constituted the extreme limits agreed upon by the parties thereto. Counsel submitted that the parties to the contract had qualified and determined the so-called progress; and that this was

(1) 1936) A.C. 1, 24
(2) (1869) L.R., 4 H.L. 100, 122.
(3) (1892) A.C. 150, 154.
(4) (1877-78) 3 A.C. 473, 478.
(5) (1879-80) 5 A.C. 842, 856.
(6) (1929) 2 D.L.R. 507, 512.
(7) (1931) Ex. C.R. 1, 4.
(8) (1935) S.C.R. 531, 536.

the way which they had understood between themselves that the progress payments were to be made. Counsel maintained therefore that, as long as instalments became due on the dates mentioned in the contract, they constituted sales and deliveries under the provisions of section 86, 1 (*a*) of the Act and that the defendant had to turn over to the Crown the amount of the sales tax on each of the progress payments of $48,800 specified in the contract, whether these payments were made or not.

I must say that I cannot agree with the learned counsel's interpretation of section 86, 1 (*a*) of the Act and cannot accept his proposition that the words " 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 " are intended to impose the tax on instalments which have not been received. This, to my mind, would be most unfair and unreasonable.

The interpretation given to section 86, 1 (*a*) of the Act by counsel for plaintiff is repugnant to justice and reason and I do not think that it should be countenanced. It would mean, assuming the worst, that, if the purchaser had paid in one progress payment ($48,800) and defaulted on the eight others totalling $390,400, the vendor, having received a payment of $48,800, could be compelled to pay a sales tax of $35,136, i.e. 8 per cent on a sum of $439,200, to wit nine payments of $48,800 each. I am unable to conceive that such was the legislators' intention, notwithstanding the fact that there are innumerable pieces of legislation which, when construed literally, may lead to an absurdity. In this connection the following may be consulted beneficially: *Maxwell on the Interpretation of Statutes,* 8th ed., pp. 169, 177 and 228; *Craies on Statute Law,* 4th ed., pp. 85 et seq.; *Beal, Cardinal Rules of Legal Interpretation,* 3rd ed., pp. 343 et seq.; *Halsbury's Laws of England,* 2nd ed., vol. 31, v° Interpretation, no. 653; *Bonham's Case* (1).

At page 169, Maxwell says:

> In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles, should, in all cases of doubtful significance, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law; and no less, but rather

(1) (1610) 4 Coke's Reports, 367, 375; Part VIII (114a).

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more, force is due to any drawn from an absurdity or injustice. But a Court of Law has nothing to do with the reasonableness or unreasonableness of a statutory provision, except so far as it may help it in interpreting what the Legislature has said (Lord Halsbury, *Cooke* v. *Vogeler,* 1901, A C. 107).

And at page 177, Maxwell makes the following comments:

> A sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations (Lord Herschell L.C. *Arrow Shipping Co.* v. *Tyne Commissioners,* 1894, A.C. 516). Whenever the language of the Legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words.

See the authorities cited in note (*a*) at the foot of page 177.

Counsel for plaintiff intimated that the defendant could have sought the annulment of the contract and thereby freed itself from the sales tax; he observed that instead the defendant let the contract run and kept on working on the construction of the machine, although Lake Sulphite Pulp Company Limited had defaulted twice in its payments; he added that as a matter of fact it continued working until the 11th of February, 1938, five days after Lake Sulphite Pulp Company Limited was in the hands of a provisional liquidator.

I must admit that I fail to see what bearing the recourse which the defendant might have had to seek the annulment of the contract can have on the question at issue.

I am inclined to believe that the defendant, which had got behind in the performance of its contract, was anxious to complete the machine and to get the balance of the progress payments. I think it acted wisely in continuing to build the machine until it became certain that the liquidator of Lake Sulphite Pulp Company Limited did not wish to complete the payments and to take delivery of the machine for the benefit of the liquidation.

What became of the portion of the machine which had already been constructed on the 11th of February, 1938, when the work was stopped has not been divulged. There was an asset of some value which it seems likely could have been disposed of either in its present state or else completed.

Be that as it may, I do not think that the question offers any interest in the present case. What the Court is

concerned with is to determine whether the defendant company is liable to pay a sales tax on instalments or progress payments which it did not receive.

Counsel for plaintiff suggested that the parties to the contract could have established a rate of progress, had they wished to do it, and could have inserted in the contract a clause stating what progress would have to be made between such and such a date; he noted that nothing of the kind had been included in the contract or even been discussed by the parties. This seems to me irrelevant. What we have to consider is the contract in its present form.

Counsel further observed that Stadler, Notman and Welsford had all admitted that in the execution of such contracts there always were delays of two, three and even six months. Counsel concluded that in the present instance time is not of the essence of the contract in suit; that on the contrary there is a clause in the contract stipulating that delay will not entitle the purchaser to damages.

Counsel pressed the point that the evidence discloses that it was due to the purchaser's insolvency that the machine had not been finished and that the work would have gone on unhampered and the machine could have been completed within six weeks, had Lake Sulphite Pulp Company Limited been in a position to pay it.

Taking for granted that these facts are exact, I do not think that they have any bearing on the matter in litigation.

Counsel for plaintiff reiterated his statement that, under the provisions of section 86, 1 (*a*), we are not concerned as to whether or not the progress payments were received by the defendant. According to him, this section does not require that the payments shall have been received in order to be taxed; it says that the tax "shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable". In counsel's view it is not material whether the instalment has been paid; the moment it falls due and becomes payable there is a fictional sale and delivery and as such it is taxable.

It was finally submitted by counsel for plaintiff that if the defendant had wanted to be paid it could have sued

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under its contract, because Lake Sulphite Pulp Company Limited was behind in its payments. I may note in passing that this is not exact; the contrary is rather conformable to the truth. Counsel added that in turn Lake Sulphite Pulp Company Limited could not oppose any plea, because of the wording of the contract, on the ground of delay. He emphasized the fact that the payments of January and February could have been exacted on their respective dates of maturity. He admitted however that, as regards the payment of March 5, it is a somewhat different proposition in view of the fact that Lake Sulphite Pulp Company Limited had gone into liquidation and was no longer in operation.

I must say that I cannot share this view; I do not think that it is judicially sound. Yet as the point seems to me to have no relevance to the question at issue, I do not deem it advisable to waste time in discussing it at length; it will suffice to refer to the statement of Mr. Justice Mignault in the case of *Employers Liability Assurance Company* v. *Lefaivre* (1), concerning the exception *non adimpleti contractus*. I may point out that Mr. Justice Mignault was dissenting in this case, but the observation he made with regard to this exception is not, as claimed by counsel for defendant, germane to the dissent. In fact Mr. Justice Rinfret, who delivered the judgment of the majority of the Court, expressed on this point a similar opinion: *see* pages 7 and following.

Counsel for plaintiff added that the defendant could have continued building the machine, had it been so directed by the liquidator of Lake Sulphite Pulp Company Limited authorized to that effect by the Court. This is quite possible, but it seems to me foreign to the matter in dispute. Again may I repeat that the question with which I am confronted is whether the defendant company is liable to pay a sales tax on progress payments which it has not collected.

It seems obvious to me that the plaintiff has no claim under the first paragraph of subsection 1 (*a*) of section 86 which provides that "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

(1) (1930) S.C.R. 1, 13.

in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof ".

The machine was never delivered, with the exception of the sole-plates valued at approximately $1,200; one of the essential conditions provided for in paragraph (*a*) of subsection 1 is lacking.

Has the plaintiff got a claim under the first proviso of article 86? According to his counsel's submission he has, if we assume that the sales tax is payable on the progress payments at the time they fall due and become payable in accordance with the terms of the contract, independently of the fact that they have not been paid. As previously stated, such an interpretation of the first proviso in article 86, 1 (*a*) seems to me thoroughly unjust and unreasonable. I may add that, in my view, it is not only repugnant to justice and equity but even to simple common sense.

The legislators have used, in this proviso, two expressions which, at first sight, may perhaps appear to be synonymous, viz. " falls due " and " becomes payable ". Counsel for plaintiff has accepted them as such. I may say that I feel loath to believe that the legislators wittingly used two expressions having, in their opinion, exactly the same meaning and scope when one would have been sufficient. Our legislators are sometimes diffuse and redundant, but I dare not think that they would be to that extent. I believe that the phrase " falls due " is intended to cover the terms of payment as set forth in the contract and that the phrase " becomes payable " refers to the time when the progress payments will mature and become exigible in accordance with the progress effectively made in the building of the pulp drying machine. This seems to me to be the only just, equitable and reasonable view to take of the legislators' intention.

Besides one must not overlook the provision contained in the second proviso of the said article, which reads thus:

> 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.

There was no physical delivery of the machine by the defendant company, save for a very trifling portion thereof,

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viz. the sole-plates, worth about $1,200, and the property of the machine never passed to the purchaser. In virtue of the contract the property of the machine shall remain in the defendant company until all payments have been fully made. The clause of the contract dealing with the right of ownership is the seventh on page (2), which is hereinabove recited.

There being no physical delivery of the machine and the property therein having remained vested in the vendor, the plaintiff's claim seems to me, for this additional reason, unfounded.

It was argued on behalf of defendant that, in order that the tax be exigible, the progress payments in respect of which it is claimed must have fallen due and become payable; in his view both conditions must exist.

The progress payments, under the terms of the contract, fell due on the 5th of each month commencing on the 5th of July and continuing for nine consecutive months, the last payment falling due and being exigible when the machine was placed in operation but in no event later than six months from the date of final shipment or offer of shipment of the machine from the defendant company's works. The progress payments, as the name implies, only became payable as the work progressed.

Lake Sulphite Pulp Company Limited made the payments fairly regularly each month, with the exception of the payment maturing on December 5, which was delayed considerably. The instalments which were payable on the 5th of July and the 5th of August were paid on the 27th of August; one must not overlook the fact that the work performed on the construction of the machine itself was only begun on or about the 3rd of September and that when the July and August instalments were paid there was no progress made on the machine at all. The payments maturing on September 5, October 5 and November 5 were made on September 30, October 7 and November 13. The progress payment which was longer deferred was the one falling due on December 5; it was only paid on January 11. At the time Lake Sulphite Pulp Company Limited had paid more than the progress of the work justified. On January 11, taking into account the payment of $48,800 made on that day, Lake Sulphite Pulp Company had overpaid $79,300 to the defendant. The

work was continued until February 11, 1938, when it ceased definitively. With the progress made in the work between the 11th of January and the 11th of February the overpayment was reduced to $15,300.

If one eliminates the word "progress" from the clause relative to the terms of payment, the contract does not come within the purview of the first proviso of section 86, 1 (*a*) which deals with contracts for the sale of goods wherein it is provided that the price shall be paid to the manufacturer or producer by instalments as the work progresses. In that case the contract would be subject to the first paragraph of section 86, 1 (*a*) and, as there was no delivery, save for a negligible part of the machine, viz. the sole-plates valued at approximately $1,200, no tax can be levied, imposed and collected.

It was contended by counsel for defendant that, if the manufacturer is unable to keep up to the progress stipulated in the contract, the obligation of the purchaser to pay is suspended until the manufacturer catches up with his work. This contention seems rational and sensible.

After due consideration I have reached the conclusion that the contract in suit is governed by the first proviso of section 86, 1 (*a*), that the progress payments therein stipulated fell due and were exigible in the proportion the work progressed and that the sales tax thereon was payable *pro tanto* at the time such payments fell due and became payable. If there were no progress in the work there were no payments due and if there were no payments there was no tax leviable.

If the interpretation hereinabove given to the expressions "falls due" and "becomes payable" in the first proviso is not accepted, the case fails in virtue of the stipulations of the second proviso, seeing that there was no physical delivery and that the property of the machine did not pass to the purchaser.

After a careful perusal of the contract and other evidence, documentary and oral, of the law and of counsel's argument, I do not think that the plaintiff is entitled to impose and levy a sales tax on progress payments which were not made and which moreover were not exigible.

Regarding the sum of $15,300 which Lake Sulphite Pulp Company Limited overpaid to the defendant, it would normally have formed part of the progress payment falling

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due January 5, 1938, if the work had been continued; as this payment never became payable and might perhaps be recovered by Lake Sulphite Pulp Company Limited in virtue of the provisions of article 1048 C.C.—a question which it is not within my competence to determine—I do not believe that any sales tax can be imposed and levied thereon.

For the aforesaid reasons there will be judgment dismissing the plaintiff's action with costs.

Judgment accordingly.