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March 19.
May 23.

HIS MAJESTY THE KING.....PLAINTIFF;

VS.

PEAT FUELS LIMITED.....DEFENDANT.

Crown—Contract—Interpretation—Words repugnant to real intention

Held, that where the real intention of the parties can be clearly collected from the language within the four corners of a deed or instrument in writing, Courts are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous what is repugnant to the real intention so gathered.

2. That a contract ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole agreement, greater regard being had to the clear intention of the parties than to any particular words which may have been used in the expression of their intent. The terms of the agreement are to be drawn partly from the written document and partly from all the surroundings of the written document, such as the nature of the transaction with regard to which the document is brought into life.

3. That the Crown is not bound by the error or inadvertence of its officers, nor by any deliberate intention of its officers without proper authority to alter the terms of a written agreement.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant a certain amount alleged to be due under an agreement entered into between the plaintiff and the defendant on March 1, 1927.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

(1) (1906) 10 Ex. C.R. 410.
(2) (1907) 38 S.C.R. 451.
(3) (1930) 1 D.L.R. 449.
(4) (1928) Ex. C.R. 29.
(5) (1928) S.C.R. 578.
(6) (1918) 18 Ex. C.R. 115.
(7) (1886) 13 S.C.R. 469 at 475.
(8) (1894) 64 Fed. Rep. 789.
(9) (1917) 17 Ex. C.R. 273; 57 S.C.R. 697.

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v.
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R. S. Robertson, K.C., and *J. A. Robertson* for plaintiff.

Ainslie Greene, K.C., for defendant.

The facts herein and the questions of law raised by the parties are stated in the Reasons for Judgment.

THE PRESIDENT, now (May 23, 1930), delivered judgment.

The matter in controversy here arises from a written agreement entered into on March 1, 1927, between the defendant company, and the plaintiff represented by the the Minister of Mines of Canada. The parties to the agreement entertain conflicting views as to the proper construction of the agreement.

Before reference is made to the precise provisions of the agreement a matter preliminary should be alluded to. There are no recitals in the agreement disclosing the history of the steps leading up to the agreement. A plain reading of the agreement would leave one with the impression that the parties were strangers in respect of the subject-matter of the agreement, at the time of entering into the negotiations resulting in the written document itself. Such being the case, and it being apparent from the pleadings that the parties were in disagreement as to the construction of the agreement, Mr. Robertson for the plaintiff, sought to tender evidence explaining the circumstances bringing the parties together, and the causes leading to the agreement; to this Mr. Greene for the defendant objected. I decided to hear such evidence subject to the defendant's objection, reserving the right to reject the same or any part of it, if after its effect became apparent such evidence was found inadmissible. The substance of that evidence was this: between 1918 and 1922 a committee set up by the Government of Canada expended public funds to an amount exceeding $300,000 in an effort to demonstrate the feasibility of producing commercially, peat fuel from peat bogs, at Alfred, Ontario. In 1922, the governmental committee ceased further experimental work, and by agreement made in 1923, such property, plant and equipment as this committee had acquired during the years it carried on its experimental work was turned over to a syndicate, and by the syndicate later transferred to the defendant company;

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the condition of the transfer was that the plant and equipment would be used only in the development of the peat fuel industry at Alfred, and that fresh capital would be procured to operate the plant. The company substituted electric power for steam power, it rebuilt the old machines, and endeavoured to carry out certain other recommendations made by the governmental committee and deemed requisite in furtherance of the project. The company failed to complete its program of plant equipment on account of lack of capital and was obliged to cease operations, it having failed to sell its shares or securities in any substantial amount.

The location of the plant was, at this time, evidently not regarded as suitable, and it was thought, should be removed to another place; certain new machines, such as an excavator and a macerator were required; and improvements and extensions in plant were generally required. The company for lack of funds was unable to provide for these necessary expenditures, and in fact, had incurred liabilities which were unpaid when it ceased operations. In such circumstances the company approached the Department of Mines for assistance and support, and after some delay negotiations ended in the agreement here in issue. It is clear, from the evidence of Mr. Moore, who was then, I think, an officer of the defendant company, and who had much to do with negotiating the agreement in question, that all the requirements in the way of new or improved plant and a new location for operations were the subject of discussions between the parties to the agreement; and the parties seem to have been in agreement upon those matters.

Evidence relating to the facts I have just narrated, was, I think, properly admissible, but any evidence going beyond this is not admissible in my opinion, particularly any evidence directed to what is the real issue here, that is, whether or not the defendant was, at its option, to take over the whole of the property and plant, or less, upon the expiration of the lease.

Now as to the agreement itself. The defendant agreed, for a rental of twelve thousand dollars, to lease to the plaintiff for a period of one year and eight months from and after March 1, 1927, its plant and equipment at Alfred,

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Ontario, and any peat bogs there or in that vicinity in which the defendant had any right or interest. It was agreed that the plaintiff should during that period have the sole right of operating the plant and it was stipulated that the plaintiff "may acquire property in the vicinity of Alfred aforesaid and remove the said plant thereto and install such further or other equipment as he may deem necessary for the efficient operation of the said plant." Then follows clause 4 of the contract which is an important and contentious clause, and it had better be recited in full:—

Upon the expiration of this lease, or sooner determination thereof by the Company as herein provided, the Company will repay to His Majesty all sums hereafter expended by His Majesty hereunder in respect of property, plant or equipment and taken over by the Company together with the cost of removal of the said plant should His Majesty remove the same under the provisions of paragraph 3 hereof, together with interest upon all monies so expended by His Majesty from the date of expenditure.

Clause 5 of the agreement provided that there should be deducted *from the sum of monies so expended by His Majesty and repayable by the Company*

such sums as may be found reasonably to represent wear and tear upon property, plant and equipment purchased and installed by His Majesty hereunder

and also any

net profit derived from the manufacture and sale of peat products produced during His Majesty's possession and occupation of the said plant hereunder.

The next important provision of the agreement was to the effect that if the company, upon thirty days notice, and after

payment of all monies hereby agreed to be paid by the Company, and upon satisfying the Minister of its financial capacity for successful operation, determine the said lease, and resume possession, occupation and operation of the said plant and equipment and property.

This option was never exercised. The last clause provided that in the event of His Majesty continuing the operation of the plant and equipment until the termination of the period of the lease,

the company may pay the monies and interest herein agreed to be paid by amortized payments over a period of two years upon duly securing His Majesty in respect thereof by mortgage upon the total plant and equipment of the company for all monies expended by His Majesty or payable by the company hereunder to His Majesty or in such other manner as shall be approved by and acceptable to His Majesty.

The plaintiff now sues the defendant in the sum of $85,326.53, being the amount claimed to be due for expendi-

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tures made by the Department of Mines for new plant, the purchase of peat bogs, repairs and alterations to plant, cost of moving plant, administrative expenses, etc. The plaintiff contends that the proper construction to put on the agreement is, that the defendant was to take over all the plant and property as it stood at the end of the period of the lease, and pay the plaintiff all sums expended by him on account of property, plant or equipment. Mr. Robertson argued that the "plant" to be taken over, was the entire property, plant and equipment as assembled and in possession of the plaintiff at the termination of the period of the lease; that the property and plant acquired by the plaintiff became merged in the leased plant and was not divisible, and that "property, plant or equipment" could only mean the complete property, plant and equipment as found assembled as an operating unit on the termination of the lease. The defendant contests this construction of the agreement, and says it does not mean that at all; that the agreement provided that the defendant should pay to the plaintiff only such sums as were expended for property, plant and equipment acquired by the plaintiff "and taken over" by the defendant; and that there was no agreement on the part of the defendant to take over any of the plant acquired by the plaintiff, it being optional only, and that the defendant is entitled to the return of so much of the plant as was leased by it.

A contract ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement, and it is said on good authority, that greater regard is to be had to the clear intention of the parties than to any particular words which may have been used in the expression of their intent. The terms of the agreement are to be drawn partly from the written document and partly from all the surroundings of the written document, such as the nature of the transaction with regard to which the document is brought into life. Bowen L.J. in *Lamb* v. *Evans* (1). The court will not therefore make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words.

(1) (1893) 1 Ch. Div. 218, at p. 230.

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After a very careful study of the agreement, I have reached the conclusion, that the plaintiff's construction of the agreement is the proper one, in fact the only one, if any business sense is to be given to the contract. The plaintiff's construction effectuated what I believe was the intention of the parties, and reading the agreement as a whole, and considering the circumstances in which it was made, I am quite free from doubt that the agreement means, that upon the termination of the lease—if the company did not earlier determine the lease under clause 10—the defendant was to take over all the property, plant and equipment and repay the plaintiff all sums expended by him in respect of the same. That is, I think, the general import of the agreement and the literal meaning of its words as well. When the defendant approached the Department of Mines in December, 1925, the plant was not considered to be sufficiently equipped, and if peat fuel was to be produced commercially, it was necessary to alter and improve the whole plant, purchase some new plant, purchase new peat bogs, and also select a new location for operations; and both parties were in agreement that probably all this would have to be done. This in fact was later done without protest of any nature by the defendant. What the plaintiff really did say to the defendant in the end, was this: "I will lease your plant, but you must agree to allow me to acquire property in the vicinity of Alfred and remove your plant to the new property, and you must agree that I shall have the right to add to your plant by the installation of such further equipment as I may deem necessary for the efficient operation of your plant, and when the lease is terminated you must repay me for whatever I may have expended upon such property, plant or equipment"; clause 3 gave the plaintiff power to purchase new property, and install new equipment. In other words, the plaintiff was to add to the leased plant if the same was deemed necessary, and any acquired property or plant became part of the leased plant, and all would go back to the defendant on the termination of the lease. If the plaintiff was to purchase property, plant or equipment for himself and at his own cost, it was hardly necessary to have the defendant agree in writing that this might be done. What more

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natural or businesslike in the circumstances than that the defendant should agree to take over the whole property and plant upon the terms stated and as it stood upon the termination of the lease. Had any doubt been raised as to this at the time of the execution of the agreement, I have no doubt the officers of the defendant company would have said "we are to take over the property and plant as a whole at the end of the lease, and if the agreement does not make this clear it should." It seems to me, that wherever the agreement speaks of property, plant or equipment, it means, the property and plant leased to the plaintiff and by him altered or added to. I cannot believe it was ever contemplated by the parties that the old plant should on the termination of the lease, at the option of the defendant, be separated from the plant as later improved and enlarged; in some instances it would hardly be a practical thing to do in any event; it would not be a sensible or businesslike thing to contemplate and would hardly effectuate what the defendant really wanted at the time the agreement was entered into, that is, an efficiently equipped property and plant for the production of peat fuel, with two years within which, if necessary, it might repay the plaintiff for sums expended by him. In my opinion there was at all times material here but one plant, that is the leased plant, and that plant the defendant agreed might be removed, altered or enlarged by the plaintiff, and the defendant was to repay the plaintiff any sums expended by him for property, plant or equipment.

Clause 4, as already stated, provides that the defendant will pay to the plaintiff upon the expiration of the lease, "all sums hereafter expended in respect of property, plant or equipment and taken over by the company, together with the cost of removal of the said plant," if the same were removed under the provisions of clause 3. The contentious words in this clause are "taken over by the company," which words the defendant contends are to be construed as meaning that the taking over was optional with the defendant. If from the whole of the agreement it is to be gathered that upon the termination of the lease, the property, plant and equipment automatically reverted to the defendant, the lessor, then these particular words do

not appear at all confusing, as they merely express what inevitably would occur upon the termination of the lease. These words, I think, simply express something as done which was agreed to be done; they are mere surplusage and the agreement would read intelligibly without them. The general tenor of the document is against the defendant's construction of these words, and if it were intended that the taking over was optional with the defendant it would be necessary that this should have been clearly expressed (1). No one else but the defendant could have been expected to take over the plant at the expiration of the lease; it belonged to the defendant, and any additions to it which were made with the consent of the defendant, did not alter this fact. Clause 5 (*a*) supports the view that the agreement was that the defendant was to take over the whole property and plant upon the termination of the lease, and repay the plaintiff for any sums of money reasonably expended for additions to the property and plant, because a deduction was to be made for "wear and tear upon property, plant and equipment purchased and installed by His Majesty hereunder." This clause seems clearly to imply that the plant was to pass into the possession of the defendant and that any moneys reasonably expended by His Majesty for property, plant and equipment was unconditionally repayable by the defendant, but there was to be a deduction for wear and tear of newly acquired property and plant. Then 5 (*b*) is also illuminative of what, I think, was the intention of the parties. It says that any profits derived by the plaintiff from the manufacture and sale of peat products "during the plaintiff's possession of the said plant," was to be deducted from the sums of money expended upon property, plant and equipment and repayable by the defendant. The words "the said plant" could here only refer to the original leased plant together with any additions thereto; and "possession" refers to possession under the lease not of the original property and plant only, but also of any additions which were made thereto, and implies that upon the termination of the lease possession was to pass from the plaintiff to the defendant. Clause

(1) See per Kelly C.B. in Gwyn vs. Neath Canal Navigation Company, (1868) L.R. 3 Ex. 209, at p. 215.

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11 of the contract is very convincing to me of the plaintiff's construction of the contract. Some precise provision would be expected to be found in the contract indicating how and when any moneys repayable by the defendant to the plaintiff were to be paid, upon the termination of the lease. And this paragraph reads:—

> In the event of His Majesty continuing to operate the said plant and equipment during the entire period of one year and eight months aforesaid, the company may pay the monies and interest *herein agreed to be paid* by amortised payments over a period of two years, etc.

This can only mean that on the expiration of the lease the property and plant passed over to the defendant, and the defendant was to repay to the plaintiff the moneys "herein agreed to be paid," and the repayment of such moneys might be extended over a period of two years. This clause does not reasonably indicate that it was optional on the part of the defendant to take over the plant; the clause reads as if that were contemplated, and the clause sets forth the terms of repayment of certain moneys expended by the plaintiff. It could not well be assumed that the plaintiff might retain the plant. Clause 11 seems to me to harmonize with the other provisions of the agreement, and read together with the other clauses, makes very clear, I think, the construction I put upon the agreement.

There is another portion of the evidence tendered by the plaintiff to which I must refer. On October 19, 1928, the Deputy Minister of Mines notified the defendant in writing that the lease would expire on October 31, 1928, "and that the only option now remaining to the company to secure return of the plant and equipment leased was by compliance with clause 11 of the agreement." The wording of this notice might give rise to an inference that in the opinion of the Deputy Minister it was optional with the defendant to take over the property and plant. If this was his opinion it was clearly erroneous and in any event the Crown is not bound by the error or inadvertence of its officers, nor would the Crown be bound by any deliberate intention of its officers without proper authority to alter the terms of a written agreement, and no such authority was established by the evidence. The defendant replied to this letter substantially as follows:—

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As explained at interview which I had with you and Mr. McLeish on Wednesday the 17th instant, it is the intention of this company to take over the Alfred plant and operate it next year.

* * * * *

I do not believe this company will be in a position to make any cash payment to the Government, so that we will avail ourselves of the clause which provides for a payment over a period of two years.

I do not think this reply is of importance one way or the other,—whatever construction be placed upon it—it cannot alter the terms of the agreement.

I am of the opinion therefore, that the plaintiff's construction of the agreement is the proper one, and that at the time of the execution of the agreement, what was in the minds of the parties was just what I have attempted to state, and nothing else. The plaintiff is entitled to judgment for any sums reasonably expended in respect of property, plant or equipment, and the cost of the removal of the plant, together with interest. This does not however, in my opinion, apply to everything set forth in the plaintiff's particulars of claim. There will be a reference to the Registrar or his Deputy to ascertain the amount owing to the plaintiff under the agreement. Costs of this action will follow the event, but the costs of the reference will be reserved.

Judgment accordingly.