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*Nov. 5, 8.
*Dec. 13.

THE CITY OF MONTREAL (DEFENDANT) .... APPELLANT;

AND

THE MONTREAL LIGHT, HEAT AND POWER COMPANY (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Contract—Supplying electrical energy—Delivery—Condition—Payment at flat rate—Obligation to pay for pressure not utilized—Sale of commodity—Agreement for service.

A contract for the supply of electrical energy provided that the company should furnish to the city at the switch-board in its pumping station, through a connection to be there made by the city with the company's wires, an electrical pressure equivalent to a certain number of horse-power units during specified hours daily, and the city agreed to pay for the same at a flat rate of "$20 per horse-power per annum for the quantity of said electrical current or power *actually delivered*" under the contract.

Held, that by supplying the pressure on their wires up to the point of delivery the company had fulfilled their obligation under the contract and was entitled to payment at the flat rate per horse-power per annum for the energy so furnished notwithstanding that the city had not utilized it.

Per GIROUARD and ANGLIN JJ.—The agreement was a contract for the sale of a commodity.

APPEALS from two judgments of the Court of King's Bench, appeal side, affirming the judgments of the Superior Court, District of Montreal, which maintained the plaintiffs' actions with costs.

The material circumstances of the case are stated in the judgments now reported.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Idington, Duff and Anglin JJ.

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Atwater K.C. and *W. H. Butler,* for the appellant.

R. C. Smith K.C. and *G. H. Montgomery,* for the respondents.

THE CHIEF JUSTICE agreed with Idington J.

GIROUARD J. concurred in the reasons given by Anglin J.

IDINGTON J.—The claim of appellant that the words "actually delivered," although of doubtful import in respect to a supply of electric current, must literally be observed and maintained cannot prevail in face of the supecifications, forming part of the contract, for a flat rate and a means therein provided for measuring the force and forming one of the factors on which to rest the flat rate.

The literal meaning of "actually delivered" is inconsistent with a flat rate fixture. In light of the scope of the entire contract and surrounding circumstances to be looked at in such case of ambiguity I find the latter term must be given a meaning. To do so reduces the question to the one possible meaning the word has. Therefore that must prevail.

It is no fault of respondents, but the misfortune of the appellants which led to the intermittent cost of service and a loss of time and service, reduced in the results thereof possibly to the unexpected profit of the respondents.

I think the appeal must be dismissed with costs.

DUFF J.—The City of Montreal being about to instal a new pump at its high-level pumping-station, to be worked by an electric motor, invited tenders of proposals for supplying the necessary electric power. The specifications stated that contractors were to

supply the power required "over their own wires and poles"; that the "delivery point of the current" should be inside the "station building"; that

the power is required for the operation of a 400 h.p. induction motor which is to run a five-million-Imperial-gallon horizontal triplex power-pump; the normal operation of the pump would demand a service of 12 hours out of the 24 every day of the year;

that the pump was

to work against an estimated water-pressure of 120 to 126 lbs. per square inch due to the head of water on the upper reservoir and the load on the pump might be taken as constant within such limits;

that, whatever the characteristics of the power, the

variations in voltage from the value finally agreed upon must not be greater than 2% plus or minus.

Under the head of "terms of payment" the specifications stated

the power is to be sold on a flat rate of so much per year for horse-powers of 12 hours per day; a horse-power under this specification means 746 true Watts as indicated by an integrating or instantaneous Watt-meter of approved type.

The respondents' tender was accepted and an agreement accordingly made which provided that the specifications should be read as part of it. The controversy arises upon the construction of this clause of the agreement:

(3) The present contract has been thus made in consideration of the price or sum of twenty dollars per horse-power per annum for the quantity of said electrical current or power *actually delivered under this contract (a horse-power means 746 true Watts), for the supply and service of said electric current daily between the hours of ten p.m. and ten a.m. throughout the year;* and for each and every hour outside and in addition to said specified time in consideration of the sum of two dollars per hour or fraction of an hour. It being understood that said two dollars per hour for extra time is based on the supply and consumption of four hundred horse-power, and should the supply be less or more than that amount the said price for extra time shall be decreased or increased accordingly.

Payments of said price shall be made monthly on the warrant of the Water Committee on the fifteenth day of each month, and on accounts rendered by said company monthly.

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And it arises in this way. The appellants having been compelled by an injunction to discontinue the use of their pump put forward the contention that, under this clause, they are bound only to pay at the rate specified according to the quantity of current actually converted into mechanical power by their motor. The clause (in specifying a rate of $20 per annum for 12 hours per day for "each horse-power actually delivered") means, according to this contention, that the appellant should pay at this rate only for the time the current should actually be in use by them. It is not disputed, as I understand Mr. Atwater, that the quantity of power necessary to work the pump against the load mentioned in the specification would (as the parties understood), with negligible variations, be a constant quantity and that the parties had in contemplation the ascertainment of that quantity once for all in the manner in which it was, in fact, afterwards ascertained; nor is it disputed that the respondents were, under the contract, bound—and only bound—to maintain in their wire terminating at the "delivery point," so-called, during the normal hours of operation a constant pressure sufficient to enable the appellant, by closing the circuit at that point, to direct an electric current through the motor of sufficient energy to furnish that quantity of power. The sole question is: This service having once been initiated, and the actual strength of the current required having been ascertained—Was the appellant bound, under the terms of the contract, to pay, as for the whole period during which the respondents should maintain the service or only for the time during which the appellant should actually avail itself of it for working the pump?

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The provisions of the specifications seem to shew —read by themselves, quite obviously and conclusively, I think—that the appellant was to pay for the service furnished by the respondents at a rate to be ascertained once for all, and not according to the measure of the use made of that service. The "delivery point" is there stated to be, not the appellant's motor, but a point within the station at which the appellant was to link up their motor with the respondents' wires. The rate of payment for each unit (one horse-power), is stated to be a "flat rate per annum" a phrase which, unless it is to be rejected as meaningless altogether, expresses the intention that the rate of payment for each unit (assuming anything to be payable at all), is to be a fixed rate for the whole year and not a rate varying with the time during which the current should actually be put to use by the appellant.

The appellant rests its case on the words "actually delivered" in the clause quoted. These words do not, once the circumstances are understood, appear to present much difficulty. The clause in question, it is to be observed, is not concerned with the obligation of the respondents under the contract, but solely with the rate at which the appellant was to pay. The rate of payment for each unit having been specified as a fixed annual rate, and the element of time having been thus eliminated, there only remained the determination of the number of units to be paid for.

That must, of course, depend upon the number of units actually absorbed in working the pump; and, as this would be a constant quantity to be ascertained once for all, the stipulation that the appellant should pay according to the number of units actually ab-

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sorbed would, in effect, be the same as a provision that it should pay for the number actually required. The phrase "actually delivered" means, I think, nothing more than this. In this view of the words, the clause harmonizes with the provisions of the specification, while, in the view advanced by the appellant, the stipulation that the rate of payment for each unit of power is to be a "flat rate" seems to be eliminated.

I agree with the court below that, in fact, the service was really initiated at the time contended for by the respondents.

ANGLIN J.—By the contract before us the plaintiffs agreed to supply to the defendant electrical current or power

to drive and operate a 400 h.p. induction motor to be used to drive a five-million-gallon horizontal triplex power-pump.

In the specifications, which are incorporated with the contract, it is provided that the power shall

be sold on a flat rate of so much per year, per horse-power, of twelve hours a day.

The contract itself contains a provision that it is

made in consideration of the price or sum of twenty dollars per horse-power per annum for the quantity of said electrical current or power actually delivered under this contract (a horse-power means 746 true Watts), for the supply and service of such electric current daily between the hours of ten p.m. and ten a.m. throughout the year; and for each and every hour outside and in addition to said specified time in consideration of the sum of $2 per hour or fraction of an hour—it being understood that said $2 per hour for extra time is based on the supply and consumption of 400 h.p., and should the supply be less or more than that amount the said price for extra time shall be increased or decreased accordingly.

We must read the contract and specifications together and construe each in the light of the other; and it is only, if at all, in the event of irreconcilable con-

flict between them that any term of the specifications may be disregarded.

The appellant contends that there is such inconsistency between the "flat rate" mentioned in the specifications and the terms of payment described in the passage quoted from the contract itself that we should disregard the former. I do not find such an inconsistency.

The one factor entering into the determination of the price to be paid, which was unascertained at the time the contract was made, was the consuming capacity or requirement of the plant which the city proposed to install. Though the motor was to be nominally of 400 h.p., its precise consumption of electric current in operation could be ascertained only when it should be actually working against the pressure of the defendant's pumping plant. It is to meet this situation that the contract provides that the rate of $20 per horse-power per annum shall apply

> to the quantity of said electric current or power *actually delivered* * * * for the supply and service of said electric current between the hours of ten p.m. and ten a.m., throughout the year.

The specifications provide that a horse-power, as defined by the contract, shall

> mean 746 true Watts as indicated by an integrating or instantaneous Watt-meter of approved type.

Acting under this provision the parties did, in fact, by the use of an instantaneous Watt-meter, fix at 365 h.p. the consuming capacity of the defendant's motor when operating their plant. An expert employed by the defendant made the test for this purpose and his report was accepted by the plaintiffs.

The provision for a fixed rate of $20 per annum per horse-power makes it clear that it was intended

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that this price should be payable by the city whether it in fact used the power placed at its disposal for one hour or for twelve hours, between ten p.m. and ten a.m., or on one day or three hundred and sixty-five days in the year. The further provision that the price is so fixed

for the supply and service of said electric current daily between the hours of ten p.m. and ten a.m., throughout the year,

indicates that, however the actual consumption of current during the twelve hours between ten p.m. and ten a.m., might vary from day to day, it was meant that payment should be made at the rate of $20 per annum for a constant number of horse-power, to be ascertained presumably, having regard to the provision of the specifications, by the use of an instantaneous Watt-meter. The parties would be thus enabled to determine the consuming capacity or requirement of the defendant's plant. This would remain constant while the plant should be in operation, because the motor would be required to work against a constant water-pressure. In no other way can the provision for payment in this contract be satisfactorily worked out. If it was meant that payment should be for the actual number of Watts consumed by the defendant, it is inconceivable that the price would have been fixed at $20 per horse-power per annum, or that the contract would have provided, as it does, for the ascertainment of the contractual horse-power by instantaneous measurement, and would not have provided for the measurement by a recording meter of the number of Watts actually used by the defendant.

Reading the contract and specifications as a whole, it is, I think, clear that the words "for the quantity of said electric current or power *actually delivered*" were

inserted merely to provide for the future determination of the then unascertained factor, viz., the consuming capacity of the pumping plant which the defendant was about to install. So read there is nothing in the terms of payment as stated in the contract at all in conflict with the "flat rate" mentioned in the specifications. On the contrary the two provisions harmonize perfectly.

Therefore I conclude that the intention of the parties as expressed in their contract was that, from the time at which the contract should become operative, the defendant should, during its term, pay to the plaintiffs $20 per annum for whatever number of horse-power of electric current should be found requisite to drive the motor to be installed in its high-level pumping-station; and that it was further intended that for this purpose the requirement or consuming capacity of the motor in horse-power should be ascertained and determined as it was in this case. The subsequent conduct of the parties, so far as it may be looked to, merely serves to confirm this view of what were the actual intentions in making this contract.

Then it is said by the appellant that "current or power" is "actually delivered" only while it is being actually used or taken by the consumer. At other times (so the appellant argues) the electric energy upon the supply wire is not "current or power"; neither is it "delivered." But, having regard to the nature of the commodity which is the subject of this contract, to the fact that the taking of the energy supplied depended entirely upon the act and volition of the defendant and to the provision of the specifications that

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the delivery point of the current will be inside the pumping station and building,

i.e., at the point to which the plaintiffs were required to carry their wires and at which the switch connecting with the defendant's wires should be placed, I think it reasonably clear that the actual delivery which the contract contemplated was the supplying and conducting by the plaintiffs to a point within the defendant's pumping station building of electrical energy—or, perhaps, expressed more accurately, of electrical pressure—in such manner that the defendant could, by making a connection which was wholly within its own power—that is, by accepting the delivery which the plaintiffs actually tendered—obtain that which the plaintiffs had contracted to furnish. The plaintiffs shew that they did everything which was incumbent upon them towards making a complete delivery of the commodity which they undertook to supply. Treating this agreement as a contract for the sale of a commodity (which I think it is), having regard to the terms of articles 1492 and 1493 C.C., it seems clear that an actual taking of the current by the defendant was not essential to its "actual delivery" within the meaning of that phrase in the contract. The delivery contemplated by the contract was, in my opinion, complete when the plaintiffs placed at the disposal of the defendant in its station building such electrical energy or pressure as would, when taken by the defendant, supply the current or power requisite to drive its pumping plant. This the evidence discloses the plaintiffs in fact did, and the courts below have accordingly held them entitled to recover the amount of their claim.

If the agreement should be regarded not as a contract of sale, but, as suggested during the argument,

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rather as an agreement whereby the plaintiffs undertook to perform work for the defendant and to bring about a state of things which would enable them to obtain certain results, it implies a condition that the defendant, on its part, will do whatever acts may be incumbent on it to enable the plaintiffs to carry out their undertaking and to earn the consideration therefor. This the defendant failed to do, and the damages to which the plaintiffs would be entitled for such breach would, in the circumstances of this case, not differ materially—if indeed they would differ at all—from the amount of the price to which they would have become entitled had the defendant done what was necessary on its part to permit of the contract being fully carried out during the period in question. But, in my opinion, the agreement is a contract for the sale of a commodity produced and to be supplied by the plaintiffs to the defendant.

The use of the terms "current or power" to describe electrical energy or pressure supplied but not taken may be technically inaccurate. Yet what the parties intended seems sufficiently clearly expressed; and, that being so, the failure to employ strictly correct words to formulate that intention will not prevent the courts from carrying it into effect.

The contract provides that it

shall continue in force for the term of five years beginning from the first supply of such electrical current.

It was contended for the appellant, though not very strenuously, that the contract was not, in fact, operative during the period for which the plaintiffs claim payment because it had merely requested the company to deliver current for experimental purposes. A perusal of the evidence, however, has satis-

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fied me that the company was in fact called upon by the city to begin to supply electrical current under the contract, and that it did in fact so supply such current while the city used it and, thereafter, continued to supply the energy or pressure necessary to produce such current, although its use was discontinued by the city, owing to the issue of an injunction restraining the operation of the city's pumping plant. With the obtaining of this injunction, the plaintiffs had nothing to do, and they cannot be held to be in any way responsible for the consequent interruption in the use by the city of the electrical energy which they held themselves at all times ready to, and did, in fact, deliver.

For the reasons which I have stated I am of opinion that the contract has been properly construed, and the obligations of the defendant correctly defined in the provincial courts.

I would dismiss the appeal with costs.

Appeals dismissed with costs.

Solicitors for the appellant: *Ethier, Archambault, Lavalee, Damphouse, Jarry & Butler.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*