ICLR: King's/Queen's Bench Division/1880/Volume 5/STEVENSON, JAQUES, & CO. v. MCLEAN. - (1880) 5 Q.B.D. 346

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[QUEEN'S BENCH DIVISION]

STEVENSON, JAQUES, & CO. v. MCLEAN.

1880 May 25.

LUSH, J.

Contract - Sale of Goods - Offer, till when open - Refusal of Offer, what amounts to - Revocation of Offer, when effective.

The defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesborough asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs fixing 40*s.* per ton, nett cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9.42 telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants, and at 1.25 P.M. telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having at 1 P.M. found a purchaser for the iron, sent a telegram at 1.34 P.M. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for non-delivery thereof. The jury found at the trial that the relation between the parties was that of buyer and seller, not of principal and agent.

The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiffs' telegram was sent at 9.42 A.M. how prices would range during the day:-

Held, by Lush, J., that under the circumstances the plaintiffs' telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that, although

the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual until it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was, therefore, maintainable.

Cooke v. Oxley (3 T. R. 653) discussed.

Bryne & Co. v. Leon van Tienhoven & Co. (49 L. J. (C.P.) 316) followed.

FURTHER CONSIDERATION before Lush, J. The facts and arguments sufficiently appear from the judgment.

May 7. ***Waddy, Q.C.***, and ***Hugh Shield***, for the plaintiffs.

Cave, Q.C., and ***Wormald***, for the defendant.

Cur. adv. vult.

May 25. LUSH, J. This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at 40*s.* per ton, nett cash. The trial took place before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for 1900*l.*, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of damages. The question of law was argued before me on the 7th of May last.

The plaintiffs are makers of iron and iron merchants at Middlesborough. The defendant being possessed of warrants for iron, which he had originally bought of the plaintiffs, wrote on the 24th of September to the plaintiffs from London, where he carries on his business: "I see that No. 3 has been sold for immediate delivery at 39*s.*, which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool: "Your letter has followed me here. The pig iron trade is at present very excited, and it is difficult to decide whether prices will be maintained or fall as suddenly as they have advanced. Sales are being made freely for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesborough, I

shall probably be able to wire you something definite on Monday." This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms:-

> "Referring to R. A. McLean's letter to you re warrants, I have seen him again to-day, and he considers 39*s.* too low for same. At 40*s.* he says he would consider an offer. However, I shall be obliged by your kindly wiring me, if possible, your best offer for all or part of the warrants he has to dispose of."

On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram:-

> "Cannot make an offer to day; warrants rather easier. Several sellers think might get 39*s.* 6*d.* if you could wire firm offer subject reply Tuesday noon."

In answer to this Fossick wrote on the same day: "Your telegram duly to hand re warrants. I have seen Mr. McLean, but he is not inclined to make a firm offer. I do not think he is likely to sell at 39*s.* 6*d.*, but will probably prefer to wait. Please let me know immediately you get any likely offer."

On the same day the defendant, who had then received the Liverpool letter of the 26th, wrote himself to the plaintiffs as follows:-

> "Mr. Fossick's clerk shewed me a telegram from him yesterday mentioning 39*s.* for No. 3 as present price, 40*s.* for forward delivery. I instructed the clerk to wire you that I would now sell for 40*s.*, nett cash, open till Monday." No such telegram was sent by Fossick's clerk.

The plaintiffs were thus on the 28th (Sunday) in possession of both letters, the one from Fossick stating that the defendant was not inclined to make a firm offer; and the other from the defendant himself, to the effect that he would sell for 40*s.*, nett cash, and would hold it open all Monday. This it was admitted must have been the meaning of "open till Monday."

On the Monday morning, at 9.42, the plaintiffs telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give."

This telegram was received at the office at Moorgate at 10.1 A.M.,

and was delivered at the defendant's office in the Old Jewry shortly afterwards.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants, through Fossick, for 40*s.*, nett cash, and at 1.25 sent off a telegram to the plaintiffs: "Have sold all my warrants here for forty nett to-day." This telegram reached Middlesborough at 1.46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1.34, the plaintiffs telegraphed to defendant: "Have secured your price for payment next Monday - write you fully by post."

By the usage of the iron market at Middlesborough, contracts made on a Monday for cash are payable on the following Monday.

At 2.6 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed: "Have your telegram following our advice to you of sale, per your instructions, which we cannot revoke, but rely upon your carrying out."

The defendant replied: "Your two telegrams received, but your sale was too late; your sale was not per my instructions." And to this the plaintiffs rejoined: "Have sold your warrants on terms stated in your letter of twenty-seventh."

The iron was sold by plaintiffs to one Walker at 41*s.* 6&D, and the contract note was signed before 1 o'clock on Monday. The price of iron rapidly rose, and the plaintiffs had to buy in fulfilment of their contract at a considerable advance on 40*s.*

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent, or that of buyer and seller. The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant: first, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer and a new proposal on the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only

as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of the telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to *Hyde v. Wrench* (1), where one party offered his estate for 1000*l.*, and the other answered by offering 950*l.* Lord Langdale, in that case, held that after the 950*l.* had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails.

The remaining objection was one founded on a well-known passage in Pothier, which has been supposed to have been sanctioned by the Court of Queen's Bench in *Cooke v. Oxley* (2), that in order to constitute a contract there must be the assent or concurrence

(1) 3 Beav. 334.

(2) 3 T. R. 653.

of the two minds at the moment when the offer is accepted; and that if, when an offer is made, and time is given to the other party to determine whether he will accept or reject it, the proposer changes his mind before the time arrives, although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of *Cooke v. Oxley* (1) does not appear to me to warrant the inference which has been drawn from it, or the supposition that the judges ever intended to lay down such a doctrine. The declaration stated a proposal by the defendant to sell to the plaintiff 266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till 4 in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver if the plaintiff would agree to purchase and give notice thereof before 4 o'clock. The Court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till 4 o'clock, and that the alleged promise to wait was nudum pactum.

All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with *Cooke v. Oxley*. (1) It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end: see *Routledge v. Grant*. (2) But in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it: *Adams v. Lindsell*. (3) "Common sense tells us," said Lord Cottenham, in *Dunlop v. Higgins* (4), "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal.

(1) 3 T. R. 653.

(2) 4 Bing. 653.

(3) 1 B. & A. 681.

(4) 1 H. L. C. 381.

(1880) 5 Q.B.D. 346 Page 352

Cooke v. Oxley (1), if decided the other way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in *Cooke v. Oxley* (1), the doctrine of Pothier before adverted to, which is undoubtedly contrary to the spirit of English law, has never been affirmed in our Courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party, has not, until recently, been laid down, no case having apparently arisen to call for a decision upon the point. In America it was decided some years ago that "an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted": *Tayloe v. Merchants' Fire Insurance Co.* (2); and in *Bryne & Co. v. Leon Van Tienhoven & Co.* (3) my Brother Lindley, in an elaborate judgment, adopted this view, and held that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all.

It follows, that as no notice of withdrawal of his offer to sell at 40*s.*, nett cash, was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and their acceptance of it made the contract, which was initiated by the proposal, complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for 1900*l.*, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed, or if the amount be not reduced, the judgment will stand for 1900*l.* The costs of the arbitration to be in the arbitrator's discretion.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Dodds & Co*.

Solicitors for defendant: *Harries, Wilkinson, & Raikes*.

(1) 3 T. R. 653.

(2) 9 How. Sup. Court Rep. 390.

(3) 49 L. J. (C P.) 316.