QUEEN'S BENCH DIVISION

SMITH v HUGHES 1871 6 QB 597

June 6 1871

Full text

Editor's italics. Comments in red.

HANNEN J:

... It appears from the evidence on both sides that the plaintiff sold the oats in question by a sample which the defendant's agent took away for examination. The bargain was only completed after this sample had been in the defendant's possession for two days. This, without more, would lead to the conclusion that the defendant bought on his own judgment as to the quality of the oats represented by the sample and with the usual warranty only, that the bulk should correspond with it ... and the case must be considered on the assumption that there was no express stipulation that the oats were old.
…
It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them: Raffles v Wichelhaus (1864) 2 H & C 906.

But one of the parties to an apparent contract may, ***by his own fault***, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor: Scott v Littledale (1858) 8 E & B 815.

But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, had ***discovered*** that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him.

The rule of law applicable to such a case is [that] the promisor is not bound to fulfil a promise [when] the promisee knew at the time [that] the promisor did not intend it…And…if by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled…[because] the mind of the promisor did not assent.

If, therefore, in the present case, the plaintiff ***knew*** that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats … he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain.

This was the question which the learned judge intended to leave to the jury; and, as I have already said, I do not think it was incorrect in its terms, but I think that it was likely to be misunderstood by the jury … The jury may have understood [the question] to mean that, if the plaintiff ***believed*** **[**i.e. not ***knew*****]** the defendant to believe that he was buying old oats, the defendant would be entitled to the verdict; but a belief on the part of the plaintiff that the defendant was making a contract to buy the oats … under a mistaken belief that they were old, would not relieve the defendant from liability ***unless*** his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate.
…
I am … disposed to think that the jury did not understand the question … It may be assumed that the defendant believed the oats were old, and it may be suspected that the plaintiff thought he so believed, but the only evidence from which it can be inferred that the plaintiff believed that the defendant thought that the plaintiff was making it a term of the contract that the oats were old is that the defendant was a trainer, and that trainers, as a rule, use old oats; and that the price given was high for new oats, and more than a prudent man would have given.

Having regard to the admitted fact that the defendant bought the oats after two days' detention of the sample, I think that the evidence was not sufficient to justify the jury in answering the question put to them in the defendant's favour, if they rightly understood it; and I therefore think there should be a new trial.

Full text

COCKBURN CJ:

This was an action brought in the county court of Surrey, upon a contract for the sale of a quantity of oats by plaintiff to defendant, which contract the defendant had refused to complete, on the ground that the contract had been for the sale and purchase of old oats, whereas the oats tendered by the plaintiff had been oats of the last crop, and therefore not in accordance with the contract.

The plaintiff was a farmer, the defendant a trainer of racehorses. And it appeared that the plaintiff, having some good winter oats to sell, had applied to the defendant's manager to know if he wanted to buy oats, and having received for answer that he (the manager) was always ready to buy good oats, exhibited to him a sample, saying at the same time that he had forty or fifty quarters of the same oats for sale, at the price of 35s. per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34s. a quarter.

Thus far the parties were agreed; but there was a conflict of evidence between them as to whether anything passed at the interview between the plaintiff and defendant's manager on the subject of the oats being old oats, the defendant asserting that he had expressly said that he was ready to buy old oats, and that the plaintiff had replied that the oats were old oats, while the plaintiff denied that any reference had been made to the oats being old or new.

The plaintiff having sent in a portion of the oats, the defendant, on meeting him afterwards, said, 'Why, those were new oats you sent me;' to which the plaintiff having answered, 'I knew they were; I had none other.' The defendant replied, 'I thought I was buying old oats: new oats are useless to me; you must take them back.' This the plaintiff refused to do, and brought this action.
It was stated by the defendant's manager that trainers as a rule always use old oats, and that his own practice was never to buy new oats if he could get old.

But the plaintiff denied having known that the defendant never bought new oats, or that trainers did not use them; and, on the contrary, asserted that a trainer had recently offered him a price for new oats. Evidence was

given for the defendant that 34s. a quarter was a very high price for new oats, and such as a prudent man of business would not have given. On the other hand, it appeared that oats were at the time very scarce and dear.

The learned judge of the county court left two questions to the jury: first, whether the word ‘old’ had been used with reference to the oats in the conversation between the plaintiff and the defendant’s manager; secondly, whether the plaintiff had believed that the defendant believed, or was under the impression, that he was contracting for old oats; in either of which cases he directed the jury to find for the defendant.

It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For, it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the judge’s direction; whereas now, as it is possible that the verdict of the jury - or at all events of some of them - may have proceeded on the second ground, we are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant’s manager desiring to buy old oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant’s manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not.

The oats offered to the defendant’s manager were a specific parcel, of which the sample submitted to him formed a part. He kept the sample for twenty-four hours, and had, therefore, full opportunity of inspecting it and forming his judgment upon it. Acting on his own judgment, he wrote to the plaintiff, offering him a price. Having this opportunity of inspecting and judging of the sample, he is practically in the same position as if he had inspected the oats in bulk. It cannot be said that, if he had gone and personally inspected the oats in bulk, and then, believing - but without anything being said or done by the seller to bring about such

a belief - that the oats were old, had offered a price for them, he would have been justified in repudiating the contract, because the seller, from the known habits of the buyer, or other circumstances, had reason to infer that the buyer was ascribing to the oats a quality they did not possess, and did not undeceive him.

I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty - as where, for instance, an article is ordered for a specific purpose - and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule caveat emptor applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding.

Mr. Justice Story, in his work on Contracts (vol. i. s. 516), states the law as to concealment as follows: - ‘The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed.’ ‘Thus,’ he goes on to say (s. 517), ‘although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of caveat emptor, he is not, ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee.’ ‘But,’ he continues (s. 518), ‘an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract.’ Further,

distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, he points out (s. 519), that with reference to the latter, the rule is ‘that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case.’ In the doctrine thus laid down I entirely agree.

Now, in this case, there was plainly no legal obligation in the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample, as he had a perfect right to do, and gave the buyer the fullest opportunity of inspecting the sample, which, practically, was equivalent to an inspection of the oats themselves. What, then, was there to create any trust or confidence between the parties, so as to make it incumbent on the plaintiff to communicate the fact that the oats were not, as the defendant assumed them to be, old oats? If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different; or even if he had said anything which showed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller, as a means of misleading him, might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract. Here, however, nothing of the sort occurs. The buyer in no way refers to the seller, but acts entirely on his own judgment.

The case of Horsfall v. Thomas , if that case can be considered good law, is an authority in point. In that case a gun which had been manufactured for a purchaser, had, when delivered, a defect in it, which afterwards caused it to burst; yet it was held that, although the manufacturer, instead of making the purchaser acquainted with the defect, had resorted to a contrivance to conceal it, as the buyer had had an opportunity of inspecting the gun, and had accepted it without doing so, and had used it, it was not competent to him to avoid the contract on the ground of fraud. The case has, however, been questioned, and dissenting altogether from the decision, I notice it only to say that my opinion in the present case has been in no degree influenced by its authority.

In the case before us it must be taken that, as the defendant, on a portion of the oats being delivered, was able by inspection to ascertain that they were new oats, his manager might, by due inspection of the sample, have arrived at the same result. The case is, therefore, one of the sale and purchase of a specific article after inspection by the buyer. Under these circumstances the rule caveat emptor clearly applies; more especially as this cannot be put as a case of latent defect, but simply as one in which the seller did not make known to the buyer a circumstance affecting the quality of the thing sold. The oats in question were in no sense defective, on the contrary they were good oats, and all that can be said is that they had not acquired the quality which greater age would have given them. There is not, so far as I am aware, any authority for the position that a vendor who submits the subject-matter of sale to the inspection of the vendee, is bound to state circumstances which may tend to detract from the estimate which the buyer may injudiciously have formed of its value. Even the civil law, and the foreign law, founded upon it, which require that the seller shall answer for latent defects, have never gone the length of saying that, so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of its value.

It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so the two minds were not ad idem; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel.

The result is that, in my opinion, the learned judge of the county court was wrong in leaving the second question to the jury, and that, consequently, the case must go down to a new trial.

BLACKBURN J:

In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor. And I also agree that where a specific lot of goods are sold by a sample, which the purchaser inspects instead of the bulk, the law is exactly the same, if the sample truly represents the bulk; though, as it is more probable that the purchaser in such a case would ask for some further warranty, slighter evidence would suffice to prove that, in fact, it was intended there should be such a warranty. On this part of the case I have nothing to add to what the Lord Chief Justice has stated.

But I have more difficulty about the second point raised in the case. I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in Freeman v. Cooke . If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

The jury were directed that, if they believed the word 'old' was used, they should find for the defendant - and this was right; for if that was the case, it is obvious that neither did the defendant intend to enter into a contract

on the plaintiff's terms, that is, to buy this parcel of oats without any stipulation as to their quality; nor could the plaintiff have been led to believe he was intending to do so.

But the second direction raises the difficulty. I think that, if from that direction the jury would understand that they were first to consider whether they were satisfied that the defendant intended to buy this parcel of oats on the terms that it was part of his contract with the plaintiff that they were old oats, so as to have the warranty of the plaintiff to that effect, they were properly told that, if that was so, the defendant could not be bound to a contract without any such warranty unless the plaintiff was misled. But I doubt whether the direction would bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old.

The difference is the same as that between buying a horse believed to be sound, and buying one believed to be warranted sound; but I doubt if it was made obvious to the jury, and I doubt this the more because I do not see much evidence to justify a finding for the defendant on this latter ground if the word 'old' was not used. There may have been more evidence than is stated in the case; and the demeanour of the witnesses may have strengthened the impression produced by the evidence there was; but it does not seem a very satisfactory verdict if it proceeded on this latter ground. I agree, therefore, in the result that there should be a new trial.

HANNEN J:

I think there should be a new trial in this case, not because the ruling of the county court judge was incorrect, but because, having regard to the evidence, I think it doubtful whether the jury sufficiently understood the direction they received to enable them to take it as their guide in determining the question submitted to them.

It appears from the evidence on both sides that the plaintiff sold the oats in question by a sample which the defendant's agent took away for examination. The bargain was only completed after this sample had been in the defendant's possession for two days. This, without more, would lead to the conclusion that the defendant bought on his own judgment as to the quality of the oats represented by the sample and with the usual

warranty only, that the bulk should correspond with it. There might, however, be superadded to this warranty an express condition that the oats should be old, and the defendant endeavoured by his evidence to establish that there was such an express bargain between him and the plaintiff. This was the first question which the jury had to consider; but as they have not stated whether they answered it in favour of he defendant, it is possible - and, from the judge's report, it is most probable - that they did not so answer it, and the case must be considered on the assumption that there was no express stipulation that the oats were old.

There might have been an implied term in the contract arising from previous dealings or other circumstances, that the oats should be old; but the learned judge probably thought the evidence did not make it necessary that he should leave this question to the jury. And the second question, which he did leave to them, seems intended to ascertain whether there was any contract at all between the parties.

It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them: Raffles v. Wichelhaus.

But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor: Scott v. Littledale.

But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cited from Paley , that a promise is to be performed 'in that sense in which the promiser apprehended at the time the promisee received it,' and may be thus expressed: 'The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the

promiser did not intend it.' And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.

If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain.

This was the question which the learned judge intended to leave to the jury; and, as I have already said, I do not think it was incorrect in its terms, but I think that it was likely to be misunderstood by the jury. The jury were asked, 'whether they were of opinion, on the whole of the evidence, that the plaintiff believed the defendant to believe, or to be under the impression that he was contracting for the purchase of old oats? If so, there would be a verdict for the defendant.' The jury may have understood this to mean that, if the plaintiff believed the defendant to believe that he was buying old oats, the defendant would be entitled to the verdict; but a belief on the part of the plaintiff that the defendant was making a contract to buy the oats, of which he offered him a sample, under a mistaken belief that they were old, would not relieve the defendant from liability unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.

I am the more disposed to think that the jury did not understand the question in this last sense because I can find very little, if any, evidence to support a finding upon it in favour of the defendant. It may be assumed that the defendant believed the oats were old, and it may be suspected that the plaintiff thought he so believed, but the only evidence from which it

can be inferred that the plaintiff believed that the defendant thought that the plaintiff was making it a term of the contract that the oats were old is that the defendant was a trainer, and that trainers, as a rule, use old oats; and that the price given was high for new oats, and more than a prudent man would have given.

Having regard to the admitted fact that the defendant bought the oats after two days' detention of the sample, I think that the evidence was not sufficient to justify the jury in answering the question put to them in the defendant's favour, if they rightly understood it; and I therefore think there should be a new trial.