

FRANK F. COLE (DEFENDANT).....APPELLANT ;

1900

AND

*May 3.

WALTER C. SUMNER (PLAINTIFF).....RESPONDENT.

*June 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Offer and acceptance—Telegrams—Completion—Mutuality.

S. a grain merchant in Truro, N. S., telegraphed to C., a grain merchant in Toronto, "Quote bottom prices 20 to 25 cars, thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each" C. replied next day, "White oats 32 half, Truro, bags two cents bushel extra." S. wired same day, "How much less can you do mixed oats for? Might work white at thirty-two, but not any more. Answer." C. answered, "Mixed oats scarce but odd cars obtainable half cent less. Exporters bidding 23 for white. Highest freight, Truro freight two half over Halifax. Offer white 32 bulk, 34 half in four bushel bags, Truro." Next day S. wired, "I confirm purchase 20,000 bushels oats, white, at thirty-two; mixed at thirty-one half, bagged even four bushels in my bags. Confirm. May yet order five cars more in bulk," and he confirmed it also by letter. C. answered telegram at once, "Cannot confirm bagged. Am asked half cent for bagging. Bags extra." S. replied, "All right: Book order. Will have to pay for bagging." C. wired same day, "Too late to-day. Made too many sales already. Will try confirm to-morrow." On receipt of this S. wrote urging action, and next day wired, "Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship." C. answered next day, "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged parties demanded half cent for bagging. They sold before your second wire yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered and S. brought an action for damages.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and S. could not recover.

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

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APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The facts are sufficiently stated above and in the judgment of the court.

*W. J. O'Connor* for the appellant.

*Borden Q.C.* for the respondent.

The judgment of the court was delivered by ;

SEDGEWICK J.—The appellant is a grain merchant carrying on business in Toronto, Ontario, and the respondent is also a grain merchant carrying on business in Truro, N.S., and the question in controversy is as to whether or not there was a completed bargain between them as to a quantity of oats. The negotiations commenced on December 6th, 1897, by the following telegram from the respondent to the appellant.

F. F. Cole, Toronto, Ont.

Quote bottom prices twenty to twenty-five cars, thousand bushels each, white oats, delivered, basis Truro freight, bagged in our bags, even four bushels each.

Walter C. Sumner.

The next day the following reply was sent :

White oats, 32½, Truro, bags two cents bushel extra. F. F. Cole.

On the same day the respondent telegraphed :

F. F. Cole, Toronto, Ont.

How much less can you do mixed oats for. Might work white at thirty-two, but not any more. Answer.

Walter C. Sumner.

The same day the appellant telegraphed back :

Mixed oats scarce, but odd cars obtainable half cent less. Exporters bidding 23 for white. Highest freight, Truro freight two half over Halifax. Offer white 32 bulk, 34½ in 4 bushel bags, Truro.

The respondent next day telegraphed the appellant :

F. F. Cole, Toronto, Ont.

I confirm purchase twenty thousand bushels oats, white at thirty-two, mixed at thirty-one half, bagged even four bushels in my bags. Confirm. May yet order five cars more in bulk.

Walter S. Sumner.

And on the same day the respondent confirmed by letter his proposal as just stated, adding :

If it is at all possible, would like to have 12,000 bushels of this order mixed oats. If cannot get that many, get what you can, but do not ship them to any other than the destinations we give you for mixed oats.

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On receipt of respondent's telegram, the appellant telegraphed him :

W. C. Sumner, Truro.

Cannot confirm bagged. Am asked half cent for bagging. Bags extra.

And received in reply the following telegram :

F. F. Cole, Toronto, Ont.

All right. Book order. Will have to pay for bagging.

Walter C. Sumner.

On the same day the following reply was sent :

W. C. Sumner, Truro.

Too late to-day. Made too many sales already. Will try confirm to-morrow.

On the receipt of this last telegram, the respondent wrote the appellant confirming previous telegrams and adding :

Your message just to hand saying, "too late to-day. Made too many sales already. Will try confirm to-morrow." Want you to try hard to do this for we confirmed to our customers. After waiting over four hours for your answer concluded you had accepted.

On December 9th the respondent telegraphed appellant :

Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship.

On December 10th the appellant telegraphed :

Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged parties demanded half cent for bagging. They sold before your second wire arrived yesterday. This is why I could not confirm. Think advance too sudden to last.

On the same day in addition, the appellant wrote the respondent :

The lot of oats which I had under offer for you were sold for export the same day you wired accepting them in bags.

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And he added :

In regard to mixed oats, I do not know at this writing where I could get even one car load. When a car is offered it can be bought for half cent bushel less than white oats. If your wire which I received here at noon on the 8th had accepted 20,000 bushels of oats at 32 cents, you would have got them but you did not accept. You accepted white oats at 32 cents, mixed $31\frac{1}{2}$ bagged even four bushel bags, and you asked me to confirm. You will note that I did not confirm. Later that day, you subsequently confirmed, but it was too late for me to secure them, and I so advised you.

There was further correspondence which so far as I can see does not materially affect the case. The oats not having been delivered, an action was brought for damages. The case was tried before Mr. Justice Townshend, who awarded damages to the amount of \$543.84. Upon appeal, his judgment was confirmed, Mr. Justice Meagher dissenting.

I am of opinion that this correspondence does not contain a complete contract. The rule of law is that :

An acceptance of a proposition must be a simple and direct affirmative in order to constitute a contract, and if the party to whom the offer or proposition is made accepts it on any condition, or with any change of its terms or provisions which is not altogether immaterial, it is no contract until the party making the offer consents to the modification ; that there can be no contract which the law will enforce until the parties to it have agreed upon the same thing in the same sense. *Carter v. Bingham* (1).

Now it appears to me that the parties have never come to a common understanding upon more than one material term in respect to each of which there may be a difference of opinion, a difference which, from the correspondence, it is simply impossible to adjust. For instance, both the appellant and the respondent want to supply the bags. The bags cost the appellant $6\frac{1}{2}$ cents, while he is asking for them 8 cents. The telegram of December 8th, "all right book order; will have to pay for bagging" which the respondent con-

tends was the final acceptance and completion of the contract, while it makes it clear that the "bagging," that is the cost of placing the grain in bags, was provided for, there was no determination as to who was to provide the bags, or as to how much was to be paid for them if the respondent did provide them.

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Again, there had been offers and replies as to mixed oats; no definite agreement has been come to as to those; and still again, there would be difficulty as to the quantity to be delivered; the appellant never assented to 20,000 bushels, but to twenty to twenty-five cars, thousand bushels each.

The court below appeared to think that a letter of the appellant written in January, 1897, ten months before, might be looked at in order to construe the alleged contract. In that letter the appellant made the respondent a standing offer as follows:

I will bag oats for you at any time free of expense, you furnishing the bags.

This contract, however, if a contract at all, shows that the terms of that letter must not have been in contemplation by the parties, or at all events, that the contract was made irrespective of the letter, because it expressly provides that the respondent should pay for bagging.

On the whole, I am of opinion that no completed contract existed between the parties. The appeal must be allowed and the action dismissed, the whole with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Alex. McNeil.*

Solicitor for the respondent: *H. A. Lovett.*
