[TYSER, C.J. AND BERTRAM, J.]

TYSER, C.J. & BERTRAM, J. 1910 December 28

HAJI KYPRI CONSTANTINIDES AND SONS

v.

THE KING'S ADVOCATE.

CONTRACT—SALE—ADVERTISEMENT FOR TENDERS—SUBSEQUENT FORMAL CONTRACT—ABSENCE OF CONSENSUS AS TO SUBJECT MATTER OF THE SALE—INTRODUCTION OF NEW TERM BEFORE COMPLETION.

Where an advertisement for tenders intimates that the person whose tender is accepted will be required to sign a form of written contract (and it is not implied that the only terms to be contained in the contract are those contained in the advertisement), there is no binding agreement between the parties until such written contract is signed.

Where after an agreement for sale has been apparently concluded, it subsequently transpires that the parties were not at one as to what constituted the subject matter of the sale, there is no binding agreement between the parties.

Where on signing a contract of sale the purchaser puts forward a fresh condition which is rejected by the vendor, there is no binding agreement between the parties, even though the vendor, without accepting the condition subsequently signs the contract.

The Government of Cyprus in an advertisement for tenders for the purchase of grain in certain Government stores intimated that a quantity of the grain would be reserved for seed corn, and that the person whose tender was accepted would be required to execute an agreement on a form to be supplied by the Receiver General.

The tender of the Plaintiffs was accepted but, on discovering that the grain reserved for seed corn by the Government was selected out of the best quality, they accompanied their signature of the agreement, and the payment of the deposit required by the agreement, with a protest in writing asserting that the Government was not entitled to select the seed corn out of the best quality. The Receiver General, on receiving the protest, declined to sign the agreement unless the protest was withdrawn, but subsequently, on the Plaintiffs reasserting their protest, claimed that they were bound by their signature, refused to return the deposit and himself signed the agreement. The Plaintiffs thereupon repudiated the agreement and demanded the return of the deposit.

HELD: *That (even assuming that it was the intention of the parties that the contract should be binding on being signed by the Plaintiffs alone) the parties were not at one as to the subject matter of the sale, and that there was therefore no binding agreement and that the Plaintiffs were therefore entitled to the return of their deposit.*

HELD: (Per BERTRAM, J.) *that the intention of the parties that the agreement should become binding on being signed by both parties, and that as before the signature by the vendors the purchasers put forward a new condition which was rejected by the vendors, no final agreement was reached.*

This was an appeal from a judgment of the President of the District Court of Nicosia.

The claim was a claim to recover a deposit of £325 deposited with the Government at the time of the signature of a contract for the purchase of barley on the ground that either there was no contract or if there was a contract it was rescinded.

The facts were as follows: the Government by a notice dated June 8th, 1909, invited tenders for the purchase of the barley in

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(among other places) the Government grain stores at Nicosia. The notice contained the two following stipulations:—

"The Government will retain out of the grain brought into the "above-named stores such amounts as may be required for seed-corn "advances, particulars of which may be obtained from the Receiver "General.

"When the tender is accepted the tenderer will be required to "execute an agreement in a form to be supplied by the Receiver "General."

The tender of the Plaintiffs was accepted. Before signing the contract the Plaintiffs discovered that the Government was selecting for seed-corn out of the grain offered for sale grain of a superior quality. They therefore, on signing the contract and paying the deposit of £325 required thereby, delivered a "protest," in which they protested that the Government had given no notice of its intention to select grain of a superior quality for seed corn, and declared that they reserved their "rights in respect of the wretched quality of the barley." They further intimated that if it was found that the seed corn selected was better than the rest that they would sue the Government for damages.

To this the Government replied (July 28th) that the Receiver General could not accept any other than the written contract, and that if the Plaintiffs did not withdraw their protest he would not sign the contract.

The Plaintiffs wrote further letters on July 31st, and August 11th, reiterating their protest and requesting a more definite answer from the Government. To these no answer was returned. Finally, on August 18th, the Plaintiffs wrote calling upon the Government within 24 hours either to send the contract signed, with an admission of their contention, or to return the deposit and then be free to sell the grain where it liked, and intimating that if they did not receive a final answer within 24 hours they would consider themselves free, and as if no sale had taken place. To this the Government replied on August 19th to the effect that the Receiver General declined to receive any protest; that he had the signature of the Plaintiffs and their deposit, and that their excuse was a frivolous one. The full text of the letter is given in the judgment of the Chief Justice.

Upon this the Plaintiffs wrote (August 27th) asking for permission to sue for the return of their deposit.

On September 13th the Government sent the Plaintiffs the contract duly signed, and offered to allow them to take a proportionate part of the selected barley. The Plaintiffs however returned the contract and having eventually obtained permission to sue proceeded with their action.

The President of the District Court gave judgment for the Defendant. The Plaintiffs appealed.

Œkonomides, Paschales Constantinides, and *Theodotou* for the Appellants.

The King's Advocate in person.

The Court allowed the appeal.

Judgment: THE CHIEF JUSTICE: In this case the Plaintiffs seek to recover a sum of £325, deposited with the Government at the time that they signed a form of contract for the purchase of barley, on the ground that either there was no contract or if there was a contract that it was rescinded.

The first question to be decided is whether the acceptance of the tender constituted a contract.

By Clause 5 the tenderer is required to execute a contract in a form to be supplied by the Receiver General. The form has been produced before us and it contains stipulations and obligations, which would not be included in a contract, based on the acceptance of the tender.

It is clear that the contract, which would be inferred from the acceptance of the tender, was not the contract, which the Defendants meant to make, but they meant to have another contract containing additional terms such as are embodied in their printed form. Therefore the parties did not intend that the contract, to be implied by the acceptance of the tender, should be the contract between them and there is no evidence that that or any other binding contract was completed by such acceptance. In my opinion the intention was that the contract between the parties was to be that contained in the written form and until that form was signed there was no contract.

We next have to consider whether or no there was subsequently a contract between the parties and, if so, what was the subject matter of the contract. The Plaintiffs did sign the formal contract stipulated for by the Government. As far as I can understand the contention of the Defendants, it amounts to this—that there was a written contract, signed by the Plaintiffs, that by that contract the Plaintiffs were bound to take the Nicosia barley, after the Defendants had selected and set aside 8,000 kiles of seed barley. That the contract is clear, and that we cannot look outside the contract, to determine the rights of the parties.

For the Plaintiffs, it is contended that the parties were not at one, as to the subject matter of the contract. That the subject matter of the contract described in the contract as " all the barley of the harvest " of 1909 excepting 8,000 kiles more or less for seed corn purposes "

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is shewn by the evidence to have two meanings. That the parties differed as to what was the thing meant by that description, and were never at one as to the subject matter of the sale. They say that what took place is, as if a written contract were made between A and B, that A should buy B's white horse, and evidence was adduced to shew that B had two white horses, one 6 years old and the other 5 years old, and it was proved that B intended to sell the 6 year old horse, and that A intended to buy the 5 year old horse. In which case there would clearly be no contract.

Now although oral evidence cannot be used to alter, in any way the description of the thing sold, which is contained in a written contract, such evidence is always admissible to shew all the circumstances necessary to place the Court, when it construes the written contract, in the position of the parties to the contract, so as to enable the Court to judge the meaning of the parties. When, on the production of such evidence, it appears that there is an ambiguity in the written contract, that it may apply to two different things, then evidence outside the contract is admissible to shew which of those things was really the subject matter of the contract.

Now, if such evidence shews that two things might have been intended, and that one party intended the one and the other party the other, there is no mutual assent and no contract.

In *Raffles v. Wichelhaus* (2 H. & C., 906) there was a contract for the sale of " 125 bales of surat cotton, to arrive *ex* ' Peerless ' from Bombay." The cotton arrived by a ship called the " Peerless " and the Defendant refused to accept it. An action was brought against him for not accepting delivery of the cotton, and he pleaded by way of defence, that the cotton which he intended to buy was cotton on another ship " Peerless," which sailed from Bombay in October, not that which arrived in a ship " Peerless " in December, which the Plaintiffs offered to deliver.

The Plaintiffs demurred, saying, that if this were so, it did not excuse the Defendant's refusal to accept the delivery of the cotton.

The Court found that in this state of facts there was no *consensus ad idem*, no contract at all between the parties.

The facts proved in this case are as follows:—After the acceptance of their tender, one of the Plaintiffs visited the Nicosia Store and saw there that the grain was being put in two heaps. One heap contained the good quality, and the other the second quality.

It appears, from the evidence, that the Government were selecting the best barley from the barley delivered into store, and retaining it for seed corn.

Subsequently on the 20th July, 1909, when one of the Plaintiffs attended at the Commissioner's Office to sign the contract, and pay the deposit required to be paid by the written contract, he handed in a written statement to the effect that, although the Plaintiffs would sign the contract, the Government had not given them notice that it would select the seed corn, and that they reserved their rights if it was found that the seed corn selected was better than the other quality, amongst other things, if the Government would not give of the quality selected, to claim damages from the Government.

This letter amounts to an assertion that what they have bought is the whole of the barley, after the deduction of the seed corn *without selection*, and that they will have a claim for damages if any is caused by the Government selecting the seed corn. This statement was handed in before the contract was signed, and it is clear that the Plaintiffs then meant to purchase barley from which no selection had been made. On the 28th July, 1909, the Defendants reply " if you do not " withdraw from your protest the Receiver General will not sign the " contract." In this letter the Defendants appear to regard the contract as incomplete, or it may be that it is an intimation that if the Plaintiffs insist on having barley without selection for seed corn, the Government will not sell it them.

On the 31st July, 1909, the Plaintiffs write again repeating their protest against the action of the Government in selecting the seed corn and reserving their rights. At this time the contention of the Plaintiffs appears to have been that the Government were bound by contract to deliver them the barley, deducting but not selecting the seed corn. The position of the Government seems to have been that they would not sign a contract as long as the Plaintiffs put forward that contention.

There were further letters as follows:—

On the 11th August, 1909, the Plaintiffs wrote again to the Defendants in similar terms to the last letter.

On the 18th August, 1909, the Plaintiffs wrote to the Government " either you must send us within 24 hours our written contract, signed " by the Government, with a right for us to take delivery of the selected " stuff . . . or if the Government refuse to do (so) . . . return us our " deposit of £325 . . . If we do not receive a final answer within 24 hours " we shall consider ourselves free and claim our deposit."

The Defendants, who had not written since the 28th July, now send an answer on the 19th August, 1909:

" Gentlemen,—In answer to your letter of yesterday's date (received " to-day) I hasten to inform you that, as the Receiver General has

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" already informed you, he refuses to receive any protest on your part. " He has your signature to the contract of sale, and your deposit of " £325, which amount is subject to forfeiture in case of any breach " of contract. The excuse brought forward by you is light and meaning- " less. The reserving (separation) of seed corn was provided in your " contract in the same way, and on the same conditions, provided for " in all the contracts with purchasers of Government corn for many " years past. The Receiver General has always exercised his discretion, " as to what produce he would separate as seed corn, and consequently " he is not disposed to allow you to shew him his duty in the present " case, nor can he allow you to escape your obligation on such a pretext, " because it may happen that the prices of to-day are less favourable " for the purchasers than when they executed the contract with him."

Now, this letter is a clear assertion on behalf of the Defendants that the Plaintiffs are bound by their contract to take what barley is left after the seed corn has been selected. It is somewhat difficult to reconcile this letter with the letter written by the Defendants on the 28th July. The Defendants on the 28th July are taking up the position that they will not sign the contract which impliedly means that they are not bound by any contract. If they were not bound the Plaintiffs were not bound, because there would be no consideration for the obligation to purchase unless the Defendants were bound to deliver.

Nothing had occurred up to the 19th August to bind the Plaintiffs any more than they were bound on the 28th July, in fact, the Plaintiffs had renewed their protest from time to time, and had not withdrawn it in accordance with the demand of the Receiver General. In the letter, however, of the 19th August, the Defendants assert that the Plaintiffs are bound by their contract. Did the Defendants mean to assert that the Plaintiffs were bound though they the Defendants were not bound ? If so, they are wrong in my opinion.

This letter of the 19th August did not alter the position of the parties. Suppose the Defendants had taken up the same position on the 28th July as they took up on the 19th August. Suppose that, in reply to the Plaintiffs' letter of the 20th July, enclosing the signed contract and what is called the protest, but which amounts in effect to a statement, that the Plaintiffs were buying the barley, subject to deduction but not selection of seed barley, the Defendants had answered by sending a signed contract in the same form with a statement that their intention was to sell the barley after deduction of selected seed barley. Could it then be said that the parties were *ad idem* ? I think not. One says I will buy the barley if seed barley is not selected, the other I will sell

the barley left after the seed barley has been selected. They would have been dealing with different things. It does not matter how slight a difference there may be in the value of the two things, the thing the Plaintiffs would have been offering to buy, and the thing the Defendants would have been offering to sell, are different.

It would have been clear from the correspondence that at the time when the contract was signed, the parties were not *ad idem* as to what was the subject matter of the contract.

Now, when the Defendants wrote on the 19th August, they certainly were in no better position than that in which they would have been if they had written the letter I suggested, on the 28th July. The Plaintiffs therefore on the 19th August were not bound by any contract. Upon this letter the Plaintiffs wrote on the 27th August, 1909, asking for permission to sue for the return of their deposit, on the ground that the Government had selected 8,000 kiles of the barley for seed. This amounts, in my opinion, to a withdrawal of what was, until accepted, a mere offer to buy the barley.

After this, on the 13th September, 1909, the Defendants wrote to the Plaintiffs informing them that there will be issued to them, in respect of their purchase, a portion of the selected barley in the ratio which the quantity they were entitled to under their contract bears to the whole quantity received into store.

The Defendants enclosed in the letter a signed copy of the contract.

On the 14th September the Plaintiffs returned the contract and stated that they considered the sale null and void.

It is quite clear that this letter of the 13th September was too late. The Government refused to agree to the sale, as understood by the Plaintiffs until the Plaintiffs had stated their determination no longer to be bound by a sale in any form. If on the 19th August the Government had written the letter of the 13th September, there would have been a binding contract to buy the barley in the store, excepting seed barley taken without selection. But by the 17th September the Plaintiffs, who were not bound by any such acceptance, had withdrawn the offer to take such barley. Their offer was at an end and nothing occurred afterwards to bind them.

I do not propose to discuss the effect of the stipulation that the Defendants were entitled to retain seed barley, or whether it would have entitled them to select the barley, or not, if the contract had been signed without any definite views as to its meaning by either party.

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In the absence of an express stipulation, it might depend on the circumstances of each case. "Seed barley" *prima facie* means "barley suitable for sowing." It might be that, if the barley were bad, seed suitable for sowing could not be obtained without selection. I do not wish however to give any decision on this point. It is unnecessary to discuss the question because the Plaintiffs distinctly stated, when they signed the contract, that their intention was to buy barley from which no selection had been made.

The appeal is allowed with costs.

BERTRAM, J.: I agree. The real question in this case is whether there was at any time a concluded agreement between the parties.

It is clear from the case of *Kingston upon Hull v. Petch* (1854) (102 R.R., 728, cited by Mr. Œconomides) that the Government's acceptance of the Plaintiff's tender did not itself constitute a contract, inasmuch as that acceptance declared that the purchaser would be required to execute an agreement on a form to be supplied by the Receiver General.

This form of agreement was presented to the purchasers. They signed it accompanying their signature with a protest, which referred to that signature, and which declared that they reserved their right to sue the vendors for damages in the event of a certain condition, which they claimed to be implied in the contract, not being observed; or to put the matter in another way, they maintained that the contract required the vendors to deliver to them certain specific barley, and they declared that they would claim damages, or assert their other legal remedies if this specific barley was not delivered. On this the vendors replied "The Receiver General will not accept any agreement other "than the written contract. If you do not withdraw your protest, "he will not sign the contract."

It seems to me impossible to say that at this point there existed that common consent between the parties which is of the essence of a contract. If that common consent did not exist, then it is equally impossible to point to any moment when it was subsequently reached.

This is the situation as it presents itself to me—but the analysis of that situation is far from easy. The solution suggested by the Chief Justice is that even assuming that the signature of the form of agreement by the purchasers constituted in appearance a concluded contract, it appears from the evidence that there was a latent ambiguity —that is to say that the document, though clear in appearance, was not clear in reality—that it was understood by the parties in different senses—that they were not *ad idem* as to the subject of the sale, and that consequently there was no binding contract.

Without dissenting from this solution, I desire to suggest another which is as follows: It seems to me that it was the intention of the parties in the negotiations that the contract was to become binding when *both* parties signed the document. It is true that the Government notice only speaks of a form of agreement being signed by the tenderer; but it is a form of "agreement," and this would include a bilateral agreement. The document is in fact a bilateral agreement. It is in form an ordinary agreement of sale between two parties—the Government being the vendor, and the Plaintiffs the purchaser. The Government on receiving the protest declined to sign: the Plaintiffs demanded the signature of the Government (in the sense they specified), or the return of their deposit, and the contract was in fact ultimately signed by the Government. All this seems to me to shew that it was understood between the parties that the document was to become binding on being signed by both.

There is certainly a difficulty in the way of this view. That difficulty is that the Plaintiffs throughout use expressions which seem to imply that in their view a binding contract already existed. In their protest they give notice that they reserve their "rights in respect of the wretched "quality of the barley." They would have no rights if there was no contract. They intimate that in certain events, they will sue the Government for damages. They could not sue for damages unless there was a contract. In their letter of August 18th, they say the Government must either sign the contract, or return the deposit, and then "be at liberty to sell the stuff wherever it prefers," implying that the Government was not free to sell, and further that if the Government did not reply within 24 hours, they themselves would consider themselves "free" (implying that they were at present bound), and "as if no such sale had taken place" (implying that a sale had taken place). With regard however to the expressions about "rights," and "damages," I interpret these as being used on the supposition that the document would be executed in due course by the Government. When this is done, they mean to say, they will have certain rights, and they will sue the Government if these rights are infringed. With regard to what they say about the Government being "free to sell "wherever it chooses," probably all they mean to imply is that the Government cannot be free to sell so long as it retains their deposit. When they say they will consider themselves "free" they do not necessarily mean "legally free," but they mean "morally free," and when they speak of a sale having taken place they may simply be referring to the acceptance of their tender.

If, however, there is a difficulty on one side, there is equally a difficulty on the other. If the Plaintiffs seem to imply that in their

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view there was a concluded contract, the Government on its side certainly seems to imply that in the view of the Government there was not, for it says " unless you withdraw your protest the Receiver " General will not sign the contract."

The truth is that the question is not so much what either party thought about the legal aspect of the matter, but whether in fact the negotiations had been concluded. In my opinion they had not. At the time when one party acceded, and before the accession of the other, the former put forward what was practically, in the view of the other, a fresh condition, which the other refused to accept, and consequently no final agreement was reached.

If I am wrong in this view, and if the signature of the written contract did of itself *prima facie* bind the Plaintiffs, then I agree with the Chief Justice, that, even on that supposition, the evidence discloses the fact that that apparent agreement was not a real one as the parties were not at one as to the subject matter of the sale.

Appeal allowed with costs.

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GEORGIOS CH. PETRIDES

v.

NIKOLA DEMETRIOU AND OTHERS.

DAMAGES—PENALTY AND LIQUIDATED DAMAGES—PRINCIPLES TO BE OBSERVED IN THE COURTS OF CYPRUS.

Where an agreement fixes a sum of money to be paid in the event of a breach of it, the Courts of Cyprus, in considering whether this sum shall be treated as damages agreed upon between the parties, or whether it shall be treated merely as a penalty stipulated in terrorem, *proof of actual damages being required, are free to apply the principles of English law, that is to say, the following principles :—*

(1) *It is open to the parties to a contract by their mutual agreement to settle the amount of damages uncertain in their nature at any sum at which they may agree.*

(2) *Where an agreement declares that in the event of one of the parties failing to pay a fixed sum of money he shall pay a larger sum this larger sum is treated as a penalty and not enforced.*

(3) *Where the agreement declares that a certain sum of money shall be paid in the event of one of the parties failing to do a particular act, and this sum is so disproportionate to any actual damages that may be caused by such default that it cannot be regarded as a genuine pre-estimate of the other party's interest in the fulfilment of the obligation, this sum is treated as a penalty and not enforced.*

(4) *Where in the absence of any such disproportion, the sum stipulated for is to be paid on the breach of a single obligation (other than an obligation for the payment of a fixed sum of money), this sum is treated as an agreed estimate of damages although the actual damages in any particular case may be trivial or considerable according to the circumstances.*