NOTES ON OFFER AND ACCEPTANCE.

By the Honourable Mr. Justice Russell.

Cooke v. Oxley.[1] When the writer began, years ago, to use Professor Langdell's *Select Cases* in the Contracts class of Dalhousie Law School, he had not turned the second page before coming upon the puzzling case of *Cooke* v. *Oxley*. Plainly stated, this was a case in which the plaintiff declared that the defendant had proposed to the plaintiff that he, the defendant, would sell to the plaintiff two hundred and sixty-six hogsheads of tobacco at a certain price, whereupon plaintiff desired that defendant should give him until four o'clock in the afternoon of that day to consider the proposal, and "thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice to the defendant before the hour of four in the afternoon of that day." The plaintiff averred that he did agree to purchase upon the terms aforesaid and did give notice before the hour named, and requested delivery and offered payment, "yet that the defendant did not, etc."

I suppose it is not doubtful that at the present day the decision in such a case would be that there had been an offer made by the defendant in the morning and an agreement that the offer should remain open until four o'clock in the afternoon, that this agreement was not binding for want of consideration, but that the offer had never been withdrawn, and, having been accepted within the time limited for its acceptance, resulted in a binding contract for the sale and delivery of the tobacco. What the decision of the Court was in 1790, when this case was decided, has been the subject of more controversy than could ever have been

[1] (1790) 3 T. R. 653.

imagined. Mr. Benjamin, in an elaborate defence of the judgment of the Court, sought to show that the decision was consistent with the view just stated as to the defendant's liability. His argument is that the case came before the Court on a motion in arrest of judgment upon the verdict for the plaintiff; that the only question, therefore, was as to the sufficiency of the plaintiff's declaration, and that if the plaintiff had stated that the defendant's offer continued open he would have been successful.

With regard to the case of *Adams* v. *Lindsell*,[2] which Mr. Story and Mr. Justice Duer cite as having overruled *Cooke* v. *Oxley*, he says that in the case first named the mutual assent was complete. "But in *Cooke* v. *Oxley* it did not appear that this mutual assent ever took place. There was no continued offer till four o'clock in the afternoon, but only a promise to continue it not binding for want of consideration. The Court held that Oxley had a right to retract up to the moment when Cooke announced his assent to the offer . . . In a word, Oxley withdrew his offer before acceptance."

How in the world Mr. Benjamin could find anything in the statement of the case to warrant him in saying that Oxley withdrew his offer before acceptance has always seemed to the present writer an insoluble mystery. If it be suggested—and that is the best that can be made of Mr. Benjamin's argument — that although nothing is said in the declaration about the withdrawal of the offer, it is not alleged that the offer was a continuing one when accepted, Mr. Langdell's answer is conclusive. "The presumption that the defendant was of the same mind when the offer was accepted as when it was made, was a presumption of law and not of fact."

Against the elaborate sophistry of Mr. Benjamin it is refreshing to read the clear and straight-forward

[2] (1818) 1 B. & Ald. 681.

statement of Judge Duer, in Duer on Marine Insurance:[3]

Speaking of the case of *Cooke* v. *Oxley,* he says it

> "not only supports the doctrine of the Supreme Court of Massachusetts [in *McCulloch* v. *The Eagle Insurance Company,* 1 Pick. 278], but goes much further, for it decides that when a bargain has been proposed and a certain time for closing it has been allowed, there is no contract, even where the offer has not been withdrawn and has been accepted within the limited period. To constitute a valid agreement, there must be proof that the party makthe offer assented to its terms after it was accepted."

Yet it is noticeable that Mr. Benjamin's sophistical explanation of the case has been accepted by some of the ablest and most learned text writers. Mr. Leake swallowed it whole. Even Sir Frederick Pollock, in a foot note in the first edition of his book on Contracts, which I am almost afraid to quote from memory, refers his readers to Mr. Benjamin for "a conclusive answer" to the criticisms that had been made of the decision in *Cooke* v. *Oxley.* In a later edition this note was significantly modified by referring the learned reader to Mr. Benjamin for a "consideration of those criticisms." In his latest edition, Sir Frederick has abandoned Mr. Benjamin altogether and swung round to the views of Mr. Langdell and Judge Duer.

There is a possible explanation of the case which I have never seen and which I hesitate to mention for the reason that, as nobody so far as I am aware has ever referred to it, I have always feared that I may have only discovered a "mare's nest." But it seems to me that Mr. Justice Buller, in his opinion, absolutely misconceived and misstated the plaintiff's declaration. He says:

> " It has been argued that this must be taken to be a complete sale from the time when the condition

[3] P. 118.

was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale, or even that the goods were kept till that time."

Now there was nothing in the declaration about any condition that the defendant should agree: on the contrary, the gravamen of the plaintiff's case is that very fact that the defendant did not agree. The condition declared upon by the plaintiff as the one upon which the defendant agreed to sell him the hogsheads of tobacco was, not that the defendant should agree, but that the plaintiff should agree to purchase them on the terms aforesaid and give notice thereof to the defendant before the hour of four o'clock, and compliance with this condition by the plaintiff was clearly alleged.

But it is not certain that the case would have been decided otherwise than it was even if the learned and able Judge had not made this obvious mistake in construing the declaration. Mr. Langdell says in his summary that "when *Cooke* v. *Oxley* was decided, it was supposed that an offer must be accepted, if ever, at the same interview at which it was made, (*i.e.*, in legal contemplation, at the same moment at which it was made), and that an acceptance at any subsequent time would be only an offer in turn, which the original offerer might accept or reject at pleasure, and that it was immaterial that the acceptance in point of time came within the very terms of the offer. And even ten years after the decision of *Adams* v. *Lindsell*, the same Court decided *Head* v. *Diggon*[4] under the influence of the old notion." This reminds me that Mr. Benjamin caps the climax of his sophistical explanation of *Cooke* v. *Oxley* by referring to the fact that *Head* v. *Diggon* was decided on the authority of *Cooke* v. *Oxley*, without any intimation that it had been overruled. This is perfectly true; but it was decided on the authority of *Cooke* v. *Oxley*, not as that case is understood and explained by Mr. Benjamin, but as it is

[4] (1828) 3 M. & R. 97.

understood and interpreted by Professor Langdell and Judge Duer, and by everyone who does not perversely blind himself to the obvious meaning and effect of the decision.

Mavor v. Pyne.[5] I should not have thought this case worth mentioning were it not for the use that has been made of it by Sir William Anson in his work on Contracts. He states it in the following terms:

"*A. ordered of X. a publication which was to be completed in twenty-four monthly numbers. He received eight and then refused to receive more. No action could be brought upon the original contract, because it was a contract not to be performed within the year and there was no memorandum in writing. . . . But it was held that although A. could not be sued on his promise to take the twenty-four numbers, there was an offer and acceptance of each of the eight numbers received and a promise to pay for them thereby created.*"

I had been using the work in my class in Contracts at Dalhousie College for some years, and every time that we came to this case it seemed to me that the author had wholly misconceived the position of the defendant. At last I wrote the learned author suggesting that the decision of the Court was in effect, and should have been if it was not, that the defendant had made a contract which was unenforceable by action, but not intrinsically bad, and certainly not void, that the defendant had broken the contract by his refusal to accept and pay for the twenty-four numbers, that the original contract had therefore been discharged, and had given rise to a right of action on a *quantum meruit* or *quantum valebat* for the numbers that had been delivered. In the same letter I referred to the difference between his view and that of Sir Frederick Pollock as to the question who is the offeror and who the offeree in the case of the omnibus and the passenger. This is of no con-

[5] (1825) 3 Bing. 288.

sequence except to explain the closing reference in his letter in reply to me, which was as follows:

"All Saints' College,
11th December, 1910.

DEAR MR. JUSTICE RUSSELL,—

I am much obliged to you for your letter with its kind expressions about my book on Contracts.

My difficulty in accepting your view about *Mavor* v. *Pyne* is that the original contract was not before the Court as it fell within section 4 of the Statute of Frauds.

The plaintiff did not recover on a *quantum meruit*, for I think he would have had to prove his original contract, which he could not do. Then what did he recover upon? Not, surely, upon a contract for eight numbers, but on the delivery monthly of the successive numbers and their acceptance and receipt.

I think that when once the original contract is put out of sight, as it must be, the only way in which one can make out a cause of action is from the conduct of the parties. I admit the difficulty which arises from the fact that the parties had in view this contract which the Statute of Frauds kept from the purview of the Court, but I think that the language of Best, C.J., supports, or at least is consistent with my view of the matter.

The omnibus case, I agree, needs reconsideration, and I will confer with Mr. Gwyer, who now undertakes the main work of the new edition, and suggest an alteration. As a man usually nowadays gets a ticket for his destination when on board the omnibus or train, I do not think that my statement holds as to the relation of passenger and company. I am not sure that it was not right thirty years ago.

Believe me
Yours very truly,
William R. Anson."

According to the solution offered in this letter from the author, there were eight offers, eight acceptances and eight contracts. Of course, that cannot be possible. I wonder that it had not occurred to either my correspondent or myself that the correct view of the matter had been given by the author himself on another page of his work, where the view presented in my letter is

clearly stated. It is also very singular that so learned a writer should have contended that the contract could not be brought to the notice of the Court for the purpose of proving its breach and consequent discharge and thus establishing the right to a *quantum meruit* which was dependent upon the discharge of the original contract.

Professor Corbin's third American edition of Anson has a note to the statement of the case in the earlier portion of the work, which is in line with what I wrote in my letter to the author. It is as follows:

> "The legal relation here described is more properly called a quasi-contract than a true contract. The expression of consent applied only to the twenty-four numbers and the price thereof. The acts and words of the parties expressed no agreement to buy and sell eight numbers. Further, the amount to be recovered for eight numbers is not one-third of the agreed price for twenty-four numbers. It is the reasonable value of eight numbers to be determined by the jury and not by the parties."

There can be no doubt as to the soundness of this criticism, and the English editor of this exceedingly valuable work will be well advised if he abandons the untenable position to which the revered author so tenaciously adhered.

Harvey v. Facey.[6] The head-note in this case (an appeal to the Privy Council from the Supreme Court of Jamaica), gives this summary: Where the appellants telegraphed, "Will you sell us B.H.P.? Telegraph lowest cash price," and the respondent telegraphed in reply, "Lowest price for B.H.P. £900," and then the appellants telegraphed, "We agree to buy B.H.P. for £900 asked by you. Please send us your title-deed in order that we may get early possession," but received no reply, it was held that there was no contract. The final telegram was not the acceptance of

[6] (1893) A. C. 552.

an offer to sell, for none had been made. It was itself an offer to buy, the acceptance to which must be expressed and could not be implied.

For several years after the above decision I had been waiting for Sir Frederick Pollock or Sir William Anson, my masters in the law of contracts, either to say that it was wrong, or else to explain it away as a mere finding of fact on the evidence in the particular case. But I had waited in vain. In the meantime I submitted the question, without prejudice, to pretty nearly every class that had gone through Dalhousie Law School, and I never found a class that did not, by an overwhelming majority, condemn the decision. I think I may therefore be bold enough to ask whether this may not be one of the cases in which the wisdom of the Privy Council does not even attain to the standard of the Apocryphal Scriptures wittily attributed to it by Sir Frederick Pollock in his essay on Commercial Law (Essays on Jurisprudence and Ethics, p. 69). It certainly is not, in this case, "good for example of life and instruction of manners." The criticisms that follow appeared a number of years ago in the *Canada Law Journal,* Vol. 45, p. 617, but I think they will bear repetition:

> If any man in ordinary business were to act as he would be warranted in acting under the decision in *Harvey* v. *Facey,* he would surely be voted out of any decent society as a person of evil example.
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> Here are the facts. Facey had been offering a certain property called Bumper Hall Pen to the Mayor and Council of Kingston, Jamaica, for £900. The offer had been considered by the Council and further consideration of its acceptance had been deferred. The negotiations began at the beginning of October, and the meeting at which the offer was considered was held October 6th. Possibly all this has nothing to do with the question at issue, but it is stated in the judgment of the Court, and if it has any bearing on the matter it must tend to shew that proposals for purchasing the property were in the air and that the owner had good reason for assuming that any enquiries addressed to him on the subject of the property "meant business." However

this may be, on the 7th of October, Facey, the owner of the property, was travelling in the train from Kingston to Porus, when Harvey et al. sent a telegram after him from Kingston addressed to him "On the train for Porus" in these words, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid." On the same day Facey replied by telegram, "Lowest price for Bumper Hall Pen £900." Harvey replied accepting the property at that figure. The question, and the only question dealt with by the Board was as to the meaning of this correspondence by telegraph. The telegram to which Facey was replying indicated in express terms that Harvey wished to elicit from the owner an offer of the property. He had no mere idle, or rather, impertinent curiosity as to the price at which Facey would be willing to sell the place to somebody else, or the price at which he held it if he did not wish to sell it to anybody at all. Facey must have known, when he sent his reply, that it would be read by the receiver as an offer to sell the property at that price. Even if the correspondence had been by letters through the post office this would have been the natural interpretation, and any intelligent and fair-minded jury would have said that this was what was intended by the parties. How much more certainly is this the proper interpretation to place upon a correspondence by telegraph where every idle word is penalized and communications are as brief as they can be made consistently with being intelligible. Not so, however, is the correspondence read by the Privy Council. The owner of the property is by their judgment permitted to say to his correspondent: I knew that you wished me to make an offer of my property and that this was your reason for asking me the price. When I told you that my lowest price was £900 I had every reason to assume that you would understand my reply to your enquiry as an offer to sell to you at that figure. So would any ordinary business man in any ordinary business transaction. But if you will examine your telegram closely, you will perceive that you asked me two distinct questions and that I answered only one of them. I told you that my price was £900, but if you will closely scrutinize my telegram, you will see how careful I was not to say that I was ready to sell at that figure. I am a "pretty smart dog," as you will have discovered, and the probability is that in the future when you deal with me, you will con-construct your sentences more cutely and parse mine more

carefully before you arrive at your conclusions. If you had said, "What is the lowest price at which you will sell me Bumper Hall Pen?" you would have caught me out, for my answer would have been precisely the same as it was and I would have been bound. If I had said, "'Yes, my lowest price is £900,' which is precisely what I meant to say, you would have had an offer of the property and your reply would have been an acceptance of an offer to sell, instead of being a mere offer on your part to purchase.

"Language is an invention to conceal thought. Words are not to be understood in the sense in which ordinary persons in like circumstances, and in view of all the circumstances, would read them, but may be understood in some narrow, so long as it is a strictly grammatical sense which happens to suit the convenience of a tricky correspondent." This is not "Crowner's Quest law." This is Privy Council law. For Colonial courts it is final and binding, unless, indeed, it can be regarded as a mere finding of fact, which would perhaps leave it open to a jury of business men, in a similar case, to find in accordance with the obvious intentions of the parties. It seems, however, to be regarded by Sir William Anson as a decision on a point of law, and it was probably so intended. As such it has already begun to work mischievous results.

A case comes from British Columbia: *Little* v. *Hanbury*, 14 B. C. 18, in which the defendant telegraphed, "Propose to go in from Alert Bay over to west coast of island, hunt elk; guarantee one month's engagement at least from arrival here, give earliest date you could arrive here. Paget recommends. State terms, wire reply." Plaintiff telegraphed, "Five dollars per day and expenses," whereupon, defendant telegraphed, "All right; please start on Friday." This was held, on the authority of *Harvey* v. *Facey*, to be no contract. Perhaps it was not. But it would seem under the facts as stated, that when the plaintiff, without saying anything about the "earliest date at which he could arrive," wired his terms, "Five dollars a day and expenses," he was offering to go as soon thereafter as was reasonable under the circumstances in contemplation of both parties. It may be an arguable question whether "all right" was an acceptance of that offer, the request to start on Friday having reference to the performance and not the formation of the contract, or whether the latter words were not a statement of the condition on

which the defendant was willing to accept, which would require the assent of the other party to conclude a contract. This, however, is not the point of the decision. The ruling is that under *Harvey* v. *Facey* the telegram of the plaintiff was not an offer to go at "five dollars a day and expenses," but merely a quotation of terms.

"Thus it is that the Books of the Privy Council, as the prayer-book says of the Apocryphal Scriptures, are read "for example of life and instruction of manners." Would that it were permissible to pursue the words of the Article and add, "but yet doth it not apply them to establish any doctrine."

A copy of this article with a personal letter was sent to Sir Frederick Pollock for insertion in the *Law Quarterly Review*, but he was away from home. A note was received from him at a later date merely saying that the Court by which the case had been decided was a very strong Court, to which I ought to have replied that the judgment was a very strong judgment. After the lapse of a few years the history of *Cooke* v. *Oxley* began to repeat itself. I do not know just when Sir Frederick began to think there was something wrong about the decision, but in the 8th edition of his work on Contracts there is a footnote to the effect that "it would not be safe to rely on this, except in closely similar circumstances." The note in the 9th edition goes further and states that this case "does not seem to be generally approved."

Meantime the authors of *Crustula Juris* had their fling at it in the following doggerel:

HARVEY v. FACEY, [1893] A. C. 552.

'Twas Bumper Hall Pen that they christened the place,
Far away o'er the seas in the isle of Jamaica,
And Kingston's good Mayor looked over the ground,
And said to his Council, "I guess we will take her."

Now Larchin M. Facey, he spoke for the owner,
And he was a-making by railway for Porus,
And so the Town Council a telegram sent,
And that was what led to the trouble before us.

"Will you sell us the place? Name your lowest cash price."
Thus wired the Mayor, or someone did for him,
Clearly business was meant and the Mayor in earnest,
The question was sent by request of the quorum.

Now, mark you the answer, for here comes the trouble,
"My lowest cash price will be nine hundred pounds."
"We will buy at your price" wired the Mayor and Council,
And thus like a contract you all say it sounds.

But jump not too fast; there is room for a quibble,
And the lords of the Council will soon sniff it out,
Did he offer to sell, or perhaps only nibble
The bait that was set for too clever a trout.

Mark his name, for he now says he was only larkin',
No offer was made, he was only in fun,
He gave them his price, it is true, but remember,
Two questions were asked, and he answered but one.

Well was he named "Facey," for never such cheek
Received commendation in British dominions,
And well may we hope we shall live till the day
When the Queen's Council Board will regret such opinions.

For what did he mean when he gave them his price?
If he wanted no trade, he could say so, or then,
At least hold his tongue and not wire a message
With only one meaning for sensible men.