

OFFER AND ACCEPTANCE.

HARVEY v. FACEY (1893), A. C. 552; 62 L. J. P. C. 127.

A REPLY TO THE HONOURABLE MR. JUSTICE RUSSELL.¹

BY A. R. MACLEOD.

Mr. Justice Russell's criticism in the May number of the CANADIAN BAR REVIEW of the Judicial Committee's judgment in the above-named case is, in substance, that, when their Lordships concurred "in the judgment of Mr. Justice Curran² that there was no concluded contract . . . to be collected from the . . . telegrams,"³ they construed the telegrams in a narrow grammatical sense which was so contrary to their obvious meaning and to the obvious intention of the parties as to shock one's intelligence and one's sense of fairness. Mr. Justice Russell adds to that the remark that it was probably intended to be "a decision on a point of law" and that "as such it has already begun to work mischievous results," as, *e.g.*, in *Little v. Hanbury*, 14 B. C. R. 18.

If the judgment itself is found to be essentially sound and to be based on an established principle, and not to have established any new principle, it will admittedly be superfluous, in a discussion of that judgment, to consider what "results" or what quality of "results" it may justly be said to have "worked."

A simple perusal of the judgment reveals the fact that the judgment is firmly based on one principle and one only, and that principle is no other than that before there can be a contract there must be an offer and an acceptance of that offer. It will not be contended that that was not, before the date of *Harvey v. Facey*, an established principle.

¹ See Mr. Justice Russell's rejoinder, *post*, p. 713.

² The trial Judge.

³ 62 L. J. P. C. at p. 129.

Mr. Justice Russell states "the facts," but his statement is not a correct statement. In it there is this cardinal error that he makes it appear that Harvey et al. represented the Mayor and Council, and that in reading the case it may be taken that Harvey et al. and the Mayor and Council were one and the same party. Mr. Justice Russell in his "doggerel," says: "And so the Town Council a telegram sent" and "Thus wired the Mayor or someone did for him." That is quite contrary to the facts as stated in the report. The telegrams were not sent by or on behalf of the Mayor and Council, but by Harvey et al. on their own behalf. Harvey et al. were not representing the Mayor and Council, but on the contrary were competitors of the Mayor and Council for the purchase of the property from Facey. The action was brought by Harvey et al. for specific performance and for an injunction to restrain Facey from conveying to the Mayor and Council. The negotiations which took place before the exchange of the telegrams were not between Facey and Harvey et al., but between Facey and the Mayor and Council. Facey had offered to sell to the Mayor and Council for £900, and the Mayor and Council had discussed that offer on the 6th of October, and had deferred the consideration of its acceptance. It was then that Harvey et al. first entered upon the scene with their telegram of October 7th: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid." Facey replied: "Lowest price for Bumper Hall Pen £900." Harvey et al. replied: "We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession." The only point to be decided was whether Facey's telegram was or was not an offer to sell to Harvey et al. for £900. On that alone depended the answer to the question: Was there a concluded contract?

The Judicial Committee held that Facey's telegram was not an offer to sell to Harvey et al., and that

therefore the second telegram of Harvey et al. was not an acceptance⁴ of an offer made by Facey, but was itself an offer which required acceptance by Facey before the contract could have been completed.

In reading the reasons of the Judicial Committee for this conclusion it must be borne in mind that before the date of the telegrams Facey had made an offer to sell to the Mayor and Council for £900, and that the Mayor and Council had the offer under consideration. The first telegram of Harvey et al. contained a direct question as to Facey's willingness to sell to Harvey et al. An affirmative reply to that question might have resulted, and, as the event shewed, would have resulted in Harvey et al. getting the property instead of the Mayor and Council. Facey did not reply to that question. His motive is immaterial. The telegrams must be read as they stand, and speculation as to motives and as to the knowledge and characters of the parties is of no assistance and is inadmissible.

Since, however, the whole substance of Mr. Justice Russell's remarks amounts merely to a description of the evil results, by way of encouraging chicanery, which he imagines must follow from the judgment, it becomes necessary to examine the matter on that level. Mr. Justice Russell, believing that the Judicial Committee was not only wrong, but obviously wrong, thinks that Facey was "a tricky correspondent," that he "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," and to sell (as Mr. Justice Russell must mean, but omits to say) to the receiver; that he won his case on a "quibble," and in the result received the commendation of the Court for his "cheek." Let the reader compete with Mr. Justice Russell and draw a Facey to illustrate the judgment. Do features less fanciful and more lifelike than Mr. Justice Russell's portrait trace themselves on the page? Is the "smart dog" and "the clever trout"

⁴ Mr. Justice Russell, referring to this telegram, in his statement of "facts" says that "Harvey replied accepting the property at that figure."

confronted by a countenance of the most ordinary straight-forwardness? If words could issue from the frank face, who shall say what they would be? What should we learn that Facey's motive was for not answering Harvey's question as to his willingness to sell to Harvey? The reader can only guess. Facey may merely have preferred to sell to the Mayor and Council rather than to Harvey. He may not have been eager to sell at all and may have preferred that Harvey should, after learning his lowest price, make him an offer to buy, if Harvey should wish to buy at that price, in order that he might further consider it, rather than that he should at that moment make an offer to sell to Harvey. He may have been eager to sell, but unwilling to commit himself to sell to Harvey until he could ascertain the use to which Harvey intended to put the property. He may have suspected that Harvey had learned that the Mayor and Council needed the property, and that it was Harvey's intention to re-sell it to them at a profit. Is it incredible or unlikely that there was some information which Facey wanted or something that he wished to guard against before expressing his willingness to sell to Harvey? If there was something of that kind, what more natural than that Facey should content himself with giving Harvey his lowest price, as he was asked to do, and reserve his answer to Harvey's first question, as to his willingness to sell to Harvey, until he should first learn whether Harvey wanted the property at that price? He was replying from a train to a telegram to which the answer had been paid for. What harm could come from letting Harvey have his lowest price? If later he got an offer from Harvey and the Mayor and Council had not already bought the property, he could then make whatever investigations or enquiries the case called for and could consider whether he would let Harvey have the property. Would Mr. Justice Russell, in Facey's place, have telegraphed the reply: "My lowest price is £900; I won't sell to you if the

Mayor and Council want the property, and, even if they don't want it, I am not sure that I will let you have it since I am not sure that I like you"? Mr. Justice Russell thinks that Facey left out the "yes" in order to be brief and to save money. The answer had been paid for by Harvey. "Yes £900" would have been a complete answer. Facey used eight words where three would have done. Ought not Mr. Justice Russell to have inferred, if an inference on such a point is profitable, that Facey was not trying to be brief, but was trying to get Harvey's money's worth?

Whatever Facey's motive for not replying, the fact is (and that alone matters), he did not reply to the question: "Will you sell to us?" He did reply to the second question as to his lowest cash price. Clearly, the point had then been reached where Harvey had the lowest price, and, if he wished, could offer to buy at that price. That offer was made by Harvey's second telegram, but was not accepted.

The Judicial Committee's reasons for the view which they took of the case are stated with sufficient clearness and precision in the following extract from the judgment:—

"It has been contended for the appellants that L. M. Facey's telegram should be read as saying "yes" to the first question put in the appellants' telegram, but there is nothing to support that contention. L. M. Facey's telegram gives a precise answer to a precise question, namely, the price. The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry."
