JOSEPH OPPENHEIMER (DEFENDANT BY COUNTERCLAIM)................. } APPELLANT;

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*Oct. 29, 30, 31.
*Nov. 17.

AND

THE BRACKMAN & KER MILLING COMPANY, LIMITED (PLAINTIFFS BY COUNTERCLAIM)......... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Appeal—Special leave—R. S. C. c. 135, *s.* 42—"*Judge of court appealed from*"—*Construction of statute—Correspondence—Sale of goods—Condition as to acceptance—Post letter—Time limit—Term for delivery—Breach of contract—Damages—Counterclaim—Condition precedent—Right of action.*

A judge of the Supreme Court of British Columbia may grant special leave for an appeal to the Supreme Court of Canada although he did not sit as a member constituting the full court which rendered the judgment appealed from.

The appellant, O., wrote a letter, dated 2nd October, 1899, offering to supply the company with thirty-seven car loads of hay at prices mentioned "subject to acceptance in five days, delivery within six months." On 5th Oct. the company wrote and mailed a letter in reply, as follows:—"We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd instant. Please ship as soon as possible the orders you already have in hand and also get off the seven cars as early as possible as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight."—This letter was registered and, although it reached O.'s post office within the five days, yet by reason of the registration it was not received by him until the

* PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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following day. On 12th Oct. O.'s agent wrote the company acknowledging the letter and saying that acceptance of the offer arrived too late and that therefore the hay could not be furnished. On 6th Nov. the company replied insisting on delivery of the hay as contracted for by the 15th of that month, and notifying O. that, in case of default, they would replace the order charging him with any extra cost and expenses.

Prior to the expiration of the six months mentioned in O.'s letter, the company, in defence to an action by him against them, counterclaimed for damages for his alleged breach of contract for delivery of the thirty-seven car loads of hay.

Held, that the correspondence did not constitute a binding contract as the parties were never *ad idem* as to all the terms proposed.

Held further, that as the six months limited for making delivery had not expired the company had no right of action for damages, even had there been a contract, and that the filing of the counterclaim was premature.

APPEALS from the judgment of the Supreme Court of British Columbia, pronounced on the 20th of September, 1900, reversing and setting aside the judgment of Martin J. at the trial, on the 18th of April, 1900, and directing a new trial, and the judgment of the said Supreme Court, on the 2nd of May, 1902, affirming the judgment of Irving J. on the new trial, which had ordered judgment to be entered on the verdict of the jury in favour of the plaintiffs by counterclaim for $1270 and costs. Both judgments appealed from were upon the respondents' counterclaim filed in defence to the action brought by the appellant.

The circumstances under which the present litigation arose are stated in the headnote and judgments now reported. The appellant and respondents had prior transactions and, at the time of the alleged breach of contract, respondents were owing appellant $997, for which amount the appellant sued on 21st November, 1899, claiming $1025.14. Respondents, while admitting

receipt of the hay for which the debt was claimed, (on the 19th of December, 1899,) counterclaimed for a small item for shortages and also for damages for the alleged breach of contract by the appellant and the contest on the present appeal was as to this claim for damages solely.

At the first trial Martin J., sitting without a jury, dismissed the counterclaim on the ground that the correspondence did not constitute a valid contract. An appeal from this judgment to the full court was allowed on 30th May, 1900, and the case was referred back for the trial of points not disposed of by the first judgment, the minutes of this judgment, on appeal, being finally settled on the 20th of September, 1900. On the 7th of May, 1902, the appellant, defendant by counterclaim, gave notice of appeal to the Supreme Court of Canada, and, on his application, Mr. Justice Drake, one of the judges of the Supreme Court of British Columbia (but who had not sat as a member of the full court which heard and decided the above mentioned appeal), on the 23rd August, 1902, granted an order that the appellant should have leave to take the appeal to the Supreme Court of Canada notwithstanding that time limited by the statute for doing so had expired.

The new trial took place before Irving J. and a special jury, and resulted in a judgment being entered for the company on their counterclaim for $1,270 and costs. An appeal from this latter judgment was argued in the full court in May, 1901, before McColl C.J. and Irving and Martin JJ. when judgment was reserved and subsequently, the Chief Justice having died in the meantime, and having, before his death handed down a judgment holding that there never was any contract between the parties, the formal judgment of the full court was settled before Martin and Walkem JJ. directing that the judgment at the

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trial should be affirmed and the appeal was dismissed with costs, Walkem J. dissenting. It was urged on the present appeal that the surviving judges disagreed as to what had been decided on the first appeal, the respondents contending that the question of contract had then been determined and was, consequently, not open for argument on the second appeal, and the appellant insisting that the question of rejected evidence was the only point then disposed of.

From the latter judgment the appellant now also appeals.

A MOTION to quash the appeal from the first judgment for want of jurisdiction was made, on behalf of the respondents, on 29th October, 1902, on the following grounds, viz.:

(*a.*) That the judgment was entered on 20th September, 1900, and special leave to appeal was obtained from Drake J. on 8th August, 1902, and not from "the court proposed to be appealed from or a judge thereof."

(*b.*) That the court appealed from is the full court as constituted for the hearing of the appeal, viz., Walkem and Irving JJ., the late Chief Justice having died in January, 1902, and only these judges sat on the appeal.

S. S. Taylor K.C. for the motion. The judges of the Supreme Court of British Columbia by the act of "sitting together" constitute a full court, but when not "sitting together" any one of their number is not of that full court. Hence no leave as required by section 42 of the Supreme and Exchequer Courts Act has been obtained. See section 42 of the Supreme and Exchequer Courts Act and also R. S. B. C., ch. 56, sec. 72.

Notice of appeal was not given after the leave was granted, nor was security deposited thereafter, but the notice was given three months prior to leave given, and the security was deposited prior to the order.

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The order of Drake J. is a ratification of an act of the appellant done without authority. Therefore there is no appeal before this court, or in the alternative the court has no jurisdiction to hear the appeal as entered.

Aylesworth K.C. contra.

The judgment of the court upon the motion to quash was delivered by:

TASCHEREAU J.—The respondent moved to quash this appeal upon the ground that it was allowed, under section forty-two of "The Supreme Court Act," by a judge who was not a judge of the court appealed from. There is nothing in this objection. Mr. Justice Drake who granted leave is a member of the Supreme Court of British Columbia and had the right to do so as such under the said section, though he did not form part of the court which gave the judgment appealed from. Motion dismissed with costs.

The appeals were then heard upon the merits.

Aylesworth K.C. and *Lennie* for the appellant. There was no acceptance to correspond with the offer; the parties were never *ad idem* as to terms; they never "struck hands." *Oriental Inland Steam Navigation Company* v. *Briggs* (1); *Cole* v. *Sumner* (2); *Magann* v. *Auger* (3); *Skillings* v. *Royal Insurance Company* (4); *Falck* v. *Williams* (5). See also Benjamin on Sales (7 ed.) p. 48.

The evidence shews the intention that acceptance of the offer, as made, was to be communicated to the appellant at Chewelah within the five days mentioned and that this was not done. *Carlill* v. *Carbolic Smoke Ball Co.* (6) *per* Bowen L. J. at page 269; *Household*

(1) 4 DeG. F. & J. 191.
(2) 30 Can. S. C. R. 379.
(3) 31 Can. S. C. R. 186.
(4) 4 Ont. L. R. 123.
(5) [1900] A. C. 176.
(6) [1893] 1 Q. B. 256.

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Fire and Carriage Accident Insurance Co. v. *Grant* (1); *Henthorn* v. *Fraser* (2).

As there is no proof that the conditions precedent to an action for damages had been complied with and as the time for delivery, six months at least, had not expired the respondents had no right to counterclaim; their demand for damages was premature; *Marshall* v. *Jamieson* (3); *Dalrymple* v. *Scott* (4); *Morton* v. *Lamb* (5); *Michael* v. *Hart & Co.* (6).

S. S. Taylor K.C. for the respondents. The respondent's letter of 5th Oct., 1899, was an absolute and unconditional acceptance of the offer as made. The suggestions made as matters of mutual convenience in regard to deliveries do not amount to variations of the material terms of the proposed contract. See *Bank of New Zealand* v. *Simpson* (7) *per* Davey L. J at pages 188-189.

The letter of acceptance was mailed in time and the mailing is equivalent to delivering of notice of acceptance within the five days. It is proved that the letter reached Chewelah in ample time for delivery within the time limited, although it was not called for at the Post Office till the day after the five days had expired. *Brogden* v. *Metropolitan Railway Co.* (8) *per* Blackburn L. J. at page 691; *Magann* v. *Auger* (9); *Marshall* v. *Jamieson* (3); Anson on Contracts (7 ed.) 291.

The breach of the contract has been proved and found by the jury, the right of action for damages had accrued before the appellant brought his action and the respondents, consequently, were entitled to the counterclaim.

(1) 4 Ex. D. 216.
(2) [1892] 2 Ch. 27.
(3) 42 U. C. Q. B. 115.
(4) 19 Ont. App. R. 477.
(5) 7 T. R. 125.
(6) [1902] 1 K. B. 482.
(7) [1900] A. C. 182.
(8) 2 App. Cas. 666.
(9) 31 Can. S. C. R. 186.

TASCHEREAU J.—I am inclined to the opinion expressed by Mr. Justice Sedgewick that there was no contract between the parties in this case. However, assuming that there was a contract, I am of opinion, for the reasons given by the learned judge, that this cross-action or counterclaim was premature. The appeal should be allowed with costs, and the counterclaim dismissed with costs.

SEDGEWICK J.—The respondents are wholesale grain dealers carrying on business in British Columbia. Their head office is at Victoria, but they have a branch at Nelson. Frank B. Gibbs is their local manager.

The appellant, Oppenheimer, had sued the respondents for hay sold and has recovered the amount claimed. In the action, however, the respondents set up this counterclaim and it is the judgment of the trial judge upon that counterclaim that is now before us.

The appellant is a grain dealer and carries on business at Chewelah, State of Washington, U.S.A.

On the 2nd of October, 1899, Gibbs, the respondents' local manager, was on a purchasing trip for his firm and on that day called upon Oppenheimer, who, after some conversation, wrote and handed Gibbs at his request and in his presence at Chewelah, Washington, the following letter:

CHEWELAH, Wash., Oct. 2, 1899.

MESSRS. BRACKMAN & KER MILLING CO.,
Nelson, B.C.

GENTLEMEN,—I can offer you 30 cars of timothy hay at $10.50 per ton on cars at Chewelah *subject to acceptance in five days, delivery within six months.*

Yours respectfully,
J. OPPENHEIMER.

P.S.—I also agree to furnish seven cars of timothy hay at $10 per ton if above offer for 30 cars is accepted. J. O.

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On the 5th of October, 1899, Gibbs wrote and posted a letter to Oppenheimer as follows:

NELSON, B.C., Oct. 5, 1899.

MR. J. OPPENHEIMER,
Chewelah, Wash.

DEAR SIR,—We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd inst.

Please ship as soon as possible the orders you already have in hand and also get off the seven cars as early as possible as our stock is very low.

Try and ship us three or four cars so as to catch the next freight here from Northport.

We will advise you further as to shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in.

Do the best you can to get some empty cars at once, as we must have three or four cars by next freight.

Yours faithfully,
THE BRACKMAN & KER MILLING CO.,
Limited, Nelson, B.C.

FRANK R. GIBBS, Local Manager.

This letter was registered at Nelson, and by reason of the registration was not received by Oppenheimer within the five days mentioned in the offer. Had it not been registered Oppenheimer would have received it in the ordinary course of post within the five days. As a fact it was not received until the following day.

On the 12th of October, 1899, Oppenheimer's brother wrote the following letter:

CHEWELAH, Wash., Oct. 12, 1899.

BRACKMAN & KER MILLING CO.,
Nelson, B.C.

GENTLEMEN,—Received your letter, but regret to inform you that your acceptance of my offer on hay arrived too late and therefore not able to furnish you the hay.

Yours, very truly,
J. OPPENHEIMER.

which the appellant confirmed upon his return from Spokane on the 17th of October, 1899.

Gibbs thereupon forwarded these letters to his head office, and in reply received a letter which he was diretced to and did deliver to Oppenheimer, at Chewelah, on the 10th November, 1899. This letter was written by the respondents' manager at Victoria, and is as follows:

VICTORIA, B.C., November 6, 1899.

MR. J. OPPENHEIMER,
Chewelah, Wash.

DEAR SIR,—We have been handed by our Nelson branch correspondence which has taken place with you over the question of thirty carloads of hay.

On this day an option was given by you for a certain length of time at a stipulated price. Two days before the option expired a registered letter of acceptance was forwarded to you and which reached your post office in ample time for you to have taken delivery of the same.

On the day on which the option expired you, however, through no fault of ours, failed to sign for the same till the following day, and in consequence now wish to get out of your bargain on this paltry excuse.

We, however, feel satisfied that no court of law would sustain your contention for one moment. We therefore beg to advise you that if the delivery of the hay as contracted for by us does not commence by the fifteen of the month, that we shall commence replacing the order charging you up with whatever expense we may be put to in the premises.

THE BRACKMAN & KER MILLING CO., LTD.,
D. R. KER, *R. General Manager.*

It is alleged that Oppenheimer refused to comply with the terms of this letter but it cannot be disputed that in compliance with the requests contained therein Oppenheimer did load a car of hay No. 11,816 at the station at Chewelah, and on the 20th of November notified the respondents that he had done so.

The respondents did not even inquire whether any attempt had been made to comply with this letter for some days when they ascertained that it was loaded as stated. After it had remained at the station several days the appellant was required by the railway officials to take it away. At this time the respond-

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ents were owing Oppenheimer for hay previously shipped a sum in the neighbourhood of $1,000.

Before the six months limited by the offer within which the hay was to be delivered had expired, viz., on the 19th December, 1899, this counterclaim was set up in an action by the appellant against the respondents for the price of hay previously delivered.

I am of opinion that the two appeals before us should be allowed, and that upon two grounds. First, that there was not an absolute, unconditional, unequivocal acceptance of the offer contained in the appellant's letter of October 2nd, 1899, and therefore there was no *concensus* between the parties. In *Cole* v. *Sumner* (1) this court dealt with the point, and it is not necessary here to further discuss the law upon the question of what is necessary to constitute a valid acceptance of a proposal in order to complete a contract. The offer of October 2nd, if accepted absolutely, would give the appellant six months within which to deliver the goods at Chewelah, and I have no doubt but that the seven cars mentioned in the postcript were to be added to the thirty, and that the only difference between them and the thirty was as to price and not as to delivery. Now it seems very clear to me that there was no such acceptance by the respondents as the law requires by respondents' letter of the 5th October, above set out. Had the first clause of that letter constituted the whole of the letter even then it would be open to criticism, inasmuch as acceptance must be a present acceptance. There was none, however; the words are, " we will accept your offer," not " we accept your offer." This is perhaps very technical and I do not base my opinion upon it nor do I think that the second clause of the letter, was an acceptance as it indicated perhaps a wrong idea of the offer

(1) 30 Can. S. C. R. 379.

of October 2nd, namely, that the appellant was under an obligation to deliver the seven cars according to their wishes and orders, although the appellant had six months under the offer to deliver thirty-seven cars. In other words, that the delivery within the six months was to be from time to time at the option and upon the request of the respondents. If that were so there was never a *concensus* between the parties as to the exact meaning and true construction of the respondents' letter, and therefore there was no contract at all. Here, again, however, I do not place much reliance upon that view. The fourth clause creates the qualification which takes away from the acceptance its validity. I repeat:

We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up we presume you will have no objection to allowing balance to remain over until farmers can haul it in.

The first sentence here shows conclusively as well as the second clause of the letter that the respondents were under the impression that they had the right to determine at what particular dates the cars contracted for should be shipped, although the offer does not refer to the shipment at all but only to delivery on cars at Chewelah. There is here a clear indication that the parties were not *ad idem* in this regard. But the next clause "should we not, etc.," most unequivocally qualifies the general acceptance contained in the first clause of the letter and shows, I think, that the acceptance referred only to the hay, its price, its delivery on cars and its acceptance in five days, but did not refer to its delivery within six months. But whether this be so or not the qualification is not a mere suggestion or inquiry, it is not a precatory phrase expressing a hope or wish but a new term or stipulation. The respondents evidently knew that

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the roads in the vicinity of Chewelah would break up before the six months expired, namely, April 2nd, 1900. It is also evident that their storage room at Nelson was limited, for the letter says so, and to guard against such contingency they stipulated for a longer period of delivery. They in effect say

> in accepting your offer whereby you agree to deliver the hay within six months, the circumstances may not enable us to pay for it on delivery and we therefore presume that you will refrain from delivering the hay and calling upon us for payment until after the six months and until the farmers can haul the hay in.

It was submitted at the argument that the phrase "we presume" is equivalent to such words as the following:

(*a*) Unless we hear from you to the contrary it is to be agreed ; or
(*b*) We take it for granted ; or
(*c*) We assume ; or
(*d*) We impress upon you the necessity of its being a term ; or
(*e*) Our acceptance is given upon the assumption that

Upon these grounds, therefore, I have concluded that the correspondence here in view created no contract between the parties.

Among other contentions of the appellant is the one "that the contract was not rescinded." That "the respondents did not act on, nor assent to and adopt the appellants refusal, but elected to treat it as inoperative and thus kept the contract alive for the benefit of both parties, and thereby became precluded from maintaining any action thereon until the six months had elapsed." Or, in other words, that the counterclaim was premature.

It is not necessary from my point of view to argue this point fully, although I thoroughly concur in that view of the case. There is no doubt, as Sir William Anson says in his book on contracts, 5th ed. p. 298,

> that parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time

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arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due.

But he goes on to state that there are two limitations to this rule—the one affecting this case is :

That if the promisee will not accept the renunciation and continues to insist on the performance of the promise, the contract remains in existence for the benefit and at the risk of both parties, and if anything occur to discharge it from other causes, the promisor may take advantage of such discharge.

That is the case here. The appellant made an offer and for this purpose we will assume the respondents unconditionally accepted it so that there was a binding contract. Almost immediately after its formation the appellant informed the respondents that he would not carry it out. That would of itself give a right to the respondents immediately to bring an action of damages upon that contract. But they refused to accept the appellant's renunciation and continued, as the correspondence above set out clearly indicates, and as the evidence in the case fully corroborates, to insist on the appellant performing his contract and even more than his contract. They having treated the contract as subsisting, notwithstanding the refusal of the appellant to carry it out, their right of action is gone and they can only sue upon it after breach by non-performance of its terms. See cases of *Avery* v. *Bowden* (1), and *Roper* v. *Johnson* (2).

It is not necessary to deal with any other points taken by the appellant. I may add that we are all agreed that this court has jurisdiction in the present case. The point of jurisdiction taken by respondents' counsel was settled at the argument in the appellant's favour.

The appeals will be allowed with costs, the judgment of the first trial judge restored and the appellant will be entitled to all his costs in the courts below.

(1) 6 E. & B. 953. (2) L. R. 8 C. P. 167 at p. 179.

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GIROUARD J.—I agree that the appeal should be allowed with costs, but only upon the ground that the action is premature.

DAVIES J.—I concur in the judgment allowing this appeal on the ground that the counter-claim was prematurely made.

I have read the judgment prepared by my brother Sedgewick and concur in his reasoning on this point. I express no opinion as to whether or not there was a binding contract made between the parties for the delivery of the hay.

MILLS J.—This is a suit to recover damages for the violation o a contract. The trial judge in the first instance held that there was no contract, and dismissed the action. A second suit was brought, and the judge who heard the case held that there was a contract, and the jury gave damages against the defendant for the sum of $1,270 and costs. The case was then taken to the Supreme Court of British Columbia, in which judgment was entered for the plaintiff company. The Chief Justice of the Supreme Court of British Columbia agreed with Justice Martin in holding that there was no contract, but the majority of the Court were of opinion that the judgment should be in favour of the plaintiff—holding that there was a contract. The correspondence which was held to constitute a contract reads as follows:—

CHEWELAH, WASH., 2nd October, 1899.

Messrs. BRACKMAN & KER MILLING CO.,
Nelson, B.C.

GENTLEMEN,—I can offer you thirty cars of timothy hay at $10.50 per ton on cars at Chewelah, subject to acceptance in five days, delivery within six months.

Yours respectfully,

J. OPPENHEIMER.

P.S.—I also agree to furnish seven cars of timothy hay at $10 per ton if the above thirty cars are accepted. J.O.

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This communication was delivered to Mr. Gibbs, who was the agent of the Milling Co., and its local manager at Nelson. To this offer the following reply was sent:—

NELSON, B.C., 5th Oct., 1899.

MR. J. OPPENHEIMER,
Chewelah, Wash.

DEAR SIR,—We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd inst.

Please ship us as soon as possible the orders you already have in hand, and also get off the seven cars at $10 as early as possible, as our stock is very low.

Try and ship us three or four cars so as to catch the next freight here from Northport.

We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing the balance to remain over until the farmers can haul it in.

Do the best you can to get some empty cars at once, as we must have three or four by next freight.

Yours truly,
BRACKMAN & KER MILLING CO.

It is maintained on behalf of the plaintiff that this is not an unconditional acceptance. On the 12th of October, Mr. Oppenheimer being away from home, his brother acknowledged the receipt of the letter of 5th of October, as follows:—

GENTLEMEN,—Received your letter, but regret to inform you that your acceptance of my offer on hay arrived too late, and therefore not able to furnish you the hay.

Yours very truly,
J. OPPENHEIMER.

And Mr. Oppenheimer on his return to Chewelah sent to the Milling Company the following letter:—

CHEWELAH, Wash. 17th October, 1899.

BRACKMAN & KER MILLING CO.,
Nelson, B.C.

GENTLEMEN,—I have just returned from the fruit fair, and in looking over things, find your correspondence concerning hay. My brother has already replied to your letter and which reply I have

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again to confirm. I would also say this, that aside from your acceptance for hay reaching me after five days have expired, your house has not treated me fair in this hay proposition, for your Mr. Gibbs as soon as he left my store had employed some farmers in town to buy up the hay which he seemingly had intended to buy from me, and he also went to Addy and done the same thing when I requested him not to do so. While I would not otherwise take advantage of it when your acceptance reached here too late, I am compelled likewise to take advantage of now rejecting the low offer I had made you on hay. Should you be inclined to buy any hay from me it will have to be an entirely new deal, and in which now I would not be able to give you the same deal as before. Kindly acknowledge receipt of three last cars.

Yours truly,
J. OPPENHEIMER.

Mr. Oppenheimer assumed that because the letter sent by the Milling Company had not been received by him within the five days mentioned in his offer there was no contract, but the letter was written and deposited in the post office to his address before the five days had expired. I am of opinion that the law as settled in the case of *Henthorn* v. *Fraser* (1) determines this point against him. There Henthorn, who lived at Birkenhead, called at the office of a Land Society in Liverpool to negotiate a purchase of some houses belonging to them. They gave him an option of purchase for fourteen days at £750. On the following day the secretary posted a withdrawal of the offer to Henthorn between 12 and 1 o'clock which reached Birkenhead after 5 p.m. Henthorn at 3.50 p.m. posted to the secretary ot the society an unconditional acceptance of the offer. This was not received till after the office was closed that day, and was opened by the secretary the following morning. The court held that although the offer was not made by post that as the parties lived in different towns, an acceptance by post must have been within their contemplation; that the

(1) [1892] 2 Ch. 27.

acceptance was completed as soon as it was posted; but that the revocation of an offer is of no effect until it is brought to the mind of the person to whom the offer is made. Here the letter accepting the offer was written after the letter of withdrawal was posted, but it was not received until the other was put in the post office, and so did not prevent its operating to complete the contract. I take it that if the Milling Company's letter had been an unqualified acceptance it was mailed in sufficient time, and that the receipt of it by the appellant after the time he mentioned, within which acceptance was to be made had expired, was still an acceptance within the time limited.

In reply to the appellant's letter the Milling Company said:

VICTORIA, B.C., November 6th, 1899.

MR. J. OPPENHEIMER,
Chewelah, Wash.,

DEAR SIR,—We have been handed by our Nelson branch correspondence which has taken place with you over the question of thirty car loads of hay.

On this hay an option was given by you for a certain length of time at a stipulated price.

Two days before the option expired, a registered letter of acceptance was forwarded to you and which reached your post office in ample time for you to have taken delivery of the same.

On the day on which the option expired you, however, through no fault of ours, failed to sign for the same till the following day, and in consequence now wish to get out of your bargain on this paltry excuse.

We, however, feel satisfied that no course (court) of law would sustain your contention for one moment. * * * We therefore beg to advise you that if the delivery of the hay as contracted for by us does not commence by the 15th of the month, that we shall commence replacing the order, charging you up, with whatever extra expense we may be put to in the premises.

Yours truly,
THE BRACKMAN & KER MILLING CO.

After the receipt of this letter, Mr. Oppenheimer seemed to have wavered in the course which he had

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determined on, and began supplying hay in conformity with his contract, although it had, if valid, nearly five months to run, and through his solicitors at Nelson he addressed to the Brackman & Ker Milling Co., on the 20th of November, 1899, the following letter:

DEAR SIRS,—We beg to advise you on behalf of Mr. J. Oppenheimer, of Chewelah, that car G. N. No. 11816 is now loaded and awaiting your acceptance at Chewelah, and has been loaded for you since the 14th inst. Mr. Oppenheimer is ready to deliver the same on payment of the price as agreed upon.

We shall expect payment of the present account against you at once, viz.: $997, otherwise shall enter suit for the full amount due. Several small items for freight have been deducted by you which should be borne by yourselves instead of Mr. Oppenheimer. Unless acceptance of the above mentioned car be made at once and the price paid, Mr. Oppenheimer will consider the contract off.

Yours truly,

ELLIOTT & LENNIE.

The proposal of Oppenheimer in his offer of the 2nd of October was to deliver hay on board the cars at Chewelah. It is there that the delivery must take place. It is upon delivery there that inspection and payment are to be made. It is certain that a car was loaded at Chewelah in November; that the Milling Company were notified; that they took no notice of the communication, and after the car had been standing upon the track for some days, and after the railway company notified Oppenheimer that it would charge demurrage, the car was sent in another direction, to another purchaser. It can scarcely be doubted that the Milling Company by their conduct had relieved Oppenheimer from his contract, if a contract existed. Their conduct was quite at variance with the terms stated in his offer.

But when we examine the communications with care which passed between the parties, I think it is obvious that there was not such an unconditional acceptance by the Milling Company of the appellant's

offer as to constitute a contract between them; they say

we would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd instant.

Had this been the whole of the communication, I would have regarded it as an unconditional acceptance of the offer. But the letter contains more than this. The second and third paragraphs relate to the purchase of seven cars of timothy hay, which are referred to in the postscript to the appellant's offer, and invite further negotiation with a view to the limitation and qualification of the offer. He proposes if his offer of thirty car loads of timothy hay at $10.50 a ton, to be delivered in six months at Chewelah is accepted, he will furnish seven car loads at $10 a ton. These seven car loads the company ask to have sent as soon as possible. They ask that three or four of them shall be forwarded so as to catch the first freight from Northport. They write:

Do the best you can to get some empty cars, as we must have three or four cars by next freight.

By the terms of the proposal it was the company's business to accept the delivery of the hay at Chewelah free on board the cars. There was nothing said in respect to the time when the seven car loads, at the cheaper rate, were to be delivered.

With regard to the shipment of the thirty car loads the offer was to deliver within six months. It might be delivered at any time within that period that might suit the convenience of the appellant. It cannot be said that there was an unqualified acceptance of the offer as to these thirty car loads of hay. The Milling Company say: "We will advise you further as to the shipment of the thirty cars." They assume that the convenience of the Milling Company rather than that of the vendor is to be consulted. But this is no part of the offer. If they accept it, they must be ready

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to take the hay at Chewelah whenever loaded on the cars within the six months. But this is not what they say in their acceptance. They say: "Should we not be able to take it all before your roads break up you will have no objection to allow the balance to remain." This is a proposal to modify the offer which had been made; it is but a qualified, not an absolute acceptance. It is a proposal to modify the offer of the appellant, and to restrain that freedom within the period of six months which, by his offer, he had reserved to himself. I do not think that the correspondence formed a binding contract between the parties I do not think they were of one mind as to the place of delivery nor as to the time, although both were stated in Oppenheimer's offer. I hold, therefore, that there was not any contract between them with respect to this sale and purchase of hay which either party could invoke the authority of the Court to enforce on his behalf. In my opinion the judgment of the Court should be reversed with costs as to the counterclaim. Whether the suit, had there been a contract, was prematurely brought or not I need not consider. Had there been a valid contract it would have been necessary to determine that point; but, in my opinion, there was not. In *Leigh* v. *Paterson* (1) the defendant had agreed to sell to the plaintiff a certain quantity of tallow to be delivered in December. On the 1st of October the defendant notified the plaintiff that the goods were sold to another, and that he would not execute the contract. The market price was then 71s. per cwt. On the 31st of December it was 81s. per cwt. It was held the price which was to regulate the plaintiff's damages was the price on the 31st of December. Here, there never was an unreserved acceptance of

(1) 8 Taunt. 540.

the offer. The subject is fully discussed in *Hochster* v. *De La Tour* (1), where all the authorities are cited.

Appeal allowed with costs.

Solicitors for the appellant: *Elliot & Lennie.*

Solicitors for the respondents: *Taylor & O'Shea.*